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ALLOCATING THE BURDEN OF PROOF IN ADMINISTRATIVE AND JUDICIAL PROCEEDINGS UNDER THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT

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The Individuals with Disabilities Education Act (hereinafter IDEA), 20 U.S.C.A. §§ 1400-82 (West 2000 & Supp. 2005), is a detailed statute governing special education. One detail missing concerns which party bears the burden of proof. To understand the importance of that issue, consider the following hypothetical.

Professor Darlene Dobson sits in her office in the Special Education Department of Catatonic State University, with the beginnings of a major headache. She has just returned from the Euphoria Independent School District, where she had served as the hearing officer in a case under the IDEA. Professor Dobson knows that this will be a tough case to decide. After a lengthy dispute, the parents of Julia D. requested the hearing because they disagreed with Euphoria's proposed educational programming and placement for their daughter. Julia D. is a first grade child with autism.[1] Euphoria proposed that Julia be placed in

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a multicategorical disabilities classroom, with up to two hours a day of Lovaas discrete trial training.[2] Julia's parents initially requested eight hours per day of Lovaas training; however, they have modified their demand to four hours of Lovaas training each day, with the remainder of the day in a general classroom.

The parties rejected pre-hearing mediation,[3] and Professor Dobson was unable to bring the parties to a last-minute agreement prior to the hearing. In Professor Dobson's opinion, the hearing was intolerably long. Counsel for both parties insisted on calling numerous witnesses, whose testimony was repetitive and only marginally relevant to the child's unique needs. Professor Dobson found herself sifting through the extraneous material for the evidence that mattered. Her problem was that the evidence was equally balanced in quality, quantity, and weight. Neither party proved their respective position better than the other party. Inasmuch as the party who has the burden of proof in this case will

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A Note for Readers. The IDEA was amended in 2004, effective July 1, 2005. All citations are to the most recent version of the IDEA, unless otherwise noted. All citations to the Code of Federal Regulations are to the 1999 implementing regulations. The regulations implementing the 2004 amendments had not yet been adopted, as of the date of this writing. If a regulation has been superseded by statute, that will be noted.

[1] "Autism" is a developmental disability characterized by significant deficits in social relations and communication skills. The preferred response to autism is early, intensive intervention targeted at the individual's social and communication deficits. Recommended interventions are often expensive and labor-intensive, and many schools are reluctant to provide the intensive interventions requested by a child's parents or treating professionals. Disputes concerning the education of children with autism have become increasingly common. *See, e.g.*, NAT'L RESEARCH COUNCIL, EDUCATING CHILDREN WITH AUTISM (2001); Perry A. Zirkel, *The Autism Case Law: Administrative and Judicial Rulings*, 17 FOCUS ON AUTISM & DEVELOPMENTAL DISORDERS 84 (2002).

[2] For information on Professor Lovaas's method, see NAT'L RESEARCH COUNCIL, *supra* note 1; Claire Maher Choutka et al., *The "Discrete Trials" of Applied Behavior Analysis for Children with Autism: Outcome-Related Factors in the Case Law*, 38 J. SPECIAL EDUC. 95 (2004); O. Ivar Lovaas, *Behavioral Treatment and Normal Educational and Intellectual Functioning in Young Autistic Children*, 55 J. CONSULTING & CLINICAL PSYCH. 3 (1987); John J. McEachin et al., *Long-term Outcome for Children with Autism Who Received Early Intensive Behavioral Treatment*, 97 AM. J. MENT. RETARDATION 359 (1993); Catherine Nelson & Dixie Snow Huefner, *Young Children with Autism: Judicial Responses to the Lovaas and Discrete Trial Training Debates*, 26 J. OF EARLY INTERVENTION 1 (2003).

[3] The IDEA requires states to offer pre-hearing mediation to parties to special education disputes. 20 U.S.C.A. § 1415(e) (West 2000 & Supp. 2005); 34 C.F.R. § 300.506 (1999). The literature on the mediation of special education disputes is extensive. For more information, see, e.g., Steven S. Goldberg & Kathleen Kelley Lynch, *Reconsidering the Legalization of School Reform: A Case for Implementing Change through Mediation*, 7 OHIO ST. J. ON DISP. RESOL. 199 (1992); Stephen S. Goldberg & Dixie Snow Huefner, *Dispute Resolution in Special Education: An Introduction to Litigation Alternatives*, 99 EDUC. L. REP. 703 (West 1995); Peter J. Kuriloff & Steven S. Goldberg, *Is Mediation a Fair Way to Resolve Special Education Disputes? First Empirical Findings*, 2 HARV. NEGOT. L. REV. 35 (1997); Steven Marchese, *Putting Square Pegs into Round Holes: Mediation and the Rights of Children with Disabilities Under the IDEA*, 53 RUTGERS L. REV. 333 (2001); Elaine Talley, *Mediation of Special Education Disputes*, 5 U.C. DAVIS J. JUV. L. & POL'Y 239 (2001).

lose, Professor Dobson must determine who bears this burden. What is the answer to this critical question?

I. INTRODUCTION

The IDEA[4] provides financial assistance to States that guarantee a "free appropriate public education" (hereinafter FAPE)[5] to children with disabilities.[6] The IDEA's primary means of ensuring substantive compliance is a detailed procedural scheme. Although one leading textbook described the IDEA as "weak on substance, strong on procedure,"[7] the statute's remedial and procedural provisions are not exhaustive. The text of the IDEA is silent on several key questions of procedure,[8] leaving gaps to be filled by courts, regulators, and commentators.

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[4] 20 U.S.C.A. §§ 1400-82. *See also* JOSEPH R. BOYLE & MARY WEISHAAR, SPECIAL EDUCATION LAW WITH CASES (2001); DIXIE SNOW HUEFNER, GETTING COMFORTABLE WITH SPECIAL EDUCATION: A FRAMEWORK FOR WORKING WITH CHILDREN WITH DISABILITIES (2000); ALLAN G. OSBORNE JR., LEGAL ISSUES IN SPECIAL EDUCATION (1996); LAURA F. ROTHSTEIN, SPECIAL EDUCATION LAW (2000); STEPHEN B. THOMAS & CHARLES J. RUSSO, SPECIAL EDUCATION LAW: ISSUES AND IMPLICATIONS FOR THE 90'S (1995); BONNIE B. TUCKER & BRUCE A. GOLDSTEIN, THE EDUCATIONAL RIGHTS OF CHILDREN WITH DISABILITIES: A GUIDE TO FEDERAL LAW (1992); H. RUTHERFORD TURNBULL III, FREE APPROPRIATE PUBLIC EDUCATION: THE LAW AND CHILDREN WITH DISABILITIES (1986); JULIE K. UNDERWOOD & JULIE F. MEAD, LEGAL ASPECTS OF SPECIAL EDUCATION AND PUPIL SERVICES (1995); MARK C. WEBER, SPECIAL EDUCATION LAW AND LITIGATION TREATISE (2d ed. 2002); PETER W.D. WRIGHT & PAMELA DARR WRIGHT, WRIGHTSLAW: SPECIAL EDUCATION LAW (1999); MITCHELL L. YELL, THE LAW AND SPECIAL EDUCATION (1998).

[5] 20 U.S.C.A. § 1412 (a)(1); 34 C.F.R. § 300.121. For the definition of "free appropriate public education," see 20 U.S.C.A. § 1401(9); 34 C.F.R. § 300.13.

[6] For the definition of "child with a disability," see 20 U.S.C.A. § 1401(3); 34 C.F.R. § 300.7.

[7] MARK G. YUDOF ET AL., EDUCATIONAL POLICY AND THE LAW 734 (3d ed. 1992).

[8] Four examples of unanswered "procedural" questions under the IDEA include (1) the standard of review applicable to further administrative review of a hearing officer's decision in states which have chosen a two-tier administrative scheme, (2) the admissibility of additional evidence in judicial proceedings, (3) the availability of money damages as a remedy for IDEA violations, and (4) the extent of permissible representation by lay advocates. For more information on the first question, see, e.g., Perry A. Zirkel, *The Standard of Review Applicable to Pennsylvania's Special Education Appeals Panel*, 3 WIDENER J. PUB. L. 871 (1994) [hereinafter Zirkel, *Standard*]. For more information on the second question, see Walker County Sch. Dist. v. Bennett, 203 F.3d 1293 (11th Cir. 2000); Andriy Krahmal et al., *"Additional Evidence" Under the Individuals with Disabilities Education Act: The Need for Rigor*, 9 TEX. J. C.L. & C.R. 201 (2004). For information on the third question, see, e.g., Terry Jean Seligmann, *A Diller, A Dollar: Section 1983 Damage Claims In Special Education Lawsuits*, 36 GA. L. REV. 465 (2002). For more information on the fourth issue, see, e.g., Kay Hennessy Seven & Perry A. Zirkel, In the Matter of Arons*: Construction of the IDEA's Lay Advocate Provision Too Narrow?*, 9 GEO. J. POVERTY L. & POL'Y 193 (2002). Until recently, the IDEA did not contain any statute of limitations, and the courts were left to fill the gap. *See, e.g.*, Allan G. Osborne, Jr., *Statutes of Limitations for Filing a Lawsuit Under the Individuals with Disabilities Education Act*, 106 EDUC. L. REP. 959 (West 1996); Perry A. Zirkel, *The Statute of Limitations Under the Individuals with Disabilities Education Act: Is* Montour *Myopic?*, 12 WIDENER L.J. 1 (2003) [hereinafter Zirkel, Montour]; Perry A. Zirkel &

One such major gap concerns the burden of proof. Who bears the burden of proof under the IDEA? Should the parent of a child with a disability be required to prove an IDEA violation or should schools be required to prove compliance with the IDEA? Should the assignment of the burden of proof depend on the specific procedural posture of each dispute? The statutory and regulatory texts expressly allocate the burden of proof in only limited situations.[9] Who shoulders the burden in the vast majority of other IDEA cases? The judges and hearing officers who have addressed this issue are deeply divided.[10] Interest groups have asked Congress to spell out the burden of proof in the reauthorization of the IDEA.[11] The 2004 reauthorization of the IDEA does not do so.[12] The United States Supreme Court has been asked to decide this issue, but has refused to do so until recently.[13] Now, the United States Supreme

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Peter J. Maher, *The Statute of Limitations Under the Individuals with Disabilities Education Act*, 175 EDUC. L. REP. 1 (West 2003). Now the IDEA contains express statutes of limitation. *See infra* notes 86, 89.

[9] *See infra* Part II; *see also* 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, 69 (1988); PETER W. D. WRIGHT, NAT'L COUNCIL ON DISABILITY, INDIVIDUALS WITH DISABILITIES EDUCATION ACT BURDEN OF PROOF: ON PARENTS OR SCHOOLS? 19 (2005).

[10] *See generally* DIXIE SNOW HUEFNER & PERRY A. ZIRKEL, BURDEN OF PROOF UNDER THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT 5-13 (1993); *see also* JACK B. CLARKE JR. & MARIA E. GLESS, A LEGAL OVERVIEW OF BURDEN OF PROOF IN SPECIAL EDUCATION DISPUTES (2003); RALPH M. GERSTEIN & LOIS GERSTEIN, EDUCATION LAW: AN ESSENTIAL GUIDE FOR ATTORNEYS, TEACHERS, ADMINISTRATORS, PARENTS, AND STUDENTS 249-50 (2004); ROTHSTEIN, *supra* note 4, at 243-44; TUCKER & GOLDSTEIN, *supra* note 4, at 13:19 to 13:21; WEBER, *supra* note 4, at 20:11; WRIGHT, *supra* note 9; YELL, *supra* note 4, at 259-60; Guernsey, *supra* note 9, at 71-77; Allan G. Osborne, *Proving that You Have Provided a FAPE under the IDEA*, 151 EDUC. L. REP. 367 (West 2001); Sharon C. Streett, *The Individuals with Disabilities Education Act*, 19 U. ARK. LITTLE ROCK L.J. 35, 42, 52 (1996); Ronald D. Wenkart, *The Burden of Proof in IDEA Due Process Hearings*, 187 EDUC. L. REP. 817 (West 2004); Elizabeth L. Anstaett, Note, *Burden of Proof Under the Education for All Handicapped Children Act*, 51 OHIO ST. L.J. 759 (1990); 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 (2005).

Some of these sources merely note the division of authority, without much more. Others are either dated (e.g., Huefner & Zirkel, Anstaett, Guernsey), are limited in jurisdictional scope (e.g., Streett), or do not fully cover the pertinent cases and authorities. Few contain proposals for resolving the division of authority.

[11] *See* NAT'L SCH. BDS. ASS'N, RECOMMENDATIONS FOR THE REAUTHORIZATION OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT 8 (2002).

[12] *See* Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647 (2004).

[13] For example, in *Doe v. Arlington County School Board*, 41 F. Supp. 2d 599, 603 (E.D. Va. 1999), the trial court allocated the burden of proof to the party challenging the administrative outcome. The Fourth Circuit affirmed in an unpublished, per curiam opinion. Doe v. Arlington County Sch. Bd., 2000 U.S. App. LEXIS 4287 (4th Cir. 2000). The U.S. Supreme Court denied

Court has granted certiorari in a case raising this issue.[14] For the moment, its decision will allocate the burden of proof, at least at the administrative stage of the special education dispute process. The Court should, with certain narrow exceptions, allocate the burden of proof to schools, regardless of who requests the administrative hearing. Furthermore, the same burden allocation should apply in judicial proceedings, regardless of which party prevailed at the administrative level.

The assignment of the burden of proof in special education proceedings can be critically important. Although the "burden of proof" is an outcome-determinative rule in civil cases in the relatively infrequent case where the evidence favoring each party is of equal weight,[15] burdens of proof are important in case analysis, preparation, and presentation. Clearly, parties in IDEA disputes need some assistance in evaluating and resolving cases short of administrative and judicial proceedings. The number of IDEA administrative appeals and court cases continues to rapidly increase,[16] with no clear edge in recent case outcomes to either schools or parents.[17] Furthermore, the amount of resources allocated to special education hearings and litigation strikes many commentators, including at least one of this Article's authors, as intolerably high.[18] The confused and confusing state of the law on burden of proof contributes to undue litigation in the resource-scarce context of education.

In Part II, this Article discusses general principles of the IDEA and burden of proof, including the IDEA's express allocations of the burden of proof in specific situations.[19] In Part III, this Article surveys the differing approaches

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certiorari. Doe v. Arlington County Sch. Bd., 531 U.S. 824 (2000). In their petition for writ of certiorari, the parents alleged the lower courts erred in allocating the burden of proof. *See* Case Note, 42 SCH. L. REPORTER 166 (Brad Colwell & T.C. Mattocks eds., Dec. 2000).

14 Schaffer v. Weast, 125 S. Ct. 1300 (2005); *see also* WRIGHT, *supra* note 9, at 25-26, 43-46.

15 2 JOHN W. STRONG, MCCORMICK ON EVIDENCE § 336, at 410 (5th ed. 1999) (stating that the burden of persuasion's importance to a particular case is "limited to those cases in which the trier of fact is actually in doubt"); *see* HUEFNER & ZIRKEL, *supra* note 10, at 3; WEBER, *supra* note 4, at 20:11; *see also, e.g.,* Waller v. Bd. of Educ., 234 F. Supp. 2d 531, 538 (D. Md. 2002) (assignment of burden of proof was not outcome-determinative in this particular case); Steinberg v. Weast, 132 F. Supp. 2d 343, 346-47 (D. Md. 2001) (same); Bd. of Educ. v. State Bd. of Educ., 622 A.2d 614, 617-18 (Conn. Ct. App. 1993) (same).

16 *See, e.g.,* Perry A. Zirkel & Anastasia D'Angelo, *Special Education Case Law: An Empirical Trends Analysis*, 161 EDUC. L. REP. 731 (West 2002).

17 *See, e.g., id*; *see also* Perry A. Zirkel, *National Trends in Education Litigation: Supreme Court Decisions Concerning Students*, 27 J.L. & EDUC. 235, 241 (1998).

18 Perry A. Zirkel, *Over-Due Process Revisions for the Individuals with Disabilities Education Act*, 55 MONT. L. REV. 403 (1994) [hereinafter Zirkel, *Revisions*]; Perry A. Zirkel, *"Transaction Costs" and the IDEA*, EDUC. WK., May 21, 2003, at 44 [hereinafter Zirkel, *Costs*]; *see also* Steven S. Goldberg & Peter J. Kuriloff, *Evaluating the Fairness of Special Education Hearings*, 57 EXCEPTIONAL CHILD. 546, 553 (1991) (noting that due process hearings "have large personal and transactional costs" and are "emotionally traumatic" for many participants); Kuriloff & Goldberg, *supra* note 3, at 40 (same).

19 *See infra* Part II.

employed by judges and regulators in situations where the IDEA does not expressly allocate the burden of proof.[20] In Part IV, this Article proposes that schools, with certain narrow exceptions, should bear the burden of proving substantive and procedural compliance with the IDEA in all IDEA issues, including identification, programming, and placement.[21] This assignment of the burden of proof is consistent with the IDEA's language, structure, and purpose, as well as reflecting sound public policy.

II. BURDEN OF PROOF AND THE IDEA: AN OVERVIEW

A. *Burden of Proof: General Principles*

"Burden of proof" has two components: the burden of production and the burden of persuasion.[22] The "burden of production" refers to the obligation to present evidence to prove each element of a claim or cause of action.[23] This burden is usually placed on the moving party or the party initiating a case; that party must introduce evidence that proves each element of its claim, or make a "prima facie" case.[24] If sufficient evidence is not presented, the party bearing the burden of production loses its case; if sufficient evidence is presented, the

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20 *See infra* Part III.

21 *See infra* Part IV. This Article does not provide an in-depth treatment of allocations of the burden of proof under Section 504 of the Rehabilitation Act (29 U.S.C. § 794 (2000)) or under the Americans with Disabilities Act (42 U.S.C. §§ 12101-12213 (2000)). For more information on these two statutes, see TOM E.C. SMITH & JAMES R. PATTON, SECTION 504 AND PUBLIC SCHOOLS (1998); PERRY ZIRKEL & STEVEN ALEMAN, SECTION 504, THE ADA, AND THE SCHOOLS (2d ed. 2000). For a side-by-side comparison of the IDEA, Section 504, and the ADA, see Perry A. Zirkel, *A Comparison of the IDEA and Section 504/ADA*, 178 EDUC. L. REP. 629 (West 2003). For a discussion of student discipline and Section 504, see Perry A. Zirkel, *Discipline Under Section 504 and the ADA*, 146 EDUC. L. REP. 617 (West 2000) [hereinafter Zirkel, *Discipline*].

This Article also does not provide an in-depth discussion of which party bears the burden of proof in cases where the burden allocation issue does not involve the IDEA, but rather involves neutral principles of law (e.g., challenges to admissibility of evidence, motions to continue, exceptions to "exhaustion of administrative remedies" requirement). The exhaustion issue has been frequently litigated, and courts have uniformly held, applying neutral principles of law, that the party seeking to avoid the exhaustion requirement has the burden of proving the existence of an exception to the exhaustion requirement. *See, e.g.*, Koster v. Frederick County Bd. of Educ., 921 F. Supp. 1453, 1456 (D. Md. 1996); Doe v. Alfred, 906 F. Supp. 1092, 1097 (S.D. W. Va. 1995).

For another example, see *Plymouth-Canton Community Schools v. K.C.*, 40 IDELR 178 (E.D. Mich. 2003) (party seeking to set aside a settlement agreement bears the burden of proof).

22 FLEMING JAMES JR., CIVIL PROCEDURE § 7.5 (1965); 2 STRONG, *supra* note 15, § 336; HUEFNER & ZIRKEL, *supra* note 10, at 3. This dual meaning gives rise to what one commentator described as a "lamentable ambiguity of phrase and confusion of terminology." 9 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2485, at 283 (James H. Chadbourn rev. 1981).

23 *See* 2 STRONG, *supra* note 15, § 336; 9 WIGMORE, *supra* note 22, §§ 2487-88; Guernsey, *supra* note 9, at 71.

24 *See* HUEFNER & ZIRKEL, *supra* note 10, at 3; 2 STRONG, *supra* note 15, § 336.

issue is submitted to the finder of fact.[25] In certain cases, if sufficient evidence is presented the burden of production may shift to the opposing party, who must present evidence to rebut the initiating party's evidence or present evidence that would constitute an affirmative defense.[26] If the defending party does not do so, the initiating party may be entitled to a judgment.[27] The burden of production may shift throughout the course of litigation.[28]

The "burden of persuasion" involves persuading the finder of fact of the correctness of a party's position.[29] The burden of persuasion, in contrast to the burden of production, does not shift; as a general rule, it stays on the same party throughout the fact-finding process.[30] The burden of persuasion in the typical civil case is outcome-determinative only when the evidence is equally divided.[31] The "burden of persuasion" rule is similar to the mythical baseball rule that a tie goes to the runner.[32] Under the burden of persuasion, the "tie" goes to the litigant who does not have the burden of persuasion.[33] The burdens of production and persuasion are typically assigned to the party initiating an action;[34] however, the burdens may be reassigned based on policy considerations.[35]

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[25] HUEFNER & ZIRKEL, *supra* note 10, at 3; 2 STRONG, *supra* note 15, § 336; 9 WIGMORE, *supra* note 22, § 2487, at 293 (stating that a party sustains its burden of production only by offering "a quantity of evidence fit to be considered by the jury and to form a reasonable basis for the verdict"); *see also, e.g.,* Iowa R. App. P. 6.14(6)(e).

[26] HUEFNER & ZIRKEL, *supra* note 10, at 3; *see, e.g.,* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); *see also* 9 WIGMORE, *supra* note 22, § 2487, at 294 (noting that, based on the strength of a proponent's evidence, a trial judge may "require the opponent to produce evidence, under penalty of losing the case at the direction of the judge").

[27] HUEFNER & ZIRKEL, *supra* note 10, at 3; 9 WIGMORE, *supra* note 22, § 2487.

[28] HUEFNER & ZIRKEL, *supra* note 10, at 3; *see, e.g., McDonnell Douglas*, 411 U.S. 792; 2 STRONG, *supra* note 15, § 336; 9 WIGMORE, *supra* note 22, §§ 2485-86, 2489.

[29] HUEFNER & ZIRKEL, *supra* note 10, at 3; 2 STRONG, *supra* note 15, § 336; 9 WIGMORE, *supra* note 22, §§ 2485-86; *see also* TUCKER & GOLDSTEIN, *supra* note 4, at 13:19; Guernsey, *supra* note 9, at 71.

[30] *See, e.g.,* HUEFNER & ZIRKEL, *supra* note 10, at 3, 14 n.5 (citing *In re* Rosemarie A., EHLR 507:151, 507:153 (SEA Wis. 1985)); *see also* 2 STRONG, *supra* note 15, § 336; 9 WIGMORE, *supra* note 22, §§ 2485-86.

[31] *See supra* note 15 and accompanying text.

[32] Major League umpire Tim McClelland writes: "There are no ties and there is no rule that says that the tie goes to the runner." Q & A with Tim McClelland, *available at* http://mlb.mlb.com/NASApp/mlb/mlb/official_info/umpires/feature.jsp?feature=mcclellandqa (last visited June 2, 2003).

[33] William Buss, *What Procedural Due Process Means to A School Psychologist: A Dialogue*, 13 J. SCH. PSYCH. 298, 309 (1975) (noting the general rule that "if the case is about even, the party with the burden of proof loses").

[34] HUEFNER & ZIRKEL, *supra* note 10, at 3; *see* 2 STRONG, *supra* note 15, § 337, at 411 ("In most cases, the party who has the burden of pleading a fact will have the burdens of producing evidence and of persuading the jury of its existence as well.").

[35] HUEFNER & ZIRKEL, *supra* note 10, at 3; 2 STRONG, *supra* note 15, § 337; 9 WIGMORE, *supra* note 22, § 2486; WRIGHT, *supra* note 9, at 28-30; Buss, *supra* note 33, at 309; Guernsey, *supra* note 9, at 71-72.

"Burden of proof" is related to, but distinguishable from, two other legal concepts: "quantum of proof" and "standard of review." "Quantum of proof" (or "standard of proof") refers to the amount of evidence that a litigant must offer before her position is accepted, when the litigant's evidence is balanced against the other party's evidence.[36] Typical quanta of proof are "preponderance of evidence," "clear and convincing evidence," and "beyond a reasonable doubt."[37] Under the "preponderance of evidence" standard, which is the quantum of proof for civil actions under the IDEA,[38] evidence favoring the party with the burden of proof must be of greater weight than the evidence favoring the defending party; in other words, the party with the burden of proof in a case with a "preponderance of the evidence" standard must present evidence showing that it is more likely than not that the party's position is correct.[39] If the evidence is equally weighty, the party has not proved the case by a preponderance of evidence.[40] The party has failed to carry that party's burden of proof.

A second concept related to burden of proof is "standard of review."[41] "Standard of review" refers to the scrutiny with which a higher tribunal reviews the factual findings of a lower tribunal.[42] At one end of the spectrum, under "de novo" review, a reviewing body gives little or no weight to a lower body's decision.[43] The reviewing body finds facts anew. At the other end of the spectrum, a lower body's findings may be reviewed for "substantial evidence" or "abuse of discretion."[44] These are exceedingly deferential standards of review. Under the "substantial evidence" standard, a reviewing body will reverse a lower body's decision only if the lower body's findings are not supported by substantial evidence.[45] If a reasonable person could find the evidence sufficient to ar-

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36 HUEFNER & ZIRKEL, *supra* note 10, at 3; Zirkel, *Standard, supra* note 8, at 876 n.26.

37 *See* Zirkel, *Standard, supra* note 8, at 876 n.26.

38 20 U.S.C.A. § 1415(i)(2)(C)(iii) (West 2000 & Supp. 2005); 34 C.F.R. § 300.512(b)(3) (1999).

39 *See* Terry Jean Seligmann, *Not as Simple as ABC: Disciplining Children with Disabilities under the 1997 IDEA Amendments*, 42 ARIZ. L. REV. 77, 99 (2000); *see also* 2 STRONG, *supra* note 15, § 339.

40 *See supra* notes 15, 31 and accompanying text.

41 *See* Martha S. Davis, *A Basic Guide to Standards of Judicial Review*, 33 S.D. L. REV. 469 (1988); Krahmal et al., *supra* note 8, at 203-04; James R. Newcomer & Perry A. Zirkel, *An Analysis of Judicial Outcomes of Special Education Cases*, 65 EXCEPTIONAL CHILD. 469, 470-71 (1999); Zirkel, *Standard, supra* note 8.

42 Typically, a lower body's conclusions of law are reviewed "de novo." A reviewing body makes its own conclusions of law, and is not bound by a lower body's legal reasoning. *See* HUEFNER & ZIRKEL, *supra* note 10, at 15 n.31; Zirkel, *Standard, supra* note 8, at 877, 892.

43 Newcomer & Zirkel, *supra* note 41, at 470; Zirkel, *Standard, supra* note 8.

44 *See infra* notes 45-47 and accompanying text. For a discussion of the "arbitrary and capricious/abuse of discretion" standard, see *Motor Vehicle Manufacturers Association v. State Farm Mutual Insurance Co.*, 463 U.S. 29 (1983).

45 *See, e.g.*, 5 U.S.C.A. § 706(2)(E) (West 2000 & Supp. 2005); Iowa R. App. P. 6.14(6)(a).

rive at the conclusion reached by the lower body, the lower body's decision is supported by "substantial evidence," even if the evidence could conceivably support a different result.[46] As a general rule, as the standard of review becomes more deferential, it becomes more likely that a lower body's decisions will be affirmed.[47]

In typical actions before administrative bodies, the burdens of production and persuasion are placed on the party initiating the action.[48] In typical actions for judicial review of administrative decisions, a reviewing court will affirm an administrative decision if supported by "substantial evidence."[49] Special education disputes do not necessarily, however, follow typical patterns.[50]

B. The IDEA: General Principles

Preceded by several high profile judicial decisions granting greater educational rights to children with disabilities,[51] the IDEA has been referred to as "the disability movement's *Brown v. Board of Education*."[52] Congress enacted the IDEA after finding that an intolerable number of children with disabilities were inadequately educated,[53] including one million children with disabilities who were "excluded entirely" from public education.[54] In enacting the IDEA, Congress intended that all children with disabilities receive a FAPE.[55]

The IDEA is a funding statute. In exchange for federal financial assistance, a state educational agency (hereinafter SEA) must agree to "adopt policies and procedures to ensure that it meets each" of twenty-five listed condi-

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46 *See, e.g.*, Consolo v. Fed. Mar. Comm'n, 383 U.S. 607 (1966); Seligmann, *supra* note 39, at 98-99.

47 *See, e.g.*, Newcomer & Zirkel, *supra* note 41, at 477.

48 5 U.S.C. § 556(d); HUEFNER & ZIRKEL, *supra* note 10, at 3.

49 *See, e.g.*, 5 § U.S.C. 706(2)(E); Richardson v. Perales, 402 U.S. 389, 401 (1971); Randall P. Bezanson, *Judicial Review of Administrative Action in Iowa*, 21 DRAKE L. REV. 1, 33-35 (1971); Guernsey, *supra* note 9, at 78.

50 *See infra* notes 103-06 and accompanying text.

51 *See, e.g.*, Mills v. Bd. of Educ., 348 F. Supp. 866 (D.D.C. 1972); Pa. Ass'n of Retarded Citizens v. Commonwealth, 334 F. Supp. 1257 (E.D. Pa. 1971). For more information, see, e.g., Edwin W. Martin et al., *The Legislative and Litigation History of Special Education*, THE FUTURE OF CHILDREN, Spring 1996, at 25.

52 JOSEPH P. SHAPIRO, NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT 166 (1993) (referring to Brown v. Board of Educ., 347 U.S. 483 (1954)). The IDEA was previously entitled the Education for the Handicapped Act, and Part B was entitled the Education for All Handicapped Children Act. It took its present name in 1990. Pub. L. 101-476, § 901(a)(1), 104 Stat. 1141, 1142 (amending 20 U.S.C.A. § 1400). It is also occasionally referred to by its original Public Law number: Public Law 94-142.

53 20 U.S.C.A. § 1400(c)(2) (West 2000 & Supp. 2005) (Congressional findings).

54 *Id.* § 1400(c)(2)(B).

55 *Id.* § 1400(d)(1)(A).

tions,[56] which are designed to ensure that all children with disabilities in each participating state receive a FAPE. SEAs in turn provide grants to local school districts (designated "local educational agencies" by the IDEA and hereinafter referred to as LEAs).[57] Although LEAs provide the vast majority of direct services under the IDEA, the recipient SEAs are ultimately responsible for guaranteeing a FAPE to each resident child with a disability, including providing direct educational services in certain circumstances.[58] A state may not provide less than what is required by the IDEA;[59] however, the state may provide more rights and protections.[60]

1. The IDEA's Substantive Entitlement

The IDEA entitles all children with disabilities to the special education[61] and related services[62] that are needed to provide each with a FAPE.[63] That phrase is deceptive in its simplicity.[64] In *Board of Education v. Rowley*,[65] the

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[56] *Id.* § 1412(a). For more information on the obligations of recipient states, see Thomas A. Mayes & Perry A. Zirkel, *State Educational Agencies and Special Education: Obligations and Liabilities*, 10 B.U. PUB. INT. L.J. 62 (2000).

[57] 20 U.S.C.A. § 1413(a).

[58] Mayes & Zirkel, *supra* note 56, at 74-80.

[59] *Id.* at 80-82.

[60] *Id.* at 89 & n.250.

[61] 20 U.S.C.A. § 1401(29) (West 2000 & Supp. 2005) (defining "special education"); 34 C.F.R. § 300.26 (1999) (same).

[62] 20 U.S.C.A. § 1401(26) (defining "related services"); 34 C.F.R. § 300.24 (same). For United States Supreme Court cases on the "related services" requirement, see *Irving Independent School District v. Tatro*, 468 U.S. 883 (1984); *Cedar Rapids Community School District v. Garret F.*, 526 U.S. 66 (1999). For a discussion of *Garret F.*, see, e.g., Deborah Rebore & Perry A. Zirkel, *The Supreme Court's Latest Special Education Ruling: A Costly Decision?*, 135 EDUC. L. REP. 331 (West 1999). For information on the obligation to provide "assistive technology" to children with disabilities, see Perry Zirkel, *Assistive Technology: What are the Legal Limits?*, THE SPECIAL EDUCATOR, Sept. 18, 1998, at 4; *see also* Janice N. Day & Dixie Snow Huefner, *Assistive Technology: Legal Issues for Students with Disabilities and Their Schools*, 18 J. EDUC. TECH. 23 (2003).

[63] 20 U.S.C.A. § 1412(a)(1); 34 C.F.R. § 300.121.

[64] What follows are some examples of the questions that periodically arise from the murk of this definition. "What is a 'free' education?" *See, e.g.*, Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 (1993); Burlington Sch. Comm. v. Dep't of Educ., 471 U.S. 359 (1985); Katharine T. Bartlett, *The Role of Cost in Educational Decisionmaking for the Handicapped Child*, 48 LAW & CONTEMP. PROBS. 7 (1985); Larry Bartlett, *Economic Cost Factors in Providing a Free Appropriate Public Education for Handicapped Children: The Legal Perspective*, 22 J.L.& EDUC. 27 (1993); Leslie A. Collins & Perry A. Zirkel, *To What Extent, If Any, May Cost Be A Factor In Special Education Cases?*, 71 EDUC. L. REP. 11 (West 1992). "What is a 'public' education?" *See, e.g.*, Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993); *Burlington Sch. Comm.*, 471 U.S. 359; Dixie Snow Huefner, Zobrest v. Catalina Foothills School District*: A Foothill in Establishment Clause Jurisprudence?*, 87 EDUC. L. REP. 15 (West 1994). "What if a child is so profoundly disabled that school officials believe her or him to be 'uneducable?'" *See, e.g.*, Timothy W. v. Rochester Sch. Dist., 875 F.2d 954 (1st Cir. 1989).

United States Supreme Court stated that the IDEA's substantive requirement is satisfied if a child with a disability is provided an individualized education program (hereinafter IEP)[66] which "is reasonably calculated to enable the child to receive educational benefits."[67] In announcing this test, the *Rowley* Court rejected arguments that the IDEA required school districts to maximize an eligible student's potential.[68] Instead, the *Rowley* Court interpreted the IDEA as providing "a modest but nonetheless genuine right to beneficial, personalized instruction."[69]

Nevertheless, the *Rowley* Court did not specify how much of an "educational benefit" is required to provide a FAPE to a child with a disability.[70] Post-*Rowley* authorities are divided.[71] Some courts have ruled that "any" benefit, no matter how small, satisfies the *Rowley* standard.[72] Other courts have stated that a "de minimis" benefit is not sufficient; rather, the educational benefit must be meaningful.[73]

2. Where Must Special Education Be Provided?

The IDEA requires that children with disabilities be educated in the "least restrictive environment" (hereinafter LRE).[74] "To the maximum extent

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65 458 U.S. 176 (1982). For more information on this decision, see, e.g., Dixie Snow Huefner, *Judicial Review of the Special Educational Requirements Under the Education for All Handicapped Children Act: Where Have We Been and Where Should We Be Going?*, 14 HARV. J. L. & PUB. POL'Y 483 (1991); Perry A. Zirkel, *Building an Appropriate Education from* Board of Education v. Rowley*: Razing the Door and Raising the Floor*, 42 MD. L. REV. 466 (1983).

66 For requirements for the content and development of IEPs (including members of IEP teams), see 20 U.S.C.A. § 1414(d) and 34 C.F.R. §§ 300.340-.350.

67 *Rowley*, 458 U.S. at 206-07.

68 *Id.* at 198.

69 Huefner, *supra* note 65, at 491.

70 *Id.* at 494; *see also* Martin A. Kotler, *The Individuals with Disabilities Education Act: A Parent's Perspective and Proposal for Change*, 27 U. MICH. J.L. REF. 331, 357 (1994) ("If progress along some type of continuum is the legal requirement, the two-pronged standard of *Rowley* does not address the issue of the amount of progress that is required to meet the educational minimum.").

71 Huefner, *supra* note 65, at 494-500; Kotler, *supra* note 70, at 357.

72 *See, e.g.*, Karl v. Bd. of Educ., 736 F.2d 873 (2d Cir. 1984).

73 *See, e.g.*, Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171 (3d Cir. 1988).

74 20 U.S.C.A. § 1412(a)(5) (West 2000 & Supp. 2005); 34 C.F.R. §§ 300.550-.556 (1999). For more information on "inclusion" and LRE, see, e.g., Larry D. Bartlett, *Mainstreaming: On the Road to Clarification*, 76 EDUC. L. REP. 17 (West 1993); Larry D. Bartlett & Scott McLeod, *Inclusion and the Regular Class Teacher Under the IDEA*, 128 EDUC. L. REP. 1 (West 1998); Theresa Bryant, *Drowning in the Mainstream: Integration of Children with Disabilities After* Oberti v. Clementon School District, 22 OHIO N.U.L. REV. 83 (1995); Anne Proffitt Dupre, *Disability and the Public Schools: The Case Against "Inclusion,"* 72 WASH. L. REV. 775 (1997); Dixie Snow Huefner, *The Mainstreaming Cases: Tensions and Trends for School Administrators*, 30 EDUC. ADMIN. Q. 27 (1994); Martha M. McCarthy, *Inclusion of Children with Disabilities: Is it Re-*

appropriate, children with disabilities" are to receive their education with children without disabilities.[75] An IEP must contain an explanation of why a child with a disability receives any of her education outside of a general classroom and apart from children without disabilities;[76] however, not all children with disabilities will be able to receive a FAPE in the general classroom.[77] Therefore, schools are obliged to maintain a "continuum of alternative placements."[78]

In review, the substantive entitlement under the IDEA can be summed up by the following equation: the IDEA's "core entitlement" is "FAPE with an IEP in the LRE."[79]

3. Procedural Safeguards of the Substantive Right

The IDEA contains numerous procedural safeguards.[80] The *Rowley* Court viewed this procedural scheme as key to securing the IDEA's substantive entitlement.[81] Among those rights granted to a parent of a child with a disability

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quired?, 95 EDUC. L. REP. 823 (West 1995); Allan G. Osborne, *Is the Era of Judicially-Ordered Inclusion Over?*, 114 EDUC. L. REP. 1011 (West 1997); Robert Rueda et al., *The Least Restrictive Environment: A Place or a Context?*, 21 REMEDIAL & SPECIAL EDUC. 70 (2000); George P. White & Thomas A. Mayes, *Making an Appropriate Special Education Placement: Conflict Abounds!*, 4 J. CASES EDUC. LEADERSHIP 9 (Spring 2001), *available at* http://www.ucea.org/ cases/V4-Iss2/whitecase.pdf; Perry A. Zirkel, *The "Inclusion" Case Law: A Factor Analysis*, 127 EDUC. L. REP. 533 (West 1998).

[75] 20 U.S.C.A. § 1412(a)(5)(A); 34 C.F.R. § 300.550(b)(1).

[76] 20 U.S.C.A. § 1414(d)(1)(A)(i)(V); 34 C.F.R. § 300.347(a)(4).

[77] *See, e.g.*, Clyde K. v. Puyallup Sch. Dist., 35 F.3d 1396 (9th Cir. 1994); Stenger v. Stanwood Sch. Dist., 977 P.2d 660 (Wash. Ct. App. 1999); *see also* David Kirp et al., *Legal Reform of Special Education: Empirical Studies and Procedural Proposals*, 62 CAL. L. REV. 40, 41-45 (1974).

[78] 34 C.F.R. § 300.551. The continuum of alternate placements includes, but is not limited to, "instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions." *Id.* § 300.551(b)(1).

[79] Julie F. Mead, *The Reauthorization Process of the Individuals with Disabilities Education Act: Expressions of Equity*, 5 J. JUST & CARING EDUC. 476, 487 & n.5 (1999) (quoted material from Dixie Snow Huefner).

[80] 20 U.S.C.A. § 1415; 34 C.F.R. §§ 300.500-.529. For further discussions of the various safeguards provided to students with disabilities and their parents, see Philip T.K. Daniel, *Education for Students with Special Needs: The Judicially Defined Role of Parents in the Process*, 29 J.L. & EDUC. 1 (2000); Dixie Snow Huefner, *A Model for Explaining the Procedural Safeguards of IDEA '97*, 134 EDUC. L. REP. 445 (West 1999); Kotler, *supra* note 70; Thomas A. Mayes & Perry A. Zirkel, *Disclosure of Special Education Students' Records: Do the 1999 IDEA Regulations Mandate that Schools Comply with FERPA?*, 8 J.L. & POL'Y 455 (2000); Deborah Rebore & Perry Zirkel, *Transfer of Rights Under the Individuals with Disabilities Act: Adulthood with Ability or Disability?*, 2000 BYU EDUC. & L.J. 33; Seven & Zirkel, *supra* note 8; Perry A. Zirkel, *Caught in the Collision: A Disabled Child's Right to Confidentiality and the News Media's Right to "Sunshine,"* 117 EDUC. L. REP. 429 (West 1997).

[81] *Rowley*, 458 U.S. at 205-06; *see* Daniel, *supra* note 80, at 11 ("Parents or guardians are seen as equal partners; the requirement is that their voice is heard, not merely encouraged."); Huefner, *supra* note 65, at 486 ("Parental participation was thought by the drafters of the Act to be the

are the right to notice of the IDEA's procedural safeguards;[82] the right to participate on the team that makes educational decisions for the child;[83] the right to notice of a proposed change in (or refusal to change) a child's identification, evaluation, placement, or programming;[84] the right to examine "all records relating to" the child;[85] and the right to request an impartial due process hearing to challenge a child's identification, evaluation, placement, or programming.[86] Schools may also request a due process hearing.[87] In a minority of states,[88] a party dissatisfied with the initial hearing officer's decision may seek further administrative review.[89] The 2004 IDEA reauthorization provides a two-year statute of limitations for requesting a due process hearing.[90]

After exhausting available administrative remedies,[91] a party dissatisfied with the outcome of administrative proceedings may file a petition in either state or federal court[92] within ninety days of the final administrative decision.[93] The IDEA provides that the court "shall receive the records of the administrative proceedings,"[94] "shall hear additional evidence at the request of a party,"[95] and

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surest mechanism against ill-considered decision-making."); *see also* Goldberg & Kuriloff, *supra* note 18, at 546; Peter J. Kuriloff, *Is Justice Served by Due Process?: Affecting the Outcomes of Special Education Hearings in Pennsylvania*, 48 LAW & CONTEMP. PROBS. 89, 89-92 (1985); Kuriloff & Goldberg, *supra* note 3, at 38.

82 20 U.S.C.A. § 1415(d); 34 C.F.R. § 300.504.

83 20 U.S.C.A. §§ 1414(d)(1)(B)(i), 1414(e); 34 C.F.R. §§ 300.344, 300.534(a)(1).

84 20 U.S.C.A. § 1415(b)(3), (c); 34 C.F.R. § 300.503.

85 20 U.S.C.A. § 1415(b)(1); 34 C.F.R. 300.501; Mayes & Zirkel, *supra* note 80.

86 20 U.S.C.A. § 1415(f)(1)(A); 34 C.F.R. § 300.507.

87 20 U.S.C.A. § 1415(f)(1)(A).

88 *See* Thomas A. Mayes & Perry A. Zirkel, *Special Education Tuition Reimbursement Claims: An Empirical Analysis*, 22 REMEDIAL & SPECIAL EDUC. 350, 351 (2001) (citing Project Forum, Due Process Hearings: 1999 Updates (available from NASDSE, Alexandria, VA)). For more information on second-tier administrative review, see Zirkel, *Standard, supra* note 8.

89 20 U.S.C.A. § 1415(g); 34 C.F.R. § 300.510(b); Zirkel, *Standard, supra* note 8. For an empirical study of outcomes in special education cases appealed to the second-tier Appeals Panel in Pennsylvania, see James R. Newcomer et al., *Characteristics and Outcomes of Special Education Hearing and Review Officer Cases*, 123 EDUC. L. REP. 449 (West 1998).

90 20 U.S.C.A. § 1415(f)(3)(C).

91 *Id.* § 1415(i)(2)(A); 34 C.F.R. § 300.512(a). Exhaustion is not required in certain limited circumstances. *See, e.g.*, Honig v. Doe, 484 U.S. 305, 327 (1988); Krahmal et al., *supra* note 8, at 205-06; Mayes & Zirkel, *supra* note 56, at 84-85; *see also supra* note 21.

92 20 U.S.C.A. § 1415(i)(2)(A); 34 C.F.R. § 300.512. An empirical examination of 200 randomly selected, published special education court decisions identified several patterns in special education litigation. Notably, Newcomer and Zirkel found that placement was the primary issue in nearly two-thirds (63 %) of the studied cases. Newcomer & Zirkel, *supra* note 41, at 474. In situations where placement was at issue, parents sought a more restrictive placement over three-quarters (76%) of the time. *Id.*

93 20 U.S.C.A. § 1415(i)(2)(B).

94 20 U.S.C.A. § 1415(i)(2)(C)(i); 34 C.F.R. § 300.512(b)(1).

shall grant "appropriate" relief based "on the preponderance of the evidence."[96] Appropriate relief may include compensatory education,[97] tuition reimbursement for unilateral private school placements,[98] declaratory relief,[99] injunctive relief,[100] and, in a minority of jurisdictions, money damages.[101] If a parent is the "prevailing party" in any action brought under the IDEA, a court may award the parent "reasonable attorneys' fees."[102]

Court actions attacking administrative decisions under the IDEA are much different from the prototypical petition for judicial review of an administrative agency's decision in a contested case. Rather than affirming the agency decision if supported by "substantial evidence" (the scope of review in almost all administrative law actions),[103] the IDEA requires a reviewing court to make

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95 20 U.S.C.A. § 1415(i)(2)(C)(ii); 34 C.F.R. § 300.512(b)(2). For a detailed discussion of this provision, see Krahmal et al., *supra* note 8.

96 20 U.S.C.A. § 1415(i)(2)(C)(iii); 34 C.F.R. § 300.512(b)(3).

97 *See, e.g.*, Miener v. Missouri, 673 F.2d 969 (8th Cir. 1982); Perry A. Zirkel & M. Kay Hennessy, *Compensatory Educational Services In Special Education Cases: An Update*, 150 EDUC. L. REP. 311 (West 2001); Mark H. Van Pelt, Comment, *Compensatory Educational Services and the Education for All Handicapped Children Act*, 1984 WIS. L. REV. 1469.

98 *See* 20 U.S.C.A. § 1412(a)(10)(C); 34 C.F.R. § 300.403(c); Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 (1993); Burlington Sch. Comm. v. Dep't of Educ., 471 U.S. 359 (1985); David S. Doty, *A Desperate Grab for Free Rehab: Unilateral Placements Under IDEA for Students with Drug and Alcohol Addictions*, 2004 BYU EDUC. & L.J. 249; Mayes & Zirkel, *supra* note 88; Allen G. Osborne, Jr., *Reimbursement for Unilateral Parental Placements in Unapproved Private Schools Under IDEA*, 90 EDUC. L. REP. 1 (West 1994); Perry A. Zirkel, *Revisiting the Issues: Tuition Reimbursement for Special Education Students*, THE FUTURE OF CHILDREN, Winter 1997, at 122; Heather J. Russell, Note, Florence County School District Four v. Carter*: A Good "IDEA,"* 45 AM. U. L. REV. 1479 (1996).

99 Mayes & Zirkel, *supra* note 56, at 64.

100 *See, e.g.*, Honig v. Doe, 484 U.S. 305 (1988); DEBORAH A. MATTISON & S.R. HAKOLA, THE AVAILABILITY OF DAMAGES AND EQUITABLE REMEDIES UNDER THE IDEA, SECTION 504, AND 42 U.S.C. SECTION 1983 (1992).

101 *See, e.g.*, Doe v. Withers, 20 IDELR 422 (W.Va. Cir. Ct. 1993); MATTISON & HAKOLA, *supra* note 86; Antonis Katsiyannis & Maria Herbst, *Punitive Damages in Special Education*, 15 J. DISABILITY POL'Y STUD. 9 (2004); Allan G. Osborne & Perry A. Zirkel, *Are Damages Available in Special Education Suits?*, 42 EDUC. L. REP. 497 (West 1988); Seligmann, *supra* note 8; Stephen C. Shannon, Note, *The Individuals with Disabilities Education Act: Determining "Appropriate Relief" in a Post-*Gwinnett *Era*, 85 VA. L. REV. 853 (1999). For more information on *Doe v. Withers*, see Perry Zirkel, *Costly Lack of Accommodations*, 75 PHI DELTA KAPPAN 652 (1994).

102 20 U.S.C.A. § 1415(i)(3)(B); 34 C.F.R. § 300.513; David L. Dagley, *Prevailing Under the HCPA*, 90 EDUC. L. REP. 547 (West 1994); Mitchell L. Yell & C.A. Espin, *The Handicapped Children's Protection Act of 1986: Time to Pay the Piper?*, 56 EXCEPTIONAL CHILD. 396 (1990); Perry Zirkel, *Individuals Ineligible for Attorney's Fees*, THE SPECIAL EDUCATOR, Feb. 11, 2000, at 10. Under the 2004 IDEA amendments, schools may obtain attorney fees from parents or attorneys for parents in certain limited situations, i.e., the attorney requested a hearing based on a frivolous issue or the parent filed the complaint for the purposes of harassment. *See* 20 U.S.C.A. § 1415(i)(3)(B).

103 *See supra* notes 44-47 and accompanying text (discussing "substantial evidence" review).

an independent review of the agency's decision.[104] In fact, the IDEA's drafters specifically deleted proposed language that would have subjected agency decisions to deferential "substantial evidence review."[105] Furthermore, state law purporting to require substantial evidence review of IDEA cases is preempted by contrary federal law.[106]

The *Rowley* Court stated that reviewing courts are to give "due weight" to the administrative proceedings under review,[107] although the Court left "due weight" undefined. It is critically important to note the *Rowley* Court did not use the term "deference."[108] It is equally critical to note the *Rowley* Court instructed "due weight" was to be given to administrative proceedings, not the administrative agency.[109] In these two ways the review prescribed by *Rowley* is different from traditional administrative law principles.

Lower courts have given differing meanings to "due weight," with varying ranges of deference to administrative decisions.[110] In cases where reviewing courts express greater degrees of deference to administrative decisions in special education decisions, it is more likely that agency decisions will be affirmed.[111]

C. *The IDEA: Specific Allocations of the Burden of Proof*

In certain limited circumstances, the IDEA and its implementing regulations assign the burden of proof in administrative proceedings to schools. Specifically, LEAs and other providers of direct educational services are assigned the burden of proof in disputes concerning independent educational evaluations; certain disputes concerning student discipline; and short-term changes in programming and placement for children with disabilities convicted as adults and confined to adult prisons.

First, the IDEA allocates the burden of proof to school districts in administrative disputes concerning payment for independent educational evaluations (hereinafter IEEs). The IDEA and implementing regulations require participating states to find and evaluate children with disabilities.[112] In the event

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104 Guernsey, *supra* note 9, at 78.

105 Bd. of Educ. v. Rowley, 458 U.S. 176, 205 (1982); HUEFNER & ZIRKEL, *supra* note 10, at 14 & n.22; Guernsey, *supra* note 9, at 82 & n.87 (all three discussing legislative history eliminating "substantial evidence" standard on judicial review).

106 Town of Burlington v. Dep't of Educ., 655 F.2d 428, 431-32 (1st Cir. 1981), *further proceedings* Town of Burlington v. Dep't of Educ., 736 F.2d 773 (1st Cir. 1984), *aff'd on other grounds sub nom.* Burlington Sch. Comm. v. Mass. Dep't of Educ., 471 U.S. 359 (1985).

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

108 Guernsey, *supra* note 9, at 78-79.

109 *Id.*; *see also* Oberti v. Bd. of Educ., 995 F.2d 1204, 1219 (3d Cir. 1993).

110 *See* Guernsey, *supra* note 9, at 78-89; Newcomer & Zirkel, *supra* note 41.

111 Newcomer & Zirkel, *supra* note 41, at 477.

112 20 U.S.C.A. §§ 1412(a)(3), 1414(a)-(c) (West 2000 & Supp. 2005); 34 C.F.R. §§ 300.125, .530-.536 (1999). For a detailed discussion of the issues associated with identifying children with

that a child's parents disagree with the school's evaluation, the statute allows parents to "obtain an independent educational evaluation of the child."[113] The implementing regulations provide further explanation of this right. Specifically, the regulations require schools to provide an IEE at public expense "if the parents disagree with an evaluation obtained by the [school]."[114] If the school does not wish to provide an IEE at public expense, it must "initiate a hearing to show that its evaluation is appropriate."[115] If the school proves that its evaluation is appropriate, then the parents may obtain an IEE, "but not at public expense."[116]

Second, IDEA '97 contained language arguably related to burden of proof in several situations concerning the discipline of students with disabilities.[117] Specifically, in parental appeals of an IEP team's decision that a child's unacceptable behavior is not a manifestation of the child's disability,[118] the school was required to demonstrate "that the child's behavior was not a manifestation of the child's disability."[119] This language was deleted in the 2004

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autism, see Julie B. Fogt et al., *Defining Autism: Professional Best Practices and Published Case Law*, 41 J. SCH. PSYCHOL. 201 (2003).

113 20 U.S.C.A. § 1415(b)(1).

114 34 C.F.R. § 300.502(b)(1).

115 *Id.* § 300.502(b)(2)(ii).

116 *Id.* § 300.502(b)(3). For decisions concerning these issues, see Grapevine-Colleyville Sch. Dist. v. Danielle R., 31 IDELR ¶ 103 (N.D. Tex. 1999); Broward County Sch. Bd., 35 IDELR ¶ 117 (Fla. SEA 2001).

117 For information on the discipline of students with disabilities, see Theresa J. Bryant, *The Death Knell for School Expulsion: The 1997 Amendments to the Individuals with Disabilities Education Act*, 47 AM. U. L. REV. 487 (1998); Cynthia A. Dieterich & Christine J. Villani, *Functional Behavioral Assessment: Process without Procedure*, 2000 BYU EDUC. & L.J. 209; Anne Proffitt Dupre, *A Study in Double Standards, Discipline, and the Disabled Student*, 75 WASH. L. REV. 1 (2000); Dixie Snow Huefner, *Another View of the Suspension and Expulsion Cases*, 57 EXCEPTIONAL CHILD. 360 (1991); Eileen L. Ordover, *Disciplinary Exclusions of Students with Disabilities*, 34 CLEARINGHOUSE REV. 50 (2000); Allan G. Osborne, *Discipline of Special-Education Students under the Individuals with Disabilities Education Act*, 29 FORDHAM URB. L.J. 513 (2001); Seligmann, *supra* note 39; Perry A. Zirkel, *Discipline of Students with Disabilities*, 174 EDUC. L. REP. 43 (West 2003); Perry A. Zirkel, *The IDEA's Suspension/Expulsion Requirements: A Practical Picture*, 134 EDUC. L. REP. 19 (West 1999).

118 For the former procedural and substantive requirements for manifestation determination reviews, see 20 U.S.C. § 1415(k)(4)-(6) (1994 & Supp. IV 1998) and 34 C.F.R. §§ 300.523-.525 (1999); Richland Sch. Dist. v. Thomas P., 33 IDELR ¶ 223 (W.D. Wis. 2000); Laurens County Sch. Dist. No. 55, 31 IDELR ¶ 204 (SEA S.C. 1999); Perry A. Zirkel, *Manifest Determination?*, 82 PHI DELTA KAPPAN 478 (2001) (discussing *Thomas P.*).

In *Board of Education of the Perry Public Schools*, 39 IDELR ¶ 251 (SEA Mich. 2003), a hearing officer, by agreement of the school, applied the standards contained in Section 300.525 to a case involving a student who was only eligible for accommodations under Section 504 of the Rehabilitation Act. The hearing officer noted that the Section 504 regulations were "silent regarding manifestation determinations." *Id.* at 2204. For a discussion of discipline of students who are solely covered by Section 504, see Zirkel, *Discipline, supra* note 21.

119 20 U.S.C. § 1415(k)(6)(B)(i) (1994 & Supp. IV 1998); 34 C.F.R. § 300.525(b) (1999) (superseded by statute). One commentator noted this provision required school officials to make

IDEA reauthorization,[120] however, the current statute does not contain any language that relates to the burden of proof on this issue.[121] Rather, it contains no presumed relationship or lack thereof between a child's disability and the child's behavior.

In addition, under IDEA '97, a hearing officer "in an expedited due process hearing" was empowered to place a student with a disability in an interim alternative educational setting (hereinafter IAES) for not more than forty-five calendar days if the school demonstrates "by substantial evidence that maintaining the current placement of the child is substantially likely to result in injury to the child or others."[122] Further, when a parent requests an expedited due process hearing to challenge a school's transfer of a student with disabilities to an IAES for a drug or weapons violation,[123] the IDEA and implementing regulations required the hearing officer to apply this same standard.[124] This clause has been deleted from the 2004 IDEA;[125] however, the amended statute does not expressly place the burden of proof on either parents or schools in these appeals.

Third, the IDEA, as amended in 1997,[126] allocates the burden of proof in certain disputes concerning IEPs and educational placements of children with disabilities who are convicted in adult criminal courts and confined to adult pris-

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decisions that are "complete, thoughtful, and founded on more than mere convenience." Mead, *supra note* 79, at 490.

120 20 U.S.C.A. § 1415(k)(3)(A).

121 *Id.*

122 20 U.S.C. § 1415(k)(3)(A)(1994 & Supp. IV 1998); 34 C.F.R. § 300.521(a); Cabot Sch. Dist., 27 IDELR 304 (SEA Ark. 1997); Dearborn Heights Sch. Dist. No. 7, 32 IDELR ¶ 106 (SEA Mich. 1999); Or. City Sch. Dist., 28 IDELR 96 (SEA Ore. 1998). As used in this provision, "substantial evidence" meant "beyond a preponderance of the evidence." 34 C.F.R. § 300.521(e) (superseded by statute). This was an unusual quantum of proof. *See* Seligmann, *supra* note 39, at 99-100. It is greater than the quantum of proof in typical civil actions, and much greater than the "substantial evidence" standard used in administrative law. It is not clear whether "substantial evidence" was equivalent to the "clear-and-convincing" standard used in civil fraud cases. For more information on expedited due process hearings, see Perry Zirkel, *Understand Criteria, Requirements for 'Expedited' Due Process Hearing*, THE SPECIAL EDUCATOR, June 18, 2000, at 3.

123 IDEA-97 provided that "school personnel" may unilaterally place a student with disabilities in an IAES for certain drug and weapons infractions. 20 U.S.C. § 1415(k)(1)(A)(1994 & Supp. IV 1998). The 2004 reauthorization retains this language, and makes clear that schools may make these changes without regard to whether the behavior was a manifestation of a disability. 20 U.S.C.A. § 1415(k)(1)(G) (West 2000 & Supp. 2005).

124 34 C.F.R. § 300.525(b)(2)(1999) (superseded by statute); *see* 20 U.S.C. § 1415(k)(6)(B)(ii)(1994 & Supp. IV 1998).

125 20 U.S.C.A. § 1415(k)(3)(B) (West 2000 & Supp. 2005). The 2004 reauthorization also provides schools may remove a covered child to an IAES if the child "has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of" an SEA or LEA. 20 U.S.C.A. § 1415(k)(1)(G)(iii).

126 Individuals with Disabilities Education Act Amendments of 1997, § 614(d)(6), Pub.L. 105-17, 111 Stat. 37, 87 (codified at 20 U.S.C. § 1414(d)(6)(1994 & Supp. IV 1998)).

ons.[127] The statute and implementing regulations allow IEP teams to make changes in programming or placement for such children "if *the State has demonstrated* a bona fide security or compelling penological interest that cannot otherwise be accommodated."[128]

Although the specific burden allocations in the IDEA are few, they are significant. They provide a potent indicator of how judges, hearing officers, and policy makers should fill the remaining statutory gaps.

III. JUDICIAL & ADMINISTRATIVE GAP-FILLING

The law regarding burden of proof under the IDEA is in disarray. What happens when a hearing officer has a case before her for which the IDEA does not expressly allocate the burden of proof, as in the case before Professor Dobson in the opening hypothetical? Hearing officers and administrative rulemakers have been bewilderingly inconsistent in allocating the burden of proof before hearing and review officers.[129] Similarly, courts have taken divergent approaches to assigning the burden of proof in IDEA court cases.[130] Some authorities allocate the burden based on a party's *status* (e.g., to the LEA regardless of circumstance).[131] Others allocate the burden of proof based on *circumstance* (e.g., to whichever party, be it parent or school, that challenges the administrative outcome).[132] This Part examines the varying approaches, organizing them on a Circuit-by-Circuit basis, with examination of key reported judicial decisions and, where available, administrative rules, regulations, and decisions.

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[127] For information on the special education rights of inmates with disabilities, see LOREN WARBOYS ET AL., CALIFORNIA JUVENILE JUSTICE SPECIAL EDUCATION MANUAL (1994); Peter E. Leone et al., *Understanding the Overrepresentation of Youths with Disabilities in Juvenile Detention*, 3 D.C. L. REV. 389 (1995); Thomas A. Mayes, *Denying Special Education in Adult Correctional Facilities: A Brief Critique of* Tunstall v. Bergeson, 2003 BYU EDUC. & L.J. 193; Thomas A. Mayes & Perry A. Zirkel, *The Intersections of Juvenile Law, Criminal Law, and Special Education Law*, 4 U.C. DAVIS J. JUV. L. & POL'Y 125 (2000); T. Rowand Robinson & Mary Jane K. Rapport, *Providing Special Education in the Juvenile Justice System*, 20 REMEDIAL & SPECIAL EDUC. 19 (1999); Perry Zirkel & Thomas Mayes, *Are Inmates with Disabilities Entitled to Special Education?*, THE SPECIAL EDUCATOR, Aug. 25, 2000, at 3. For two general discussions of persons with disabilities and the criminal justice system, see, e.g., Thomas A. Mayes, *Persons with Autism and Criminal Justice: Core Concepts and Leading Cases*, 5 J. POSITIVE BEHAV. INTERVENTIONS 92 (2003); Laurence Miller, *Brain Injury and Violent Crime: Clinical, Neuropsychological, and Forensic Considerations*, J. COGNITIVE REHABILITATION, Nov.-Dec. 1998, at 12.

[128] 20 U.S.C.A. § 1414(d)(7)(B); 34 C.F.R. 300.311(c) (emphasis added). The power provided under these provisions is limited. The allowable changes may last only so long as the emergent circumstance lasts. *See* Mayes & Zirkel, *supra* note 127, at 138. If a more permanent change is desired, then the IDEA's usual procedures must be followed. Furthermore, neither administrative convenience nor cost control, standing alone, is considered to be "a bona fide security or compelling penological interest." *Id.* at 138-39; Zirkel & Mayes, *supra* note 127, at 3.

[129] *See infra* Part III.

[130] *See infra* Part III.

[131] *See, e.g.*, Oberti v. Bd. of Educ., 995 F.2d 1204 (3d Cir. 1993).

[132] *See, e.g.*, Barnett v. Fairfax County Sch. Bd., 927 F.2d 146 (4th Cir. 1991).

A. *The District of Columbia Circuit*

1. Administrative Proceedings

At the administrative level in the District of Columbia, the LEA bears the burden of proof. In the landmark case of *Mills v. Board of Education of the District of Columbia*,[133] a predecessor to the IDEA, the school district was assigned "the burden of proof as to all facts and as to the appropriateness of any placement, denial of placement, or transfer."[134] Cases occurring after the passage of the IDEA have followed *Mills* in assigning the burden of proof at the administrative stage to the LEA,[135] and District regulations specifically allocate the burden of proof to the LEA.[136] In *Hammond v. District of Columbia*, a federal district judge remanded a portion of a family's claim for compensatory education for further administrative proceedings, in part because the hearing officer assigned the burden of proof to the parents.[137]

2. Judicial Proceedings

In IDEA actions in the federal courts of the District of Columbia, the burden of proof is on the party attacking the administrative outcome.[138] More specifically, the District of Columbia Circuit placed the burden in that manner, based on its conclusion that *Rowley* required it to give "deference" to hearing and review officers.[139]

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133 348 F. Supp. 866 (D.D.C. 1972).

134 *Id.* at 881.

135 Davis v. D.C. Bd. of Educ., 530 F. Supp. 1209, 1211-12 (D.D.C. 1982); *see* Kroot v. District of Columbia, 800 F. Supp. 976, 981-82 (D.D.C. 1992).

136 D.C. Mun. Regs. tit. 5, § 3030.3 (2005).

137 35 IDELR ¶ 121 (D.D.C. 2001) (citing *Mills* and *Kroot*).

138 Kerkam v. McKenzie, 862 F.2d 884 (D.C. Cir. 1988); *see also* Leonard v. McKenzie, 869 F.2d 1558, 1561 (D.C. Cir. 1989); *accord* Angevine v. Smith, 959 F.2d 292 (D.C. Cir. 1992) (following *Kerkam* and *Leonard*); Andersen v. District of Columbia, 877 F.2d 1018 (D.C. Cir. 1989) (same); Fagan v. District of Columbia, 817 F. Supp. 161, 166 (D.D.C. 1993) (same).

139 *Kerkam*, 862 F.2d at 887. In allocating the burden of proof to the party attacking the administrative decisions, the *Kerkam* court harmonized its new rule with prior cases that appeared to place the burden of proof on the schools. *See* McKenzie v. Smith, 771 F.2d 1527 (D.C. Cir. 1985). The *Kerkam* court noted that, in the prior cases, the schools were attacking the administrative outcome. 862 F.2d at 887 (discussing *McKenzie*).

B. *The First Circuit: Maine, Massachusetts, New Hampshire, Puerto Rico, and Rhode Island*

1. Judicial Proceedings

In federal courts in the First Circuit, the party challenging the administrative decision has the burden of proof.[140] In *Town of Burlington v. Massachusetts Department of Education*, the First Circuit allocated the burden to the challenger based on that court's reading of *Rowley* and an extension of general rules of administrative law to special education cases.[141] In *Roland M. v. Concord School Committee*,[142] the First Circuit applied this principle to issues of procedural compliance. The *Roland M.* court held that the parents had the burden of proving that the school's procedural violations resulted in a denial of a FAPE, where a hearing officer found no harm caused by procedural violations.[143]

2. Administrative Proceedings

Regarding who bears the burden of proof in administrative proceedings, this Circuit was silent until 2004. In *T.B. ex rel. N.B. v. Warwick School Committee*,[144] the First Circuit, in a footnote, stated that schools had the burden of proof at the administrative level. In *Lang v. Braintree School Committee*, a federal court in Massachusetts stated that the party challenging the status quo has the burden of proof,[145] although it is unclear whether this allocation applied to

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[140] Town of Burlington v. Mass. Dep't of Educ., 736 F.2d 773, 794 (1st Cir. 1984), *aff'd on other grounds sub nom.* Burlington Sch. Comm. v. Mass. Dep't of Educ., 471 U.S. 359 (1985).

In an earlier case, the First Circuit placed the burden of proof on the party seeking to change the status quo. *See* Doe v. Brookline Sch. Comm., 722 F.2d 910 (1st Cir. 1983). The procedural posture of *Doe* was unique. Rather than a review of an administrative decision, the moving party sought a preliminary injunction to avoid the stay-put rule and administrative procedures. HUEFNER & ZIRKEL, *supra* note 10, at 18 & n.105. "Since there had been no state hearing, there could be no losing party at that level." *Id.*

[141] *Town of Burlington*, 736 F.2d at 794.

[142] 910 F.2d 983 (1st Cir. 1990).

[143] *Id.* at 994-95. One further facet of *Roland M.* deserves a brief note. Associate Justice David Souter, then Circuit Judge Souter, was on the *Roland M.* panel. *Id.* at 986 & n.*. He heard oral argument (on June 4, 1990) and participated in the panel's post-argument conference; however, he "did not participate in the drafting or the issuance of the panel's opinion," which occurred on August 3, 1990. *Id.* In the interim, Judge Souter was elevated to the Supreme Court of the United States. It would be hazardous to conclude, however, that Justice Souter would definitely arrive at the same conclusion in a similar case before the Supreme Court. First, one tempts fate when one predicts how any judge will rule. Second, *Judge* Souter was limited by prior First Circuit precedent (*Town of Burlington*, 736 F.2d at 794); in contrast, *Justice* Souter would not be so constrained.

[144] 361 F.3d 80, 82 n.1 (1st Cir. 2004).

[145] Lang v. Braintree Sch. Comm., 545 F. Supp. 1221, 1228 (D. Mass. 1982). In *Lang*, the court allocated the burden of proof to the school district because of the school's procedural violations and because the school proposed a change to the status quo. *Id.* Given the importance of the

the administrative stage of a special education dispute, the judicial stage, or both. Maine, by regulation, allocates the burden of production to the party requesting the hearing.[146]

C. *The Second Circuit: Connecticut, New York, and Vermont*

1. Federal Court Decisions

The Second Circuit has taken a circuitous route to its burden of proof allocation. In *Briggs v. Board of Education*,[147] the Second Circuit did not address the issue; however, some commentators construed language used in *Briggs* as placing the burden in judicial proceedings on the party challenging the outcome of the administrative hearing.[148] After *Briggs*, the district courts of the Second Circuit initially were divided. Some courts placed the burden on the party challenging the outcome of the administrative hearings.[149] Others placed the burden of proof on school districts to prove compliance with the IDEA's requirements, regardless of which party prevailed before the agency.[150]

Beginning in 1998, the Second Circuit began to resolve the intra-Circuit split of authority. In *Walczak v. Florida Union Free School District*, the Second Circuit held, relying on New York hearing officer cases, that the burden of proof at due process hearings is borne by the schools.[151] The *Walczak* court took the

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preservation of the status quo to the *Lang* court, we believe that this case stands for the proposition that the challenger to the status quo bears the burden of proof even in cases where there has no procedural violation by the school district. For a brief discussion of *Lang*, see Zirkel, *supra* note 65, at 485.

Dr. Allan Osborne, a Massachusetts school principal and a prolific writer in the field of special education law, cites *Lang* as placing the burden of proof on the school district (at least at the judicial review stage). Osborne, *supra* note 10, at 369 & n.10. We believe that Dr. Osborne misreads *Lang*. The school in *Lang* bore the burden of proof, not because it was the school, but because it had committed a procedural violation and, most important, was proposing a change in the status quo.

146 05-071-101 ME. CODE R. § 13.12(I) (Weil 2004).

147 882 F.2d 688 (2d Cir. 1989). Although not addressed by the Second Circuit, the parents raised the burden-of-proof issue in district court. *See* HUEFNER & ZIRKEL, *supra* note 10, at 19 n.137. For the lower court opinion, see 707 F. Supp. 623 (D. Conn. 1988).

148 *See, e.g.*, Julie Mead, *Expressions of Congressional Intent: Examining the 1997 Amendments to the IDEA*, 127 EDUC. L. REP. 511, 516 (West 1998); *cf.* Mavis v. Sobel, 839 F. Supp. 968, 985 (N.D.N.Y. 1993) (disagreeing with assertion that *Briggs* resolved the burden of proof question in the Second Circuit).

149 Evans v. Bd. of Educ., 930 F. Supp. 83, 93 (S.D.N.Y. 1996); Hiller v. Bd. of Educ., 743 F. Supp. 958, 967-68 (N.D.N.Y. 1990).

150 Wall v. Mattituck-Cutchogue Sch. Dist., 945 F. Supp. 501, 511 (E.D.N.Y. 1996); *Mavis*, 839 F. Supp. at 985 (burden on LEA, at least concerning LRE).

151 142 F.3d 121, 122 (2d Cir. 1998) (citing New York SEA decisions); *see also* HUEFNER & ZIRKEL, *supra* note 10, at 6 & 17 n.61 (LEA has burden of persuasion (citing early SEA decisions)). Some earlier New York administrative decisions had allocated the burden of proof to the child's parents. *See* Zirkel, *supra* note 65, at 485 & n.133.

administrative decisions of a single state and apparently elevated those decisions to the law of the Circuit. The Second Circuit extended the *Walczak* rule in *M.S. v. Board of Education*.[152] The *M.S.* court held that the school shouldered the burden of proving substantive and procedural compliance with the IDEA, at both the administrative and the judicial stage.[153] The Second Circuit, however, created a limited exception. In tuition reimbursement cases,[154] the parents of a child with a disability must prove the appropriateness of the private placement.[155]

The manner in which the Second Circuit announced its allocation of the burden of proof is unusual. First, it dramatically extended *Walzcak* in *M.S.* Second, the *M.S.* court's decision contained no reference to the division of authorities within the Second Circuit, and no rationale for allocating the burden of proof to schools. Given the deep division of authority, one would have expected more discussion from the Second Circuit about why it adopted the particular rule.

2. State Regulations

Connecticut's state law changed after *Walczak* and *M.S.* Prior to these two cases, state regulations provided that the burden of production in administrative hearings lies with the party requesting the hearing.[156] In addition, Connecticut state court decisions allocated the burden of proof in court cases to the party attacking the administrative outcome.[157] In July 2000, the Connecticut Department of Education significantly revised state regulations on burden of proof.[158] First, the Department deleted the regulation which placed the burden

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[152] 231 F.3d 96 (2d Cir. 2000); *see also* A.A. v. Philips, 386 F.3d 455 (2d Cir. 2004); Warton v. New Fairfield Bd. of Educ., 217 F. Supp. 2d 261 (D. Conn. 2002). After *Walzcak* but before *M.S.*, a federal judge in Connecticut ruled that the party challenging the IEP (at the administrative stage) and challenging the administrative outcome (on judicial review) bore the burden of proof, but without citation to state or federal authority. *See* Mr. & Mrs. H. v. Region 14 Bd. of Educ., 46 F. Supp. 2d 106, 109 (D. Conn. 1999).

[153] 231 F.3d at 102-04.

[154] *See supra* note 98 (discussing the remedy of tuition reimbursement under the IDEA).

[155] *M.S.*, 231 F.3d at 104 (citing Carlisle Area Sch. Dist. v. Scott P., 62 F.3d 520 (3d Cir. 1995)). In tuition reimbursement cases, the appropriateness of the parent's private placement is only an issue if the school's proposed placement is found to be inappropriate. If the school's proposed placement is found to be appropriate, the parent's claim fails, regardless of the merits of the parent's placement. *See supra* note 98 (discussing the remedy of tuition reimbursement under the IDEA).

[156] CONN. AGENCIES REGS. § 10-76h-2(f)(4) (1990); *see also* Doe v. Bd. of Educ., 753 F. Supp. 65 (D. Conn. 1990).

[157] Cheshire Bd. of Educ. v. Conn. State Bd. of Educ., 17 EHLR 942 (Conn. Super. Ct. 1991).

[158] *See* 62 CONN. L.J. 3 (July 18, 2000). These regulations were published four days after *M.S.* was argued, but before it was decided. *M.S.*, 231 F.2d at 96 (argued on July 14, 2000).

of proof upon the party requesting the administrative hearing.[159] Second, the Department enacted a new regulation concerning the burden of proof.[160] This new regulation placed the burden of production ("the burden of going forward") on the party requesting the due process hearing; however, the school has the burden of persuasion "in all cases."[161] Like the Second Circuit in *M.S.*,[162] the Department created an exception for tuition reimbursement cases.[163] If a school fails to prove its proposed placement was appropriate, then the party requesting tuition reimbursement for a unilateral placement of a child with a disability must prove that the unilateral placement was appropriate.[164]

Finally, New York has a special regulation governing the education of students with disabilities who are placed in hospitals operated by the Office of Mental Health, in residential schools operated by the Office of Mental Retardation and Developmental Disabilities, or in child care institutions.[165] If one of these facilities determines that a resident student may profit from public school instruction, that institution may recommend that student to the school district in which the facility is located.[166] If the local school district determines that it is unable to provide a FAPE or arrange for the provision of a FAPE to the student, it must notify the parent and the facility.[167] The parent may request a hearing, and the local school district has the burden of proving that it is neither able to provide a FAPE to the student nor arrange for the provision of a FAPE elsewhere.[168]

D. The Third Circuit: Delaware, New Jersey, Pennsylvania, and The Virgin Islands

The state and federal courts of the Third Circuit have issued several decisions on burden of proof, many of which are favorable to parents. Most of these decisions contain thorough discussions of the issue.[169] These leading cases are widely discussed in opinions from other courts[170] and by commenta-

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159 62 CONN. L.J. at 8B (deleting CONN. AGENCIES REGS. § 10-76h-2(f)(4)).

160 *Id.* at 17B (enacting CONN. AGENCIES REGS. § 10-76h-14 (2000)).

161 CONN. AGENCIES REGS. § 10-76h-14(a) (2003).

162 *See M.S.*, 231 F.2d at 104.

163 CONN. AGENCIES REGS. § 10-76h-14(c).

164 *Id.*

165 N.Y. COMP. CODES R. & REGS. tit. VIII, § 200.11 (2002).

166 *Id.* § 200.11(a)(1).

167 *Id.* § 200.11(c).

168 *Id.* § 200.11(c)(1).

169 For example, the Third Circuit's opinions in *Oberti v. Board of Education*, 995 F.2d 1204 (3d Cir. 1993), and in *Carlisle Area School District v. Scott P.*, 62 F.3d 520 (3d Cir. 1995), contain seven paragraphs and four paragraphs, respectively, that discuss burdens of proof.

170 In a search of the LEXIS computer aided legal research database conducted by the lead author on November 14, 2003, the New Jersey Supreme Court's decision in *Lascari v. Board of*

tors.[171] Anyone concerned with burden-of-proof issues in special education must carefully consider the Third Circuit's authorities.

1. The New Jersey Supreme Court's *Lascari* Decision

A leading case in the Third Circuit is a state court case. In *Lascari v. Board of Education*,[172] the Supreme Court of New Jersey placed the burden of proof upon the school district at the administrative stage.[173] Dissatisfied with the services offered by the Ramapo Indian Hills High School District, John Lascari's parents enrolled him at the Landmark School, an out-of-state boarding school.[174] John's parents sought tuition reimbursement from Ramapo, which was denied after several administrative and judicial reviews.[175] The Lascaris appealed to New Jersey's highest court.[176]

The *Lascari* court provided four justifications for allocating the burden of proof to school districts. First, the IDEA imposes an obligation on schools to provide a FAPE to children with disabilities, and provides to families a detailed "regulatory scheme" to protect that right.[177] The *Lascari* court concluded that placing the burden of proof on schools was akin to the procedural protections provided by the IDEA.[178] Second, the school is more likely to have or be able to obtain needed evidence.[179] Third, the school is arguably more aware of the requirements imposed by special education law.[180] Fourth, the nature of the proceedings (tried before a hearing officer and reviewed by a court sitting without a jury) and the common interest in educating a child with a disability both support allocating the burden to schools.[181]

After reviewing these factors, the *Lascari* court announced its rule:

Education, 560 A.2d 1180 (N.J. 1989) was cited by seven federal courts outside of the Third Circuit. The Third Circuit's *Oberti* decision, 995 F.2d 1204, was cited by 38 courts outside of the Third Circuit.

171 In the LEXIS search referred to above, see *supra* note 170, *Lascari* was cited by nine law review articles and *Oberti* was cited by 56 law review articles.

172 560 A.2d 1180 (N.J. 1989).

173 *Id.* at 1182. In later portions of its opinion, the *Lascari* court stated that it was placing the burden of proof on the school in all cases where any party "seeks to change" the child's IEP. *Id.* at 1188. In that sense, *Lascari* may be construed to not apply in cases where the change of an IEP is not at issue (i.e., no IEP, disputes about implementation, disputes about placement). When the opinion is read as a whole, that construction is too limiting.

174 *Id.* at 1184-85.

175 *Id.* at 1185-87.

176 *Id.* at 1187.

177 *Id.* at 1188.

178 *Id.*

179 *Id.*

180 *Id.*

181 *Id.*

> To conclude, we believe the obligation of parents at the due-process hearing should be merely to place in issue the appropriateness of the IEP. The school board should then bear the burden of proving that the IEP was appropriate. In reaching that result, we have sought to implement the intent of the statutory and regulatory schemes.[182]

Applying this rule to the case before it, the New Jersey Supreme Court concluded that the school had failed to meet its burden of proof and reversed the lower court's decisions in favor of the school.[183]

2. The Third Circuit's *Oberti* Decision

In *Oberti v. Board of Education*,[184] the Third Circuit first definitively allocated the burden of proof in IDEA disputes.[185] Rafael Oberti was a child with Down Syndrome and a student of the Clementon School District in New Jersey.[186] Rafael's parents wanted him to receive his education in a general classroom in his neighborhood school; in contrast, Clementon proposed a placement in a segregated classroom "in a different district."[187] After a due process hear-

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182 *Id.* at 1188-89.

183 *Id.* at 1193. Notably, the appropriateness of the private placement was not at issue in *Lascari*. "In fact, the board sought to establish the appropriateness of its own program by proving that it was similar to the Landmark program." *Id.* at 1192. The board attempted to argue that the Landmark school was not the LRE, but that argument was rejected by the court. *Id.* at 1191-92.

184 995 F.2d 1204 (3d Cir. 1993), *aff'g* 801 F. Supp. 1392 (D.N.J. 1992). For discussions of *Oberti*, see Bryant, *supra* note 74; Brooke R. Whitted & Shelley Davis, Oberti v. Board of Education*: A Rational View*, 31 CLEARINGHOUSE REV. 132 (1997); Daniel G. Lyons, Comment, *IDEA – The Third Circuit Sets Its Standards for Interpreting the Mainstreaming Requirement of the Individuals with Disabilities Education Act –* Oberti v. Board of Education *(1993)*, 39 VILL. L. REV. 1057 (1994); Daniel H. Melvin, II, Comment, *The Desegregation of Children with Disabilities*, 44 DEPAUL L. REV. 599 (1995).

In *Molly L. v. Lower Merion School District*, 194 F. Supp. 2d 422 (E.D. Pa. 2002), a federal district judge applied the *Oberti* burden-of-proof allocation to a case involving a student who was solely eligible under Section 504. We disapprove of the extension of IDEA burden allocations to Section 504 cases. Our proposed burden allocation is largely informed by the IDEA's detailed language, *see infra* Part IV.A, and Section 504 lacks such detailed language.

185 In *Grymes v. Madden*, 672 F.2d 321 (3d Cir. 1982), the Third Circuit made references to burdens of proof; however, this was not at issue on appeal. For more discussion of *Grymes*, see HUEFNER & ZIRKEL, *supra* note 10, at 10 & nn.133-36.

In *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1034-1035 (3d Cir. 1993), the Third Circuit reprinted a trial court decision, in its entirety, which cited *Lascari* for the proposition that the LEA always bears the burden of proof whenever "a change in the child's IEP is sought."

186 995 F.2d at 1206.

187 *Id.* at 1208-09. The out-of-district placement was a 45-minute bus ride from Rafael's home. *Id.* at 1208.

ing requested by Rafael's parents, [188] an Administrative Law Judge (hereinafter "ALJ") ruled in favor of Clementon.[189]

Rafael's parents filed a complaint in federal district court.[190] After the trial court denied cross motions for summary judgment,[191] the court reviewed the administrative record and held a three-day-long evidentiary hearing in May 1992.[192] In August 1992, the district court ruled in favor of the Obertis and Clementon appealed.[193]

On appeal, the Third Circuit affirmed the trial court's conclusion that Clementon violated the IDEA.[194] Clementon claimed "once the [ALJ] decided in its favor, the burden should have shifted to the parents who challenged the agency decision in the district court."[195] Clementon based its argument on *Rowley*'s admonition that trial courts must give "due weight" to state administrative proceedings.[196]

The *Oberti* court rejected Clementon's argument, however, and held the district court did not err in placing the burden on the district.[197] According to the court, *Rowley* required due weight to be given "to the *administrative proceedings*, not to the party who happened to prevail in those proceedings."[198] The court reasoned:

> Given that the district court must *independently* review the evidence adduced at the administrative proceedings and can receive new evidence, we see no reason to shift the ultimate burden of proof to the party who happened to have lost before the state agency, especially since the loss at the administrative level

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188 *Id.* at 1209 ("three-day due process hearing").

189 *Id.* at 1209.

190 *Id.* at 1210.

191 *Id.* The order denying the motions for summary judgment was reported at 789 F. Supp. 1322 (D.N.J. 1992).

192 995 F.2d at 1210-12.

193 *Id.* at 1212-13. The trial court's decision is reported at 801 F. Supp. 1392 (D.N.J. 1992). Interestingly, after the *Oberti* district court decisions, but before the Third Circuit's *Oberti* decision, a different federal district judge in New Jersey ruled that the party challenging the administrative outcome had the burden of proof. Remis v. N.J. Dep't of Human Servs., 815 F. Supp. 141, 143 (D.N.J. 1993). The different allocation, however, was not outcome-determinative. In *Remis*, the educational agency was challenging the ALJ's decision and would have borne the burden of proof as well under the *Oberti* district court decisions. Compare this result with the decision in *Egg Harbor Twp. Bd. of Educ. v. S.O.*, 19 IDELR 15, 17 (D.N.J. 1992), in which the federal district court followed *Lascari*.

194 995 F.2d at 1224.

195 *Id.* at 1218.

196 *Id.* (quoting *Rowley*, 458 U.S. at 206).

197 *Id.* at 1219-20.

198 *Id.* at 1219 (emphasis added).

> may have been due to incomplete or insufficient evidence or to an incorrect application of the Act.[199]

The *Oberti* court concluded that it could, consistent with the IDEA, simultaneously give "due weight" to the administrative stage of the dispute and place the burden of proof on the LEA.[200]

The *Oberti* court supported its burden allocation with the following considerations. First, placing the burden of proof on parents would dilute the protections that the IDEA provides to parents.[201] Second, schools have superior access to evidence, "greater control over the potentially more persuasive witnesses," and "greater overall educational expertise than the parents."[202] The *Oberti* court concluded that "when the IDEA's mainstreaming requirement is specifically at issue, it is appropriate to place the burden of proving compliance with the IDEA on the school."[203] According to the court, the IDEA's "strong presumption in favor of mainstreaming . . . would be turned on its head" if parents had to demonstrate affirmatively that their children with disabilities belonged in a general classroom.[204] The *Oberti* decision has been extended by other courts in the Third Circuit to issues other than "mainstreaming" or least restrictive environment.[205]

3. The Third Circuit's *Carlisle* Decision

After *Oberti*, it was unclear which party would bear the burden of proof when the parents, as opposed to the school, requested a more restrictive placement.[206] In *Carlisle Area School District v. Scott P.*,[207] the Third Circuit purported to answer this question. In *Carlisle*, the Third Circuit held that parents had the burden of proving the appropriateness of a more restrictive placement.[208] In doing so, the *Carlisle* court relied on one of *Oberti*'s factors: "a strong presumption in favor of mainstreaming."[209]

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199 *Id.* (emphasis added).

200 *Id.*; *see also* Laughlin v. Cent. Bucks Sch. Dist., 1994 U.S. Dist. LEXIS 201 (E.D. Pa. Jan. 12, 1994) (placing burden on LEA in district court, even though LEA prevailed at administrative level).

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

202 *Id.* (citing *Lascari*, 560 A.2d at 1188).

203 *Id.*

204 *Id.*; *see also* Buss, *supra* note 33, at 309; Kirp et al., *supra* note 77, at 136.

205 *See, e.g.*, Delaware County Intermediate Unit v. Martin K., 831 F. Supp. 1206, 1214 (E.D. Pa. 1993).

206 *See, e.g.*, Bryant, *supra* note 74, at 113.

207 62 F.3d 520 (3d Cir. 1995).

208 *Id.* at 533.

209 *Id.* (quoting *Oberti*, 995 F.2d at 1214).

The *Carlisle* court's burden allocation rests on shaky procedural ground. At best, the court's burden allocation is dicta. *Carlisle* concerned the family's request for tuition reimbursement and compensatory education.[210] The trial court found, and the Third Circuit affirmed, that the school district's proposed placements were appropriate.[211] As the school district had met its burden of compliance with the IDEA, the court's inquiry should have ended at that point. It was entirely unnecessary to allocate the burden of proof.[212] The Third Circuit may wish to revisit the question posed in *Carlisle*, but in a case in which the question is properly before the court and necessary to the case's decision.

4. Pennsylvania's Law on Burden of Proof: State Law in a State of Flux

Pennsylvania's burden-of-proof allocation has markedly changed over time. In the *PARC* consent decree[213] and an implementing regulation,[214] the school district had a very modest burden of production, which was satisfied when the district introduced an "official report recommending a change in educational assignment."[215] Upon receipt of this official report, the burden of production shifted to the parents.[216] Neither *PARC* nor the regulation specified which party bore the burden of persuasion.[217] The regulation also did not address which party bore the burden of production "when the parent, rather than the LEA, was the party seeking a change in the child's educational status."[218] Pennsylvania courts[219] and administrative officers[220] interpreted this regulation to place the burden of proof on the party challenging the status quo, with many hearing officers expressly allocating the burden of production to the party challenging the status quo.[221]

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210 *Id.* at 523.

211 *Id.* at 534.

212 Since the school offered an appropriate education, albeit one rejected by Scott P.'s parents, the school met the burden imposed on it by *Oberti* and the tuition reimbursement analysis should have come to an end. For more information on the law of tuition reimbursement, see, e.g., Mayes & Zirkel, *supra* note 88.

213 Pa. Ass'n for Retarded Children v. Commonwealth, 343 F. Supp. 297, 305 (E.D. Pa. 1972) [hereinafter *PARC*].

214 22 PA. CODE § 13.32(15) (1977).

215 *See supra* notes 213-14.

216 HUEFNER & ZIRKEL, *supra* note 10, at 5.

217 *Id.*

218 *Id.*

219 *Id.* at 5 & 15 n.43 (citing court decisions); *see also* Fitz v. Intermediate Unit 29, 403 A.2d 138 (Pa. Commw. Ct. 1979) (placing burden on parent to prove inappropriateness of school's offered education in tuition reimbursement case).

220 HUEFNER & ZIRKEL, *supra* note 10, at 5 & 15 n.45 (citing SEA decisions).

221 *Id.*

Pennsylvania amended its regulations in 1990 and deleted all references to burden of proof.[222] The first post-amendment decisions were split.[223] Some applied pre-amendment rules, while others placed the burden on the party seeking the more restrictive placement.[224] After *Oberti*, the burden-of-proof issue appeared to be resolved in Pennsylvania state courts; however, a recent Pennsylvania Commonwealth Court decision has cast renewed doubt on this issue. In *Mars Area School District v. Laurie L.*,[225] the Commonwealth Court held that Laurie L. had the burden of proof because she had requested a due process hearing concerning the District's decision that her son was no longer eligible for special education.[226] The Commonwealth Court reversed an administrative ruling in favor of Laurie L. and her child.[227]

In *Laurie L.*, the Commonwealth Court relied on a state administrative regulation, which provides that a parent of a child with a disability may request an "impartial due process hearing" when that parent disagrees with a District's "evaluation," among other things.[228] This regulation does not specify which party bears the burden of proof. More important, the Commonwealth Court did not distinguish, much less mention, the substantial body of law developed by the federal courts of the Third Circuit, which assigns the burden of proof in a different manner.[229] In *Laurie L.*, the Commonwealth Court created a situation in which the outcome of any future Pennsylvania special education dispute may be determined by whether the case is litigated in the Commonwealth Court or in federal district court.

5. Delaware's State Statute

By statute, Delaware allocates the burden of proof to schools.[230] In contrast to the Third Circuit's *Carlisle* decision,[231] Delaware's state law apparently makes no distinction for cases in which the parents seek a more restrictive placement.[232]

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222 *Id.* at 5 & 16 n.46 (citing 22 PA. CODE § 14.64).

223 *Id.* at 5 & 16 nn.47-48.

224 *Id.* at 5 & 16 n.48 (citing *In re* Chanse B., 17 EHLR 208 (Pa. SEA 1990)).

225 827 A.2d 1249 (Pa. Commw. Ct. 2003).

226 *Id.* at 1255.

227 *Id.* at 1258.

228 *Id.* at 1255 & n.15 (citing 22 PA. CODE § 14.162(b)).

229 *See supra* notes 169-212 and accompanying text (discussing Third Circuit cases).

230 DEL. CODE ANN. tit. 14, § 3140 (2005).

231 62 F.3d at 533.

232 *See* DEL. CODE ANN. tit. 14, § 3140.

E. *The Fourth Circuit: Maryland, North Carolina, South Carolina, Virginia, and West Virginia*

A long line of Fourth Circuit cases places the burden of proof on the party challenging the outcome of the administrative proceedings in federal district court.[233] Regarding the burden of proof at administrative hearings, the Fourth Circuit recently resolved[234] an intra-Circuit split of authority.[235] The Fourth Circuit now allocates the burden of proof to the party initiating the proceeding,[236] and this decision is now being reviewed by the United States Supreme Court.[237] The Fourth Circuit arrived at this decision following years of protracted litigation involving a claim for tuition reimbursement for a Maryland child named Brian Schaffer.

1. The *Brian S.* Litigation

In *Brian S. v. Vance*,[238] the United States District Court for the District of Maryland held that the school had the burden of proof in administrative proceedings under the IDEA. In the first administrative decision in this case, the ALJ determined the allocation of the burden of proof to be "critical."[239] Ultimately, the ALJ allocated the burden to Brian's parents, concluded that they had not met their burden, and ruled for the school.[240]

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233 *See* Barnett v. Fairfax County Sch. Bd., 927 F.2d 146, 152 (4th Cir. 1991); Tice v. Botetourt County Sch. Bd., 908 F.2d 1200, 1206 n.5 (4th Cir. 1990); Spielberg v. Henrico County Pub. Sch., 853 F.2d 256, 258 n.2 (4th Cir. 1988); Frederick v. Vance, 30 IDELR 752 (D. Md. 1999); Fritschle v. Andres, 45 F. Supp. 2d 500, 508 n.21 (D. Md. 1999); Doe v. Arlington County Sch. Bd., 41 F. Supp. 2d 599, 603 (E.D. Va. 1999); Jones v. Bd. of Educ., 15 F. Supp. 2d 783, 786 n.3 (D. Md. 1998); King v. Bd. of Educ., 999 F. Supp. 750, 768 (D. Md. 1998); *cf.* Bales v. Clarke, 523 F. Supp. 1366, 1370 (E.D. Va. 1981) (placing burden on parents, where school district prevailed at administrative level). One may read *Bales*'s brief reference to burden of proof as placing the burden of proof on parents, as parents; however, such a reading is no longer tenable based on subsequent Fourth Circuit cases which announce a different rule while still commanding the same result.

234 Weast v. Schaffer, 377 F.3d 449 (4th Cir. 2004). In *Brian S. v. Vance*, the trial court noted that the Fourth Circuit had this question before it in 1980, but did not answer it. 86 F. Supp. 2d 538, 539 n.1 (D. Md. 2000) (citing Stemple v. Bd. of Educ., 623 F.2d 893, 896 (4th Cir. 1980)), *vacated and remanded sub nom.* Schaffer v. Vance, 2 Fed. App'x 232 (4th Cir. 2001), *further proceedings sub nom.* Weast v. Schaffer, 240 F. Supp. 2d 396 (D. Md. 2002), *rev'd*, 377 F.3d 449 (4th Cir. 2004), *cert. granted*, 125 S. Ct. 1300 (2005).

235 *Fritschle*, 45 F. Supp. 2d at 508 n.21; *see also* Steinberg v. Weast, 132 F. Supp. 2d 343, 346-47 & nn. 5-6 (D. Md. 2001); *Brian S.*, 86 F. Supp. 2d at 539 n.1.

236 *Weast*, 377 F.3d at 450.

237 *Schaffer*, 125 S. Ct. 1300.

238 *Brian S.*, 86 F. Supp. 2d at 538.

239 *Brian S.*, 86 F. Supp. 2d at 540 (quoting ALJ's decision, p. 29).

240 *Id.* at 540-41.

Brian's parents filed a complaint in federal court.[241] On cross motions for summary judgment, the court ruled in favor of Brian's parents.[242] The court assigned the burden of proof to the school district, at least in cases in which there is a dispute concerning a child's initial placement.[243] The court remanded the case to the ALJ for reconsideration of the case using what it considered to be the proper burden of proof.[244]

The school appealed.[245] While the appeal was pending, the ALJ allocated the burden of proof to the school and issued a revised decision that was partially favorable to the parents.[246] Taking notice of the revised ALJ decision, the Fourth Circuit vacated the trial court decision, and remanded the cause to the trial court "with directions that any issue with respect to the proof scheme in this case be consolidated with the consideration on the merits."[247]

On remand, both parties appealed the ALJ's partially favorable decision.[248] The trial court, noting that the ALJ applied the burden of proof to the school,[249] affirmed the decision to award tuition reimbursement;[250] however, it reversed the decision to partially reimburse the parents.[251]

After the initial *Brian S.* decision, the case law in the Fourth Circuit was somewhat cloudy.[252] The clouds cleared (at least for now) on July 29, 2004, when the Fourth Circuit reversed Brian S.'s favorable judgment.[253] In a divided

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241 *Id.* at 539.

242 *Id.* at 545.

243 *Id.* In cases where there was a challenge to an existing IEP, the *Brian S.* court noted that it would assign the administrative burden of proof to the party making the challenge.

244 *Id.*

245 Schaffer v. Vance, 2 Fed. App'x 232 (4th Cir. 2001), *further proceedings sub nom.* Weast v. Schaffer, 240 F. Supp. 2d 396 (D. Md. 2002), *rev'd*, 377 F.3d 449 (4th Cir. 2004), *cert. granted*, 125 S. Ct. 1300 (2005).

246 2 Fed. App'x at 233. On remand in this tuition reimbursement case, the ALJ awarded the parents tuition reimbursement, but to a lesser extent than sought by the parents. *Weast*, 240 F. Supp. 2d 396 (one-half of a school year, rather than the whole year). This is a somewhat common disposition of tuition reimbursement disputes. In one out of eight tuition reimbursement cases, parents receive partially favorable decisions. *See* Mayes & Zirkel, *supra* note 88, at 355.

247 *Id.*

248 *Weast*, 240 F. Supp. 2d 396.

249 *Id.* at 406.

250 *Id.*

251 *Id.*

252 *See* Steinberg v. Weast, 132 F. Supp. 2d 343, 346-47 (D. Md. 2001) (assignment of burden of proof to parents, even if error, was harmless); *see also* Waller v. Bd. of Educ., 234 F. Supp. 2d 531 (D. Md. 2002) (same); *cf.* Bd. of Educ. v. Michael M., 95 F. Supp. 2d 600 (S.D. W. Va. 2000) (school district bore the burden of proof). For a discussion of *Michael M.*, see Osborne, *supra* note 10, at 369-71.

253 Weast v. Schaffer, 377 F.3d 449 (4th Cir. 2004). For three discussions, see WRIGHT, *supra* note 9; Lindsay P. Hembree, Recent Development, *Burden of Proof* – Weast v. Schaffer*: The Burden of Proof in Proving the Adequacy of Individualized Education Programs*, 28 AM. J. TRIAL

opinion, the Fourth Circuit concluded there was "no valid reason to depart from the general rule that the party initiating a proceeding has the burden of proof . . . ."[254] Holding "that parents who challenge an IEP have the burden of proof in the administrative hearing," the Fourth Circuit remanded Brian S.'s case for further proceedings.[255]

The Fourth Circuit first noted the IDEA's silence regarding the burden of proof[256] and the division of authorities regarding the burden's allocation in administrative proceedings.[257] It then rejected all reasons offered by Brian S.'s parents in favor of assigning the burden to the school: the remedial nature of the IDEA, the greater access to expertise and information possessed by school personnel, and the history of the IDEA.[258] In discussing its result, the Fourth Circuit observed that placing the burden of proof on the school would be to presume that all IEPs are inadequate.[259] Further, it stated: "A presumption of inadequacy would go against the basic policy of the IDEA, which is to rely on the professional expertise of local educators."[260]

2. Brian Schaffer and the United States Supreme Court

The Supreme Court of the United States granted the Schaffers' petition for writ of certiorari.[261] On appeal, nine states and numerous advocacy groups authored amicus briefs in support of the Schaffers,[262] while the States of Alaska,

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ADVOC. 259 (2004); Recent Case, *Disability Law - Individuals with Disabilities Education Act – Fourth Circuit Holds That Parents Bear the Burden of Proof in a Due Process Hearing Against a School District*: Weast v. Schaffer, 377 F.3d 449 (4th Cir. 2004), 118 HARV. L. REV. 1078 (2005).

254 *Id.* at 450. One judge dissented. *Id.* at 456-59 (Luttig, J., dissenting).

255 *Id.* at 456.

256 *Id.* at 452. The Fourth Circuit is only partially correct. The IDEA allocates the burden of proof in several narrow circumstances, as noted above. *See supra* Part II.C. The Fourth Circuit's decision does not account for these express allocations, either by indicating them as exceptions to the general rule it announced or by indicating whether it considered them as interpretive guides (*See infra* Part IV).

257 *Weast*, 377 F.3d at 452. The Fourth Circuit considered only federal appellate decisions. In doing so and in not considering state regulations, for example, it considered only a fraction of the controlling legal authority. For instance, the Fourth Circuit observed: "It is not clear how the D.C. Circuit would assign the burden in a case . . . where only the substance of the IEP is challenged." *Id.* at 453. It is not clear that the D.C. Circuit would ever need to make such an assignment, when that matter is resolved by regulation. *See* D.C. MUN. REGS. tit. 5, § 3022.16 (2005).

258 *Weast*, 377 F.3d at 453-55.

259 *Id.* at 455-56.

260 *Id.*

261 Schaffer v. Weast, 125 S. Ct. 1300 (2005).

262 WRIGHT, *supra* note 9, at 3; *Amicus Briefs Filed in* Schaffer v. Weast, *available at* http://www.wrightslaw.com/news/05/schaffer.amicus.states.htm#orgs (last visited July 7, 2005) (on file with author).

Hawaii, and Oklahoma supported the District.[263] The United States, which supported the Schaffers in proceedings before the Fourth Circuit,[264] recently announced it was supporting the District's position before the Supreme Court.[265]

3. An Intra-Circuit Conflict of Law, Post-*Schaffer*

The Fourth Circuit's most recent decision has created another intra-circuit division of authority. By regulation, West Virginia allocates the burden of proof "as to the appropriateness of any proposed action" to the school.[266] This would include placement disputes, even when the school is proposing a less restrictive placement.[267]

F. The Fifth Circuit (Louisiana, Mississippi, and Texas) and the Eleventh Circuit (Alabama, Florida, and Georgia)

Discussion of the burden-of-proof allocations in these two circuits requires a brief review of their peculiar history. Until October 1, 1981, the states that form the present Fifth Circuit and the states that form the Eleventh Circuit formed the original Fifth Circuit.[268] On that date, the Circuit was split into two Circuits.[269] Prior to that date, the original Fifth Circuit was divided into two administrative units: Unit A and Unit B.[270] "A decision of either administrative unit was binding on both units and became the law of the old Fifth."[271] In the first case decided by the new Eleventh Circuit, it decided that the decisions of the original Fifth Circuit "shall be binding as precedent in the Eleventh Circuit."[272]

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263 WRIGHT, *supra* note 9, at 3 n.8.

264 Caroline Hendrie, *High Court to Decide Who Must Prove Case in Special Ed. Disputes*, EDUC. WK., Mar. 2, 2005, at 1.

265 WRIGHT, *supra* note 9, at 3-4; Christina A. Samuels, *Switching Sides, U.S. Backs District in IDEA Case Before Supreme Court,* EDUC. WK., June 28, 2005, http://www.edweek.org/ew/articles/2005/06/28/42schaffer_web.h24.html (on file with author).

266 W. VA. CODE R. § 126-16-8.1.11(c) (2003).

267 *Id.* (stating that "school personnel" have the burden of proving why a "more normalized placement *could*/could not adequately and appropriately service the individual's educational needs" (emphasis added)). Additionally, Virginia state courts apparently assume the burden is borne by school districts. *See* WEBER, *supra* note 4, at 22:1 & n.9 (citing Sch. Bd. v. Beasley, 380 S.E.2d 884, 888 (Va. 1989)); WRIGHT, *supra* note 9, at 19 n.65 (same).

268 Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981).

269 *Id.* at 1207 (citing Fifth Circuit Court of Appeals Reorganization Act of 1980, Pub. L. 96-452, 94 Stat. 1995).

270 *Id.* at 1211 n.8.

271 *Id.*

272 *Id.* at 1207.

One decision from the original Fifth Circuit addressed burdens of proof. In *S-1 v. Turlington*,[273] a panel of Unit B appeared to provide guidance concerning the burden of proof under the IDEA. The *S-1* plaintiffs challenged disciplinary suspensions and expulsions, asserting that the misconduct for which they were disciplined was related to their disabilities.[274] Defendants asserted that the plaintiffs had waived this argument, as none had raised it prior to exclusion.[275] The *S-1* court considered which party had the burden of raising the issue of whether a student's misbehavior was a "manifestation" of the student's disability: the student or the school.[276] In allocating the burden to the school to determine whether a child's behavior was a manifestation of the child's disability, the *S-1* court noted the Act's "remedial" purpose and further observed "that in most cases, the handicapped students and their parents lack the wherewithal either to know or to assert their rights" under the IDEA.[277] These two rationales are not limited to disciplinary exclusions, and seem broad enough to apply to all IDEA disputes.[278] Although *S-1* was binding precedent in the new Fifth Circuit[279] and the Eleventh Circuit,[280] neither court followed (or even discussed) *S-1* in later burden-allocation cases.[281]

1. The Fifth Circuit's Path

In the Fifth Circuit, the party challenging the terms of an IEP bears the burden of proving that the IEP is inappropriate.[282] This rule was first announced in *Tatro v. Texas*.[283] In *Tatro*, the school initially refused the Tatro family's request that it provide clean intermittent catheterization (CIC) to their daughter Amber, who had spina bifida.[284] In order for Amber to remain in the placement provided in the IEP, she needed CIC. The Fifth Circuit stated:

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273 635 F.2d 342 (5th Cir. Unit B 1981) (abrogated on other grounds).

274 *Id.*

275 *Id.* at 348.

276 *Id.* at 348-49.

277 *Id.* at 349.

278 HUEFNER & ZIRKEL, *supra* note 10, at 11.

279 The Fifth Circuit encompasses Louisiana, Mississippi, and Texas.

280 The Eleventh Circuit encompasses Alabama, Florida, and Georgia.

281 *See, e.g.*, HUEFNER & ZIRKEL, *supra* note 10, at 20 n.154. Query: To what extent does *S-1* survive the 2004 IDEA reauthorization, which deleted similar language from the statute? *See supra* notes 117-25 (discussing "manifestation determination" law).

282 *See* Tatro v. Texas, 703 F.2d 823 (5th Cir. 1983), *aff'd on other grounds sub nom.* Irving Indep. Sch. Dist. v. Tatro, 468 U.S. 883 (1984); *see also* Cypress-Fairbanks Indep. Sch. Dist. v. Michael F., 118 F.3d 245 (5th Cir. 1997); Salley v. St. Tammany Parrish, 57 F.3d 458 (5th Cir. 1995); Christopher M. v. Corpus Christi Sch. Dist., 933 F.2d 1285 (5th Cir. 1991); Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ., 790 F.2d 1153 (5th Cir. 1986).

283 703 F.2d 823.

284 *Id.* at 825.

> We are convinced that the central role of the IEP ... gives rise to a presumption in favor of the educational placement established by [the child's] IEP. Moreover, because the IEP is jointly developed by the school district and the parents, fairness requires that the party attacking its terms should bear the burden of showing why the educational setting established by the IEP is not appropriate.[285]

The *Tatro* court's focus was clearly on the child's agreed-upon placement, rather than the other terms sought by the parent.[286] The court placed the burden on the school to show that the jointly established placement was inappropriate, "rather than on the parents to show that their child could not benefit from special education provided in her home or in an institutional setting where CIC was already provided."[287]

In *Alamo Heights Independent School District v. State Board of Education*,[288] the Fifth Circuit cited the above-quoted language from *Tatro*;[289] however, the court shifted its focus from *placement* to *programming*.[290] In *Alamo Heights*, the parent sought to add extended school year (hereinafter ESY) services to a previously adopted IEP. The Fifth Circuit affirmed the trial court's order that ESY services be provided.[291] Although it found that the parent had carried the burden of proof, by shifting its focus from placement to programming, the Fifth Circuit's *Alamo Heights* burden allocation was arguably divorced from *Tatro's* underlying rationale: "allocation of [the burden of proof] on a jointly developed placement to which the school district reneged."[292]

In subsequent cases, the courts of the Fifth Circuit have consistently applied the programming emphasis of *Alamo Heights* rather than the placement emphasis of *Tatro*.[293] The Fifth Circuit's post-*Tatro* cases have, in the vast majority of instances, placed the burden on those who challenge the inappropriateness of an IEP,[294] including a proposed IEP.[295] The Fifth Circuit's burden allocation applies both at the administrative level and in court.[296]

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285 *Id.* at 830.

286 HUEFNER & ZIRKEL, *supra* note 10, at 7.

287 *Id.*

288 790 F.2d 1153 (5th Cir. 1986).

289 *Id.* at 1158 (citing *Tatro*, 703 F.2d at 830).

290 HUEFNER & ZIRKEL, *supra* note 10, at 7.

291 *Alamo Heights*, 790 F.2d 1153.

292 HUEFNER & ZIRKEL, *supra* note 10, at 7.

293 *See, e.g.*, *Cypress-Fairbanks*, 118 F.3d at 247-48; *Salley*, 57 F.3d at 466; *Christopher M.*, 933 F.2d at 1290; Grapevine-Colleyville Indep. Sch. Dist. v. Danielle R., 31 IDELR ¶ 103 (N.D. Tex. 1999); Swift v. Rapides Pub. Sch. Sys., 812 F. Supp. 666 (W.D. La. 1993).

294 HUEFNER & ZIRKEL, *supra* note 10, at 17 n.76 (citing Ann V. Lockwood, *What the Hearing Officer Wants to Know in a Special Education Hearing*, TEX. SCH. ADMIN. LEG. DIG., Nov. 1992, at 1, 2). The Fifth Circuit also placed the burden of proving procedural compliance with the

Finally, two decisions concerning discipline of students with disabilities from the Fifth Circuit deserve note. In *Klein Independent School District*, a Texas hearing officer assigned the burden of proof to the school in a manifestation determination case, consistent with portions of IDEA '97 that have since been amended.[297] In *Colvin ex rel. Colvin v. Lowndes County*,[298] a Mississippi federal judge ruled that a parent who seeks the IDEA's protections for a child who has not been identified as IDEA-eligible has the burden of proving that the school knew or should have known of the student's disability.[299]

2. The Eleventh Circuit's Path

In *Devine v. Indian River County School Board*,[300] the Eleventh Circuit held that the party attacking "an existing IEP"[301] bears the burden of proving that the IEP is inappropriate.[302] In doing so, the court rejected the family's request to adopt the *Lascari* court's burden allocation.[303] Rather, it relied on the Fifth Circuit's *Christopher M.* decision.[304] The *Devine* court made no reference to *S-1 v. Turlington*,[305] which was binding precedent.[306] It is unclear, then, whether *S-1* has any force in the Eleventh Circuit outside of the context of student discipline. Arguably, it does in instances where the challenge does not concern an "existing IEP."

The *Devine* decision supersedes prior federal district court decisions. In *Burger v. Murray County School District*,[307] a Georgia federal judge had placed the burden of proof on the party seeking to change the existing placement.[308] In *Tracey T. v. McDaniel*,[309] a Georgia federal court limited *Burger*'s burden allo-

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IDEA, with liability imposed even for a minor procedural violation. *See, e.g., Cypress-Fairbanks*, 118 F.3d at 248. The 2004 IDEA reauthorization has revised this rule. 20 U.S.C.A. § 1415(f)(3)(E)(ii) (West 2000 & Supp. 2005).

295 *See, e.g., Salley*, 57 F.3d at 466-67; *see also* Brillon v. Klein Indep. Sch. Dist., 100 Fed. App'x 309, 311 (5th Cir. 2004).

296 HUEFNER & ZIRKEL, *supra* note 10, at 17 n.75 & 18 n.92.

297 34 IDELR ¶ 140 (Tex. SEA 2000).

298 114 F. Supp. 2d 504 (N.D. Miss. 1999).

299 *Id.* at 509 (citing Rodiriecus L. v. Waukegan Sch. Dist. No. 60, 90 F.3d 249, 254 (7th Cir. 1996)).

300 249 F.3d 1289 (11th Cir. 2001), *cert. denied*, 537 U.S. 815 (2002).

301 *Id.* at 1291.

302 *Id.* at 1291-92.

303 *Id.* at 1291 (citing *Lascari*, 560 A.2d at 1188).

304 *Id.* at 1291-92 (citing *Christopher M.*, 933 F.2d at 1290-91).

305 635 F.2d 342 (5th Cir. Unit B 1981).

306 *See supra* notes 273-81 and accompanying text.

307 612 F. Supp. 434 (N.D. Ga. 1984).

308 *Id.* at 437.

309 610 F. Supp. 947 (N.D. Ga. 1985).

cation to administrative proceedings.[310] The *Tracey T.* court placed the burden in judicial proceedings on the party challenging the administrative outcome.[311]

All three Eleventh Circuit states have state authorities that, to varying degrees, differ from *Devine*'s burden allocation. Alabama's special education regulations allocate the "burden of proof" at the administrative level to the school system.[312] Georgia's special education regulations provide that LEAs have, as a general rule, the burden of production and persuasion in administrative proceedings.[313] Georgia's general rule allocating the burden to the school system is subject to two important exceptions. First, the rule provides that the family bears the burden of proof when it proposes a placement that is more restrictive than the placement "provided by an existing, agreed upon IEP."[314] Second, the rule empowers the presiding officer to "*modify* and apply these general principles to conform with the requirements of law and justice in individual cases under unique or unusual circumstances as determined by the ALJ."[315] Finally, a Florida hearing officer stated, relying on state rules of administrative law, that the burden of proof "in an administrative proceeding is on the party asserting the affirmative of the issue, unless the burden is otherwise established by statute."[316] In this appeal, the issue was reimbursement for an IEE,[317] an instance in which the IDEA establishes the burden of proof.[318] In instances where the IDEA does not allocate the burden of proof, Florida hearing officers apparently allocate the burden of proof to the party asserting the "affirmative of the issue,"[319] whatever that may be.

As all three states have burden allocations that differ from the *Devine* rule, reviewing courts will certainly be confronted with conflicting rules of law. An Alabama federal judge faced such a situation in *Eric J. v. Huntsville City Board of Education.*[320] He attempted to harmonize the Alabama regulation (allocating the burden to the schools) with the authorities that place the burden of

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310 *Id.*

311 *Id.* at 949.

312 ALA. ADMIN. CODE r. 290-8-9-.08(8)(c)(6)(ii)(I) (2005).

313 GA. COMP. R. & REGS. r. 160-4-7.18(1)(g)(8) (2005).

314 *Id.*

315 *Id.* (emphasis added). We disapprove of allocating something as fundamental as the burden of proof on a case-by-case basis. If it is to be used at all, we would suggest that this power to reallocate the burden of proof be used sparingly, and only in the most extraordinary circumstances. Professor McCormick considered a rule whereby the fact-finder could determine the burden of proof on an ad hoc basis to be "most undesirable." 2 STRONG, *supra* note 15, § 336, at 509.

316 Broward County Sch. Bd., 35 IDELR ¶ 117, at 444 (Fla. SEA 2001).

317 *Id.*

318 *See supra* notes 112-16 and accompanying text.

319 *Broward County Sch. Bd.*, 35 IDELR ¶ 117, at 444.

320 22 IDELR 858, 867-68 (N.D. Ala. 1995).

proof on a party challenging the administrative outcome.[321] The court concluded that the school had the burden of proof at the hearing and the parents, who were challenging the adverse administrative decision, had the burden of proof in district court.[322] The *Eric J.* burden allocation, at least as far as it concerns judicial review, has been superseded by *Devine*. Nevertheless, the case illustrates the dilemma that reviewing courts may face in the Eleventh Circuit.

G. *The Sixth Circuit: Kentucky, Michigan, Ohio, and Tennessee*

The Sixth Circuit allocates the burden of proof to the party challenging the child's jointly developed IEP.[323] This burden applies in both administrative and judicial proceedings.[324] In *Doe v. Defendant I*, relying on *Tatro*, the Sixth Circuit first announced this rule.[325] It did so without discussing prior Sixth Circuit decisions that had allocated the burden of proof to the litigant who is challenging the administrative outcome.[326]

In *Doe*, *Renner v. Board of Education*, and *Cordrey v.Euckert*, the parents were challenging the terms or implementation of an adopted IEP.[327] In *Doe v. Board of Education of Tullahoma City Schools*,[328] however, the Sixth Circuit dealt with a case with a slight but crucially important difference: the IEP was merely proposed, not adopted. In the fall of 1989, John Doe, a student in the Tullahoma school system, notwithstanding an IQ of 130, was identified as an individual with a disability because of "a neurological impairment that hinders his ability to process auditory information and engage in normal language and thinking skills."[329] In May 1990, John's IEP team decided that an IEP would be developed after John selected courses for the coming school year.[330] During the

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321 *Id.*

322 *Id.*

323 Knable v. Bexley City Sch. Dist., 238 F.3d 755, 768 (6th Cir. 2000); Renner v. Bd. of Educ., 185 F.3d 635, 642 (6th Cir. 1999); Doe v. Bd. of Educ., 9 F.3d 455, 458 (6th Cir. 1993); Cordrey v. Euckert, 917 F.2d 1460, 1466 (6th Cir. 1990); Doe v. Defendant I, 898 F.2d 1186, 1191 (6th Cir. 1990); Deal *ex rel.* Deal v. Hamilton County Dep't of Educ., 259 F. Supp. 2d 687, 697 (E.D. Tenn. 2003), *rev'd on other grounds*, 392 F.3d 840, 854 (6th Cir. 2004); Brimmer v. Traverse City Area Pub. Schs., 872 F. Supp. 447, 449 (W.D. Mich. 1994).

324 HUEFNER & ZIRKEL, *supra* note 10, at 13.

325 898 F.2d at 1191 (citing *Tatro*, 703 F.2d at 830).

326 Doe v. Smith, 879 F.2d 1340, 1341 (6th Cir. 1989) (citing Kerkam v. McKenzie, 862 F.2d 884, 887 (D.C. Cir. 1988)); Barwacz v. Mich. Dep't of Educ., 674 F. Supp. 1296, 1302 (W.D. Mich. 1987).

327 *Renner*, 185 F.3d 635 (parent's proposal to increase amount of discrete trial training for a student with autism); *Cordrey*, 917 F.2d 1460 (parent's request for addition of ESY to extant IEP); *Defendant I*, 898 F.2d 1186 (where IEP provided for tutoring and testing, parent's rejection of tutoring and testing offered by school and request for reimbursement).

328 9 F.3d 455 (6th Cir. 1993).

329 *Id.* at 456.

330 *Id.*

summer of 1990, John's parents requested that Tullahoma provide funding for John to attend a private school for children with learning disabilities in Carbondale, Illinois.[331] After the IEP team refused to provide funding, the parents enrolled John in the Carbondale school and requested tuition reimbursement.[332] In his absence, the school chose courses for John, and the IEP team developed an IEP.[333] "The school system's proposed IEP rejected the parents' assertion that the [Carbondale school] was the only appropriate placement."[334] An ALJ ruled that the school's proposed placement was appropriate, and a federal court agreed.[335] On appeal, the Sixth Circuit held, *inter alia*, that the parents, as the parties challenging "the IEP devised by [the school],"[336] had the burden of proof.[337]

The *Tullahoma* case was a subtle but dramatic reallocation of the burden of proof. It has been followed in other cases in the Sixth Circuit;[338] however, one Ohio State Level Review Officer declined to follow *Tullahoma* in *Huntington Local School District*.[339] In that case, the school district sought a due process hearing after the parent rejected an IEP that provided a more restrictive placement. [340] The hearing officer specifically placed the burden on the district, noting two factors: the district requested the IEP meeting and the dispute concerned a "proposed" IEP.[341]

Finally, a first-tier hearing officer addressed the interaction of the Sixth Circuit's judicial gap-filling and Congress's specific allocations of the burden of proof in "manifestation determination" cases.[342] The hearing officer rejected the school's argument based on the *Cordrey* line of cases for several reasons, the

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331 *Id.*

332 *Id.* at 456-57.

333 *Id.* at 457.

334 *Id.*

335 *Id.*

336 *Id.* at 458.

337 *Id.*

338 *See, e.g.*, Kenton County Sch. Dist. v. Hunt, 384 F.3d 269 (6th Cir. 2004); Dong v. Bd. of Educ., 197 F.3d 793, 799-800 (6th Cir. 1999); Bd. of Educ. v. Patrick M., 9 F. Supp. 2d 811, 820 (N.D. Ohio 1998). The *Dong* case adds additional confusion to the burden-of-proof issue in the Sixth Circuit. In addition to citing Sixth Circuit cases, the *Dong* court cited *Clyde K. v. Puyallup School District*, 35 F.3d 1396 (9th Cir. 1994). In *Clyde K.*, the Ninth Circuit placed the burden of proof at the judicial phase upon the party challenging the administrative outcome. 35 F.3d at 1398-99. The *Clyde K.* burden allocation is quite different from the *Doe v. Defendant I* allocation, and is in line with an earlier line of Sixth Circuit cases that address the burden of proof. *See supra* notes 323-37 and accompanying text (discussing the evolution of the Sixth Circuit's burden allocation).

339 39 IDELR ¶ 210 (Ohio SEA 2003).

340 *Id.*

341 *Id.* at 2056.

342 Bd. of Educ. of Perry Pub. Schs., 39 IDELR ¶ 251 (Mich. SEA 2003).

most important of which is that the plain language of the regulations allocates the burden to the schools.[343]

H. The Seventh Circuit: Illinois, Indiana, and Wisconsin

In *Board of Education of School District No. 21 v. Illinois State Board of Education*,[344] the Seventh Circuit assigned the burden of proof to the plaintiff in federal district court. In doing so, the Seventh Circuit did not offer a rationale.[345] Additionally, the *School District 21* court cited Second Circuit and Sixth Circuit cases in support of its burden allocation;[346] however, neither authority cited by the Court concerned burden of proof.[347] Rather, both cases concerned scope of review, as opposed to burden of proof.[348]

It is less clear who bears the burden of proof before administrative agencies. A federal judge noted that no Seventh Circuit case had addressed the question; however, the court found it unnecessary to answer, as it would not have been outcome-determinative.[349] By statute, Illinois assigns a modest burden to the school district.[350] Indiana assigns the burden of proof to the party requesting the due process hearing.[351] A federal district court assigned the burden of proof to a school district in *Richland School District v. Thomas P.*;[352] however, this case concerned burden of proof in a case involving a manifesta-

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343 *Id.* at 2204. The other reasons deserve note. First, the hearing officer noted that the regulations post-dated the *Cordrey* opinion. Second, the hearing officer noted that the *Cordrey* line of cases did not deal with discipline disputes. *Id.*

344 Bd. of Educ. of Cmty. Consol. Sch. Dist. No. 21 v. Ill. State Bd. of Educ., 938 F.2d 712, 716 (7th Cir. 1991); *see* Bd. of Educ. of Murphysboro Cmty. Unit Sch. Dist. No. 186 v. Ill. State Bd. of Educ., 41 F.3d 1162, 1167 (7th Cir. 1994) (citing and following *School District No. 21*); *see also* Alex R. v. Forrestville Valley Cmty. Unit Sch. Dist. No. 221, 375 F.3d 603 (7th Cir. 2004); Evanston Cmty. Consol. Sch. Dist. No. 65 v. Michael M., 356 F.3d 798 (7th Cir. 2004); Heather S. v. Wis., 125 F.3d 1045 (7th Cir. 1997); Keith H. v. Janesville Sch. Dist., 305 F. Supp. 2d 986, 998 (W.D. Wis. 2003).

345 HUEFNER & ZIRKEL, *supra* note 10, at 9 (discussing *School District 21*).

346 *School District 21*, 938 F.2d at 716.

347 HUEFNER & ZIRKEL, *supra* note 10, at 9.

348 *Id.*

349 T.H. v. Bd. of Educ., 55 F. Supp. 2d 830, 835 (N.D. Ill. 1999). One text seemingly asserts that the school has the burden of proof in administrative hearings; *see* GERSTEIN & GERSTEIN, *supra* note 10, at 250 n.39 (citing Beth B. v. Van Clay, 282 F.3d 493 (7th Cir. 2002)); however, the case at issue was applying an Illinois statute and does not necessarily indicate the standard for the entire Seventh Circuit.

350 Beth B. v. Van Clay, 211 F. Supp. 2d 1020, 1028 (N.D. Ill. 2001) (citing 105 ILL. COMP. STAT. 5/14-8.02), *aff'd*, 282 F.3d 493 (7th Cir. 2002).

351 511 IND. ADMIN. CODE 7-30-3(r)(2005).

352 32 IDELR ¶ 233 (W.D. Wis. 2000).

tion determination review,[353] an area of law affected by the 2004 IDEA reauthorization.[354]

I. *The Eighth Circuit: Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota*

1. The Eighth Circuit's Pronouncements

In *E.S. v. Independent School District 196*,[355] the Eighth Circuit placed the burden of proof on schools in administrative proceedings; in judicial proceedings, the burden of proof is placed upon the party challenging the administrative outcome. In assigning the burden to schools at the administrative stage, the *E.S.* court relied on a Ninth Circuit case[356] rather than a Minnesota regulation assigning the burden in the same manner.[357] The Eighth Circuit, however, confirmed its assignment of administrative burden of proof in *Blackmon v. Springfield R-XII School District*.[358]

2. State Law in the Eighth Circuit

As noted above,[359] Minnesota assigns the burden of proof to the school.[360] However, Minnesota requires the parents to assume the burden of proof when they seek tuition reimbursement.[361] At least three Eighth Circuit states have administrative rules allocating the burden of proof, at least at the administrative level, that may appear to conflict with the *E.S./Blackmon* rule. Arkansas (since 1993), Iowa, and Nebraska place the burden of production on

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353 *Id.*; *see also* Zirkel, *supra* note 118 (discussing *Thomas P.*).

354 *See supra* notes 117-25 and accompanying text.

355 135 F.3d 566, 569 (8th Cir. 1998). For federal district court cases from the Eighth Circuit, prior to *E.S.*, assigning the burden of proof to the party challenging the administrative outcome, see Yankton Sch. Dist. v. Schramm, 900 F. Supp. 1182, 1186 (D.S.D. 1995), *aff'd (as modified) on other grounds*, 93 F.3d 1369 (8th Cir. 1996); Fort Zumwalt Sch. Dist. v. Mo. State Bd. of Educ., 923 F. Supp. 1216, 1229 (E.D. Mo. 1996), *rev'd on other grounds sub nom.* Ft. Zumwalt Sch. Dist. v. Clynes, 119 F.3d 607 (8th Cir. 1997).

356 *E.S.*, 135 F.2d at 569 (citing Clyde K. v. Puyallup Sch. Dist. No. 3, 35 F.3d 1396, 1398-99 (9th Cir. 1994)).

357 MINN. R. 3525.3900(F) (2001); *see also* Indep. Sch. Dist., 31 IDELR ¶ 44 (Minn. SEA 1999) (applying regulation); Indep. Sch. Dist. No. 11, 31 IDELR ¶ 174 (Minn. SEA 1999) (same).

358 198 F.3d 648, 658 (8th Cir. 1999).

359 *See supra* note 357.

360 *See supra* note 357; *see also* MINN. STAT. § 125A.091, subdiv. 16 (2005).

361 MINN. STAT. § 125A.091, subdiv. 16.

the party initiating the administrative action.[362] Prior to the change in 1993, Arkansas regulations placed the burden of proof on the school district.[363]

Finally, South Dakota has administrative regulations that provide that schools have the burden of proof in actions for injunctive relief under *Honig v. Doe*,[364] where the school seeks the suspension or expulsion of a student with disabilities.[365] These regulations do not grant students much additional protection for, as a general rule, persons seeking injunctive relief always have the burden of proof.[366]

J. *The Ninth Circuit: Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Northern Mariana Islands, Oregon, and Washington*

1. The Ninth Circuit Speaks

In *Clyde K. v. Puyallup School District No. 3*,[367] the Ninth Circuit assigned the burden of proof to schools in administrative proceedings and to the party attacking the outcome of the administrative proceedings in court.[368] Relying on *Oberti*, the *Clyde K.* plaintiffs requested that the Ninth Circuit assign the burden of proof to the school district in court, regardless of the administrative outcome.[369] The Ninth Circuit rejected this argument, stating:

> We note, however, that merely because a statute confers substantive rights on a favored group does not mean the group is also entitled to receive every procedural advantage. Absent clear statutory language to the contrary, procedural questions are resolved by neutral principles that are independent of any

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362 ARKANSAS DEP'T OF EDUC., RULES AND REGULATIONS GOVERNING SPECIAL EDUCATION AND RELATED SERVICES: PROCEDURAL REQUIREMENTS AND PROGRAM STANDARDS § 10.01.28 (2000); IOWA ADMIN. CODE r. 281-41.117 (2001); 92 NEB. ADMIN. CODE § 55-007.01A (2002).

363 Streett, *supra* note 10, at 42.

364 484 U.S. 305 (1988).

365 S.D. ADMIN. R. 24:05:26:13 (2002) (suspension); *Id.* R. 24:05:26.01:12 (expulsion).

366 *See, e.g.*, Champlin Ref. Co. v. Corp. Comm'n, 286 U.S. 210, 238 (1932); Guar. Trust Co. v. Henwood, 86 F.2d 347, 354 (8th Cir. 1936); Gross v. Conn. Mut. Life Ins. Co., 361 N.W.2d 259, 265 (S.D. 1985).

367 35 F.3d 1396 (9th Cir. 1994). For further information on *Clyde K.*, see McCarthy, *supra* note 74; Mitchell L. Yell, *Clyde K. and Sheila K. v. Puyallup School District: The Courts, Inclusion, and Students with Behavioral Disorders*, 20 BEHAV. DISORDERS 179 (1995); Perry A. Zirkel & Ivan B. Gluckman, *"Full Inclusion" of Students with Disabilities, Part 2*, NASSP BULL., Sept. 1996, at 91.

368 35 F.3d at 1398-99; *see also* Seattle Sch. Dist. No. 1 v. B.S., 82 F.3d 1493, 1498 (9th Cir. 1996) (burden of proof in district court was on school, as party challenging the administrative outcome); Everett v. Santa Barbara High Sch., 32 IDELR ¶175 (C.D. Cal. 2000) (hearing officer erred in placing burden of proof on parents).

369 *Clyde K.*, 35 F.3d at 1398-99 (citing Oberti v. Bd. of Educ., 995 F.2d 1204 (3d Cir. 1993)).

> particular statute's substantive policy objectives. Allocation of the burden of proof has long been governed by the rule that the party bringing the lawsuit must persuade the court to grant the requested relief. Because we find nothing in the IDEA suggesting that a contrary standard should apply here, we join the substantial majority of the circuits that have addressed this issue by placing the burden of proof on the party challenging the administrative ruling.[370]

In *Clyde K.*, the Ninth Circuit declined to adopt prior allocations of the burden of proof in judicial proceedings by lower federal courts. Two earlier decisions from lower courts in the Ninth Circuit had assigned the burden of proof in court actions to the party seeking the more restrictive placement.[371] Another lower court assigned the burden of proof to the parents, although it was unclear whether the court assigned the burden to the parents as parents or to the parents as the party attacking the administrative results.[372]

2. State Law in the Ninth Circuit

At the administrative level, Alaska places the burden of proof on the LEA.[373] Montana places the burden of production on the party requesting the hearing.[374] A Nevada hearing officer placed the burden of proof upon the child's guardian to prove that the child's residence was in Nevada, where the child's guardian unilaterally placed the child in a New York private school.[375] An Oregon regulation provides that, when the state Department of Education decides to withhold funding or recoup funds from a local school district for violations of the IDEA, the local district may request an administrative hearing.[376] If the proposed sanction is challenged and a hearing requested, "the burden of proof ... is on the Department."[377] Finally, the Montana organization supervising interscholastic athletics has a rule stating that high school athletes with dis-

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370 *Id.* at 1399 (citing *Roland M.*, *Kerkam*, and *Spielberg*).

371 *See* Sacramento Unified Sch. Dist. v. Holland, 786 F. Supp. 874 (E.D. Cal. 1992); Harmon v. Mead Sch. Dist. No. 354, 17 EHLR 1029 (E.D. Wash. 1991).

372 Ash v. Lake Oswego Sch. Dist. No 7J, 766 F. Supp. 852, 863 (D. Or. 1991), *aff'd*, 980 F.2d 585 (9th Cir. 1992). On appeal, the Ninth Circuit did not specifically address the "burden of proof" issue.

373 ALASKA ADMIN. CODE tit. 4, § 52.550(e)(9) (2003).

374 MONT. ADMIN. R. 10.16.3521(1) (2001).

375 Washoe County Sch. Dist., 29 IDELR 569 (Nev. SEA 1998). The hearing officer ruled that the child was not a resident of Nevada, and the review officer affirmed.

376 OR. ADMIN. R. 581-015-0054 (2001).

377 *Id.* R. 581-015-0054(15)(c). For more information on SEA supervision of local school districts, see Mayes & Zirkel, *supra* note 56, at 67-74.

abilities under the IDEA and Section 504 who seek a waiver of the organization's age limits have the burden of proving that they are entitled to a waiver.[378]

K. *The Tenth Circuit: Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming*

In *Johnson v. Independent School District No. 4*,[379] the Tenth Circuit allocated the burden of proof to the "party attacking the child's individual education plan."[380] In doing so, the Tenth Circuit adopted the Fifth Circuit's *Alamo Heights* rule.[381] *Johnson* involved a family's request to add ESY services to an existing IEP.[382] The court held the trial court used the incorrect legal standard and remanded.[383] The *Johnson* rule applies to both administrative and judicial proceedings.[384]

Like the Sixth Circuit,[385] the courts and hearing officers in the Tenth Circuit have encountered difficulty in applying its rule. Citing *Johnson*, a Utah federal district court allocated the burden of proof to the party challenging the administrative outcome.[386] This, however, is not the holding of *Johnson* and is not the law of the Tenth Circuit.[387] In *Urban v. Jefferson County School District R-1*,[388] a Colorado federal district judge did not cite *Johnson* but stated that, in determining the burden of proof, the nature of the challenge to the IEP must be determined. Where a change in the IEP is sought, "the burden of showing that the *placement* is 'appropriate' rests with the school district" whereas "where the issue is whether the IEP is appropriate," the burden rests with the parents to prove that it is inappropriate.[389] The court seemed to be distinguishing chal-

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[378] M.H. v. Montana High Sch. Ass'n, 929 P.2d 239, 242 (Mont. 1996) (citing rule in deciding a § 504 claim). *See generally* Adam A. Milani, *Can I Play?: The Dilemma of the Disabled Athlete in Interscholastic Sports*, 49 ALA. L. REV. 817 (1998); Kathleen A. Sullivan et al., *Leveling the Playing Field or Leveling the Players? Section 504, the Americans with Disabilities Act, and Interscholastic Sports*, 33 J. SPECIAL EDUC. 258 (2000).

[379] 921 F.2d 1022 (10th Cir. 1990).

[380] *Id.* at 1026. *See also* Fowler v. Unified Sch. Dist. No. 259, 107 F.3d 797, 807 n.10 (10th Cir.), *vacated*, 521 U.S. 1115 (1997) (citing *Johnson*, 921 F.2d at 1026, and HUEFNER & ZIRKEL, *supra* note 10); A.E. v. Indep. Sch. Dist. No. 25, 936 F.2d 472 (10th Cir. 1991).

[381] 921 F.2d at 1026 (citing *Alamo Heights*).

[382] *Id.*

[383] *Id.*

[384] HUEFNER & ZIRKEL, *supra* note 10, at 13.

[385] *See supra* Part III.G.

[386] L.B. v. Nebo Sch. Dist., 214 F. Supp. 2d 1172, 1180 (D. Utah 2002), *aff'd in part, rev'd in part*, 379 F.3d 966 (10th Cir. 2004) (citing *Johnson*, 921 F.2d at 1026).

[387] *See supra* notes 379-84 and accompanying text (discussing the Tenth Circuit's burden-of-proof allocation).

[388] 870 F. Supp. 1558 (D. Colo. 1994), *aff'd*, 89 F.3d 720 (10th Cir. 1996).

[389] 870 F. Supp. at 1566.

lenges to a current IEP placement from challenges to the IEP itself. In making this distinction, the court cited the Third Circuit's *Fuhrmann* decision for the placement burden[390] and Sixth Circuit cases for the programming burden.[391] Then, it proceeded to cite Seventh Circuit authority in concluding that the parents bore the burden as the parties challenging the administrative outcome.[392]

There is also some dispute in the Tenth Circuit, at least at the hearing officer level, concerning what party bears the burden of proof when a proposed IEP, as opposed to an existing IEP, is being attacked. A Colorado hearing officer allocated the burden to the parents when they attack an IEP proposed by a school,[393] but noted that other Colorado hearing officers had ruled differently.[394] In a prior case, a Colorado hearing officer placed the burden of proof on the school in a dispute over an IEP that had not been approved by the parents.[395]

IV. A PROPOSED RESOLUTION

The preceding discussion reveals that confusion reigns over the allocation of the burden of proof. The jurisdictions are badly divided, and several jurisdictions have internal conflicts as well. In several jurisdictions, hearing officers must apply law, which is, at best, inconsistent and is, at worst, contradictory. This uncertain state of affairs provides no help to parents and school personnel. A change is in order.

In this section, we propose that schools bear the burden of proof at all stages and for all issues, regardless of which side initiated the action. As an exception to this general rule, we propose that parents be required to prove the appropriateness of a private, unilateral placement before a school would be required to pay tuition reimbursement to the parents. Our proposal, which is supported by the statutory language and by consideration of policy, is most consistent with the burden allocation adopted by the Second Circuit.[396]

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390 *Id.* at 1566 (citing *Fuhrmann*, 993 F.2d at 1035).

391 *Id.* (citing *Doe*, 9 F.3d at 458; *Cordrey*, 917 F.2d at 1469).

392 *Id.* (citing Bd. of Educ. v. Ill. St. Bd. of Educ., 938 F.2d 712, 716 (7th Cir. 1991). The *Urban* district court's discussion of burden of proof was not germane to its primary legal ruling that IDEA contains no legal entitlement to a neighborhood school placement. Burden of proof was not an issue on appeal. *Urban*, 89 F.3d 720.

393 Jefferson County Sch. Dist. R-1, 39 IDELR ¶ 173 (Colo. SEA 2003).

394 *Id.*

395 Douglas County Sch. Dist. RE-1, 35 IDELR ¶ 295 (Colo. SEA 2001).

396 *See supra* Part III.C (discussing the Second Circuit's burden allocation).

A. *Administrative Hearings*

1. Reasons Supporting the Preferred Allocation

Of all of the approaches to allocating the burden of proof at the administrative level, the preferred approach is to assign the burden to the school, regardless of which party requested the due process hearing. This approach has been adopted by a notable number of judicial and administrative authorities,[397] as well as several commentators.[398]

First, this approach coheres with Congress's and the United States Department of Education's explicit allocations of the burden in certain cases. The IDEA and its implementing regulations assign the burden of proof to LEAs in disputes concerning independent educational evaluations,[399] changes to a child's placement or programming when the child is convicted of an adult crime and confined to an adult prison,[400] and until recently, common disciplinary issues (such as manifestation determinations and removals to interim alternate educational settings).[401] Given the fact that the IDEA expressly allocates the burden of proof to LEAs in such a fundamental matter as evaluation and such a controversial matter as corrections education,[402] it makes perfect sense to allocate the burden of proof to LEAs in other matters.[403] As noted by one legal encyclopedia, "different parts of a statute reflect light upon each other."[404] The IDEA's express provisions concerning discipline and evaluation illuminate the issue of which party should bear the burden of proof in other, unspecified contexts. By expressly imposing the burden on LEAs when these two elementary issues are

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397 *See, e.g., supra* Parts III.A, III.C, III.D, III.I, and III.J.

398 *See, e.g.*, WRIGHT, *supra* note 9; Huefner, *supra* note 65, at 510-13; Anstaett, *supra* note 10, at 770-72; William N. Myhill, Note, *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, 1078-83 (2004); Recent Case, *supra* note 253, at 1084-85; *cf.* Guernsey, *supra* note 9, at 71-77 (while proposing the allocation of the burden of proof on substantive to the party proposing a change in the status quo, proposing that school districts should be required to prove procedural compliance).

399 *See supra* notes 112-16 and accompanying text; *see also* HUEFNER & ZIRKEL, *supra* note 10, at 14 n.17 (stating IEE regulations are "probative" concerning the overall allocation of the burden of proof).

400 *See supra* notes 126-28 and accompanying text.

401 *See supra* notes 117-25 and accompanying text.

402 *See, e.g.*, Mayes & Zirkel, *supra* note 127, at 138-39.

403 *See* Robert S. Summers, *Statutory Interpretation in the United States*, *in* INTERPRETING STATUTES: A COMPARATIVE STUDY 407, 413-14, 422, 441 (D. Neil MacCormick & Robert S. Summers eds., 1991); *see also* Mayes & Zirkel, *supra* note 80, at 464-66 (statutory language must be read in context); *see also* Brief for Petitioner at 22-29, Schaffer v. Weast, No. 04-698 (U.S. Apr. 29, 2005); *contra* Brief for Respondent at 22-28, Schaffer v. Weast, No. 04-698 (U.S. June 24, 2005).

404 73 AM. JUR. 2D *Statutes* § 105 (1964).

in dispute, Congress has provided the clearest guidance to courts and regulatory bodies on how to fill the statutory gap.[405]

Second, schools are more likely to have access to information and evidence concerning a child with a disability.[406] The child's educational records are in the possession and control of the school.[407] School personnel will presumably have the expertise to interpret those records, classroom observations, and standardized test results.[408] School personnel are also more likely to have the expertise necessary to develop a program for a child with a disability,[409] including expertise in or awareness of special education law.[410] LEAs are also more likely to have access to expert witnesses, such as outside consultants, than parents.[411] Under general principles of evidence, the burden of proof may be reallocated to the party with easier access to evidence.[412]

Although this consideration is "seldom the controlling factor" in burden allocations,[413] ready availability of evidence is a key rationale for allocating the burden of proof to the school district, regardless of which party requests the hearing.[414] In fact, these factors were noted by commentators prior to the

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[405] Others may argue Congress's express allocation of the burden of proof in only these contexts may implicate a common rule of statutory construction: "*expressio unius exlusio alterius* (mention of one excludes another)." *See* Summers, *supra* note 403, at 418. In this particular problem of statutory construction, this canon does not provide much assistance. Courts, hearing officers, and regulatory drafters have formulated an impressive variety of burden allocations. If the burden of proof in IDEA cases were an "either/or" question, then this canon might be informative; however, there are more than two ways to allocate the burden of proof in special education disputes. An "either/or" construction insufficiently describes the variety of burden allocations. As it is, the multiplicity of possible burden allocations greatly reduces the guidance offered by this particular canon.

[406] Huefner, *supra* note 65, at 511; Kirp et al., *supra* note 77, at 136; Anstaett, *supra* note 10, at 772; Myhill, *supra* note 398, at 1080; Oberti v. Bd. of Educ., 995 F.2d 1204, 1219 (3d Cir. 1993) (citing Lascari v. Bd. of Educ., 560 A.2d 1180, 1188 (N.J. 1989); *see also* Brief for Petitioner, *supra* note 403, at 39-45; *but see* Brief for Respondent, *supra* note 403, at 40-43.

[407] *See, e.g.*, 20 U.S.C. § 1232g (2000) (the Family Educational Rights and Privacy Act, also known as FERPA); Mayes & Zirkel, *supra* note 80 (discussing relationship between IDEA and FERPA).

[408] Kirp et al., *supra* note 77, at 136.

[409] *See, e.g., Oberti*, 995 F.2d at 1219; Huefner, *supra* note 65, at 511; Marchese, *supra* note 3, at 343; Osborne, *supra* note 10, at 368-69; Myhill, *supra* note 398, at 1080.

[410] *Lascari*, 560 A.2d at 1188; Marchese, *supra* note 3, at 343; Tom E. C. Smith, *Status of Due Process Hearings*, 48 EXCEPTIONAL CHILD. 232, 235 (1981).

[411] Smith, *supra* note 410, at 235.

[412] 2 STRONG, *supra* note 15, § 337; 9 WIGMORE, *supra* note 22, § 2486; WRIGHT, *supra* note 9, at 33-35 (citing Int'l Bhd. of Teamsters v. United States, 431 U.S. 324 (1977) and Concrete Pipe & Prods. v. Constr. Laborers Pension Trust, 508 U.S. 602 (1993)).

[413] 2 STRONG, *supra* note 15, § 337.

[414] *See, e.g.*, Weast v. Schaffer, 377 F.3d 449, 453-54 (4th Cir. 2004) (discussing these provisions, as part of the court's refusal to allocate the burden of proof in administrative proceedings to schools).

IDEA's enactment as justifications for placing the burden of proof in special education disputes on schools.[415] Although the IDEA does provide several means by which parents may access information about their children and their rights under the IDEA,[416] and assuming that schools comply with those requirements,[417] schools remain far more able to apply, interpret, and present that information. In many instances, information about alternative solutions or outcomes is simply not available to parents.[418] In other instances, the information made available to the parents is viewed solely through the interpretive lens provided by the school,[419] if any interpretation or explanation is provided at all.[420] While some authors argue teachers "may have greater unbiased knowledge than parents,"[421] this is not often the case. Teachers and other service providers "have interests that may diverge from those of the children they purportedly represent."[422] As noted by Professor Kotler:

> Of equal importance in limiting parental participation, however, is a strong resentment by educators of the parental right and power under the Act to challenge the educators' professional judgment. The educators' response has often been to seek consciously to circumvent the principle of parental involvement which underlines the Act.[423]

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415 Kirp et al., *supra* note 77, at 136.

416 *See, e.g.*, *Weast*, 377 F.3d at 453-54; *see also* Guernsey, *supra* note 9, at 74-77. One particular protection cited by the *Weast* court, the written notice of procedural safeguards, is particularly interesting. The notice must be understandable to parents yet legally accurate, a combination that is "easier said than done." Huefner, *supra* note 80, at 445. The empirical research bears this out. One study found that 61 % of parents entitled to notices of IDEA's procedural safeguards "knew little or nothing about their rights." Martin et al., *supra* note 51, at 31.

417 *See, e.g.*, Goldberg & Kuriloff, *supra* note 18, at 550 (Nearly one-quarter of parents (24 %) studied received "no or nearly no" information, and only another quarter (24 %) received "all or nearly all" information.).

418 *See, e.g.*, Claire M. Choutka, *Experiencing the Reality of Service Delivery: One Parent's Perspective*, 24 J. ASS'N PERSONS SEVERE HANDICAPS 213 (1999); Huefner, *supra* note 65, at 511 & n.106; Kotler, *supra* note 70, at 361-73; Rand E. Rosenblatt, *Equality, Entitlement, and National Health Care Reform: The Challenge of Managed Competition and Managed Care*, 60 BROOK. L. REV. 105, 137-38 (1994).

419 *See supra* note 418; *see also* Daniel, *supra* note 80.

420 *See, e.g.*, Goldberg & Kuriloff, *supra* note 18, at 550 ("More disturbing was a claim by over half of the parents (51 %) that schools provided no or almost no explanations of the meaning of whatever records were provided.").

421 Bryant, *supra* note 74, at 113.

422 Rachel F. Moran, Review Essay, *Reflections on the Enigma of Indeterminacy in Child-Advocacy Cases*, 74 CAL. L. REV. 603, 614 (1986).

423 Kotler, *supra* note 70, at 366; *see* Marchese, *supra* note 3, at 343-44 (stating that educators may not trust parental input, viewing it as not "objective"); *see also* Oberti v. Bd. of Educ., 995 F.2d 1204, 1219 (3d Cir. 1993) (similar, citing David M. Engel, *Law, Culture, and Children with*

Furthermore, parents of children involved in education and welfare disputes may be "frequently disorganized and unable to effectively represent their children's interests," while teachers and other service providers "are usually highly organized."[424] Although an information imbalance is not itself grounds to reallocate the burden, the sheer magnitude of the imbalance is a convincing rationale.[425]

Third, the history of special education law prior to the enactment of the IDEA supports this allocation. To those who use them,[426] statutes' historical antecedents are crucial interpretive aids.[427] The IDEA was grounded on the principles of cases seeking educational access for children with disabilities,[428] such as *PARC v. Commonwealth*[429] and *Mills v. Board of Education*.[430] The Supreme Court, in *Rowley*, noted that these cases "established . . . the principles

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Disabilities: Educational Rights and the Construction of Difference, 1991 DUKE L.J. 166, 187-94).

[424] Moran, *supra* note 422, at 614. In support of its claim that the IDEA's procedural safeguards adequately level the playing field for parents, the District points to the requirement imposed by the IDEA regulations that parents be notified of free or reduced-cost legal assistance available to them. *See* Hendrie, *supra* note 264 (summarizing District's brief in opposition to petition for certiorari). This is problematic for two reasons. First, there is no guarantee that such resources are available in all areas. Second, there is no guarantee that, even if such resources exist nearby, the parents will receive any help due to the limited resources (available staff, travel budget, etc.) and multiple priorities (domestic abuse, housing and homelessness, etc.) characteristic of many civil legal aid offices (The lead author of this Article spent seven years as a civil legal aid attorney in Waterloo, Iowa.). For more information, see Marie A. Failinger & Larry May, *Litigating Against Poverty: Legal Services and Group Representation*, 45 OHIO ST. L.J. 1 (1984); Roger C. Cramton, *Delivery of Legal Services to Ordinary Americans*, 44 CASE W. RES. L. REV. 531 (1994). *See also* Brief for Petitioner, *supra* note 403, at 45-50 (stating there is no level playing field in IDEA disputes).

[425] Concern about information imbalance should be greater in communities that are not middle-class or wealthy, as parents in less advantaged communities often "tend to accept what the school district offers due to their respect for its expertise, intimidation by its authority, or ignorance of their rights." Terry Jean Seligmann, *An IDEA Schools Can Use: Lessons from Special Education Legislation*, 29 FORDHAM URB. L.J. 759, 781-82 (2001); *see also* Rosenblatt, *supra* note 418, at 138. In fact, those who support the Fourth Circuit's *Weast* decision argue that parents are sophisticated advocates for their children. *See, e.g.*, Letter from Jack D. Dale, Superintendent, Fairfax County Public Schools, to Judith W. Jagdmann, Virginia Attorney General (Apr. 25, 2005) (on file with author). While the Schaffers may be effective advocates for their child, the *Weast* dissent notes they are "not typical." *See* Weast v. Schaffer, 377 F.3d 449, 458-59 (4th Cir. 2004) (Luttig, J., dissenting). This point is supported by the empirical research. *See supra* notes 416-24.

[426] *See generally* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (Amy Gutmann ed., 1997) (arguing use of many common interpretive aids is inappropriate).

[427] Summers, *supra* note 403, at 426-27.

[428] *See, e.g.*, Bd. of Educ. v. Rowley, 458 U.S. 176 (1982); WRIGHT, *supra* note 9, at 10-19; Martin et al., *supra* note 51, at 26-28 (discussing predecessors to the IDEA); Buss, *supra* note 33, at 301-303 (discussing *PARC* and *Mills*).

[429] PARC v. Commonwealth, 343 F. Supp. 279 (E.D. Pa. 1972).

[430] Mills v. Bd. of Educ., 348 F. Supp. 866 (D.D.C. 1972).

which, to a significant extent, guided the drafters of the Act."[431] Notably, *Mills* assigns the burden of proof to the LEA,[432] and *PARC* assigns a modest burden of production to the school.[433] In addition, pre-IDEA commentary recommends assigning the burden of proof to LEAs,[434] and such commentary offers a valuable interpretive aid.[435] This considerable pre-IDEA history provides further support for allocating the burden of proof to LEAs.[436] This argument is strengthened when one recalls that *PARC*, *Mills*, and other pre-IDEA court actions were not grounded solely on notions of educational policy; rather, they were suits to vindicate constitutional rights.[437] To the extent that allocating the burden of proof to the schools is a constitutional requirement rather than a policy choice, the pre-IDEA cases provide even greater support for our preferred allocation,[438] especially when one considers the maxim that statutes are to be construed to avoid constitutional questions.[439]

Fourth, other related issues of fairness weigh in favor of assigning the burden to school officials. While fairness is one justification for assigning the burden of proof to the party who is an assertion's proponent,[440] fairness is often the reason why the burden is reallocated.[441] This consideration is particularly relevant in special education disputes. Parents, rightly or wrongly, often believe that the "deck is stacked against them" in due process hearings and on judicial review.[442] Parents holding this view come to "distrust"[443] the due process hear-

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431 *Rowley*, 458 U.S. at 192.

432 348 F. Supp. at 881; *see also* Lebanks v. Spears, 60 F.R.D. 135, 142 (E.D. La. 1973).

433 *PARC*, 343 F. Supp. at 305.

434 Kirp et al., *supra* note 77, at 136-37.

435 Summers, *supra* note 403, at 418, 429, 443.

436 This argument may cut both ways. As noted by the Fourth Circuit, Congress borrowed many principles from *PARC* and *Mills*, but did not include a provision on burden of proof. Weast v. Schaffer, 377 F.3d 449, 454-55 (4th Cir. 2004). From this, the Fourth Circuit inferred that Congress did not intend to alter the traditional allocation of the burden of proof. *Id.* In response, it is important to note that this argument from historical underpinnings is only one basis for our preferred allocation. It does, however, provide an important clue as to the proper allocation.

437 *See, e.g.*, Buss, *supra* note 33; Martin et al., *supra* note 51, at 28; Mead, *supra* note 79, at 480.

438 To the extent that the pre-IDEA cases announce a constitutional rule, the *Weast* rationale, 377 F.3d. at 454-55, is weakened. *See supra* note 437; *see also* 20 U.S.C.A. § 1400(c)(6) (West 2000 & Supp. 2005) (Congressional finding that the IDEA is necessary "to ensure equal protection of the law").

439 *See, e.g.*, Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 7 (1993); Mayes & Zirkel, *supra* note 80, at 476-78; Summers, *supra* note 403, at 417, 451.

440 2 STRONG, *supra* note 15, § 337.

441 *Id.*; 9 WIGMORE, *supra* note 22, § 2486; WRIGHT, *supra* note 9, at 29-30.

442 *See, e.g.*, Goldberg & Kuriloff, *supra* note 18; Kuriloff & Goldberg, *supra* note 3; Zirkel, *Revisions, supra* note 18, at 406-07; *see also* Buss, *supra* note 33, at 308 (stating "that due process requires not only fairness in fact but *the appearance of fairness*" (emphasis added)).

ing system in particular and the school system in general. This lack of trust may cause parents to become disengaged from their children's education, with continuing negative effects.[444] Trust is essential to a healthy organization,[445] and to schools in particular.[446] Moreover, parental involvement is crucial to educational success in general,[447] and critical to the success of students with disabilities.[448] For instance, teachers often state that parental involvement is the most important change needed to improve schools, and state that lack of parental involvement is one of the major barriers to effective school reform.[449] Furthermore, lack of parental involvement and support is "significantly related" to an intention of new special education teachers to leave the field.[450] Distrust may actually lead to litigation.[451] Where trust is lacking, the challenge is to restore or create "rapport" between parents and school officials.[452] To foster increased parental trust in the system, promote parental involvement, and hopefully reduce the incidence of litigation,[453] courts and policy-makers should consider allocat-

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443 Zirkel, *Revisions, supra* note 18, at 414; *see also* Kotler, *supra* note 70, at 371 (describing sources of "miscommunication and deception" by some special educators); *see generally* RICHARD A. SCHMUCK ET AL., THE SECOND HANDBOOK OF ORGANIZATION DEVELOPMENT IN SCHOOLS 91 (1977) (defining trust as "the knowledge that the other person will not take *unfair advantage* of one, either deliberately or accidentally, consciously or unconsciously" (emphasis added)).

444 *See, e.g.*, STEVEN R. COVEY, THE SEVEN HABITS OF HIGHLY EFFECTIVE PEOPLE 220 (1989) ("[W]ithout trust, we lack the credibility for open, mutual learning and communication and real creativity.").

445 *See, e.g., id.* at 178, 220, 270, 424 (noting the importance of trust to "optimal outcomes"); SCHMUCK ET AL., *supra* note 443, at 91-92; Robert Hogan et al., *What We Know About Leadership: Effectiveness and Personality*, 49 AM. PSYCHOLOGIST 493, 495, 499 (1994) (noting the importance of trust to effective leadership).

446 BARRY RUTHERFORD ET AL., U.S. DEP'T OF EDUC., PARENT AND COMMUNITY INVOLVEMENT IN EDUCATION 10 (1997) (noting harms from "mutual mistrust"); SCHMUCK ET AL., *supra* note 443, at 91-92; Michael Fullan, *The Three Stories of Education Reform*, 81 PHI DELTA KAPPAN 581, 582 (2000) ("When parents, the community, the teachers, and the students share a rapport, learning occurs.").

447 *See, e.g.*, CAROL GESTWICKI, HOME, SCHOOL AND COMMUNITY RELATIONS (5th ed. 2004); Daniel, *supra* note 80, at 3; *see also* SCHMUCK ET AL., *supra* note 443, at 394, 448-56.

448 *See, e.g.*, 20 U.S.C. § 1400(c)(5)(B) (2000) (congressional finding); GESTWICKI, *supra* note 447, at 529-40; Huefner, *supra* note 65, at 486; Donna L. Terman et al., *Special Education for Students with Disabilities: Analysis and Recommendations*, THE FUTURE OF CHILDREN, Spring 1996, at 4, 15 (noting that parents "are the primary repository of information about the child's medical condition, academic history, behavioral patterns, and responses to previous interventions").

449 Carol A. Langdon & Nick Vesper, *The Sixth Phi Delta Kappa Poll of Teachers' Attitudes toward Public Schools*, 81 PHI DELTA KAPPAN 607, 609 (2000).

450 Nancy L. George et al., *To Leave or to Stay? An Exploratory Study of Teachers of Students with Emotional and Behavioral Disorders*, 16 REMEDIAL & SPECIAL EDUC. 227, 233 (1995).

451 *See, e.g.*, COVEY, *supra* note 444, at 280.

452 Fullan, *supra* note 446, at 582.

453 *See, e.g.*, Zirkel & D'Angelo, *supra* note 16 (noting the increase in frequency of special education litigation); *see also* Mayes & Zirkel, *supra* note 88, at 354-55 (noting the sharp increase

ing the burden of proof to schools in such jurisdictions where that allocation has not already been made. Finally, noted pre-IDEA commentators recommended allocating the burden to schools as "consistent with fundamental fairness."[454]

Fifth, the IDEA, unlike statutes that solely protect against discrimination,[455] imposes an "affirmative obligation" on schools.[456] This obligation, which one commentator referred to as "accountable access,"[457] is an often-cited reason for allocating the burden of proof to schools, regardless of which party requests the due process hearing.[458] A school's accountability to parents would be diluted if it did not have to prove compliance with the IDEA.[459] Unlike non-discrimination statutes such as Section 504 and the ADA, the IDEA provides specific financial support for the education of children with disabilities.[460] The "affirmative obligation" comes with a financial incentive, and it would make sense to require school officials to show they have provided a FAPE and have not gotten something for nothing.

The statute and regulations provide additional support for the notion that schools should be required to prove they have not "gotten something for nothing." The IDEA and implementing regulations contain an additional burden allocation, but one that would not arise in disputes with parents. The statute and regulations provide that IDEA funds must be used to supplement, not supplant, other income sources for special education.[461] The statute and regulations, however, allow the Secretary to waive this requirement if the State proves by "clear and convincing evidence that all children with disabilities have available to

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in frequency of tuition reimbursement cases); *cf.* Goldberg & Kuriloff, *supra* note 18, at 554 ("The question then, is really not of doing away with due process [citation omitted], but of finding ways to prevent disputes between parents and schools from landing in court.").

454 Kirp et al., *supra* note 77, at 136; *cf.* WRIGHT, *supra* note 9, at 29-30.

455 Section 504 and the Americans with Disabilities Act are examples.

456 *See, e.g.*, Weast v. Schaffer, 377 F.3d 449, 458 (4th Cir. 2004) (Luttig, J., dissenting). In *Weast*, the Fourth Circuit concluded that the IDEA was analogous to such "remedial federal statutes," and such analogy supported allocating the burden of proof to the party initiating the administrative proceedings. *Id.* at 453-54. In contrast, the *Weast* dissent distinguished these statutes, noting that the IDEA imposes a positive obligation. *Id.* at 457-58.

457 Mead, *supra* note 79, at 490. Professor Mead further wrote: "[The IDEA] holds us to a higher level of accountability in terms of documenting the fruits of our labors and also in justifying the professional child-centered rationales for the decisions we make." *Id.* The "procedural safeguards" contained in the IDEA reinforce accountability as a justification for imposing the burden of proof on schools. Huefner, *supra* note 65, at 511.

458 *Id.*; *see also Weast*, 377 F.3d at 457-58 (Luttig, J., dissenting); Wall v. Mattituck-Cutchogue Sch. Dist., 945 F. Supp. 501, 511 (E.D.N.Y. 1996) ("overarching obligation"); Myhill, *supra* note 398, at 1080 (same); Recent Case, *supra* note 253, at 1082-84.

459 *See, e.g.*, Huefner, *supra* note 65, at 511.

460 *See* ZIRKEL & ALEMAN, *supra* note 21. We note that Section 504 covers entities receiving federal financial assistance, *see id.*; however, that assistance need not be tied to a specific purpose or program. In contrast, recipients of IDEA funds must spend those funds for a specific purpose. *See* 20 U.S.C. §§ 1411-13 (2000); 34 C.F.R. §§ 300.110-396.33 (1999).

461 20 U.S.C.A. § 1412(a)(17)(C) (West 2000 & Supp. 2005); 34 C.F.R. § 300.153 (1999).

them" a FAPE.[462] To waive this requirement, SEAs must prove that they provide a FAPE to all children. They are not entitled to a presumption that they do so.

Sixth, Congress's "[f]indings"[463] when reauthorizing the IDEA in 2004 support our preferred allocation. While first noting the shameful history of excluding and insufficiently educating children with disabilities prior to the IDEA,[464] Congress notes that the IDEA has been a qualified (but not total) success.[465] Congress noted that the IDEA's success has been hindered by two factors: "low expectations, and an insufficient focus on applying replicable research on proven methods of teaching and learning for children with disabilities."[466] In our view, these hindrances, expressly identified by Congress, point directly toward allocating the burden of proof to schools. "Low expectations" is a common complaint leveled against schools by parents of and advocates for children with disabilities.[467] To have this complaint echoed by Congress is an important ground for allocating the burden to schools. Furthermore, the finding regarding "an insufficient focus on applying . . . research"[468] is a powerful critique of the present educational practices of schools. This is a clear indication that the status quo and present practices are insufficient. If the status quo on the macro level is insufficient, this would suggest that schools should bear the burden of proof.

Seventh, the indeterminacy, or risk of erroneous outcomes, associated with special education litigation outcomes counsel in favor of allocating the burden of proof. Child welfare disputes are characterized by a high degree of indeterminacy,[469] and special education disputes are no different. In areas of law characterized by indeterminacy, a shift in the burden of proof is often outcome-determinative.[470] What constitutes a proper educational program for many children with disabilities is often extremely controversial and complex,[471] demonstrating indeterminacy. Further, demonstrating indeterminacy is the pattern of outcomes of these disputes, which do not overwhelmingly favor either schools or parents.[472] Given this indeterminacy, who should bear the risk of an erroneous outcome? The child? The school district? The school district is bet-

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462 20 U.S.C.A. § 1412(a)(17)(C); 34 C.F.R. §§ 300.153(b), 300.589.

463 20 U.S.C.A. § 1400(c).

464 *Id.* § 1400(c)(2); *see also* WRIGHT, *supra* note 9, at 10-19; Martin et al., *supra* note 51, at 26-28.

465 20 U.S.C.A. § 1400(c)(3)-(4).

466 *Id.* § 1400(c)(4).

467 *See, e.g.*, Kotler, *supra* note 70, at 369-72.

468 20 U.S.C.A.. § 1400(c)(4).

469 *See, e.g.*, Moran, *supra* note 422.

470 *Id. See also* Anstaett, *supra* note 10, at 759.

471 *See supra* notes 1-2; *see also* Kotler, *supra* note 70.

472 Mayes & Zirkel, *supra* note 88, at 354-55; Newcomer & Zirkel, *supra* note 41, at 474, 477.

ter situated to absorb the cost of an erroneous outcome. If the erroneous determination harms the child, the child primarily bears the brunt of the harm; in contrast, if the erroneous determination harms the district, the costs are not borne by any single individual. Rather, they are spread across society. According to Professor Kotler, "uncertainty must be resolved in favor of the child," which is consistent with "the goals underlying the [IDEA]."[473]

Eighth, experience over the past twenty-five years counsels in favor of assigning the burden of proof to school districts. Burdens of proof are commonly allocated based on experience.[474] The experience under the current regime has led to confusion and lack of uniformity.[475] In our view, the current experience suggests that something needs to change. One way involves extending the burden to schools, in areas where the schools do not categorically bear the burden.[476]

Finally, while two noted commentators on special education law take no position on which party should bear the burden of persuasion, they do recommend assigning the burden of production to the schools.[477] They recommend this allocation for two reasons, based on practical considerations. First, "hearings generally arise as a result of parental disagreement with the recommendation of the LEA, and thus the LEA should first justify its recommendation."[478] Second, "since the evaluators upon whom the LEA relied in making its recommendation will ultimately have to testify, it is efficient and logical to have this evidence put in the record first."[479]

2. Refuting Arguments Against the Preferred Allocation

In addition to these strong reasons supporting our burden allocation, the reasons against this burden allocation are particularly weak. The two most commonly cited are (1) the general rule allocating the burden to the party re-

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473 Kotler, *supra* note 70, at 373; *see* Kirp et al., *supra* note 77, at 136-37; *see also* Brief for Petitioner, *supra* note 403, at 34-39.

474 *See, e.g.*, 9 WIGMORE, *supra* note 22, § 2486 ("It is merely a question of policy and fairness based on experience in the different situations."); *see also* Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 209 (1973) (quoting Wigmore); Myhill, *supra* note 398, at 1079 (quoting *Keyes* & Wigmore).

475 HUEFNER & ZIRKEL, *supra* note 10, at 12; *see* CLARKE & GLESS, *supra* note 10, at 13; Anstaett, *supra* note 10.

476 An interesting topic for empirical research would be whether the allocation of the burden of proof correlates with outcomes in special education disputes.

477 TUCKER & GOLDSTEIN, *supra* note 4, at 13:20.

478 *Id.*

479 *Id.*

questing the hearing or initiating the action,[480] and (2) the idea of deference owed to school officials.[481]

Courts and commentators rejecting requests to allocate the burden to schools often cite the general rule of evidence assigning the burden of proof to the party requesting the hearing.[482] Most recently, the Fourth Circuit made much of this rationale.[483] Like noted commentators on the law of evidence,[484] we note that this rationale is riddled with exceptions. Furthermore, to the extent this is a general rule of administrative law, general principles of administrative law are in many ways ill-suited to application to special education law, especially given the IDEA's marked departures from traditional administrative law statutes.[485] The "general rule" rationale, for this reason, is particularly weak. Such a weak "general rule" should not stand in the face of compelling rationales to the contrary.

Many courts, in rejecting calls to place the burden on schools, cite the deference owed to school officials.[486] These courts usually cite language from *Rowley* requiring "due weight" to "administrative proceedings."[487] We find this rationale particularly unconvincing, for the language cited by these courts to *Rowley* does not support this proposition. "Due weight" to "administrative proceedings" does not necessarily equate to deference to school officials.[488] For example, due process hearings are conducted by impartial hearing officers, who must not have conflicts of interest or affiliations with the school.[489] In contrast, school officials have their own agendas, resources, and instructional philosophies and delivery systems. An alternate source of this "deference" is equally suspect. Traditionally and outside of special education litigation, courts have deferred to the academic decisions of school officials.[490] The enactment of the IDEA, however, is a vast departure from the idea of academic deference, as it puts parents and potentially the courts in the middle of educational decisions.[491]

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480 *See infra* notes 482-85; *see also* Brief for Respondent, *supra* note 403, at 14-32.

481 *See infra* notes 486-97.

482 *See, e.g.*, Wenkart, *supra* note 10; Samuels, *supra* note 265 (quoting United States' brief filed in support of the District in *Weast*).

483 Weast v. Schaffer, 377 F.3d 449, 452 (4th Cir. 2004).

484 2 STRONG, *supra* note 15, § 337; 9 WIGMORE, *supra* note 22, § 2486.

485 HUEFNER & ZIRKEL, *supra* note 10, at 14 nn. 13 & 22.

486 *See, e.g.*, Cordrey v. Euckert, 917 F.2d 1460, 1464 (6th Cir. 1990) (citing Doe v. Defendant 1, 898 F.2d 1186, 1188-89 (6th Cir. 1990)); Devine v. Indian River County Sch. Bd., 249 F.3d 1289, 1292 (11th Cir. 2001).

487 Bd. of Educ. v. Rowley, 458 U.S. 176, 206 (1982).

488 *See, e.g.*, Guernsey, *supra* note 9, at 71-77; *see also* Choutka et al., *supra* note 2, at 101.

489 20 U.S.C.A. § 1415(f)(3)(A)(i) (West 2000 & Supp. 2005).

490 *See, e.g.*, Terrence Leas, *Higher Education, the Courts, and the "Doctrine" of Academic Abstention*, 20 J.L. & EDUC. 135 (1991)

491 This idea of deference may be an appropriate consideration when fixing the standard of review, however. *See, e.g.*, Krahmal et al., *supra* note 8; Newcomer & Zirkel, *supra* note 41.

Related to this idea of deference is the *Weast* court's observation that placing the burden of proof on schools would be to presume that all IEPs, as well as other school decisions, are inadequate.[492] It is not clear why framing the issue in this manner was enlightening. However, there are several reasons why framing the issue as one of deference should not be the case. As noted above, Congressional findings reflect (1) a disgraceful history of excluding children with disabilities from schooling,[493] (2) "low expectations" for students with disabilities,[494] and (3) and an insufficient use of research-validated methods of delivering special education.[495] In light of these three Congressional statements, why should anyone presume that a school's actions are appropriate? Furthermore, the *Weast* court's observation is more untenable since no state is in compliance with the IDEA.[496] If states, which must ensure[497] the provision of FAPE by local districts, are not in compliance with the IDEA, then it makes perfect sense to adopt a rule, disfavored by the *Weast* court, requiring local districts to prove IDEA compliance.

Some briefs in support of the district in *Weast* suggest that the Spending Clause[498] is a barrier to the relief the Schaffers seek.[499] Assuming this argument is properly before the Supreme Court,[500] the argument provides no reason to affirm the Fourth Circuit's judgment. Under Spending Clause jurisprudence, Congress may place conditions on the receipt of federal expenditures only when

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We also think presuming a school's decision to be inadequate under the IDEA would actually improve the quality of special education. A shared characteristic of all successful organizations is the capacity to critically reflect on present practice and cast aside assumptions that hinder growth and improvement. *See, e.g.*, Michael Hammer & Steven A. Stanton, *The Power of Reflection*, FORTUNE, Nov. 24, 1997, at 291-96. This practice of reform and renewal based on reflection is linked to educational success, including improved special education practice. *See, e.g.*, Linda A. Patriarca & Margaret A. Lamb, *Preparing Secondary Special Education Teachers to Be Collaborative Decision Makers and Reflective Practitioners: A Promising Practicum Model*, 13 TCHR. EDUC. & SPECIAL EDUC. 228 (1990). By placing the burden of proof on schools, school personnel would be required to consider whether they had met the requirements of the IDEA. This burden allocation would incorporate the practice of reflection into special education disputes. This would lead to better educational outcomes for children with disabilities, a prime consideration of Congress when it enacted the IDEA. *See supra* notes 463-68.

492 Weast v. Schaffer, 377 F.3d 449, 455 (4th Cir. 2004).

493 20 U.S.C.A. § 1400(c)(2); *see also supra* notes 426-39, 463-68 and accompanying text.

494 20 U.S.C.A. § 1400(c)(4).

495 *Id.*

496 WRIGHT, *supra* note 9, at 4-7 (citing JANE WEST, NAT'L COUNCIL ON DISABILITY, BACK TO SCHOOL ON CIVIL RIGHTS (2000)).

497 20 U.S.C.A. § 1412(a); *see also* Mayes & Zirkel, *supra* note 56, at 69-72.

498 U.S. CONST. art. 1, § 8, cl. 1.

499 Brief for Respondents, *supra* note 403, at 28-32; *see* WRIGHT, *supra* note 9, at 27.

500 The Fourth Circuit did not rely on Spending Clause cases in its *Weast* decision. Weast v. Schaffer, 377 F.3d 449 (4th Cir. 2004). Query whether the argument was (1) raised below, and (2) preserved for Supreme Court review.

it does so "unambiguously."[501] A state must accept a condition on federal funds knowingly, and any condition is invalid where the states are "unaware of the conditions or [are] unable to ascertain what is expected of [them]."[502] This rule has limited value for three reasons. First, the IDEA is more than a Spending Clause enactment; rather, it is also a statue to vindicate constitutional claims and protect constitutional rights.[503] Second, the IDEA clearly describes the obligations states are to assume: they are to provide a FAPE to children with disabilities.[504] Thus, requiring schools to prove that they have done what the IDEA requires them to do hardly runs afoul of Spending Clause jurisprudence. Finally, when a school presented the Supreme Court with a Spending Clause argument in *Cedar Rapids Community School District v. Garrett F.*,[505] that argument could only command a two Justice dissent.[506] The Spending Clause provides no reason to affirm the Fourth Circuit's decision in *Weast*.

3. The Inadequacy of Alternate Allocations

In the following paragraphs, we consider the various alternate burden allocations. We conclude all, for varying reasons and to varying degrees, are inferior to allocating the burden to the school officials.

Some cases have been interpreted to place the burden categorically on parents as parents.[507] We disagree with the interpretation of these cases, as all of them could be read instead to place the burden on the parent as the party requesting the due process hearing.[508] Even if this were the correct reading of these cases, this is the least preferable of all of the competing burden allocations. Allocating the burden of proof to parents, as parents, does not cohere with the IDEA's purpose, language, and history.[509] More importantly, allocating the burden of proof to parents in all circumstances would undermine paren-

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501 Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981).

502 *Id.*

503 *See supra* notes 426-39, 463-68.

504 *See supra* Part II.B. The Supreme Court's Spending Clause jurisprudence indicates the Clause would be violated only when the federal statute did not provide clear notice to recipients "that they could be liable for the *conduct* at issue." Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 640 (1999) (emphasis added). The issue here does not concern a school's conduct, but rather a procedural issue that arises in a school-parent dispute.

505 526 U.S. 66, 72-73 (1999).

506 *Id.* at 83-85 (Thomas, J., joined by Kennedy, J., dissenting).

507 *See, e.g.*, Bales v. Clarke, 523 F. Supp. 1366, 1370 (E.D. Va. 1981); *see also* HUEFNER & ZIRKEL, *supra* note 10, at 5 & n.51 (repealed Wisconsin statute placed the burden of persuasion on parents).

508 The burden allocation in *Bales*, 523 F. Supp. at 1370, for example, was brief and nonspecific. As the parents in *Bales* were also the party who requested the hearing, it is just as likely that the court allocated the burden to the parents based on this other rule.

509 *See supra* notes 399-405, 426-39, 463-68 and accompanying text.

tal respect for school authorities and the dispute resolution system, thereby decreasing the likelihood of parental involvement with the special education process.[510]

We also disagree with authorities adopting the "general rule" that places the burden on the party seeking a hearing.[511] First, as noted above, this "general rule" is a particularly weak "general rule."[512] Second, the idea that special education cases, which are properly regarded as sui generis,[513] should be treated like any other legal dispute seems particularly inappropriate, and appears to be fitting square pegs into round holes.[514] We suspect that this contributes to the continued and unwanted legalization of special education disputes.[515] Third, this appears to be a facially neutral rule; however, it favors schools in practice, as the vast majority of due process requests are filed by parents.[516]

Finally, this allocation may potentially contribute to delays in prompt resolution of special education disputes, a major problem with the current system.[517] Consider the hypothetical at the beginning of this article. Julia D.'s parents requested the hearing; however, the dispute about Julia's education had been lengthy. Assuming that both parties had known of these difficulties, they may have been engaging in a game of "chicken," with neither party being willing to file for a due process hearing when a consequence of such filing would be assuming the burden of proof. This is particularly important in cases such as Julia D.'s, where the evidence is far from clear-cut (if not evenly divided). To reduce jockeying and gamesmanship and return the focus to the child, the burden of proof should be allocated to the schools, regardless of which party requests the hearing.

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510 *See supra* notes 440-54 and accompanying text.

511 *See, e.g.*, ARKANSAS DEP'T OF EDUC., RULES AND REGULATIONS GOVERNING SPECIAL EDUCATION AND RELATED SERVICES: PROCEDURAL REQUIREMENTS AND PROGRAM STANDARDS § 10.01.28 (2000); 511 IND. ADMIN. CODE 7-30-3(r) (2005); IOWA ADMIN. CODE r. 281-41.117 (2001); 05-071-101 ME. CODE R. § 13.12(I) (Weil 2005); MONT. ADMIN. R. 10.16.3521(1) (2001); NEB. ADMIN. CODE 92-55-007.01A (2002); Mars Area Sch. Dist. v. Laurie L., 827 A.2d 1249, 1255 (Pa. Commw. Ct. 2003).

512 *See supra* notes 482-85.

513 *See, e.g.*, Zirkel, *Revisions, supra* note 18, at 408 ("special character of actions under the IDEA").

514 *Cf.* Marchese, *supra* note 3.

515 *Cf.* Zirkel, *Costs, supra* note 18 (discussing the costs associated with the current IDEA dispute resolution regime).

516 *See, e.g.*, Smith, *supra* note 410, at 235 (parents requested 1931 of 2005 hearings [96.3 %]); *see also* KRISTEN RICKEY & DEE ANN WILSON, IOWA DEP'T OF EDUC., A REPORT ON SPECIAL EDUCATION DUE PROCESS HEARINGS IN IOWA 9 (2003) (parents requested 44 of 50 hearings [88 %]).

517 The lead author first developed his hypothetical as a potential explanation for a particular course of proceedings in a particular special education dispute. It remains to be seen whether this fact pattern is widespread.

Other undesirable burden allocations do not even have the attribute of comprehensiveness. One such formulation places the burden on the party proposing the change in the status quo.[518] The chief defect with this allocation is it does not account for the possibility that both parties may advocate a position that represents a departure from the status quo.[519] For example, in Julia D.'s case, both parties seek to change the status quo: the school seeks a separate classroom and her parents seek additional one-on-one programming. Under this allocation, who would bear the burden of proof? The allocation would be one more thing for the parties to war over, and one further distraction from the child's education. Additionally, we disapprove of this allocation because it is based on a frequently inaccurate view of special education: that an exceptional child's "status quo" is a desirable default option. We question whether, given the unique developmental trajectories of many exceptional children and the trial-and-error, use-whatever-is-available nature of special education practice, the decision to use the status quo as a default rule absent proof to the contrary is prudent. It is unwise to arbitrarily prefer a "status quo" that may be impractical or ineffective. Similar to judicial determinations of the appropriateness of years-old IEPs,[520] debates about departures from the status quo may amount to a waste of time and resources (at best) and may blur the proper focus: the child's needs and the school's obligation to meet those needs.

We recognize that some authorities rely on the IDEA's stay-put provision[521] to support the "status quo" burden allocation.[522] In our view, stay-put has nothing to do with burden of proof, and equating the two obscures the proper inquiry. Stay-put concerns the placement, and sometimes programming, of the child during a pending dispute.[523] It has absolutely nothing to do with

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[518] *See, e.g.*, Burger v. Murray County Sch. Dist., 612 F. Supp. 434, 437 (N.D. Ga. 1984); Lang v. Braintree Sch. Comm., 545 F. Supp. 1221, 1228 (D. Mass. 1982); Guernsey, *supra* note 9, at 74. Although certain authors characterize certain federal appellate decisions as adopting the "change in the status quo" allocation, *see* Wenkart, *supra* note 10, we believe those characterizations are incorrect. In our view, no federal appellate decision adopts this allocation. HUEFNER & ZIRKEL, *supra* note 10, at 8.

Anne Johnson proposes allocating the burden of proof for substantive issues to the party challenging the status quo and allocating the burden of proving procedural compliance to the school district. Johnson, *supra* note 10, at 612-22. We think this burden allocation suffers from the defects associated with a "status quo" allocation. Furthermore, the burden of proving procedural compliance is not longer a meaningful allocation, as the IDEA has been amended to provide that relief may be granted for procedural violations only to the extent that those procedural violations result in substantive harms. 20 U.S.C.A. § 1415(f)(3)(E)(ii) (West 2000 & Supp. 2005).

[519] As noted above, this approach lacks comprehensiveness. For example, it does not address issues such as eligibility. HUEFNER & ZIRKEL, *supra* note 10, at 8.

[520] *See, e.g.*, Zirkel, *Revisions, supra* note 18, at 404-05.

[521] 20 U.S.C.A. § 1415(j).

[522] HUEFNER & ZIRKEL, *supra* note 10, at 8.

[523] *Id.*

which party should prevail in that dispute, and offers no guidance as to which party should be required to prove its case.[524]

We also disagree with those who place the burden of proof on the party attacking the IEP,[525] for this burden allocation is even narrower in scope than the formulation placing the burden of proof on those seeking to alter the status quo. It does not account for the situation, as in Julia D.'s case, where both the school and the parent propose a change to an existing IEP. It does not account for instances in which a party is not challenging the IEP itself, but challenging the IEP's implementation. It also does not account for other non-IEP disputes, "such as eligibility and discipline."[526]

Other problems with this formulation are apparent with close thought. Some courts and hearing officers have extended this burden to parties challenging a *proposed* IEP.[527] This is objectionable as a matter of policy, and not supported by the statute's language.[528] To assign the burden of proof to a party (read, a parent) attacking a school's proposed IEP is to assume the unilateral, proposed IEP is correct. This would short-circuit the parental protections provided by the IDEA, and would eliminate an incentive to work with parents of children with disabilities.[529] It is particularly inappropriate to assign the burden of proof to the "party challenging the IEP" when the IEP is over a year old and has expired, whether by its own terms or by the operation of law, for this would give legal effect to a document after its lifespan. More importantly, the needs of the child may have changed with the passage of time, and the IEP may no longer be appropriate.[530]

4. An Exception to the General Rule

We have also considered whether to carve out various exceptions to our proposed general rule. We believe one exception is appropriate. At step two of the analysis in a tuition reimbursement case,[531] the parents should have the burden of proving the appropriateness of the private placement. This allocation,

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524 *Id.* (discussing *Burger*, 612 F. Supp. at 437).

525 *Id.* at 7-8 (discussing cases).

526 *Id.* at 8.

527 *See, e.g.*, Doe v. Bd. of Educ., 9 F.3d 455, 458 (6th Cir. 1993) (citing Cordrey v. Euckert, 917 F.2d 1460, 1469 (6th Cir. 1990)); Jefferson County Sch. Dist. R-1, 39 IDELR ¶ 173 (SEA Colo. 2003).

528 *See, e.g.*, HUEFNER & ZIRKEL, *supra* note 10, at 8 ("If a proposed IEP is contested, then, by definition, it does not reflect a joint agreement.").

529 If schools could require parents to attack an IEP to which the parents had not agreed, then schools could circumvent the role given to parents by the IDEA.

530 HUEFNER & ZIRKEL, *supra* note 10, at 8.

531 *See supra* note 98.

already expressly adopted by a few authorities,[532] is consistent with the statute, rules, and case law concerning tuition reimbursement.[533]

It is also consistent with many of the policies supporting allocating the burden to schools in all other instances. For example, the burden of proof is often allocated based on which party has better access to needed information.[534] In this instance, it would be the parents, for they selected the private school and would have better access to the private school's curriculum and available services, the student's performance at the private school, and other needed information. Additionally, considerations of parental rapport and trust with school officials[535] favor assigning the burden to parents at Step Two.

In a tuition reimbursement case, the primary parent-school relationship is between the child's parents and the private school, a school the parents presumably trust. Requiring the public school to prove the private school was not providing an appropriate education would not enhance the parent-private school relationship, and requiring the parents to prove the appropriateness of the private school's education would not detract from the parent-private school relationship.

Other authorities, notably the Third Circuit,[536] create a broader exception to the school's burden: the parent has the burden of proof whenever she proposes a placement further removed from the general education classroom, often referred to as a more restrictive placement. While this formulation has some appeal, it has analytical and practical difficulties. First, it assumes the general education classroom is the LRE, but in actuality, the LRE is inextricably linked to FAPE. LRE is the setting closest to the general education environment in which FAPE may be delivered; if FAPE cannot be delivered in the general education setting, it is not the LRE. Second, if there is a dispute about FAPE or other non-LRE questions, for which the school should properly bear the burden of proof, it would seem unfair for the school to avoid its burden by the adversarial alchemy of reframing the dispute as an LRE question. Placement is only one piece of the special education puzzle, and the school should be required to prove the appropriateness of all of its decisions, from identification to placement. Third, one neglects other considerations supporting the allocation of the burden on schools by placing the burden on parents whenever they propose what appears to be a more restrictive environment. For example, part of the school's affirmative obligation[537] is to maintain a "continuum of alternative place-

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532 *See, e.g.*, MINN. STAT. § 125A.091, subdiv. 16 (2005); M.S. v. Bd. of Educ., 231 F.3d 96, 104 (2d Cir. 2000).

533 *See supra* note 98.

534 *See supra* notes 406-25.

535 *See supra* notes 440-54.

536 Carlisle Area Sch. Dist. v. Scott P., 62 F.3d 520 (3d Cir. 1995); *see also In re* Marie I., EHLR 506:291 (Ga. SEA 1985).

537 *See supra* notes 456-62.

ments."[538] The obligation to maintain this continuum carries with it an additional obligation to propose a placement for the child at the correct point on the continuum. When placement is an issue, the school should be required to prove it actually has available such a continuum and justify its location of the child's proposed placement along that continuum. Furthermore, the school's access to critical information and specialized knowledge[539] is no different regardless of whether it is the party proposing a less restrictive or a more restrictive placement. Finally, crucial historical antecedents do not favor shifting the burden. In *Mills v. District of Columbia Board of Education*, the school was required to bear the burden of proof for "*any* placement,"[540] which certainly includes a less restrictive placement.

The IDEA and its implementing regulations state that each eligible child's IEP must contain an explanation of the extent to which that child receives an education away from the general classroom and children without disabilities.[541] This may appear to create a presumption in favor of the general classroom. While this provision has been read to place the burden of proof in this instance on a school proposing a more restrictive placement,[542] this provision should not be read as placing the burden of proof on parents who propose a more restrictive placement. While this statutory language may enhance the rationales for placing the burden on schools when the school requests a more restrictive placement, it does not overcome the compelling rationales for placing the burden of proof on the schools in all instances.

Additionally, the existence, nature, and effect of presumptions in the law are controversial.[543] To the extent this statute creates a "presumption" when a parent proposes a more "restrictive" setting, it should be read as creating a burden of production only. Once the parent produces enough evidence to generate a factual issue concerning placement, the presumption vanishes.[544] This approach to presumptions is widely used,[545] and is consistent with the treatment of presumptions in the Federal Rules of Evidence.[546] Under this approach, the

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538 34 C.F.R. § 300.551(a) (1999).

539 *See supra* notes 406-11.

540 Mills v. D.C. Bd. of Educ., 348 F. Supp. 866, 881 (D.D.C. 1972) (emphasis added).

541 20 U.S.C.A. § 1414(d)(1)(A)(i)(IV) (West 2000 & Supp. 2005); 34 C.F.R. § 300.347(a)(4).

542 *See, e.g.*, KERN ALEXANDER & M. DAVID ALEXANDER, LAW OF SCHOOLS, STUDENTS, TEACHERS IN A NUTSHELL 261 (3d ed. 2003).

543 HUEFNER & ZIRKEL, *supra* note 10, at 16 n.53.

544 This is called the "bursting bubble" theory of presumptions. *See* 2 STRONG, *supra* note 15, § 336.

545 *Id.*

546 FED. R. EVID. 301. For a comprehensive explanation of this rule, see 1 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 301.02[1] *et seq.* (2d ed. 2003). While Rule 301 does not apply to administrative hearings, *see id.* § 301.05(2), it is highly persuasive, especially given our proposal to not shift the burden of proof at the judicial stage, *see infra* Part IV.B.

burden of production may shift, but the burden of persuasion remains on the party who initially bore it (here, the school district).[547] This approach is consistent with the general rule that the burden of persuasion does not shift in the course of litigation.[548]

B. Judicial Proceedings

Regardless of which party prevails at the administrative level, the burden should not shift when the case moves to court. It should be borne by the schools in all instances,[549] except when the issue is the appropriateness of the private school placement selected by parents in a tuition reimbursement case.[550] This departure from the general rule in administrative law, that the party challenging the administrative outcome bears the burden of proof,[551] is justified by the text of the IDEA, the IDEA's legislative history, and considerations of policy.

First, in judicial proceedings under the IDEA, trial courts retain their fact-finding function.[552] Reviewing courts do not merely review administrative fact-findings for legal sufficiency, such as for support by substantial evidence. They may receive additional evidence not presented to the administrative decision-maker.[553] They retain the fact-finding function even if no additional evidence is introduced.[554] Under general principles of evidence, the burden of persuasion never shifts as long as facts are still to be found.[555] This rule militates in favor of not shifting the burden of proof at the transition from agency to court.

Second, the IDEA's legislative history further erodes the rationale for applying the "general rule" in judicial proceedings. When the IDEA was first adopted, Congress specifically deleted a "substantial evidence" standard of re-

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547 2 STRONG, *supra* note 15, § 344; *see* 1 WEINSTEIN & BERGER, *supra* note 546, § 301.02[2] (citing Wards Cove Packing Co. v. Antonio, 490 U.S. 642 (1989)).

548 9 WIGMORE, *supra* note 22, § 2489.

549 *See supra* notes 397-530.

550 *See supra* notes 531-35.

551 *See, e.g.*, Clyde K. v. Puyallup Sch. Dist. No. 3, 35 F.3d 1396, 1398-99 (9th Cir. 1994).

552 *See, e.g.*, Wall v. Mattituck-Cutchogue Sch. Dist., 945 F. Supp. 501, 511 (E.D.N.Y. 1996) ("Because the district court retains a fact-finding role, there is a continuum from the proceedings at the administrative level to the review in the district court.") (citing Huefner, *supra* note 65, at 512).

553 20 U.S.C.A. § 1415(i)(2)(C)(ii) (West 2000 & Supp. 2005). That it may be undesirable for courts to consider additional evidence, *see* Krahmal et al., *supra* note 8, does not eliminate the statutorily conferred power to do so.

554 This is true regardless of the amount of deference given to the administrative decision. Even if the administrative decision is given a great deal of deference, the statute establishes that the court still must make findings of fact based on a preponderance of the evidence. For a discussion of scope of review and degrees of deference in special education court cases, see Newcomer & Zirkel, *supra* note 41.

555 9 WIGMORE, *supra* note 22, § 2489.

view.[556] While the concepts of scope of review and burden of proof are separate, they are still related.[557] Congressional action on the IDEA's standard of review must be considered when determining the IDEA's burden of proof. If Congress removed the traditional standard of review from the IDEA and thereby reduced the deference to be granted to administrative decisions, this is a powerful signal that other attempts to afford deference to administrative decisions by reliance on other "general rules" is questionable at best.

Third, policy considerations justify allocating the burden to schools in judicial proceedings, regardless of which party prevailed below.[558] The major policy reasons for assigning the burden of proof to schools at the administrative level do not change when the dispute makes the transition to court. By moving from an agency to a court, schools do not suddenly become less informed about special education, lose access to key evidence or information, or have less need to demonstrate they are maintaining their FAPE obligation.[559] Parents do not become more trusting of the school system when the dispute progresses to court.[560]

As noted above[561] and in other places,[562] special education litigation can be and often is wasteful and damaging. In many instances, the dispute itself has become more important than the subject child.[563] Allocating the burden of proof to the school district in judicial proceedings would serve as a hedge against further legalization. Allowing the burden of proof to shift on transition between levels of the special education dispute resolution hierarchy could conceivably produce perverse outcomes. In close cases, such as the one confronting Professor Dobson in the opening hypothetical, the burden of proof may be outcome-determinative. Outcomes in these cases may change simply because the burden of proof has been reallocated, "causing a musical-chairs wasting of administrative and judicial resources."[564]

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556 HUEFNER & ZIRKEL, *supra* note 10, at 14 n.22 (citing S. CONF. REP. NO. 94-455, at 50 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1503).

557 *See supra* notes 41-47; *see also* Krahmal et al., *supra* note 8, at 203-05.

558 HUEFNER & ZIRKEL, *supra* note 10, at 9-10.

559 *See supra* notes 406-25. Additionally, the extent to which discovery is available in judicial proceedings under the IDEA is unsettled. Krahmal et al., *supra* note 8, at 208.

560 *See supra* notes 440-54.

561 *See supra* note 18.

562 *See, e.g.*, Krahmal et al., *supra* note 8, at 220-21 & n.130; Perry A. Zirkel, *Special Education: "Needless Adversariness"*, 74 PHI DELTA KAPPAN 809, 810 (1993); *see also* Antonis Katsiyannis & Maria Herbst, *Minimize Litigation in Special Education*, 40 INTERVENTION SCH. & CLINIC 106 (2004); *cf.* Burlington Sch. Comm. v. Dep't of Educ., 471 U.S. 359, 370 (1985) (describing IDEA's dispute resolution mechanism as "ponderous").

563 Zirkel, *Revisions, supra* note 18, at 407-08 & nn.26-30.

564 HUEFNER & ZIRKEL, *supra* note 10, at 10. In addition, one of the authors of the present article, based on experience trying a wide variety of cases (with the attending pre-trial discovery "chess matches"), believes a fixed burden of proof would remove an incentive to choose not to introduce all favorable evidence at an administrative hearing and to use this withheld evidence in

The Ninth Circuit offered the strongest defense of the traditional position in *Clyde K. v. Puyallup School District No. 3*.[565] In the passage previously quoted,[566] the *Clyde K.* court set forth several reasons why it adopted the "general rule," including that (1) the substantive right conferred on parents by the IDEA does not entitle parents "to receive every procedural advantage" and (2) the absence of statutory language indicating a departure from the general rule of burden allocation.[567] We find these reasons insufficient. First, as noted above,[568] the general rule adopted by the Ninth Circuit is particularly weak and riddled with exceptions,[569] and the strength of the substantive and procedural rights accorded to parents under the IDEA should override a particularly weak "general rule." Second, the judiciary, absent a statutory pronouncement,[570] should be free to allocate the burden of proof based on considerations of "policy and fairness based on experience in the different situations."[571] Based on "policy and fairness," the judiciary ought to allocate the burden of proof in judicial proceedings in the same manner as it is allocated in administrative proceedings.

C. *The Need for Uniformity*

Additional considerations counsel in favor of uniformity in allocating the burden of proof. This subpart makes the case for uniform adoption of our preferred burden of proof.[572]

Core principles of federal-state relations require the adoption of a uniform application of burden-of-proof rules. This is because of the unique nature of the judicial review process in special education. Federal and state courts

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further court actions. To this author, it is certainly conceivable (though not currently quantifiable) that some parents may decide not to introduce some favorable piece of evidence (however minor it might be) at the administrative stage, knowing that they would have the burden of proof under the "traditional view" if they filed a court action. The evidence not introduced would then become a device by which parents would seek to justify overturning the adverse administrative hearing. The use of additional evidence (that is, evidence not presented at the administrative level) in special education disputes wastes time and money. Krahmal et al., *supra* note 8, at 216-17, 220. More importantly, it leads to hearing officers making decisions based on incomplete records. *Id.* at 218-19. Allocating the burden of proof to schools in all instances would remove a conceivable, structural incentive to "save" evidence for potential use in judicial proceedings.

565 35 F.3d 1396, 1399 (9th Cir 1994). For more information on the Ninth Circuit's burden allocation, *see supra* Part III.J.

566 *See supra* note 370 and accompanying text (quoting *Clyde K.*, 35 F.3d at 1399).

567 *Clyde K.*, 35 F.3d at 1399.

568 *See supra* notes 482-85.

569 9 WIGMORE, *supra* note 22, § 2486, at 288.

570 *Cf.* 2 STRONG, *supra* note 15, § 337, at 413-14 (stating burden allocation is often a "*judicial* estimate of the probabilities of the situation" (emphasis added)).

571 9 WIGMORE, *supra* note 22, § 2486, at 291.

572 Thirteen states, urging the Supreme Court to grant the Schaffers' certiorari petition, made this very point. *See* Hendrie, *supra* note 264 (briefly describing this argument).

have concurrent jurisdiction to review state administrative decisions.[573] This is an unusual arrangement. A hearing officer like Professor Dobson may potentially find herself wondering which of two sets of burden of proof allocations to follow. In many jurisdictions, a state law (statutes, regulations, or court decisions) burden allocation may differ from federal case law on the subject. Further, when interpreting federal law, state courts are not necessarily bound by the decisions of lower federal courts.[574] Thus, a state trial court and a federal trial court, each applying two different legal rules, may potentially review a hearing officer's decision, and the rule applied may be outcome-determinative.

Sometimes, courts attempt to seek uniformity. In *Montour School District v. S.T.*,[575] the Pennsylvania appellate court sought to follow federal precedent concerning the statute of limitations under the IDEA.[576] Other times, court decisions create dissonance. For example, Pennsylvania state court decisions conflict with Third Circuit precedent concerning the standard of review.[577] More importantly, Pennsylvania state and federal courts differ in allocating the burden of proof.[578] This situation is not unique to Pennsylvania.[579] This issue lurks in the First,[580] Fourth,[581] Eighth,[582] Ninth,[583] and Eleventh[584] Circuits. In

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573 20 U.S.C.A. § 1415(i)(2) (West 2000 & Supp. 2005); 34 C.F.R. § 300.512 (1999).

574 U.S. *ex rel.* Lawrence v. Woods, 432 F.2d 1072, 1075-76 (7th Cir. 1970); Montour Sch. Dist. v. S.T., 805 A.2d 29, 39-40 (Pa. Commw. Ct. 2002); Thompson v. Vill. of Hales Corners, 340 N.W.2d 704, 712-13 (Wis. 1983); *see* Lagares v. Camdenton R-III Sch. Dist., 68 S.W.3d 518 (Mo. Ct. App. 2001) (state court not bound by federal court interpretation of state law); *see also* Lockhart v. Fretwell, 506 U.S. 364, 376 (1993) (Thomas, J., concurring) ("In our federal system, a state trial court's interpretation of federal law is no less authoritative than that of the federal court of appeals in whose circuit the trial court is located.") (dicta).

575 *See Montour*, 805 A.2d at 40.

576 Zirkel, Montour, *supra* note 8, at 23.

577 *Id.* at 23 n.141.

578 *Compare* Oberti v. Bd. of Educ., 995 F.2d 1204, 1219 (3d Cir. 1993) (burden on school) *with* Mars Area Sch. Dist. v. Laurie L., 827 A.2d 1249, 1255 (Pa. Commw. Ct. 2003) (burden on party seeking hearing).

579 *See generally supra* Part III (providing a Circuit-by-Circuit review of burden of proof allocations).

580 *Compare* T.B. ex rel. N.B. v. Warwick Sch. Comm., 361 F.3d 80, 82 n.1 (1st Cir. 2004) (burden on school at hearing), *with* 05-071-101 ME. CODE R. § 13.12(I) (Weil 2005) (burden on party requesting hearing).

581 *Compare* Weast v. Schaffer, 377 F.3d 449, 452-53 (4th Cir. 2004) (burden at administrative hearing on party requesting hearing) *with* W.VA. CODE R. § 126-16-8.1.11(c) (2003) (burden on school in administrative hearing).

582 *Compare* E.S. v. Indep. Sch. Dist. 196, 135 F.3d 566, 569 (8th Cir. 1998) (burden on the school in administrative hearings) *with* state regulations in Arkansas, Iowa, and Nebraska, *see supra* note 362 (burden on the party seeking the administrative hearing).

583 *Compare* Clyde K. v Puyallup Sch. Dist. No. 3, 35 F.3d 1396, 1398 (9th Cir. 1994) (burden on school at administrative hearing) *with* MONT. ADMIN. R. 10.16.3521(1) (2001) (burden on party requesting hearing).

an extremely close case in such jurisdictions, such as the one confronting Professor Dobson, reversal could easily occur solely based on which forum was selected.[585]

Assume Professor Dobson's hearing is in Pennsylvania, not Catatonic State. If she applies Pennsylvania precedent[586] and rules for the district because she allocates the burden to Julia D.'s parents, the parents could certainly appeal to federal district court, which would apply the *Oberti* burden allocation and allocate the burden of proof to Euphoria.[587] Reversal would be likely. In contrast, should Professor Dobson follow federal court precedent and rule in favor of Julia D.'s parents because Euphoria failed to meet its burden of proof, Euphoria could then seek review in the Pennsylvania Commonwealth Court, which would allocate the burden to Julia D.'s parents.[588] Reversal would be likely. This is an entirely unacceptable situation, which provides neither swift nor certain resolutions to special education disputes. Nor should the result vary, depending solely on the child's state of residence. To achieve the rapid resolution of special education disputes, a uniform approach to the burden of proof should be adopted,[589] and that approach should place the burden on school districts as set forth above.[590]

We would recommend the United States Supreme Court adopt this allocation in *Schaffer*. If the Supreme Court does not do so, we would recommend corrective action by Congress, as Congress has done in the past when it disagreed with the policy implications of the Court's IDEA cases.[591] Regardless of the outcome of *Schaffer*, we would recommend that Congress take action to place the burden of proof in judicial proceedings under the IDEA on the school authorities, with the exceptions noted in this article, an issue not before the Court in *Schaffer*.

V. CONCLUSION

In the opening hypothetical, Professor Dobson should assign the burden of proof to the Euphoria Independent School District. Doing so, she should rule

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584 *Compare* Devine v. Indian River County Sch. Bd., 249 F.3d 1289, 1291-92 (11th Cir. 2001) (burden on party attacking "existing IEP") *with* Alabama and Georgia regulations, *see supra* notes 312-15 (burden on schools at administrative hearing).

585 *Cf.* Hendrie, *supra* note 264.

586 Mars Area Sch. Dist. v. Laurie L., 827 A.2d 1249 (Pa. Commw. Ct. 2003).

587 Oberti v. Bd. of Educ., 995 F.2d 1204, 1219 (3d Cir. 1993).

588 *See supra* notes 586-87.

589 By a uniform approach, we mean a uniform minimum requirement. We recognize states could choose to provide more protection than that provided by the IDEA. *See* Mayes & Zirkel, *supra* note 56, at 89. Should a state choose to adopt a burden allocation that is more favorable to parents, then that approach would be applied.

590 *See supra* Part IV.

591 *See, e.g.*, Zirkel, *supra* note 17, at 241 n.25.

for Julia D.'s parents if the school failed to prove its case. This result is preferred for several reasons.[592] It is supported by statutory considerations (including express findings by Congress) and historical antecedents. It is supported by sound public policy, including a recognition of schools' superior access to information and the proper allocation of the risk of erroneous decisions. It is consistent with fairness and would promote healthy parent-school dialogue. Moreover, similar considerations, including Congress's findings, make arguments against the preferred burden allocation and in favor of other allocations unconvincing, even though those arguments rely on purportedly neutral general rules.[593]

Furthermore, when the dissatisfied party appeals Professor Dobson's decision to state or federal court, the burden should be borne by the school, regardless of who prevailed below. The reasons for this proposed allocation are similar to reasons for allocating the burden to the schools at the administrative level.[594]

Finally, consider the following variation on Professor Dobson's dilemma. Assume Julia D.'s parents are requesting tuition reimbursement for a unilateral private school placement and the school has failed to prove its proposed program offered a FAPE. In that instance, Professor Dobson should require Julia D.'s parents to prove the appropriateness of their unilateral placement. This departure from the general rule is supported by the structure of the IDEA, basic fairness, and sound public policy.[595]

We would like to close with one last thought. If schools are concerned about meeting whatever burden may be allocated to them or about the cost of bearing the burden of proof,[596] they need only carry out the intent of the law with respect to identification, evaluation, programming, and placement.[597] If they do so, they need not worry about shouldering the burden of proof.[598]

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592 *See supra* Part IV.A.1.

593 *See supra* Parts IV.A.2 and IV.A.3.

594 *See supra* Part IV.B.

595 *See supra* Part IV.A.4.

596 *Cf.* WRIGHT, *supra* note 9, at 27.

597 *Cf.* Mayes & Zirkel, *supra* note 88, at 357.

598 *Cf.* Florence County Sch. Dist. v. Carter, 510 U.S. 7, 15 (1993) ("This is IDEA's mandate, and school officials who conform to it need not worry about reimbursement claims.").