

A New Perspective on *Schaffer v. Weast*: Using a Social-Relations Approach to Determine the Allocation of the Burden of Proof in Special Education Due Process Hearings

JOANNE KARGER, J.D., ED.D.*

Table of Contents

Introduction.....	136
I. Application of Minow’s Framework to an Analysis	
Approach of IDEA.....	141
A. Traditional Rights-Analysis Approach and Its Relationship to IDEA.....	142
B. Social-Relations Approach and Its Relationship to IDEA.....	146
1. Relationship between the School District and the Child with a Disability.....	147
2. Relationship between the School District and the Parent.....	153
3. Relationship between the Student with Disabilities and Their Non-Disabled Peers.....	157
II. The Burden of Proof and IDEA.....	161
A. The Concept of Burden of Proof.....	161
B. The Burden of Proof in IDEA Hearings; Split among the Circuits.....	163
1. Circuits Assigning the Burden of Proof to the Moving Party.....	163
2. Circuits Assigning the Burden to the School District.....	165
C. State Statutes and Regulations.....	177

* Attorney, Center for Law and Education; Ed.D. 2007, Harvard Graduate School of Education; J.D. 2001, Boston College Law School. The author wishes to thank Professors Thomas Hehir, Martha Minow, and Richard Elmore for their valuable comments.

D. Fourth Circuit Opinion in <i>Schaffer</i>	172
III. Analysis of <i>Schaffer v. Weast</i>	174
A. Majority Opinion.....	175
1. Traditional Rights-Analysis Approach.....	175
2. Relationships Overlooked by the Court	178
a. Relationship between the School District and the Child with a Disability	179
b. Relationship between the School District and the Parent.....	189
c. Relationship between the Student and their Non-Disabled Peers.....	193
B. Ginsburg’s Dissent	194
C. Implications of the <i>Schaffer</i> Decision	198
1. Implications for Parents	198
2. Implications for School Districts	202
3. Implications for Hearing Officers	204
IV. Proposal for the Allocation of the Burden of Proof in IDEA Due Process Hearings	208
A. Post- <i>Schaffer</i> Activity at the State Level	208
B. Proposed method for Allocating the Burden of Proof in IDEA Due Process hearings.....	215
1. Basic Rule for the Allocation of the Burden of Proof (Non-LRE Claims)	219
2. LRE Claims Involving Disputes over Placement.....	220
3. LRE Claims Involving Tuition Reimbursement	223
Conclusion.....	229

List of Tables

Table 1. Differences in Burden Allocation among the Circuits Prior to <i>Schaffer</i>	168
Table 2. Differences in Burden Allocation among States Prior to <i>Schaffer</i>	172
Table 3. Comparison of States Assigning the Burden to the School District Pre- and Post- <i>Schaffer</i>	215
Table 4. Proposed Allocation of the Burden of Proof in Claims Brought under IDEA.....	224

Introduction

In 1975, Congress passed the Education for All Handicapped Children Act (EAHCA), representing a major advancement in the provision of educational opportunities for children with disabilities.² This statute, later renamed the Individuals with Disabilities Education Act (IDEA),³ confers numerous rights on students with disabilities and their parents, with each right corresponding to a concomitant obligation on the part of states and/or school districts.⁴ At its core, IDEA provides students with disabilities with the right to a “free appropriate public education” (FAPE)⁵ in the “least restrictive environment” (LRE).⁶ In addition, to ensure the meaningful

² Pub. L. No. 94-142, 89 Stat. 773 (1975) (codified as amended at 20 U.S.C.A. §§ 1400-1487 (West Supp. 2006)). *See also* S. REP. NO. 94-168, at 9 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1425, 1433 (“Certainly the failure to provide a right to education to handicapped children cannot be allowed to continue ... Congress must take a more active role ... to guarantee that handicapped children are provided equal educational opportunity.”).

³ Education of the Handicapped Act Amendments of 1990, Pub. L. No. 101-476, § 901(a), § 601(a), 104 Stat. 1103, 1141-42 (1990) (codified as amended at 20 U.S.C.A. § 1400(a) (West Supp. 2006)).

⁴ States are eligible to receive funding under IDEA if they demonstrate that they have in effect policies and procedures that meet certain conditions. 20 U.S.C.A. § 1412(a) (West Supp. 2006). IDEA similarly lays out numerous conditions that school districts must meet as a prerequisite for receipt of funding under the statute. *Id.* § 1413(a).

⁵ FAPE is defined as:

special education and related services that - (A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State educational agency; (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and (D) are provided in conformity with the individualized education program required under [the law].

20 U.S.C.A. § 1401(9); *see also* 34 C.F.R. § 300.17 (2007). For a more extensive discussion of the obligation of school districts to provide FAPE, *see infra* Part I.B.1.

⁶ LRE refers to the education of students with disabilities to the maximum extent appropriate in a setting together with students without disabilities. 20 U.S.C.A. § 1412(a)(5)(A); *see also* 34 C.F.R. § 300.114(a)(2). For a more extensive discussion of the requirement that students with disabilities be educated in the LRE, *see infra* Part I.B.3.

participation of parents in decisions affecting their child's educational program, IDEA affords parents the right to be a member of their child's individualized education program (IEP) team.⁷ Similarly, IDEA provides parents with various procedural protections, including the right to request an administrative due process hearing for complaints relating to matters of identification, evaluation, educational placement, or the provision of FAPE.⁸ IDEA does not specify, however, which party – the parents or the school district – should bear the burden of proof at an administrative due process hearing.⁹ As a result, a split developed among the circuits, with some circuits assigning the burden to the moving party (most often the parents), and others assigning the burden to the school district.¹⁰

⁷ 20 U.S.C. § 1414(d)(1)(B)(i); *see also* 34 C.F.R. § 300.321(a)(1). For a more extensive discussion of the goal of IDEA to promote the meaningful participation of parents in their child's educational program, *see infra* Part I.B.2.

⁸ 20 U.S.C. § 1415(b)(6)(A); *see also* 34 C.F.R. § 300.507(a)(1).

⁹ *See Schaffer v. Weast*, 546 U.S. 49, 51 (2005) (“The Act is silent, however, as to which party bears the burden of persuasion at [a due process] hearing.”); *id.* at 54 (“Congress has never explicitly stated, however, which party should bear the burden of proof at IDEA hearings.”). There is also a question as to which party bears the burden of proof in judicial proceedings under IDEA. *See* Thomas A. Mayes et al., *Allocating the Burden of Proof in Administrative and Judicial Proceedings under the Individuals with Disabilities Education Act*, 108 W. VA. L. REV. 27, 45-72 (2005). Because the Court's decision in *Schaffer* addressed the allocation of the burden of proof only in the context of due process hearings, the discussion in the present article is limited to this situation.

¹⁰ Prior to the Supreme Court's decision in *Schaffer*, five circuits had assigned the burden to the moving party. *See Weast v. Schaffer*, 377 F.3d 449, 453 (4th Cir. 2004), *aff'd*, 546 U.S. 49 (2005); *Devine v. Indian River County Sch. Bd.*, 249 F.3d 1289, 1292 (11th Cir. 2001); *Cordrey v. Euckert*, 917 F.2d 1460, 1466 (6th Cir. 1990); *Johnson v. Independent Sch. Dist. No. 4*, 921 F.2d 1022, 1026 (10th Cir. 1990); *Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ.*, 790 F.2d 1153, 1158 (5th Cir. 1986). Seven circuits had assigned the burden to the school district. *See L.T. v. Warwick Sch. Comm.*, 361 F.3d 80, 82 n.1 (1st Cir. 2004) (dictum); *Beth B. v. Van Clay*, 282 F.3d 493, 496 (7th Cir. 2002) (dictum); *M.S. v. Board of Educ.*, 231 F.3d 96, 104 (2d Cir. 2000) (except for tuition reimbursement cases); *E.S. v. Independent Sch. Dist., No. 196*, 135 F.3d 566, 569 (8th Cir. 1998); *Carlisle Area Sch. Dist. v. Scott P.*, 62 F.3d 520,

On November 14, 2005, in *Schaffer v. Weast* (*Schaffer*), the United States Supreme Court addressed the question of the allocation of the burden of proof in special education due process hearings.¹¹ In *Schaffer*, the Court held that when a child's IEP is being challenged, the party seeking relief bears the burden.¹² Justice Ginsburg wrote a dissenting opinion, in which she concluded that for policy reasons, convenience, and fairness the burden should be assigned to the school district.¹³ The Court's decision in *Schaffer* resolved the split among the circuits;¹⁴ however, the Court declined to address the question of whether states, on their own, could adopt legislation or regulations assigning the burden to the school district.¹⁵ Consequently, post-*Schaffer*, the debate

533 (3d Cir. 1995) (except when parent requests more restrictive placement); *Clyde K. v. Puyallup Sch. Dist.*, No. 3, 35 F.3d 1396, 1398-99 (9th Cir. 1994); *McKenzie v. Smith*, 771 F.2d 1527, 1532 (D.C. Cir. 1985) (particularly for procedural issues). For a more detailed discussion of the pre-*Schaffer* split among the circuits, *see infra* Part II.B.

¹¹ 546 U.S. at 62.

¹² *Id.*

¹³ *Id.* at 63 (Ginsburg, J., dissenting).

¹⁴ Since *Schaffer*, the U.S. Supreme Court has handed down additional decisions pertaining to IDEA. In *Arlington Central School District Board of Education v. Murphy*, the Court held that IDEA does not authorize parents who prevail in actions under the statute to recoup fees for services rendered by educational experts. 126 S. Ct. 2455, 2457 (2006). The Court in *Arlington* also found that because IDEA was passed under the Spending Clause, the statute had to provide states with "clear notice" of their obligation with respect to the payment of expert fees. *Id.* at 2458-59. In *Winkelman v. Parma City School District*, the Court held that, because parents possess rights under IDEA, they are entitled to prosecute claims under the statute on their own behalf. 127 S. Ct. 1994, 2006 (2007). Most recently, on October 10, 2007, an equally divided Supreme Court affirmed a judgment of the Second Circuit, which had held that a parent whose child had not previously received special education services under IDEA was not barred from receiving tuition reimbursement for a private school placement. *See Board of Educ. v. Tom F.*, 127 S. Ct. 1393 (2007), *aff'g* 193 Fed. Appx. 26 (2d Cir. 2006).

¹⁵ 546 U.S. at 61-62 (stating that because Maryland, the state in which *Schaffer* originated, did not have its own law or regulation with respect to the allocation of the burden of proof, the Court need not address the issue). Justice Breyer argued in a dissenting opinion that he believed that Congress left the matter of the allocation of the burden of proof to the states to decide. *Id.* at 71 (Breyer, J., dissenting).

concerning which party should bear the burden of proof has continued at the state level.¹⁶

The present article utilizes Martha Minow's framework for the legal treatment of difference as a theoretical lens through which to analyze the question of the allocation of the burden of proof in IDEA due process hearings.¹⁷ According to Minow, the traditional "rights-analysis approach," which strives to redress past discrimination by providing equal treatment, perpetuates the categorization of the group, against whom the discrimination has been targeted, as "different."¹⁸ In place of this traditional approach, she proposed a "social-relations approach," which considers difference as a function of the multiple relationships involved.¹⁹ A social-relations approach is particularly appropriate for analyzing issues pertaining to rights and

¹⁶ Of the states that had legislation/regulations assigning the burden to the school district prior to *Schaffer*, a number have since amended their rules to place the burden on the party seeking relief. See ALA. ADMIN. CODE r. 290-8-9-.08(8)(c) (Supp. 2005) (amending ALA. ADMIN. CODE r. 290-8-9-.08(8)(c)(6)(ii)(I) (Supp. 2004)); ALASKA ADMIN. CODE tit. 4, § 52.550(e)(9) (Supp. 2006) (amending ALASKA ADMIN. CODE tit. 4, § 52.550(e)(9) (2003)); D.C. MUN. REGS. tit. 5, § 3030.3 (Supp. 2006) (amending D.C. MUN. REGS. tit. 5, § 3030.3 (2003)); GA. COMP. R. & REGS. r. 160-4-7-.18(1)(g)(8) (Supp. 2006) (amending GA. COMP. R. & REGS. r. 160-4-7-.18(1)(g)(8) (2002)). At the same time, other states have left intact their rules assigning the burden to the school district. See CONN. AGENCIES REGS. § 10-76h-14(a) (2005); DEL. CODE ANN. tit. 14, § 3140 (1999); 105 ILL. COMP. STAT. ANN. 5/14-8.02a(g) (West 2005) (burden of production); MINN. STAT. ANN. § 125A.091, subd. 16 (West Supp. 2005); W. VA. CODE ST. R. tit. 126, § 16-8.1.11(c) (2005). But see H.B. 7176, 2007 Gen. Assem., Reg. Sess. (Conn. 2007); S.B. 2967, 84th Leg., Reg. Sess. (Minn. 2006). Still others have passed legislation, see A. 5396, 230th Leg., Reg. Sess. (N.Y. 2007), or introduced bills, see A. 4076, 212th Leg., Reg. Sess. (N.J. 2007); S. 2604, 212th Leg., Reg. Sess. (N.J. 2007); S.B. 2080, 23rd Leg., Reg. Sess. (Haw. 2006); H.B. 2101, 23rd Leg., Reg. Sess. (Haw. 2006); S.B. 2733, 23rd Leg., Reg. Sess. (Haw. 2006); S.B. 241, 2006 Gen. Assem., Reg. Sess. (Va. 2006), to assign the burden to the school district. For a more detailed discussion of post-*Schaffer* activity at the state level, see *infra* Part IV.A.

¹⁷ MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW, 105-20 (1990).

¹⁸ *Id.* at 107-09.

¹⁹ *Id.* at 110-14.

obligations under IDEA because a significant feature of the statute is the promotion of positive social relations that help nurture the child's development and growth.²⁰

The present article argues that the Supreme Court's opinion in *Schaffer* manifested a traditional rights-analysis approach and, in so doing, disregarded three important relationships that are inherent in issues of rights and obligations under IDEA – the relationship between the school district and the child with a disability, the relationship between the school district and the parent, and the relationship between students with disabilities and their non-disabled peers.²¹ In addition, the present article argues that Ginsburg's dissent only partially addressed the relationships overlooked by the Court and, therefore, also had shortcomings.²² Consequently, this article proposes an alternative method for the allocation of the burden of proof that reflects a social-relations approach.²³ The proposed alternative differs from the majority opinion, which assigned the burden, in all instances, to the party seeking relief, and from Ginsburg's dissent, which assigned the burden, in all instances, to the school district.²⁴ Similarly, the proposed alternative moves beyond a simple either/or question of who should bear the burden of proof and addresses the underlying relationships that are associated with the process of the labeling of children with disabilities as "different."²⁵ This article ultimately recommends that

²⁰ See *infra* Part I for a discussion of the manner in which the two approaches described by Minow relate to issues of rights and obligations under IDEA.

²¹ See *infra* Part III.A for an analysis of the majority opinion in *Schaffer*.

²² See *infra* Part III.B for an analysis of Ginsburg's dissent in *Schaffer*.

²³ See *infra* Part IV.B for a discussion of the proposed alternative method for the allocation of the burden of proof.

²⁴ See *infra* notes 366-71 and accompanying text for a discussion of the extent to which the proposed method differs from the Court's opinion and Ginsburg's dissent in *Schaffer*.

²⁵ See *infra* notes 373-418 and accompanying text for a discussion of the manner in which the proposed method addresses the relationships at the heart of IDEA.

²⁶ See *infra* notes 360-64, 421-23 and accompanying text for a discussion of why Congress should address the allocation of the burden of proof in IDEA due process hearings.

Congress incorporate the proposed method into the next reauthorization cycle of IDEA.²⁶ Moreover, until such action is taken by Congress, this article urges the adoption of the proposed method of burden allocation by states.²⁷

Part I presents an overview of Minow's framework and discusses its applicability to an analysis of rights and obligations under IDEA.²⁸ Part II describes the concept of the burden of proof and discusses related case law and state statutes and regulations in the years leading up to the Supreme Court's decision in *Schaffer*.²⁹ Part III uses Minow's framework to analyze the majority and dissenting opinions in *Schaffer* and concludes by discussing the implications of the Supreme Court's decision for parents, school districts, and hearing officers.³⁰ Finally, Part IV describes post-*Schaffer* activity by states and lower courts and presents an alternative proposal for the allocation of the burden of proof in administrative due process hearings under IDEA.³¹

I. Application of Minow's Framework to an Analysis of IDEA

Martha Minow's theoretical framework for an analysis of the legal treatment of difference, as presented in her book *Making All the Difference: Inclusion, Exclusion, and American Law*,³² is instructive in examining issues of rights and obligations under IDEA and is utilized later in this article to analyze the majority and dissenting opinions in *Schaffer*.³³ As noted, Minow distinguished the traditional "rights-analysis approach" from an alternative legal approach to difference, which she referred to as the "social-relations approach."³⁴

²⁷ See *infra* notes 337-59, 365 and accompanying text for a discussion of why action by states is important.

²⁸ See *infra* notes 31-118 and accompanying text.

²⁹ See *infra* notes 119-82 and accompanying text.

³⁰ See *infra* notes 183-331 and accompanying text.

³¹ See *infra* notes 332-421 and accompanying text.

³² See MINOW, *supra* note 16, at 105-20.

³³ See *infra* Part III (applying Minow's framework to an analysis of the majority and dissenting opinions in *Schaffer*).

³⁴ See *supra* notes 17-18 and accompanying text. Minow also described a third approach to the legal treatment of difference – the abnormal-persons

Part I presents an overview of these two approaches and discusses how they relate to an interpretation of rights and obligations under IDEA.³⁵

A. Traditional Rights-Analysis Approach and Its Relationship to IDEA

The traditional rights-analysis approach, described by Minow as “the dominant framework for contemporary analysis,”³⁶ derives from the civil rights movement of the 1950s and 1960s.³⁷ This approach strives to redress past discrimination by providing equal treatment for the group against whom the discrimination had previously been directed.³⁸ While the traditional rights-analysis approach begins with the assumption that all members of a community are entitled to the same fundamental rights (i.e., similar treatment), it chooses, in certain circumstances, to bestow additional rights (i.e., differential treatment) to remedy past mistreatment or account for the specialized needs of a particular group.³⁹ One of the fundamental limitations of this approach is that there are no guidelines with respect to determinations of similar and/or differential treatment.⁴⁰ Consequently, such determinations are relative, depending on

approach. MINOW, *supra* note 16, at 105-07. This approach categorizes individuals into two distinct groups – “normal” and “abnormal” – with “abnormality” being viewed as intrinsic to the person deemed different. *Id.* at 105-06. According to this approach, “abnormal” persons should automatically receive differential treatment. *Id.* at 106. The present article does not focus on the abnormal-persons approach; rather, it focuses on the traditional rights-analysis and social-relations approaches.

³⁵ See *infra* notes 35-118 and accompanying text.

³⁶ MINOW, *supra* note 16, at 119.

³⁷ *Id.* at 107, 132.

³⁸ *Id.* at 12, 107-08.

³⁹ *Id.* at 108.

⁴⁰ See *id.* at 109 (“Rights analysis itself offers no answer to the question it poses: when are historical attributions of difference acceptable, and when are they false? Nor does it specify how to distinguish a violation of rights that can be remedied by ... [similar treatment] from a violation that justifies new rights or special treatment.”); see also *id.* at 216 (“Most fundamentally, rights analysts face the dilemma of attempting to justify both equal and special treatment.”).

the baseline selected for similar treatment and the perspective of the individual making the judgment.⁴¹ The complex choice between sameness and difference is encapsulated in a conundrum, which Minow referred to as the “dilemma of difference.”⁴² According to this dilemma, differential treatment of those labeled “different” may highlight and thereby perpetuate the difference, whereas similar treatment runs the risk of ignoring and likewise perpetuating the difference.⁴³

In keeping with a traditional rights-analysis approach, the EAHCA, the precursor to IDEA, was enacted in 1975 to remedy past discrimination against children with disabilities by providing them with the same right as their non-disabled peers to have access to FAPE.⁴⁴ In fact, the language of the statute was based in large part on two federal court cases from the early 1970s, *Pennsylvania Association for Retarded Citizens (PARC) v. Pennsylvania*⁴⁵ and *Mills v. Board of Education*,⁴⁶ both of which were heavily influenced by the Supreme Court’s decision in *Brown v. Board of Education*.⁴⁷

⁴¹ MINOW, *supra* note 16, at 109.

⁴² *Id.* at 20-21.

⁴³ *Id.*

⁴⁴ See S. REP. NO. 94-168, at 9 (1975), reprinted in 1975 U.S.C.C.A.N. 1425, 1433 (“This Nation has long embraced a philosophy that the right to a free appropriate public education is basic to equal opportunity ... It is contradictory to that philosophy when that right is not assured equally to all groups of people within the Nation.”). At the time the statute was enacted in 1975, it was estimated that more than 50% of children with disabilities were not receiving an appropriate education and that over one million children with disabilities were completely excluded from the public schools. *Id.* at 8, reprinted in 1975 U.S.C.C.A.N. 1425, 1432.

⁴⁵ 334 F.Supp. 1257, 1259 (E.D. Pa. 1971) (“Having undertaken to provide a free public education to all of its children, including its exceptional children, the Commonwealth of Pennsylvania may not deny any mentally retarded child access to a free public program of education and training.”).

⁴⁶ 348 F.Supp. 866, 876 (D.D.C. 1972) (finding that District of Columbia Public schools must “provide a publicly-supported education for ... ‘exceptional’ children.”).

⁴⁷ 347 U.S. 483 (1954). See S. REP. NO. 94-168, at 6 (1975), reprinted in 1975 U.S.C.C.A.N. 1425, 1430. See also MINOW, *supra* note 16, at 132 (discussing impact of *Brown* on the emergence of the traditional rights-analysis approach: “The Supreme Court’s ruling in *Brown v. Board of*

At the same time, IDEA is an example of a statute that extends additional rights to children with disabilities in order to address their particular needs.⁴⁸ Consequently, the dilemma of difference emerges at the heart of all decisions pertaining to rights and obligations under the statute.⁴⁹

The first Supreme Court case decided under the statute, *Board of Education v. Rowley*, demonstrates the extent to which the dilemma of difference can impact judicial interpretations of IDEA.⁵⁰ In this case, the majority, concurring, and dissenting opinions all reflected different viewpoints concerning when children with disabilities should be treated in a manner similar to and/or different from their non-disabled peers.⁵¹ In *Rowley*, the question at issue was whether a school district should be required to give differential treatment to a deaf child by providing her with a sign language interpreter.⁵² The majority opinion rejected the argument that Congress intended students with disabilities to be given “equal educational opportunities.”⁵³ The Court believed that “equal educational opportunities” could mean that students with disabilities were to receive *only* the same services that are available to non-disabled students, a standard the Court believed was lower than that which was required by the statute.⁵⁴ In the alternative, such a standard could also mean that students with disabilities were to receive *every* service necessary to reach their maximum potential, a standard the Court believed was higher than that which was required under

Education demonstrated the power of legal language to transform through rights rhetoric long-standing political struggles over the treatment of differences.”).

⁴⁸ See MINOW, *supra* note 16, at 108 n. 25.

⁴⁹ See *id.* at 21, 108-10.

⁵⁰ See *infra* notes 50-60 and accompanying text (discussing *Board of Educ. v. Rowley*, 458 U.S. 176 (1982)).

⁵¹ Compare *Rowley*, 458 U.S. at 198-200, with *id.* at 210-12 (Blackmun, J., concurring), and *id.* at 212-15 (White, J., dissenting); see *infra* notes 52-60 and accompanying text.

⁵² See 458 U.S. at 184-85.

⁵³ *Id.* at 198-99.

⁵⁴ *Id.*

the statute.⁵⁵ Consequently, the Court concluded that Congress intended students with disabilities to be given “equal access,” and that the standard for appropriateness under the statute should be “some educational benefit.”⁵⁶

In contrast to the majority opinion, both the concurring and dissenting opinions in *Rowley* expressed the view that the baseline for similar treatment should be equal educational opportunity.⁵⁷ The concurring and dissenting opinions differed, however, with respect to their determination of whether differential treatment (i.e., a sign language interpreter) was necessary to promote such an opportunity.⁵⁸ Justice Blackmun, in his concurring opinion, concluded that differential treatment was not necessary because the student’s program, “viewed as a whole, offered her an opportunity to understand and participate in the classroom that was substantially equal to that given her nonhandicapped classmates.”⁵⁹ On the other hand, Justice White, in his dissenting opinion, argued that the provision of differential treatment was necessary to promote the student’s “equal opportunity to learn” because, without the assistance of an interpreter, the student was able to understand less than 50% of what children without disabilities were able to understand.⁶⁰ Thus, while the majority, concurring, and dissenting opinions in *Rowley* all used a traditional rights-analysis approach, they reflected divergent views regarding the baseline for equality and the provision of differential treatment.⁶¹

⁵⁵ *Id.* at 199.

⁵⁶ *Id.* at 200.

⁵⁷ See *infra* notes 58-59 and accompanying text.

⁵⁸ Compare 458 U.S. at 210-12 (Blackmun, J., concurring), with *id.* at 212-15 (White, J., dissenting); see *infra* notes 58-59 and accompanying text.

⁵⁹ *Id.* at 211 (Blackmun, J., concurring) (emphasis in original).

⁶⁰ *Id.* at 215 (White, J., dissenting).

⁶¹ See *supra* notes 52-59 and accompanying text.

B. Social-Relations Approach and Its Relationship to IDEA

Minow proposed the social-relations approach as an alternative to the traditional rights-analysis approach.⁶² The social-relations approach addresses the dilemma of difference by moving beyond a discussion of rights to an analysis of difference as a function of the relationships between individuals labeled “different” and those in positions of power who do the labeling.⁶³ Rather than viewing difference as originating within the person deemed different or as representing deviation from a fixed norm, the social-relations approach views difference as socially-constructed, based on the complex web of relationships and power surrounding the process of labeling.⁶⁴ As a result, the social-relations approach challenges the definition of normality, attempts to take into account the perspective of the individual deemed “different,” and questions existing social structures.⁶⁵

Minow’s social-relations approach is more appropriate for examining issues of rights and obligations under IDEA

⁶² MINOW, *supra* note 16, at 13, 111-12, 379-80.

⁶³ *Id.* at 112 (explaining that a social-relations approach “challenges the very positioning of any individual or group as ‘different’ by treating difference as a function of the relationships between those naming the difference and those so named.”).

⁶⁴ *See id.* at 111-12.

⁶⁵ *See id.* at 112, 216. This approach is similar to a paradigm that has been referred to in the literature as the “sociopolitical definition of disability,” which posits that “the major problems confronted by people with disabilities can be traced to the restraints imposed by a disabling environment instead of personal defects or deficiencies.” Harlan Hahn, *Accommodations and the ADA: Unreasonable Bias or Biased Reasoning?* 21 BERKELEY J. EMP. & LAB. L. 166, 173 (2000). *See also* Laura L. Rovner, *Disability, Equality, and Identity*, 55 ALA. L. REV. 1043, 1051-54 (2004) (explaining that the “socio-political model of disability” views the challenges confronting individuals with disabilities as deriving from an “inhospitable” environment as well as inferior cultural constructs of disability). Similarly, a “social system model” “refers to disabilities that are socially constructed and relevant to some but not all settings.” NATIONAL RESEARCH COUNCIL, *EDUCATING ONE AND ALL: STUDENTS WITH DISABILITIES AND STANDARDS-BASED REFORM* 81 (Lorraine M. McDonnell et al., eds., 1997).

than the traditional rights-analysis approach.⁶⁶ While IDEA was enacted to remedy past discrimination against children with disabilities by providing them with the same right as their non-disabled peers to have access to FAPE, from the outset, the statute has also sought to foster positive relationships that support the child's development and progress.⁶⁷ Consequently, examining rights and obligations under IDEA in terms of the underlying relationships is a particularly effective means by which to analyze the issues involved.⁶⁸ The remainder of Part I.B discusses three important kinds of relationships that are promoted by the statute: (1) the relationship between the school district and the child with a disability; (2) the relationship between the school district and the parent; and (3) the relationship between students with disabilities and their non-disabled peers.⁶⁹ These relationships are revisited in Part III in reference to the Supreme Court's decision in *Schaffer*.⁷⁰

*1. Relationship between the School District and the Child with a Disability*⁷¹

A primary goal of IDEA is "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living."⁷² The right of children with disabilities to have access to a free appropriate public education (FAPE) corresponds to a substantial affirmative obligation on the part of local school

⁶⁶ See *infra* notes 66-67 and accompanying text.

⁶⁷ See *infra* Parts I.B.1-3.

⁶⁸ A social-relations approach is applicable to an analysis of IDEA for two reasons: (1) the statute addresses the education of children who have been labeled "different" because of their perceived disabilities and (2) the statute itself promotes positive social relations.

⁶⁹ See *infra* notes 70-118 and accompanying text.

⁷⁰ See *infra* notes 203-74 and accompanying text.

⁷¹ The relationship between the school district and the child with a disability refers to the overall relationship as well as the individual relationships between the child and school district personnel.

⁷² 20 U.S.C.A. § 1400(d)(1)(A) (West Supp. 2006).

districts.⁷³ Providing students with disabilities with FAPE does not merely consist of the completion of a checklist of procedures by the school district but also requires the provision of a substantive level of education, defined by the Supreme Court as “some educational benefit.”⁷⁴ The scope of “some educational benefit” has been further clarified by the requirement included in the 1997 and 2004 reauthorizations of IDEA that school districts ensure that their students with disabilities have access to,⁷⁵ are involved in, and make progress in⁷⁶ the general education curriculum⁷⁷ – i.e., the

⁷³ See *id.* § 1413(a)(1) (incorporating by reference *id.* § 1412(a)(1)).

⁷⁴ In its decision in *Board of Education v. Rowley*, the Supreme Court outlined the following two-pronged inquiry to determine whether a school district has provided its students with disabilities with an appropriate education under FAPE: (1) compliance with the procedural requirements of the law and (2) the provision of an educational program that is “reasonably calculated to enable the child to receive educational benefits.” 458 U.S. 176, 206-07 (1982). The Court gave minimal guidance, however, with respect to the nature of the educational services that would constitute “some educational benefit.” *Id.* at 200. In the years following *Rowley*, the issue was again brought to the lower courts, with some courts concluding that the benefit had to be more than minimal. See *e.g.*, *Board of Educ. v. Diamond*, 808 F.2d 987, 991-92 (3d Cir. 1986); *Doe v. Smith*, 879 F.2d 1340, 1341 (6th Cir. 1989); *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 179-82 (3d Cir. 1988). At the same time, others emphasized that only a “basic floor of opportunity” was required. See *e.g.*, *Weiss v. School Bd. of Hillsborough County*, 141 F.3d 990, 997 (11th Cir. 1998); *Gregory K. v. Longview Sch. Dist.*, 811 F.2d 1307, 1314 (9th Cir. 1987).

⁷⁵ 20 U.S.C.A. § 1400(c)(5)(A).

⁷⁶ *Id.* §§ 1414(d)(1)(A)(i)(I)(aa), (II)(aa), (IV)(bb); see also 34 C.F.R. §§ 300.320(a)(1)(i), (2)(i)(A), (4)(ii) (2007).

⁷⁷ As part of 2004 reauthorization of IDEA, Congress replaced the words “general curriculum” used in the 1997 reauthorization with the phrase “general education curriculum.” See, *e.g.*, 20 U.S.C.A. § 1400(c)(5) (West Supp. 2006) (“Almost 30 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by ... ensuring their access to the general education curriculum in the regular classroom, to the maximum extent possible.”).

The right of children with disabilities to have access to the general education curriculum can be viewed as comprising three interrelated stages:

The first stage, access, refers to the accessibility of the curriculum to the student. Involvement, the second stage, can be thought of as the on-going

same curriculum as that provided to students without disabilities.⁷⁸ The obligation to provide FAPE under IDEA, including the provision of access to the general education curriculum, creates a special relationship between the school district and the child with a disability, centering on the design and implementation of an individualized education program (IEP) that addresses the child's unique learning needs.⁷⁹

The IEP has been described as both a document and a process.⁸⁰ The document must contain specific information

process of meaningful participation by the student in the general education curriculum and, as such, is an interim phase that links access to progress. Progress in the general education curriculum, the third stage, refers not only to a final outcome, but also to an evaluative measure that can feed back into the earlier stages of access and involvement.

Joanne Karger, *What IDEA and NCLB Suggest about Curriculum Access for Students with Disabilities*, in *THE UNIVERSALLY DESIGNED CLASSROOM: ACCESSIBLE CURRICULUM AND DIGITAL TECHNOLOGIES* 72 (David H. Rose et al., eds., 2005). See also Chuck Hitchcock et al., *Equal Access, Participation, and Progress in the General Curriculum*, in *THE UNIVERSALLY DESIGNED CLASSROOM: ACCESSIBLE CURRICULUM AND DIGITAL TECHNOLOGIES* 37 (David H. Rose et al., eds., 2005).

⁷⁸ 34 C.F.R. § 300.320(a)(1)(i).

⁷⁹ See 20 U.S.C.A. § 1414(d)(1)(A)(i) (describing requirements pertaining to contents of IEPs). See also BARBARA D. BATEMAN & CYNTHIA M. HERR, *WRITING MEASURABLE IEP GOALS AND OBJECTIVES* 38-39 (2003) (stating that the child's unique needs serve as "the starting point for the IEP" and should be "driving the IEP content."); LAWRENCE M. SIEGEL, *THE COMPLETE IEP GUIDE: HOW TO ADVOCATE FOR YOUR SPECIAL ED CHILD* 2/14 (2d ed. 2002) (noting that the "child's needs dictate what is in an IEP" and that "the IEP must fit the child, not the other way around.").

⁸⁰ See Steven W. Smith, *Individualized Education Programs (IEPs) in Special Education – From Intent to Acquiescence*, 57 *EXCEPTIONAL CHILDREN* 6, 6 (1990). See also BATEMAN & HERR, *supra* note 78, at 10 (explaining that while the IEP document serves as the "heart of IDEA," "it's the IEP process, with parents as full and equal participants with the school personnel, that determines what services the child will actually receive."); JUDITH E. HEUMANN & KENNETH R. WARLICK, OFFICE OF SPECIAL EDUC. & REHABILITATIVE SERVS., U.S. DEP'T OF EDUC., *A GUIDE TO THE INDIVIDUALIZED EDUCATION PROGRAM: COVER MEMO 2* (Policy Memo No. 00-19, June 30, 2000), available at <http://199.231.132.47/discidea/topdocs/iep/covermem.htm> (last visited Nov. 15, 2007) ("The Congress intended for the IEP to be both a process and a document through which each eligible child with a disability would receive a free appropriate public education,

such as a statement of the child's present levels of academic achievement and functional performance, including how the child's disability impacts his/her involvement and progress in the general education curriculum.⁸¹ In addition, the IEP must specify measurable annual goals to enable the child to be involved in and progress in the general education curriculum⁸² as well as the special education and related services, supplementary aids and services, and program modifications or support for school personnel that will be provided to enable the child to be involved in and progress in the general education curriculum.⁸³ Moreover, the IEP must indicate the

based on his or her individual needs"); MARGARET J. MCLAUGHLIN ET AL., INDIVIDUAL EDUCATIONAL PROGRAMS: ISSUES AND OPTIONS FOR CHANGE 1 (Project Forum, Nat'l Ass'n of State Dirs. of Special Educ. Year 2 Deliverable No. 5-2-4), available in ERIC, ED No. 385038 (referring to IEP as a document defining special education and related services and as a process offering "the opportunity for teachers and other service providers, parents, and students to provide input into the development of a plan tailored to the student's individual educational strengths and requirements.").

⁸¹ 20 U.S.C.A. § 1414(d)(1)(A)(i)(I)(aa); see also 34 C.F.R. § 300.320(a)(1)(i). The significance of determining how the child's disability impacts his/her participation in the general education curriculum cannot be overstated. See DIANE TWACHTMAN-CULLEN & JENNIFER TWACHTMAN-REILLY, HOW WELL DOES YOUR IEP MEASURE UP? QUALITY INDICATORS FOR EFFECTIVE SERVICE DELIVERY 11 (2002). This statement "addresses the *impact* of the student's disability on his/her life, particularly as it relates to the student's ability to benefit from the mainstream environment." *Id.* (emphasis in original). Consequently, in drafting such a statement, IEP teams should think about the following: "Issues related to independence, prompt levels, and the general need for assistance in inclusive situations are appropriately stated here. Moreover, information regarding these issues provides the basis for determining not only whether modifications and accommodations are needed, but also the specific types that may be necessary." *Id.*

⁸² 20 U.S.C.A. § 1414(d)(1)(A)(i)(II)(aa); see also 34 C.F.R. § 300.320(a)(2)(i)(A).

⁸³ 20 U.S.C.A. § 1414(d)(1)(A)(i)(IV)(bb); see also 34 C.F.R. § 300.320(a)(4)(ii). See also H. REP. NO. 105-95, at 100 (1997), reprinted in 1997 U.S.C.A.A.N. 78, 97-98 ("The new emphasis on participation in the general education curriculum ... is intended to produce attention to the accommodations and adjustments necessary for disabled children to access the general education curriculum and the special services which may be

appropriate accommodations that are necessary to measure the student's performance on state and districtwide assessments or a statement as to why the alternate assessment selected is appropriate.⁸⁴

The IEP "process" refers to the collaborative effort of various participants in the drafting of the document.⁸⁵ Because IDEA requires that the IEP be developed by a multi-disciplinary team consisting of the child's parents as well as various district personnel,⁸⁶ all members must work together in the design of the child's educational program.⁸⁷ It is

necessary for appropriate participation in particular areas of the curriculum due to the nature of the disability.").

⁸⁴20 U.S.C.A. § 1414(d)(1)(A)(i)(VI); *see also* 34 C.F.R. § 300.320(a)(6).

⁸⁵ *See* BATEMAN & HERR, *supra* note 78, at 10; MCLAUGHLIN ET AL., *supra* note 79, at 1.

⁸⁶ The team must consist of the following individuals: (1) the child's parents; (2) not less than one regular education teacher (if the child is, or may be, participating in the regular education environment); (3) not less than one special education teacher or not less than one special education provider; (4) a local educational representative who is qualified to provide or supervise the provision of special education services and is knowledgeable about the general education curriculum and the availability of district resources; (5) an individual who can interpret the instructional implications of evaluation results; (6) at the discretion of the parent or district, other individuals with knowledge or special expertise regarding the child, including related services personnel; and (7) when appropriate, the child. 20 U.S.C.A. § 1414(d)(1)(B); *see also* 34 C.F.R. § 300.321(a). The 2004 reauthorization also clarified that, if the parent and district agree, a member of the team will not be required to attend a meeting, in whole or in part, when the member's area of the curriculum or related services is not being modified or discussed. 20 U.S.C.A. § 1414(d)(1)(C)(i) (West Supp. 2006); *see also* 34 C.F.R. § 320.321(e)(1) (2007). Moreover, even if the meeting involves a modification to or discussion of the member's area of the curriculum or related services, the member can be excused from attending the meeting, in whole or in part, if the parent and district consent and the member submits his/her input in writing. 20 U.S.C.A. § 1414(d)(1)(C)(ii); *see also* 34 C.F.R. § 320.321(e)(2). The parent's agreement and consent in both instances must be in writing. 20 U.S.C.A. § 1414(d)(1)(C)(iii).

⁸⁷ *See* JUDY W. WOOD, ADAPTING INSTRUCTION TO ACCOMMODATE STUDENTS IN INCLUSIVE SETTINGS 119 (3d ed. 1998) (discussing importance of "[e]stablishing clear channels of communication among team members..."). In the early years of the implementation of the EAHCA, many studies had documented the limited participation of general

particularly important that, in developing an appropriate IEP, school personnel consider the perspective of the child as well as that of his/her parents.⁸⁸ Moreover, the process of implementation of the child's IEP involves decisions on the part of the school district concerning how to provide a supportive learning environment, including the promotion of positive interactions between the student and his/her teachers⁸⁹ – for example the child's teachers must know how to engage

education teachers in the IEP process. *See, e.g.*, James E. Gilliam & Margaret C. Coleman, *Who Influences IEP Committee Decisions?* 47 *EXCEPTIONAL CHILDREN* 642, 642-43 (1981) (finding that IEP team members gave a higher ranking to the perceived importance of general education teachers prior to the IEP meeting than team members gave to general education teachers' actual participation at the meeting); Marleen C. Pugach, *Regular Classroom Teacher Involvement in the Development and Utilization of IEPs*, 48 *EXCEPTIONAL CHILDREN* 371, 373-74 (1982) (sending questionnaires and interviewing general education teachers and finding that majority of teachers were not involved in the development of IEPs for students in their classes); Ann Nevin et al., *What Administrators Can Do to Facilitate the Regular Classroom Teacher's Role in Implementing Individual Educational Plans: An Empirical Analysis*, 14 *PLANNING & CHANGING* 150, 156 (1983) (surveying general education teachers and finding that they were not very involved in IEP development process).

⁸⁸ *See* MARGARET J. MCLAUGHLIN & VICTOR NOLET, WHAT EVERY PRINCIPAL NEEDS TO KNOW ABOUT SPECIAL EDUCATION 47 (2004) (“To be able to work effectively with parents of students with disabilities a [school district] must understand and respect the perspective of those parents.”).

⁸⁹ The responsibility of school districts to determine the manner in which the student's IEP should be implemented in order to ensure that the child receives FAPE is underscored by the Supreme Court's decision in *Board of Education v. Rowley*, in which the Court expressed a desire to defer to the expertise and decisions of educational practitioners, stating that “courts must be careful to avoid imposing their view of preferable educational methods upon the States ... courts lack the ‘specialized knowledge and experience’ necessary to resolve ‘persistent and difficult questions of educational policy.’” 458 U.S. 176, 207-08 (1982) (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 42 (1973)). Consequently, the Court in *Rowley* concluded that “once a court determines that the requirements of the Act have been met, questions of methodology are for resolution by the States.” *Id.* at 208.

the child and draw him/her into class activities.⁹⁰ All of the responsibilities associated with the IEP as both a document and process help to shape a unique relationship between the school district and the child with a disability.⁹¹

2. Relationship between the School District and the Parent

From the outset, another significant relationship promoted by the statute is the relationship between the school district and the parent.⁹² In an effort to create a meaningful partnership between parents and school districts, the statute, calls for the participation of parents as members of their child's IEP team.⁹³ In addition, the statute provides various procedural safeguards to help parents ensure that their child

⁹⁰ See CHERYL M. JORGENSEN, *RESTRUCTURING HIGH SCHOOLS FOR ALL STUDENTS: TAKING INCLUSION TO THE NEXT LEVEL* 95 (1998) (noting that “[w]hen effective teachers conduct whole-class discussions, sit with small groups, or speak to students one to one, they personalize instruction for each student ... ask different kinds of questions, use a variety of motivational techniques based on the student’s personality, and push the student to think more critically.”); Christopher Murray & Mark T. Greenberg, *Examining the Importance of Social Relationships and Social Contexts in the Lives of Children with High-Incidence Disabilities*, 39 J. SPECIAL EDUC. 220, 228 (2006) (finding that negative relationship patterns between teachers and students with disabilities were associated with increased behavioral problems on the part of the students, whereas students with disabilities who felt supported by their teachers were less likely to experience problems with anxiety).

⁹¹ See *supra* notes 80-89 and accompanying text.

⁹² See *Schaffer v. Weast*, 546 U.S. 49, 53 (2005) (“The core of the statute ... is the cooperative process that it establishes between parents and schools); *Rowley*, 458 U.S. at 182 n. 6 (discussing “Congress’ effort to maximize parental involvement in the education of each handicapped child.”). See also *Honig v. Doe*, 484 U.S. 305, 311 (1988) (noting that “aware that schools had all too often denied ... children appropriate educations without in any way consulting their parents, Congress repeatedly emphasized throughout the Act the importance and indeed the necessity of parental participation in both the development of the IEP and any subsequent assessments of its effectiveness.”); *School Comm. of Burlington v. Department of Educ.*, 471 U.S. 359, 368 (1985) (“In several places, the Act emphasizes the participation of the parents in developing the child’s educational program and assessing its effectiveness.”).

⁹³ See *supra* note 85 (listing members of the IEP team).

receives FAPE.⁹⁴ For example, parents are provided the right to inspect their child's educational records; participate in meetings concerning their child's education with respect to issues of identification, evaluation, placement, or FAPE; and obtain an independent educational evaluation.⁹⁵ Parents also have the right to file a request for a due process hearing for complaints in matters of identification, evaluation, educational placement, or FAPE.⁹⁶ IDEA does not indicate, however, whether the parents or the school district should bear the burden of proof at due process hearings.⁹⁷

While the intent of IDEA is for parents to become partners with school districts in the development of their child's educational program, research has shown that many parents feel denigrated in their relationships with school personnel, who are in positions of power.⁹⁸ In fact, parents of

⁹⁴ 20 U.S.C.A. § 1415 (West Supp. 2006) (specifying procedural safeguards afforded parents).

⁹⁵ *Id.* § 1415(b)(1); *see also* 34 C.F.R. §§ 500.501-500.502 (2007).

⁹⁶ 20 U.S.C.A. § 1415(b)(6)(A); *see also* 34 C.F.R. § 300.507(a)(1). The 2004 reauthorization of IDEA incorporated additional procedural protections for parents, including the requirement that, if the school district has not sent the parent a prior written notice, the school district must, within 10 days of receiving the complaint, provide the parent a written response, consisting of an explanation of why the district refused to act in the manner raised in the complaint, a description of other options considered but rejected by the IEP team, and a description of evaluation procedures, assessments, records, reports, and other factors used by the district in arriving at its decision. 20 U.S.C.A. § 1415(c)(2)(B)(i)(I) (West Supp. 2006); *see also* 34 C.F.R. § 300.508(e) (2007).

⁹⁷ *See supra* note 8 and accompanying text.

⁹⁸ *See* David M. Engel, *Law, Culture, and Children with Disabilities: Educational Rights and the Construction of Difference*, 1991 DUKE L.J. 166, 188 (1991) ("Most parents describe themselves as terrified and inarticulate. Some liken themselves to prisoners awaiting their sentence, and this courtroom imagery emphasizes their perception of the judgmental rather than cooperative quality of the decisionmaking as well as their feelings of vulnerability and disempowerment."); Pamela Pruitt Garriott et al., *Teachers as Parents, Parents as Children: What's Wrong with This Picture?* 45 PREVENTING SCH. FAILURE 37, 42 (2000) (finding that some parents "felt devalued, disrespected, and ostracized from the [IEP] planning process" and that "[b]eing placed in this subservient position seemed to create an unnatural dynamic in the parent/professional interaction that fostered submissive, dependent behavior on the part of the

children with disabilities sometimes feel as though they wear the labels assigned to their children.⁹⁹ In addition, the proliferation of due process hearings has further contributed to an adversarial relationship between parents and school districts, fraught with emotional and financial strain for both sides.¹⁰⁰ Parents of children from low-income households are particularly affected by the power differential in their relationships with school district personnel.¹⁰¹ Research has shown that although students with disabilities are more likely to come from low-income households than children in the general population and to have parents with lower levels of

parent and dominant, authoritarian behavior on the part of the educator.”); Alan Gartner & Dorothy Kerzner Lipsky, *Beyond Special Education: Toward a Quality System for All Students*, 57 HARV. EDUC. REV. 367, 378-79 (1987) (describing the “power struggles” experienced by parents of children with disabilities as part of their involvement in the decisions affecting their child’s education.).

⁹⁹ Gartner & Lipsky, *supra* note 97, at 378 (citations omitted) (“Parents of children with disabilities often feel as if they share their children’s labels and are thereby perceived by others as part of the overall problem and in need of professional services for themselves.”).

¹⁰⁰ In a review of the literature pertaining to due process hearings, Neal and Kirp found that “[p]arents generally reported both considerable expense and psychological cost in the hearing process. They often felt themselves blamed either for being bad parents or for being troublemakers.” David Neal & David L. Kirp, *The Allure of Legalization Reconsidered: The Case of Special Education*, in *SCHOOL DAYS, RULE DAYS: THE LEGALIZATION AND REGULATION OF EDUCATION* 343, 355 (David L. Kirp & Donald N. Jensen eds., 1986). At the same time, “[s]chool districts regarded the hearings as expensive, time-consuming and a threat to their professional judgment and skill.” *Id.* See also Steven S. Goldberg & Peter J. Kuriloff, *Evaluating the Fairness of Special Education Hearings*, 57 EXCEPTIONAL CHILDREN 546, 553 (1991) (“[H]earings seem to have large personal and transactional costs. Many parents and school officials believed the hearings were emotionally traumatic.”); Perry A. Zirkel, *Special Education: Needless Adversariness?* 74 PHI DELTA KAPPAN 809, 810 (1993) (advocating for a change in IDEA that would reallocate resources toward educational services rather than “needless adversariness.”).

¹⁰¹ See Judith Singer & John A. Butler, *The Education for All Handicapped Children Act: Schools as Agents of Social Reform*, 57 HARV. EDUC. REV. 125, 151 (1987) (evaluating implementation of the EAHCA and finding that “[p]arental participation has been weak among those of low income and little education.”).

education,¹⁰² middle class parents are those who most often proceed to a hearing.¹⁰³ Thus, it appears that the due process system established under IDEA has not facilitated the involvement of low-income parents, many of whom may not have the knowledge or resources to bring successful claims against the district.¹⁰⁴

¹⁰² In a statistical analysis of the Special Education Elementary Longitudinal Study (SEELS) dataset, consisting of more than 12,000 elementary and middle school students receiving special education services, it was found that 36% of students with disabilities came from households with incomes of \$25,000 or less, as compared to 24% of students in the general population ($p < .001$). Mary Wagner et al., *Characteristics of Students' Households*, in *THE CHILDREN WE SERVE: THE DEMOGRAPHIC CHARACTERISTICS OF ELEMENTARY AND MIDDLE SCHOOL STUDENTS WITH DISABILITIES AND THEIR HOUSEHOLDS* 28 (Rep. of the Special Educ. Elementary Longitudinal Study (SEELS) Prepared for the Office of Special Educ. Programs, U.S. Dep't of Educ., Sept., 2002), available at http://www.seels.net/designdocs/SEELS_Children_We_Serve_Report.pdf (last visited Nov. 15, 2007). The study also found that 16% of students with disabilities had mothers who had completed college, as compared to 25% of students in the general population ($p < .001$). *Id.* at 23-24. Similarly, 20% of students with disabilities had fathers who had completed college, as compared to 34% of students in the general population. *Id.* at 24.

¹⁰³ See Milton Budoff et al., *Due Process Hearings: Appeals for Appropriate Public School Programs*, 48 *EXCEPTIONAL CHILDREN* 180, 180 (1981) (examining special education due process hearings in Massachusetts and finding that most hearings were "initiated by middle class parents seeking placements for learning disabled children"); Neal & Kirp, *supra* note 99, at 354 (noting that, unlike middle class parents, who tend to bring claims against the school districts for failure to provide an "appropriate" education and for tuition reimbursement, parents from low-income households are more likely "to resist changes proposed by the school, rather than to initiate change."); Michael J. Opuda, *A Comparison of Parents who Initiated Due Process Hearings and Complaints in Maine* 92 (1997) (unpublished Ph.D. dissertation, Virginia Polytechnic Institute and State University), available in Dissertation Abstracts International, UMI No. 9923374 (examining due process hearings and complaint investigations in Maine and finding that families who initiated hearings tended to have higher income levels and higher levels of paternal education).

¹⁰⁴ See Neal & Kirp, *supra* note 99, at 354; Singer & Butler, *supra* note 100, at 151. See also 150 CONG. REC. S5351 (daily ed. May 12, 2004)

3. Relationship between Students with Disabilities and Their Non-Disabled Peers

A third relationship promoted by IDEA, the relationship between students with disabilities and their non-disabled peers, is reflected in the statute's strong preference for the integration of students with disabilities into the regular classroom.¹⁰⁵ IDEA specifies that children with disabilities are to be educated in the "least restrictive environment" (LRE) – i.e., to the maximum extent appropriate, children with disabilities are to be educated alongside their non-disabled peers.¹⁰⁶ Removal from the regular class should occur "only when the 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...."¹⁰⁷ Moreover, the IEP must include a statement explaining "the extent, if any, to which the child will not participate with nondisabled children in the regular class...."¹⁰⁸ Some legal and educational scholars have noted that the LRE requirement

(statement of Sen. Kennedy) (discussing disadvantages of parents in relation to school districts with respect to IDEA's due process system and noting: "Most parents don't have access to any attorney, or must rely on low-cost legal aid.").

¹⁰⁵ See *Board of Educ. v. Rowley*, 458 U.S. 176, 181 n. 4 (noting the statute's "preference for 'mainstreaming' handicapped children").

¹⁰⁶ 20 U.S.C.A. § 1412(a)(5)(A) (West Supp. 2006); see also 34 C.F.R. § 300.114(a)(2) (2007). The statute's implementing regulations further specify that school districts have a continuum of services available for their students with disabilities. 34 C.F.R. § 300.115. Similarly, the statute promotes the integration of students with disabilities into "extracurricular and other non-academic activities." 20 U.S.C.A. § 1414(d)(1)(A)(i)(IV)(bb); see also 34 C.F.R. § 300.320(a)(4)(ii).

¹⁰⁷ 20 U.S.C.A. § 1412(a)(5)(A). Because the Supreme Court has not ruled directly on the LRE requirement, the standards established at the circuit court level provide the highest authority for this provision. See *Sacramento Unified Sch. Dist. v. Rachel H.*, 14 F.3d 1398, 1403-04 (9th Cir. 1994); *Oberti v. Board of Educ.*, 995 F.2d 1204, 1217-18 (3d Cir. 1993); *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1048-50 (5th Cir. 1989); *Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir. 1983).

¹⁰⁸ 20 U.S.C.A. § 1414(d)(1)(A)(i)(V); 34 C.F.R. § 300.320(a)(5).

has created a “rebuttable presumption” in favor of integration.¹⁰⁹

The integration of students with disabilities into the regular classroom allows for the development of positive social relations between children with disabilities and their non-disabled peers by creating opportunities for interaction and socialization.¹¹⁰ In addition, such integration equips students with disabilities with valuable skills they can use when they leave the school setting by providing them exposure to more challenging curriculum.¹¹¹ Research has

¹⁰⁹ See Martin A. Kotler, *The Individuals with Disabilities Education Act: A Parent's Perspective and Proposal for Change*, 27 U. MICH. J.L. REFORM 331, 380 (1994). See also Jean B. Crockett, *The Least Restrictive Environment and the 1997 IDEA Amendments and Federal Regulations*, 28 J.L. & EDUC. 543, 545-46 (1999).

¹¹⁰ See LINDA G. MORRA, U.S. GEN. ACCOUNTING OFFICE, SPECIAL EDUCATION REFORM: DISTRICTS GRAPPLE WITH INCLUSION PROGRAMS, TESTIMONY BEFORE THE SUBCOMMITTEE ON SELECT EDUCATION AND CIVIL RIGHTS COMMITTEE ON EDUCATION AND LABOR, U.S. HOUSE OF REPRESENTATIVES 12 (April 28, 1994), available in ERIC, ED No. 372552 (stating that “[i]nclusion gives disabled students the opportunity to have good peer role models” and that the “greatest gains” of inclusion for disabled students “have been in the areas of social interaction, language development, appropriate behavior, and self-esteem.”); Dale Fryxell & Craig H. Kennedy, *Placement Along the Continuum of Services and Its Impact on Students' Social Relationships*, 20 J. ASSOC. FOR PERSONS WITH SEVERE HANDICAPS 259, 265 (1995) (comparing experiences of students with severe disabilities who were educated in regular classrooms with those of students with severe disabilities who were educated in self-contained classrooms and finding that the former: “(a) had higher levels of social contact with peers without disabilities, (b) received and provided higher proportions of social support, and (c) had larger friendship networks composed primarily of peers without disabilities.”); Andrea McDonnell et al., *Educating Students with Severe Disabilities in Their Neighborhood School: The Utah Elementary Integration Model*, 12 REMEDIAL & SPECIAL EDUC. 34, 42 (1991) (finding that students with severe disabilities participating in an inclusive education model had greater contact with their non-disabled peers both in school and after school).

¹¹¹ For many years, the special education curriculum, which was often provided outside of the regular classroom, was distinctly separate from the “traditional” curriculum. See generally Marleen C. Pugach & Cynthia L. Warger, *Curriculum Considerations*, in INTEGRATING GENERAL AND SPECIAL EDUCATION 125-48 (John I. Goodlad & Thomas C. Lovitt, eds. 1993). The inclusion of the IEP statement concerning how the child’s

shown that, controlling for other differences, students with disabilities who spend more time in regular classes score higher on reading and mathematics tests than students who spend less time in regular classes.¹¹² Furthermore, the inclusion of students with disabilities in the regular class can lead teachers to reconceptualize the learning environment in a manner that accommodates the multiple and varied needs of all students.¹¹³ When classrooms are restructured in this manner, the stigma of difference is removed from the individual child with a disability and the definition of

disability impacts his/her involvement and progress in the general curriculum, as part of the 1997 reauthorization of IDEA, was intended to combat this problem. *See* H. REP. NO. 105-95, at 100 (1997), *reprinted in* 1997 U.S.C.C.A.N. 78, 97 (“This provision is intended to ensure that children’s special education and related services are in addition to and are affected by the general education curriculum, not separate from it.”).

It is also important to point out that promoting the exposure of students with disabilities to a more challenging curriculum in the regular classroom has the secondary benefit of helping students with disabilities apply their practical learning skills to their lives outside of school. *See* JORGESON, *supra* note 89, at 7 (noting that “[l]ike all students, [a student with a disability] needs to learn to work independently and with her peers, to manage time and materials, to contribute thoughts and hear the thoughts of others, and to solve problems and rethink solutions – in short, to function in the real world.”).

¹¹² Jose Blackorby et al., *The Academic Performance of Elementary and Middle School Students*, in ENGAGEMENT, ACADEMICS, SOCIAL ADJUSTMENT, AND INDEPENDENCE: THE ACHIEVEMENTS OF ELEMENTARY AND MIDDLE SCHOOL STUDENTS WITH DISABILITIES 4-18 (Rep. of the Special Educ. Elementary Longitudinal Study (SEELS) Prepared for the Office of Special Educ.

Programs, U.S. Dep’t of Educ., Oct., 2005), *available at* http://www.seels.net/designdocs/engagement/All_SEELS_outcomes_10-04-05.pdf (last visited Nov. 15, 2007).

¹¹³ *See* Anne Meyer & David H. Rose, *The Future Is in the Margins: The Role of Technology and Disability in Educational Reform*, in THE UNIVERSALLY DESIGNED CLASSROOM: ACCESSIBLE CURRICULUM AND DIGITAL TECHNOLOGIES 24 (David H. Rose et al., eds. 2005) (noting that when “concepts of learning and individual differences” are changed to address the needs of diverse learners – for example, students with disabilities – the classroom comes to be characterized by “more flexible and diversified teaching so that all learners can be appropriately challenged, supported, and engaged.”).

normality is changed.¹¹⁴ Integration also has the potential to benefit the larger school community by sensitizing non-disabled students to become “more compassionate, more helpful, and more friendly in relating to ... disabled students.”¹¹⁵ Thus, IDEA’s promotion of the relationship between students with disabilities and their non-disabled peers can have a positive effect on society as a whole by demonstrating to the broader community that “disability is a natural aspect of life.”¹¹⁶

¹¹⁴ See JORGESON, *supra* note 89, at 12 (stating that as a result of integrating students with disabilities into the regular classroom, all students “are less bound by false ideals of normalcy...”). Cf. Gartner & Lipsky, *supra* note 97, at 382 (pointing out that one of the factors that led to the historical exclusion of children with disabilities from the public schools was “a narrowing of the definition of what [was] considered ‘normal.’”).

¹¹⁵ MORRA, *supra* note 109, at 12. See also Spencer J. Salend & Laurel M. Garrick Duhaney, *The Impact of Inclusion on Students With and Without Disabilities and Their Educators*, 20 REMEDIAL & SPECIAL EDUC. 114, 120 (1999) (summarizing the literature on the impact of inclusion and stating that non-disabled students indicated that “inclusion benefits them in terms of an increased acceptance, understanding, and tolerance of individual differences; a greater awareness and sensitivity to the needs of others; greater opportunities to have friendships with students with disabilities; and an improved ability to deal with disability in their own lives.”).

Research has also found that the inclusion of students with disabilities in regular classrooms does not have a negative effect on the academic achievement of the non-disabled students in the classroom. See Allison Gruner, *Inclusion and the “Other” Students: Examining the Relationship between Inclusive Classrooms, Their Contextual Characteristics, and Achievement for Nondisabled Students* 91 (2005) (unpublished Ed.D. dissertation, Harvard Graduate School of Education), available in Dissertation Abstracts International, UMI No. 3176332. In addition, practices such as frequent meetings between the general education and special education teacher, in certain types of inclusive classrooms, can have a positive impact on the academic achievement of the students without disabilities in the classroom. See *id.*

¹¹⁶ THOMAS HEHIR, NEW DIRECTIONS IN SPECIAL EDUCATION: ELIMINATING ABLEISM IN POLICY AND PRACTICE 69 (2005). See also 20 U.S.C.A. § 1400(c)(1) (West Supp. 2006) (“Disability is a natural part of the human experience ... Improving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities.”).

In summary, a social-relations approach is particularly appropriate for analyzing issues of rights and obligations under IDEA.¹¹⁷ While the statute was enacted to remedy past discrimination against children with disabilities by providing them with the same right as their non-disabled peers to have access to FAPE, the statute also strives to promote positive social relations that benefit the child.¹¹⁸ In particular, the statute supports three important types of relationships: the relationship between the school district and the child, the relationship between the school district and the parent, and the relationship between students with disabilities and their non-disabled peers.¹¹⁹

II. The Burden of Proof and IDEA

A. *The Concept of the Burden of Proof*

The concept of the “burden of proof” consists of two separate burdens.¹²⁰ The first, the “burden of production,” refers to the burden of bringing forward sufficient evidence with respect to a particular fact at issue.¹²¹ The second, the “burden of persuasion,” refers to the burden of convincing the trier of fact that the alleged fact is true.¹²² When the party

¹¹⁷ See *supra* notes 66-115 and accompanying text.

¹¹⁸ See *supra* notes 66-67 and accompanying text.

¹¹⁹ See *supra* notes 70-115 and accompanying text.

¹²⁰ See *Schaffer v. Weast*, 546 U.S. 49, 56 (2005); 2 JOHN W. STRONG, MCCORMICK ON EVIDENCE § 336, at 409 (5th ed. 1999) [hereinafter MCCORMICK]; 1 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 62, at 312 (2d ed., 1994); 9 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2487, at 299 (James H. Chadbourne rev., 1981). Although historically the term “burden of proof” was used to describe two separate burdens, the term has sometimes been used to refer only to the burden of persuasion. See *Director, Office of Workers’ Compensation Programs, Dep’t of Labor v. Greenwich Collieries Dir.*, 512 U.S. 267, 272-76 (1994).

¹²¹ See MCCORMICK, *supra* note 119, § 336, at 409. See also *Schaffer*, 546 U.S. at 56; *Director, Office of Workers’ Compensation Programs*, 512 U.S. at 272; MUELLER & KIRKPATRICK, *supra* note 119, § 62, at 313; WIGMORE, *supra* note 119, § 2487, at 292.

¹²² See MCCORMICK, *supra* note 119, § 336, at 409; MUELLER & KIRKPATRICK, *supra* note 119, § 62, at 313. The “burden of persuasion” has also been referred to as the “risk of nonpersuasion.” See MCCORMICK,

bearing the burden of production is unable to offer sufficient evidence in his/her favor, this party will not prevail.¹²³ The burden of persuasion comes into play after the burden of production has been met and all of the evidence has been presented.¹²⁴ In order for a party to meet the burden of persuasion in IDEA due process hearings, the party must prove its claim by a preponderance of the evidence.¹²⁵ If the evidence presented is equally divided between the two parties – i.e., in equipoise – the party bearing the burden of persuasion will not prevail.¹²⁶

Although the burdens of production and persuasion are typically allocated to the party initiating the proceeding, in certain circumstances, these burdens may be assigned to the non-moving party for reasons such as policy considerations, convenience, or fairness.¹²⁷ An example of a policy consideration would be burdening the defendant for a disfavored defense such as contributory negligence.¹²⁸ With respect to issues of convenience and fairness, considerations such as which party has greater knowledge and access to information are relevant.¹²⁹ There is, however, no single test

supra note 119, § 336, at 410; MUELLER & KIRKPATRICK, *supra* note 119, § 62, at 313; WIGMORE, *supra* note 119, § 2486, at 287.

¹²³ See MCCORMICK, *supra* note 119, § 336, at 409; MUELLER & KIRKPATRICK, *supra* note 119, § 62, at 313; WIGMORE, *supra* note 119, § 2487, at 293.

¹²⁴ See MCCORMICK, *supra* note 119, § 336, at 409.

¹²⁵ 20 U.S.C.A. § 1415(i)(2)(C)(iii) (West Supp. 2006).

¹²⁶ See *Schaffer*, 546 U.S. at 55. See also *Director, Office of Workers' Compensation Programs*, 512 U.S. at 272.

¹²⁷ See MCCORMICK, *supra* note 119, § 337, at 412-15. See also MUELLER & KIRKPATRICK, *supra* note 119, § 63, at 314-17; WIGMORE, *supra* note 119, §§ 2486, 2488, at 288-92, 299-300.

¹²⁸ See MCCORMICK, *supra* note 119, § 337, at 413; MUELLER & KIRKPATRICK, *supra* note 119, § 63, at 314. Certain policy considerations embedded in statutory or regulatory language may provide guidance on underlying burdens. MUELLER & KIRKPATRICK, *supra* note 119, § 63, at 315. Such a burden allocation on the part of the statutory or regulatory language, however, may not be intentional. *Id.*

¹²⁹ See MCCORMICK, *supra* note 119, § 337, at 413; MUELLER & KIRKPATRICK, *supra* note 119, § 63, at 316; WIGMORE, *supra* note 119, § 2486, at 290. It has been pointed out, however, that concerns with

determining the manner in which the burden of proof should be allocated.¹³⁰

B. The Burden of Proof in IDEA Hearings: Split among the Circuits

Prior to the Supreme Court's decision in *Schaffer*, a split had developed among the circuits with respect to the allocation of the burden of proof in IDEA due process hearings. Some circuits assigned the burden to the moving party (most often the parents), while others assigned the burden to the school district.¹³¹ In addition, a number of states had adopted statutes or regulations allocating the burden of proof in IDEA due process hearings.¹³² Parts II.B and II.C examine the various methods of burden allocation utilized by different circuits and states in the years leading up to *Schaffer*.¹³³ Part II.D presents a discussion of the Fourth Circuit opinion in *Schaffer* that precipitated the Supreme Court's granting of *certiorari*.¹³⁴

1. Circuits Assigning the Burden of Proof to the Moving Party

As seen in Table 1, prior to the Supreme Court's decision in *Schaffer*, five circuits had assigned the burden of proof to the moving party (Group A).¹³⁵ A number of these circuits, including the Fourth, in which the *Schaffer* case originated, had assigned the burden to the moving party

knowledge and access to information should not be overstated with respect to burden allocations. MCCORMICK, *supra* note 119, § 337, at 413.

¹³⁰ See WIGMORE, *supra* note 119, § 2486, at 292 ("There is, then, no one principle, or set of harmonious principles, which afford a sure and universal test for the solution of a given class of cases.").

¹³¹ See *infra* tbl.1 (comparing circuits that had assigned the burden to the moving party prior to *Schaffer* with those that had assigned the burden to the school district).

¹³² See *infra* tbl.2 (comparing states that had legislation/regulations assigning the burden to the moving party prior to *Schaffer* with those that had legislation/regulations assigning the burden to the school district).

¹³³ See *infra* notes 134-61 and accompanying text.

¹³⁴ See *infra* notes 162-72 and accompanying text.

¹³⁵ See *infra* tbl.1.

because of the traditional rule of burden allocation.¹³⁶ For example, in 1990, in *Cordrey v. Euckert*, the Sixth Circuit stated, “[N]othing in [IDEA] indicates that alleged violations should be treated differently from alleged violations of any other federal statute ... Absent more definitive authorization or compelling justification, we decline to go beyond strict review to reverse the traditional burden of proof.”¹³⁷ Other circuits had assigned the burden to the moving party in light of the deference given by IDEA to the educational expertise of school district personnel.¹³⁸ For example, in 1986, in *Alamo Heights Independent School District v. State Board of Education*, the Fifth Circuit concluded that because of the deference IDEA affords educational practitioners, IDEA creates a “‘presumption in favor of the education placement established by [a child’s] IEP,’ and ‘the party attacking its terms should bear the burden of showing why the educational setting established by the IEP is not appropriate.’”¹³⁹

¹³⁶ See *Weast v. Schaffer*, 377 F.3d 449, 453 (4th Cir. 2004), *aff’d*, 546 U.S. 49 (2005); *Cordrey v. Euckert*, 917 F.2d 1460, 1466 (6th Cir. 1990).

¹³⁷ 917 F.2d at 1466.

¹³⁸ See *Devine v. Indian River County Sch. Bd.*, 249 F.3d 1289, 1292 (11th Cir. 2001); *Johnson v. Independent Sch. Dist. No. 4*, 921 F.2d 1022, 1026 (10th Cir. 1990); *Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ.*, 790 F.2d 1153, 1158 (5th Cir. 1986).

¹³⁹ 790 F.2d at 1158 (alteration in original) (quoting *Tatro v. Texas*, 703 F.2d 823, 830 (5th Cir. 1983), *aff’d*, 468 U.S. 883 (1984)).

Table 1. Differences in Burden Allocation among the Circuits Prior to *Schaffer*

Burden Assigned to Moving Party (Group A)	Burden Assigned to School District (Group B)
<ul style="list-style-type: none"> • Fourth Circuit (<i>Schaffer</i>) • Fifth Circuit • Sixth Circuit • Tenth Circuit • Eleventh Circuit 	<ul style="list-style-type: none"> • D.C. Circuit (particularly for procedural issues) • First Circuit (in dicta) • Second Circuit (except in tuition reimbursement cases) • Third Circuit (except when parent requests a more restrictive placement) • Seventh Circuit (in dicta) • Eighth Circuit • Ninth Circuit

2. Circuits Assigning the Burden to the School District

Table 1 also shows that, prior to *Schaffer*, seven circuits had assigned the burden of proof to the school district (Group B).¹⁴⁰ Of these, the Third Circuit had provided the most detailed argument in favor of such an allocation.¹⁴¹ In 1993, in *Oberti v. Board of Education*, the Third Circuit held that the school district should bear the burden for several reasons.¹⁴² First, the court noted that placing the burden on parents would work against the goal of IDEA to ensure that the rights of students and parents are protected.¹⁴³ In addition,

¹⁴⁰ See *supra* tbl.1.

¹⁴¹ See *Carlisle Area Sch. Dist. v. Scott P.*, 62 F.3d 520, 533 (3d Cir. 1995); *Oberti v. Board of Educ.*, 995 F.2d 1204, 1219-20 (3d Cir. 1993). See also *Lascari v. Board of Educ.*, 560 A.2d 1180, 1188-89 (N.J. 1989).

¹⁴² 995 F.2d at 1219-20.

¹⁴³ *Id.* at 1219.

the court highlighted the advantages that school districts have over parents:

In practical terms, the school has an advantage when a dispute arises under the Act: the school has better access to the relevant information, greater control over the potentially more persuasive witnesses (those who have been directly involved with the child's education), and greater overall educational expertise than the parents.¹⁴⁴

Finally, because the school district in *Oberti* advocated a more restrictive placement, the Third Circuit concluded that “the Act’s strong presumption in favor of mainstreaming ... would be turned on its head if parents had to prove that their child was worthy of being included, rather than the school district having to justify a decision to exclude the child from the regular classroom.”¹⁴⁵

While in *Oberti* the school district was the party requesting the more restrictive placement, in a subsequent decision, the Third Circuit addressed the question of the allocation of the burden when parents request the more restrictive placement.¹⁴⁶ In 1995, in *Carlisle Area School District v. Scott P.*, the Third Circuit held that, in cases in which the school district advocates the less restrictive placement, the school district should not be required to bear the burden of proving that the parents’ proposed more restrictive placement is inappropriate.¹⁴⁷ Thus, according to the Third Circuit, the school district had to bear the burden of proof, except in instances in which the parents were advocating a more restrictive placement.¹⁴⁸

¹⁴⁴ *Id.* (citing *Lascari*, 560 A.2d at 1188).

¹⁴⁵ *Id.*

¹⁴⁶ *Carlisle Area Sch. Dist.*, 62 F.3d at 533.

¹⁴⁷ *Id.*

¹⁴⁸ See *supra* notes 141-46 and accompanying text.

The Second, Eighth, and Ninth Circuits had also assigned the burden to the school district.¹⁴⁹ For example, in 1998, in *E.S. v. Independent School District, No. 196*, the Eighth Circuit cited a Ninth Circuit decision for the conclusion that in administrative hearings, the burden should be allocated to the school district.¹⁵⁰ Similarly, the Second Circuit held that the school district should bear the burden of proving the appropriateness of an IEP, except with respect to claims for tuition reimbursement, in which case the parent should have the burden of proving the appropriateness of the private school placement.¹⁵¹ The remaining three circuits in Group B – the First, Seventh, and D.C. Circuits – did not make as strong a statement concerning the allocation of the burden to the school district as the previous four.¹⁵²

C. State Statutes and Regulations

As Table 2 indicates, prior to *Schaffer*, several states had adopted statutes or regulations with respect to the allocation of the burden of proof at IDEA due process

¹⁴⁹ See *M.S. v. Board of Educ.*, 231 F.3d 96, 104 (2d Cir. 2000); *E.S. v. Independent Sch. Dist., No. 196*, 135 F.3d 566, 569 (8th Cir. 1998); *Clyde K. v. Puyallup Sch. Dist., No. 3*, 35 F.3d 1396, 1398-99 (9th Cir. 1994).

¹⁵⁰ 135 F.3d at 569 (“At the administrative level, the District clearly had the burden of proving that it had complied with the IDEA”) (citing *Clyde K.*, 35 F.3d at 1398-99).

¹⁵¹ *M.S.*, 231 F.3d at 104 (noting that because the parent “chose a private school for [the child] that educated learning disabled students only, [the parent] bears the burden of proving that such a restrictive, non-mainstream environment was needed to provide [the child] with an appropriate education.”).

¹⁵² The First Circuit had not spoken on the issue until 2004, when, in a footnote, the court noted in dicta that “the school district always bears the burden in the due process hearing of showing that its proposed IEP is adequate.” *L.T. v. Warwick Sch. Comm.*, 361 F.3d 80, 82 n.1 (1st Cir. 2004) (dictum). See also *Beth B. v. Van Clay*, 282 F.3d 493, 496 (7th Cir. 2002) (dictum). The District of Columbia Circuit had likewise assigned the burden to the school district, particularly with respect to proving procedural compliance. See *McKenzie v. Smith*, 771 F.2d 1527, 1532 (D.C. Cir. 1985). Some questioned, however, whether the D.C. Circuit’s assignment of the burden to the school district had been due to the district’s municipal regulations rather than a judicial rule. See Brief of Petitioners at 18 n. 21, *Schaffer v. Weast*, 546 U.S. 49 (2005) (No. 04-698).

hearings.¹⁵³ With respect to the states in Group A, the circuits that had assigned the burden to the moving party, only Kentucky had a rule in place that called for an allocation of the burden to the moving party.¹⁵⁴ At the same time, within Group A, in the years leading up to *Schaffer*, Alabama, Georgia, and West Virginia had adopted regulations that went against the rule of the circuit by assigning the burden to the school district.¹⁵⁵

¹⁵³ See *infra* tbl.2.

¹⁵⁴ 707 KY. ADMIN. REGS. 1:340 § 7(4) (2004) (incorporating by reference KY. REV. STAT. ANN. § 13B.090(7) (Michie 2002) (“the party proposing that the agency take action ... has the burden of going forward and the ultimate burden of persuasion”)).

¹⁵⁵ ALA. ADMIN. CODE r. 290-8-9-.08(8)(c)(6)(ii)(I) (Supp. 2004) (“Education Agency ... [assumes] the burden of proof regarding the appropriateness of services proposed or provided.”), amended by ALA. ADMIN. CODE r. 290-8-9-.08(8)(c) (Supp. 2005); GA. COMP. R. & REGS. r. 160-4-7-.18(1)(g)(8) (2002) (amended 2006) (indicating that the school district bears the burden except when the parent proposes a more restrictive placement; allowing the hearing officer to modify the rules for “unique or unusual circumstances”); W. VA. CODE ST. R. tit. 126, § 16-8.1.11(c) (2005) (“The burden of proof ... will be upon the school personnel recommending the matter in contention.”). As will be discussed in greater detail *infra* Part IV.A., some of these regulations have subsequently been amended.

Table 2. Differences in Burden Allocation among States Prior to *Schaffer*

	States with Rules Assigning Burden to Moving Party	States with Rules Assigning Burden to School District
Circuits Assigning Burden to Moving Party (Group A)		
Fourth Circuit		<ul style="list-style-type: none"> • West Virginia
Fifth Circuit		
Sixth Circuit	<ul style="list-style-type: none"> • Kentucky 	
Tenth Circuit		
Eleventh Circuit		<ul style="list-style-type: none"> • Alabama* • Georgia* (except when parent requests a more restrictive placement; hearing officer can adapt rules for “unique or unusual circumstances”)
Circuits Assigning Burden to School District (Group B)		
D.C. Circuit		<ul style="list-style-type: none"> • D.C.*
First Circuit	<ul style="list-style-type: none"> • Maine (burden of production) 	
Second Circuit		<ul style="list-style-type: none"> • Connecticut⁺ (except in tuition reimbursement cases)
Third Circuit		<ul style="list-style-type: none"> • Delaware
Seventh Circuit	<ul style="list-style-type: none"> • Indiana 	<ul style="list-style-type: none"> • Illinois (burden of production)

	States with Rules Assigning Burden to Moving Party	States with Rules Assigning Burden to School District
Eighth Circuit	<ul style="list-style-type: none"> • Arkansas (hearing officer can determine which party bears burden of proof) • Iowa (burden of production) • Nebraska (burden of production) 	<ul style="list-style-type: none"> • Minnesota⁺ (except in tuition reimbursement cases)
Ninth Circuit	<ul style="list-style-type: none"> • Montana (burden of production) 	<ul style="list-style-type: none"> • Alaska*

Note: State statute/regulations with an * indicate that these are no longer in effect; state statute/regulations with a ⁺ indicate that a bill has been introduced in the state to assign the burden to the school district.

Within Group B, the group of circuits that had allocated the burden to the school district, in the years leading up to *Schaffer*, only Indiana had a rule in place that was in opposition to the circuit rule by assigning the burden of persuasion to the moving party.¹⁵⁶ A number of other states had regulations allocating the burden of production to the moving party – Iowa, Maine, and Nebraska.¹⁵⁷ In addition,

¹⁵⁶ IND. ADMIN. CODE tit. 511, r. 7-30-3(p) (2003) (incorporating by reference IND. CODE ANN. § 4-21.5-3-14(c) (Michie 1996) (stating that the “person requesting that an agency take action ... has the burden of persuasion and the burden of going forward with the proof of the request”).

¹⁵⁷ IOWA ADMIN. CODE r. 281-41.117 (2001) (“The appellant may begin by giving a short opening statement ... which may include the ... type and nature of the evidence to be introduced and the conclusions which the appellant believes the evidence shall substantiate.”); 05-071-101 CODE ME. R. § 13.12(I) (2003) (stating that the “party requesting the hearing” makes his/her opening statement and presents his/her evidence first); MONT. ADMIN. R. 10.16.3521(1)(a) (2001) (indicating that “the petitioner” makes his/her statement and presents his/her evidence first, but noting that the procedural order may be changed by the hearing officer with a showing of good cause); 92 NEB. ADMIN. R. & REGS. 55-007.01 (2002) (specifying

regulations for the state of Arkansas allowed the hearing officer the discretion to determine which party would bear the burden of proof.¹⁵⁸ On the other hand, within Group B, several states had adopted statutes or regulations assigning the burden of proof to the school district – Alaska, Connecticut (except in tuition reimbursement cases), Delaware, the District of Columbia, Illinois (burden of production) and Minnesota (except in tuition reimbursement cases).¹⁵⁹ It is interesting that, in either Group A or Group B, only Indiana and Kentucky had allocated the burden of persuasion to the moving party.¹⁶⁰ Moreover, in both Indiana and Kentucky, the burden of persuasion was not allocated to the moving party explicitly in special education due process hearings; rather, such a rule was incorporated by reference to the state’s general provisions regarding administrative hearings.¹⁶¹ The manner

that, at the discretion of the hearing officer, the petitioner makes his/her opening statement and presents his/her evidence first).

¹⁵⁸ ARK. R. & REGS. § 10.01.28.1 (2005) (“[T]he hearing officer shall determine which party bears the burden of proof in regard to the particular issues raised.”).

¹⁵⁹ ALASKA ADMIN. CODE tit. 4, § 52.550(e)(9) (2003) (amended 2006) (“[T]he burden of proof is on the district...”); CONN. AGENCIES REGS. § 10-76h-14(a) (2005) (assigning the burden to the school district except in tuition reimbursement cases, in which the parent has to prove the appropriateness of the unilateral placement); D.C. MUN. REGS. tit. 5, § 3030.3 (2003) (amended 2006) (“The LEA shall bear the burden of proof...”); DEL. CODE ANN. tit. 14, § 3140 (1999) (“The burden of proof and persuasion ... shall be on the district...”); 105 ILL. COMP. STAT. ANN. 5/14-8.02a(g) (West 2005) (“The school district shall present evidence that the special education needs of the child have been appropriately identified and that the special education program and related services proposed to meet the needs of the child are adequate, appropriate, and available.”); MINN. STAT. ANN. § 125A.091, subd. 16 (West Supp. 2005) (assigning the burden to the school district except in tuition reimbursement cases, in which the parent has to prove the appropriateness of the private placement). As will be discussed in greater detail *infra* Part IV.A., a number of these states have amended their statutes/regulations in the aftermath of *Schaffer*.

¹⁶⁰ See *supra* tbl.2.

¹⁶¹ See IND. ADMIN. CODE tit. 511, r. 7-30-3(p) (2003) (incorporating by reference IND. CODE ANN. § 4-21.5-3-14(c) (Michie 1996)); 707 KY. ADMIN. REGS. 1:340 § 7(4) (2004) (incorporating by reference KY. REV. STAT. ANN. § 13B.090(7) (2002)).

in which the *Schaffer* decision has impacted these various state requirements will be discussed in Part IV.A of this article.¹⁶²

D. Fourth Circuit Opinion in Schaffer

The *Schaffer* case centered on a boy named Brian with Attention Deficit Hyperactivity Disorder (ADHD) and other learning disabilities.¹⁶³ Brian had attended a private school through the seventh grade, at which time the school informed the boy's mother that he would have to attend a different school, better able to accommodate his disabilities.¹⁶⁴ He was subsequently evaluated by his neighborhood school district and found eligible to receive special education services.¹⁶⁵ The school district offered to serve Brian in his "home" school.¹⁶⁶ When Brian's parents voiced concern over the class size at the "home" school, the district proposed an alternative placement in another school within the district with smaller class sizes.¹⁶⁷ The parents rejected the school's proposed alternative placement and instead placed Brian in a private school and requested a due process hearing seeking reimbursement for tuition and related expenses.¹⁶⁸

At the original hearing, the hearing officer assigned the burden of proof to the parents and subsequently found in favor of the school district.¹⁶⁹ The parents appealed to federal district court, which concluded that the hearing officer's assignment of the burden to the parents was incorrect and remanded the case for further proceedings.¹⁷⁰ During the second hearing, the hearing officer assigned the burden to the school district, finding this time in favor of the parents.¹⁷¹

¹⁶² See *infra* tbl.3 & notes 342-59 and accompanying text.

¹⁶³ *Weast v. Schaffer*, 377 F.3d 449, 450 (4th Cir. 2004), *aff'd*, 546 U.S. 49 (2005).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 450-51.

¹⁶⁷ *Id.*

¹⁶⁸ *Weast*, 377 F.3d at 451.

¹⁶⁹ *Id.*

¹⁷⁰ *Brian S. v. Vance*, 86 F.Supp.2d 538, 545 (D. Md. 2000), *vacated sub nom.* *Schaffer v. Vance*, 2 Fed. Appx. 232, 233 (4th Cir. 2001).

¹⁷¹ *Weast*, 377 F.3d. at 451.

Thus, *Schaffer* represented an example of a case that was in evidentiary equipoise.¹⁷² The school district then appealed the case to federal district court, which decided that the hearing officer had accurately assigned the burden to the school district.¹⁷³ The school district then appealed the district court's second decision to the United States Court of Appeals for the Fourth Circuit.¹⁷⁴

The Fourth Circuit reversed, concluding that because IDEA is silent on the issue of the burden of proof, the default rule should be followed, and the party initiating the action and seeking relief should bear the burden.¹⁷⁵ The court analogized IDEA to other "remedial federal statutes," including Title VII of the Civil Rights Act of 1964 (Title VII), the Americans with Disabilities Act (ADA), and the Age Discrimination in Employment Act (ADEA), all of which assign the burden to the party seeking the protection or benefit, not the party charged with providing the obligation.¹⁷⁶ The court also dismissed the argument that the school district should bear the burden because of the advantage of school districts in terms of greater expertise and resources, stating: "We do not automatically assign the burden of proof to the side with the bigger guns."¹⁷⁷ Moreover, the court concluded that Congress had adequately addressed the "natural advantage" of school districts by incorporating explicit procedural protections into IDEA.¹⁷⁸ Finally, the court noted that assigning the burden to the school district would presume all IEPs to be inadequate and thereby work against IDEA's principle of relying on the professional expertise of educators.¹⁷⁹

¹⁷² See *Schaffer v. Weast*, 546 U.S. 49 (2005), *aff'g* 377 F.3d 449 (4th Cir. 2004).

¹⁷³ *Weast v. Schaffer*, 240 F.Supp.2d 396, 402 (D. Md. 2002), *rev'd*, 377 F.3d 449 (4th Cir. 2004), *aff'd*, 546 U.S. 49 (2005).

¹⁷⁴ *Weast*, 377 F.3d at 452.

¹⁷⁵ *Id.* at 453, 456.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 454.

¹⁷⁹ *Weast*, 377 F.3d at 455-56.

Judge Luttig dissented, stating that for reasons of policy, convenience, and fairness, it was necessary to depart from the normal rule of allocating the burden to the party seeking relief.¹⁸⁰ With respect to policy considerations, Judge Luttig concluded that because IDEA places an affirmative obligation on school districts to provide students with an appropriate education, it is reasonable to assume that the school district should also bear the burden of proof at due process hearings.¹⁸¹ Moreover, with respect to convenience and fairness, Judge Luttig argued that the burden should be allocated to the school district because it “possesses a distinct, inherent advantage over the parents of disabled children in assessing the feasibility and the likely benefit of alternative educational arrangements.”¹⁸² He explained that “even in the rosier of scenarios,” the incorporation of procedural protections for parents does “not begin to impart to the average parent the level of expertise or knowledge that the school district possesses as a matter of course.”¹⁸³

III. ANALYSIS OF *SCHAFFER V. WEAST*

On November 14, 2005, in *Schaffer v. Weast*, in a 6-2 decision authored by Justice O’Connor, the United States Supreme Court affirmed the decision of the Fourth Circuit and held that, in administrative due process hearings in which a child’s IEP is being challenged, the burden of persuasion¹⁸⁴ should be allocated to the party seeking relief.¹⁸⁵ Justice Ginsburg wrote a dissenting opinion, in which she argued that for “policy considerations, convenience, and fairness” the

¹⁸⁰ *Id.* at 457 (Luttig, J., dissenting).

¹⁸¹ *Id.* at 457-58 (Luttig, J., dissenting).

¹⁸² *Id.* at 458 (Luttig, J., dissenting).

¹⁸³ *Id.* (Luttig, J., dissenting).

¹⁸⁴ The Supreme Court noted that its analysis in *Schaffer* was limited to the burden of persuasion. *Schaffer v. Weast*, 546 U.S. 49, 56 (2005) (“We note at the outset that this case concerns only the burden of persuasion ... and when we speak of the burden of proof in this opinion, it is this to which we refer.”).

¹⁸⁵ *Id.* at 62.

burden should be assigned to the school district.¹⁸⁶ Part III analyzes the majority opinion and Justice Ginsburg's dissent, using Minow's framework for the legal treatment of difference as a backdrop.¹⁸⁷ Part III.A argues that the majority opinion manifested a traditional rights-analysis approach and disregarded the significance of three kinds of relationships that are promoted by IDEA: (1) the relationship between the school district and the child with a disability; (2) the relationship between the school district and the parent; and (3) the relationship between students with disabilities and their non-disabled peers.¹⁸⁸ Part III.B then argues that Justice Ginsburg's dissent only partially addressed the relationships ignored by the majority opinion.¹⁸⁹ Finally, Part III.C concludes by discussing the implications of the *Schaffer* decision for parents, school districts, and hearing officers.¹⁹⁰

A. *The Majority Opinion*

1. *Traditional Rights-Analysis Approach*

An examination of the majority opinion in *Schaffer* reveals that it reflects what Minow has referred to as a traditional rights-analysis approach.¹⁹¹ This approach, as

¹⁸⁶ *Id.* at 63 (Ginsburg, J., dissenting) (citing 377 F.3d at 456-59 (Luttig, J., dissenting)). Justice Breyer also wrote a dissenting opinion, in which he argued that Congress left the question of the allocation of the burden of persuasion to the states to decide. *Id.* at 71 (Breyer, J., dissenting). Justice Stevens wrote a brief concurring opinion in which he noted that although he agreed with much of what Justice Ginsburg stated, he decided to join the majority opinion because he believed that it should be presumed that school officials properly carry out their responsibilities under the law. *Id.* at 62-63 (Stevens, J., concurring). Chief Justice Roberts, who had begun to serve his appointment on November 5, 2005, did not participate in the case. *Id.*

¹⁸⁷ See *infra* notes 190-331 and accompanying text.

¹⁸⁸ See *infra* notes 190-274 and accompanying text; see also *supra* Part I.B for a discussion of these three relationships in the context of Minow's social-relations approach.

¹⁸⁹ See *infra* notes 275-297 and accompanying text.

¹⁹⁰ See *infra* notes 298-331 and accompanying text.

¹⁹¹ It is not surprising that the majority opinion in *Schaffer* reflected a traditional rights-analysis approach, given that this approach is the "dominant framework for contemporary analysis." MINOW, *supra* note 16,

noted earlier, focuses on providing equal treatment to redress past discrimination.¹⁹² The Court, for example, noted the exclusion and isolation experienced by children with disabilities prior to the passage of the EAHCA, stating that “the majority of disabled children in America were ‘either totally excluded from schools or sitting idly in regular classrooms....’”¹⁹³ The *Schaffer* case also involved the dilemma of difference: Should parents of students with disabilities, because of unique circumstances, receive differential treatment from other moving parties with respect to the allocation of the burden of persuasion in a due process hearing?¹⁹⁴ In its decision, the Court concluded that because IDEA is silent on the issue of the burden of proof, the “ordinary default rule” should be followed – namely, the party seeking relief should bear the burden.¹⁹⁵ In other words, according to the Court, parents of children with disabilities should not receive differential treatment with respect to the allocation of the burden of persuasion.¹⁹⁶ In response to the argument made by the attorneys for the parents that the burden should be allocated to the school district because it was so assigned in *PARC* and *Mills*, the two cases that led to the initial enactment of the EAHCA in 1975, the Court quoted the Fourth Circuit to state that it could not “conclude ... that Congress intended to adopt the ideas that it failed to write into

at 119; *see supra* note 35 and accompanying text. Moreover, as noted, this approach emerged from the civil rights movement of the 1950s and 1960s, and the language of the EAHCA was based largely on *PARC* and *Mills*, both of which were heavily influenced by the Supreme Court’s decision in *Brown*. *See supra* notes 36, 44-46 and accompanying text.

¹⁹² *See supra* notes 35-48 and accompanying text for a description of Minow’s traditional rights-analysis approach.

¹⁹³ *Schaffer v. Weast*, 546 U.S. 49, 52 (2005) (quoting H.R. REP. NO. 94-332, at 52 (1975)).

¹⁹⁴ As noted earlier, the dilemma of difference reflects the complex choice between similar and/or differential treatment. *See supra* notes 41-42 and accompanying text.

¹⁹⁵ *Schaffer*, 546 U.S. at 56-58.

¹⁹⁶ *See id.* at 57-58 (“Absent some reason to believe that Congress intended otherwise ... we will conclude that the burden of persuasion lies where it usually falls, upon the party seeking relief.”).

the text of the statute”¹⁹⁷ Thus, for the Supreme Court, a narrow interpretation of congressional intent based on a close reading of the statute’s language was the primary factor in its decision.¹⁹⁸ The Court declined to address whether states could override the default rule and place the burden on the school district.¹⁹⁹

In its argument, the Court further noted that in claims brought under Title VII and the ADA, as well as in other areas of law such as equal protection and securities fraud, the ordinary default rule has been followed, and the burden of persuasion has been assigned to the party seeking relief.²⁰⁰

¹⁹⁷ *Id.* at 58 (quoting 377 F.3d 449, 455 (4th Cir. 2004)). Further advocating a close reading of the statute’s language, the attorneys for the school district argued that, because IDEA was enacted pursuant to the Spending Clause, imposition by Congress of a condition to the receipt of federal funds must be made “unambiguously.” Brief for Respondents at 29, *Schaffer* (No. 04-698). Although the Supreme Court in *Schaffer* noted that IDEA “is a Spending Clause statute,” 546 U.S. at 51, the Court did not elaborate further on its interpretation of Spending Clause legislation and did not refer back to the Spending Clause in arriving at its conclusion regarding the allocation of the burden of persuasion. In a subsequent decision, however, the Court found that, because IDEA was passed under the Spending Clause, the Court “must ask whether the IDEA furnishes clear notice regarding the liability at issue in this case.” *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 126 S. Ct. 2455, 2459 (2006); *see supra* note 13.

¹⁹⁸ *Schaffer*, 546 U.S. at 57-58. In the three prior Supreme Court IDEA decisions in which the Court had ruled against the parent/child, the Court had similarly relied on a close examination of statutory language and congressional intent. *See Dellmuth v. Muth*, 491 U.S. 223, 232 (1989) (determining that it could not be concluded that Congress intended state sovereign immunity to be abrogated under EAHCA because language of statute did not “evinced an unmistakably clear intention”); *Smith v. Robinson*, 468 U.S. 992, 1013 (1984) (focusing closely on statutory language and legislative intent to conclude that Congress intended EAHCA to be “the exclusive avenue through which the child and his parents or guardian can pursue their claim.”); and *Board of Educ. v. Rowley*, 458 U.S. 176, 192 (1982) (examining statutory language and legislative history of EAHCA and concluding that the intent of Congress “was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside.”).

¹⁹⁹ 546 U.S. at 61-62.

²⁰⁰ *Id.* at 57 (citing *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993) (Title VII); *id.* at 531 (Souter, J., dissenting) (same); *Lujan v.*

The Court acknowledged that there are certain exceptions to this rule – for example, cases in which the defendant asserts an affirmative defense²⁰¹ – but pointed out that placement of the entire burden of persuasion on the non-moving party at the outset of the proceeding is rare.²⁰² The Court concluded, therefore, that, because no compelling reason warranted departure from the ordinary default rule, this rule should be followed, and the burden of persuasion in IDEA due process hearings should be assigned to the party seeking relief.²⁰³

2. Relationships Overlooked by the Court

The Court in *Schaffer* took a traditional rights-analysis approach and viewed the allocation of the burden of proof in dichotomous terms – i.e., either the moving party or the school district should bear the burden.²⁰⁴ In contrast, a social-relations approach moves beyond a simple either/or question to address the allocation of the burden of proof in the context of the relationships surrounding the process of labeling children with disabilities as “different.”²⁰⁵ This Part discusses

Defenders of Wildlife, 504 U.S. 555, 561 (1992) (standing); *Cleveland v. Policy Management Sys. Corp.*, 526 U.S. 795, 806 (1999) (Americans with Disabilities Act); *Hunt v. Cromartie*, 526 U.S. 541, 553 (1999) (equal protection); *Wharf (Holdings) Ltd. v. United Int’l Holdings, Inc.*, 532 U.S. 588, 593 (2001) (securities fraud); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975) (preliminary injunctions); *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977) (First Amendment); *Director, Office of Workers’ Compensation Programs v. Greenwich Collieries Dir.*, 512 U.S. 267, 271 (1994) (Administrative Procedure Act).

²⁰¹ *Id.* (citing MCCORMICK, *supra* note 119, § 337, at 412-15; *FTC v. Morton Slat Co.*, 334 U.S. 37, 44-45 (1948); *Alaska Dep’t. of Env. Conservation v. EPA*, 540 U.S. 461, 494 (2004)).

²⁰² *Id.* at 57.

²⁰³ *See id.* at 57-58.

²⁰⁴ *See* 546 U.S. at 56-58 (deciding whether ordinary default rule should be followed and burden of persuasion should be assigned to party seeking relief or ordinary default rule should be abandoned and burden should be placed on school district).

²⁰⁵ *See* MINOW, *supra* note 16, at 336 (“Thinking about problems in either/or terms... may hide the very bases of relationships between people and between alternatives.”); *id.* at 340 (“Simplifying a problem into either/or solutions fails to capture the complexity of the human relationships involved.”).

three relationships promoted by IDEA, as described earlier, to which the Court did not pay sufficient attention in arriving at its decision concerning the allocation of the burden of proof.²⁰⁶

a. Relationship between the School District and the Child with a Disability

As noted earlier, IDEA sets in motion an ongoing relationship between the school district and the child with a disability through which the school district must provide the child with an appropriate education that meets his/her individualized needs.²⁰⁷ In deciding that the ordinary default rule should be adopted, the Court ignored significant differences between the school district-child relationship under IDEA and the relationships involved in other statutes in which the ordinary default rule has been followed.²⁰⁸ Specifically, the school district-child relationship under IDEA is unique with respect to the substantial nature of what is required of the school district,²⁰⁹ the purpose of the relationship,²¹⁰ and the expertise of school district personnel.²¹¹ Although the attorneys for the parents raised some of these points, their various arguments were made in isolation, without attention to the totality of the relationship between the school district and the child.²¹²

First, the Court failed to consider that IDEA differs from other civil rights statutes in that what is required of the school district in its relationship with the child is substantial.²¹³ While traditional civil rights statutes prohibit discrimination, IDEA requires more of the school district by imposing a significant affirmative obligation on the district to

²⁰⁶ See *infra* notes 206-74 and accompanying text.

²⁰⁷ See *supra* Part I.B.1 (discussing manner in which IDEA promotes the relationship between the school district and the child).

²⁰⁸ See *infra* notes 212-29 and accompanying text.

²⁰⁹ See *infra* notes 212-20 and accompanying text.

²¹⁰ See *infra* notes 221-25 and accompanying text.

²¹¹ See *infra* notes 226-29 and accompanying text.

²¹² See, e.g., briefs cited *infra* note 213.

²¹³ See *infra* notes 213-20 and accompanying text.

provide each child with FAPE.²¹⁴ Moreover, while some civil

²¹⁴ See *Weast v. Schaffer*, 377 F.3d 449, 457-58 (4th Cir. 2004), *aff'd*, 546 U.S. 49 (2005) (Luttig, J., dissenting) (emphasis in original) (“Unlike the civil rights statutes referenced by the majority, the IDEA does not merely seek to *remedy* discrimination against disabled students, it imposes an *affirmative obligation* on the nation’s school systems to provide disabled students with an enhanced level of attention and services.”); Brief of Petitioners at 30, *Schaffer* (No. 04-698) (stating that IDEA creates “a system where school districts not only must end ... discrimination, but must affirmatively provide every child with disabilities an appropriate education suitable for his or her individual needs.”); Brief of Amici Curiae Council of Parent Attorneys and Advocates et al. Supporting Petitioners at 10 & n. 6, *Schaffer* (No 04-698) [hereinafter Brief of Parent Attorneys and Advocates] (noting that IDEA differs from other civil rights statutes in that it imposes “a unique affirmative obligation on states and local school districts to identify, locate, and evaluate children, even those in private schools and prisons” as well as an affirmative obligation “to seek out children who require services.”); Brief of the Commonwealth of Virginia and Eight Other States as Amici Curiae in Support of the Petitioners at 11 n. 11, *Schaffer* (No. 04-698) [hereinafter Brief of Virginia] (arguing that “it may be that the existence of an affirmative obligation on the government to act distinguishes the IDEA from most other civil rights laws.”). See also *Smith v. Robinson*, 468 U.S. 992, 1016 (1984) (noting that EAHCA differs from Section 504 in that “[w]hile the [EAHCA] guarantees a right to a free appropriate public education, § 504 simply prevents discrimination on the basis of handicap.”); *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 623 n. 6 (1999) (Thomas, J., dissenting) (“IDEA is not an anti-discrimination law. It is a grant program that affirmatively requires States accepting federal funds to provide disabled children with a ‘free appropriate public education’....”).

Commentators on the allocation of burden of proof in IDEA due process hearings have also mentioned the statute’s affirmative obligation. See Sandra M. Di Iorio, *Breaking IDEA’s Silence: Assigning the Burden of Proof at Due Process Hearings and Judicial Proceedings Brought by Parents Against a School District*, 78 TEMP. L. REV. 719, 733 (2005); Christopher Thomas Leahy & Michael A. Mugmon, *Allocation of the Burden of Proof in Individuals with Disabilities Education Act Due Process Challenges*, 29 VT. L. REV. 951, 969-70 (2005); Mayes et al., *supra* note 8, at 79; 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, 611 (2005); 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*, 118 HARV. L. REV. 1078, 1082-83 (2005) [hereinafter Recent Case, *Disability Law*]. These works, however, do not discuss IDEA’s affirmative

rights statutes impose affirmative obligations along with the preclusion of discrimination, such obligations are much less extensive than the obligation to provide FAPE under IDEA.²¹⁵ For example, Title I of the ADA prohibits discrimination in employment on the basis of disability and requires employers to provide a “reasonable accommodation” for known mental or physical limitations of an otherwise qualified employee or job applicant, unless to do so would create an “undue hardship” on the operation of the business.²¹⁶ In contrast, as

obligation in the context of the relationship between the school district and the child with a disability.

²¹⁵ See Brief of Petitioners at 32, *Schaffer* (No. 04-698) (noting that “IDEA goes much further” than other statutes imposing an affirmative obligation). The attorneys for the school district argued that the ordinary rule for the burden allocation should be adopted for IDEA claims because such a rule has been followed in claims brought under the ADA, a statute that also imposes an affirmative obligation. Brief for Respondents at 19, *Schaffer* (No. 04-698). The attorneys for the school district did not recognize, however, that the affirmative obligation imposed by IDEA is much more substantial in nature than that imposed by the ADA. See *infra* notes 215-20 and accompanying text.

²¹⁶ 42 U.S.C.A. § 12112(b)(5)(A) (West Supp. 2006). The ADA defines the term “reasonable accommodation” as:

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

Id. § 12111(9). The “reasonable accommodation” and “undue hardship” provisions serve to limit the scope of the employer’s obligation under Title I of the ADA. See Samuel R. Bagenstos, “*Rational Discrimination, Accommodation, and the Politics of (Disability) Civil Rights*,” 89 VA. L. REV. 825, 836 (2003) (citations omitted) (“Taken together, [the reasonable accommodation and undue hardship] limitations operate to protect an employer from being called upon to bear accommodation costs that are too great for him to bear comfortably ... or that are too great, in fairness, to require any employer (or its nondisabled employees) to bear ...”). IDEA contains no such limitations.

Similarly, Title VII prohibits discrimination in employment on the basis of race, color, religion, sex, or national origin, 42 U.S.C.A. § 2000e-2, and requires employers to “reasonably accommodate” the religious observance or practice of their employees or job applicants, unless to do so would create an “undue hardship” for the employer’s business. *Id.* § 2000e(j).

noted earlier, the requirement that school districts design and implement an appropriate IEP that provides the child with FAPE helps to shape a special relationship between the school district and the child.²¹⁷ The written IEP document, prepared by a multi-disciplinary team (including the child's parents), must contain prescribed information such as the levels at which the child is currently functioning, the goals that will drive the child's educational program, and the various accommodations and supports that will most appropriately support the child's learning.²¹⁸ In addition, the process associated with the development of the IEP involves collaboration among the various team members.²¹⁹ The process of implementation of the IEP further involves consideration of multiple factors that will create a supportive learning environment, including the kinds of interactions that take place between the child and his/her teachers.²²⁰ Thus, what is required of a school district in its relationship with the child with a disability in the provision of FAPE under IDEA is considerably greater than what is required of an employer in its relationship with an employee in the provision of a reasonable accommodation under Title I of the ADA.²²¹

The Supreme Court has interpreted this affirmative obligation under Title VII to mean providing accommodations that incur only a "de minimis cost" to the employer. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977).

²¹⁷ See *supra* Part I.B for a discussion of the relationship between the school district and the child with a disability as promoted by IDEA.

²¹⁸ See *supra* notes 80-83 and accompanying text (discussing IEP document).

²¹⁹ See *supra* notes 84-87 and accompanying text (discussing process involved in development of the IEP).

²²⁰ See *supra* notes 88-89 and accompanying text (discussing process involved in implementation of the IEP).

²²¹ It is also to be pointed out that, although IDEA, like the ADA, calls for the provision of accommodations, the requirements are not analogous. IDEA requires that IEPs specify the supplementary aids and services, program modifications, or supports to personnel that will be provided for the child. 20 U.S.C.A. § 1414(d)(1)(A)(i)(IV), *see also* 34 C.F.R. § 300.320(a)(4) (2007). In addition, IDEA requires that IEPs list the appropriate accommodations that are necessary to measure the child's achievement on State and districtwide assessments. 20 U.S.C.A. §

Second, the Court failed to take into account that the purpose of the relationship between the school district and the child, as envisioned by IDEA, is very different from the purpose of the employer-employee relationship with respect to Title I of the ADA.²²² The primary purpose of the school district-child relationship under IDEA is to provide an educational benefit to the child²²³ in order to “prepare [the child] for further education, employment, and independent living.”²²⁴ On the other hand, the primary purpose of the employer-employee relationship in claims brought under Title I of the ADA is not to benefit the individual employee but rather to benefit the business and make a profit.²²⁵ The attorneys for the parents correctly pointed out that

while a business subject to the ADA must provide certain accommodations to its employees, serving the welfare of those employees is not the *raison d’être* of the business. The purpose of the business is to produce a product or service and make a profit. For public schools, on the other hand, educating children is their *raison d’être*.²²⁶

1414(d)(1)(A)(i)(VI); *see also* 34 C.F.R. § 300.320(a)(6)(i). The provision of accommodations under IDEA, unlike the ADA, is only one of the many requirements that comprise the school district’s affirmative obligation to provide FAPE.

²²² *See infra* notes 222-25 and accompanying text.

²²³ *See Board of Educ. v. Rowley*, 458 U.S. 176, 200 (1982) (“Implicit in the congressional purpose of providing access to a ‘free appropriate public education’ is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child.”).

²²⁴ 20 U.S.C.A. § 1400(d)(1)(A); *see also id.* § 1400(c)(1) (discussing the “national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities.”).

²²⁵ *See* Michael Ashley Stein, *The Law and Economics of Disability Accommodations*, 53 DUKE L.J. 79, 147 (2003) (explaining that “as stipulated under the neoclassical economic model of the labor market, employers act on their own interests and want to maximize their individual profits.”).

²²⁶ Brief of Petitioners at 32, *Schaffer* (No. 04-698). One of the briefs filed on behalf of the school district had argued that the differing purposes of a

Third, the Court did not consider that the relationship between the school district and the child under IDEA differs from the employer-employee relationship involved in the ADA in that school personnel have particular expertise in providing educational services,²²⁷ while employers, whose responsibility is to run a business, do not necessarily have expertise in the provision of accommodations.²²⁸ Although the Court noted that “IDEA relies heavily upon the expertise of school districts,” the Court also concluded that placement of the burden on the school district would make the assumption that every IEP should be considered invalid unless proven otherwise by the school district.²²⁹ The Court did not

business under Title I of the ADA and a public school under IDEA did not warrant departure from the ordinary default rule, stating, “[T]he fact that public schools have . . . a mission to educate all children, disabled and non-disabled, makes it more, not less, important to provide state and local educators with sufficient flexibility to achieve the requirements of the IDEA and, at the same time, to fulfill their mission with respect to all children.” Brief for the United States as Amicus Curiae Supporting Respondent at 29, *Schaffer* (No. 04-698). It is important to point out, however, that the “mission” of public schools is to educate all children, including the child with a disability, whose education is at issue at the due process hearing. In contrast, the “mission” of a business under Title I of the ADA is not to benefit the individual employee.

²²⁷ The principle of deference to the expertise of school district personnel in IDEA cases began with the Supreme Court’s decision in *Rowley*. See 458 U.S. at 207-08.

²²⁸ See John F. Newman & Roxan E. Dinwoodie, *Impact of the Americans with Disabilities Act on Private Sector Employers*, 20 J. REHABILITATION ADMIN. 3, 7-8 (1996) (surveying private sector employers about their experiences with the ADA and finding that the employers had limited information about the ADA requirements with respect to the employment of individuals with disabilities).

²²⁹ *Schaffer v. Weast*, 546 U.S. 49, 59 (2005). Justice Stevens took this argument one step further in his concurring opinion by stating that the burden should be placed on the party seeking relief because it should be presumed “that public school officials are properly performing their difficult responsibilities under this important statute.” *Id.* at 62-63 (Stevens, J., concurring).

A number of the lower court cases that had assigned the burden to the moving party prior to *Schaffer* had likewise focused on the deference that is to be given to the educational decisions of school personnel. See *supra* note 137 and accompanying text (citing *Devine v. Indian River County Sch. Bd.*, 249 F.3d 1289, 1292 (11th Cir. 2001); *Johnson v. Independent*

understand, however, that school personnel should have to justify the appropriateness of their proposed program specifically because of their significant expertise.²³⁰ Thus, in its conclusion that the ordinary default rule for the allocation of the burden of persuasion should be followed in IDEA due process disputes, the Court failed to take into account differences between the unique school district-child relationship under IDEA and the relationships involved in other statutes in which the ordinary default rule has been followed.²³¹

The Court further overlooked the relationship between the school district and the child by treating the allocation of the burden of persuasion as a minor matter of procedure.²³²

Sch. Dist. No. 4, 921 F.2d 1022, 1026 (10th Cir. 1990); Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ., 790 F.2d 1153, 1158 (5th Cir. 1986)). See also Brief for Respondents at 31, *Schaffer* (No. 04-698) (“In enacting IDEA, Congress gave no indication – much less any clear expression – that it intended to upset the traditional respect accorded to the judgments of state and local officials on education matters by requiring educators to bear the burden of proof in any hearing challenging the adequacy of their judgments in adopting an [IEP].”).

²³⁰ Brief of Various Autism Organizations as Amici Curiae in Support of Petitioners at 12-13, *Schaffer* (No. 04-698) [hereinafter Brief of Various Autism Organizations]; see also Brief for Petitioners at 30-31, *Schaffer* (No. 04-698) (quoting Brief for the United States as Amicus Curiae Supporting Appellees Urging Affirmance at 12, *Schaffer v. Vance*, 2 Fed. Appx. 232 (4th Cir. 2001) (No. 00-1471)) (“Because the IDEA contemplates that the school would take the lead in ... proposing an appropriate educational plan, it is entirely consistent with the statutory scheme to also require that the school be able to prove at the due process administrative hearing that the proposed IEP will provide FAPE to a child with a disability.”).

²³¹ See *supra* notes 212-29 and accompanying text.

²³² The importance of the procedural requirements of the statute was first recognized in *Board of Education v. Rowley*, in which the Supreme Court noted that “Congress placed every bit as much emphasis upon compliance with procedures ... as it did upon the measurement of the resulting IEP against a substantive standard.” 458 U.S. 176, 205-06 (1982). Subsequent lower courts continued to underscore the importance of procedural compliance. See, e.g., *W.G. v. Board of Trustees of Target Range Sch. Dist. No. 23*, 960 F.2d 1479, 1484-85 (9th Cir. 1992) (holding that procedural violations can constitute a denial of FAPE); *Tice v. Botetourt County Sch. Bd.*, 908 F.2d 1200, 1206-07 (4th Cir. 1990) (same); *Johnson*

While the question of which party should bear the burden of persuasion is technically procedural in nature, determination of whether the burden has been met depends on whether the school district has carried out its responsibilities in relation to the child by providing the child with an appropriate education.²³³ By applying an abstract procedural rule to the specific situation of special education due process hearings, the Court, in essence, artificially separated the procedural question of which party should bear the burden of persuasion from the substantive vision of the statute.²³⁴ This substantive vision, which is at the heart of the school district-child relationship, seeks to ensure that each child receives an appropriate education that confers an educational benefit²³⁵ and prepares the child for post-school education, employment, and independence.²³⁶

Finally, the Court overlooked the relationship between the school district and the child by ignoring the positive impact that due process hearings can have on this relationship.²³⁷ Although much has been written about the negative effects of due process hearings,²³⁸ research has also

v. Franklin County Sch. Bd., 806 F.2d 623, 629-30 (5th Cir. 1986) (same). *But see* Urban v. Jefferson County Sch. Dist. R-1, 89 F.3d 720, 726 (10th Cir. 1996) (finding that a procedural violation alone is not sufficient to constitute a denial of FAPE); Doe v. Defendant I, 898 F.2d 1186, 1190 (6th Cir. 1990) (same).

²³³ For example, in *Schaffer*, the original due process hearing centered on the question of whether the school district's proposed educational program was inadequate. *See* Weast v. Schaffer, 377 F.3d 449, 451 (4th Cir. 2004), *aff'd*, 536 U.S. 49 (2005). *See also* Candace S. Kovacic-Fleischer, *Proving Discrimination After Price Waterhouse and Wards Cove: Semantics As Substance*, 39 AM. U. L. REV. 615, 621 (1990) (noting that "although allocation of the burdens of production and persuasion is nominally procedural, it has significant, substantive impact.").

²³⁴ In contrast, a social-relations approach resists the urge to apply an abstract rule and demands, instead, the use of "context-specific analyses." *See* MINOW, *supra* note 16, at 348.

²³⁵ *See supra* note 222 (citing *Rowley*, 458 U.S. at 200).

²³⁶ *See supra* note 223 (citing 20 U.S.C.A. § 1400(d)(1)(A) (West Supp. 2006)).

²³⁷ *See infra* notes 237-44 and accompanying text.

²³⁸ *See supra* notes 97-103 and accompanying text (discussing some of the negative aspects of due process).

demonstrated that the threat of due process can lead school districts to establish programmatic changes that serve their students with disabilities in a more effective manner.²³⁹ For example, the threat of due process can propel school districts to create new programs that include students with disabilities to a greater extent in the regular classroom.²⁴⁰ Even districts with a history of paying excessive amounts for tuition reimbursement for the unilateral placement by parents of their children in private schools have eventually begun to create improved programming.²⁴¹ The Court failed to consider that allocating the burden of persuasion to the school district could potentially lead school districts to develop better IEPs.²⁴² The Court actually noted that “[a]ssigning the burden of persuasion to school districts might encourage schools to put more

²³⁹ See Paul Foster, *Experiences and Perceptions of Special Education Directors Regarding the Due Process Hearing System* 91 (2004) (unpublished Ed.D. dissertation, Baylor University), available in Dissertation Abstracts International, UMI No. 3151938 (examining the experiences of 140 special education directors in Texas and finding that a majority reported that they create programs for students with disabilities in an effort to avoid the cost of due process hearings); Thomas Francis Hehir, *The Impact of Due Process on the Programmatic Decisions of Special Education Directors* 124-25 (1990) (unpublished Ed.D. dissertation, Harvard Graduate School of Education), available in Dissertation Abstracts International, UMI No. 9032438 (interviewing 28 special education directors in Massachusetts and finding that they developed programs in an effort to avoid hearings).

²⁴⁰ Hehir, *supra* note 238, at 88 (finding that, because of the motivating effect of due process, when parents of children with developmental disabilities in some districts sought less restrictive placements for their children, entirely new programs were created to serve large numbers of students).

²⁴¹ *Id.* at 108 (“In these districts [in which parents have sought costly private placements for their children], due process is playing a role by creating an economic incentive to develop programs within them.”).

²⁴² One of the briefs filed on behalf of the school district in *Schaffer* noted: [P]lacing the burden of proof at the due process hearings on school districts will alter a school district’s conduct as it drafts every IEP... If a school district is aware that it will be required to show that its proposed education plan for the child meets the substantive requirements of the IDEA in any subsequent due process hearing, it will have a stronger incentive to work with the parent to reach the correct result in initially developing the IEP. Brief for the ARC of the United States et al. as Amici Curiae in Support of Petitioners at 6, *Schaffer* (No. 04-698) [hereinafter Brief for the ARC].

resources into preparing IEPs and presenting their evidence.”²⁴³ Unfortunately, the Court went on to describe the preparation of IEPs as leading to additional “litigation and administrative expenditures” rather than as involving expenditures associated with the provision of “educational services.”²⁴⁴ Reference to the preparation of IEPs as part of the litigation and/or administrative process is contrary to the goal of the statute that views the IEP as the blueprint guiding the relationship between the school district and the child by specifying how the child will receive FAPE.²⁴⁵

In summary, the Court did not consider the relationship between the school district and the child as relevant to its decision that the ordinary default rule should be followed for the allocation of the burden of proof in IDEA due process disputes.²⁴⁶ First, the Court ignored differences between this relationship and the relationships involved in other civil rights statutes in terms of the substantial nature of what is required of the school district, the purpose of the relationship to provide an educational benefit to the child, and the expertise of school district personnel.²⁴⁷ Second, the Court treated the allocation of the burden of proof as merely procedural in nature, overlooking the substantive vision of the statute.²⁴⁸ Finally, the Court failed to take into account the positive impact that the threat of due process can have on the relationship between the school district and the child.²⁴⁹

²⁴³ Schaffer v. Weast, 546 U.S. 49, 58 (2005).

²⁴⁴ *Id.*

²⁴⁵ See *supra* notes 78-90 and accompanying text (describing the role of the IEP in helping to shape the relationship between the school district and the child with a disability).

²⁴⁶ See *supra* notes 212-44 and accompanying text.

²⁴⁷ See *supra* notes 212-30 and accompanying text.

²⁴⁸ See *supra* notes 231-35 and accompanying text.

²⁴⁹ See *supra* notes 236-44 and accompanying text.

b. Relationship between the School District and the Parent

The Court further disregarded IDEA's goal to promote a meaningful partnership between the school district and the parent.²⁵⁰ Although IDEA envisioned a collaborative relationship between parents and school districts, school districts have distinct advantages over parents, including better access to records and witnesses, greater expertise, superior knowledge of the availability of educational services in the district, and greater influence on decisions made by the IEP team.²⁵¹ In fact, research has shown that, contrary to the intent

²⁵⁰ See *supra* Part I.B.2 (discussing the goal of IDEA to foster a meaningful partnership between parents and school districts).

²⁵¹ See Brief of Petitioners at 45-50, *Schaffer* (No. 04-698) (listing advantages school districts have over parents); Brief for the ARC, *supra* note 241, at 13-18 (same); Brief of Parent Attorneys and Advocates, *supra* note 213, at 16-27 (same); Brief of Various Autism Organizations, *supra* note 229, at 11-12 (noting that with respect to the IEP process, "parents are ... decisively outmanned by their 'teammates' – not just in numbers, but in expertise, in training, in time, and in resources."). See also Di Iorio, *supra* note 213, at 734-39; Leahy & Mugmon, *supra* note 213, at 963-64; Mayes et al., *supra* note 8, at 74-76; Elizabeth L. Anstaett, Note, *Burden of Proof Under the Education for All Handicapped Children Act*, 51 OHIO ST. L.J. 759, 771 (1990); Johnson, *supra* note 213, at 618-20.

In contrast, the attorneys for the school district argued that parents have an advantage in knowledge in terms of information about their own child: "As the 'I' in IEP denotes, this is an individualized inquiry focusing on a particular child's needs Thus, the single most important source of relevant information ... is the child ... Clearly, parents have at least equal and, in most cases, superior access to that source of information." Brief for Respondents at 40, *Schaffer* (No. 04-698). See also Brief of Amicus Curiae National School Boards Association in Support of Respondents at 20-23, *Schaffer* (No. 04-698) [hereinafter Brief of National School Boards Association]; Brief Amici Curiae of the States of Hawaii et al. in Support of Respondents at 24, *Schaffer* (No. 04-698).

It is important to point out, however, that although parents may have a keen awareness of their child's strengths and needs, they do not have the knowledge and expertise of school personnel. See *Weast v. Schaffer*, 377 F.3d 499, 458, *aff'd*, 546 U.S. 49 (2005) (Luttig, J., dissenting) ("While individual parents may have insight into the educational development of their own children, they lack the comprehensive understanding of the educational alternatives available to disabled children in the school district that officials of the school system possess."); Leahy & Mugmon, *supra* note 213, at 964 ("[N]o matter how familiar parents may become with their own

of IDEA, parents often feel devalued and at a significant disadvantage in their relationships with school personnel.²⁵² Moreover, as reported in the literature, the large number of due process hearings has further exacerbated the adversarial relationship between parents and school districts, bringing significant costs and emotional stress to both sides.²⁵³

In addition to the above findings, research has also shown that parents of children with disabilities are more likely to come from low-income backgrounds and have lower levels of education.²⁵⁴ This fact often creates a less advantageous situation for many parents, who may not have the knowledge and/or resources to prepare an adequate case against the school district.²⁵⁵ It is interesting to note that, as Judge Luttig pointed out in his Fourth Circuit dissenting opinion, the parents in *Schaffer*, unlike the majority of parents of students with disabilities, were “knowledgeable about the educational resources available to their son and sophisticated (if yet unsuccessful) in their pursuit of these resources.”²⁵⁶ The Supreme Court in *Schaffer* may have been influenced in part

child’s situation and IEP, they fundamentally lack the institutional frame of reference inherent in the school district’s vast special education experiences.”).

²⁵² See *supra* notes 97-98 and accompanying text (discussing feelings of powerlessness on the part of parents).

²⁵³ See *supra* note 99 and accompanying text (describing the adversarial relationship between parents and school districts).

²⁵⁴ See *supra* notes 100-03 and accompanying text (discussing income levels of children with disabilities); see also Brief for the ARC, *supra* note 241, at 9-13; Brief of Parent Attorneys and Advocates, *supra* note 213, at 20-21.

²⁵⁵ Particularly affected by this situation are children who are homeless or in foster care. See Brief for the ARC, *supra* note 241, at 12-13 (noting that “the reality is that a homeless parent is going to have, on average, less ability to advocate on behalf of his or her child at an IEP meeting or a due process hearing [Foster children with disabilities] end up placed with adults not well-equipped to navigate through the special education process on their behalf.”); see also Brief of Parent Attorneys and Advocates, *supra* note 213, at 16.

²⁵⁶ 377 F.3d at 458 (Luttig, J., dissenting).

by the level of knowledge exhibited by these particular parents.²⁵⁷

Although the Court referred to the “natural advantage” of school districts as the “most plausible” argument for assigning the burden to the school district, the Court concluded, as did the Fourth Circuit, that Congress had addressed this advantage by providing parents with various procedural protections under IDEA.²⁵⁸ Moreover, the Court noted that additional provisions were incorporated into the 2004 reauthorization of IDEA to “ensure that the school bears no unique informational advantage.”²⁵⁹ The Court failed to recognize, however, that while IDEA includes such safeguards, these procedural protections have not been sufficient to make parents meaningful partners in the development of their child’s IEP.²⁶⁰ Unfortunately, the

²⁵⁷ See *id.* (Luttig, J. dissenting) (emphasis in original) (“I fear that, in reaching the contrary conclusion, the majority has been unduly influenced by ... the parents of the disabled student *in this case* ... If so, it is regrettable. These parents are not typical, and any choice regarding the burden of proof should not be made in the belief that they are.”).

²⁵⁸ See *Schaffer v. Weast*, 546 U.S. 49, 60 (2005); see also 377 F.3d at 454 (“Congress has taken into account the natural advantage a school system might have in the IEP process ... As a result, the school system has no unfair information or resource advantage that compels us to reassign the burden of proof to the school system....”). The briefs filed on behalf of the school district made similar arguments. See Brief for Respondents at 24, *Schaffer* (No. 04-698) (claiming that “Congress sought to level the playing field in IDEA hearings” by providing parents with a set of procedural safeguards); Brief of National School Boards Association, *supra* note 250, at 20-23 (arguing that because parents have access to their child’s educational information, “Congress has substantially evened the playing field”); Brief of the Council of the Great City Schools et al. as Amici Curiae in Support of Respondent at 23, *Schaffer* (No. 04-698) [hereinafter Brief of the Council of the Great City Schools] (“IDEA’s procedural safeguards ensure a level playing field”); Brief for the United States as Amicus Curiae Supporting Respondent at 27, *Schaffer* (No. 04-698) (“Congress thought that the procedural safeguards contained in the Act provided a sufficiently level playing field....”).

²⁵⁹ *Schaffer*, 546 U.S. at 61.

²⁶⁰ In addition, the specified safeguards are not necessarily an exhaustive list. See Leahy & Mugnon, *supra* note 213, at 967-68 (“[I]t is possible – even quite reasonable – to understand the procedural safeguards specified

Court's assignment of the burden of persuasion, in all instances, to the party seeking relief will likely increase the feelings of powerlessness on the part of parents, thereby undermining the goal of IDEA to promote a meaningful partnership between parents and school districts.²⁶¹

While the Court rejected the arguments reflecting the perspective of parents concerning the antagonistic relationship between parents and school districts,²⁶² the Court took into account the perspective of school districts regarding this relationship.²⁶³ School districts point out that they feel challenged in carrying out their obligations under IDEA²⁶⁴ because of the costs associated with due process hearings²⁶⁵ and tuition reimbursement.²⁶⁶ In addition, IDEA's complex legal requirements lead school district personnel to focus inordinately on procedural compliance.²⁶⁷ The attorneys for

in the IDEA to be representative, and not exhaustive, of Congressional intent to protect the rights of parents vis a vis school districts.”).

²⁶¹ For a discussion of the implications of the *Schaffer* decision for parents and school districts, see *infra* Part III.C.

²⁶² See, e.g., briefs and articles cited *supra* note 250 (discussing advantages of school districts over parents).

²⁶³ See *infra* notes 263-68 and accompanying text.

²⁶⁴ See, e.g., briefs cited *infra* notes 264-65.

²⁶⁵ See Brief for Respondents at 38, *Schaffer* (No. 04-698) (discussing costs associated with due process hearings).

²⁶⁶ See *id.* at 36 n. 19, *Schaffer* (No. 04-698) (discussing the large expenses associated with tuition reimbursement for unilateral placements in private schools); Brief of the Council of the Great City Schools, *supra* note 257, at 17-18 (same).

²⁶⁷ A study of special education in the Baltimore City Public Schools found an overemphasis on the procedural “compliance maze.” KALMAN R. HETTLEMAN, STILL GETTING IT WRONG: THE CONTINUING FAILURE OF SPECIAL EDUCATION IN THE BALTIMORE CITY PUBLIC SCHOOLS 20-21 (Feb. 1, 2002), available at http://www.abell.org/pubsitems/ed_getting_it_wrong.pdf (last visited Nov. 15, 2007). Moreover, it was reported that “[t]he price paid by students and teachers for the compliance maze is far greater than just the waste of money. It diverts focus from instruction, saps morale ... and impedes integration of General Education and Special Education.” *Id.* See also PRESIDENT’S COMM’N ON EXCELLENCE IN SPECIAL EDUC., U.S. DEP’T OF EDUC., A NEW ERA: REVITALIZING SPECIAL EDUCATION FOR CHILDREN AND THEIR FAMILIES 18 (July, 2002), available at <http://www.ed.gov/inits/commissionsboards/>

the school district noted that due process hearings are costly to school districts in terms of both time and resources: “[I]n addition to direct legal and administrative costs, hearings impose substantial opportunity costs for both school districts and students, for educators must be out of the classrooms while attending and even preparing for hearings.”²⁶⁸ The Court appeared to have been particularly sympathetic toward school districts with respect to the litigation and administrative costs associated with due process hearings, noting that “[I]tilitating a due process complaint is an expensive affair, costing schools approximately \$8,000-to-\$12,000 per hearing.”²⁶⁹

c. Relationship between Students with Disabilities and their Non-Disabled Peers

Finally, the Court overlooked the goal of IDEA to promote positive social relations between students with disabilities and their non-disabled peers.²⁷⁰ Although *Schaffer* involved a request for tuition reimbursement for placement in a private school (an LRE issue),²⁷¹ the Court did not take into account the strong statutory preference that students with disabilities be educated, to the maximum extent appropriate, in the LRE.²⁷² The integration of students with disabilities into the regular classroom allows for greater opportunities for exposure to more challenging curriculum and for interaction

whspecialeducation/reports/images/Pres_Rep.pdf (last visited Nov. 15, 2007) (finding that IDEA’s “emphasis on procedural compliance requirements trickles down to directly impact the amount of time actually spent providing direct services, including instruction to children with disabilities.”).

²⁶⁸ Brief for Respondents at 38, *Schaffer* (No. 04-698).

²⁶⁹ *Schaffer v. Weast*, 546 U.S. 49, 59 (2005) (citing JAY G. CHAMBERS ET AL., WHAT ARE WE SPENDING ON PROCEDURAL SAFEGUARDS IN SPECIAL EDUCATION 1999-2000, at 8 (Rep. No. 4 of the Special Educ. Expenditure Project (SEEP) Submitted to the Office of Special Educ. Programs, U.S. Dep’t of Education, May, 2003)).

²⁷⁰ See *supra* Part I.B.3 (discussing the goal of IDEA to foster positive relations between students with disabilities and their non-disabled classmates).

²⁷¹ See *supra* notes 104-08 for a discussion of LRE.

²⁷² See 20 U.S.C.A. § 1412(a)(5)(A) (West Supp. 2006); 34 C.F.R. § 300.114(a)(2) (2007).

and socialization among students with disabilities and their non-disabled classmates.²⁷³ Moreover, such integration can benefit the larger school community as well as society as a whole by sensitizing non-disabled students to differences, helping to change the standard of normality, and demonstrating that disability “is a natural part of the human experience.”²⁷⁴ As one commentator noted, “Since the eradication of prejudice and debilitating stereotypes is a slow and uncertain process in the best of worlds, children, and their educational communities, may afford the best opportunity the country has to bring individuals with disabilities into the mainstream.”²⁷⁵

B. Ginsburg’s Dissent

Justice Ginsburg, in arriving at the conclusion that for policy reasons and fairness the burden of persuasion should be assigned to the school district, partially addressed the relationships overlooked by the Court.²⁷⁶ Unlike the majority opinion, Justice Ginsburg took into account the substantial nature of what is required of the school district in its relationship with the child, stating: “The IDEA is atypical in this respect: It casts an affirmative, beneficiary-specific obligation on providers of public education. School districts are charged with responsibility to offer to each disabled child an individualized education program (IEP) suitable to the child’s special needs.”²⁷⁷ Ginsburg consequently concluded, “The proponent of the IEP, it seems to me, is properly called

²⁷³ See *supra* notes 109-11 and accompanying text (discussing opportunities in the regular classroom for exposure to more challenging curriculum and increased interactions between students with disabilities and their non-disabled peers).

²⁷⁴ 20 U.S.C.A. § 1400(c)(1). See also *supra* notes 112-15 and accompanying text (discussing the benefits of integration for the larger school community).

²⁷⁵ Daniel H. Melvin II, *The Desegregation of Children with Disabilities*, 44 DEPAUL L. REV. 599, 648 (1995).

²⁷⁶ See *infra* notes 203-74 and accompanying text.

²⁷⁷ *Schaffer v. Weast*, 546 U.S. 49, 64 (2005) (Ginsburg, J., dissenting) (citing 20 U.S.C.A. §§ 1400(d)(1), 1412(a)(4), 1414(d)).

upon to demonstrate its adequacy.”²⁷⁸ Similarly, Justice Ginsburg understood the positive effect that due process hearings can have on the relationship between the school district and the child.²⁷⁹ She responded to the Court’s classification of the preparation of IEPs as litigation and administrative expenditures as inaccurate, and noted: “Costs entailed in the preparation of suitable IEPs ... are the very expenditures necessary to ensure each child covered by IDEA [has] access to a free [and] appropriate education. These outlays surely relate to ‘educational services.’”²⁸⁰ Ginsburg further stated that “school districts striving to balance their budgets, if ‘left to [their] own devices,’ will favor educational options that enable them to conserve resources.”²⁸¹ On the other hand, “[p]lacing the burden on the district ... will strengthen school officials’ resolve to choose a course genuinely tailored to the child’s individual needs.”²⁸²

Unlike the majority opinion, Justice Ginsburg expressed concern about the advantage in knowledge and power that school districts have over parents: “[T]he school district is ... in a far better position to demonstrate that it has fulfilled [its statutory] obligation than the disabled student’s parents are in to show that the school district has failed to do so.”²⁸³ Ginsburg further discussed the unequal nature of the relationship between parents and school districts by referring to the Third Circuit opinion in *Oberti v. Board of Education*, which found that school districts have greater access to information, better control over witnesses, and greater expertise.²⁸⁴ Citing Judge Luttig’s dissent, Ginsburg noted that most parents of students with disabilities lack the knowledge and “sophisticat[ion]” to bring a successful case

²⁷⁸ *Id.* (Ginsburg, J., dissenting).

²⁷⁹ *See supra* notes 236-44 and accompanying text (discussing the motivating effect of due process).

²⁸⁰ 546 U.S. at 65-66 (Ginsburg, J., dissenting).

²⁸¹ *Id.* (Ginsburg, J., dissenting) (alteration in original) (quoting *Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840, 864-65 (6th Cir. 2004)).

²⁸² *Id.* (Ginsburg, J., dissenting).

²⁸³ *Id.* at 538 (Ginsburg, J., dissenting) (alteration in original) (quoting 377 F.3d 449, 457 (4th Cir. 2004) (Luttig, J., dissenting)).

²⁸⁴ *Id.* (quoting 995 F.2d 1204, 1219 (3d Cir. 1993)).

against the school district.²⁸⁵ Although Justice Ginsburg recognized the significant knowledge and power differential between parents and school districts, she did not fully address the adversarial relationship between parents and school districts because she did not acknowledge the difficulties noted by school districts in carrying out their obligations under IDEA.²⁸⁶ By assigning the burden to school districts in all instances, without exception, Justice Ginsburg ignored the concern of school districts in regard to the substantial costs associated with due process hearings and, in particular, with respect to tuition reimbursement.²⁸⁷

Thus, while the majority opinion did not sufficiently address the perspective of parents regarding their disadvantaged position in relation to school districts as a result of a discrepancy in knowledge and power, Justice Ginsburg did not acknowledge the perspective of school districts and the challenges they face.²⁸⁸ It is interesting that, on the one hand, the attorneys for the parents argued that the Court's decision to assign the burden to the party seeking relief would exacerbate the antagonistic relationship between parents and school districts by leading school districts to become more intransigent in their interactions with parents.²⁸⁹ At the same time, the attorneys for the school district argued that assigning

²⁸⁵ *Schaffer*, 546 U.S. at 66-67 (Ginsburg, J., dissenting) (alteration in original) (quoting *Weast v. Schaffer*, 377 F.3d at 458 (Luttig, J., dissenting)).

²⁸⁶ See *supra* notes 263-68 and accompanying text (discussing some of the challenges pointed out by school districts).

²⁸⁷ See Brief of the Council of the Great City Schools, *supra* note 257, at 17-18 ("The cost of ... private-school placements – reportedly around \$25,000 annually per child in the nation's three largest school districts – represents an enormous expenditure of funds diverted from both general curricula services and specialized programs of compensatory education or language acquisition for low-income, minority, and limited English proficient children.").

²⁸⁸ Neither opinion addressed both sides of the adversarial relationship between parents and school districts by considering the full relational context.

²⁸⁹ Brief of Petitioners at 33, *Schaffer* (No. 04-698) ("Placing the burden on the parents significantly strengthens the hand of often-intransigent school district bureaucracies.").

the burden to the school district in all situations would likewise perpetuate the contentious relationship between parents and school districts by leading parents to become more litigious, particularly with respect to tuition reimbursement cases.²⁹⁰ In essence, the majority opinion and Justice Ginsburg's dissent reflect the dilemma of difference, with opposing views about whether differential treatment was appropriate.²⁹¹ The majority opinion determined that parents of children with disabilities should not receive differential treatment,²⁹² whereas Justice Ginsburg concluded that differential treatment was appropriate.²⁹³ Both opinions, however, perpetuate the adversarial relationship between parents and school districts as well as the notion that students with disabilities and their parents are "different."²⁹⁴

Finally, with respect to the relationship between students with disabilities and their non-disabled peers, although *Schaffer* involved an LRE issue, neither Justice Ginsburg nor the majority opinion mentioned IDEA's strong preference for the integration of students with disabilities into the regular classroom, providing opportunities for exposure to more challenging curriculum and for interactions between students with disabilities and their non-disabled peers.²⁹⁵ Thus, Justice Ginsburg addressed the relationship between the school district and the child but only partially considered the relationship between the school district and the parent.²⁹⁶ In addition, Justice Ginsburg did not take into account the

²⁹⁰ Brief for Respondents at 35, *Schaffer* (No. 04-698) ("Interpreting IDEA to impose a burden of proof on school districts in any hearing initiated by a parent would increase the incentive for litigation over IEPs....").

²⁹¹ See *supra* notes 41-42 and accompanying text (describing the dilemma of difference).

²⁹² See *supra* notes 193-95 and accompanying text.

²⁹³ See *supra* text accompanying note 275.

²⁹⁴ See *supra* notes 289-92 and accompanying text.

²⁹⁵ See *supra* notes 104-08 and accompanying text (discussing 20 U.S.C.A. § 1412(a)(5)(A) (West Supp. 2006); 34 C.F.R. § 300.114(a)(2) (2007)). See also *supra* notes 269-74 and accompanying text (noting the majority opinion's lack of focus on the LRE).

²⁹⁶ See *supra* notes 276-86 and accompanying text (discussing Ginsburg's consideration of the school district-child and school district-parent relationships).

important relationship between students with disabilities and their non-disabled classmates.²⁹⁷ In contrast, the proposal made by the present article considers this relationship by taking a social-relations approach.²⁹⁸

C. Implications of the Schaffer Decision

1. Implications for Parents

In the aftermath of *Schaffer*, some parent advocates and attorneys have indicated that they are not overly concerned about the impact of the case.²⁹⁹ First, relatively few due process hearings are in evidentiary equipoise, as was *Schaffer*; in most hearings, the evidence is more strongly in support of one of the parties, and the question of which party bears the burden of persuasion is not critical.³⁰⁰ In addition, because the goal of parents is to prevail at due process hearings in order to obtain better educational services for their

²⁹⁷ See *supra* note 294 and accompanying text (noting Ginsburg's lack of consideration of the relationship between students with disabilities and their non-disabled peers).

²⁹⁸ See *infra* Part IV.B (proposing alternative approach to the allocation of the burden of proof in IDEA due process hearing)

²⁹⁹ See Matt Cohen, *Schaffer v. Weast Supreme Court Decision*, 68 FAMILIES TOGETHER, INC. NEWSLETTER 7 (Mar. 2006), available at http://www.families-together-inc.com/newsletters/march06news/index_files/Page442.htm (last visited Nov. 15, 2007); Letter from Attorney Robert Crabtree on *Schaffer v. Weast* Supreme Court Case to the Federation for Children with Special Needs (Nov. 14, 2005), available at <http://pfr.org/Shaffer-Weast.html> (last visited Nov. 15, 2007) [hereinafter Crabtree Letter]; Charles P. Fox, *Schaffer v. Weast: The Sky Is Not Falling* (last modified Nov. 21, 2005), available at http://specialedlaw.blogspot.com/home/2005/11/shaffer_v_weast.html (last visited Nov. 15, 2007); PETER W.D. WRIGHT, *SCHAFFER V. WEAST: HOW WILL THE DECISION AFFECT YOU?* 6-7 (last modified Dec. 7, 2005), available at <http://www.wrightslaw.com/law/art/schaffer.impact.pwright.pdf> (last visited Nov. 15, 2007).

³⁰⁰ See *Schaffer v. Weast*, 546 U.S. 49, 69 (2005) (Breyer, J., dissenting) (noting that a situation in which the evidence is in "perfect" equipoise is a "rara avis"); Cohen, *supra* note 298, ("Most cases are not so close that the burden of proof is the legal threshold by which the cases are determined. In cases that strongly favor parents or schools, the burden of proof should not be an issue.").

child, parents will most likely mount as strong a case as possible, regardless of who bears the burden of persuasion.³⁰¹ Moreover, because the decision underscores the importance of the procedural protections in IDEA by mentioning some of these protections in detail, the *Schaffer* decision may lead some hearing officers to be less tolerant of procedural violations by school districts.³⁰²

Nevertheless, because the Court's decision did not help parents feel that they are on more of an equal playing field in their relations with school personnel, it is likely that the decision will have an overall negative psychological effect on parents.³⁰³ In those jurisdictions in which the burden of

³⁰¹ See ARKANSAS GOVERNOR'S DEVELOPMENTAL DISABILITIES COUNCIL, SUPREME COURT RULING'S IMPACT 2, available at <http://www.ddcouncil.org/pdfs/whitepaper.pdf> (last visited Dec. 7, 2007) (stating that parent attorneys should always behave as if the parents have the burden of proof); Crabtree Letter, *supra* note 298 (noting that parent attorneys have generally assumed that parents bear the burden because "not to assume so and to build one's case accordingly would have been foolhardy."); Fox, *supra* note 298 ("The simple reality is that only a foolhardy parents' lawyer would ever approach a case and factor in burden of proof in strategic decision-making.").

³⁰² See Fox, *supra* note 298 ("Schaffer ... reiterated the primacy of the procedural safeguards embodied in the statute that all too often hearing officers are willing to ignore."); Nessa G. Siegel Co., LPA, *Burden of Proof: What Does It Mean to Ohio Parents?*, available at <http://www.nessasiegel.com/articles/articleofmonth1106.html> (last visited Dec. 7, 2007) (noting that the *Schaffer* opinion "emphasizes the procedural requirements and ensures that parents receive all their rights when participating in decisions affecting their child."); WRIGHT, *supra* note 298, at 6 (arguing that a school district's "attempt to delay or sabotage" post-*Schaffer* "can be expected to backfire" and that "[i]f litigation does ensue, these tactics may be a sufficient procedural breach to justify a ruling in favor of the parent and child.").

³⁰³ See Autism Society of America, *Schaffer v. Weast Decision Sides with School Districts: Ruling Unfortunate for Families of Children with Disabilities* (last modified Nov. 16, 2005), available at <http://www.autism-society.org/site/News2?page=NewsArticle&id=8139> (last visited Nov. 16, 2005) (noting that "the Supreme Court's decision ... places additional burdens and obstacles on the parents and advocates for these students wishing to obtain the services needed to improve their lives."); *Statement of The Council of Parent Attorneys and Advocates Amicus Committee* (last modified Jan.

persuasion had previously been assigned to the school district, and the state currently does not have its own statute or regulation allocating the burden to the school district, the decision may make the due process system even more overwhelming for parents of students with disabilities.³⁰⁴ As noted, parents of students with disabilities tend to have lower socio-economic and educational levels than parents of children in the general population.³⁰⁵ In fact, those parents who do not have the resources to hire an attorney may be further deterred from bringing claims on their own.³⁰⁶ Because of these potentially negative repercussions for parents, some commentators have criticized the Court's decision in *Schaffer*.³⁰⁷ For example, an editorial in the New York Times stated:

The court's ruling ignores the clear advantages that school districts almost always have over parents ... The districts have the money, and many have lawyers and rosters of experts on

2006), available at <http://www.copaa.org/news/schaffer.html> (last visited Nov. 15, 2007) ("The Supreme Court's *Schaffer v. Weast* decision has the potential to harm 6.5 million children with disabilities ... The Supreme Court's decision in *Weast* further ensures that parents will find the process more intimidating and daunting.").

³⁰⁴ See *supra* notes 97-99 and accompanying text (discussing the due process system and the feelings of powerlessness on the part of parents).

³⁰⁵ See *supra* notes 100-03 and accompanying text. See also *Statement of The Council of Parent Attorneys and Advocates Amicus Committee*, *supra* note 302 ("It is unfortunate that the Supreme Court overlooked the immense consequences for all families – in particular those families with limited resources.").

³⁰⁶ See Dan Martin, *Ruling puts the onus on isle parents versus DOE: The Supreme Court decision affects special-needs kids*, 10 STAR BULLETIN 2005 (Nov. 15, 2005), available at <http://starbulletin.com/2005/11/15/news/story01.html> (last visited Nov. 15, 2007) ("[T]he ruling could especially hurt low-income and immigrant families that do not have the stomach – or wherewithal – for a fight with the [school district].").

³⁰⁷ See, e.g., *id.*; *Disability Law, Moving Forward*, N.Y. TIMES, Nov. 18, 2005, available at <http://www.nytimes.com/2005/11/18/opinion/18fri3.html?ex=1289970000&en=f545304d4cd99918&ei=5090&partner=rssuserland&emc=rss> (last visited Nov. 15, 2007) [hereinafter *Disability Law, Moving Forward*].

their payrolls. But many of the families cannot afford legal representation at all. With less pressure to justify themselves, school districts can simply stand pat – even when their educational plans have proved disastrous for the disabled children in question. This was clearly not the outcome that Congress intended when it passed this landmark law, and deliberately expanded the rights of disabled children and their parents.³⁰⁸

While phrased in hyperbolic language, this editorial captures the feelings of frustration and intimidation that due process hearings raise for many parents.³⁰⁹ Moreover, the Court's decision in *Schaffer* will likely be even more discouraging to parents in light of the Court's subsequent ruling in *Arlington Central School District Board of Education v. Murphy*, in which the Court held that the language of IDEA did not provide states with "clear notice" of their obligation with respect to the payment of expert fees, as required of a statute passed under the Spending Clause.³¹⁰ In response to the potentially negative impact of *Schaffer* on parents, some parent advocates and attorneys have been urging state legislatures to adopt statutes or regulations assigning the burden to the school district.³¹¹

³⁰⁸ *Disability Law, Moving Forward*, *supra* note 306.

³⁰⁹ See *supra* notes 97-103 and accompanying text (discussing feelings of intimidation of parents).

³¹⁰ See 126 S. Ct. 2455, 2457 (2006). See also NYSARC, Inc., *Gov. Pataki Vetoed Legislation – Burden of Proof* (last modified Aug. 7, 2006), available at <http://www.nysarc.org/news-info/nysarc-news-view-story-detail.asp?varID=108> (last visited Nov. 15, 2007) ("With the addition of *Schaffer* and then *Arlington* ... there is a clear trend toward eliminating the right to FAPE except for those parents with sufficient means to hire the necessary legal help and, now, pay for expert witnesses without any hope of being reimbursed, even if they prevail.").

³¹¹ See, e.g., Sandra M. Gumerove, *TAKE ACTION!! Placing the Burden of Proof where it belongs – on the School District* (last modified April 12, 2006), available at <http://advokidsblog.com/?p=43> (last visited Nov. 15, 2007); NYSARC, Inc., *supra* note 309. For a discussion of post-*Schaffer* activity at the state level, see *infra* Part IV.A.

2. Implications for School Districts

While *Schaffer* may have a negative psychological effect on parents, the decision represents a symbolic victory for school districts and may make them feel “relieved and vindicated.”³¹² In addition, it is possible that, because the party seeking relief now bears the burden of persuasion, the decision may discourage some parent attorneys, who previously might have taken advantage of school districts, from filing frivolous claims.³¹³ Similarly, the decision may lead some parents to pursue less adversarial procedures such as mediation or settlements.³¹⁴

³¹² LESLIE R. STELLMAN, COMMONWEALTH EDUC. POLICY INST., SPECIAL EDUCATION AND THE BURDENS OF PROOF: THE LEGACY OF SCHAFFER EX REL. SCHAFFER V. WEAST (Winter, 2006), available at <http://www.cepionline.org/pdf/Policy%20Briefs/Les%20Stellman--Schaffer%20v.%20Weast.pdf> (last visited Nov. 15, 2007). See also Richard S. Vacca, Commonwealth Educ. Policy Institute, *The Burden of Proof under IDEA: Schaffer v. Weast*, 4-7 CEPI EDUC. LAW NEWSLETTER (Mar. 24, 2006), available at http://www.cepionline.org/newsletter/2005-2006/2006_Mar_Burden_Of_Proof.html (last visited Nov. 15, 2007) (noting that “the *Schaffer* decision undoubtedly will have a positive impact on the confidence level of local public school officials.”); Crabtree Letter, *supra* note 298 (“[T]he *Schaffer* decision has been reported in some quarters ... as a major victory for school districts”).

³¹³ Maree Sneed et al., *Schaffer v. Weast: Burden of Proof at IDEA Administrative Hearings*, HOGAN & HARTSON, LLP, EDUC. UPDATE, (Nov. 17, 2005), available at http://www.hhlaw.com/files/Publication/43d8134e-5187-439a-8fde-9e6fff3dba67/Presentation/PublicationAttachment/2379e774-c4de-420d-a6be-ae1be2c10ecb/2233_Schaffer%20Update.pdf (last visited Nov. 15, 2007) (noting that the *Schaffer* decision may deter “some parents from filing non-meritorious due process claims in the first place.”).

³¹⁴ *Traditional law applies to special education cases*, 10 STAR BULLETIN 2005 (Nov. 16, 2005), available at <http://starbulletin.com/2005/11/16/editorial/editorial01.html> (last visited Nov. 15, 2007) (“The ruling should encourage some parents to opt for mediation instead of costly litigation, allowing school districts to spend their education dollars on schooling.”). See also National School Boards Association, *NSBA Applauds Supreme Court Decision in Favor of Montgomery County, Maryland Schools* (last modified Nov. 14, 2005), available at <http://www.nsba.org/site/>

At the same time, because the Court's decision did nothing to address the feelings of powerlessness on the part of parents, the contentious relationship between parents and school districts will likely continue.³¹⁵ Consequently, it is in the best interest of school districts to strive to ease tensions with parents.³¹⁶ For example, because the Court's ruling may make some parents more receptive to the use of less adversarial means than due process, school districts should encourage parents to use informal dispute resolution techniques.³¹⁷ Such an approach has been emphasized in new provisions in the 2004 reauthorization of IDEA, requiring school districts to establish and implement mediation services that produce legally binding agreements³¹⁸ and to convene a "resolution session" within 15 days of receipt of a parental complaint.³¹⁹ In order to promote the use of these techniques, appropriate professional development should be initiated for school personnel, and extensive outreach should be provided to parents.³²⁰ Moreover, school districts should work toward improving the quality of IEPs by providing professional development to help school personnel design appropriate IEPs that are truly individualized and conduct IEP meetings in a

doc.asp?TRACKID=&VID=2&CID=90&DID=37251 (last visited Nov. 15, 2007) ("This decision will help limit the cost of special education hearings, allowing schools to spend the money and resources on educating children, not legal proceedings.").

³¹⁵ See *supra* notes 302-10 and accompanying text.

³¹⁶ See *infra* notes 316-20 and accompanying text.

³¹⁷ See *supra* note 313 and accompanying text.

³¹⁸ See 20 U.S.C.A. § 1415(e)(2)(F) (West Supp. 2006); see also 34 C.F.R. § 300.506(b)(6) (2007).

³¹⁹ See 20 U.S.C.A. § 1415(f)(1)(B); see also 34 C.F.R. § 300.510.

³²⁰ See THOMAS HEHIR ET AL., COMPREHENSIVE MANAGEMENT REVIEW AND EVALUATION OF SPECIAL EDUCATION: SUBMITTED TO THE NEW YORK CITY DEPARTMENT OF EDUCATION 98-99 (September 20, 2005), available at <http://www.nycboe.net/NR/rdonlyres/0E84335C-D6B5-4B56-81AB-FDDE8EC61278/6227/FinalHehirReport0920052.pdf> (last visited Nov. 15, 2007) (providing recommendations for the New York City Department of Education with respect to addressing the challenges associated with its due process system).

manner that incorporates the insight and perspective of parents.³²¹

3. Implications for Hearing Officers

The extent to which the Supreme Court's ruling in *Schaffer* will impact the decisions of hearing officers is unclear.³²² On the one hand, the fact that parents – as the party most often seeking relief – now bear the burden of persuasion, may send the message to hearing officers to be highly critical of parental challenges of their child's IEP.³²³ On the other hand, the Court's emphasis on IDEA's procedural protections may lead some hearing officers to hold school districts to a high standard with respect to compliance with the procedural requirements of the statute.³²⁴

Regardless of which party bears the burden of persuasion, hearing officers must make determinations as to whether the burden has been met.³²⁵ Such determinations are based on whether the school district has provided the child with an appropriate education and are closely connected to the

³²¹ See NAT'L ASS'N OF STATE DIRS. OF SPECIAL EDUC., LINKAGE OF THE IEP TO THE GENERAL EDUCATION CURRICULUM, QUICK TURN AROUND (QTA): A BRIEF ANALYSIS OF A CRITICAL ISSUE IN SPECIAL EDUCATION 4 (Feb. 1999), available in ERIC, ED No. 428489 (surveying 33 state directors/administrators of special education and finding a need for increased professional development training for IEP teams); KIM MOHEREK SOPKO, THE IEP: A SYNTHESIS OF CURRENT LITERATURE SINCE 1997, at 13 (Prepared for Project Forum, Nat'l Ass'n of State Dirs. of Special Educ., Feb. 2003), available in ERIC, ED No. 476559 (describing the need for more professional development for general and special educators to help in the drafting of IEPs).

³²² See *infra* notes 322-23 and accompanying text.

³²³ The Court noted that assigning the burden to the district would "assume that every IEP is invalid..." *Schaffer v. Weast*, 546 U.S. 49, 59 (2005). The opposite might be said of the allocation of the burden to the moving party – i.e., such an assignment might assume the validity of every IEP.

³²⁴ See *supra* note 301 and accompanying text (discussing the impact of *Schaffer* on compliance with the procedural requirements of IDEA).

³²⁵ For example, in *Schaffer*, the hearing officer had to evaluate the appropriateness of the school district's proposed program. See *Weast v. Schaffer*, 377 F.3d 449, 455 (4th Cir. 2004), *aff'd*, 546 U.S. 49 (2005).

statute's substantive vision of education.³²⁶ Consequently, it is important for hearing officers to understand the meaning of an "appropriate" education within the context of current special education policy.³²⁷ In particular, hearing officers need to be cognizant of the fact that the concept of an appropriate education encompasses the requirement that students with disabilities have access to the general education curriculum.³²⁸

Below is a checklist that can be used by hearing officers who must decide, in each instance, whether a student has received access to the general education curriculum, to the maximum extent appropriate, in accordance with FAPE.³²⁹ Because IDEA requires that students with disabilities: (1) have access to, (2) be involved in, and (3) progress in the general education curriculum, the checklist utilizes questions that fall under these three categories.³³⁰

³²⁶ See *supra* 231-35 and accompanying text (discussing the relationship between the allocation of the burden of proof and the substantive vision of IDEA).

³²⁷ See *infra* notes 327-30 and accompanying text.

³²⁸ See *supra* notes 74-77 and accompanying text (discussing the concept of access to the general education curriculum).

³²⁹ The manner and extent to which a student will receive access to the general education curriculum will depend upon the individualized needs of the student. The issue has greater complexity with respect to students with significant disabilities. For a discussion of ways to provide access to the general education curriculum for students with significant disabilities, see generally SANDRA J. THOMPSON ET AL., *ALTERNATE ASSESSMENTS FOR STUDENTS WITH DISABILITIES* (2001); MICHAEL L. WEHMEYER, *PROVIDING ACCESS TO THE GENERAL CURRICULUM: TEACHING STUDENTS WITH MENTAL RETARDATION* (2002).

³³⁰ See *supra* note 76 and accompanying text (discussing the categories of access, involvement, and progress).

Checklist of Questions for Hearing Officers to Consider in Determining Whether the Burden Has Been Met and the Student Has Received an Appropriate Education:³³¹

ACCESS

- What are the child's individualized learning needs as articulated by the IEP, additional documentation, and/or expert witnesses?

- Does the offered or provided educational program enable the child to participate, as appropriate, in grade-level work or is the program watered down?

- Does the offered or provided educational program enable the child to use the same materials as other children at his/her grade level? If not, is the content the same?

- What instructional accommodations is the child receiving? Are the accommodations sufficient to enable the child to participate in grade-level work and use grade-level materials, as appropriate?

INVOLVEMENT

- Does the offered or provided educational program enable the child to participate in the regular classroom, to the maximum extent appropriate?

³³¹ These questions have been adapted from the legal requirements associated with IEPs and the educational literature pertaining to access to the general education curriculum. See Karger, *supra* note 76, at 71-81; JOANNE KARGER, ACCESS TO THE GENERAL CURRICULUM FOR STUDENTS WITH DISABILITIES: THE ROLE OF THE IEP (Rep. Prepared for the Nat'l Ctr. on Accessing the Gen. Curriculum, June, 2004), available at http://www.cast.org/publications/nac/nac_iep.html (last visited Nov. 15, 2007).

■ If the child is not participating in the regular classroom, has the IEP sufficiently articulated a justification for removal?

■ If the child is not participating in the regular classroom, does the offered or provided educational program allow for additional opportunities for the child to interact with his/her non-disabled peers?

PROGRESS

■ Does the offered or provided educational program enable the child to make progress toward his/her annual goals as stated in the IEP?

■ Does the offered or provided educational program enable the child to make progress in accordance with traditional measures of student improvement – e.g., improved grades in courses, better attendance, and promotional advancement?

■ Does the offered or provided educational program enable the child to make progress on state and districtwide assessments?

■ What assessment accommodations is the child receiving? Do the assessment accommodations match the instructional accommodations? Are the assessment accommodations sufficient to enable the child to demonstrate what he/she has learned?

The above checklist can be used as a starting point for hearing officers in making determinations as to whether the student has received FAPE in the LRE and can also be used by

school districts to ensure that they have provided the student with an appropriate education.³³²

IV. Proposal for the Allocation of the Burden of Proof in IDEA Due Process Hearings

Part III analyzed the majority and dissenting opinions in *Schaffer* and discussed the implications of the Court's decision for parents, school districts, and hearing officers.³³³ Part IV provides an alternative proposal for the allocation of the burden of proof in IDEA due process hearings in the aftermath of *Schaffer*.³³⁴ Part IV.A lays the foundation for this proposal by describing activity that has taken place at the state level post-*Schaffer*.³³⁵ Part IV.B presents the proposal, which reflects a social-relations approach for the allocation of the burden of proof, and recommends that Congress incorporate this method into the next reauthorization of IDEA.³³⁶ It is further recommended that, until such action is taken by Congress, states adopt the proposed method of burden allocation.³³⁷

A. *Post-Schaffer* Activity at the State Level

Because the Supreme Court declined to address whether states, on their own, could "override the default rule and put the burden always on the school district,"³³⁸ the question concerning which party should bear the burden of proof in IDEA due process hearings has continued at the state level.³³⁹ Table 3, derived in part from Table 2, shows the states that have assigned the burden to the school district pre- and post-*Schaffer*.³⁴⁰

³³² See *supra* note 330 and accompanying text.

³³³ See *supra* notes 190-331 and accompanying text.

³³⁴ See *infra* notes 337-421 and accompanying text.

³³⁵ See *infra* notes 337-59 and accompanying text.

³³⁶ See *infra* notes 360-421 and accompanying text.

³³⁷ See *infra* notes 365, 420 and accompanying text.

³³⁸ *Schaffer v. Weast*, 546 U.S. 49, 61-62 (2005).

³³⁹ See *infra* notes 340-59 and accompanying text.

³⁴⁰ See *infra* tbl.3.

Table 3. Comparison of States Assigning the Burden to the School District Pre- and Post-Schaffer

	Pre-Schaffer States Assigning Burden to School District	Post-Schaffer Status of States Assigning Burden to School District Pre-Schaffer	Post-Schaffer Additional States Introducing Bills Assigning Burden to School District
Circuits assigning burden to moving party pre-Schaffer			
Fourth Circuit	West Virginia	✓ Still in effect	Virginia – bill introduced
Eleventh Circuit	Alabama	Changed to moving party (7/05, prior to <i>Schaffer</i>)	
	Georgia	Changed to moving party	
Circuits assigning burden to district pre-Schaffer			
D.C. Circuit	D.C.	Changed to moving party	
Second Circuit	Connecticut	✓ Still in effect (bill introduced assigning burden to moving party)	New York – bill passed
Third Circuit	Delaware	✓ Still in effect	New Jersey – bill introduced
Seventh Circuit	Illinois (burden of production)	✓ Still in effect (burden of production)	
Eighth Circuit	Minnesota	✓ Still in effect (bill introduced assigning burden to moving party)	
Ninth Circuit	Alaska	Changed to moving party	Hawaii – bill introduced

Following the Court's ruling in November, 2005, states have had varying responses to the Court's decision in *Schaffer*.³⁴¹ Prior to *Schaffer*, eight states and the District of Columbia had adopted statutes or regulations allocating the burden to the school district – Alabama, Alaska, Connecticut, the District of Columbia, Delaware, Georgia, Illinois (burden of production), Minnesota, and West Virginia.³⁴² Table 3 shows that since the Supreme Court handed down its opinion, three of these states have modified their rules to align with the Court's decision – namely, Alaska³⁴³ the District of Columbia,³⁴⁴ and Georgia.³⁴⁵ In addition, Alabama had changed its regulation four months prior to the Court's decision in *Schaffer*.³⁴⁶ Moreover, in the states of Connecticut

³⁴¹ See *infra* notes 342-52 and accompanying text.

³⁴² See *supra* Part II.B, tbl.2.

³⁴³ ALASKA ADMIN. CODE tit. 4, § 52.550(e)(9) (Supp. 2006) (amending ALASKA ADMIN. CODE tit. 4, § 52.550(e)(9) (2003)) (placing the burden on “the party that requests the hearing”). See also State Board of Education & Early Development, *Approved Minutes of a Regular Meeting* 6 (March 16, 2006), available at http://www.eed.state.ak.us/State%5FBoard/minutes/2006_316minutes.pdf (last visited Nov. 15, 2007).

³⁴⁴ D.C. MUN. REGS. tit. 5, § 3030.3 (Supp. 2006) (amending D.C. MUN. REGS. tit. 5, § 3030.3 (2003)) (allocating the burden to “the party seeking relief”). See also V. Dion Haynes, *D.C. Schools to Test New Special-Ed Rule*, WASHINGTON POST, March 14, 2006, at B03 (discussing the background leading up to the adoption of the proposed D.C. regulation); Letter from Selene Almazan, Chair, Council of Parent Attorneys and Advocates (COPAA) to Russell Smith, Executive Director, D.C. Board of Education (April 20, 2006), available at http://www.copaa.org/pdf/BOP_WDC.pdf (last visited Nov. 15, 2007) (urging the D.C. Board of Education to withdraw its proposed change to the D.C. regulation).

³⁴⁵ GA. COMP. R. & REGS. r. 160-4-7-.18(1)(g)(8) (Supp. 2006) (amending GA. COMP. R. & REGS. r. 160-4-7-.18(1)(g)(8) (2002)) (allocating the burden to “the party seeking relief,” but allowing hearing officers the discretion to modify the rule “to conform with the requirements of law and justice in individual cases under unique or unusual circumstances...”).

³⁴⁶ ALA. ADMIN. CODE r. 290-8-9-.08(8)(c) (Supp. 2005) (amending ALA. ADMIN. CODE r. 290-8-9-.08(8)(c)(6)(ii)(I) (Supp. 2004)) (specifying that the burden is allocated to the “party filing the hearing request.”). The new Alabama regulation became effective on July 1, 2005, four months prior to *Schaffer*. See *Escambia County Bd. of Educ. v. Benton*, 406 F. Supp. 2d

and Minnesota, bills have been introduced to place the burden of proof on the party seeking relief.³⁴⁷

At the same time, Table 3 shows that some states have maintained their pre-*Schaffer* legislation/regulations that assign the burden to the school district and thereby differ from the Court's decision – namely, Delaware, Illinois (burden of production), and West Virginia.³⁴⁸ In addition, a number of other states have considered the adoption of rules that would likewise work against the Court's decision in *Schaffer*.³⁴⁹ In the Third and Ninth Circuits, both of which previously assigned the burden to the school district, bills have been introduced in the states of New Jersey and Hawaii, respectively, to allocate the burden of proof to the school district.³⁵⁰ Similarly, in the Fourth Circuit, in which the

1248, 1263-64 (S.D. Ala. 2005) (discussing the changed Alabama regulation).

³⁴⁷ See H.B. 7176, 2007 Gen. Assem., Reg. Sess. (Conn. 2007) (placing the burden of proof on “the party requesting the hearing.”); S.B. 2967, 84th Leg., Reg. Sess. (Minn. 2006) (proposing that the burden be placed on “the party seeking relief”).

³⁴⁸ See DEL. CODE ANN. tit. 14, § 3140 (1999); 105 ILL. COMP. STAT. ANN. 5/14-8.02g(a) (West 2005) (burden of production); W. VA. CODE ST. R. tit. 126, § 16-8.1.11(c) (2005).

³⁴⁹ See *infra* notes 349-52 and accompanying text.

³⁵⁰ In 2006, the Hawaii Legislature introduced the following bills: S.B. 2080, 23rd Leg., Reg. Sess. (Haw. 2006) (proposing placement of the burden of proof on the school district; if the hearing officer finds that the school district has failed to prove compliance and the parent requests tuition reimbursement for unilateral placement, the parent would have to prove the appropriateness of the private placement); H.B. 2101, 23rd Leg., Reg. Sess. (Haw. 2006) (same); S.B. 2733, 23rd Leg., Reg. Sess. (Haw. 2006) (proposing allocation of the burden of proof to the school district; if the hearing officer finds against the school district and the parent requests tuition reimbursement for unilateral placement, the parent would have to prove the appropriateness of the private placement). See also Letter from Robert Berlow, Chair, Government Relations, COPAA to Senators Norman Sakamoto and Gary L. Hooser (Feb. 14, 2006), available at <http://www.copaa.org/pdf/Haw-COPAA.pdf> (last visited Nov. 15, 2007) (urging passage of S.B. 2080 and S.B. 2733).

In May, 2007, the New Jersey Legislature introduced two similar bills. See A. 4076, 212th Leg., Reg. Sess. (N.J. 2007) (“[T]he school district shall have the burden of proof and the burden of production”); S. 2604, 212th Leg., Reg. Sess. (N.J. 2007) (same). Previously, some parent advocates in

Schaffer case originated, a bill has been introduced in the Commonwealth of Virginia to allocate the burden to the school district.³⁵¹ In the Second Circuit, which had also previously placed the burden on the school district, the New York State Legislature recently passed a bill assigning the burden of proof to the school district, except in tuition reimbursement cases.³⁵² Governor Spitzer signed this bill into law on August 15, 2007.³⁵³

An examination of post-*Schaffer* lower court decisions reveals that the decisions depend on whether the state in which

New Jersey had tried to convince the New Jersey Board of Education to adopt a regulation that would assign the burden of proof to the school district in accordance with the prior New Jersey Supreme Court case, *Lascari v. Board of Educ.*, 560 A.2d 1180, 1188-89 (N.J. 1989). The Board of Education, however, had declined to adopt such a regulation. See New Jersey State Board of Education, Rule Adoptions, Comments and Responses, 2006 Reg. LEXIS 44523 (Sept. 5, 2006).

³⁵¹ S.B. 241, 2006 Gen. Assem., Reg. Sess. (Va. 2006) (proposing placement of the burden of persuasion on “the school division”). See also Letter from Robert I. Berlow, Chair, Government Relations, COPAA to Members, Senate Committee on Education and Health and Senator Patricia S. Ticer (Jan. 24, 2006), available at http://www.copaa.org/pdf/BOP_Va_COPAA.pdf (last visited Nov. 15, 2007) (urging passage of S.B. 241).

³⁵² A. 5396, 230th Leg., Reg. Sess. (N.Y. 2007) (“The Board of Education or trustees of the school district or the state agency responsible for providing education to students with disabilities shall have the burden of proof, including the burden of persuasion and burden of production, in any such impartial hearing, except that a parent or person in parental relation seeking tuition reimbursement for a unilateral parental placement shall have the burden of persuasion and burden of production on the appropriateness of such placement.”).

³⁵³ See New York State Developmental Disabilities Planning Council, Burden of Proof Bill Signed (last modified Sept., 2007), available at http://ebulletin.us/archive/2007/september/09_07_burden_proof.php (last visited Nov. 15, 2007). The bill took effect on October 15, 2007. *Id.* In 2006, the New York State Legislature passed a similar bill. See S.B. 8354, 229th Leg., Reg. Sess. (N.Y. 2006). Then Governor Pataki, however, vetoed this earlier bill. See New York State United Teachers, 2006 Legislative Update: Bills of Interest that have passed both houses of the Legislature (last modified Sept, 19, 2006), available at <http://nysut.org/legislation/bulletins/2006endofsession.html> (last visited Nov. 15, 2007); NYSARC, Inc., *supra* note 309.

the case arose had a statute or regulation allocating the burden of persuasion to the school district.³⁵⁴ For example, in *L.E. v. Ramsey Board of Education*, the Third Circuit, which had previously held that the school district should bear the burden of proof, concluded that since the case arose in New Jersey, a state that did not have a statutory or regulatory provision concerning the allocation of the burden of proof, “*Schaffer* controls,” and the party seeking relief bears the burden of proof in all aspects of the appropriateness of the IEP, including LRE issues.³⁵⁵ The finding by the Third Circuit that, even for LRE claims, the party seeking relief should bear

³⁵⁴ See *infra* notes 354-59 and accompanying text.

³⁵⁵ 435 F.3d 384, 391-92 (3d Cir. 2006). Post-*Schaffer* cases arising in other circuits that had previously assigned the burden to the school district have similarly held that the burden should now be allocated to the moving party. See *Van Duyn v. Baker Sch. Dist.* 5J, 2007 U.S. App. LEXIS 21285, at *17-*18 (9th Cir. 2007); *Cabouli v. Chappaqua Centr. Sch. Dist.*, 2006 U.S. App. LEXIS 27016, at *3 (2nd Cir. 2006); *Brown v. Bartholomew Consol. Sch. Corp.*, 442 F.3d 588, 594 n. 1 (7th Cir. 2006); *West Platte R-II Sch. Dist. v. Wilson*, 439 F.3d 782, 784-85 (8th Cir. 2006). For additional cases from the Second Circuit that have concluded as such, see, e.g., *Arlington Centr. Sch. Dist. v. L.P.*, 421 F. Supp. 2d 692, 696 (S.D.N.Y. 2006) (finding that, following *Schaffer*, the party requesting the due process hearing bears the burden of proving that the district’s proposed services are inadequate); *Gagliardo v. Arlington Centr. Sch. Dist.*, 418 F. Supp. 2d 559, 563 (S.D.N.Y. 2006) (noting that *Schaffer* overturned the “long-settled rule” in the Second Circuit requiring the school district to prove the appropriateness of its proposed placement); *Bay Shore Union Free Sch. Dist. v. T.*, 405 F. Supp. 2d 230, 238 (E.D.N.Y. 2005) (finding that *Schaffer* “works a profound change in the procedure, if not the substance, of administrative hearings under IDEA in New York.”). For additional cases from the Ninth Circuit that have concluded in a similar manner, see, e.g., *B.B. v. State of Hawaii, Dep’t of Educ.*, 2006 U.S. Dist. LEXIS 76880, at **15-16 (D. Haw. 2006) (noting that, following *Schaffer*, “the law changed” from the previous rule in which the school district had the burden of proof at administrative hearings); *A.M. v. Fairbanks North Star Borough Sch. Dist.*, 2006 U.S. Dist. LEXIS 71724, at *16 (D. Alaska 2006) (holding that in the aftermath of *Schaffer* and the revised Alaska regulations, “[i]t is undisputed that the parents bear the burden of demonstrating ... that the [school district] did not comply with the IDEA.”); *Department of Educ., State of Hawaii v. L.K.*, 2006 U.S. Dist. LEXIS 46695, at *28 n. 11 (D. Haw. 2006) (stating that “had the administrative proceeding taken place after *Schaffer*, the burden of proof would have been on [the child] and his parents, not the DOE.”).

the burden of proof is significant because such a ruling stands in direct opposition to the Third Circuit's prior conclusion in *Oberti v. Board of Education*.³⁵⁶ In *Oberti*, the court held that school districts that propose a more restrictive placement should bear the burden of proof.³⁵⁷ On the other hand, in post-*Schaffer* cases arising in a state with a statutory or regulatory provision in effect that assigns the burden to the school district, courts have found that the state rule prevails.³⁵⁸ For example, in *Independent School District No. 701 v. J.T.*, the United States District Court for the District of Minnesota held that because Minnesota had a law in effect that "firmly places the burden in such hearings on the school district ... the holding in *Schaffer* does not apply here...."³⁵⁹ Thus, in the

³⁵⁶ See *supra* notes 141-44 and accompanying text (discussing *Oberti*, 995 F.2d 1204 (3d Cir. 1993)).

³⁵⁷ See 995 F.2d at 1219. Subsequent district court cases in the Third Circuit have spoken directly to the applicability of *Oberti* post-*Schaffer*. See *Leighty v. Laurel Sch. Dist.*, 2006 U.S. Dist. LEXIS 74689, at *13 (W.D. Pa. 2006) ("In light of *Schaffer*, *Oberti* is no longer the applicable law to the extent that it placed the burden of proof on the school district."); *Greenwood v. Wissahickon Sch. Dist.*, 2006 U.S. Dist. LEXIS 4274, at *2 (E.D. Pa. 2006) (noting that *Schaffer* "effectively overturned" *Oberti* with respect to the placement of the burden of proof on the school district for proving compliance with the LRE requirement).

³⁵⁸ See cases discussed *infra* note 358 and accompanying text. See also *Kerry M. v. Manhattan Sch. Dist. #114*, 2006 U.S. Dist. LEXIS 71109, at *16 (N.D. Ill. 2006) (finding that because an Illinois statutory provision assigned only the burden of production to the school district, the provision "[did] not contain the explicit burden of proof language necessary to override the default rule...."); *Anders v. Indian River Sch. Dist.*, 2007 Del. Fam. Ct. LEXIS 42, at *43 (De. Fam. Ct. 2007) (noting that, in accordance with a Delaware statute, the school district bears the burden of proof).

³⁵⁹ 2006 U.S. Dist. LEXIS 8474, at *18 n. 6 (D. Minn. 2006). As noted earlier, Minnesota subsequently introduced a bill in the aftermath of *Schaffer* to assign the burden to the moving party. See *supra* note 346 and accompanying text (discussing S.B. 2967, 84th Leg., Reg. Sess. (Minn. 2006)). Courts deciding cases in the District of Columbia and Alabama prior to the time that these jurisdictions changed their regulations to assign the burden to the moving party similarly held that the burden allocation should follow the state regulations rather than the Supreme Court's decision in *Schaffer*. See *Gellert v. District of Columbia Public Schools*, 435 F. Supp. 2d 18, 22 n. 3 (D.D.C. 2006) ("[T]he recent ruling in *Schaffer* does not affect the validity of the District of Columbia's [current] regulation placing the burden of proof at the administrative level on

aftermath of *Schaffer*, lower courts have followed the Supreme Court's ruling, unless the state has a statute or regulation in effect that assigns the burden to the school district.³⁶⁰

B. Proposed Method for Allocating the Burden of Proof in IDEA Due Process Hearings

Since states have had varied responses to the Court's decision in *Schaffer*, Congress should take the initiative and incorporate a provision into the next reauthorization cycle of IDEA that addresses the allocation of the burden of proof in IDEA due process hearings.³⁶¹ Although some disability advocates have argued that it is unlikely that Congress will act to assign the burden to the school district,³⁶² the method proposed by the present article, based on a social-relations approach, has appeal because it is balanced in nature and is in keeping with the spirit and intent of IDEA.³⁶³ In addition, given that Congress has responded to the Supreme Court in

DCPS.”); *Jenkins v. District of Columbia*, 2005 U.S. Dist. LEXIS 34002, at *6 n. 4 (D.D.C. 2005) (noting that because the Court in *Schaffer* did not address whether states could override the default rule, “we will assume that the District of Columbia’s decision to place the burden of proof on DCPS is a valid exercise of its legislative power.”). *See also Escambia County Bd. of Educ. v. Benton*, 406 F. Supp. 2d 1248, 1264 (S.D. Ala. 2005) (“[T]his action falls outside the ambit of *Schaffer* ... because at the time of the Administrative Decision, Alabama had a regulation that specifically imposed the burden of proof on school districts when parents called into question the propriety of an IEP.”).

³⁶⁰ *See supra* notes 353-58 and accompanying text.

³⁶¹ *See infra* notes 419-21 and accompanying text. In August, 2006, post-*Schaffer*, the United States Department of Education declined to add specific language regarding the allocation of the burden of proof into its revised regulations implementing IDEA, noting: “Since Supreme Court precedent is binding legal authority, further regulation in this area is unnecessary. In addition, we are not aware of significant questions regarding the burden of production that would require regulation.” 71 Fed. Reg. 46,540, 46,706 (2006).

³⁶² *See NYSARC, supra* note 309 (“No one in Washington remotely expects Congress to attempt to reverse *Schaffer v. Weast* by amending IDEA to give the burden of proof to school districts.”).

³⁶³ *See infra* notes 373-418 and accompanying text (presenting proposed approach).

prior cases,³⁶⁴ it is possible that Congress will do so again with respect to the allocation of the burden of proof.³⁶⁵ While Congress should ultimately address the issue, until such action by Congress, the proposed method of burden allocation should be adopted at the state level.³⁶⁶

The recommended method for the allocation of the burden of proof reflects a social-relations approach by considering the three relationships described in this article underlying the process of labeling children with disabilities as “different.”³⁶⁷ These relationships are promoted by IDEA but were overlooked by the majority opinion and only partially addressed by Justice Ginsburg.³⁶⁸ In addition, the proposed alternative does not address the question of the burden

³⁶⁴ For example, following the Supreme Court’s ruling in *Smith v. Robinson*, 468 U.S. 992 (1984), Congress incorporated a provision into the EAHCA allowing courts to award attorney’s fees to prevailing parents. Handicapped Children’s Protection Act of 1986, Pub. L. No. 99-372, sec. 2, § 614(e)(4)(B), 100 Stat. 796, 796 (1986) (codified as amended at 20 U.S.C. § 1415(i)(3)(B) (West Supp. 2006)). Similarly, following the Court’s ruling in *Dellmuth v. Muth*, 491 U.S. 223 (1989), as part of the 1990 reauthorization of the statute, Congress again answered the Court by adding a provision that explicitly abrogated state sovereign immunity. Education of the Handicapped Act Amendments of 1990, Pub. L. No. 101-476, sec. 103, § 604(a), 104 Stat. 1103, 1106 (1990) (codified as amended at 20 U.S.C. § 1403(a) (West Supp. 2006)).

³⁶⁵ It is also noteworthy that, on November 14, 2007, a bill was introduced in the U.S. House of Representatives to amend IDEA “to permit a prevailing party in an action or proceeding brought to enforce [IDEA] to be awarded expert fees and certain other expenses.” IDEA Fairness Restoration Act, H.R. 4188, 110th Cong., 1st Sess. (2007). If passed, this bill will override the U.S. Supreme Court’s decision in *Arlington Central School District v. Murphy*, which was handed down after *Schaffer*. See *supra* note 13 (discussing 126 S. Ct. 2455 (2006)).

³⁶⁶ See *supra* notes 340-52 and accompanying text (discussing post-*Schaffer* efforts at the state level to address the allocation of the burden of proof).

³⁶⁷ See *supra* Part I.B. (outlining relationships at the heart of IDEA).

³⁶⁸ See *supra* notes 203-96 and accompanying text (analyzing relationships to which the majority opinion and Ginsburg’s dissent did not pay sufficient attention).

allocation from a dichotomous standpoint by assigning the burden, in all instances, either to the moving party or to the school district; rather, the proposal calls for three separate allocations for three different categories of claims brought under IDEA: (1) claims involving non-LRE issues; (2) LRE claims involving disputes over placement that do not pertain to tuition reimbursement; and (3) LRE claims involving tuition reimbursement for unilateral placement in a private school.³⁶⁹ Furthermore, while the majority opinion and Ginsburg's dissent focused only on the burden of persuasion,³⁷⁰ the proposed alternative also addresses the burden of production.³⁷¹ The burden of production, which involves coming forward with sufficient evidence, is an integral part of the burden of proof.³⁷² Table 4 presents the proposed allocation of the burdens of production and persuasion for the three categories of claims:³⁷³

³⁶⁹ See *infra* tbl.4.

³⁷⁰ See *supra* note 183 (noting that the *Schaffer* decision addressed only the burden of persuasion).

³⁷¹ See *infra* notes 373-75, 382-89, 399 and accompanying text (specifying the manner in which the proposed approach addresses the burden of production).

³⁷² See *supra* notes 120, 122 and accompanying text (describing the burden of production).

³⁷³ See *infra* tbl.4.

Table 4. Proposed Allocation of the Burden of Proof in Claims Brought under IDEA

	Burden of Production	Burden of Persuasion
<i>(1) Claims Involving Non-LRE Issues</i>	School District	School District
<i>(2) LRE Claims Involving Disputes over Placement</i>		
School District seeks more restrictive placement	School District	School District
Parent seeks more restrictive placement	Parent	School District
<i>(3) LRE Claims Involving Tuition Reimbursement</i>	Parent	Phase 1 – School District Phase 2 – Parent

1. Basic Rule for the Allocation of the Burden of Proof (Non-LRE Claims)

The basic rule assigns the burden of production and the burden of persuasion to the school district.³⁷⁴ Assignment of the burden of production to the school district takes into account the knowledge and power differential characterizing the relationship between the school district and the parent – i.e., school districts, which are in positions of power, have greater access to information and records, as well as greater knowledge and expertise than parents.³⁷⁵ Consequently, the school district should be obligated to present its evidence first that the program offered or provided affords the student FAPE.³⁷⁶ The basic rule also assigns the burden of persuasion to the school district, thereby acknowledging the uniqueness of the relationship between the school district and the child with a disability because of the substantial nature of what is required of the school district, the purpose of the relationship (i.e., to benefit the child), and the significant expertise of school personnel.³⁷⁷ Consequently, school districts should be required to prove, by a preponderance of the evidence, the appropriateness of their decisions.³⁷⁸ Such an allocation also takes into account the positive effect that due process hearings can have on the relationship between the school district and the child.³⁷⁹ Moreover, this rule recognizes that, in general, assigning the burden of persuasion to the parents, rather than the school district, places an added strain on parents, who

³⁷⁴ Such an assignment is in keeping with the fact that the burdens of production and persuasion are generally assigned to the same party. See MCCORMICK, *supra* note 119, § 337, at 415.

³⁷⁵ See *supra* note 250 and accompanying text (describing the advantages of school districts).

³⁷⁶ See *supra* notes 126-29 (discussing reasons for allocating the burdens of production and persuasion to the non-moving party).

³⁷⁷ See *supra* notes 208-30 and accompanying text (specifying the manner in which the school district-child relationship under IDEA is unique).

³⁷⁸ See *supra* notes 220, 222-23, 229, 234-35, 241 and accompanying text.

³⁷⁹ See *supra* notes 236-44 and accompanying text (describing the motivating effect of due process).

already feel at a disadvantage in their relationship with school personnel.³⁸⁰

2. LRE Claims Involving Disputes over Placement

While Justice Ginsburg assigned the burden to the school district in all instances,³⁸¹ the proposed method advocates a separate burden allocation for claims involving disputes over placement.³⁸² Because IDEA has a strong emphasis on promoting positive social relations between students with disabilities and their non-disabled peers, the proposed method calls for the party seeking the more restrictive placement – whether the parent or the school district – to bear the burden of production.³⁸³ As noted earlier, the integration of students with disabilities into the regular classroom provides opportunities for exposure to more challenging curriculum as well as for increased socialization and interactions between these students and their non-disabled classmates.³⁸⁴ Additionally, when students with disabilities are educated in regular classes, the definition of normality is broadened, and the stigma of difference is removed from the individual child.³⁸⁵ Integration also demonstrates to students without disabilities that disability is a natural part of life.³⁸⁶ Hence, in claims in which the parent seeks the more restrictive placement, the parent would bear the burden of production to rebut the statutory presumption in favor of the LRE by establishing a *prima facie* showing that the more restrictive placement is appropriate.³⁸⁷ Although the school district has

³⁸⁰ See *supra* notes 97-103, 250-54 and accompanying text (discussing the knowledge and power differential between parents and school districts).

³⁸¹ See *Schaffer v. Weast*, 546 U.S. 49, 64 (2005) (Ginsburg J., dissenting).

³⁸² The proposed method similarly differs from recommendations made by other commentators who have advocated assignment of the burden to the school district in all circumstances. See Leahy & Mugmon, *supra* note 213, at 971; Anstaett, *supra* note 250, at 771.

³⁸³ See *supra* tbl.4.

³⁸⁴ See *supra* notes 109-11 and accompanying text.

³⁸⁵ See *supra* notes 112-14 and accompanying text.

³⁸⁶ See *supra* note 115 and accompanying text.

³⁸⁷ Requiring the parents to rebut the presumption in favor of the LRE by bearing the burden of production is in keeping with the general treatment

greater access to information and records, the statute's goal of fostering relationships between students with disabilities and their non-disabled peers warrants placing the burden of production on a parent seeking a more restrictive placement.³⁸⁸ Furthermore, assignment of the burden of production to the parent or school district, whichever party is seeking the more restrictive placement, sends the message that this party has to make a strong argument that the proposed restrictive placement is appropriate.³⁸⁹ Thus, the allocation of the burden of proof serves a symbolic as well as a practical purpose.³⁹⁰

At the same time, while the party seeking the more restrictive placement would bear the burden of production, the school district, in all such claims, would bear the burden of persuasion – i.e., the school district would have to prove, by a preponderance of the evidence, that the offered or provided placement is appropriate because it affords the child FAPE.³⁹¹ In claims in which the school district is the party requesting the more restrictive placement, the burden allocation would be the same as in the basic rule stated above – namely, the school district would bear both the burden of production and the

of presumptions. See MCCORMICK, *supra* note 119, § 342, at 434 (“[T]he description of a presumption as a rule that, at a minimum, shifts the burden of producing evidence is to be preferred....”); MUELLER & KIRKPATRICK, *supra* note 119, § 66, at 320 (“In effect, presumptions have at least the effect of shifting the burden of production to the party who would be disadvantaged by a finding of the presumed fact....”); WIGMORE, *supra* note 119, § 2487, at 295 (“So far as ‘presumption’ means anything for the present purpose, it signifies a ruling as to the duty of producing evidence.”).

³⁸⁸ The attorneys for the parents in *Schaffer* actually acknowledged that in certain instances, it may be appropriate for a hearing officer to “[call] upon parents to present their evidence first, requiring them to make out a prima facie case that the school district would then have the burden of overcoming.” Reply Brief of Petitioners at 15, *Schaffer* (No. 04-698).

³⁸⁹ Assigning the burden of production to the party seeking the more restrictive placement also sends the message that, at the IEP development stage, if any of the IEP team members would like to propose a more restrictive placement, there must be a strong rationale for doing so.

³⁹⁰ See *supra* note 388 and accompanying text.

³⁹¹ See *supra* tbl.4.

burden of persuasion.³⁹² On the other hand, in claims in which the parent seeks the more restrictive placement, the parent would bear the burden of production, while the school district would bear the burden of persuasion.³⁹³

The proposed method does not assign the burden of persuasion to the parent seeking a more restrictive placement because such an allocation would assume that the regular classroom is the LRE for all students and does not fully take into account the perspective of the parent/child.³⁹⁴ Moreover, placing the burden of persuasion on the school district considers the relationship between the school district and the child by acknowledging the central role that school districts play in designing and implementing an appropriate

³⁹² See *supra* notes 373-79 and accompanying text (discussing the basic rule).

³⁹³ Other commentators have also proposed strategies according to which the burden of production in IDEA due process hearings would be assigned to one party and the burden of persuasion would be assigned to the other party. See Di Iorio, *supra* note 213, at 739-40 (advocating assignment of the burden of proof to the school district or, alternatively, a burden-shifting model, by which the parent would bear the initial burden of proving that their child is not making sufficient progress and the school district would then bear the burden of proving the appropriateness of its plan); Recent Case, *Disability Law*, *supra* note 213, at 1084 (suggesting the use of a modified burden-shifting model similar to that used in claims brought under the ADA, according to which the plaintiff would carry the initial burden to show that the child's disability falls under the listed disability categories, while the school district would have the ultimate burden of proving the adequacy of the IEP); Jordan D. Schnitzer, Note, *Follow the Teacher's Advice: Resolving Weast v. Schaffer: Burden Should Shift from School System to Parent to Prove the Inadequacy of Disabled Child's IEP*, 50 ST. LOUIS U. L.J. 223, 254-55 (2005) (recommending assignment of the burden of production to the school district and assignment of the burden of persuasion to the party challenging the IEP). The method proposed by the present article differs from these other recommendations by assigning the burdens of production and persuasion to different parties only in the situation in which the parent requests a more restrictive placement.

³⁹⁴ See Mayes et al., *supra* note 8 at 88 (noting that the regular classroom is not automatically the LRE for every student; rather "the LRE is inextricably linked to FAPE."). For some children, removal from the regular classroom for a portion of instruction or all instruction may be appropriate.

educational program.³⁹⁵ At the same time, such an assignment takes into account the relationship between the school district and the parent by recognizing the lack of knowledge, expertise, and resources on the part of many parents to bring a successful claim against the school district, in particular parents from low-income backgrounds.³⁹⁶ Consequently, the proposed method advocates that parents seeking a more restrictive placement bear the less onerous burden of production.³⁹⁷

3. LRE Claims Involving Tuition Reimbursement

Finally, the proposed method advocates a third burden allocation for claims in which, as in *Schaffer*, the parent is seeking tuition reimbursement for unilateral placement in a private school.³⁹⁸ Such claims are, in essence, a sub-category

³⁹⁵ See *supra* Part I.B.1 (discussing the relationship between the school district and the child).

³⁹⁶ See *supra* Part I.B.2 (discussing the relationship between the school district and the parent).

³⁹⁷ See *Mayes et al.*, *supra* note 8, at 89 (“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.”).

Pre-*Schaffer* cases had similarly addressed the issue of the allocation of the burden of proof for LRE claims. See *Carlisle Area Sch. Dist. v. Scott P.*, 62 F.3d 520, 533 (3d Cir. 1995); *Oberti v. Board of Educ.*, 995 F.2d 1204, 1219-20 (3d Cir. 1993). See also GA. COMP. R. & REGS. r. 160-4-7-.18(1)(g)(8) (2002) (amended 2006) (specifying that parents who request a more restrictive placement bear the burden of proving the appropriateness of such an environment). In addition, in the legislative history leading up to the enactment of the EAHCA in 1975, Congressman George Miller (D-California) stated: “I believe the burden of proof ... ought to rest with that administrator or teacher who seeks for one reason or another to remove a child from a normal classroom, to segregate him or her from nonhandicapped children, to place him in a program of special education.” 121 CONG. REC. 25540 (1975). These earlier approaches, however, called for the party seeking the more restrictive placement to bear the burden of persuasion. The present article does not recommend that the burden of persuasion be allocated to the parent seeking the more restrictive placement but, rather, that the parent bear only the burden of production. See *supra* notes 393-95 and accompanying text.

³⁹⁸ Some have called for the assignment of the burden of persuasion to the parents in certain situations other than tuition reimbursement. See William

of LRE claims because the private school placement proposed by the parent would be a more restrictive setting.³⁹⁹ For these claims, as for other LRE claims in which the parent is seeking the more restrictive placement, the parent would bear the burden of production to rebut IDEA's presumption in favor of the LRE.⁴⁰⁰ The burden of persuasion, however, would be allocated in keeping with the Supreme Court's 1993 ruling in *Florence County School District Four v. Carter*, in which the Supreme Court held that school districts are required to reimburse parents who unilaterally place their child in a non-approved private school, if it is found that (1) the school district has not provided an appropriate education under IDEA and (2) the private school placement is otherwise appropriate.⁴⁰¹ Therefore, with respect to the burden of persuasion for claims involving tuition reimbursement, the school district would have to prove the first phase of the analysis – namely, that the offered or provided less restrictive setting is appropriate for this particular child.⁴⁰² If the school district is able to prove the appropriateness of such a

D. White, *Where To Place the Burden: Individuals with Disabilities Education Act Administrative Due Process Hearings*, 84 N.C. L. REV. 1013, 1045-47 (2006) (advocating the placement of the burden on parents in the challenge of an existing IEP but on the school district in an initial IEP challenge); Luke Hertenstein, Note, *Assigning the Burden of Proof in Due Process Hearings: Schaffer v. Weast and the Need to Amend the Individuals with Disabilities in Education Act*, 74 UMKC L. REV. 1043, 1053-55 (2006) (suggesting that the burden of persuasion be assigned as follows: at the evaluation stage, to the party opposing the evaluation; at the initial IEP development stage, to the school district; and at the IEP modification stage, to the party challenging the IEP). In contrast, the present article suggests allocating the burden of persuasion to the parents only with respect to proving the appropriateness of a private school placement in tuition reimbursement cases.

³⁹⁹ See *M.S. v. Board of Educ.*, 231 F.3d 96, 104 (2d Cir. 2000) (noting that a parent's unilateral placement of his or her child in a private school represents "a restrictive, non-mainstream environment").

⁴⁰⁰ See *supra* notes 382-88 and accompanying text.

⁴⁰¹ 510 U.S. 7, 12-13 (1993).

⁴⁰² See *supra* tbl.4. Assigning the burden of persuasion to the school district to prove the appropriateness of its offered or provided placement follows the basic rule for non-LRE claims. See *supra* notes 373-79 and accompanying text.

placement, the inquiry would end at that point.⁴⁰³ If, however, the school district is unable to demonstrate appropriateness, the parents would bear the burden of persuasion with respect to proving the second phase of the analysis – namely, that the private school placement is otherwise appropriate.⁴⁰⁴

There are several reasons why tuition reimbursement cases should be handled differently from other LRE claims.⁴⁰⁵ First, education in a private school class is far removed from education in the regular classroom in the child's neighborhood

⁴⁰³ See CONN. AGENCIES REGS. § 10-76h-14(b) (2005) (“The hearing officer shall have the authority to bifurcate a hearing regarding a unilateral placement. If the hearing officer determines that the program offered by the public agency is appropriate, it is not necessary to inquire into the appropriateness of the parent’s placement.”), *but see* H.B. 7176, 2007 Gen. Assem., Reg. Sess. (Conn. 2007).

⁴⁰⁴ See CONN. AGENCIES REGS. § 10-76h-14(c) (stating that “upon a finding that a public agency’s placement or program or proposed placement or program is not appropriate, any party seeking reimbursement for a unilateral placement or program shall prove the appropriateness of such placement or program by a preponderance of the evidence.”), *but see* H.B. 7176, 2007 Gen. Assem., Reg. Sess. (Conn. 2007). See also S.B. 2080, 23rd Leg., Reg. Sess. (Haw. 2006) (proposing placement of the burden of proof on the school district except in tuition reimbursement cases, in which the parent would have to prove the appropriateness of the private placement); H.B. 2101, 23rd Leg., Reg. Sess. (Haw. 2006) (same); S.B. 2733, 23rd Leg., Reg. Sess. (Haw. 2006) (same); MINN. STAT. § 125A.091, subd. 16 (Supp. 2005) (requiring the parent to prove the appropriateness of the private school placement in claims for tuition reimbursement), *but see* S.B. 2967, 84th Leg., Reg. Sess. (Minn. 2006) (proposing statutory language assigning the burden to the party seeking relief). Prior to *Schaffer*, the Second Circuit had taken a similar approach in tuition reimbursement cases. See *M.S.*, 231 F.3d at 104. The New York State Legislature recently passed a bill that included a similar burden assignment. See *supra* notes 351-52 and accompanying text (discussing A.5396, 230th Leg., Reg. Sess. (N.Y. 2007)).

Other commentators have also advocated assigning the burden of persuasion to the parents in tuition reimbursement cases to prove the appropriateness of the private school placement. See Mayes et al., *supra* note 8, at 87-88. The method proposed by the present article differs in that it includes the burden of production as well as the burden of persuasion and calls for a separate burden allocation for non-tuition reimbursement LRE claims. In addition, the proposed method is based on a consideration of the various relationships involved.

⁴⁰⁵ See *infra* notes 405-09 and accompanying text.

school, thereby perpetuating the divide between special and general education and minimizing opportunities for social integration between students with disabilities and their non-disabled peers.⁴⁰⁶ When parents unilaterally place their child with a disability in a private school, the population of the private school often consists almost exclusively of students with disabilities.⁴⁰⁷ In addition, the parent is in a better position than the school district to prove the appropriateness of the private school placement.⁴⁰⁸ Furthermore, as noted earlier, an important aspect of the adversarial relationship between parents and school districts is that school districts feel burdened by the significant costs associated with tuition reimbursement.⁴⁰⁹ In *Schaffer*, the attorneys for the school district argued that it is especially important for parents to bear the burden “when, as in this case, parents initiate the IDEA hearing to demand that a public school ... pay tens of thousands of dollars in private school tuition.”⁴¹⁰

⁴⁰⁶ See *supra* notes 109-15 and accompanying text. See also HEHIR, *supra* note 115, at 69 (recognizing “that education plays a central role in the integration of disabled people in ... society”); Melvin, *supra* note 274, at 648 (discussing the fact that schools provide the best opportunity to integrate individuals with disabilities into society).

⁴⁰⁷ For example, Brian Schaffer’s parents had unilaterally placed him in the McLean School, a private school for students with learning and language-based disabilities. See *Weast v. Schaffer*, 240 F.Supp.2d 396, 399 (D. Md. 2002), *rev’d*, 377 F.3d 449 (4th Cir. 2004), *aff’d*, 546 U.S. 49 (2005). Similarly, in *Florence County School District Four v. Carter*, the parents had unilaterally placed their child in Trident Academy, a private school that specialized in providing education to students with disabilities. See 510 U.S. 7, 10 (1993).

⁴⁰⁸ See *Mayes et al.*, *supra* note 8, at 88 (pointing out that parents “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.”).

⁴⁰⁹ See *supra* note 264 and accompanying text.

⁴¹⁰ Brief for Respondents at 34 n. 19, *Schaffer* (No. 04-698). See also Brief of the Council of the Great City Schools, *supra* note 257, at 18, *Schaffer* (No. 04-698) (“A rule making it possible for parents to prevail without actually carrying the burden of proof would only invite additional litigation designed to shift the costs of private-school education from parents to public schools”).

Had the approach advocated above been followed, the outcome in the *Schaffer* case would have been the same.⁴¹¹ The burden of persuasion would have been allocated to the parents to prove that the private school placement was appropriate, and, because the evidence was in equipoise, the parents would not have prevailed.⁴¹² The line of reasoning, however, would have been very different.⁴¹³ According to the Court's approach, the burden of persuasion was assigned to the parents in *Schaffer* because the Court believed that the ordinary default rule should be followed, and the party seeking relief should bear the burden.⁴¹⁴ In contrast, according to the method advocated above, the burden would be allocated to the parents to prove the appropriateness of the private placement, not because of their status as the moving party but, rather, because they were seeking tuition reimbursement.⁴¹⁵

The proposed alternative moves beyond the either/or question of who should bear the burden of persuasion and takes a social-relations approach by addressing the underlying relationships that are associated with the process of the labeling of students with disabilities as "different."⁴¹⁶ First, the social-relations approach proposed by the present article underscores the relationship between the school district and the child as well as the central role that school districts play in designing and implementing appropriate educational programs.⁴¹⁷ Second, the approach considers the relationship between the school district and the parent by recognizing the knowledge and power differential between parents and school

⁴¹¹ See *infra* note 411 and accompanying text.

⁴¹² According to the proposed method, because the evidence was in equipoise, and the school district would not have been able to prove the appropriateness of its proposed placement, the parents would have had the burden of proving the appropriateness of the private placement.

⁴¹³ See *infra* notes 413-14 and accompanying text.

⁴¹⁴ *Schaffer v. Weast*, 546 U.S. 49, 62 (2005).

⁴¹⁵ See *supra* notes 397-409 and accompanying text (discussing the third category of claims under proposed method of burden allocation).

⁴¹⁶ See *supra* notes 62-64 and accompanying text (describing the social-relations approach).

⁴¹⁷ See *supra* notes 206-48 and accompanying text (discussing the relationship between the school district and the child with a disability).

districts, by understanding that school districts feel overburdened with respect to the significant fees associated with tuition reimbursement, and by acknowledging that some parent attorneys take advantage of school districts through the pursuit of frivolous claims.⁴¹⁸ Finally, the proposed approach reflects the important value that IDEA places on the integration of students with disabilities into the regular classroom.⁴¹⁹

Congress should incorporate this alternative method for the allocation of the burden of proof into the next reauthorization of IDEA.⁴²⁰ Until Congress takes such action, the present article urges states to adopt this approach.⁴²¹ Possible statutory/regulatory language that could be used is as follows:⁴²²

- (1) Excluding claims described under subsections (2) and (3), in a special education due process hearing, the district shall bear the burden of coming forward with the evidence. The district shall also bear the burden of proving, by a preponderance of the evidence, that the program offered or provided by the district is appropriate.

- (2) For claims involving disputes over placement, the party seeking the more restrictive placement shall bear the burden of coming forward with the evidence. For such claims, the district shall bear the burden of proving, by a preponderance of the evidence, that the

⁴¹⁸ See *supra* notes 49-68 and accompanying text (discussing the relationship between the school district and the parent).

⁴¹⁹ See *supra* notes 269-74 and accompanying text (discussing the relationship between students with disabilities and their non-disabled peers).

⁴²⁰ See *supra* notes 360-64, 421-23 and accompanying text (discussing why it is important for Congress to act).

⁴²¹ See *supra* notes 337-59, 365 and accompanying text (discussing post-*Schaffer* activity at the state level).

⁴²² This language is adapted from regulations for the state of Connecticut that are still in effect post-*Schaffer*. See CONN. AGENCIES REGS. § 10-76h-14 (2005), *but see* H.B. 7176, 2007 Gen. Assem., Reg. Sess. (Conn. 2007).

placement offered or provided by the district is appropriate.

- (3) For claims involving tuition reimbursement for unilateral placement, the party seeking reimbursement shall bear the burden of coming forward with the evidence. For such claims,
 - (a) The district shall bear the burden of proving, by a preponderance of the evidence, that the placement offered or provided by the district is appropriate;
 - (b) If it is not shown that the placement offered or provided by the district is appropriate, the party seeking reimbursement shall bear the burden of proving, by a preponderance of the evidence, that the unilateral placement is otherwise appropriate.

Conclusion

The present article utilized Martha Minow's theoretical framework for the legal treatment of difference to analyze the allocation of the burden of proof in IDEA due process hearings in the Supreme Court's decision in *Schaffer v. Weast*. The majority opinion in *Schaffer*, which held that the ordinary default rule should be followed and that the burden should be allocated to the party initiating the action and seeking relief, manifested a traditional rights-analysis approach. In so doing, the majority opinion neglected three relationships that are promoted by IDEA – namely, (1) the relationship between the school district and the child with a disability; (2) the relationship between the school district and the parent; and (3) the relationship between students with disabilities and their non-disabled peers. At the same time, Ginsburg's dissent, which concluded that, for policy reasons and fairness, differential treatment was warranted and the burden should be allocated to the school district, only partially addressed these

relationships. Moreover, the majority opinion and Ginsburg's dissent reflected the dilemma of difference, with the two opinions reaching opposite conclusions about whether differential treatment was appropriate. Both opinions, however, approached the question of the burden allocation from an either/or standpoint, and both result in the perpetuation of an adversarial relationship between parents and school districts and the labeling of students with disabilities and their parents as "different."

While the Supreme Court's decision in *Schaffer* represents a symbolic victory for school districts, the ruling will likely have a negative psychological impact on parents, in particular parents from low-income backgrounds. Consequently, it is prudent for school districts to begin to address this relationship by promoting the use of informal dispute resolution techniques. School districts should also strive to design IEPs that truly meet the individualized needs of the child and conduct IEP meetings in a manner that takes into account the insight and perspective of parents. In addition, hearing officers should use the checklist provided as a guide to help them understand the meaning of an appropriate education within the context of current special education policy.

Finally, in light of the varied responses of states to the Supreme Court's decision in *Schaffer*, Congress should incorporate the proposed alternative method for the allocation of the burden of proof, based on a social-relations approach, into the next reauthorization cycle of IDEA. Until such action is taken by Congress, states should adopt this alternative approach. The proposed method, which considers the three kinds of relationships that are part of the fabric of IDEA, calls for the following burden allocations: (1) For claims involving non-LRE issues, the school district would bear the burdens of production and persuasion; (2) for LRE claims involving disputes over placement (non-tuition reimbursement), the party seeking the more restrictive placement would bear the burden of production, and the school district would bear the burden of persuasion; and (3) for LRE claims involving tuition reimbursement for unilateral placement in a private school, the

parent would bear the burden of production, the school district would bear the burden of persuasion to prove the appropriateness of its offered/provided placement, and the parent would bear the burden of persuasion to prove the appropriateness of the private placement. Because this proposal is more balanced with respect to the concerns of parents and school districts than either the majority opinion or Ginsburg's dissent, it has the potential to appeal to both sides of the debate. Moreover, the alternative method more fully captures the spirit and intent of IDEA because such an approach is based on a consideration of the relationships underlying the labeling of students with disabilities as "different."

