

EVENING THE PLAYING FIELD: TAILORING THE ALLOCATION OF THE BURDEN OF PROOF AT IDEA DUE PROCESS HEARINGS TO BALANCE CHILDREN'S RIGHTS AND SCHOOLS' NEEDS

Abstract: The Individuals with Disabilities in Education Act (the "IDEA") is a broad federal mandate intended to make a "free appropriate public education" available to all disabled students. More importantly, however, the IDEA encourages schools to enable parents to collaborate with their child's educators. In the event that parents and educators disagree about a child's educational plan, the IDEA channels this conflict through an administrative appeals process. But despite the fact that the IDEA's due process hearing is one of its most prominent procedural safeguards, the IDEA fails to specify which party bears the burden of proof during the proceedings. The existing conflict of authority regarding the allocation of the burden of proof at due process hearings must be resolved in order achieve the IDEA's mandate. A modified burden-shifting scheme would best mirror the IDEA's delicate balancing of the rights of disabled children and the need to impose a realistic mandate on school districts.

INTRODUCTION

Originally enacted in 1975, the Individuals with Disabilities in Education Act (the "IDEA") created a broad federal mandate to make "a free appropriate public education" available to every disabled student.¹ To this end, the IDEA allocates federal funding to state educational agencies, contingent upon their schools' compliance with nu-

¹ 20 U.S.C. § 1400(d)(1)(A) (2000). The IDEA was originally promulgated as the Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (codified as amended at 20 U.S.C. § 1400). During the 2003 to 2004 school year, approximately 6.5 million students received educational services through the IDEA, with states receiving more than \$9 billion in aid. U.S. Gov't ACCOUNTABILITY OFFICE, GAO-04-879, REPORT TO THE RANKING MINORITY MEMBER, COMM. ON HEALTH, EDUC., LABOR & PENSIONS, U.S. SENATE, SPECIAL EDUCATION: IMPROVED TIMELINESS AND BETTER USE OF ENFORCEMENT ACTIONS COULD STRENGTHEN EDUCATION'S MONITORING SYSTEM 1 (2004), available at <http://www.gao.gov/new.items/d04879.pdf>.

merous statutory requirements.² More importantly, however, the IDEA contemplates a process whereby schools enable parents to collaborate with their child's educators to better serve their child's needs.³ Thus, one of the IDEA's central requirements is that recipient schools develop an individualized education program (an "IEP") for each disabled student.⁴ Essentially, an IEP is a written plan detailing how the school intends to provide the student with the IDEA's required "free appropriate public education" ("FAPE").⁵

Ideally, the IEP represents the product of a cooperative process between the school and the student's parent(s).⁶ Nevertheless, as a significant volume of litigation attests, the IEP process can produce vigorous conflicts between school officials and parents.⁷ The circumstances of one recent case are particularly illustrative.⁸ In the year approaching his entry into eighth grade, the parents of Brian S. sought to have his eligibility for special education services evaluated by a local public middle school.⁹ Brian had been diagnosed with Attention Deficit Hyperactivity Disorder and learning disabilities.¹⁰ After an initial evaluation, the school issued an IEP, which proposed that Brian be enrolled in special education classes and receive speech therapy.¹¹ After Brian's parents expressed their concern with the school's class sizes, the committee modified the plan to permit Brian to receive the

² 20 U.S.C. § 1412.

³ See *id.* § 1414(b).

⁴ *Id.* § 1414(d).

⁵ See *id.* §§ 1400(d)(1)(A), 1414(d). One of the most important requirements of the IDEA, the IEP is an educational roadmap, as it details the student's present level of functioning and sets out both long- and short-term educational objectives. *Id.* § 1414(d); see Barbara J. Morgan, Case Comment, *Burden of Proof—A School Board Bears the Burden of Proving That the Education of a Handicapped Child Is "Appropriate" Under the Education for All Handicapped Children Act of 1975*: *Lascari v. Board of Education of Ramapo Indian Hills Regional High School District*, 116 N.J. 30, 560 A.2d 1180 (1989), 22 RUTGERS L.J. 273, 278 (1990). The IDEA's FAPE mandate has been interpreted to require that the local education agency provide the student with "some educational benefit," simply a "basic floor of opportunity." *Bd. of Educ. v. Rowley*, 458 U.S. 176, 189–201 (1982). Thus, the IDEA does not affirmatively require U.S. public schools to provide handicapped students with educational programs designed to maximize their educational potential. See *id.* at 198.

⁶ See Philip T.K. Daniel & Karen Bond Coriell, *Traversing the Sisyphian Trails of the Education for All Handicapped Children's Act: An Overview*, 18 OHIO N.U. L. REV. 571, 593–94 (1992).

⁷ Judith DeBerry, *When Parents and Educators Clash: Are Special Education Students Entitled to a Cadillac Education?*, 34 ST. MARY'S L.J. 503, 504–05 (2003).

⁸ See *Weast v. Schaffer*, 377 F.3d 449, 450–52 (4th Cir. 2004), *cert. granted*, 125 S. Ct. 1300 (2005).

⁹ *Id.* at 450.

¹⁰ *Id.* Until that time, Brian had attended a local private school. *Id.*

¹¹ *Id.* at 450–51.

same services at another school within the system in smaller classes.¹² Despite this proposed modification, Brian's parents rejected the IEP and chose to enroll him in a private school.¹³

The IDEA channels this type of parent-educator conflict through an administrative appeals process, one of its most prominent procedural safeguards.¹⁴ But despite the IDEA's otherwise specific procedures, it is silent on a crucial threshold issue—specification of the burden of proof borne by each party at its initial administrative due process hearing.¹⁵ This omission introduces an awkward tension, because the IDEA outlines extremely specific due process provisions yet fails to specify the burden of proof for the administrative and court proceedings those provisions create.¹⁶ In Brian's case, this issue stimulated a lengthy series of appeals concerning which party is to bear the burden of proof at administrative due process hearings under the IDEA.¹⁷

In July 2004, the U.S. Court of Appeals for the Fourth Circuit resolved Brian's case by allocating the burden of proof to the parents as the party challenging the school's IEP.¹⁸ In doing so, the court widened the existing split among the federal circuit courts of appeals regarding the proper allocation of the burden of proof at this stage in the IDEA appeals process.¹⁹ Relying on a theory of implied legislative

¹² *Id.*

¹³ *Weast*, 377 F.3d at 451.

¹⁴ See 20 U.S.C. § 1415(f) (2000). Roughly 11,000 due process hearings were requested during the period of 1996 to 2002. U.S. GOV'T ACCOUNTING OFFICE, *supra* note 1, at 12.

¹⁵ See Thomas F. Guernsey, *When the Teachers and Parents Can't Agree, Who Really Decides? Burdens of Proof and Standards of Review Under the Education for All Handicapped Children Act*, 36 CLEV. ST. L. REV. 67, 72 (1987–1988). In outlining its impartial due process hearing and administrative procedures, the IDEA does not make reference to the burden of proof at the due process hearing. See 20 U.S.C. § 1415. In describing the parent's right to bring a civil action to enforce the IDEA's requirements, the IDEA only provides for the standard of review that governs at appeals beyond the initial due process hearing, which is a preponderance of the evidence standard. *Id.* § 1415(i)(2)(B)(iii). Given the IDEA's procedural complexity, this Note confines its analysis to the allocation of the burden of proof at due process hearings under the IDEA. See *id.* § 1415; see *infra* notes 56–70 and accompanying text.

¹⁶ See Guernsey, *supra* note 15, at 68–69.

¹⁷ See *Weast*, 377 F.3d at 451–52.

¹⁸ *Id.* at 456.

¹⁹ See *id.*; see also *Devine v. Indian River County Sch. Bd.*, 249 F.3d 1289, 1291–92 (11th Cir. 2001); *Renner v. Bd. of Educ.*, 185 F.3d 635, 642 (6th Cir. 1999); *Walczak v. Fla. Union Free Sch. Dist.*, 142 F.3d 119, 122 (2d Cir. 1998); *E.S. v. Indep. Sch. Dist.*, 135 F.3d 566, 569 (8th Cir. 1998); *Clyde K. v. Puyallup Sch. Dist.*, 35 F.3d 1396, 1398–99 (9th Cir. 1994); *Fuhrmann v. E. Hanover Bd. of Educ.*, 993 F.2d 1031, 1034–35 (3d Cir. 1993); *Johnson v. Indep. Sch. Dist.*, 921 F.2d 1022, 1026 (10th Cir. 1990); *Doe v. Defendant I*, 898 F.2d 1186,

intent and emphasizing the school district's greater experience and resources, the U.S. Courts of Appeals for the Second, Third, Eighth, and Ninth Circuits allocate the burden of proof to the school district to defend its IEP's adequacy.²⁰ Declining to venture beyond traditional evidentiary doctrine without a firmer congressional mandate, the U.S. Courts of Appeals for the First, Fourth, Fifth, Sixth, Tenth, and Eleventh Circuits allocate the burden to the party that challenges the IEP or seeks to change the status quo, typically the parent.²¹

Resolution of this issue is necessary for the IDEA's continued effectiveness because the due process hearing is among its most fundamental procedural safeguards.²² At these hearings, the allocation of the burden of proof often determines the outcome, especially when the proceedings involve closely contested battles of expert testimony regarding the student's needs.²³ But foremost, the IDEA's procedural and substantive requirements must complement each other in order for the statute to serve as an effective mandate.²⁴ By granting disabled students the right to a "free appropriate public education" supported by procedural safeguards, the IDEA struck a delicate balance between protecting the rights of disabled children and imposing realistic obligations on school districts.²⁵ This Note argues that the allocation of the burden of

1191 (6th Cir. 1990); *Doe v. Brookline Sch. Comm.*, 722 F.2d 910, 917 (1st Cir. 1983); *Tatro v. Texas*, 703 F.2d 823, 830 (5th Cir. 1983).

²⁰ *Walczak*, 142 F.3d at 122; *E.S.*, 135 F.3d at 569; *Clyde K.*, 35 F.3d at 1398-99; *Fuhrmann*, 993 F.2d at 1034-35.

²¹ *Weast*, 377 F.3d at 456; *Devine*, 249 F.3d at 1291-92; *Renner*, 185 F.3d at 642; *Johnson*, 921 F.2d at 1026; *Doe v. Defendant I*, 898 F.2d at 1191; *Doe v. Brookline Sch. Comm.*, 722 F.2d at 917; *Tatro*, 703 F.2d at 830. Although in most cases the party challenging the status quo will be the student's parent, in some instances it is possible that the school district will assume the position of the challenging party. See *Tatro*, 703 F.2d at 830-31.

²² See Rebecca Weber Goldman, Comment, *A Free Appropriate Education in the Least Restrictive Environment: Promises Made, Promises Broken by the Individuals with Disabilities Education Act*, 20 U. DAYTON L. REV. 243, 280-81 (1994). The due process hearing is essential because it represents the primary mechanism by which parents can enforce a school's statutory obligation to provide their student with a FAPE. See Guernsey, *supra* note 15, at 70-71; Goldman, *supra*, at 280-81.

²³ See Guernsey, *supra* note 15, at 68 (observing that the burden of proof significantly influences the outcome of due process hearings); Elizabeth L. Anstaett, Note, *Burden of Proof Under the Education for All Handicapped Children Act*, 51 OHIO ST. L.J. 759, 759 (1990) (explaining that the allocation of the burden of proof can determine the outcome of a hearing because educational placements are the subject of expert disagreement); Rachel Ratcliff Womack, Comment, *Autism and the Individuals with Disabilities Education Act: Are Autistic Children Receiving Appropriate Treatment in Our Schools?*, 34 TEX. TECH. L. REV. 189, 192-93 (2002).

²⁴ See Daniel & Coriell, *supra* note 6, at 594.

²⁵ See 20 U.S.C. §§ 1414(d), 1415 (2000); Guernsey, *supra* note 15, at 68; Anstaett, *supra* note 23, at 759; Womack, *supra* note 23, at 192-93.

proof at IDEA due process hearings should achieve this same balance.²⁶ Specifically, a proper allocation would still impose the evidentiary onus on the plaintiff but would also incorporate burden-shifting to level the evidentiary playing field between school districts and parents.²⁷

Part I of this Note traces the origin and evolution of the IDEA's various safeguards.²⁸ It focuses on the two federal district court cases that gave rise to the IDEA and how they allocated the burden of proof at the initial administrative hearing.²⁹ Part I also reviews the IDEA's procedural safeguards to highlight their extensive commitment to due process.³⁰ Part II details the debate among the federal circuit courts of appeals and scholars that have addressed the allocation of the burden of proof at IDEA due process hearings.³¹ Part II.A presents the rationales of the federal circuit courts of appeals that allocate the burden to the local education agency.³² Part II.B presents the rationales of those circuits that allocate the burden to the challenging party.³³ Part II.C outlines the major scholarly proposals for possible allocations.³⁴ Finally, Part III presents a proposal for resolving this conflict that is most consistent with the IDEA's statutory framework.³⁵

I. THE IDEA'S PROCEDURAL SAFEGUARDS IN PERSPECTIVE

Two federal district court cases preceded the enactment of the IDEA in 1975.³⁶ In 1972, in *Pennsylvania Ass'n for Retarded Children v. Pennsylvania (PARC)*, the United States District Court for the Eastern District of Pennsylvania became the first federal court to hold that handicapped students possess a right to a free public education that cannot be denied without due process.³⁷ The United States District Court for the District of Columbia reached a similar conclusion in 1972

²⁶ See *infra* notes 195–207 and accompanying text.

²⁷ See *infra* notes 195–207 and accompanying text.

²⁸ See *infra* notes 36–75 and accompanying text.

²⁹ See *infra* notes 36–54 and accompanying text.

³⁰ See *infra* notes 55–75 and accompanying text.

³¹ See *infra* notes 76–187 and accompanying text.

³² See *infra* notes 88–107 and accompanying text.

³³ See *infra* notes 108–140 and accompanying text.

³⁴ See *infra* notes 141–187 and accompanying text.

³⁵ See *infra* notes 203–219 and accompanying text.

³⁶ See *Mills v. Bd. of Educ.*, 348 F. Supp. 866, 866 (D.D.C. 1972); *Pa. Ass'n for Retarded Children v. Pennsylvania (PARC)*, 343 F. Supp. 279, 279 (E.D. Pa. 1972).

³⁷ 343 F. Supp. 279 at 293–95; see Andriy Krahmal et al., "Additional Evidence" Under the Individuals with Disabilities Education Act: The Need for Rigor, 9 TEX. J. ON C.L. & C.R. 201, 201 (2004); Anstaett, *supra* note 23, at 759–60.

in *Mills v. Board of Education*.³⁸ Before these decisions brought the needs of disabled children to Congress's attention, the U.S. public education system systemically underserved and excluded such students.³⁹ The allocation of the burden of proof in these cases remains relevant because the IDEA ultimately reflected much of *PARC* and *Mills*.⁴⁰

In *Mills* and *PARC*, classes of handicapped students sought declaratory and injunctive relief to obtain a public education.⁴¹ Once the defendant's liability had been established in each case, the district courts oversaw the fashioning of judgment orders to integrate handicapped children into the public education system and prevent their future exclusion.⁴² *PARC*'s Amended Stipulation and the *Mills* Judgment Decree both outline many procedural protections that the IDEA later incorporated.⁴³ For example, both orders mandated a due process hearing and detailed its procedures with specificity.⁴⁴

The *PARC* order addressed at some length the evidentiary standards for the due process hearing it mandated.⁴⁵ First, it required substantial evidence to support a proposed change in any handicapped student's status.⁴⁶ More importantly, however, it provided that the school district's production of an official report would "discharge its burden of going forward with the evidence."⁴⁷ Further, the order

³⁸ See 348 F. Supp. at 873-76.

³⁹ See 20 U.S.C. § 1400(c)(2)(A)-(E) (2000). Notably, the congressional findings codified in the IDEA state that prior to its enactment, one million American children with disabilities were entirely excluded from public schools. *Id.* § 1400(c)(2)(C); see DeBerry, *supra* note 7, at 508-09.

⁴⁰ See 20 U.S.C. § 1415; *Mills*, 348 F. Supp. at 877-83; *PARC*, 343 F. Supp. at 293-97; Anstaett, *supra* note 23, at 760.

⁴¹ See *Mills*, 348 F. Supp. at 868; *PARC*, 343 F. Supp. at 281-82.

⁴² See *Mills*, 348 F. Supp. at 877-83; *PARC*, 343 F. Supp. at 302-06.

⁴³ See *Mills*, 348 F. Supp. at 877-83; *PARC*, 343 F. Supp. at 302-06. See generally 20 U.S.C. § 1415 (outlining procedural safeguards). Like the IDEA, the *Mills* Judgment Decree required school districts to formulate educational proposals for each student. 20 U.S.C. § 1414(d)(2); 348 F. Supp. at 879. Similarly, *Mills* also required schools to send a procedural safeguards notice, informing parents of their appeal rights in the event of a dispute. See 20 U.S.C. § 1415(d)(2)(j); 348 F. Supp. at 879. *Mills*' hearing procedures, including its provisions regarding the contents of the safeguards notice, the parent's right to counsel, and the impartiality of the hearing officer, are largely similar to those of the IDEA. See 20 U.S.C. § 1415(f); 348 F. Supp. at 880-83. *PARC*'s Amended Stipulation contains highly similar safeguards to those found both in *Mills* and in the current IDEA. See 20 U.S.C. § 1415(f); *Mills*, 348 F. Supp. at 880-83; *PARC*, 343 F. Supp. at 303-06.

⁴⁴ See 20 U.S.C. § 1415(f), (h); *Mills*, 348 F. Supp. at 880-83; *PARC*, 343 F. Supp. at 302-06.

⁴⁵ 343 F. Supp. at 305.

⁴⁶ *Id.*

⁴⁷ *Id.* This language appears to refer to the burden of producing evidence. See CHARLES McCORMICK, *McCORMICK ON EVIDENCE* § 336 (John W. Strong ed., West 5th ed. 1999).

stated that upon the school district's production of such a report, the parent would be required to introduce evidence to support his or her position.⁴⁸ Thus, insofar as the burden of production was concerned, the *PARC* order contemplated a burden-shifting scheme in which the school district and then the parents would be required to offer evidence.⁴⁹ Though the *PARC* order failed to specify which party was to bear the ultimate burden of persuading the trier of fact, at least one court has read its allocation to indicate that this ultimate burden would rest with the school district.⁵⁰

An equivalent portion of the *Mills* order also addresses the allocation of the burden of proof.⁵¹ In outlining hearing procedures, the *Mills* court required the school district to bear the burden of proof regarding any educational placement, denial, or transfer at issue in the hearing.⁵² In sum, both of these common law predecessors to the IDEA allocated at least the initial burden of producing evidence to the educational agency rather than to the challenging party.⁵³ Moreover, the *Mills* court explicitly assigned both the burden of production and the burden of persuasion to the school district.⁵⁴

The IDEA grafted many of *Mills* and *PARC*'s proposed procedural safeguards to ensure that the rights of students and their parents would be adequately protected.⁵⁵ On the whole, these safeguards focus on two important areas.⁵⁶ First, they ensure schools' procedural compliance in identifying and formulating IEPs for disabled students.⁵⁷ Second, they provide a dispute resolution mechanism to address any conflicts that emerge during the IEP process—the due process hearing.⁵⁸ As an ini-

⁴⁸ *PARC*, 343 F. Supp. at 305.

⁴⁹ See *id.*

⁵⁰ *Weast v. Schaffer*, 377 F.3d 449, 455 (4th Cir. 2004), cert. granted, 125 S. Ct. 1300 (2005); see *PARC*, 343 F. Supp. at 305.

⁵¹ 348 F. Supp. at 880–83.

⁵² See *id.* at 881.

⁵³ See *id.*; *PARC*, 343 F. Supp. at 305.

⁵⁴ See *Mills*, 348 F. Supp. at 881.

⁵⁵ See 20 U.S.C. § 1400(d)(1)(b) (2000); see also *id.* § 1415 (codifying procedural safeguards); *supra* note 43 and accompanying text (detailing the IDEA's codification of its case law predecessors' safeguards).

⁵⁶ See generally 20 U.S.C. § 1415 (outlining procedural safeguards).

⁵⁷ See *id.* §§ 1415(d) (mandating that school district issue a "procedural safeguards notice" upon the student's initial referral), *id.* § 1415(b)(1) (requiring school district to allow parent to participate in all meetings regarding the student's educational placement); *id.* § 1415(b)(3) (requiring school district to provide parent with written notice regarding changes to the student's IEP).

⁵⁸ See *id.* § 1415(e) (authorizing state and local educational agencies to provide mediation services to parents); *id.* § 1415(f) (outlining "impartial due process hearing" and its

tial step, the IDEA requires that a "procedural safeguards notice" be provided to the parent upon the student's initial referral for evaluation.⁵⁹ This notice must contain a full, plain language explanation of the student's rights.⁶⁰

Once the student is evaluated, the parent retains the right to participate in all meetings regarding the child's placement or services.⁶¹ In addition, parents are entitled to receive prior written notice whenever the school proposes to change the student's IEP or refuses to accommodate a request for a change.⁶² Furthermore, parents are able to obtain a free independent educational evaluation of their child, and they are entitled to examine all their child's records.⁶³ Beyond these procedural mechanisms, the IDEA also authorizes funding for information centers designed to assist parents in learning about how the statute might accommodate their child's needs.⁶⁴

Should a dispute arise during the IEP process, parents can request an impartial due process hearing.⁶⁵ Upon the filing of a hearing request, the school must offer parents the option of free mediation, and it must also notify them of any available community services that might assist them.⁶⁶ If the hearing proceeds, the IDEA requires the disclosure of any evaluations between the parties at least five days prior to the hearing date.⁶⁷ At the hearing, parents may be represented by counsel and have the right to present evidence, confront witnesses, and obtain findings of fact.⁶⁸ Though the hearing decision is enforceable against the parties, either party can appeal the outcome by bringing a civil ac-

procedures); *id.* § 1415(g) (detailing parties' appeal rights); *id.* § 1415(h) (establishing safeguards that will govern hearings and appeals, including parental right to counsel, present evidence, and cross-examine witnesses).

⁵⁹ See *id.* § 1415(d).

⁶⁰ See *id.*

⁶¹ 20 U.S.C. § 1415(b)(1) (2000).

⁶² *Id.* § 1415(b)(3). Among other requirements, such notices must contain a description of the action proposed or refused, the school's justification for the action, and a statement relating the IDEA's procedural safeguards. *Id.* § 1415(c)(1)-(7).

⁶³ *Id.* § 1415(b)(1).

⁶⁴ *Id.* § 1482.

⁶⁵ *Id.* § 1415(f)-(g). This provision allows a state to elect to have either a one- or two-tiered administrative appeals structure. See *id.* The due process hearing may be conducted by either the local or state educational agency, as determined by either state law or by the policy of the state agency. *Id.* § 1415(f). Thus, a state can elect to have a single hearing conducted by either the local or state educational agency, or two hearings—one at the local level and then a second at the state level. See *id.*

⁶⁶ 20 U.S.C. § 1415(c)(7), (e) (2000).

⁶⁷ *Id.* § 1415(f)(2).

⁶⁸ *Id.* § 1415(h).

tion in either state or federal court.⁶⁹ Prevailing parents are entitled to petition for an award of reasonable attorneys' fees.⁷⁰

In contrast to both *Mills* and *PARC*'s procedural provisions, the IDEA fails to address the burden of proof at the due process hearing.⁷¹ This omission gives rise to a question of statutory interpretation: does the IDEA express an implied congressional intent to incorporate the type of allocation to the school district outlined by *Mills* and *PARC*?⁷² Or should the IDEA's silence be interpreted to express an adherence to a traditional allocation of the burden of proof?⁷³ In requiring the plaintiff, typically the parent, to bear the burden of proof, one group of federal circuit courts of appeals emphasizes traditional evidentiary principles and limits its statutory inquiry to Congress's express intent.⁷⁴ In assigning the burden of proof to the school district, the remaining circuits rely on an implicit reading of Congress's intent and find that policy considerations warrant a departure from the traditional allocation of the burden of proof.⁷⁵

II. DIVERGENT READINGS OF THE IDEA'S LEGISLATIVE INTENT AND THE PROPER ROLE OF TRADITIONAL EVIDENTIARY PRINCIPLES AMONG THE FEDERAL CIRCUIT COURTS OF APPEALS

What most courts and scholars refer to as the "burden of proof" actually encompasses two burdens.⁷⁶ First is the burden of production,

⁶⁹ *Id.* § 1415 (i) (2) (A).

⁷⁰ *Id.* § 1415 (i) (3) (B).

⁷¹ See 20 U.S.C. § 1415 (2000); Guernsey, *supra* note 15, at 72.

⁷² See 20 U.S.C. § 1415; *Mills*, 348 F. Supp. at 881; *PARC*, 343 F. Supp. at 305.

⁷³ See 20 U.S.C. § 1415; Guernsey, *supra* note 15, at 69, 72.

⁷⁴ See *Weast*, 377 F.3d at 456; *Devine v. Indian River County Sch. Bd.*, 249 F.3d 1289, 1291-92 (11th Cir. 2001); *Renner v. Bd. of Educ.*, 185 F.3d 635, 642 (6th Cir. 1999); *Johnson v. Indep. Sch. Dist.*, 921 F.2d 1022, 1026 (10th Cir. 1990); *Doe v. Defendant I*, 898 F.2d 1186, 1191 (6th Cir. 1990); *Doe v. Brookline Sch. Comm.*, 722 F.2d 910, 917 (1st Cir. 1983); *Tatro v. Texas*, 703 F.2d 823, 830 (5th Cir. 1983).

⁷⁵ See *Walczak v. Fla. Union Free Sch. Dist.*, 142 F.3d 119, 122 (2d Cir. 1998); *E.S. v. Indep. Sch. Dist.*, 135 F.3d 566, 569 (8th Cir. 1998); *Clyde K. v. Puyallup Sch. Dist.*, 35 F.3d 1396, 1398-99 (9th Cir. 1994); *Fuhrmann v. E. Hanover Bd. of Educ.*, 993 F.2d 1031, 1034-35 (3d Cir. 1993).

⁷⁶ *McCORMICK*, *supra* note 47, § 336. Typically there is a relationship between the two burdens because the party charged with the burden of production usually assumes the burden of persuasion as well. See *id.* § 337. In addition, the burden of persuasion is often more determinative because it is the ultimate evidentiary burden and has a critical impact in cases "where the trier of fact is actually in doubt." *Id.* § 336. The burden of proof, however, is an ambiguous term. See *id.* Given the ultimate significance of the burden of persuasion, many references to the "burden of proof" can be read to refer primarily to the bur-

or the burden of bringing forth sufficient evidence regarding a fact at issue.⁷⁷ Second is the burden of persuasion, or the ultimate burden of convincing the fact finder in satisfaction of the applicable standard of proof.⁷⁸ Under traditional evidentiary doctrine, courts allocate both the burden of production and the burden of persuasion to the plaintiff.⁷⁹ The rationale is that the plaintiff is the one seeking to change the present state of affairs and thus is the most logical party to risk a failure of proof.⁸⁰

Nevertheless, there is no hard and fast rule governing the allocation of the burden of proof.⁸¹ Fairness, convenience, or other policy considerations can justify a nontraditional allocation, that is, an assignment of the burden to the defendant.⁸² Consequently, the IDEA's silence as to which party should bear the burden of proof at its due process hearings provokes a central question: do special considerations justify a nontraditional allocation of the burden of proof to the school district?⁸³ In formulating a response to this question, the federal circuit courts of appeals rely on divergent sources.⁸⁴ Some circuits stress school districts' affirmative obligations to students under the IDEA and present fairness arguments regarding the parties' respective advantages as IDEA litigants.⁸⁵ Others reaffirm a traditional allocation by strictly construing the IDEA's legislative intent and empha-

den of persuasion. *See id.*; 9 J.H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2485 (James H. Chadbourn ed., 1981).

⁷⁷ McCORMICK, *supra* note 47, § 336.

⁷⁸ *Id.*

⁷⁹ *See id.* § 337.

⁸⁰ *See id.*

⁸¹ *See id.* Professor J.H. Wigmore's treatise states that "[t]he truth is that there is not and cannot be any one general solvent for all cases. It is merely a question of policy and fairness based on experience in the different situations." WIGMORE, *supra* note 76, § 2486.

⁸² *See* McCORMICK, *supra* note 47, § 337. In addition, although it is most natural to place the burden on the party who urges change, it can also be appropriate under certain circumstances to impose the burden of proof on a party when the facts with regard to a certain issue lie particularly within that party's knowledge. *See id.* According to Professor Charles McCormick, this proposition is a near-exception to the traditional rule. *Id.* Nevertheless, a party can still be required to plead and prove matters in circumstances where the opposing party retains the relevant proof. *Id.* Additionally, it may be warranted under certain circumstances to allocate the two evidentiary burdens to different parties or to shift the burdens. *Id.*

⁸³ *See* McCORMICK, *supra* note 47, § 337.

⁸⁴ *See* *Weast v. Schaffer*, 377 F.3d 449, 452-53 (4th Cir. 2004), *cert. granted*, 125 S. Ct. 1300 (2005) (relying on traditional evidentiary doctrine and a narrow construction of Congress's legislative intent); *Oberti v. Bd. of Educ.*, 995 F.2d 1204, 1207, 1218-20 (3d Cir. 1993) (emphasizing the IDEA's remedial purpose); *Tatro v. Texas*, 703 F.2d 823, 830 (5th Cir. 1983) (focusing on the IEP's central role and the issue of fairness).

⁸⁵ *See, e.g., Oberti*, 995 F.2d at 1218-20.

sizing the protection already afforded by its procedural safeguards.⁸⁶ The following discussion outlines these arguments along with leading scholarly responses to this issue.⁸⁷

A. The Primacy of Policy Considerations Among Federal Circuit Courts of Appeals Allocating the Burden of Proof to the Local Educational Agency

Several federal circuit courts of appeals have simply declared that they adhere to the rule that the school system must bear the burden of proving its IEP's adequacy at the due process hearing.⁸⁸ Among the courts that do so, the U.S. Court of Appeals for the Third Circuit provides the clearest rationale.⁸⁹ In developing its rationale, the Third Circuit relied in part on a 1989 New Jersey Supreme Court decision that first considered the issue, *Lascari v. Board of Education*.⁹⁰ *Lascari* allocated the burden of proof to the school district because the IDEA charges it with the responsibility for implementing IEPs.⁹¹ According to the *Lascari* court, this allocation was most consistent with the IDEA's extensive procedural safeguards and also with the evidentiary consideration that the burden of proof should be placed on the party best able to meet it.⁹² Additionally, the court stressed that school districts had educational experts at their disposal, already possessed the child's records, and would be more familiar with the applicable state and federal law.⁹³

In sum, the Third Circuit requires the school district to bear the burden of showing that its placement is appropriate, regardless of whether the school district or the parent is the party seeking change.⁹⁴ For this circuit, the affirmative nature of the IDEA's obligations for school districts adequately justifies assigning them the burden of

⁸⁶ See, e.g., *Weast*, 377 F.3d at 452-53; *Tatro*, 703 F.2d at 830.

⁸⁷ See *infra* notes 88-97, 108-118, 141-147 and accompanying text.

⁸⁸ See *Walczak v. Fla. Union Free Sch. Dist.*, 142 F.3d 119, 122 (2d Cir. 1998); *E.S. v. Indep. Sch. Dist.*, 135 F.3d 566, 569 (8th Cir. 1998); *Clyde K. v. Puyallup Sch. Dist.*, 35 F.3d 1396, 1398 (9th Cir. 1994).

⁸⁹ See *Carlisle Area Sch. v. Scott P.*, 62 F.3d 520, 533 (3d Cir. 1995); *Oberti*, 995 F.2d at 1218-19; *Fuhrmann v. E. Hanover Bd. of Educ.*, 993 F.2d 1031, 1034-35 (3d Cir. 1993); see also *Lascari v. Bd. of Educ.*, 560 A.2d 1180, 1181-82, 1188 (N.J. 1989) (allocating the burden of proof under New Jersey state law to the local school district).

⁹⁰ See *Fuhrmann*, 993 F.2d at 1034-35 (citing *Lascari*, 560 A.2d at 1189).

⁹¹ See 560 A.2d at 1188. One commentator devotes an extensive discussion to a critique of *Lascari*'s holding. See Morgan, *supra* note 5, at 283-87.

⁹² See 560 A.2d at 1188.

⁹³ See *id.*

⁹⁴ See *Carlisle*, 62 F.3d at 533; *Oberti*, 995 F.2d at 1207, 1218-20; *Fuhrmann*, 993 F.2d at 1034-35.

proof.⁹⁵ In addition, the Third Circuit relies on a related evidentiary argument, holding that fairness requires the school district to bear the risk of a failure of proof because it has superior access to the necessary evidence and a greater capability to explain that evidence's relevance.⁹⁶ Subsequently, the Third Circuit has applied its adoption of *Lascari's* reasoning in a series of cases that affirmed an overriding concern for the welfare of handicapped children.⁹⁷

For example, in 1993 in *Oberti v. Board of Education*, the Third Circuit held that the school district should bear the burden of proof at both the due process hearing and at the district court level under the IDEA.⁹⁸ In doing so, the court found that requiring parents to prove that the school district has failed to comply with the IDEA would undermine its explicit desire to protect disabled children's rights.⁹⁹ The court stated that imposing such a burden on the parent would diminish judicial enforcement of the IDEA's requirements.¹⁰⁰ Finally, in citing a study that found parents are at a general disadvantage in IDEA disputes because they usually lack the specific expertise of their child's educators, the court emphasized the school district's practical advantage in IDEA litigation.¹⁰¹

⁹⁵ See *Carlisle*, 62 F.3d at 533; *Oberti*, 995 F.2d at 1207, 1218-20; *Fuhrmann*, 993 F.2d at 1034-35.

⁹⁶ See *Fuhrmann*, 993 F.2d at 1034-35; *Lascari*, 560 A.2d at 1187-88.

⁹⁷ See *Carlisle*, 62 F.3d at 533; *Oberti*, 995 F.2d at 1207, 1218-20.

⁹⁸ 995 F.2d at 1207, 1218-20. It is important to note, however, that an argument can be made that *Oberti's* holding only pertains to the allocation of the burden of proof for a specific type of IDEA claim. See *id.* Rather than concluding that the school district must always bear the burden of proving its compliance with the IDEA, the court implied that the school simply bears the burden of proving its compliance with the IDEA's mainstreaming requirement. *Id.* at 1207, 1219. Essentially, the IDEA requires that children with disabilities be educated in the "least restrictive environment," meaning that they are to be educated in settings that include nondisabled students wherever possible. 20 U.S.C. § 1412(5)(a) (2000). Thus, the IDEA articulates a strong preference for mainstreaming, that is, for educating disabled students in settings where they are able to benefit from interaction with their nondisabled peers. See *id.* In *Oberti*, for instance, the parents alleged that the school district violated the IDEA by placing their son in a segregated special education class due to his disruptive behavior. 995 F.2d at 1206, 1208. The Third Circuit concluded that the IDEA's strong presumption for mainstreaming would be contradicted if the burden of proof was imposed on the parents for mainstreaming claims. *Id.* at 1219. The court reasoned that to do so would effectively require parents to prove their child should be included in a less restrictive environment, which is plainly inconsistent with the IDEA's explicit preference for mainstreaming. See 20 U.S.C. § 1412(5)(a); *Oberti*, 995 F.2d at 1219.

⁹⁹ *Oberti*, 995 F.2d at 1219.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

The Third Circuit further refined its position in 1995, in *Carlisle Area School v. Scott P.*¹⁰² In *Carlisle*, the court refused to assign the burden of proof to school districts for claims involving "mainstreaming," which the IDEA explicitly prefers.¹⁰³ Instead, the *Carlisle* court held that the school district should not be required to bear the burden of proof when it advocates for a less restrictive placement.¹⁰⁴ Addressing the burden of proof more generally, the court stated that although the school district is required to prove affirmatively the appropriateness of its own IEP, it is not required to prove the inappropriateness of an alternate plan that a parent proposed.¹⁰⁵ The court observed that this type of requirement would impose too substantial of a burden on the school district.¹⁰⁶ Hence, although in *Carlisle* the Third Circuit recognized a narrow limitation to its allocation, the court still ultimately affirmed its position that the IDEA's affirmative obligations justify a nontraditional allocation of the burden of proof to the school districts.¹⁰⁷

B. *Siding with the Status Quo: The Reliance on Traditional Evidentiary Principles Among the Federal Circuit Courts of Appeals Allocating the Burden of Proof to the Challenging Party*

Relying on a narrower reading of the IDEA's legislative intent, the U.S. Court of Appeals for the First Circuit was one of the first courts to allocate the burden of proof to the challenging party.¹⁰⁸ In 1983, the First Circuit held in *Doe v. Brookline School Committee* that the party seeking to modify the status quo should bear the burden of proof in proceedings under the IDEA.¹⁰⁹ Applied to the facts presented in *Doe*, the burden fell upon the school district because it was the party seeking to alter the existing IEP by discontinuing payment for the student's private school tuition.¹¹⁰ The court relied upon the congressional preference for maintenance of the current educational placement to support this allocation.¹¹¹ Specifically, the court interpreted the IDEA's "stay-put" provision, which mandates that a student remain in his or her cur-

¹⁰² 62 F.3d at 533.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ See *Carlisle*, 62 F.3d at 533.

¹⁰⁸ See *Doe v. Brookline Sch. Comm.*, 722 F.2d 910, 917 (1st Cir. 1983).

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ See *id.*

rent educational placement during the pendency of any appeal, to express the IDEA's strong preference for the preservation of the status quo.¹¹² Accordingly, the court concluded that the most consistent allocation of the burden of proof would be to the party seeking to modify the placement that the IDEA otherwise preserves.¹¹³

In contrast to the First Circuit's reliance on the IDEA's "stay-put" provision, the U.S. Court of Appeals for the Fifth Circuit's reasoning has become the dominant rationale among the federal circuit courts of appeals allocating the burden to the challenger.¹¹⁴ In 1983, in *Tatro v. Texas*, the Fifth Circuit first allocated the burden to the challenging party, reasoning that the IEP's central role created a presumption in favor of the placement it established.¹¹⁵ In *Tatro*, the parents of a child with spina bifida appealed a school district's denial of their request for catheterization services so that she could attend a preschool program.¹¹⁶ In holding that the district was required to amend the student's plan to provide catheterization, the Fifth Circuit concluded in an oft-quoted passage that "because the IEP is jointly developed by the school district and the parents, fairness requires that the party attacking its terms should bear the burden of showing why the educational setting established by the IEP is not appropriate."¹¹⁷ The U.S. Courts

¹¹² See *id.* at 915-17. The IDEA contains a so-called "stay-put" provision, whereby the child is required to stay in his or her current educational placement during an appeal unless the school district and the student's parents agree to an alternate placement. 20 U.S.C. § 1415(j) (2000). Some scholars, however, critique courts' reliance on the stay-put provision as a justification for requiring the party challenging the status quo, typically the plaintiff, to bear the burden of proof. See Dixie Snow Huefner & Perry A. Zirkel, *Burden of Proof Under the Individuals with Disabilities Education Act*, 9 INDIVIDUALS WITH DISABILITIES EDUC. L. REP. 1, 8 (1993). They contend that the stay-put provision does not establish a presumption that the current placement is appropriate and, instead, they interpret the provision's purpose to be shielding the student from being switched between multiple placements during an appeal. See *id.*

¹¹³ See *Doe v. Brookline Sch. Comm.*, 722 F.2d at 917.

¹¹⁴ See *Devine v. Indian River County Sch. Bd.*, 249 F.3d 1289, 1291 (11th Cir. 2001); *Johnson v. Indep. Sch. Dist.*, 921 F.2d 1022, 1026 (10th Cir. 1990); *Doe v. Defendant I*, 898 F.2d 1186, 1191 (6th Cir. 1990); *Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ.*, 790 F.2d 1153, 1158 (5th Cir. 1986); *Tatro*, 703 F.2d at 830.

¹¹⁵ 703 F.2d at 830.

¹¹⁶ *Id.* at 825.

¹¹⁷ *Id.* at 830; see *Devine*, 249 F.3d at 1291 (quoting *Tatro*); *Johnson*, 921 F.2d at 1026 (same); *Doe v. Defendant I*, 898 F.2d at 1191 (same); *Alamo Heights*, 790 F.2d at 1158 (same). The reasoning the Fifth Circuit forwarded in *Tatro* has been critiqued by proponents who urge courts to allocate the burden of proof to the school. See 703 F.2d at 830-31; Anstaett, *supra* note 23, at 766; Womack, *supra* note 23, at 215. Anstaett and Womack both stress that schools and parents hardly assume equal roles within the IEP development process, making it inaccurate to characterize the plan as the joint product of all participants. Anstaett, *supra* note 23, at 766; Womack, *supra* note 23, at 215.

of Appeals for the Fourth, Sixth, Tenth, and Eleventh Circuits have since subscribed to *Tatro's* allocation of the burden.¹¹⁸

Thus, *Tatro* implied that the IEP represents the joint product of the school and the parents' efforts, embodying a sort of contract between them to an educational placement and package of services.¹¹⁹ Adopting this premise, the court then required the party attacking the plan to prove why it should be permitted to deviate from the terms it had previously agreed to.¹²⁰ In *Tatro*, the school district had to demonstrate why the placement it had endorsed—an early childhood education program—was now inappropriate because the student's attendance would require the school to provide catheterization services.¹²¹ As a result, *Tatro* produced the counterintuitive result of imposing the burden of proof on the school district.¹²² In most cases, one would expect an allocation to the parent as the challenging party.¹²³

¹¹⁸ See *Weast*, 377 F.3d at 456; *Devine*, 249 F.3d at 1291; *Johnson*, 921 F.2d at 1026; *Doe v. Defendant I*, 898 F.2d at 1191; *Tatro*, 703 F.2d at 830. The Fifth Circuit also derived this allocation from the standard of review adopted by the then-leading Supreme Court precedent in the area. See *Bd. of Educ. v. Rowley*, 458 U.S. 176, 206-07 (1982). In 1982, in *Board of Education v. Rowley*, the Court held that the IDEA expressed a congressional intent to defer to the expertise of state educators in determining how to educate handicapped children appropriately. See *id.* at 206-08.

¹¹⁹ See 703 F.2d at 830.

¹²⁰ See *id.*

¹²¹ See *id.* at 830-31.

¹²² See *id.* Interestingly, both the First and Fifth Circuits' allocations to the challenging party resulted in imposing the burden of proof on the school district, not the parent. See *Doe v. Brookline Sch. Comm.*, 722 F.2d at 915-17; *Tatro*, 703 F.2d at 830-31. Though this may be an insignificant parallel, it does suggest that factual happenstance, in addition to the desire to adhere to traditional evidentiary rules, influences how courts address this issue. See *Doe v. Brookline Sch. Comm.*, 722 F.2d at 915-17; *Tatro*, 703 F.2d at 830-31.

¹²³ See *Tatro*, 703 F.2d at 830; see also McCORMICK, *supra* note 47, § 336 (explaining that generally courts assign the burden of proof to the plaintiff because it is the party challenging the status quo). For instance, the court allocated the burden of proof to the parent as the challenging party in the 1986 case of *Alamo Heights v. State Board of Education*, in which the Fifth Circuit reiterated *Tatro's* essential holding that the party attacking the IEP's terms should bear the burden of demonstrating why the setting it establishes is now inappropriate. See *Alamo Heights*, 790 F.2d at 1158; *Tatro*, 703 F.2d at 830. *Alamo Heights* slightly expanded *Tatro*, however. See *Alamo Heights*, 790 F.2d at 1156, 1158-59; *Tatro*, 703 F.2d at 830. Although the parent in *Alamo Heights* had not presented any claims attacking the setting contained in her son's IEP, the Fifth Circuit still allocated the burden of proof to her because she sought to add services to the agreed-upon plan. See 790 F.2d at 1156. Thus, the court read *Tatro* to also impose the burden of proof upon a party that sought to add services to the IEP. See *id.* at 1158-59; *Tatro*, 703 F.2d at 830; see also *Christopher M. v. Corpus Christi Ind. Sch. Dist.*, 933 F.2d 1285, 1288, 1290-91 (5th Cir. 1991) (holding likewise that disabled student bore burden of proof because he sought to have his school day extended to seven hours, rather than two hours as proposed in his IEP).

In 1990, in *Doe v. Defendant I*, the U.S. Court of Appeals for the Sixth Circuit joined the Fifth Circuit in allocating the burden of proof at due process hearings under the IDEA to the party attacking the IEP's terms.¹²⁴ The Sixth Circuit has since refused to modify its application of *Tatro's* holding.¹²⁵ For instance, in 1990 in *Cordrey v. Euckert*, the Sixth Circuit declined an invitation by the petitioning parents and an amicus curiae to impose the burden of proof on issues pertaining to procedural compliance under the IDEA to the school district.¹²⁶ Though the court acknowledged that the IDEA affirmatively required the local educational agency to comply with its comprehensive procedures, it found no definitive authorization within the IDEA itself or any other compelling justification that would warrant a departure from the traditional allocation of the burden of proof.¹²⁷

In 2004, in *Weast v. Schaffer*, the U.S. Court of Appeals for the Fourth Circuit similarly refused to deviate from the traditional rule that the party initiating a proceeding bears the burden of proof.¹²⁸ In *Weast*, the parents of a student with Attention Deficit Hyperactivity Disorder and learning disabilities challenged the adequacy of a school's proposed IEP, seeking reimbursement for private school tuition.¹²⁹ In its opinion, the Fourth Circuit examined evidentiary doctrine, comparable federal statutory entitlements, and various policy arguments.¹³⁰ The court rejected opposing circuits' analyses that allocated the burden of proof to the school district, concluding that those decisions offered little supporting reasoning.¹³¹

Instead, the *Weast* court relied heavily on traditional evidentiary doctrine, stating that the party seeking relief normally bears the burden of proof when a statute is otherwise silent on the issue.¹³² In support, the court cited to both Charles McCormick's and J.H. Wigmore's treatises to underscore that courts traditionally allocate the burden of proof to the party who initiates a proceeding to enforce a statutory obligation.¹³³ In doing so, the court reasoned that the bur-

¹²⁴ See *Doe v. Defendant I*, 898 F.2d at 1191.

¹²⁵ See *Cordrey v. Euckert*, 917 F.2d 1460, 1466 (6th Cir. 1990).

¹²⁶ See *id.*

¹²⁷ See *id.* at 1466, 1469-70.

¹²⁸ 377 F.3d at 456. On February 22, 2005, the U.S. Supreme Court granted certiorari to review the Fourth Circuit's decision in *Weast. Schaffer v. Weast*, 125 S. Ct. 1300 (2005).

¹²⁹ 377 F.3d at 450-51.

¹³⁰ See *id.* at 452-56.

¹³¹ *Id.* at 453.

¹³² *Id.* at 452, 455-56.

¹³³ *Id.* at 452, 455; see MCCORMICK, *supra* note 47, § 337; WIGMORE, *supra* note 76, § 2485.

den of proof should indicate which party should lose the action if no evidence is offered by either party.¹³⁴ Thus, the court concluded that to allocate the burden of proof to the school district would effectively presume every IEP's inadequacy.¹³⁵

Consequently, the *Weast* court rejected any contention that the school district should bear the burden of proof because of its affirmative statutory obligations under the IDEA.¹³⁶ The court also refused to grant weight to the practical consideration that school districts have the advantage in IEP litigation.¹³⁷ Stating that "[w]e do not automatically assign the burden of proof to the side with the bigger guns," the court emphasized that the IDEA's procedural safeguards create a roughly level playing field between parents and school districts.¹³⁸ In particular, the court highlighted parents' involvement in IEP development, their right to examine records within the school's possession, and the ability of prevailing parents to recover attorneys' fees.¹³⁹ Thus, the court implied that Congress accounted for a school district's potential advantages at the hearing and chose to reduce any informational or resource advantage through the IDEA's existing procedural protections.¹⁴⁰

C. Splitting the Difference: Existing Burden-Shifting Proposals

Several academic proposals have addressed the proper allocation of the burden of proof at due process hearings under the IDEA.¹⁴¹ As this Section details, many proposed allocations favor some type of burden-shifting scheme, whereby courts would separate the burdens of production and persuasion and assign them to different parties depending on the stage of the proceeding.¹⁴² For instance, one proposal

¹³⁴ *Weast*, 377 F.3d at 455.

¹³⁵ *See id.* at 455–56.

¹³⁶ *Id.* at 453.

¹³⁷ *Id.*

¹³⁸ *Id.* at 453–54.

¹³⁹ *Weast*, 377 F.3d at 454.

¹⁴⁰ *See id.*

¹⁴¹ *See* Guernsey, *supra* note 15, at 72–77; Anstaett, *supra* note 23, at 770–72; Womack, *supra* note 23, at 215–16; Recent Case, *Individuals with Disabilities Education Act—Fourth Circuit Holds That Parents Bear the Burden of Proof in a Due Process Hearing Against a School District*: *Weast v. Schaffer*, 377 F.3d 449 (4th Cir. 2004), 118 HARV. L. REV. 1078, 1082–85 (2005).

¹⁴² *See* Guernsey, *supra* note 15, at 72–77 (arguing for an allocation that would separate the burden of proof on substantive and procedural issues); Anstaett, *supra* note 23, at 770–72 (calling for an allocation that would only require the parent to discharge the minimal burden of producing evidence that their student's disability qualified for services under the IDEA); Recent Case, *supra* note 141, at 1082–85 (contending that courts should adopt a burden-shifting scheme similar to that embodied in the Americans with Disabilities Act's

separates the burden of proof on procedural issues from the burden on substantive issues, suggesting various ways the former might be assigned to the school district.¹⁴³ Alternatively, a second proposal analogizes due process hearings to Social Security disability appeals, contending the parent should only be required to discharge the initial burden of producing evidence of the student's disability.¹⁴⁴ Under this scheme, the school district would bear the ultimate burden of persuading the fact finder.¹⁴⁵ Finally, a third proposal contends that the IDEA should incorporate a burden-shifting scheme similar to that embodied in the Americans with Disabilities Act's ("ADA") reasonable accommodation provision.¹⁴⁶ Using this approach, after the parent presented a prima facie case that the student's disability fell into a statutory category, the burden would shift to the school district to prove that it accommodated the student's disability through an adequate IEP.¹⁴⁷

An early proposal draws a distinction between the burden of proof on procedural and substantive issues.¹⁴⁸ Insofar as the IDEA is concerned, this proposal argues that the application of traditional evidentiary theory is arguably ineffective for procedural issues.¹⁴⁹ This proposal contends that the IDEA's elaborate safeguards place an emphasis on procedural compliance that justifies imposing the burden of proving adherence to the statutory requirements on the school district.¹⁵⁰ Several rationales support splitting the burden of proof on procedural and substantive issues in this manner.¹⁵¹

First, splitting the burden would be responsive to *Board of Education v. Rowley*, a 1982 U.S. Supreme Court case addressing the standard of review applicable to the IDEA.¹⁵² In this leading case, the Court addressed what the IDEA's "free appropriate public education" mandate required of schools.¹⁵³ The Court held that schools must provide

(the "ADA") reasonable accommodation provision); see also McCORMICK, *supra* note 47, § 337 (explaining burden-shifting generally).

¹⁴³ See Guernsey, *supra* note 15, at 72-77.

¹⁴⁴ See Anstaett, *supra* note 23, at 771.

¹⁴⁵ See *id.*

¹⁴⁶ See Recent Case, *supra* note 141, at 1084.

¹⁴⁷ See *id.*

¹⁴⁸ See Guernsey, *supra* note 15, at 72-77.

¹⁴⁹ See *id.* at 74-75.

¹⁵⁰ See *id.*

¹⁵¹ See *id.* at 75-77.

¹⁵² See 458 U.S. at 189-201; see also Guernsey, *supra* note 15, at 75 (describing the organization of a court's inquiry under *Rowley*).

¹⁵³ See 20 U.S.C. § 1400(d)(1)(A) (2000); *Rowley*, 458 U.S. at 189-201; Guernsey, *supra* note 15, at 75.

handicapped students with "some educational benefit," simply a "basic floor of opportunity."¹⁵⁴ In *Rowley*, the Court also indicated that judicial review under the IDEA should begin with an inquiry into the school's compliance with the statute's procedural safeguards.¹⁵⁵ Thus, *Rowley's* primary emphasis on procedural compliance might justify allocating the burden of proof on this issue to the school district.¹⁵⁶

Second, allocating the burden of proof to the school district to demonstrate procedural compliance would also be consistent with the statute's remedial goals.¹⁵⁷ The IDEA's procedural safeguards are integral to providing each disabled student with an enforceable right to a "free appropriate public education."¹⁵⁸ Accordingly, the school district should be required to demonstrate compliance because the IDEA explicitly recognizes a desire to protect the rights of disabled students.¹⁵⁹ Third, though parents can access their child's records under the IDEA's procedural provisions, this entitlement falls short of formal discovery.¹⁶⁰ Also, this limited disclosure requirement typically produces records that are more useful on substantive issues and may not even contain evidence of procedural violations.¹⁶¹

According to this proposal, two different allocations could be used to place some of the burden on the school district to disprove allegations of procedural violations.¹⁶² One approach is to allocate the burden of production to the school district on this issue, which would respond to the reality that evidence of procedural violations lies almost exclusively within the school district's control.¹⁶³ Once the school district satisfied its burden by producing sufficient evidence to demonstrate compliance, the burden of persuasion on the issue would then shift to the parents.¹⁶⁴ This scheme, however, might not fully respond to the contention that the IDEA is expressly remedial.¹⁶⁵ After all, the burden of persuasion would still be assigned to the parent, despite the IDEA's desire to safeguard the student's rights.¹⁶⁶

¹⁵⁴ *Rowley*, 458 U.S. at 201.

¹⁵⁵ *See id.* at 206-07.

¹⁵⁶ *See id.*; Guernsey, *supra* note 15, at 75.

¹⁵⁷ *See* Guernsey, *supra* note 15, at 75-76.

¹⁵⁸ *See* 20 U.S.C. § 1400(d)(1)(A); Guernsey, *supra* note 15, at 75-76.

¹⁵⁹ *See* 20 U.S.C. § 1400(d)(1)(A)-(B); Guernsey, *supra* note 15, at 75-76.

¹⁶⁰ *See* Guernsey, *supra* note 15, at 76.

¹⁶¹ *See id.*

¹⁶² *See id.* at 76-77.

¹⁶³ *See id.* at 76.

¹⁶⁴ *See id.*

¹⁶⁵ *See* Guernsey, *supra* note 15, at 76.

¹⁶⁶ *See* 20 U.S.C. § 1400(d)(1)(A)-(B) (2000); Guernsey, *supra* note 15, at 76.

A second approach could take the form of a scheme similar to that used under the Civil Rights Act of 1964.¹⁶⁷ In contrast to the first approach, the parents would carry the burden of producing evidence sufficient to reasonably demonstrate a procedural violation.¹⁶⁸ At that point, the burden of production would shift to the school district to produce rebuttal evidence.¹⁶⁹ Due to the difficulties parents face in assembling proof, the amount of evidence required to meet their burden could be nominal.¹⁷⁰ One proposed standard is that parents should be required to allege "a specific violation of a procedural right provided by the Act [the IDEA] or its supporting regulations along with information sufficient to allow a reasonable person to infer the existence of that procedural violation."¹⁷¹

In opposition to this type of proposal, others argue that parents who seek to take advantage of the due process rights afforded by the IDEA should not be forced to bear the burden of persuasion on any claim.¹⁷² One counter-proposal analogizes the IDEA proceedings to Social Security disability cases because they are an area of administrative law in which the burden of persuasion has been shifted to the agency to respect the individual's rights.¹⁷³ This proposal suggests that the IDEA due process hearings should resemble Social Security disability appeals, where the claimant is initially required to offer probative evidence that he cannot work due to a disability, then the agency must meet its burden of persuasion by demonstrating that feasible work is available to the claimant.¹⁷⁴ Applied to a due process hearing, the parent first would be required to discharge the burden of producing evidence of the student's disability, but then the ultimate burden of persuasion would shift to the school district to defend its IEP.¹⁷⁵ This proposal echoes the concern that allocating the burden of per-

¹⁶⁷ See 42 U.S.C. § 2000e, 2000e-1-4; *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03 (1973) (holding that the Title VII plaintiff bears the initial burden of establishing a prima facie case of discrimination, then the burden shifts to the defendant to offer a legitimate, nondiscriminatory reason for the contested employment action); *Guernsey*, *supra* note 15, at 76-77.

¹⁶⁸ See 42 U.S.C. § 2000e, 2000e-1-4; *McDonnell Douglas*, 411 U.S. at 802-03; *Guernsey*, *supra* note 15, at 76.

¹⁶⁹ See 42 U.S.C. § 2000e, 2000e-1-4; *McDonnell Douglas*, 411 U.S. at 802-03; *Guernsey*, *supra* note 15, at 76.

¹⁷⁰ See *Guernsey*, *supra* note 15, at 77.

¹⁷¹ See *id.*

¹⁷² See *Anstaett*, *supra* note 23, at 770-72; *Womack*, *supra* note 23, at 215-16.

¹⁷³ See *Anstaett*, *supra* note 23, at 771.

¹⁷⁴ *Id.*

¹⁷⁵ See *id.*

suasion to the school district is preferable because it is better able to build its case.¹⁷⁶ Also, a pro-parent standard is arguably necessary for the IDEA to protect student rights and ensure schools' compliance.¹⁷⁷

Finally, an analysis of the Fourth Circuit's 2004 decision in *Weast* proposes that courts should adopt a modified burden-shifting approach that mirrors that practiced in the ADA's reasonable accommodation provision.¹⁷⁸ Specifically, this analysis rejects any attempt to analogize the IDEA to civil rights statutes that do not place the burden of proof on defendants.¹⁷⁹ Unlike civil rights legislation, it contends, the IDEA imposes "affirmative obligations" on state actors.¹⁸⁰ Accordingly, *Weast's* analytical misstep was its failure to appreciate the affirmative obligations that the IDEA places on school districts.¹⁸¹ Instead, a modified burden-shifting approach would ensure that the party in the best position to offer evidence will carry an appropriate burden.¹⁸²

Drawing a parallel to the ADA's reasonable accommodation provision, this proposal suggests that the IDEA adopt a regime where the plaintiff would first have to establish a *prima facie* case that the student's disability falls into an applicable category covered by the statute.¹⁸³ Upon the parent's satisfaction of this burden, the burden would shift to the school district to prove its IEP's adequacy.¹⁸⁴ Hence, each party could carry an appropriate burden—the plaintiff parent because he or she typically possesses greater knowledge about the student's disability and the defendant school district because it typically has the experience and resources to determine how the student's needs might be met in an educational plan.¹⁸⁵ Thus, this framework hypothesizes that both parties would bear the burden of proof on matters for which they have greater access to the relevant information.¹⁸⁶ If the child's eligibility under the IDEA is not contested, the scheme would allocate the burden of proof in its entirety to the school district.¹⁸⁷

¹⁷⁶ See *id.* at 771–72.

¹⁷⁷ See *id.*

¹⁷⁸ See *Weast*, 377 F.3d at 452–56; Recent Case, *supra* note 141, at 1082–85.

¹⁷⁹ See Recent Case, *supra* note 141, at 1082–83.

¹⁸⁰ See *id.* at 1083–84.

¹⁸¹ See *id.* at 1083.

¹⁸² See *id.* at 1083–84.

¹⁸³ See *id.* at 1084.

¹⁸⁴ See Recent Case, *supra* note 141, at 1084.

¹⁸⁵ See *id.*

¹⁸⁶ See *id.*

¹⁸⁷ See *id.*

III. THE APPROPRIATE PROCEDURAL COMPROMISE: TAILORING THE ALLOCATION OF THE BURDEN OF PROOF TO BALANCE THE IDEA'S REMEDIAL PURPOSE AND SCHOOL DISTRICTS' OBLIGATIONS

The IDEA and its procedural safeguards aspire to make "a free appropriate public education" available to all disabled students.¹⁸⁸ Because the due process hearing is the IDEA's most fundamental procedural safeguard, resolution of this conflict of authority is necessary for the IDEA's continued effectiveness as a statutory mandate.¹⁸⁹ Due to the IDEA's silence regarding the allocation of the burden of proof at due process hearings, its procedural and substantive requirements currently cannot function together to promote its goals.¹⁹⁰ In addition, on a practical level the unsettled state of the law discourages parents from commencing actions to enforce their children's rights, mainly because they lack sufficient information to calculate their chances of success.¹⁹¹ At the same time, due to the lack of uniformity different jurisdictions arrive at different outcomes depending on their allocation of the burden of proof, which could inhibit students' interstate mobility.¹⁹² Although the Supreme Court has granted certiorari to review this issue, it would be more desirable for Congress to amend the IDEA's procedural provisions to specify the burden of proof at due process hearings.¹⁹³ Congressional amendment would

¹⁸⁸ 20 U.S.C. §§ 1400(d)(1)(A), 1415 (2000).

¹⁸⁹ See *id.* §§ 1400(d)(1)(A), 1415; Guernsey, *supra* note 15, at 68, 70-71 (highlighting the centrality of the FAPE mandate within the IDEA, but observing that the statute provides little substantive guidance regarding the definition of this critical term); Anstaett, *supra* note 23, at 759 (observing that the allocation of the burden of proof at due process hearings is particularly important because IDEA disputes typically involve conflicting expert testimony); Goldman, *supra* note 22, at 280-81 (concluding that the parent's right to obtain a due process hearing is among the IDEA's most important safeguards); Womack, *supra* note 23, at 192-93 (stating that the allocation of the burden of proof has determined the outcome of many IDEA disputes).

¹⁹⁰ See 20 U.S.C. §§ 1400(d)(1)(A), 1415; Guernsey, *supra* note 15, at 68, 70-71; Anstaett, *supra* note 23, at 759; Goldman, *supra* note 22, at 280-81; Womack, *supra* note 23, at 192-93.

¹⁹¹ See Anstaett, *supra* note 23, at 771-72. As one commentator notes, it is important that parents be able to calculate their chances of winning an IDEA dispute. *Id.* The Supreme Court has held that parents may be reimbursed for private school tuition when a court ultimately determines that the child's IEP is inadequate and they had placed their child at a private school with an appropriate educational program during the pendency of their appeal. *Id.* (citing *Burlington Sch. Comm. v. Mass. Dep't of Educ.*, 471 U.S. 359, 369-74 (1985)).

¹⁹² See Huefner & Zirkel, *supra* note 112, at 12.

¹⁹³ *Schaffer v. Weast*, 125 S. Ct. 1300 (2005) (granting certiorari).

allow for a more extended debate that would better incorporate the sensitive policy considerations at issue.¹⁹⁴

The IDEA struck a delicate balance between respecting the rights of disabled children while imposing a realistic mandate on school districts.¹⁹⁵ The allocation of the burden of proof under the IDEA should achieve this same balance.¹⁹⁶ According to traditional evidentiary doctrine, courts should allocate both the burden of producing evidence and the burden of persuading the fact finder to the plaintiff because it is the most logical party to risk a failure of proof.¹⁹⁷ Thus, traditional evidentiary principles imply that the party who challenges the status quo should bear much of the evidentiary onus in an IDEA dispute.¹⁹⁸

But despite the dictates of traditional evidentiary doctrine, fairness, convenience, and other policy considerations can justify a non-traditional allocation.¹⁹⁹ Moreover, courts may separate the burdens of production and persuasion and even shift them from one party to the

¹⁹⁴ See *Walczak v. Fla. Union Free Sch. Dist.*, 142 F.3d 119, 122 (2d Cir. 1998); *E.S. v. Indep. Sch. Dist.*, 135 F.3d 566, 569 (8th Cir. 1998); *Oberti v. Bd. of Educ.*, 995 F.2d 1204, 1219 (3d Cir. 1993) (emphasizing the school district's relative advantages in IDEA litigation and the IDEA's desire to protect the rights of students and parents); *Fuhrmann v. E. Hanover Bd. of Educ.*, 993 F.2d 1031, 1034-35 (3d Cir. 1993); *Lascari v. Bd. of Educ.*, 560 A.2d 1180, 1181-82, 1188 (N.J. 1989) (discussing a length the policy concerns that warrant an assignment of the burden of proof to the school district); Jonathan A. Beyer, *A Modest Proposal: Mediating IDEA Disputes Without Splitting the Baby*, 28 J.L. & Educ. 37, 41-43 (1999) (outlining the various reasons why parents may experience difficulty in winning IDEA disputes); Steven Marchese, *Putting Square Pegs into Round Holes: Mediation and the Rights of Children with Disabilities Under the IDEA*, 53 RUTGERS L. REV. 333, 343 (2001) (describing some parental disadvantages in IDEA litigation); Sharon C. Streett, *The Individuals with Disabilities Education Act*, 19 U. ARK. LITTLE ROCK L. REV. 35, 41 (1996) (detailing the effect on parents of the limited discovery provisions for due process hearings); Goldman, *supra* note 22, at 281-82 (explaining why some parents choose not to pursue IDEA due process claims).

¹⁹⁵ See 20 U.S.C. §§ 1400(d)(1)(A), 1415; Guernsey, *supra* note 15, at 68, 70-71; Anstaett, *supra* note 23, at 759; Goldman, *supra* note 22, at 280-81; Womack, *supra* note 23, at 192-93; see also *supra* notes 141-147 and accompanying text (presenting competing scholarly proposals responding to the need to tailor the allocation of the burden of proof to the IDEA's purpose and goals).

¹⁹⁶ See 20 U.S.C. §§ 1400(d)(1)(A), 1415; Guernsey, *supra* note 15, at 68, 70-71; Anstaett, *supra* note 23, at 759; Goldman, *supra* note 22, at 280-81; Womack, *supra* note 23, at 192-93.

¹⁹⁷ See McCORMICK, *supra* note 47, § 337.

¹⁹⁸ See *id.*

¹⁹⁹ See *id.* In addition, while it is most natural to place the burden on the party who urges change, it can also be appropriate under certain circumstances to impose the burdens of production or persuasion on a party when the facts with regard to a certain issue lie particularly within that party's knowledge. See *id.* Professor McCormick's treatment of this proposition, however, classifies it as a near-exception because he also notes that a party often must plead and prove matters to which the opposing party has superior access to the relevant proof. See *id.* It may be warranted under certain circumstances to allocate the two evidentiary burdens to different parties or to shift the burdens. See *id.*

other when necessity dictates.²⁰⁰ Due to the affirmative obligations the IDEA imposes on school districts and the absence of a level evidentiary playing field for parents and school districts, a modified burden-shifting scheme is appropriate.²⁰¹ In other words, the IDEA's remedial purpose and substantial fairness considerations warrant a departure from the traditional allocation of the burden of proof to the plaintiff to an alternate scheme.²⁰²

This departure should assume the form of a modified burden-shifting framework that would impose tailored burdens on both school districts and parents.²⁰³ In modifying the traditional allocation, a burden-shifting scheme for IDEA due process hearings should completely separate the burden of proof on substantive and procedural issues.²⁰⁴ Consistent with the IDEA's central emphasis on due process, the statute should assign the burden for procedural issues to the school district.²⁰⁵ The burden for substantive issues, however, should rest with the party challenging the status quo, typically the parent.²⁰⁶

²⁰⁰ See *id.*; Anstaett, *supra* note 23, at 763.

²⁰¹ See *Oberti*, 995 F.2d at 1218-19 (assigning the burden of proof for mainstreaming claims under the IDEA to school districts due to the statute's "express purpose" of protecting disabled children's rights); *Fuhrmann*, 993 F.2d at 1034-35; see also *Lascari*, 560 A.2d at 1181-82, 1188 (allocating the burden of proof under New Jersey state law to the local school district due to the affirmative nature of the obligations the IDEA imposes on schools); *Beyer*, *supra* note 194, at 41-43 (detailing parents' relative disadvantages at IDEA due process hearings); *Marchese*, *supra* note 194, at 343 (same); *Streett*, *supra* note 194, at 41 (same); *Goldman*, *supra* note 22, at 281-82 (same).

²⁰² See *Oberti*, 995 F.2d at 1218-19; *Fuhrmann*, 993 F.2d at 1034-35; see also *Lascari*, 560 A.2d at 1181-82, 1188; *Beyer*, *supra* note 194, at 41-43; *Marchese*, *supra* note 194, at 343; *Streett*, *supra* note 194, at 41; *Goldman*, *supra* note 22, at 281-82.

²⁰³ See *Oberti*, 995 F.2d at 1218-19; *Fuhrmann*, 993 F.2d at 1034-35; see also *Lascari*, 560 A.2d at 1181-82, 1188; *McCORMICK*, *supra* note 47, § 337 (explaining burden-shifting more generally); *Beyer*, *supra* note 194, at 41-43; *Marchese*, *supra* note 194, at 343; *Streett*, *supra* note 194, at 41; *Goldman*, *supra* note 22, at 281-82.

²⁰⁴ See *Guernsey*, *supra* note 15, at 74; *supra* notes 55-70, 89-97 and accompanying text.

²⁰⁵ See *supra* notes 55-70 and accompanying text (outlining the IDEA's procedural safeguards). "Procedural issues" would include any allegations that the school had failed to comply with the IDEA's due process safeguards. See generally 20 U.S.C. § 1415 (2000) (enumerating procedural safeguards). For instance, parents might allege that they had failed to receive written prior notice regarding a proposal to change their student's IEP. See *id.* § 1415(b)(3)(A). Alternatively, parents might allege that the school had failed to provide them with the opportunity to participate in meetings regarding their child's educational placement. See *id.* § 1415(b)(1).

²⁰⁶ See *supra* notes 79-80, 108-123 and accompanying text. "Substantive issues" would include any allegations pertaining to the school's obligation under the IDEA to provide the student with a "free appropriate public education." See 20 U.S.C. § 1400(d)(1)(A). In other words, "substantive issues" would encompass claims related to the sufficiency of the student's IEP. See *id.* Also, in some cases, the school district will assume the position of the challenging party and thus bear the burden for both procedural and substantive issues. See

Separating the burden of proof in this manner would even the playing field in IDEA disputes but would preserve the integrity of traditional evidentiary principles, namely the proposition that the plaintiff must bear the risk of a failure of proof.²⁰⁷

Consequently, the due process hearing would function quite differently, as the school district would bear the burdens of production and persuasion for procedural issues and the parent would bear those burdens for substantive issues.²⁰⁸ Operating under this new allocation, the hearing officer would begin the hearing by examining any procedural claims.²⁰⁹ For these claims, the officer would require the school district to satisfy its burden of production by offering sufficient evidence to support a reasonable inference that it complied with the IDEA's due process safeguards.²¹⁰ In the officer's final analysis, the school district would also bear the burden of persuasion.²¹¹ After the hearing officer addressed the procedural allegations, he or she would continue the hearing by requiring the challenging party to satisfy its burden of production on substantive issues.²¹² At that point, the parents would offer sufficient evidence that the school district failed to meet its statutory obligation under the IDEA to provide their child with a "free

Tatro v. Tex., 703 F.2d 823, 829-30 (5th Cir. 1983). This could occur, for example, when a school seeks to change a previously agreed-to IEP over parental objection. *See id.* at 825.

²⁰⁷ *See* McCORMICK, *supra* note 47, § 337 (explaining that the traditional assignment of the burden of proof is to the party challenging the status quo, namely the plaintiff); WIGMORE, *supra* note 76, § 2485 (describing the traditional practice of assigning the burden of proof to the plaintiff).

²⁰⁸ *See Oberti*, 995 F.2d at 1218-19; *Fuhrmann*, 993 F.2d at 1034-35; *see also Lascari*, 560 A.2d at 1181-82, 1188; *Beyer*, *supra* note 194, at 41-43; *Marchese*, *supra* note 194, at 343; *Streett*, *supra* note 194, at 41; *Goldman*, *supra* note 22, at 281-82.

²⁰⁹ *See Bd. of Educ. v. Rowley*, 458 U.S. 176, 206-07 (1982). Procedural claims would include any allegations related to the IDEA's due process safeguards. *See generally* 20 U.S.C. § 1415 (enumerating procedural safeguards).

²¹⁰ *See generally* 20 U.S.C. § 1415 (enumerating procedural safeguards).

²¹¹ *See generally id.* (enumerating procedural safeguards).

²¹² *See West v. Schaffer*, 377 F.3d 449, 456 (4th Cir. 2004), *cert. granted*, 125 S. Ct. 1300 (2005) (assigning burden of proof to parents as the party suing to enforce a statutory obligation); *Devine v. Indian River County Sch. Bd.*, 249 F.3d 1289, 1291-92 (11th Cir. 2001) (holding that the deference the IDEA accords to the child's educators justifies requiring parents to bear the burden of proof); *Johnson v. Indep. Sch. Dist.*, 921 F.2d 1022, 1026 (10th Cir. 1990); *Doe v. Defendant I*, 898 F.2d 1186, 1191 (6th Cir. 1990) (emphasizing that the IDEA demonstrates a "legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content of an IEP," which justifies assigning the burden of proof to the parent); *Doe v. Brookline Sch. Comm.*, 722 F.2d 910, 917 (1st Cir. 1983); *Tatro*, 703 F.2d at 830 (holding that fairness requires the party challenging the IEP to prove the plan's inadequacy).

appropriate public education."²¹³ The hearing officer would assign the burden of persuasion on substantive issues to the parents.²¹⁴

This allocation would respond to the tension between evidentiary principles, statutory interpretation challenges, and policy considerations that are present in the current circuit split.²¹⁵ Several persuasive rationales support this modified scheme.²¹⁶ First, separating the burden of proof on procedural and substantive issues would be most consistent with Congress's legislative intent and the fact that the IDEA is a remedial statute that imposes affirmative obligations upon school districts.²¹⁷ Second, this allocation would mirror the delicate policy balance that the IDEA struck to establish an effective yet realistic mandate for disabled students.²¹⁸ Finally, this allocation would possess a practical adaptability to the type of fact patterns common to IDEA disputes.²¹⁹

A. Dividing the Burdens Is Most Consistent with Congress's Legislative Intent and the IDEA's Remedial Purpose

An evaluation of the IDEA's case law predecessors, *Pennsylvania Ass'n for Retarded Children v. Pennsylvania (PARC)* and *Mills v. Board of Education*, illuminates Congress's legislative intent.²²⁰ Although Congress modeled much of what became the IDEA from *PARC* and *Mills*, wholly grafting their procedural safeguards in some cases, it failed to replicate the cases' allocation of the burden of proof to the educational agency.²²¹ Thus, given Congress's selective incorporation of some aspects of *PARC* and *Mills'* procedural regimes, it appears that Congress did not intend to duplicate the cases' allocation of the burden of proof to the local agency.²²² In other words, the IDEA evidences that Congress copied some of *PARC* and *Mills'* procedural

²¹³ 20 U.S.C. § 1400(d)(1)(A) (providing that one of the IDEA's purposes is to provide disabled students with a FAPE); see *supra* notes 79–80, 108–123 and accompanying text.

²¹⁴ See *Weast*, 377 F.3d at 456; *Devine*, 249 F.3d at 1291–92; *Johnson*, 921 F.2d at 1026; *Doe v. Defendant I*, 898 F.2d at 1191; *Doe v. Brookline Sch. Comm.*, 722 F.2d at 917; *Tatro*, 703 F.2d at 830.

²¹⁵ See *supra* notes 81–87 and accompanying text.

²¹⁶ See *infra* notes 220–272 and accompanying text.

²¹⁷ See *infra* notes 220–235 and accompanying text.

²¹⁸ See *infra* notes 236–265 and accompanying text.

²¹⁹ See *infra* notes 266–272 and accompanying text.

²²⁰ See *Mills v. Bd. of Educ.*, 348 F. Supp. 866, 866 (D.D.C. 1972); *Pa. Ass'n for Retarded Children v. Pennsylvania (PARC)*, 343 F. Supp. 279, 279 (E.D. Pa. 1972).

²²¹ See 20 U.S.C. § 1415 (2000) (outlining procedural safeguards); *Mills*, 348 F. Supp. at 880–83; *PARC*, 343 F. Supp. at 305.

²²² See 20 U.S.C. § 1415 (outlining procedural safeguards); *Weast*, 377 F.3d at 454–55; *Mills*, 348 F. Supp. at 880–83; *PARC*, 343 F. Supp. at 305.

safeguards, but did not do so for others.²²³ Thus, by its silence regarding the burden of proof, Congress would appear to have defaulted to the traditional allocation.²²⁴ This would indicate that the plaintiff should assume a share of the responsibility for producing evidence and persuading the fact finder.²²⁵

As the courts that adhere to a traditional allocation have acknowledged, the statutory framework of the IDEA itself implies that a challenging party should bear much of the responsibility for proving its claims at the due process hearing.²²⁶ The IDEA establishes presumptions in favor of the status quo in several ways.²²⁷ Because the IEP is the sole mechanism that provides disabled students with a "free appropriate public education," the IEP's centrality endows the plan with a measure of presumed validity.²²⁸ At the same time, the IDEA contains little in the way of substantive requirements, suggesting a deference to local educators that is not overridden by the statute's procedural safeguards.²²⁹ Finally, the IDEA's stay-put provision, which requires that students remain in their current educational placements during any appeals, further reflects the IDEA's subscription to the norm that the IEP is presumptively valid.²³⁰

Although the IDEA is silent as to who bears the burden of proof at the due process hearing, the statute does specify its remedial goals clearly and imposes affirmative obligations upon school districts.²³¹ In short, the IDEA consists of a rather vague affirmative obligation—the provision of a "free appropriate public education"—that is accomplished by the enforcement of an elaborate system of procedural safe-

²²³ See 20 U.S.C. § 1415 (outlining procedural safeguards); *Weast*, 377 F.3d at 454–55; *Mills*, 348 F. Supp. at 880–83; *PARC*, 343 F. Supp. at 305.

²²⁴ See 20 U.S.C. § 1415 (outlining procedural safeguards); *Weast*, 377 F.3d at 454–55; *Mills*, 348 F. Supp. at 880–83; *PARC*, 343 F. Supp. at 305.

²²⁵ See 20 U.S.C. § 1415 (outlining procedural safeguards); *Weast*, 377 F.3d at 454–55; *Mills*, 348 F. Supp. at 880–83; *PARC*, 343 F. Supp. at 305.

²²⁶ See *Weast*, 377 F.3d at 456; *Renner v. Bd. of Educ.*, 185 F.3d 635, 642 (6th Cir. 1999); *Doe v. Bd. of Educ.*, 9 F.3d 455, 458 (6th Cir. 1993); *Christopher M. v. Corpus Christi Indep. Sch. Dist.*, 933 F.2d 1285, 1290–91 (5th Cir. 1991); *Johnson*, 921 F.2d at 1026; *Cordrey v. Euckert*, 917 F.2d 1460, 1469–70 (6th Cir. 1990); *Doe v. Defendant I*, 898 F.2d at 1191; *Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ.*, 790 F.2d 1153, 1158 (5th Cir. 1986); *Doe v. Brookline Sch. Comm.*, 722 F.2d at 917; *Tatro*, 703 F.2d at 830.

²²⁷ See *infra* notes 228–230 and accompanying text.

²²⁸ See 20 U.S.C. § 1414(d) (2000); *Tatro*, 703 F.2d at 830.

²²⁹ See *Rowley*, 458 U.S. at 189, 195, 208; *Guernsey*, *supra* note 15, at 69–72.

²³⁰ See *Doe v. Brookline Sch. Comm.*, 722 F.2d at 917.

²³¹ See 20 U.S.C. §§ 1400(d), 1414(d), 1415; *supra* notes 228–230 and accompanying text.

guards.²³² Thus, the IDEA reflects the presumption that so long as its procedures are followed by participating schools, the end-product will be a plan that provides for the student's needs and thus accomplishes the statute's remedial goal.²³³ Consequently, the IDEA places a premium on due process that justifies a departure from the traditional allocation of the burden of proof to a modified burden-shifting approach.²³⁴ Because the IDEA's provisions so strongly emphasize the need for procedural compliance, it is appropriate to assign the burdens of production and persuasion on procedural issues to the school district.²³⁵

B. Competing Fairness Considerations Call for Splitting the Burden Rather Than Assigning It Completely to the School District

A modified burden-shifting scheme is also responsive to the reality that there is not a level evidentiary playing field between parents and school districts.²³⁶ Requiring the school district to produce evidence and ultimately to prove its own procedural compliance acknowledges the practical realities of litigation under the IDEA.²³⁷ As even the courts that have allocated the burden of proof entirely to the parent have observed, school districts can easily out-manuever parents in IDEA disputes.²³⁸ Nonetheless, although school districts undoubtedly remain the more sophisticated party in IDEA disputes, they are also subject to substantial policy pressures in balancing their

²³² See 20 U.S.C. §§ 1400(d), 1414(d), 1415; *supra* notes 14-16, 55-75 and accompanying text.

²³³ See *Rowley*, 458 U.S. at 206; see also 20 U.S.C. § 1415 (enumerating procedural safeguards).

²³⁴ See *Rowley*, 458 U.S. at 206; see also 20 U.S.C. § 1415 (enumerating procedural safeguards).

²³⁵ See *Rowley*, 458 U.S. at 206; see also 20 U.S.C. § 1415 (enumerating procedural safeguards).

²³⁶ See *Walczak*, 142 F.3d at 122; *E.S.*, 135 F.3d at 569; *Oberti*, 995 F.2d at 1219; *Fuhrmann*, 993 F.2d at 1034-35; *Lascari*, 560 A.2d at 1181-82, 1188; *Beyer*, *supra* note 194, at 41-43; *Marchese*, *supra* note 194, at 343; *Streett*, *supra* note 194, at 41; *Goldman*, *supra* note 22, at 281-82.

²³⁷ See *Walczak*, 142 F.3d at 122; *E.S.*, 135 F.3d at 569; *Oberti*, 995 F.2d at 1219; *Fuhrmann*, 993 F.2d at 1034-35; *Lascari*, 560 A.2d at 1181-82, 1188; *Beyer*, *supra* note 194, at 41-43; *Marchese*, *supra* note 194, at 343; *Streett*, *supra* note 194, at 41; *Goldman*, *supra* note 22, at 281-82.

²³⁸ See *Walczak*, 142 F.3d at 122; *E.S.*, 135 F.3d at 569; *Oberti*, 995 F.2d at 1219; *Fuhrmann*, 993 F.2d at 1034-35; *Lascari*, 560 A.2d at 1181-82, 1188; *Beyer*, *supra* note 194, at 41-43; *Marchese*, *supra* note 194, at 343; *Streett*, *supra* note 194, at 41; *Goldman*, *supra* note 22, at 281-82.

affirmative obligations to all their students.²³⁹ Due process hearings already impose high costs that caution against allocating the burden of proof in its entirety to the school district.²⁴⁰

Thus, a modified scheme would first compensate for some of the IDEA's procedural deficiencies, evening the playing field in the parent's favor.²⁴¹ Although the IDEA's procedural safeguards aspire to produce parity between school districts and parents, it does not exist.²⁴² The IDEA entitles parents to receive a "procedural safeguards notice" containing a plain language explanation of their rights upon the student's initial referral for evaluation, but such a notice hardly equips a parent to handle the intricacies of the hearing process.²⁴³ Parents may be ineffective in challenging an IEP for many reasons.²⁴⁴

First, though the IDEA mandates parental access to their child's educational records and provides for the disclosure of any evaluations five days before the hearing, these provisions do not possess the rigor of the discovery process involved in civil litigation.²⁴⁵ One difficulty here is that the school district typically exerts direct control over those records, which are often only helpful in proving procedural violations.²⁴⁶ Additionally, school districts control the witnesses that would be critical to a successful hearing.²⁴⁷ Second, parents often lack

²³⁹ See *Walczak*, 142 F.3d at 122; *E.S.*, 135 F.3d at 569; *Oberti*, 995 F.2d at 1219; *Fuhrmann*, 993 F.2d at 1034-35; *Lascari*, 560 A.2d at 1181-82, 1188; *Beyer*, *supra* note 194, at 41-43; *Marchese*, *supra* note 194, at 343; *Streett*, *supra* note 194, at 41; *Goldman*, *supra* note 22, at 281-82.

²⁴⁰ See *Walczak*, 142 F.3d at 122; *E.S.*, 135 F.3d at 569; *Oberti*, 995 F.2d at 1219; *Fuhrmann*, 993 F.2d at 1034-35; *Lascari*, 560 A.2d at 1181-82, 1188; *Beyer*, *supra* note 194, at 41-43; *Marchese*, *supra* note 194, at 343; *Streett*, *supra* note 194, at 41; *Goldman*, *supra* note 22, at 281-82.

²⁴¹ See *Walczak*, 142 F.3d at 122; *E.S.*, 135 F.3d at 569; *Oberti*, 995 F.2d at 1219; *Fuhrmann*, 993 F.2d at 1034-35; *Lascari*, 560 A.2d at 1181-82, 1188; *Beyer*, *supra* note 194, at 41-43; *Marchese*, *supra* note 194, at 343; *Streett*, *supra* note 194, at 41; *Goldman*, *supra* note 22, at 281-82.

²⁴² See *Walczak*, 142 F.3d at 122; *E.S.*, 135 F.3d at 569; *Oberti*, 995 F.2d at 1219; *Fuhrmann*, 993 F.2d at 1034-35; *Lascari*, 560 A.2d at 1181-82, 1188; *Beyer*, *supra* note 194, at 41-43; *Marchese*, *supra* note 194, at 343; *Streett*, *supra* note 194, at 41; *Goldman*, *supra* note 22, at 281-82.

²⁴³ See 20 U.S.C. § 1415(d) (2000); see also *Goldman*, *supra* note 22, at 281 (explaining that although the IDEA provides parents with various rights to information, parents may still be unable to obtain the facts they need to succeed at a hearing).

²⁴⁴ See *Beyer*, *supra* note 194, at 41-43; *Goldman*, *supra* note 22, at 281-82; see also *infra* notes 245-255 and accompanying text (outlining the difficulties of IEP litigation from the parent's perspective).

²⁴⁵ See 20 U.S.C. § 1415(f) (2); *Guernsey*, *supra* note 15, at 76; *Streett*, *supra* note 194, at 41.

²⁴⁶ See *Guernsey*, *supra* note 15, at 76; *Streett*, *supra* note 194, at 41.

²⁴⁷ See 20 U.S.C. § 1415(f) (2); *Guernsey*, *supra* note 15, at 76; *Streett*, *supra* note 194, at 41.

sufficient expertise or resources to critique the specific failures of the IEP.²⁴⁸ It is often difficult for them to identify alternative educational strategies or placements that would better suit their child, and the IEP process relies extensively on technical jargon to discuss the child's development.²⁴⁹ The IDEA's due process hearings are frequently won on technicalities that require a mastery of this language.²⁵⁰

Third, a due process hearing requires financial resources.²⁵¹ Retaining an attorney and hiring experts represent substantial costs, despite the IDEA's provisions that award attorney's fees to prevailing parents and require school districts to inform parents of low-cost legal and advocacy services.²⁵² Fourth, the sheer length of the appeals process deters some parents, especially when a due process challenge can endure for several months or even years.²⁵³ The due process system also imposes emotional pressures on parents, including the discomfort that can result when they must challenge educators with whom they have worked.²⁵⁴ A related problem that parents often encounter is the perception among school personnel that they cannot be trusted to be "objective" about their child's education.²⁵⁵

At the same time, due process hearings produce strong policy ramifications for school districts that the existing federal circuit courts of appeals' case law and scholarly literature do not fully elaborate.²⁵⁶ Although many argue that allocating the burden of proof to the challenging party might result in assigning parents a burden they are unequipped to meet, allocating the entire burden to school districts would similarly impose a heavy burden on the school districts.²⁵⁷ Due process hearings are extremely costly to school districts, and they divert scarce resources from other educational expenditures.²⁵⁸ Each new IDEA claim represents a commitment of additional resources school districts must divert to hire attorneys and experts to defend their placements, adding to the already substantial education costs of

²⁴⁸ See Guernsey, *supra* note 15, at 76; Streett, *supra* note 194, at 41; Goldman, *supra* note 22, at 281. Steven Marchese states that "these parents may be unable to understand their children's placements, let alone articulate different ones." Marchese, *supra* note 194, at 343.

²⁴⁹ See Marchese, *supra* note 194, at 343.

²⁵⁰ See *id.* at 343-44.

²⁵¹ Beyer, *supra* note 194, at 41; Goldman, *supra* note 22, at 281.

²⁵² 20 U.S.C. § 1415(i)(3)(B); Beyer, *supra* note 194, at 41; Goldman, *supra* note 22, at 281.

²⁵³ Beyer, *supra* note 194, at 41-42; Goldman, *supra* note 22, at 281-82.

²⁵⁴ Beyer, *supra* note 194, at 41-42.

²⁵⁵ Marchese, *supra* note 194, at 343-44.

²⁵⁶ See *infra* notes 257-265 and accompanying text.

²⁵⁷ See Beyer, *supra* note 194, at 42; Morgan, *supra* note 5, at 287.

²⁵⁸ See Morgan, *supra* note 5, at 287.

students with disabilities.²⁵⁹ Such costs limit the pool of resources available for substantive rather than procedural expenditures.²⁶⁰

In short, if the hearing process becomes too burdensome for school districts, it might diminish rather than increase school districts' ability to meet their affirmative statutory obligations.²⁶¹ The stakes for school districts at due process hearings can be extremely high.²⁶² Current law entitles prevailing parents to private tuition reimbursement.²⁶³ Essentially, parents can reject a public school's IEP, place their student in a private school, and successfully require the public school system to finance their child's education if a court ultimately determines that the IEP was not designed to provide the student with a "free appropriate public education."²⁶⁴ Thus, although some suggest that allocating the entire burden of proof to school districts is necessary to ensure their procedural compliance, school districts already have a strong financial incentive to meet their statutory obligations, both procedural and substantive.²⁶⁵

C. *Dividing the Burdens Is a Better Fit for the Common IDEA Fact Pattern*

Finally, a modified allocation would also incorporate enough flexibility to allow it to be adapted to the fact patterns that are common to IDEA disputes.²⁶⁶ A successful allocation of the burden of proof at due process hearings under the IDEA must be tailored to meet the statute's unique challenges, rather than imported from an-

²⁵⁹ Beyer, *supra* note 194, at 42.

²⁶⁰ See Beyer, *supra* note 194, at 42; Morgan, *supra* note 5, at 287.

²⁶¹ See *supra* notes 256–260 and accompanying text.

²⁶² See *infra* notes 264–265 and accompanying text.

²⁶³ See *Burlington*, 471 U.S. at 369–74.

²⁶⁴ See 20 U.S.C. § 1414(d) (2000); *Burlington*, 471 U.S. at 369–74.

²⁶⁵ See 20 U.S.C. § 1414(d); *Id.*; see *Oberti*, 995 F.2d at 1207–08, 1220–24.

²⁶⁶ See *Weast*, 377 F.3d at 450–52. In *Weast*, for example, the parents of a child with Attention Deficit Hyperactivity Disorder and learning disabilities had their child evaluated by a public middle school to determine his eligibility for special education services under the IDEA. *Id.* at 450. The school determined that the student's disabilities qualified and then prepared an IEP. *Id.* at 450–51. Dissatisfied with the terms of the proposed plan, the parents enrolled the student in a private school and then sought tuition reimbursement by bringing a claim in federal court alleging that the proposed IEP was not designed to provide the child with a FAPE. *Id.* Thus, the central dispute between the parties did not concern the child's eligibility; instead, its focus was whether the proposed IEP satisfied the IDEA's FAPE mandate. *Id.*; see *Oberti*, 995 F.2d at 1207–08, 1220–24 (addressing whether the school complied with the IDEA when it relocated the student to a segregated special education class, not whether student's disability qualified for services); *Tatro*, 703 F.2d at 825, 830 (addressing whether the IDEA required the school to provide related medical services, not whether the student's disability was eligible).

other statutory source, such as civil rights legislation or even other disability mandates.²⁶⁷ Under the burden-shifting schemes common to other disability statutes, once the plaintiff has established that his or her disability meets the statutory definition, the entire burden then shifts to the defendant to prove that it accommodated that disability.²⁶⁸ On a practical level, this approach would be ill-suited to balancing children's rights and school districts' needs, mainly because in most due process hearings the parties concede that the student's disability qualifies for assistance under the IDEA.²⁶⁹ Instead, the focal point of most hearings concerns whether the school's IEP is designed to provide the disabled student with a "free appropriate public education."²⁷⁰ Thus, if the burden shifted to the school district once the parent established that the student's disability qualified for assistance, the burden of proof would almost always rest with the school district.²⁷¹ For this reason, no substantive reallocation of the burden of proof would actually result.²⁷²

CONCLUSION

The conflict of authority regarding the proper allocation of the burden of proof at initial due process hearings under the IDEA must be resolved in order for the IDEA to serve as an effective mandate for disabled students and their parents. Whether a new allocation is produced through Supreme Court review or by Congress's amendment of the IDEA, a modified burden-shifting scheme would best mirror the IDEA's delicate balancing of the rights of disabled children and

²⁶⁷ See Guernsey, *supra* note 15, at 76-77; Anstaett, *supra* note 23, at 771; Recent Case, *supra* note 141, at 1083-84.

²⁶⁸ See Guernsey, *supra* note 15, at 76-77; Anstaett, *supra* note 23, at 771; Recent Case, *supra* note 141, at 1083-84.

²⁶⁹ See 20 U.S.C. § 1401(3)(A) (defining "child with a disability" broadly to include mental retardation; hearing, speech, language, orthopedic, visual, or other health impairments; serious emotional disturbances; autism; and specific learning disabilities).

²⁷⁰ See, e.g., *E.S.*, 135 F.3d at 567-68, 569 (addressing whether the school district was required to provide one-on-one tutoring using a specific instructional method in order to provide student with a FAPE); *Alamo Heights*, 790 F.2d at 1155-58 (indicating that issue was not whether student's disability qualified under the IDEA, but whether school district was required to provide summer services to handicapped child in order to satisfy the FAPE mandate).

²⁷¹ See 20 U.S.C. § 1401(3)(A); *Weast*, 377 F.3d at 450-52; *E.S.*, 135 F.3d at 567-68, 569; *Oberti*, 995 F.2d at 1207-08, 1220-24; *Alamo Heights*, 790 F.2d at 1155-58; *Tatro*, 703 F.2d at 825, 830.

²⁷² See McCORMICK, *supra* note 47, § 337 (detailing the traditional allocation of the burden of proof to the plaintiff); WIGMORE, *supra* note 76, § 2485 (same).

the need to impose a realistic mandate on school districts. Consistent with traditional evidentiary principles, the party challenging the status quo should bear the burden of proof on all substantive issues. On procedural issues, however, the school districts should bear the burden of proof to better respond to the IDEA's remedial purpose and its premium on procedural compliance.

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