

# **Individuals with Disabilities Education Act Burden of Proof: On Parents or Schools?**

*Schaffer v. Weast*

pending

**IN THE SUPREME COURT OF  
THE UNITED STATES**

**Policy Paper**



**National Council on Disability  
1331 F. Street, NW, Suite 850  
Washington, D. C. 20004**

**[www.ncd.gov](http://www.ncd.gov)**

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**Lex Frieden, Chairperson  
July 25, 2005**

National Council on Disability

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This paper was authored by:  
Peter W. D. Wright, Esq.  
[www.wrightslaw.com](http://www.wrightslaw.com)

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## I. Executive Summary

The Individuals with Disabilities Education Act does not specify whether parents or school districts have the burden of proof in special education litigation. It is the position of the National Council on Disability that school districts, not parents, should have the burden of proof in issues about IEPs, placement, eligibility, and other matters related to an appropriate education.

In *Schaffer v. Weast*, the United States Court of Appeals for the Fourth Circuit held that “parents who challenge an IEP . . . have the burden of proof in the administrative hearing.” The Court noted that the “. . . circuits are split - and splintered in reasoning - on this question.” The split revolves around the *Tatro / Alamo Heights* line of cases contrasted with the *Lascari / Oberti* line of cases. Five Circuits have assigned the burden of proof, the *Tatro / Alamo Heights* rule, to the parents. Five other Circuits, following the *Lascari / Oberti* rule, assign the burden to the schools. The United States Supreme Court agreed to resolve the split between the Circuits. Oral argument will be heard on October 5, 2005.

If a parent disputes an IEP, the courts agree that it is the parent’s burden to “place in issue the appropriateness of the IEP.” The next issue is whether the parent has the burden of proving that the IEP is not appropriate or whether the school district has the burden of proving that the IEP is appropriate.

There are several competing principles. Should the party attacking the terms of an IEP bear the burden of showing why the IEP is not appropriate? Or, should the party that prepared the IEP and has greater expertise and resources have the burden of proving that the IEP is appropriate?

If a statute is silent regarding which party has the burden of proof, the complainant usually has the burden of proof. The U. S. Supreme Court has issued several decisions about burden of proof in the absence of statutory guidance. In most cases, the Court, relying on the policy and history of the statute and concerns of fundamental fairness, has been consistent in assigning the burden of proof to the party more likely to have access to the information that explains their actions in order to arrive at a result that is “right” and “just.”

This paper reviews the history of special education, special education law, the *Mills* case which formed the backbone of the procedural safeguards in the Individuals with Disabilities Education Act, special education burden of proof cases, and U. S. Supreme Court cases.

Brian Schaffer, Peter Mills and Bill Dunstan are children with disabilities whose cases were decided by different courts. Their own educational and legal processes are typical of the circumstances when parents and schools disagree. Because the burden of proof was assigned to Bill Dunstan, the outcome in his case was not fair or right, and the outcome was unjust.

## II. Introduction

The Individuals with Disabilities Education Act<sup>1</sup> does not specify whether parents or school districts have the burden of proof in special education litigation. The United States Courts of Appeal are split on this issue.

On July 29, 2004, the United States Court of Appeals for the Fourth Circuit held that “parents who challenge an IEP [Individualized Education Plan] have the burden of proof in the administrative hearing.”<sup>2</sup> The Fourth Circuit commented that the “. . . circuits are split - and splintered in reasoning - on this question.”<sup>3</sup>

Judge Luttig, in his dissent explained that:

Not only does the school district have the affirmative, statutory obligation under the IDEA to develop a suitable education program (IEP) for every disabled child, the school district is also in a far better position to demonstrate that it has fulfilled this obligation than the disabled student’s parents are in to show that the school district has failed to do so. Accordingly, I would hold that the school district - and not the comparatively uninformed parents of the disabled child - must bear the burden of proving that the disabled child has been provided with the statutorily required appropriate educational resources.<sup>4</sup>

On February 22, 2005, the United States Supreme Court agreed to hear “*Brian Schaffer, a minor, by his parents and next friends, Jocelyn and Martin Schaffer, Petitioners, v. Jerry Weast, Superintendent of Montgomery County Public Schools, et al.*” (Case # 04-698) In *Schaffer*, the Question Presented is:

Under the Individuals with Disabilities Education Act, when parents of a disabled child and a local school district reach an impasse over the child’s individualized education program, either side has a right to bring the dispute to an administrative hearing officer for resolution. At the hearing, which side has the burden of proof – the parents or the school district?

Twenty-four organizations and nine states have filed amicus briefs with the United States Supreme Court in support of Brian Schaffer.<sup>5, 6</sup> Fifteen organizations, Guam, and three states

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<sup>1</sup> The Individuals with Disabilities Act has been re-authorized and renamed on several occasions. It was initially known as the Education for the Handicapped Act, passed in 1975 in Public Law 94-142. On July 1, 2005 the Individuals with Disabilities Education Improvement Act of 2004, i.e., known as IDEA 2004 went into effect.

<sup>2</sup> *Weast v. Schaffer*, 377 F.3d 449, 456 (4th Cir. 2004), cert. granted, 125. S. Ct. 1300 (2005)

<sup>3</sup> *Weast* at page 453

<sup>4</sup> *Weast* at page 456-457

<sup>5</sup> Alexander Graham Bell Association for the Deaf and Hard of Hearing, American Association of People with Disabilities, ARC of the United States, Autism Society of America, Autism Society of America, Northern Virginia Chapter, Bazelon Center for Mental Health Law, Center for Law and Education, Council of Parent Attorneys and Advocates, Disability Rights Education and Defense Fund, Inc, TASH, Inc, Education Law Center of New Jersey, Education Law Center of Pennsylvania, Epilepsy Foundation, NAMI, National Association of Protection and

have filed amicus briefs in support of Montgomery County.<sup>7, 8</sup> The state of Maryland did not file a brief in support of Montgomery County. Five years ago, when *Schaffer* was first before the U.S. Court of Appeals for the Fourth Circuit, the United States filed a brief in support of Brian Schaffer and argued that the school district should have the burden of proof. The United States argued that:

The district court correctly held that the school has the burden of showing the adequacy of its proposed IEP at the due process administrative hearing. This result is consistent with the IDEA's requirement that the public agency bear the responsibility for ensuring that FAPE is available to a child with a disability. It is also consistent with Congress's intent that the school take the lead in formulating the IEP and that parents have a meaningful opportunity to participate in determining the special education and related services to be provided to their child.

To hold otherwise would unhinge this statutory framework. It would, in effect, allow the school -- through the IEP team, consisting of mostly school representatives -- to propose an IEP and, if the parents disagree with the draft IEP, abstain from the school's statutory responsibilities to provide FAPE and to take the lead in developing the IEP by forcing the parents, who lack the school's resources and knowledge of the IDEA, to prove at the administrative hearing that the IEP does not provide FAPE. The school's stance with respect to a draft IEP challenge at the administrative hearing is also unsupportable in light of Congress's intent for the school to have an ongoing obligation to provide FAPE and to continue to reevaluate the IEP regularly after it has been implemented.

The Court should, therefore, affirm the district court's allocation of the burden of proof to the school at the administrative hearing.

The brief relied on the Third Circuit's *Oberti*<sup>9</sup> and the U. S. Supreme Court's decision in *Keyes*<sup>10</sup> as the primary legal authority. Both cases will be discussed later in this report.

On June 24, 2005, the United States changed positions and filed a brief with the U. S. Supreme Court on behalf of *Weast* asserting that the burden of proof should be placed on parents and not

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Advocacy Systems, National Children's Law Network, National Law Center on Homelessness and Poverty, Parents for Autistic Children's Education (PACE™), Parents Of Autistic Children of Northern Virginia (POAC-NoVA), Inc., United Cerebral Palsy, University of Richmond's School of Law Disability Law Clinic, Unlocking Autism (UA), and the Western Law Center for Disability Rights.)

<sup>6</sup> Connecticut, Illinois, Kansas, Minnesota, Nevada, Rhode Island, Virginia, Washington, and Wisconsin.

<sup>7</sup> American Association of School Administrators, Connecticut Association of Boards of Education, Connecticut Association of Public School Superintendents, Council of Great City Schools, Great City Schools, Illinois Association of School Boards, Kansas Association of School Boards, Minnesota School Boards Association, National Association of Elementary School Principals, National Education Association, National Association of School Boards, Pennsylvania Association of School Administrators, Public School Superintendent's Association of Maryland, Texas Association of School Boards Legal Assistance Fund, and the Virginia School Boards Association.

<sup>8</sup> Alaska, Hawaii and Oklahoma.

<sup>9</sup> *Oberti v. Bd. of Educ.*, 995 F.2d 1204 (3d Cir. 1993)

<sup>10</sup> *Keyes v. School Dist. No. 1*, 413 U.S. 189 (1973)

on the school districts.<sup>11</sup> It argued that the “Spending Clause” of the United States Constitution restricts the U. S. Supreme Court’s ability to place the burden of proof on school districts. The United States also argued that, because the recent amendments to the Individuals with Disabilities Education Act<sup>12</sup> (IDEA 2004) provide greater procedural safeguards to children with disabilities, the burden of proof should now be on parents. The United States also argued that deference should be afforded to the school districts.

Oral argument is expected in the fall, probably in October or November, 2005.

### **III. National Council on Disability**

The National Council on Disability (NCD) is an independent federal agency led by 15 members appointed by the President of the United States and confirmed by the U.S. Senate.<sup>13</sup>

As provided by statute:

- (2) The purpose of the National Council is to promote policies, programs, practices, and procedures that -
- (A) guarantee equal opportunity for all individuals with disabilities, regardless of the nature or severity of the disability; and
  - (B) empower individuals with disabilities to achieve economic self-sufficiency, independent living, and inclusion and integration into all aspects of society.<sup>14</sup>

NCD was initially established in 1978 as an advisory board within the Department of Education (Public Law 95-602). The Rehabilitation Act Amendments of 1984 (Public Law 98-221) transformed NCD into an independent agency.

The statutory mandate of NCD includes the following duties:

- Review and evaluate federal policies, programs, practices, and procedures concerning people with disabilities, including programs established or assisted under the Rehabilitation Act of 1973, as amended, and the Developmental Disabilities Assistance and Bill of Rights Act.
- Review and evaluate all statutes and regulations pertaining to federal programs that assist people with disabilities, to assess their effectiveness in meeting the needs of these people.
- Review and evaluate emerging federal, state, local, and private sector policy issues that affect people with disabilities, including the need for and coordination of adult services, access to

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<sup>11</sup> “After careful review of its administrative practice, the relevant case law, and the text, structure and history of the IDEA, including the 2004 amendments to the Act, the government is now of the view that, where, as here, a State has not placed the burden of proof on school districts as a matter of state law, the traditional rule that the burden of proof falls on the party seeking relief applies to IDEA due process hearings.” Brief, page 7, 8.

<sup>12</sup> The Individuals with Disabilities Education Improvement Act of 2004 will be referred to as “IDEA 2004.”

<sup>13</sup> 29 U.S.C. § 780

<sup>14</sup> 29 U.S.C. §780(a)(2)



personal assistance services, school reform efforts and the impact of these efforts on persons with disabilities, access to health care, and policies that operate as disincentives for individuals to seek and retain employment.

- Make recommendations to the President, Congress, the Secretary of Education, the Director of the National Institute on Disability and Rehabilitation Research, and other officials of federal agencies regarding ways to promote equal opportunity, economic self-sufficiency, independent living, and inclusion and integration into all aspects of society for Americans with disabilities.
- Provide Congress with advice, recommendations, legislative proposals, and other information that NCD or Congress deems appropriate.<sup>15</sup>

In 1995, NCD studied Individualized Education Program (IEP) meetings and reported that “[a]t every hearing [held by the Council], witness after witness testified that the IEP process is extremely frustrating, often intimidating, and hardly ever conducive to making them feel that they were equal partners with professionals.”<sup>16</sup>

On January 25, 2000, NCD issued a report entitled “*Back to School on Civil Rights*.”<sup>17</sup> In the cover letter to the President, NCD explained that:

Back to School on Civil Rights looks at more than two decades of federal monitoring and enforcement of compliance with Part B of IDEA. Overall, NCD finds that federal efforts to enforce the law over several Administrations have been inconsistent and ineffective. Despite the important efforts of your Administration to be more aggressive than any of its predecessors in addressing these compliance problems, failures to ensure local compliance with Part B requirements continue to be widespread and persist over many years. Enforcement of the law is too often the burden of parents who must invoke formal complaint procedures and request due process hearings to obtain the services and supports to which their children are entitled under law. The report includes recommendations for your Administration and Congress that would build on the 1997 reauthorization of IDEA.<sup>18</sup>

The report contains a number of findings and recommendations. In the initial “Executive Summary” of the Report, NCD stated that:

In the past 25 years, states have not met their general supervisory obligations to ensure compliance with the civil rights requirements of IDEA at the local level . . . The Federal Government has frequently failed to take effective action to enforce the civil rights

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<sup>15</sup> Source: <http://www.ncd.gov/brochure.htm> - last visited on July 17, 2005

<sup>16</sup> National Council on Disability, *Improving the Implementation of the Individuals with Disabilities Education Act: Making Schools Work for All of America’s Children* at page 57 (1995).

<sup>17</sup> National Council on Disability, *Back to School on Civil Rights* (2000)

<sup>18</sup> January 25, 2000 letter to the President at:

[http://www.ncd.gov/newsroom/publications/2000/backtoschool\\_1.htm](http://www.ncd.gov/newsroom/publications/2000/backtoschool_1.htm) - last visited July 18, 2005

protections of IDEA when federal officials determine that states have failed to ensure compliance with the law.<sup>19</sup>

...

As a result of 25 years of nonenforcement by the Federal Government, parents are still a main enforcement vehicle for ensuring compliance with IDEA.<sup>20</sup>

...

Many states are found eligible for full funding under Part B of IDEA while simultaneously failing to ensure compliance with the law. Though no state is fully ensuring compliance with IDEA, states usually receive full funding every fiscal year. Once eligible for funding, a state receives regular increases, which are automatic under the formula. OSEP's findings of state noncompliance with IDEA requirements usually have no effect on that state's eligibility for funding unless (1) the state's policies or procedures create systemic obstacles to implementing IDEA, or (2) persistent noncompliance leads OSEP to enforce by imposing high risk status with "special conditions" to be met for continued funding.<sup>21</sup>

...

After 25 years, all states are out of compliance with IDEA to varying degrees."<sup>22</sup>

Later, on February 13, 2002, NCD wrote to Representative Castle about re-authorization of IDEA and provided a copy of *Back to School on Civil Rights*. The cover letter explained that:<sup>23</sup>

As Congress begins serious discussions leading to the reauthorization of discretionary programs in the Individuals with Disabilities Education Act (IDEA) and potential amendments to Part B of the Act, we want to make you aware of NCD information and staff expertise available to assist you.

NCD is currently coordinating a multi-year study on the implementation and enforcement of the Americans with Disabilities Act and other civil rights laws. This study has included an in-depth examination of state implementation of the Individuals with Disabilities Education Act (IDEA), *Back to School on Civil Rights*, which was distributed to congressional offices in 2000. Additionally, we have conducted a number of research studies pertaining to the implementation of the IDEA. We believe there are a number of issues in "*Back to School*" and our research findings that significantly bear on the reauthorization and potential amendments.

For example, NCD has found:

- A significant lack of school accountability, poor enforcement of existing federal laws, and systemic barriers have denied students their educational rights and opportunities (*Achieving Independence: The Challenge for the 21st Century*, NCD 1996);

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<sup>19</sup> NCD - *Back to School on Civil Rights*, page 7

<sup>20</sup> Id. page 70

<sup>21</sup> Id. page 78

<sup>22</sup> Id. page 125

<sup>23</sup> [http://www.ncd.gov/newsroom/correspondence/2002/castle\\_02-13-02.htm](http://www.ncd.gov/newsroom/correspondence/2002/castle_02-13-02.htm) - last visited on July 18, 2005

- Disciplinary issues are most likely to occur when students are ignored or not provided services they need, leading to measures that deprive them of appropriate preparation for life. (*Discipline of Students with Disabilities: A Position Statement*, NCD 1998);
- There is not a state in the nation in compliance with IDEA, Part B. NCD found schools in every state denying appropriate supports and services to students with disabilities and not being held accountable for enforcement of the Act. (*Back to School on Civil Rights*, NCD 2000).

The purpose of IDEA 2004 is to provide a child with a disability with a free appropriate public education that is designed to meet the child’s unique needs and prepare the child for “further education, employment, and independent living.”<sup>24</sup>

The purpose of the NCD is to “empower individuals with disabilities to achieve economic self-sufficiency, independent living, and inclusion and integration into all aspects of society.”<sup>25</sup>

IDEA 2004 and NCD have similar purposes; economic self-sufficiency and independent living. In order to effectively accomplish the purpose of both statutes, it is the position of this Council that school districts, not parents, should have the burden of proof in issues regarding IEPs, placement, eligibility, and other matters related to an appropriate education.

## **IV. History of Special Education and Special Education Law**

### **A. History of Special Education**

#### **1. Common Schools Teach Common Values**

During the last century, waves of poor, non-English speaking, Catholic and Jewish immigrants poured into the United States. Citizens were afraid that these new immigrants would bring class hatreds, religious intolerance, crime, and violence to America. Social and political leaders searched for ways to “reach down into the lower portions of the population and teach children to share the values, ideals and controls held by the rest of society.”<sup>26</sup>

An educational reformer named Horace Mann proposed a solution to these social problems. He recommended that communities establish common schools funded by tax dollars. He believed that when children from different social, religious and economic backgrounds were educated together, they would learn to accept and respect each other. Common schools taught common values that included self-discipline and tolerance for others. These common schools would socialize children, improve interpersonal relationships, and improve social conditions.<sup>27</sup>

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<sup>24</sup> 20 U.S.C. §1400(d)(1)(A)

<sup>25</sup> 29 U.S.C. §780(a)(2)

<sup>26</sup> Church, Robert L. (1976) *Education in the United States* page 81 (New York: The Free Press)

<sup>27</sup> Cremin, Lawrence A. (1967) *The Transformation of the School: Progressivism in American Education, 1876-1957* pages 183-194 (New York: Knopf)

## **2. Early Special Education Programs**

The first special education programs were delinquency prevention programs for “at risk” children who lived in urban slums. Urban school districts designed manual training classes as a supplement to their general education programs. By 1890, hundreds of thousands of children were learning carpentry, metal work, sewing, cooking and drawing in manual classes. Children were also taught social values in these classes.

Manual training was a way of teaching children industriousness, and clearing up their character problems . . . the appeal of this training was the belief that it would attract children to school, especially poor children, so their morals could be reshaped . . . Manual training would teach children to be industrious and prevent the idleness that accounted for the increasing crime rate . . . it could teach self discipline and will power.<sup>28</sup>

Early special education programs also focused on the “moral training” of African-American children.<sup>29</sup>

## **3. Compulsory Attendance Laws**

For public schools to succeed in the mission of socializing children, all children had to attend school. Poor children attended school sporadically, quit early, or didn’t enter school at all. Public school authorities lobbied their legislatures for compulsory school attendance laws. Compulsory attendance laws gave school officials the power to prosecute parents legally if they failed to send their children to school.<sup>30</sup>

## **4. Children with Disabilities Excluded**

Until 1975, children with disabilities were often excluded from school. When allowed to attend, children with many different disabilities were often lumped together in generic special education classes. Because schools segregated children with disabilities from non-disabled children, special education classes were often held in undesirable, out-of-the-way places, like trailers and school basements.

Despite compulsory attendance laws, most states allowed school authorities to exclude children if they believed that the child would not benefit from education or if the child’s presence would be disruptive to others, i.e., to non-disabled children and teachers. In 1958, the Illinois Supreme Court held that compulsory education laws did not apply to children with mental impairments.

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<sup>28</sup> Cremin at pages 220-222

<sup>29</sup> Cremin at page 182-226

<sup>30</sup> Sperry, David, Philip T. K. Daniel, Dixie Snow Huefner, E. Gordon Gee. (1998) *Education Law and the Public Schools: A Compendium*, pages 139-145 (Norwood, MA: Christopher-Gordon Publishers, Inc. ), Cremin at pages 182-226

Until 1969, it was a crime in North Carolina for a parent to try to enroll a child with a disability in public school after the child had been excluded.<sup>31</sup>

## 5. ***Brown v. Board of Education*, 347 U. S. 483 (1954)**

In 1954, the U. S. Supreme Court issued a landmark civil rights decision in *Brown v. Board of Education*, 347 U. S. 483 (1954). In *Brown*, school children from four states argued that segregated public schools were inherently unequal and deprived them of equal protection of the laws. The Supreme Court found that African-American children had the right to equal educational opportunities and that segregated schools “have no place in the field of public education.” The Court wrote:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.<sup>32</sup>

We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other “tangible” factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.<sup>33</sup>

In *Brown*, the Supreme Court described the emotional impact that segregation has on children, especially when segregation “has the sanction of the law:”

To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. The effect of this separation on their educational opportunities was well stated by a finding in the Kansas case by a court which nevertheless felt compelled to rule against the Negro plaintiffs:

Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the Negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to

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<sup>31</sup> Weber, Mark. (2002) *Special Education Law and Litigation Treatise* (Horsham, PA, LRP Publications, Inc. ) page 1.1, (1965 N.C. Sess. Laws. Ch. 584, amending N.C. Gen. Stat. Section 115-165 (1963))

<sup>32</sup> *Brown v. Board of Education*, 347 U. S. 483, 493 (1954)

<sup>33</sup> *Brown* at page 493

[retard] the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racially integrated school system.<sup>34</sup>

After the decision in *Brown*, parents of children with disabilities began to bring lawsuits against their school districts for excluding and segregating children with disabilities. The parents argued that, by excluding these children, schools were discriminating against the children because of their disabilities.

## **B. History of Special Education Law**

### **1. Elementary and Secondary Education Act of 1965 and Education of the Handicapped Act of 1970**

In a policy paper about school vouchers, the National Council on Disability (NCD) provided a brief history of special education law and the interrelationship with the Elementary and Secondary Education Act of 1965 (ESEA). In the paper, NCD explained that:

Congress first addressed the education of students with disabilities in 1966 when it amended the Elementary and Secondary Education Act of 1965 to establish a grant program to assist states in the “initiation, expansion, and improvement of programs and projects . . . for the education of handicapped children.” In 1970, that program was replaced by the Education of the Handicapped Act (P.L. 91-230) that, like its predecessor, established a grant program aimed at stimulating the States to develop educational programs and resources for individuals with disabilities. Neither program included any specific mandates on the use of the funds provided by the grants; nor could either program be shown to have significantly improved the education of children with disabilities. In the early 1970s, two federal court cases provided the first substantial steps forward in the education of individuals with disabilities. *Pennsylvania Assn. for Retarded Children (P.A.R.C.) v. Commonwealth* (1971) and *Mills v. Board of Education of the District of Columbia* (1972) held against discriminatory exclusion practices of school districts and opened up public schools to children with disabilities.<sup>35</sup>

### **2. PARC and Mills**

During the early 1970s, two cases were catalysts in special education law: *Pennsylvania Assn. for Retarded Children v. Commonwealth of Pennsylvania*, 334 F. Supp. 1257 (E. D. Pa, 1971) and 343 F. Supp. 279 (E. D. Pa. 1972) and *Mills v. Board of Education of District of Columbia*, 348 F. Supp. 866 (D. DC 1972).

*PARC* dealt with the exclusion of children with mental retardation from public schools. In the subsequent settlement, it was agreed that educational placement decisions included a process of

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<sup>34</sup> *Brown* at page 494

<sup>35</sup> National Council on Disability, Policy Paper, *School Vouchers and Students with Disabilities*, page 9, April 15, 2003, available at: <http://www.ncd.gov/newsroom/publications/2003/pdf/vouchers.pdf> - last visited July 17, 2005

parental participation and a means to resolve disputes.<sup>36</sup> *Mills* involved the practice of suspending, expelling and excluding children with disabilities from the District of Columbia public schools.

In 1971, Peter Mills and class filed suit against Washington, D. C. Public Schools. In *Mills*, Judge Waddy stated that:

The genesis of this case is found (1) in the failure of the District of Columbia to provide publicly supported education and training to plaintiffs and other “exceptional” children, members of their class, and (2) the excluding, suspending, expelling, reassigning and transferring of “exceptional” children from regular public school classes without affording them due process of law.<sup>37</sup>

The school districts’ primary defense in *Mills*<sup>38</sup> was the high cost of educating children with disabilities.

Because *Mills* focused on procedural safeguards and is the basis for the procedural safeguards in IDEA 2004 at 20 U.S.C. §1415, we will focus on the law of *Mills* and, later, the facts of the individual children. Judge Waddy provided clear guidance about the burden of proof.

In *Mills*, the basis of the suit was that “because of behavioral problems, emotional disturbance, brain injury, or hyperactivity,” the children were excluded from a public school education. The action was certified as a class action.

In his opinion, Judge Waddy wrote:

The Answer of the defendants to the Complaint contains the following:

“These defendants say that it is impossible to afford plaintiffs the relief they request unless:

- (a) The Congress of the United States appropriates millions of dollars to improve special education services in the District of Columbia; or
- (b) These defendants divert millions of dollars from funds already specifically appropriated for other educational services in order to improve special educational services. These defendants suggest that to do so would violate an Act of Congress and would be inequitable to children outside the alleged plaintiff class.”

This Court is not persuaded by that contention.

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<sup>36</sup> *Pennsylvania Assn. for Retarded Children v. Commonwealth of Pennsylvania*, 343 F. Supp. 279, 303 (E. D. Pa. 1972)

<sup>37</sup> *Mills* at page 868

<sup>38</sup> Financial cost is often one of the primary defenses in special education cases before the U. S. Supreme Court.

The defendants are required by the Constitution of the United States, the District of Columbia Code, and their own regulations to provide a publicly supported education for these “exceptional” children. Their failure to fulfill this clear duty to include and retain these children in the public school system, or otherwise provide them with publicly supported education, and their failure to afford them due process hearing and periodical review, cannot be excused by the claim that there are insufficient funds. In *Goldberg v. Kelly*, 397 U.S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1969) the Supreme Court, in a case that involved the right of a welfare recipient to a hearing before termination of his benefits, held that Constitutional rights must be afforded citizens despite the greater expense involved. The Court stated . . . that “the State’s interest that his [welfare recipient] payments not be erroneously terminated, clearly outweighs the State’s competing concern to prevent any increase in its fiscal and administrative burdens.” **Similarly the District of Columbia’s interest in educating the excluded children clearly must outweigh its interest in preserving its financial resources.** If sufficient funds are not available to finance all of the services and programs that are needed and desirable in the system then the available funds must be expended equitably in such a manner that no child is entirely excluded from a publicly supported education consistent with his needs and ability to benefit therefrom. The inadequacies of the District of Columbia Public School System whether occasioned by insufficient funding or administrative inefficiency, certainly **cannot be permitted to bear more heavily** on the “exceptional” or handicapped child than on the normal child.<sup>39</sup> (Emphasis added.)

The Court held that: “Plaintiffs’ entitlement to relief in this case is clear. The applicable statutes and regulations and the Constitution of the United States require it.”<sup>40</sup> In the Judgment, the Court Ordered that:

The District of Columbia shall provide to each child of school age a free and suitable publicly supported education regardless of the degree of the child’s mental, physical or emotional disability or impairment. Furthermore, defendants shall not exclude any child resident in the District of Columbia from such publicly supported education on the basis of a claim of insufficient resources.<sup>41</sup>

To compare Judge Waddy’s term, a “free and suitable publicly supported education” to the definition of a “free appropriate public education” (FAPE) in IDEA 2004, see 20 U.S.C. §1401(9) and the requirement that FAPE be provided in the state plan at 20 U.S.C. §1412(a)(1).

Judge Waddy outlined very specific procedures for due process hearings. Many of these procedures were copied almost verbatim into the procedural safeguards of the Education for All Handicapped Children Act in 1975 and have continued in the law through IDEA 2004.

For example, in Paragraph 13 of his Order, Judge Waddy outlined specific “Hearing Procedures” that must be followed. Each member of the “plaintiff class is to be provided with a publicly

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<sup>39</sup> *Mills* at pages 875-877

<sup>40</sup> *Mills* at page 873

<sup>41</sup> *Mills* at page 881



supported educational program suited to his needs . . .” Before a child is placed into a program, the parents must be provided with notice “of the proposed educational placement, the reasons therefore, and the right to a hearing before a Hearing Officer if there is an objection to the placement proposed.”<sup>42</sup>

Before the school system could take any “action regarding a child’s placement” the defendants must provide notice that shall:

- (a) describe the proposed action in detail;
- (b) clearly state the specific and complete reasons for the proposed action, including the specification of any tests or reports upon which such action is proposed;
- (c) describe any alternative educational opportunities available on a permanent or temporary basis;
- (d) inform the parent or guardian of the right to object to the proposed action at a hearing before the Hearing Officer;
- (e) inform the parent or guardian that the child is eligible to receive, at no charge, the services of a federally or locally funded diagnostic center for an independent medical, psychological and educational evaluation and shall specify the name, address and telephone number of an appropriate local diagnostic center;
- (f) inform the parent or guardian of the right to be represented at the hearing by legal counsel; to examine the child’s school records before the hearing, including any tests or reports upon which the proposed action may be based, to present evidence, including expert medical, psychological and educational testimony; and, to confront and cross-examine any school official, employee, or agent of the school district or public department who may have evidence upon which the proposed action was based.<sup>43</sup>

Compare Judge Waddy’s notice requirements, above, to the notice requirements in 20 U.S.C. §1415(b)(3) and §1415(c)(1). IDEA 2004 mandates that the “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

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<sup>42</sup> *Mills* at page 880

<sup>43</sup> *Mills* at pages 880-881

evaluation, the means by which a copy of a description of the procedural safeguards can be obtained;

(D) sources for parents to contact to obtain assistance in understanding the provisions of this part;

(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.<sup>44</sup>

In a Hearing, Judge Waddy mandated that the child would have the right to "a representative of his own choosing, including legal counsel."<sup>45</sup>

The parent had the right of access to all records pertaining to the child.<sup>46</sup>

The Hearing Officer could not be an employee of the school system.<sup>47</sup>

The parent had the right to present evidence and testimony and cross-examine any witness testifying for the school system. The parent had the right to force the attendance of any school official or other public employee.<sup>48</sup>

A tape recording or other "record of the hearing shall be made and transcribed" and made available to the parent.<sup>49</sup>

A decision that included findings of fact and conclusions of law was to be filed within thirty days after the hearing.<sup>50</sup>

Judge Waddy, by his Order, restored the constitutional right to an education for the class of children who were denied an education. Of critical importance is that Judge Waddy, as a part of the procedural safeguards outlined in his Order, subsection entitled "Hearing Procedures," stated expressly that:

**Defendants shall bear the burden of proof as to all facts and as to the appropriateness of any placement, denial of placement or transfer.<sup>51</sup>**

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<sup>44</sup> See IDEA 2004: 20 U.S.C. §1415(c)(1)

<sup>45</sup> See IDEA 2004: 20 U.S.C. §1415(h)(1)

<sup>46</sup> See IDEA 2004: 20 U.S.C. §1415(f)(2)

<sup>47</sup> See IDEA 2004: 20 U.S.C. §1415(f)(3)(A)(i)(I)

<sup>48</sup> See IDEA 2004: 20 U.S.C. §1415(h)(2)

<sup>49</sup> See IDEA 2004: 20 U.S.C. §1415(h)(3)

<sup>50</sup> 20 U.S.C. §1415(h)(4) and 34 C.F.R. § 300.511(a) - 45 days from date of request for hearing

<sup>51</sup> *Mills* at page 881

In 1972, Judge Waddy ordered that the school district shall have “the burden of proof as to all facts and as to the appropriateness of any placement, denial of placement or transfer.” The procedural safeguards outlined by Judge Waddy form the basis of the procedural safeguards in existence today at 20 U.S.C. §1415.

Congress tracked Judge Waddy’s order, almost verbatim, in creating the procedural safeguards that protect and enforce a child with a disability’s right to an appropriate education.

One needs only to study *Mills* to resolve confusion about the procedural safeguards, the meaning of Section 1415 and the intent of Congress. In disputes, the burden of proof is on the school district.

The rulings in the *Mills* and *PARC* cases led to Congressional hearings and the subsequent enactment of Public Law 94-142, originally known as the Education for All Handicapped Children Act and now known as the Individuals with Disabilities Education Act (IDEA 2004).

### 3. Congressional Investigation

After *PARC* and *Mills*, Congress launched an investigation into the status of children with handicaps and disabilities. In May, 1972, legislation was introduced in Congress after several:

. . . landmark court cases establishing in law the right to education for all handicapped children [*Mills* and *PARC*] . . . In 1954, the Supreme Court of the United States [*Brown v. Board of Education*] established the principle that all children be guaranteed equal educational opportunity. The Court stated “In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity . . . is a right which must be made available to all on equal terms.”<sup>52</sup>

Congress found that millions of children were not receiving an appropriate education:

Yet, the most recent statistics provided by the Bureau of Education for the Handicapped estimated that of the more than 8 million children . . . with handicapping conditions requiring special education and related services, only 3.9 million such children are receiving an appropriate education. 1.75 million handicapped children are receiving no educational services at all, and 2.5 million handicapped children are receiving an inappropriate education.<sup>53</sup>

Congress described the social and economic costs of failing to educate children with disabilities:

The long-range implications of these statistics are that public agencies and taxpayers will spend billions of dollars over the lifetimes of these individuals to maintain such persons as dependents and in a minimally acceptable lifestyle. With proper education services, many would be able to become productive citizens productive citizens productive citizens

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<sup>52</sup> *United States Code Congressional and Administrative News 1975* (USCCAN) at page 1430

<sup>53</sup> USCCAN at page 1433

productive citizens productive citizens, contributing to society contributing to society contributing to society contributing to society contributing to society instead of being forced to remain burdens. Others, through such services, would increase their independence, thus reducing their dependence on society.<sup>54</sup>

There is no pride in being forced to receive economic assistance. Not only does this have negative effects upon the handicapped person, but it has far-reaching effects for such person's family.<sup>55</sup>

Providing educational services will ensure against persons needlessly being forced into institutional settings. One need only look at public residential institutions to find thousands of persons whose families are no longer able to care for them and who themselves have received no educational services. Billions of dollars are expended each year to maintain persons in these subhuman conditions . . .<sup>56</sup>

Parents of handicapped children all too frequently are not able to advocate the rights of their children because they have been erroneously led to believe that their children will not be able to lead meaningful lives . . . **It should not . . . be necessary for parents throughout the country to continue utilizing the courts** to assure themselves a remedy . . .<sup>57</sup>

#### **4. The Education for All Handicapped Children Act of 1975 - Public Law 94-142**

On November 19, 1975, Public Law 94-142 was enacted and called the Education for All Handicapped Children Act of 1975. When the law was reauthorized in 1990, it was renamed the Individuals with Disabilities Education Act (IDEA). Subsequent re-authorizations in 1997 and 2004 are known as IDEA 97 and IDEA 2004.

The phrase "handicapped child" was used in Public Law 94-142. It was later replaced by "child with a disability" in the statute and regulations.

Congress intended that all "handicapped children" would "have a right to education, and to establish a process by which State and local educational agencies may be held accountable for providing educational services for all handicapped children."<sup>58</sup>

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<sup>54</sup> Id. at page 1433

<sup>55</sup> Id. at page 1433

<sup>56</sup> Id. at page 1433

<sup>57</sup> Id. at page 1433

<sup>58</sup> Id. at page 1427

## 5. Discrimination Against Minorities

In 1975, Congress found that poor African-American children were over-represented in special education classes. Today these problems persist. In IDEA 2004, Congress explained that dropout rates are high for minorities:<sup>59</sup>

(A) Greater efforts are needed to prevent the intensification of problems connected with mislabeling and high dropout rates among minority children with disabilities.

(B) More minority children continue to be served in special education than would be expected from the percentage of minority students in the general school population.

(C) African-American children are identified as having mental retardation and emotional disturbance at rates greater than their White counterparts.

(D) In the 1998-1999 school year, African-American children represented just 14.8 percent of the population aged 6 through 21, but comprised 20.2 percent of all children with disabilities.

(E) Studies have found that schools with predominately White students and teachers have placed disproportionately high numbers of their minority students into special education.

## 6. Financial Considerations

Since *Mills*, school districts have complained about the cost of special education. In the briefs filed by, and on behalf of the local education agencies in *Carter*, *Garret F*, and *Schaffer*, school districts complained about the cost of special education.

In *Carter*, Justice O'Connor explained that:

The school district also claims that allowing reimbursement for parents such as Shannon's puts an unreasonable burden on financially strapped local educational authorities. The school district argues that requiring parents to choose a state-approved private school if they want reimbursement is the only meaningful way to allow States to control costs; otherwise States will have to reimburse dissatisfied parents for any private school that provides an education that is proper under the Act, no matter how expensive it may be.

There is no doubt that Congress has imposed a significant financial burden on States and school districts that participate in IDEA. Yet public educational authorities who want to avoid reimbursing parents for the private education of a disabled child can do one of two things: give the child a free appropriate public education in a public setting, or place the child in an appropriate private setting of the State's choice. This is IDEA's mandate, and school officials who conform to it need not worry about reimbursement claims.<sup>60</sup>

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<sup>59</sup> 20 U.S.C. §1400(c)(12) - IDEA 2004

<sup>60</sup> *Florence County School District IV v. Carter*, 510 U.S. 7, 12 (1993)

## 7. Purpose of No Child Left Behind and IDEA 2004

The purpose of No Child Left Behind is:<sup>61</sup>

[T]o ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging State academic achievement standards and state academic assessments. This purpose can be accomplished by —

...  
(2) meeting the educational needs of low-achieving children in our Nation’s highest-poverty schools, limited English proficient children, migratory children, children with disabilities, Indian children, neglected or delinquent children, and young children in need of reading assistance;

(3) closing the achievement gap between high- and low-performing children, especially the achievement gaps between minority and nonminority students, and between disadvantaged children and their more advantaged peers;

...  
(9) promoting schoolwide reform and ensuring the access of children to effective, scientifically based instructional strategies and challenging academic content;

No Child Left Behind expects children with disabilities to be proficient in academic skills, including math and reading. The educational achievement gap between more advantaged children and children with disabilities is to be closed. Brian Schaffer and Shannon Carter, two cases that will be discussed later, had advantages that Bill Dunstan lacked. Brian and Shannon were represented by counsel, Bill was not. The educational achievement gaps for Brian and Shannon were closed. The outcome for Bill was different.

When Congress passed the Education for All Handicapped Children Act (Public Law 94-142) in 1975, they included an elaborate system of legal checks and balances called “procedural safeguards” designed to protect the rights of children and their parents. As noted earlier, the *Mills* case formed the backbone of these safeguards. Initially, the law focused on ensuring that children had access to an education and due process of law. Now, most children with disabilities attend school. When Congress reauthorized the law in 1997, they focused on accountability and improved outcomes, while maintaining the goals of access and due process. With the Individuals with Disabilities Education Act of 2004, (IDEA 2004), Congress increased the focus on accountability and improved outcomes with their emphasis on reading, early intervention, research-based instruction, and highly qualified teachers.

IDEA has two primary purposes: The first purpose is to provide an education that meets a child’s unique needs and prepares the child for further education, employment, and independent living. The second purpose is to protect the rights of children with disabilities and their parents.<sup>62</sup>

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<sup>61</sup> 20 U.S.C. §6301 - the statement of purpose of No Child Left Behind

<sup>62</sup> 20 U.S.C. §1400(d)(1)

The statute is clear, protect the rights of parents and children with disabilities. As a part of protecting their rights, the statute did not assign the burden of proof to parents in disputes.

Query: In *Dunstan* (to be discussed later), what steps were taken to protect the child's rights? By the Maryland Office of Administrative Hearings and by Baltimore City Public Schools? Because the guardian was unable to properly mark, identify, and move for the submission of exhibits, all exhibits were excluded. The guardian was unable to protect the rights of the child. What protection was afforded the child when the guardian was unable to properly present a case in a judicial forum?

Did Peter Mills, in 1972, have more procedural protections than Bill Dunstan in 2002? Answer - yes. In 1972 the burden of proof was on the school district to prove the facts and appropriateness of any placement. In 2002, the burden of proof was on Bill Dunstan and his guardian to prove that Bill needed to learn how to read, count money, and fill out job applications.

As will be clear later, the second purpose of IDEA was not met with Bill Dunstan. As a result, the first purpose, to prepare the child for employment and independent living - was not achieved.

## V. Determining Burden of Proof

To determine the appropriate burden of proof when a statute is silent, one needs to study legislative history (above), then special education case law, focusing on development of the split among circuits, then by a review of case law from the U. S. Supreme Court.

(While IDEA 2004 is silent on the burden of proof, seven states<sup>63</sup> have assigned the burden of proof to school districts by state statute or regulation. Two State Supreme Courts<sup>64, 65</sup> have also assigned the burden of proof to the school districts.)

After a review of case law, the facts of a case need to be applied to the law in order to arrive at the right result.

This paper will examine the facts in three different special education cases.

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<sup>63</sup> Alaska Regulations: 4 AAC 52.550(e)(9)

Alabama Regulations: Chapter 290-8-9.08(8)(c)(6)(ii)(I)

Connecticut Regulations: § 10-76h-14

Delaware Statute: 14 § 3140

District of Columbia Regulations: Mun. Regs. Title 5, § 3030.3,

Minnesota Statute: § 125A.091, Subdivision 16

West Virginia Regulations: § 126-16-8.1.11c

<sup>64</sup> New Jersey - *Lascari v. Bd. of Educ. of Ramapo Indian Hills Reg. High Sch. Dist.*, 116 N.J. 30, 560 A.2d 1180 (NJ 1989)

<sup>65</sup> Virginia - *School Bd. of Campbell County v. Beasley*, 238 Va. 44, at 51, 380 S.E.2d 884 (VA 1989)

Finally, we will seek to extrapolate the “spirit” of special education law with the “letter” of the (burden of proof) law and summarize the conflicts between the two.

## VI. Split Among Circuits

The U. S. Courts of Appeal are split as to whether the parents, school district, or party seeking to change a child’s Individualized Educational Program (IEP) or placement, have the burden of proof. The first highly-publicized case regarding burden of proof came in 1983 with the Fifth Circuit’s ruling in *Tatro*.<sup>66</sup>

### A. *Tatro (1983) and Alamo Heights (1986)*

The case began in 1979, when Amber Tatro was three and one-half years old. Amber’s mother asked the school district to provide special education for Amber. The school district agreed and developed an IEP that placed Amber in an Early Childhood Development (ECD) class. However the school district did not want to provide Amber with Clean Intermittent Catherization (CIC) and “the school district maintained that it had no legal obligation to administer it.”<sup>67</sup>

In 1983, the Fifth Circuit found that the school district’s IEP included placement in the public school program. However, if Amber did not receive CIC, then the placement could not be implemented. In essence, the school district was attacking the IEP that it developed with the parents. The Court ruled that that the school district was required to provide CIC for Amber, explaining that:

[B]ecause the IEP is jointly developed by the school district and the parents, fairness requires that the party attacking its terms should bear the burden of showing why the educational setting established by the IEP is not appropriate. Since the school district has not even attempted to do so, its argument must be rejected and we need not reach the thorny issue of what circumstances might call for judicial modification of an IEP.<sup>68</sup>

*Tatro* became the leading case that the “party attacking the IEP should bear the burden (of proof.) (The school district appealed the CIC issue to the U. S. Supreme Court where the parents prevailed.)<sup>69</sup> Had the Fifth Circuit avoided a discussion about the IEP and simply held that the school district had the burden of proving that their denial of CIC was justified, the outcome would have been the same.

In 1986, the Fifth Circuit issued the decision in *Alamo Heights* and renewed its *Tatro* position that the burden of proof is on the party attacking the terms of the IEP.<sup>70</sup>

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<sup>66</sup> *Tatro v. Texas*, 703 F.2d 823 (5th Cir. 1983), aff’d in part, rev’d in part, on other grounds, sub nom. *Irving Indep. School Dist. v. Tatro*, 468 U.S. 883 (1984)

<sup>67</sup> *Tatro*, 703 F. 2d at page 825

<sup>68</sup> *Tatro* at page 830

<sup>69</sup> *Irving Indep. School Dist. v. Tatro*, 468 U.S. 883 (1984)

<sup>70</sup> *Alamo Heights Independent School District v. State Board of Education*, 790 F.2d 1153, 1158 (5th Cir. 1986)



## **B. *Lascari* (1989)**

In 1989, the New Jersey Supreme Court in *Lascari*<sup>71</sup> found that: “Across the country other courts have struggled with determining which party bears the burden of proving the appropriateness or inappropriateness of the education provided by the district.”

In *Lascari*, the Court explained that *Tatro* placed the burden of proof on the school district even though *Tatro* stands for the proposition that the burden of proof should be on the parents:

In cases in which the district has sought to change a child’s placement, some courts have allocated the burden of proof to the district. That allocation is supported by the view that when a child is currently learning in a placement that was jointly developed by the district and the parents, the party attacking the program should show why it is inappropriate . . . In placing the burden on the district when it attacks the IEP, those courts have also relied on the statutory preference for maintaining the status quo when the child is receiving an appropriate education.<sup>72</sup>

*Lascari* explained that “Although we agree with the results of those cases, we are not certain that the courts would have placed the burden of proof on the party seeking to change the IEP if that party had been the parents rather than the school district.” In other words, the *Tatro* Court focused on the welfare of Amber, ensuring that she received CIC so she could attend school.

In most special education disputes, the parent asserts that the IEP is not appropriate and thus, under the *Tatro* rule, has the burden of proof. However, in *Tatro*, the Court placed the burden on the school district.

The New Jersey Supreme Court explained that underlying the law is “an abiding concern for the welfare” of the child and parents.<sup>73</sup>

The purpose of procedural safeguards is to protect children and their parents. “Like those procedural safeguards, the allocation of the burden of proof protects the rights of handicapped children to an appropriate education.”<sup>74</sup>

In addition to concern for the child’s welfare and protection of rights, the Court added:

Our result is also consistent with the proposition that the burdens of persuasion and of production should be placed on the party better able to meet those burdens. In the past, we have placed either the burden of production . . . or the burden of proof on the party with the better access to relevant information . . . By contrast, parents may lack the expertise needed to formulate an appropriate education for their child.<sup>75</sup>

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<sup>71</sup> *Lascari v. Bd. of Educ. of Ramapo Indian Hills Regional High Sch. Dist.* 116 N.J. 30, 560 A.2d 1180 (NJ 1989)

<sup>72</sup> *Lascari* at pages 1187-1188

<sup>73</sup> *Lascari* at page 1188

<sup>74</sup> *Lascari* at page 1188

<sup>75</sup> *Lascari* at page 1188

The burden of production of evidence and the burden of proof shall be on the party with “better access to relevant information.” In disputes between parents and school districts, the critical factor is to obtain “the right result for the handicapped child.”

[B]oth the parents and district have an interest in assuring that a handicapped child receives an appropriate education. In that setting, the adversary nature of the proceedings should yield to obtaining the right result for the handicapped child. Thus, the distinction between the burden of proof and the burden of production may be less critical . . .<sup>76</sup>

The overriding theme in *Lascari* (and perhaps in *Tatro*) is that “the adversary nature of the proceedings should yield to obtaining the right result for the handicapped child.”

*Lascari* concluded that the parent’s obligation “should be merely to place in issue the appropriateness of the IEP. The school board should then bear the burden of proving that the IEP was appropriate. In reaching that result, we have sought to implement the intent of the statutory and regulatory schemes.”<sup>77</sup>

### **C. *Johnson (1990), Cordrey (1990), and Doe (1993)***

In 1990, the Tenth Circuit in *Johnson* relied on and quoted *Tatro* in holding that IDEA creates a “presumption in favor of the educational plan” and that “the party that attacking its terms should bear the burden . . .”<sup>78</sup>

Later in 1990, in *Cordrey*,<sup>79</sup> and in 1993, in *Doe*,<sup>80</sup> the Sixth Circuit, relying on *Tatro*, held that the burden is on the party that challenges the IEP.

### **D. *Oberti (1993)***

In 1993, the Third Circuit, in *Oberti*,<sup>81</sup> departed from the rule developed in the Fifth, Tenth, and Sixth Circuits. In *Oberti*, the Court provided a comprehensive explanation about the developing burden of proof case law. The Court explained that there were two issues, burden of proof at the initial administrative hearing, and then, if a case is appealed to the U. S. District Court, regardless of the earlier outcome, whether the school district had the burden of proof on appeal.

*Oberti* held that the school district has the burden of proof at the due process administrative hearing level, and at the U. S. District Court level, even if the school district prevailed at the administrative hearing.

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<sup>76</sup> *Lascari* at page 1188 “right result”

<sup>77</sup> *Lascari* at pages 1188-1189

<sup>78</sup> *Johnson v. Independent School District No. 4*, 921 F.2d 1022, 1026 (10th Cir. 1990)

<sup>79</sup> *Cordrey v. Eukert*, 917 F.2d 1460, 1466 (6th Cir. 1990)

<sup>80</sup> *Doe v. Board of Education of Tullahoma City*, 9 F.3d 455, 458 (6th Cir. 1993)

<sup>81</sup> *Oberti v. Bd. of Educ.*, 995 F.2d 1204 (3d Cir. 1993)

The Court explained that:

In reviewing the decision of a state agency under IDEA, the district court “must make an independent determination based on a preponderance of the evidence.” *Geis v. Bd. of Educ.*, 774 F.2d 575, 583 (3d Cir. 1985). Given that the district court must independently review the evidence adduced at the administrative proceedings and can receive new evidence, we see no reason to shift the ultimate burden of proof to the party who happened to have lost before the state agency, especially since the loss at the administrative level may have been due to incomplete or insufficient evidence or to an incorrect application of the Act.<sup>82</sup>

Relying on *Lascari* and Engel, *Law, Culture, and Children with Disabilities*, 1991 Duke L.J. at 187-94, the Court explained:

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.

In *Oberti*, the Third Circuit departed from the prior rulings in other circuits and aligned with the New Jersey Supreme Court.

### **E. Clyde K. (1994)**

In 1994 the Ninth Circuit, in *Clyde K.*, aligned with *Oberti* and departed from the Fifth, Sixth and Tenth Circuits. *Clyde K.* held that the “school clearly had the burden of proving at the administrative hearing that it complied with the IDEA.” However, if parents lost at the administrative hearing, the Court explained that “we join the substantial majority of the circuits that have addressed this issue by placing the burden of proof on the party challenging the administrative ruling.”<sup>83</sup>

In other words, the school district had the burden of proof in the special education due process hearing, i.e., administrative hearing. However, on appeal, the party that lost in the administrative hearing had the burden of proving that the lower level decision is incorrect and should be overturned.

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<sup>82</sup> *Oberti* at page 1219

<sup>83</sup> *Clyde K. v. Puyallup School District No. 3*, 35 F.3d 1396, 1398 (9th Cir. 1994)

## **F. E.S. (1998), Walczak (1998), and Blackmon (1999)**

In 1998 the Eighth Circuit, in *E.S.*, relying on the reasoning in the Ninth Circuit's *Clyde K.*, held that "the District clearly had the burden of proving that it had complied with the IDEA."<sup>84</sup>

Several months later, the Second Circuit joined with the Third, Eighth, and Ninth Circuits and the New Jersey Supreme Court. In *Walczak*, the Second Circuit held that in a due process hearing, "school authorities have the burden of supporting the proposed IEP."<sup>85</sup>

At this point, the Fifth, Sixth, and Tenth Circuits had aligned with the original *Tatro / Alamo Heights* position. The Second, Third, Eighth, and Ninth Circuits followed the *Lascari / Oberti* rule. A clear split among Circuits had developed.

In 1999, the Eighth Circuit, in *Blackmon*, relied on the earlier *E.S.* case and held that "At Grace's administrative due process hearing the School District had the burden of proving that its proposed IEP would satisfy the requirements of the IDEA and provide Grace with a free appropriate public education."<sup>86</sup>

## **G. Devine (2001)**

In 2001, the Eleventh Circuit, in *Devine*,<sup>87</sup> issued a ruling in regard to a 1992-1993 IEP. This case was unusual and drawn out. The parent participated in and agreed with IEPs created for the 1989-1990, 1990-1991, and 1991-1992 school years. The parent requested a private residential program for the 1992-1993 school year and the school did not agree. The due process hearing was in 1993 and the Hearing Officer held that the proposed IEP was not appropriate. However, he did not agree that the child needed a residential placement. The parents then moved to Massachusetts, but continued the litigation. In October, 1993, the parents appealed the adverse decision and filed a Complaint in the U. S. District Court. On the second day of trial, the father, a non-lawyer, requested permission to discharge counsel and represent his son. The District Court refused his request. That issue was appealed to the Eleventh Circuit which upheld the denial.<sup>88</sup> The father was not permitted to represent his son. The case returned to the District Court. After an adverse ruling from the District Court, the parents again appealed to the Eleventh Circuit.

The parents asked the Eleventh Circuit to adopt the *Lascari* standard. The school district asked the Court to follow the rule of the Fifth Circuit in *Tatro*. The Court discussed the split among the circuits and concluded:

We believe the Fifth Circuit holds the better view, especially in the light of our circuit's previous recognition that great deference must be paid to the educators who develop the

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<sup>84</sup> *E.S. v. Independent School District No. 196*, 135 F.3d 566, 569 (8th Cir. 1998)

<sup>85</sup> *Walczak v. Florida Union Free School District*, 142 F.3d 119, 122 (2d Cir. 1998)

<sup>86</sup> *Blackmon v. Springfield R-XII School District*, 198 F.3d 648, 658 (8th Cir. 1999)

<sup>87</sup> *Devine v. Indian River County School Board*, 249 F.3d 1289 (11th Cir. 2001)

<sup>88</sup> *Devine v. Indian River County School Bd.*, 121 F.3d 576 (11th Cir. 1997)

IEP . . . In the present case, because it is the parents who are seeking to attack a program they once deemed appropriate, the burden rests on the parents in this IEP challenge.<sup>89</sup>

## **H. T. B. (2004)**

In March, 2004, the First Circuit in *T.B. v. Warwick School Committee*,<sup>90</sup> commented on a Hearing Officer's statement in a due process decision. The Hearing Officer reported that the burden of proof shifted from the parent to the school district during the presentation of the case. The First Circuit, in a footnote, aligned itself with the Second, Third, Eighth, and Ninth Circuits explaining that:

This statement is puzzling because the school district **always bears the burden** in the due process hearing of showing that its proposed IEP is adequate. (Cites omitted.) (Emphasis added.)

By March, 2004, the Fifth, Sixth, Tenth and Eleventh Circuits were aligned with the original *Tatro / Alamo Heights* position. The First, Second, Third, Eighth, and Ninth Circuits followed the *Lascari / Oberti* rule. The split continued.

## **I. Weast v. Schaffer (2004)**

On July 29, 2004, the Fourth Circuit issued the ruling in *Weast v. Schaffer*.<sup>91</sup> The Court summarized the split among Circuits as follows:

Three circuits assign the burden to the parents, and four (perhaps five) assign it to the school system. The Sixth Circuit holds to “the traditional burden of proof” and requires the parents challenging an IEP to establish both its procedural and substantive deficiencies. (Cites omitted.) The Fifth and Tenth Circuits also assign the burden of proof to the parents, but for a different reason. According to these circuits, because the statute relies on the expertise of education professionals in local school systems, their decisions about the substantive terms of an IEP are owed deference; as a result, the parents bear the burden of proving why an IEP is deficient. (Cites omitted.)

On the other side the Third Circuit assigns the burden of proof to school systems when their IEPs are challenged by parents in administrative proceedings. (Cites omitted.) (. . . holding that when an administrative decision upholding an IEP is challenged in district court, the school district has the burden of proof because of its expertise and access to information and witnesses). Three other circuits, the Second, Eighth, and Ninth, have announced without explanation that the school system has the burden of proving the adequacy of the IEP at the administrative hearing. (Cites omitted.) Finally, the D.C. Circuit assigned the burden of proof to a school system when an IEP was challenged as procedurally deficient, noting that “[t]he underlying assumption of the Act is that to the

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<sup>89</sup> *Devine* (2001) at page 1292

<sup>90</sup> *T.B. v. Warwick School Committee*, 361 F.3d 80, 82 (1st Cir. 2004)

<sup>91</sup> *Weast v. Schaffer*, 377 F. 3d 449 (2004)

extent its procedural mechanisms are faithfully employed, [disabled] children will be afforded an appropriate education.” (Cite omitted.) It is not clear how the D.C. Circuit would assign the burden in a case such as this one where only the substance of the IEP is challenged.<sup>92</sup>

The Fourth Circuit held that parents who are “attacking the terms of an IEP” must “bear the burden” of proof:

Congress enacted the IDEA with the **clear intention of deferring to local school authorities** for the development of educational plans for disabled children. (Cites omitted.) And while Congress “[e]ntrust[s] a [disabled] child’s education to state and local agencies” under the IDEA, it “protect[s] individual children by providing for parental involvement [and for certain assistance to parents] . . . in the formulation of [a] child’s [IEP].” *Rowley*, 458 U.S. at 208. Under this statutory arrangement, it is reasonable to require parents attacking the terms of an IEP to bear the burden of showing why it is deficient.<sup>93</sup>

Contrary to the assertion by the Fourth Circuit, Public Law 94-142, the Education for All Handicapped Children Act of 1975, was not enacted “with the clear intention of deferring to local school authorities for the development of educational plans for disabled children.” It was enacted to correct the educational abuses evidenced by *PARC* and *Mills*. Nothing in either the original Public Law 94-142 or IDEA 2004 provides a clear intent to provide deference to school districts for the development of an IEP. The law places the burden on the school district to develop the document, jointly, with the parents.

Judge Luttig did not agree with the majority. He explained that:

Not only does the school district have the affirmative, statutory obligation under the IDEA to develop a suitable education program (IEP) for every disabled child, the school district is also in a far better position to demonstrate that it has fulfilled this obligation than the disabled student’s parents are in to show that the school district has failed to do so. Accordingly, I would hold that the school district - and not the comparatively uninformed parents of the disabled child - must bear the burden of proving that the disabled child has been provided with the statutorily required appropriate educational resources.<sup>94</sup>

## **J. In Summation: The Split Among Circuits**

The Circuits have split into two camps: those aligned with the *Tatro / Alamo Heights* rule and those aligned with the *Lascari / Oberti* rule.

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<sup>92</sup> *Weast*, 377 F. 3d at pages 452-453

<sup>93</sup> *Weast* at page 456

<sup>94</sup> *Weast* at page 456-457

The Circuits agree that if a parent disputes the appropriateness of an IEP, it is the parent’s burden to “place in issue the appropriateness of the IEP.” After that, the issue is whether the parent has the burden of proving that the IEP is not appropriate or whether the school district has the burden of proving that the IEP is appropriate.

The splits among the Circuits is based on several competing principles. Should the party attacking the terms of an IEP bear the burden of showing why the IEP is not appropriate? Or, should the party that prepared the IEP and has greater expertise and resources have the burden of proving that the IEP is appropriate?

When a dispute between parents and a school district arises, should the adversarial nature of the proceedings yield to obtaining the right result for the handicapped child? Or, should deference should be paid to the educators who developed the IEP?

Several briefs filed on behalf of *Weast* have argued that IDEA is a “Spending” statute which restricts the U. S. Supreme Court’s ability to mandate that school districts have the burden of proof. The Fifth Circuit in *Tatro* and *Alamo Heights*, nor any of the Circuits aligned with *Tatro / Alamo Heights*, took that position. The briefs filed on behalf of *Weast*, like the position taken by the Washington, D. C. public schools in *Mills*, expressed concerns about the financial impact of assigning the burden to school districts. Again, none of the Circuit Courts that adopted the *Tatro / Alamo Heights* rule expressed concerns about the financial impact of the burden of proof.

To understand these issues and how the split between circuits will be resolved, one must look at U. S. Supreme Court case law about which party bears the burden of proof when the statute is silent. Over the years, the Court has been confronted with this issue. Their decisions provide guidance in *Schaffer v. Weast* and how this may be resolved.

## **VII. Analysis of Burden of Proof Case Law from The U. S. Supreme Court**

In enacting a law, Congress generally assigns rights and responsibilities, but may not specify which party has the burden of proof in a dispute.

Assigning the burden of proof is more than a mere procedural issue. Shifting the burden can have absolute control over the outcome. This “is a rule of substantive law . . .”<sup>95</sup>

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<sup>95</sup> *American Dredging Co. v. Miller*, 510 U.S. 443, 454 (1994)

## **A. *Tinker (1914)* - Position of Advantage, Policy of the Statute**

In 1914, in *Tinker*,<sup>96</sup> the U. S. Supreme Court ruled on assignment of the burden of proof in a collection case against an “Osage Indian.” The Indian Appropriation Act did not permit loans and extensions of credit by traders beyond a certain percentage of the debtor’s income. The statute did not provide a burden of proof standard. Justice Holmes enunciated a standard, not from formal logic or law, but simply that the person who holds the position of advantage has the burden of proof.

Justice Holmes found that the trader “occupied the **position of advantage** and that rather than formal logic determines the burden of proof.”<sup>97</sup> (Emphasis added.) Justice Holmes relied on the policy of the statute.

The court is of opinion that, in view of the **policy of the statute**, the relative position of the parties and the protection necessarily extended to Indians, the burden was on the plaintiff [trader] not only to bring his claim within the permission of the statute in fact, as he was warned by its letter that he must, but also to prove that he had done so, in case of dispute.<sup>98</sup> (Emphasis added.)

## **B. *Campbell (1961)* - So That Justice Shall Be Done**

In 1961, in *Campbell*,<sup>99</sup> a criminal defendant sought to obtain an “Interview Report” from police Investigator Toomey. The District Court “placed on the criminal defendants the burden of subpoenaing the government investigator as ‘their witness’ in order to support their request for the Interview Report.”

The Court noted that the “statute says nothing of burdens of producing evidence.”<sup>100</sup>

The Supreme Court held that the Court, on its own Motion, could call Toomey as a witness, or that the Government should be required to produce him.

Not only did the Government have the **advantage over the defense of knowing the contents** of the Interview Report but it also had the advantage of having Toomey in its employ and presumably knew, or could readily ascertain from him, the facts about the interview. In addition to the consideration that the interest of the United States in a criminal prosecution . . .” is not that it shall win a case, but that **justice shall be done . . .**” (Cite omitted.)<sup>101</sup> (Emphasis added.)

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<sup>96</sup> *Tinker v. Midland Valley Mercantile Co.*, 231 U.S. 681 (1914)

<sup>97</sup> *Tinker* at page 683

<sup>98</sup> *Tinker* at page 682

<sup>99</sup> *Campbell v. United States*, 365 U.S. 85 (1961)

<sup>100</sup> *Campbell* at page 95

<sup>101</sup> *Campbell* at page 96



So “that justice shall be done,” the Court, on its own Motion, or the Government, should have called Toomey to the stand. This would have been the right result. Compare with this with *Lascari*, “the adversary nature of the proceedings should yield to obtaining **the right result** for the handicapped child.”<sup>102</sup> Compare this with *Dunstan’s* inability to submit any evidence, allowing the school district to prevail without presenting any exhibits or testimony. Was this the right result? (*Dunstan* will be discussed later.)

### C. **Keyes (1973) - Policy and Fairness**

In 1973, while Congress was hearing testimony about the *Mills* and *PARC* cases and the need for a law to provide children with disabilities the right to a free appropriate education, the U. S. Supreme Court issued a ruling in *Keyes*,<sup>103</sup> a school desegregation case.

In *Keyes*, parents in Denver Colorado filed suit against the school district charging that “by use of various techniques such as the manipulation of student attendance zones, schoolsite selection and a neighborhood school policy, created or maintained racially or ethnically (or both racially and ethnically) segregated schools throughout the school district, entitling petitioners to a decree directing desegregation of the entire school district.” The District Court found that “the respondent School Board had engaged over almost a decade after 1960 in an unconstitutional policy of deliberate racial segregation.”<sup>104</sup>

[W]e have held that where plaintiffs prove that a current condition of segregated schooling exists within a school district where a dual system was compelled or authorized by statute at the time of our decision in *Brown v. Board of Education*, 347 U.S. 483 (1954) (*Brown I*), **the State automatically assumes an affirmative duty** “to effectuate a transition to a racially nondiscriminatory school system,” . . . (cites omitted) that is, to eliminate from the public schools within their school system “all vestiges of state-imposed segregation.” (Cites omitted.)<sup>105</sup> (Emphasis added.)

Twenty years later, the same pattern of discrimination and “segregated schooling” continued for children with disabilities. In 1975, Congress found that:

Before the date of enactment of the Education for All Handicapped Children Act of 1975 (Public Law 94-142), the educational needs of millions of children with disabilities were not being fully met because-

- (A) the children did not receive appropriate educational services;
- (B) the children were excluded entirely from the public school system and from being educated with their peers;<sup>106</sup>

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<sup>102</sup> *Lascari* at page 1188 “right result”

<sup>103</sup> *Keyes v. School Dist. No. 1*, 413 U.S. 189 (1973)

<sup>104</sup> *Keyes* at page 198

<sup>105</sup> *Keyes* at page 200

<sup>106</sup> 20 U.S.C. §1400(c)(2) - IDEA 2004

As in *Brown*, the State should assume “an affirmative duty . . . to eliminate from the public schools within their school system ‘all vestiges of state-imposed’”<sup>107</sup> exclusion of children with disabilities from a free, appropriate public education. As a remedial measure, the Education for All Handicapped Children Act of 1975 imposed an affirmative duty on states to provide a free appropriate public education for children with disabilities.

In *Keyes*, the Court advised that the burden shifting principle is not new. Quoting 9 J. Wigmore, *Evidence* § 2486, at 275 (3d ed. 1940), the Court explained that the application of the burden of proof “is merely a question of **policy and fairness** based on experience in different situations.”<sup>108</sup> (Emphasis added.)

Query? Is it the policy of IDEA that Bill Dunstan’s right to an appropriate education shall be determined by the gamesmanship tactics and litigation strategies, without regard to the right result? In *Dunstan*, was it fair that the school district could prevail in a due process hearing without submitting any exhibits or calling any witnesses?

#### **D. *Matthews* (1976) - Three Factors: Erroneous Deprivation of an Education**

In 1976, in *Matthews v. Eldridge*,<sup>109</sup> Justice Powell explained that the “issue in this case is whether the Due Process Clause of the Fifth Amendment requires that prior to the termination of Social Security disability benefit payments the recipient be afforded an opportunity for an evidentiary hearing.”<sup>110</sup>

In resolving this issue, the Court explained that due process “generally requires consideration of three distinct factors:

- First, the **private interest** that will be affected by the official action;
- second, the **risk of an erroneous deprivation of such interest** through the procedures used, . . . and
- finally, the Government’s interest, including the function involved and the **fiscal** and administrative **burdens** that the additional or substitute procedural requirement would entail.<sup>111</sup> (Emphasis added.)

In a special education dispute, the **private interest** that will be affected is whether the disabled child receives a free appropriate education designed to meet the child’s unique needs so the child is prepared for further education, employment, and independent living,<sup>112</sup> i.e., the purpose of IDEA 2004.

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<sup>107</sup> *Keyes* at page 200

<sup>108</sup> *Keyes* at page 209

<sup>109</sup> *Matthews v. Eldridge*, 424 U.S. 319 (1976)

<sup>110</sup> *Matthews* at page 323

<sup>111</sup> *Matthews* at page 335

<sup>112</sup> 20 U.S.C. §1400(d)(1) - IDEA 2004

The second factor, “**erroneous deprivation of such interest**,” i.e., depriving a child of an appropriate education, causes illiteracy, unemployment, dependency, and crime. The risk of an erroneous deprivation of such an interest is apparent comparing the outcomes for Shannon Carter and Bill Dunstan. Both cases will be discussed in the next few pages.

The risk of an erroneous deprivation of an education is too high to allow this to be decided by legal maneuvering and litigation tactics and strategies.

As the Court held in *Brown*:

Today, **education is perhaps the most important function of state and local governments**. . . It is required in the performance of our most basic public responsibilities . . . It is the very foundation of good citizenship. Today it is a principal instrument in . . . preparing [a child] . . . for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.<sup>113</sup> (Emphasis added.)

The third factor in *Matthews*, “**fiscal burden**,” is not onerous on a school district. If school makes a mistake, the worst that can happen, from a financial and economic perspective, is that some additional sums may be paid and a child receives an education that may be more than the minimum required.

A child may receive an extra hour of speech or occupational therapy, or a few days of “Extended School Year” (ESY) services, or Clean Intermittent Catherization (CIC). Perhaps the child’s parents may be reimbursed for tuition at a private special education school such as Trident Academy which taught Shannon Carter how to read, write, spell and do arithmetic.<sup>114</sup> Shannon Carter was featured in a New York Times article by Brent Staples, “*How the Clip ‘N Snip’s Owner Changed Special Education.*”<sup>115</sup>

The people of Florence, S.C., know Shannon Carter as the owner of Shannon’s Clip ‘N Snip, a barber shop where the locals get haircuts and conversation. The Clip ‘N Snip has room for seven barber chairs, but Shannon is limiting the business to two for the moment and renting out space until the economy improves enough for the barbering business to expand. Shannon’s public school teachers are no doubt surprised to see her running a business and working out a financial plan.

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<sup>113</sup> *Brown v. Board of Education*, 347 U. S. 483, 493 (1954)

<sup>114</sup> *Florence County Sch. Dist. IV v. Shannon Carter*, 510 U.S. 7 (1993). Shannon graduated from Trident Academy reading at the high school level. The author of this paper represented Shannon Carter before the U.S. Court of Appeals for the Fourth Circuit and before the United States Supreme Court.

<sup>115</sup> New York Times, *How the Clip ‘N Snip’s Owner Changed Special Education*, January 5, 2002

If an error was committed by awarding reimbursement to Shannon's parents for her tuition at Trident Academy, the error was financial in nature. Shannon became the owner of a successful business, and lives independently.<sup>116</sup>

Query: Shannon's IEP stated that Shannon's reading would improve from the 5.4 to the 5.8 grade equivalent level as measured by the Woodcock Reading Mastery Test after a year of special education. Shannon, as a sixteen year old, was reading at the fifth grade level and about to enter the tenth grade.<sup>117</sup> The school district proposed only four months gain and drew a line in the sand. Should the courts and parents deferred to the "expertise" of the school district? Would the outcome for Shannon be different, given deference to the school districts educational plan to increase her reading by four tenths of a grade level after a year of special education?

As early as 1972, in *Mills*, and continuing through the arguments in *Carter* and *Schaffer*, school districts have argued that if a Court requires additional services, or places the burden of proof on the school district, the **financial burdens will be insurmountable**.

Since the Elementary and Secondary Education Act was passed in 1965, the federal government has spent "more than **\$321 billion** (in 2002 dollars) to help educate disadvantaged children."

In a report entitled "Federal Spending on K-12 Education (Elementary and Secondary Education Act)"<sup>118</sup> the Department of Education included several graphs. One graph showed the relationship between increased federal spending and reading scores between 1965 and 2000. Despite dramatic increases in funding, the reading scores did not improve. According to the text accompanying the graphs:

Since the Elementary and Secondary Education Act first passed Congress in 1965, the federal government has spent more than \$321 billion (in 2002 dollars) to help educate disadvantaged children. Yet nearly 40 years later, only 32 percent of fourth-graders can read skillfully at grade level. Sadly, most of the 68 percent who can't read well are minority children and those who live in poverty.

Another graph, entitled "The United States Department of Education Budget Service and The Nation's Report Card. Fourth Grade, Reading 2000," noted that:

Math proficiency scores for twelfth graders were reported from 1990 to 2000. The scores remained below 20%.

Science proficiency scores for twelfth graders were reported from 1996 to 2000. The scores steadily declined from slightly above 20% to below 20% during that time.

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<sup>116</sup> See 20 U.S.C. §1400(d) - Purpose of IDEA.

<sup>117</sup> *Carter v. Florence County School District IV*, 950 F. 2d 156 (4th. Cir. 1991) affirmed, *Florence County School District IV v. Carter*, 510 U.S. 7 (1993)

<sup>118</sup> <http://www.ed.gov/nclb/overview/importance/edlite-index.html>- last visited July 17, 2005

and

<http://www.wrightslaw.com/nclb/fed.spending.graph.htm> - last visited July 17, 2005

One graph, “Historic Increases for Education for 1996-2003,” compared the growth of funding expended for Education, Defense and Health and Human Services. Federal funding for Education increased by 132%, Health and Human Services by 96% and Defense by 48%.

Forty years of increased spending has not led to improvements in educational achievement. The briefs in support of placing the burden of proof on parents stress the need to defer to the “expertise of professional educators.” How much deference is warranted when only twenty percent of twelfth graders are proficient in math and science? How much deference is warranted when the National Education Association filed suit to restrict the data collection and testing requirements of No Child Left Behind?

### **E. *International Brotherhood (1977) - Superior Access to the Proof***

In 1977, the United States filed suit against a motor freight carrier and the union that represented the company’s employees. In *International Bhd. of Teamsters v. United States*,<sup>119</sup> the “Government alleged that the company had engaged in a pattern or practice of discriminating against Negroes and Spanish-surnamed persons . . .” who were hired in lower paying, less desirable jobs.<sup>120</sup>

The discriminatory pattern and practice “did create a greater likelihood that any single decision was a component of the overall pattern. Moreover, the finding of a pattern or practice changed the position of the employer to that of a proved wrongdoer.”<sup>121</sup>

Finally, the employer was **in the best position to show** why any individual employee was denied an employment opportunity. Insofar as the reasons related to available vacancies or the employer’s evaluation of the applicant’s qualifications, the company’s records were the most relevant items of proof. If the refusal to hire was based on other factors, the employer and its agents **knew best what those factors were** and the extent to which they influenced the decisionmaking process.<sup>122</sup> (Emphasis added.)

The Court explained that “[p]resumptions shifting the burden of proof are often created to reflect judicial evaluations of probabilities and to conform with a party’s superior access to the proof.”<sup>123</sup> The burden of proof shifted from the discriminated employees to the employer.

In special education disputes, the school district, like the employer, is in the best position to explain why the school district refused to increase the remedial therapy, change an educational placement, or intensify the services a child could receive. Since 1975, it has been clear that when a school district “(A) proposes to initiate or change; or (B) refuses to initiate or change, the

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<sup>119</sup> *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977)

<sup>120</sup> *International Bhd* at page 324

<sup>121</sup> *International Bhd* at page 359

<sup>122</sup> *International Bhd* at page 359

<sup>123</sup> *International Bhd* at page 359

identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to the child” the school district must provide the parents with written notice.<sup>124</sup>

The 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;
- ...
- (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.<sup>125</sup>

Query? Is mailing the “Prior Written Notice” sufficient for the school district to meet its burden? In subsequent litigation, should the school district offer testimony and evidence that supports the basis of the Prior Written Notice? In *Dunstan*, there was no evidence that the school provided “Prior Written Notice” to the Guardian. If Baltimore had been required to provide the “Prior Written Notice” to the Guardian and Administrative Law Judge, and required to provide proof to support that document, would the result have been the same?

In addition to providing the “written notice” to the parents, it is NCD’s position that the school district should also have the burden of proving that their position is appropriate.

## **F. Concrete Pipe (1993) - Party with Information Has Burden**

In 1993, in *Concrete Pipe*,<sup>126</sup> an employer withdrew from a pension plan and “was assessed ‘withdrawal liability’ under provisions of the Employee Retirement Income Security Act of 1974”<sup>127</sup> (ERISA) by the plan sponsor.

Justice Souter explained that the incoherency of ERISA “is resolved by applying the canon requiring that an ambiguous statute be construed to avoid serious constitutional problems unless such construction is plainly contrary to Congress’s intent. Thus, the presumption is construed to place the burden on the employer to disprove an alleged fact . . .”<sup>128</sup>

It is indeed entirely sensible to **burden the party more likely to have information** relevant to the facts about its withdrawal from the Plan with the obligation to demonstrate

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<sup>124</sup> 20 U.S.C. §1415(b)(3) - IDEA 2004. See also Paragraphs 13(e) and 13(f) of Judge Waddy’s Order in *Mills* (at 880-881) that provided very detailed notification and procedural safeguards to protect the child if a dispute arose “regarding a child’s placement, denial of placement, or transfer” or suspension.

<sup>125</sup> 20 U.S.C. §1415(c) - IDEA 2004

<sup>126</sup> *Concrete Pipe & Prods. of Cal. Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602 (1993)

<sup>127</sup> *Concrete Pipe* at page 605

<sup>128</sup> *Concrete Pipe* at page 603

that facts treated by the Plan as amounting to a withdrawal did not occur as alleged. Such was the rule at common law.<sup>129</sup>

...  
[W]e have a common obligation in each situation to resolve the uncertainty in favor of definite meaning, and the canon for resolving ambiguity applies with equal force when terminology renders a statute incoherent. In applying that canon here, we must give effect to the one conclusion clearly supported by the statutory language, that **Congress intended to shift the burden of persuasion** to the employer in a dispute over a sponsor’s factual determination. This objective can be realized **without raising serious constitutional concerns** simply by construing the presumption to place the burden on the employer to disprove a challenged factual determination by a preponderance. In so construing the statute we make no pretense to have read the congressional mind to perfection.<sup>130</sup> (Emphasis added.)

School districts are “**more likely to have information relevant to**” their educational resources, teachers, evaluations, and other data about the child with a disability. Either Congress intended to shift the burden to the parent in a dispute, or Congress intended to shift “the burden of persuasion to the” school district. Shifting the burden of persuasion to the school district “can realized without raising serious constitutional concerns . . .”

### **G. In Summation: Supreme Court Rulings - Ambiguous Statutes**

Many federal statutes provides duties and responsibilities to different parties and rules of procedure regarding the resolution of disputes. These rules of procedure and procedural safeguards may not include assignment of the burden of proof. When the U. S. Supreme Court is presented with such a case, the Court must look to the policy of the statute, the position of the parties and other factors to determine which party has the burden of proof. This is the Court’s task in *Schaffer v. Weast*. The federal special education law, originally known as the Education for All Handicapped Children Act of 1975 and now as the Individuals with Disabilities Education Act of 2004, has never assigned the burden of proof to one party or another. The rationale and factors in previous U. S. Supreme Court cases provide guidance as to the correct ruling in *Schaffer v. Weast*.

Cases from *Tinker* to *Concrete Pipe* have been consistent in assigning the burden of proof to the party more likely to have access to the information that explains their actions. The argument against this shift, as expressed in *Matthews*, relates to the interest, i.e., receiving an education, to the harm if there is a risk of loss in acquiring an education, and the economic burden if an erroneous ruling is issued and a better education is provided at a greater cost.

In *Tinker*, Justice Holmes said that the policy of the statute and position of advantage is the key. In *Campbell*, the Court looked at which party had the advantage to determine what was necessary to ensure that “justice shall be done.” The party with the advantage had the burden. In

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<sup>129</sup> *Concrete Pipe* at page 626

<sup>130</sup> *Concrete Pipe* at page 629

*Keyes*, the Court explained that the answer “is merely a question of policy and fairness based on experience in different situations.” In *Matthews*, the Court looked at Due Process Clause of the Fifth Amendment and concluded that three factors must be considered: the private interest that would be affected, the risk of an erroneous deprivation of such interest, and the financial burden. *International Brotherhood* placed the burden on the party that “was in the best position to show why” an action was or was not taken because that party “knew best what those factors were and the extent that they influenced the decisionmaking process.” *Concrete Pipe* explained that “It is indeed entirely sensible to burden the party more likely to have information relevant to the facts . . .” In that instance, the Court explained that, despite the omission of language assigning the burden of proof to the employer, “Congress intended to shift the burden of persuasion to the employer . . .”

When Congress enacted Education for All Handicapped Children Act of 1975 and established the requirements for “Prior Written Notice,” Congress intended to provide detailed procedural safeguards for children and their parents. Congress intended that children with disabilities would be provided with a free, appropriate public education. Congress intended that school districts would provide clear written notice whenever they proposed to change a child’s educational program. Congress intended that if a school district denied a parent’s request for additional or changed services, the school district would provide the parent with clear written notice that included:

- (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;
- . . .
- (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.<sup>131</sup>

Congress realized that school districts have the position of advantage and are in the best position to show why an educational program is or is not provided. Congress was aware that school districts are aware of the factors that affect the educational decisionmaking. Could Congress have intended that the school district explain why they proposed or refused to take action, but in the event of a dispute, shift the burden to the parent to show why the school district’s plan was not appropriate? Could Congress have intended that the statutory requirements were met by the mere notice, without any obligation to prove that the school’s proposal was appropriate? Given the educational status of children in the 1970’s, it is unlikely that Congress intended that children like Peter Mills had to prove that his exclusion from school was not appropriate. Given 25 years of non-enforcement and non-compliance by the U. S. Department of Education and the State Departments of Education and Local Education Agencies, as described five years ago by this Council in *Back to School on Civil Rights*,<sup>132</sup> is it reasonable to assume that Congress now

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<sup>131</sup> 20 U.S.C. §1415(c)(1) - IDEA 2004

<sup>132</sup> National Council on Disability, *Back to School on Civil Rights* (2000)



intends to shift the burden of proof to parents, even though “parents are still a main enforcement vehicle for ensuring compliance with IDEA?”<sup>133</sup>

We have reviewed the evolution of special education and special education law, beginning with *Mills* and *PARC*, the evolution of the burden of proof split among the circuits, and how the U. S. Supreme Court resolved burden of proof issues when the statute is silent.

We will now learn about three cases. Look at the facts in these cases and evaluate the burden of proof law from the Circuit Courts of Appeal and the U. S. Supreme Court decisions.

## VIII. Three Special Education Cases

Brian Schaffer, Peter Mills and “classmates,” and “Bill Dunstan” are children with disabilities whose cases were decided by different courts. The educational and legal processes experienced by these children are typical of the circumstances when parents and schools disagree. These cases are useful examples because the administrative and court decisions were radically divergent.

### **A. *Peter Mills (Class Action Law Suit) – 1971 – Washington, D.C.***

In December, 1971, twelve year old Peter Mills, a dependent ward of the District of Columbia, was a behavior problem. He was expelled from school. He was a:

committed dependent ward of the District of Columbia resident at Junior Village. He was excluded from the Brent Elementary School on March 23, 1971, at which time he was in the fourth grade. Peter allegedly was a ‘behavior problem’ and was recommended and approved for exclusion by the principal. Defendants have not provided him with a full hearing or with a timely and adequate review of his status. Furthermore, Defendants have failed to provide for his reenrollment in the District of Columbia Public Schools or enrollment in private school. On information and belief, numerous other dependent children of school attendance age at Junior Village are denied a publicly-supported education. Peter remains excluded from any publicly-supported education.<sup>134</sup>

Thirteen year old Duane Blacksheare resided at St. Elizabeth’s Hospital and was a dependent ward of the District of Columbia. He had been expelled from school since the third grade because he was a “behavior problem.”

George Liddell was eight years old. He was never permitted to attend public school because he was retarded.

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<sup>133</sup> Id. page 70

<sup>134</sup> *Mills v. Board of Education of the District of Columbia*, 348 F. Supp. 866, 869 (D.D.C. 1972)

Steven Gaston was eight years old. He was described as being “slightly brain-damaged and hyperactive, and was excluded because he wandered around the classroom.” He had been excluded from school since September, 1969.

Michael Williams, sixteen years old, also resided at St. Elizabeth’s Hospital. He suffered from epilepsy and slight retardation. He was excluded from school “because of health problems and school absences.”

Janice King, thirteen years old, “is brain-damaged and retarded, with right hemiplegia, resulting from a childhood illness.” Judge Waddy explained that: “Despite repeated efforts by her parents, Janice has been excluded from all publicly-supported education.”

Jerome James was twelve years old. He was retarded and “has been totally excluded from public school.”

Peter and these six “classmates” filed suit against the Washington D. C. Public Schools and sought certification as a class. “The action was certified as a class action under Rule 23(b)(1) and (2) of Federal Rules of Civil Procedure by order of the Court dated December 17, 1971.”<sup>135</sup> The case was heard by Judge Waddy of the U.S. District Court of the District of Columbia.

In his ruling on December 21, 1971, Judge Waddy ordered that:

1. Defendants shall provide plaintiffs Peter Mills, Duane Blacksheare, Steven Gaston and Michael Williams with a publicly supported education suited to their (plaintiffs’) needs by January 3, 1972.
2. Defendants shall provide counsel for plaintiffs, by January 3, 1972, a list showing, for every child of school age then known not to be attending a publicly supported educational program because of suspension, expulsion, exclusion, or any other denial of placement, the name of the child’s parent or guardian, the child’s name, age, address and telephone number, the date of his suspension, expulsion, exclusion or denial of placement and, without attributing a particular characteristic to any specific child, a breakdown of such list, showing the alleged causal characteristics for such nonattendance and the number of children possessing such alleged characteristics.
3. By January 3, 1972, defendants shall initiate efforts to identify remaining members of the class not presently known to them, and also by that date, shall notify counsel for plaintiffs of the nature and extent of such efforts. Such efforts shall include, at a minimum, a system-wide survey of elementary and secondary schools, use of the mass written and electronic media, and a survey of District of Columbia agencies who may have knowledge pertaining to such remaining members of the class. By February 1, 1972, defendants shall provide counsel for plaintiffs with the names, addresses and telephone numbers of such remaining members of the class then known to them.<sup>136</sup>

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<sup>135</sup> *Mills* at page 868

<sup>136</sup> *Mills* at page 871

On August 1, 1972, Judge Waddy ordered that:

The District of Columbia shall provide to each child of school age a free and suitable publicly supported education regardless of the degree of the child's mental, physical or emotional disability or impairment. Furthermore, defendants shall not exclude any child resident in the District of Columbia from such publicly supported education on the basis of a claim of insufficient resources.

Defendants shall not suspend a child from the public schools for disciplinary reasons for any period in excess of two days without affording him a hearing pursuant to the provisions of Paragraph 13.f., below, and without providing for his education during the period of any such suspension.<sup>137</sup>

Paragraphs 13(e) and 13(f) of Judge Waddy's Order provided detailed notification and procedural safeguards to protect the child if a dispute arose "regarding a child's placement, denial of placement, or transfer" or suspension.<sup>138</sup>

Judge Waddy further ordered at paragraph 13(e)(8) that:

**Defendants shall bear the burden of proof as to all facts and as to the appropriateness of any placement, denial of placement or transfer.**<sup>139</sup>

Thirty years ago, Judge Waddy ordered that Peter Mills, named members of his class, and all other children with disabilities were to be provided with a free education. If a dispute arose, the Washington D. C. public schools had the **burden of proof** as to all facts and to the appropriateness of any placement, denial of placement or transfer. Subsequently, jurists have pointed to his case and that of the plaintiff class as having formed the backbone of the procedural safeguards subsection of IDEA. (20 U.S.C. §1415)

## **B. "Bill Dunstan" – 2002 – Baltimore, MD**

Bill Dunstan,<sup>140</sup> in his quest for an education, did not fare as well as expelled children with disabilities who resided in Washington D. C. in the early 1970's.

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<sup>137</sup> *Mills* at page 878

<sup>138</sup> *Mills* at pages 880-881

<sup>139</sup> *Mills* at page 881

<sup>140</sup> The name **Bill Dunstan** is a pseudonym. The child's name is unknown and has been redacted from the decision posted on the Maryland Office of Administrative Hearings website. The June 26, 2002 case is actually styled as *XXXX XXXX v. Baltimore City Public Schools* by the Maryland Office of Administrative Hearings (OAH) and is Case #: OAH NO.: MSDE-CITY-OT-200200192. It is available on the internet at the author's website and Maryland OAH website at:

<http://www.wrightslaw.com/law/caselaw/2002/dunstanvbaltimorecity.pdf> - last visited July 17, 2005

and

Bill Dunstan was “put out of school” in February 2001 for excessive absences. Evidently, when he returned to school in the fall, he repeated the 11<sup>th</sup> grade. Bill Dunstan resided with his sister who was also his legal guardian. (Presumably his parents were deceased or unable to care for him.) According to his sister, Bill needed to learn how to read, count money, and fill out job applications.<sup>141</sup>

On May 14, 2002, Bill’s sister requested a special education due process hearing in an effort to obtain remedial educational services for her brother.

The Administrative Law Judge wrote that: “The [sister’s written] request for a Due Process Hearing filed against the Baltimore City Public Schools (BCPS) stated the following:”

Bill Dunstan has been attending (redacted) High School since the year 2000. In February 2001 he was put out of school for attendance. In July & August of 2001, I requested ARD or IEP meetings. One of the appropriators (sic) at the meeting recommended Bill repeat eleventh grade due to errors on the schools (sic) part. I agreed. When the school year started, Bill was once again, not in correct classes or academy, he was not receiving any type of remedial classes, such as Reading. Bill is Level 4 and has Learning Disabled documents (sic) from (redacted). (School has copies) None of his teachers knew that he was special-ed. (sic)<sup>142</sup>

The Administrative Law Judge wrote:

The Guardian chose to present her case herself. At the outset of the hearing I asked her to state what her complaint was and what relief she was seeking. She responded that her complaint was the “inappropriate placement of Bill for 2001-2002, and no promises kept.” As a remedy she stated that she was seeking appropriate placement and that Bill needs daily living skills. The Guardian testified that she believes that Bill needs classes to improve reading skills and comprehension skills and to learn how to count money and fill out job applications. Although she assert that the student has a current IEP and that she signed it, she did not present it for admission into the record. Further, she did not allege that there were any special education services required under the IEP that are not being provided to the student. She did not present any assessments or evaluations to show what special education services, if any, the student should be receiving. Her allegations that Bill is not in the correct classes is completely unsupported by any evidence. She presented no factual evidence, but instead spoke only in the most general of terms. (he’s not getting remedial classes; he needs reading/comprehension skills, needs to learn how to count money and fill out job applications).<sup>143</sup>

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[http://www.msde.state.md.us/specialeducation/hearing\\_decisions2002/02-H-CITY-192.pdf](http://www.msde.state.md.us/specialeducation/hearing_decisions2002/02-H-CITY-192.pdf) - last visited July 17, 2005 For ease of reading clarity, rather than using first and last name of XXXX, the child is named “**Bill Dunstan**” by the author.

<sup>141</sup> *Dunstan* at pages 5-6

<sup>142</sup> *Dunstan* at page 5

<sup>143</sup> *Dunstan* at pages 5-6

On June 26, 2002, Bill Dunstan's due process hearing was held. BCPS was represented by counsel. Bill and his sister had no counsel and no expert witnesses.

The ALJ stated:

It was clear that the Guardian, although well-intentioned, did not know how to go about presenting evidence to support her complaint.<sup>144</sup>

Compare this statement with Judge Waddy's Order in *Mills* that:

Defendants shall bear the burden of proof as to all facts and as to the appropriateness of any placement, denial of placement or transfer.<sup>145</sup>

Unlike Washington D. C. Public Schools, Baltimore City Public Schools did not have the "burden of proof as to all facts and as to the appropriateness of any placement, denial of placement or transfer."

After Bill Dunstan and his sister/guardian testified, Baltimore City Public Schools "made an oral Motion for Summary Decision at the conclusion of the Guardian's case. In its Motion the BCPS alleged that the Guardian presented no genuine issue as to any material fact and that BCPS is entitled to prevail as a matter of law."<sup>146</sup> Baltimore City Public Schools had not presented witnesses or submitted any evidence. The Guardian, having the burden of proof, evidently failed to make a "prima facie" case.

The case was dismissed.<sup>147</sup>

What happened to Bill? Neither the school board attorney nor the Administrative Law Judge recall the case or subsequent outcome.<sup>148</sup> We know that Bill was living with his sister in 2002 and that evaluations and reports were completed seven to ten years before the Hearing. It is likely that these reports documented the presence of a learning disability ten years earlier. After ten years, Bill still could not read, fill out a job application, or count money. What happened? The Hearing was held on June 26, 2002. It is likely that Bill Dunstan never returned to school. Since he could not complete a job application or count money, what is Bill's life like now? A life of dependence, unemployment, drugs, crime and incarceration?

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<sup>144</sup> *Dunstan* at page 6

<sup>145</sup> *Mills* at page 881

<sup>146</sup> *Dunstan* at page 1

<sup>147</sup> *Dunstan* at page 7

<sup>148</sup> The author talked with counsel for Baltimore City Schools and talked with the Administrative Law Judge. Neither person has any recollection of the case or any subsequent developments.

Research suggests that many like Bill are incarcerated. On May 1, 2003, NCD published “*Addressing the Needs of Youth with Disabilities in the Juvenile Justice System: The Current Status of Evidence-Based Research.*”<sup>149 150</sup> The report explained that:

[A]pproximately 10 percent of general population youth have a special education disability, compared with between 30 and 50 percent of incarcerated youth.

...

Some estimates suggest, for example, that 10 percent of youth in correctional facilities have specific learning disabilities (SLD), while others suggest that the percentage is closer to 36 percent. Estimates of the prevalence of emotional disturbance (ED) range upwards of 50 percent; for SED, estimates run as high as 20 percent. Up to 12 percent of incarcerated youth are labeled with mental retardation. Research suggests that attention deficit hyperactivity disorder (ADHD) is four to five times more prevalent in correctional facilities than in schools. Between 20 and 50 percent of incarcerated youth are estimated to have ADHD. Research suggests that learning disability and emotional disturbance are the most common types of disabilities among youth in correctional settings. (Cites omitted.)

The prevalence of learning and emotional disturbance disabilities among incarcerated youth appears to have increased more than the prevalence for other disabilities has. Between 1993 and 1997, for example, the number of youth with disabilities of any kind in correctional facilities rose from roughly 12,500 to 16,000, an increase of 28 percent.

Few national, state, or even local studies provide representative estimates of the prevalence of disabilities among children and youth at risk of engaging in delinquency or among those already in the juvenile justice system. One exception, focusing on learning disabilities, involved

[A] study conducted by the National Center on State Courts . . . [which] relied on large, representative samples. It indicated that “36 percent of incarcerated juveniles were found to have a learning disability, and youngsters with learning disabilities were found to be more than twice as likely to commit a delinquent offense than their non-learning-disabled counterparts.” (Note: All cites in preceding paragraphs omitted.)

The purpose of IDEA 2004 is to:

(A) 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

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<sup>149</sup> National Council on Disability, *Addressing the Needs of Youth with Disabilities in the Juvenile Justice System: The Current Status of Evidence-Based Research*, (2003) at <http://www.ncd.gov/newsroom/publications/2003/juvenile.htm> - last visited on July 17, 2005

<sup>150</sup> See also The Urban Institute, *Addressing the Needs of Youth with Disabilities in the Juvenile Justice System: The Current State of Knowledge* (2003) at [http://www.urban.org/UploadedPDF/410885\\_youth\\_with\\_disabilities.pdf](http://www.urban.org/UploadedPDF/410885_youth_with_disabilities.pdf) - last visited July 17, 2005

their unique needs and prepare them for further education, employment, and independent living; [and]

(B) to ensure that the rights of children with disabilities and parents of such children are protected;<sup>151</sup>

Did Baltimore provide Bill with an education designed to meet his unique needs? Did Baltimore prepare Bill Dunstan for further education, employment and independent living?

Who protected his rights, and the rights of his sister guardian? Using trial tactics and strategies and “gamesmanship,” did the system allow Baltimore City Public Schools to prevail, without submitting any evidence or testimony to prove that the school provided Bill with an education designed to meet his needs and enable him to become a productive member of society?

Later that year, in another Maryland courtroom, Judge Messitte explained that if the burden of proof is on the child and parent, a “**school district could rest without having to produce any evidence.**” He wrote in a footnote:

This Court would add a further observation: The Congressional statements and declarations that appear at the beginning of the IDEA refer to minority children, . . . in particular, economically disadvantaged minorities. Strictly speaking, if parents in those categories have the burden of persuasion at the administrative level, their failure to put on a prima facie case would mean that the school district could rest without having to produce any evidence in justification of the IEP. On the other hand, parents who can afford to retain counsel and experts, while still having the burden of persuasion, could at least force the school district to produce evidence in support of the IEP.<sup>152</sup>

Judge Messitte anticipated the outcome in a case such as *Bill Dunstan v. Baltimore City Public Schools*.

In *Dunstan*, the ALJ implied that the sister was at fault because she did not retain an attorney and did not know how to submit documents into evidence.

Bill was a child with a disability who had an IEP. Baltimore City Public Schools would have a file on Bill Dunstan with IEPs and evaluations that accumulated over ten years. The school district possessed all evidence needed for the ALJ to determine if Baltimore was providing Bill with a free appropriate education designed to meet Bill Dunstan’s unique needs and prepare him for employment and independent living. Baltimore City Public Schools possessed the evidence that the ALJ could have used to determine if Bill could read, count money and fill out job applications. The rule of law in that courtroom and the Maryland Office of Administrative Hearings was that the sister had to meet the burden and prove that Baltimore had failed her brother.

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<sup>151</sup> 20 U.S.C. §1400(d)(1)

<sup>152</sup> *Weast v. Schaffer (Schaffer II)*, 240 F. Supp. 2d 396 (D. Md. 2002) Footnote 8

### **C. Brian Schaffer – 2005 – Montgomery County, Maryland**

Next, we look at Brian Schaffer’s case. It will be heard in the U.S. Supreme Court and is the focus of the burden of proof question pending before the Court.

Brian was born on May 13, 1984.<sup>153</sup> He attended a small private school from kindergarten through the seventh grade. During those year, he had a language impairment, attention deficit disorder, auditory processing disorder, and other disabilities. The private school had small classes and provided Brian with significant accommodations. In the fall of the seventh grade, the school staff told Brian’s parents that he needed to attend a school that may meet his needs. Private evaluators agreed with the private school and recommended that Brian attend a “small, self-contained, full-day special education program.”

Brian’s parents contacted Montgomery County Public Schools (MCPS) and requested that Brian be evaluated for their special education program. MCPS found Brian eligible for services but disagreed with the private school staff and private evaluators about the severity of his disorders and intensity of services. MCPS asserted that Brian did not need a private program and suggested that he attend regular public school classes that utilized an “inclusion model.”

On the advice of the private school staff and independent evaluators, the parents argued that their son would be damaged in the proposed public school program. The parents enrolled Brian into a private special education school that teaches learning and language disabled students in small classes. The parents noted that MCPS proposed a less intense program with a higher student teacher ratio, than the original private school where Brian was failing.

The parents continued to request that MCPS provide their son with an appropriate education. Then, alleging that the school district failed to provide their son with a free appropriate education, the parents requested a due process hearing.<sup>154</sup>

On July 9, 1998, the ALJ said the decision about which side had the “burden of proof” was critical to the outcome. He said that “deference” is owed to the public school’s IEP. Relying on the Fifth Circuit’s decision in the *Alamo Heights* burden of proof case,<sup>155</sup> he found that the parents failed to meet their burden of proving that Montgomery County’s IEP was not appropriate and denied their request for tuition reimbursement.<sup>156</sup>

The Schaffers appealed to the U. S. District Court. On March 15, 2000, Judge Peter J. Messitte, relying on *Lascari*,<sup>157</sup> the 1989 New Jersey Supreme Court case, held that the school district had

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<sup>153</sup> Source: *Schaffer v. Weast* Joint Appendix filed with the U. S. Court of Appeals for the Fourth Circuit

<sup>154</sup> If a school district fails to offer FAPE to a child with a disability, pursuant to *Burlington School Comm. v. Dept. of Education*, 471 U.S. 359 (1985), *Florence County Sch. Dist. IV v. Carter*, 510 U.S. 7 (1993) and 20 U.S.C. §1412(a)(10) parents are entitled to reimbursement for the reasonable costs of a private school education.

<sup>155</sup> *Alamo Heights Independent School District v. State Board of Education*, 790 F.2d 1153 (5th Cir. 1986)

<sup>156</sup> #98-MSDE-MONT-OT-016662, July 9, 1998 DP 1 decision, ALJ Nichols

<sup>157</sup> *Lascari v. Bd. of Educ. of Ramapo Indian Hills Reg. High Sch. Dist.*, 116 N.J. 30, 560 A.2d 1180 (NJ 1989)



the burden of proof,<sup>158</sup> and remanded the case back to the ALJ. Montgomery County appealed to the U. S. Court of Appeals for the Fourth Circuit.

The case continued at two levels: on remand at the Maryland Office of Administrative Hearings and on appeal before the U. S. Court of Appeals for the Fourth Circuit.

Because of Judge Messitte's Order, at the second due process hearing, the burden of proof was now on the school district. In the second Administrative Hearing, the ALJ found that the "inclusion model" proposed by the school district was not appropriate for Brian. He found that the "IEP had no goals to address [Brian's] severe auditory deficit (perception of sound), which is responsible for his reading problem, and no goals to address his articulation problem."<sup>159</sup>

On November 27, 2000, the ALJ denied the parents' request for full reimbursement for three years tuition. Instead, he ordered partial reimbursement for the 1998-1999 school year.<sup>160</sup> Both sides appealed to the U. S. District Court.

On December 4, 2000, between the second Administrative Hearing and the second appeal to the U.S. District Court, the Fourth Circuit heard oral argument and learned that the parents partially prevailed at the Administrative Hearing. On January 10, 2001, the Fourth Circuit vacated the first District Court order on burden of proof and remanded the case back to the District Court for a ruling on the new decision from the second Administrative Hearing and renewed argument as to which side had the burden of proof.<sup>161</sup>

On November 21, 2002, on remand from the Fourth Circuit and pursuant to the cross-appeal by parents and school district, Judge Messitte (the same judge who had ruled on the original burden of proof issue) ordered full reimbursement for the 1998-1999 school year<sup>162</sup> and denied reimbursement for the 1999-2000 and 2000-2001 school years.<sup>163</sup>

Montgomery County appealed reimbursement for the 1998-1999 school year to the Fourth Circuit. On July 29, 2004 the Fourth Circuit reversed Judge Messitte and ruled in favor of Montgomery County.<sup>164</sup> Addressing the burden of proof argument, the Court wrote:

We believe that when parents challenge the adequacy of an IEP, they should lose if no evidence is presented . . . Congress enacted the IDEA with the clear intention of deferring to local school authorities for the development of educational plans for disabled

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<sup>158</sup> *Brian S. v. Paul Vance*, U. S. District Court, Maryland, March 15, 2000, Fourth Circuit Joint Appendix, Page 65, at 77

<sup>159</sup> MSDE-MONT-OT-00000214, *Schaffer v. Montgomery County Public Schools*, November 27, 2000, Fourth Circuit Joint Appendix, Page 82, at 104

<sup>160</sup> MSDE-MONT-OT-00000214, November 27, 2000, 2000 DP 2 decision Nichol

<sup>161</sup> Case # 00-1471, The opinion is found at *Schaffer v. Vance*, Case # 00-1471, 2 Fed. Appx. 232 (4th Cir. 2001) (per curium)

<sup>162</sup> *Weast v. Schaffer (Schaffer II)*, 240 F. Supp. 2d 396 (D. Md. 2002)

<sup>163</sup> The Court explained that the parents should have requested separate due process hearings for the subsequent years.

<sup>164</sup> *Weast v. Schaffer*, 377 F.3d 449 (4<sup>th</sup> Cir. 2004)

children . . . Under this statutory arrangement, it is reasonable to require parents attacking the terms of an IEP to bear the burden of showing why it is deficient.<sup>165</sup>

Judge Luttig, following the *Lascari / Oberti* rule, dissented.<sup>166</sup>

During litigation, Montgomery County later offered a different, and appropriate IEP for the 2001-2002 school year. In 2001, at age 17, Brian began attending Montgomery County Public Schools. He graduated from High School and now attends college.<sup>167</sup>

## IX. Conclusion

The Individuals with Disabilities Education Act does not specify whether parents or school districts have the burden of proof in special education litigation. The U. S. Courts of Appeal are split with half aligning with the *Lascari / Oberti* rule that assigns the burden to school districts and the other half adopting the contrary *Tatro / Alamo Heights* rule.

The *Lascari / Oberti* rule follows the logic and reasoning of the U. S. Supreme Court cases that resolve a burden of proof issue where the statute is silent.

In 1914, Justice Holmes explained in *Tinker* that formal logic and assigning to the complainant the burden of proof does not control. The burden of proof is determined by the **policy of the statute** and relative position of the parties. In *Campbell*, the contents of a report were sought. The Court explained that the “**right result**” was to put the burden on the party that had possession of the information so “**justice shall be done.**” See also *International Brotherhood and Concrete Pipe*.

In *Keyes*, the Court explained that the application of the burden of proof “is merely a question of **policy and fairness** based on experience in different situations.” The policy and purpose of IDEA is to prepare children for economic self-sufficiency, independent living, employment, and to protect the rights of the child. Query: Was that policy and purpose of IDEA applied in *Dunstan*? Was the outcome fair?

*Matthews* provided three factors to use when assessing the assignment of the burden. First, what is the nature of the interest that is at stake? Second, if the person is erroneously deprived of that interest, how harsh is the result? Third, what is the economic burden if the person is erroneously provided with the benefit?

The interest at stake is an education. In *Brown*, the Supreme Court held that “Today, **education is perhaps the most important function of state and local governments . . .**” Bill Dunstan was denied an appropriate education. As a result, the risk to him and society is great. The economic burden of providing him with an education will likely be less than the cost of unemployment, welfare dependency, possible incarceration.

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<sup>165</sup> *Weast* at page 456

<sup>166</sup> *Weast* at page 449

<sup>167</sup> Sources: Interview with Brian’s counsel and article in The Washington Post, March 14, 2005

Depriving a child of an appropriate education causes illiteracy, unemployment, dependency, and crime. The risk of an erroneous deprivation of such an interest is apparent when one compares the outcomes of Shannon Carter and Bill Dunstan.

Ten U. S. Courts of Appeal have addressed this issue. They agree that, if a parent disputes an IEP, it is the parent's burden to "place in issue the appropriateness of the IEP." After that, the question is whether the parent has the burden of proving that the IEP is not appropriate, or whether the school district has the burden of proving that the IEP is appropriate.

The split among the Circuits is based on several competing principles. Should the party attacking the terms of an IEP bear the burden of showing why the IEP is not appropriate? Should deference be given to the school district's proposed plan? Or, should the party that prepared the IEP and has greater expertise and resources have the burden of proving that the IEP is appropriate?

The logic and reasoning of the *Lascari / Oberti* Circuits is consistent with the U. S. Supreme Court rulings given the purpose of the Individuals with Disabilities Education Act which is to provide the children with an appropriate education that prepares them for "further education, employment and independent living" and to protect the rights of the children. This is also consistent with the secondary purpose of the statute to protect the rights of parents and their children.

Bill Dunstan's rights were not protected. Neither he nor his guardian had their "day in court" so that Bill could begin to receive services that would lead to "further education, employment and independent living."

Before the Education for All Handicapped Children Act was enacted in 1975, the educational needs of millions of children with disabilities were not being met because-

(A) the children did not receive appropriate educational services;

(B) the children were excluded entirely from the public school system and from being educated with their peers;<sup>168</sup>

Thirty years later, the same problems persist. Bill Dunstan did not receive appropriate services. From February, 2001 until the beginning of the following school year, he was out of school "for excessive absences." When he returned in the Fall, he repeated the eleventh grade, unable to read or complete a job application. Because the sister guardian had the burden of proof, she was unable to secure help for her brother. Absent a change in Maryland, the Fourth Circuit, and Circuits following the *Tatro / Alamo Heights* rule, this pattern will repeat itself around the country.

When Congress reauthorized IDEA in 2004, they wrote:

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<sup>168</sup> 20 U.S.C. §1400(c)(2)

[T]he implementation of this title has been impeded by low expectations, and an insufficient focus on applying replicable research on proven methods of teaching and learning for children with disabilities.<sup>169</sup>

It is undisputed that millions of children with disabilities were denied an education and excluded from school. Today, in 2005, there are significant problems with children not being taught basic reading, writing, arithmetic, and spelling skills so they can be economically self-sufficient<sup>170</sup> and employable. The remedial nature of special education law, the procedural safeguards from *Mills*, decades of failure by schools to educate children with disabilities require that the school district bear the burden of proving that their proposed education program, denial of special education eligibility, or other action is proper, under the Act.

School districts should have the burden of proof in issues about IEPs, placement, eligibility, and other matters related to an appropriate education.

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<sup>169</sup> 20 U.S.C. §1400(c)(4)

<sup>170</sup> 20 U.S.C. §1400(c)(1)