

## **BURDEN OF PROOF**

### **ISSUE**

The Need for a State Regulation to Allocate Burden of Proof in Special Education Due Process Cases to School Districts

### **BACKGROUND**

In the common law, burden of proof is the obligation to prove allegations which are presented in a legal action. Under the federal Individuals with Disabilities Education Act (IDEA), parents and school districts have the right under due process to an administrative hearing when there is an unresolved disagreement over which special education services students should have to successfully meet their academic goals. Until recently, it has been understood, unless otherwise specified in a state's due process regulations or statutes, that the school district had the burden of proof in due process proceedings.

*Schaffer vs. Weast* is a landmark decision by the U.S. Supreme Court which determined that the party "seeking relief" has the burden of proof in IDEA due process proceedings. The Plaintiffs in *Schaffer* sued the Superintendent of Maryland's Montgomery County School District (MCSD) for the costs of privately educating their son when the school refused to place their child in an appropriate classroom setting. The Schaffers argued that the placement proposed by MCSD did not meet their son's disability-related needs and therefore did not provide him with a free and appropriate public education (FAPE) as the IDEA requires. The Court highlighted to the Schaffer's that the federal IDEA statute was silent with respect to who has the burden of proof in due process proceedings. Because the two sides were in "evidentiary equipoise", and because the state of Maryland had no statutory provision assigning the burden of proof in due process proceedings, the Court concluded that the Plaintiffs had failed to carry their burden of proof, as they, not MCSD, were challenging the IEP placement.

Prior to the *Weast* decision, Pennsylvania's school districts had the burden of proof, regardless of who requested the due process hearing. Therefore, it was the obligation of the district to present its case first. Such an allocation of the burden made sense, as it is the school district that has the duty to provide FAPE to the child in the least restrictive environment (LRE). Moreover, it is practical, productive, time-saving, and cost-minimizing to have the school district, which has the easiest access to the student's records and the teachers and experts that work with the child daily, testify first at the hearing.<sup>1</sup> It is a fact that a large percentage of parents are un-represented during due process hearings. Assigned burden to the school districts created predictability in the system; as the district clearly proceeded first and identified the issues in the case to the hearing officer.

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<sup>1</sup> In fact, the Supreme Court acknowledged that school districts have a "natural advantage" over the parents in a dispute in that they have the teachers, therapists, nurses, and psychologists to observe the child all day (and testify without charge) write the IEP progress reports, test the students and grade the tests.

Unfortunately, the Court did not foresee the impact of its decision in states such as Pennsylvania that have no assigned the burden of proof in their due process regulations and statutes. Without such clarification, and armed with *Weast*, many school districts across the Commonwealth are taking the position in every case in which a parent requests due process that the parent is the party “seeking relief” and therefore automatically carries the burden of proof. It is not necessarily the case that the parent is the one attempting to change the status quo. Often it is the school district that is seeking a change of placement or modification of the child’s current program or services. A parent’s resistance to such effort should not saddle them automatically with the burden of proof, particularly when it is the school district, not the parent, which is attempting to force a change such as placement.<sup>2</sup> The Supreme Court specifically rejected this approach. “The rule applies with equal effect to school districts,” it said. “If they seek to challenge an IEP, they will in turn bear the burden of persuasion before an administration law judge.”

## **POSITION**

The Arc of Pennsylvania strongly affirms that many of the rights, benefits, and successes of students in today’s special education programs were driven by parents who were given a voice through due process. Pennsylvania must take the affirmative step of adopting a statutory provision which allocates the burden of proof in due process proceedings to the school districts. This will continue to provide predictability in the system, clarity of the issues, and cost savings during the hearing process so that the goal of achieving appropriate education outcomes for Pennsylvania’s children with disabilities can be maximized in the shortest amount of time. Without a clear statutory assignment of burden of proof, it is assured that due process will take more time and more money on all sides. Additional pretrial proceedings are no necessary in order to sort through the issue to ascertain who bears the burden of proof. This delays hearings and burdens the system unnecessarily. The hearing process is now more un-navigable than before as parents now must recognize and argue technical legal issues.

It is important to recognize that few parents will go into this process without the resources to secure adequate legal representation and expert witness testimonies, sufficient knowledge of the law, and the ability to take time away from their jobs and care of their children. It is a certainty that even parents with meritorious claims, will not pursue due process. Thus, the very legal system put in place to protect Pennsylvania’s most vulnerable children will be incapable of ensuring appropriate education outcomes for them. The Arc of Pennsylvania supports statutory provisioning of burden of proof to school districts in due process proceedings.

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<sup>2</sup> Such an automatic assignment of the burden of proof to the parent is particularly inappropriate if the district attempting to force the student into a more restrictive placement. Such a policy contradicts the specific terms of the IDEA and its implementing regulations which clearly indicate that it is the district, not the parent, which must establish that the more restrictive placement is necessary in order to confer FAPE. 20 U.S.C. § 1412 (a) (5). *See also* 34 C.F.R. 300.550(b): “Each public agency shall ensure that to the maximum extent appropriate, children with disabilities....are educated with children who are not disabled” and that “special classes, separate schooling, or other removal of children with disabilities from the regular education environment occurs only if nature and severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.”