How Will *Schaffer v. Weast* Affect You?

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In *Schaffer v. Weast*, Justice Sandra Day O'Connor explained that the Court "granted certiorari … to resolve the following question: At an administrative hearing assessing the appropriateness of an IEP, which party bears the burden of persuasion?"

The last two paragraphs clarify the limited nature of this decision:

> Finally, respondents and several States urge us to decide that States may, if they wish, override the default rule and put the burden always on the school district. Several States have laws or regulations purporting to do so, at least under some circumstances … (AK, AL, CT, DC, DE, GA, IL, KY, MN, WV) Because no such law or regulation exists in Maryland, we need not decide this issue today. Justice Breyer contends that the allocation of the burden ought to be left entirely up to the States. But neither party made this argument before this Court or the courts below. We therefore decline to address it.
>
> We hold no more than we must to resolve the case at hand: The burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief. In this case, that party is Brian, as represented by his parents. But the rule applies with equal effect to school districts: If they seek to challenge an IEP, they will in turn bear the burden of persuasion before an ALJ. The judgment of the United States Court of Appeals for the Fourth Circuit is, therefore, affirmed. (Decision, pages 11-12)

Justice O'Connor described the parental rights and safeguards that serve to counterbalance the "natural advantage" of school districts:

> School districts have a "natural advantage" in information and expertise, but Congress addressed this when it obliged schools to safeguard the procedural rights of parents and to share information with them … As noted above, parents have the right to review all records that the school possesses in relation to their child … They also have the right to an "independent educational evaluation of the[ir] child." *Ibid*. The regulations clarify this entitlement by providing that a "parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency." … IDEA thus ensures parents access to an expert who can evaluate all the materials that the school must make available, and who can give an independent opinion. They are not left to challenge the government without a realistic opportunity to access the necessary evidence, or without an expert with the firepower to match the opposition. (Decision pages 10-11)

Prior Written Notice

The decision in *Schaffer v. Weast* focused on revisions in IDEA 2004 and "Prior Written Notice" (PWN). These revisions require that school districts to provide "Prior Written Notice" (PWN) when the school district "refuses to initiate or change, the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to the child." See 20 USC §1415(b)(3) (***Wrightslaw: IDEA 2004***, page 99)

Prior Written Notice "**shall** include –

> (A) a description of the action proposed or refused by the agency; (B) an explanation of why the agency proposes or refuses to take the action and a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action; (C) a statement that the parents of a child with a disability have protection under the procedural safeguards of this part and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained; … (E) a description of other options considered by the IEP Team and the reason why those options were rejected; and (F) a description of the factors that are relevant to the agency's proposal or refusal." See 20 USC §1415(c)(1) (***Wrightslaw: IDEA 2004***, page 100)

The PWN requirement was a significant factor in the Court's ruling in favor of the school district in *Schaffer v. Weast:*

> Additionally, in 2004, Congress added provisions requiring school districts to answer the subject matter of a complaint in writing, and to provide parents with the reasoning behind the disputed action, details about the other options considered and rejected by the IEP team, and a description of all evaluations, reports, and other factors that the school used in coming to its decision … Prior to a hearing, the parties must disclose evaluations and recommendations that they intend to rely upon … IDEA hearings are deliberately informal and intended to give ALJs the flexibility that they need to ensure that each side can fairly present its evidence. IDEA, in fact, requires state authorities to organize hearings in a way that guarantees parents and children the procedural protections of the Act … Finally, and perhaps most importantly, parents may recover attorney's fees if they prevail … These protections ensure that the school bears no unique informational advantage.

Dissents

Two Justices dissented from the majority opinion. As Justice O'Connor explained in the decision, the case does not adversely affect states that already place the burden of proof on one party or the other.

Justice Breyer dissented because he believed that the case should be remanded back to Maryland to determine the issue, not the U. S. Supreme Court:

> Maryland has no special state law or regulation setting forth a special IEP-related burden of persuasion standard. But it does have rules of state administrative procedure and a body of state administrative law. The state ALJ should determine how those rules, or other state law applies to this case … Because the state ALJ did not do this (i.e., he looked for a federal, not a state, burden of persuasion rule), I would remand this case. (Breyer dissent, page 5)

Justice Ginsburg dissented because she was "persuaded that 'policy considerations, convenience, and fairness' call for assigning the burden of proof to the school district in this case." (Ginsburg dissent, page 2) Citing the Sixth Circuit's Deal case, she noted

> Understandably, school districts striving to balance their budgets, if '[l]eft to [their] own devices,' will favor educational options that enable them to conserve resources. *Deal v. Hamilton County Bd. of Ed.*, 392 F. 3d 840, 864-865 (CA6 2004).
> http://www.wrightslaw.com/law/caselaw/04/6th.deal.hamilton.tn.htm

Justice Ginsburg expressed concerns about the faulty reliance on the "Stay Put" provision in the statute. 20 USC §1415(j) (***Wrightslaw: IDEA 2004,*** page 110) She explained:

> The Court suggests that the IDEA's stay-put provision, 20 U. S. C. §1415(j), supports placement of the burden of persuasion on the parents. The stay-put provision, however, merely preserves the status quo. It would work to the advantage of the child and the parents when the school seeks to cut services offered under a previously established IEP. True, Congress did not require that "a child be given the educational placement that a parent requested during a dispute." But neither did Congress require that the IEP advanced by the school district go into effect during the pendency of a dispute. (Ginsburg dissent, page 3, footnote 1)

Justice Ginsberg explained that if a school district does not have the burden of proof, the district is unlikely to try to reach consensus with a parent about an IEP:

> This case is illustrative. Not until the District Court ruled that the school district had the burden of persuasion did the school design an IEP that met Brian Schaffer's special educational needs. See ante, at 5; Tr. of Oral Arg. 21-22 (Counsel for the Schaffers observed that "Montgomery County ... gave [Brian] the kind of services he had sought from the beginning ... once [the school district was] given the burden of proof."). Had the school district, in the first instance, offered Brian a public or private school placement equivalent to the one the district ultimately provided, this entire litigation and its attendant costs could have been avoided. (Ginsburg dissent, page 4)

Implications

The implications of this decision will vary around the country. In many jurisdictions, states are already operating under the rule that the moving party has the burden of proof. In these states, the decision should have no significant impact.

In about half of all states, this case will change the usual due process special education procedures. If the state did not have a pre-existing state rule or regulation that assigned the burden of proof to the school district, the burden will be on the moving party.

Because Maryland did not have a regulation or statute that assigned the burden of proof to one side or the other, the Court ruled that: "The burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief." (Decision, page 12)

Some states, by state statute or state regulation, already assign the burden to the school district. These states include Alabama, Alaska, Connecticut, Washington, D.C., Delaware, Georgia, Illinois, Kentucky, Minnesota, and West Virginia. These states are not covered by this ruling.

Unless the state legislature and/or Board of Education decide to change the state law or regulation, residents in these states should not expect to see a change in due process procedures. (See Ala. Admin. Code Rule 290-8-9-.08(8)(c)(6), Alaska Admin. Code tit. 4, §52.550(e)(9), Conn. Agencies Regs. §10-76h-14, Del. Code Ann., Tit. 14, §3140, District of Columbia Mun. Regs. Title 5, § 3030.3, Georgia Administrative Code, Rule 160-4-7.18(1)(g)(8), Illinois statute, Chapter 105, Act 5, Article 14, Section 8.02, Ky. Rev. Stat. Ann. §13B.090(7), Minn. Stat. §125A.091, subd. 16 (2004), and W.Va. Code Rules §126-16-8.1.11(c))

Several Circuit Courts of Appeal have already assigned the burden of proof to the moving party that seeks to change the child's status or services (the Fourth, Fifth, Sixth, Seventh and Eleventh Circuits). States under the jurisdiction of these circuits that do not have a state statute or regulation that addresses burden of proof include: Colorado, Kansas, Louisiana, Maryland, Michigan, Mississippi, Oklahoma, New Mexico, North Carolina, Ohio, South Carolina, Tennessee, Texas, Utah, Virginia, and Wyoming.

Residents of these states should not expect to see a change in their due process procedures since the moving party already has the burden.

Circuits that place the burden of proof on the school district, or have not addressed this issue, will be affected by the decision in *Schaffer v. Weast* (the First, Second, Third, Seventh, Eighth, and Ninth Circuits). States under the jurisdiction of these circuits that do not have a state statute or regulation that assigns the burden of proof to the school district include: Arizona, Arkansas, California, Florida, Hawaii, Idaho, Illinois, Iowa, Maine, Massachusetts, Missouri, Montana, Nebraska, Nevada, New Hampshire, New York, North Dakota, Oregon, Pennsylvania, Puerto Rico, Rhode Island, South Dakota, Vermont, Washington, and Wisconsin,

The New Jersey Supreme Court in *Lascari* previously ruled that the burden of proof is on the school district. We are unsure as to the legal status in New Jersey.

We attempted to determine which states that have a state statute or regulation that places the burden of proof on the school district. There may be more states. If you know about other states, please send us the specific legal citation so that we can corroborate the information and correct the table below.

Table. Burden of Proof in States

No change. Burden continues to be on school district.	No change. Burden continues to be on moving party.	**Change?? Burden is on moving party**
Alabama	Colorado	Arizona
Alaska	Indiana	Arkansas
Connecticut	Kansas	California
Washington, D.C.	Louisiana	Florida
Delaware	Maryland	Hawaii
Georgia	Michigan	Idaho
Illinois	Mississippi	Iowa
Kentucky	Oklahoma	Maine
Minnesota	New Mexico	Massachusetts
West Virginia	North Carolina	Missouri
	Ohio	Montana
	South Carolina	Nebraska
	Tennessee	Nevada
	Texas	New Hampshire
	Utah	New York
	Virginia	North Dakota
	Wyoming	Oregon
	Kansas	Pennsylvania
	Louisiana	Puerto Rico
	Maryland	Rhode Island
	Michigan	South Dakota
	Mississippi	Vermont
	Oklahoma	Washington
		Wisconsin

Take it or Leave It!
When School Districts Draw Lines in the Sand

Many school districts, regardless of whether the moving party (usually the parent) had the burden of proof prior to *Schaffer,* would present parents with a unilateral change in the child's IEP (often a reduction of services). If the parents did not consent to the change, the school would respond: "Take it or leave it. Take us to due process."

The parents were in dilemma. They could request a special education due process hearing or they could accept the changed IEP. When the parents did request due process, Hearing Officers and Administrative Law Judges frequently assumed that the parents were the moving party since they were objecting to the proposed IEP. The parents had the burden of proving that the new proposed IEP was not appropriate.

The decision in *Schaffer* changed this.

Given this same scenario, if the parents do not consent to the changed IEP, it is clear that the school district must seek a special education due process hearing. Justice O'Connor wrote:

> School districts may also seek such hearings, as Congress clarified in the 2004 amendments. See S. Rep. No. 108-185, p. 37 (2003). They may do so, for example, if they wish to change an existing IEP but the parents do not consent, or if parents refuse to allow their child to be evaluated. As a practical matter, it appears that most hearing requests come from parents rather than schools. (Decision, page 3-4)

When the school district seeks to change an IEP and parents do not consent, the school district may not unilaterally change the IEP. The school district must now request a due process hearing, present their evidence first, and prove that their proposed IEP provides the child with a free appropriate education.

The 2004 amendments to IDEA require that school districts provide parents with "Prior Written Notice" as a condition of being able to proceed to a due process hearing.

Assume that a school district changes a child's IEP without obtaining the parent's consent, without a due process hearing, and without an Order from a Hearing Officer or Administrative Law Judge. Subsequently, the parent removes the child from the public school program and places the child into a private program. The school district may find themselves without a defense to the parent's request for tuition reimbursement. (Note: The parent must comply with the required 10 business day rule in 20 USC §1412(a)(10)(C) (***Wrightslaw: IDEA 2004***, page 65.)

Due Process Complaint Notice

Prior Written Notice is rigidly adhered to in some school districts and completely disregarded in others. According to the reauthorized IDEA 2004, the parent's Due Process Complaint Notice must provide "a description of the nature of the problem of the child relating to such proposed initiation or change, including facts relating to such problem; and a proposed resolution of the problem to the extent known and available to the party at the time." 20 USC §1415(b)(7) (***Wrightslaw: IDEA 2004***, page 99)

When the parents provide the due process complaint notice:

> If the local educational agency has not sent a prior written notice to the parent regarding the subject matter contained in the parent's due process complaint notice, such local educational agency shall, within 10 days of receiving the complaint, send to the parent a response that shall include - (aa) an explanation of why the agency proposed or refused to take the action raised in the complaint; (bb) a description of other options that the IEP Team considered and the reasons why those options were rejected; (cc) a description of each evaluation procedure, assessment, record, or report the agency used as the basis for the proposed or refused action; and (dd) a description of the factors that are relevant to the agency's proposal or refusal. 20 USC §1415(c)(2) (***Wrightslaw: IDEA 2004***, page 100)

In a disagreement with parents, school districts often draw lines in the sand. They may refuse to provide services or they may reduce services, without any evaluation or new data that justifies the proposed change in services. In this situation, the school district is required to provide Prior Written Notice. Many districts

fail to do this. After the parent requests a due process hearing, the school district then generates evidence, evaluations, and witnesses to support their earlier decision.

This conflicts with Prior Written Notice as described by Justice O'Connor and IDEA 2004. PWN, as a pre-trial requirement, will receive greater scrutiny in light of the Court's emphasis in *Schaffer* that:

> Congress added provisions requiring school districts to answer the subject matter of a complaint in writing, and to provide parents with the reasoning behind the disputed action, details about the other options considered and rejected by the IEP team, and a description of all evaluations, reports, and other factors that the school used in coming to its decision.

Parent's Rights and Protections as "Firepower to Match the Opposition"

In *Schaffer*, the Court reviewed and clarified the rights and protections afforded to parents so that the "parents [have] access to an expert who can evaluate all the materials that the school must make available" so they have "the firepower to match the opposition:"

> Congress … obliged schools to safeguard the procedural rights of parents and to share information with them … parents have the right to review all records that the school possesses in relation to their child. §1415(b)(1). They also have the right to an "independent educational evaluation of the[ir] child." *Ibid*. The regulations clarify this entitlement by providing that a 'parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency.' 34 CFR §300.502(b)(1) (2005). (Decision, page 10-11)

Old Tactics May Backfire

In an attempt to delay or sabotage the process, some districts refuse to release records. Some districts advise parents that they must use evaluators from the school's "approved list of evaluators." In some jurisdictions, principals refuse to permit the parent's evaluator or expert to observe the child's public school program.

In light of *Schaffer*, these tactics can be expected to backfire. If litigation does ensue, these tactics may be a sufficient procedural breach to justify a ruling in favor of the parent and child.

Final Thoughts

From a personal perspective, Pam and I live in the land of the Fourth Circuit where we have always had the burden of proof. I always go first. This gives me control over the order of witnesses, and allows me to lay out the case and theme of the case in the manner I prefer.

I always have all witnesses excluded, except school district's party representative. The witnesses are instructed by Hearing Officer / Administrative Law Judge (HO / ALJ) that they may not discuss testimony with other witnesses.

On occasion, if that sole remaining school district employee is a key witness, I have called that person as my first or second witness, as an adverse witness.

I have always gone first in Virginia, Ohio, North Carolina, and South Carolina. I prefer to go first. I had a case in Pennsylvania where the school district had the burden of proof and was expected to go first. Opposing counsel and I agreed that I would go first, even though the school district had the burden of

proof. The Hearing Officer refused to go along with our agreement and forced the school district to go first.

What was the result?

The due process hearing, a tuition reimbursement "Carter" case, could have been completed in two or three days. Instead, the case continued for months, with nearly two weeks of testimony.

Why?

The school district attorney had to anticipate my case, the testimony of my witnesses, and had to cover every possible issue from A to Z in direct examination of school witnesses. The case that should have been clear, simple and quick became long, drawn out and slow. In the process, the issues in the case became more convoluted.

In general, what controls outcome is not the facts nor the law. It comes down to one thing: Does the Hearing Office / Administrative Law Judge want to rule in your favor?

If you can win that battle - and make the decision-maker feel the case in his/her heart and gut and want to rule in your favor - that person will find facts and law to rule in your favor and justify the outcome.

Facts and law get you into the courthouse and onto the playing field, but they do not get you into the end zone. It is the human emotions of the HO / ALJ and your ability to influence their beliefs and emotions will take you into the end zone, without regard to which side has the burden of proof.

Unless the opposition has a heavy burden, such as having to prove a case beyond a reasonable doubt, I always prefer to go first. But then, I was raised in the land of the Fourth Circuit and we have never known it any other way. It really isn't so bad!

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The decision in *Schaffer v. Weast* may be downloaded from:

http://www.wrightslaw.com/law/caselaw/ussupct.schaffer.weast.htm

December 7, 2005 Note from Pete Wright: We were misinformed about Indiana and have since moved it to the no change status in the above table.