SUPREME COURT OF THE UNITED STATES

No. 04–698

BRIAN SCHAFFER, A MINOR, BY HIS PARENTS AND NEXT FRIENDS, JOCELYN AND MARTIN SCHAFFER, ET AL., PETITIONERS *v.* JERRY WEAST, SUPERINTENDENT, MONTGOMERY COUNTY PUBLIC SCHOOLS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

[November 14, 2005]

JUSTICE GINSBURG, dissenting.

When the legislature is silent on the burden of proof, courts ordinarily allocate the burden to the party initiating the proceeding and seeking relief. As the Fourth Circuit recognized, however, "other factors," prime among them "policy considerations, convenience, and fairness," may warrant a different allocation. 377 F. 3d 449, 452 (2004) (citing 2 J. Strong, McCormick on Evidence §337, p. 415 (5th ed. 1999) (allocation of proof burden "will depend upon the weight . . . given to any one or more of several factors, including: . . . special policy considerations . . .[,] convenience, . . . [and] fairness")); see also 9 J. Wigmore, Evidence §2486, p. 291 (J. Chadbourn rev. ed. 1981) (assigning proof burden presents "a question of policy and fairness based on experience in the different situations"). The Court has followed the same counsel. See *Alaska Dept. of Environmental Conservation* v. *EPA,* 540 U. S. 461, 494, n. 17 (2004) ("No 'single principle or rule . . . solve[s] all cases and afford[s] a general test for ascertaining the incidence' of proof burdens." (quoting Wigmore, *supra*, §2486, p. 288; emphasis deleted)). For reasons well stated by Circuit Judge Luttig, dissenting in the Court of Ap-

peals, 377 F. 3d, at 456–459, I am persuaded that "policy considerations, convenience, and fairness" call for assigning the burden of proof to the school district in this case.

The Individuals with Disabilities Education Act (IDEA), 20 U. S. C. §1400 *et seq.*, was designed to overcome the pattern of disregard and neglect disabled children historically encountered in seeking access to public education. See §1400(c)(2) (congressional findings); S. Rep. No. 94–168, pp. 6, 8–9 (1975); *Mills* v. *Board of Ed. of District of Columbia*, 348 F. Supp. 866 (DC 1972); *Pennsylvania Assn. for Retarded Children* v. *Pennsylvania*, 334 F. Supp. 1257 (ED Pa. 1971), and 343 F. Supp. 279 (ED Pa. 1972). Under typical civil rights and social welfare legislation, the complaining party must allege and prove discrimination or qualification for statutory benefits. See, *e.g.*, *St. Mary's Honor Center* v. *Hicks,* 509 U. S. 502, 511 (1993) (Title VII of the Civil Rights Act of 1964, 42 U. S. C. §2000e *et seq.*); *Director, Office of Workers' Compensation Programs* v. *Greenwich Collieries,* 512 U. S. 267, 270 (1994) (Black Lung Benefits Act, 30 U. S. C. §901 *et seq.*). The IDEA is atypical in this respect: It casts an affirmative, beneficiary-specific obligation on providers of public education. School districts are charged with responsibility to offer to each disabled child an individualized education program (IEP) suitable to the child's special needs. 20 U. S. C. §§1400(d)(1), 1412(a)(4), 1414(d). The proponent of the IEP, it seems to me, is properly called upon to demonstrate its adequacy.

Familiar with the full range of education facilities in the area, and informed by "their experiences with other, similarly-disabled children," 377 F. 3d, at 458 (Luttig, J., dissenting), "the school district is . . . in a far better position to demonstrate that it has fulfilled [its statutory] obligation than the disabled student's parents are in to show that the school district has failed to do so," *id.*, at 457. Accord *Oberti* v. *Board of Ed. of Borough of Clemen-*

ton School Dist., 995 F. 2d 1204, 1219 (CA3 1993) ("In practical terms, the school has an advantage when a dispute arises under the Act: the school has better access to relevant information, greater control over the potentially more persuasive witnesses (those who have been directly involved with the child's education), and greater overall educational expertise than the parents."); *Lascari* v. *Board of Ed. of Ramapo Indian Hills Regional High School Dist.*, 116 N. J. 30, 45–46, 560 A. 2d 1180, 1188–1189 (1989) (in view of the school district's "better access to relevant information," parent's obligation "should be merely to place in issue the appropriateness of the IEP. The school board should then bear the burden of proving that the IEP was appropriate. In reaching that result, we have sought to implement the intent of the statutory and regulatory schemes.").[1]

Understandably, school districts striving to balance their budgets, if "[l]eft to [their] own devices," will favor educational options that enable them to conserve resources. *Deal* v. *Hamilton County Bd. of Ed.*, 392 F. 3d 840, 864–865 (CA6 2004). Saddled with a proof burden in administrative "due process" hearings, parents are likely to find a district-proposed IEP "resistant to challenge." 377 F. 3d, at 459 (Luttig, J., dissenting). Placing the burden on the district to show that its plan measures up to the statutorily mandated "free appropriate public education," 20 U. S. C. §1400(d)(1)(A), will strengthen school

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[1] The Court suggests that the IDEA's stay-put provision, 20 U. S. C. §1415(j), supports placement of the burden of persuasion on the parents. *Ante*, at 10. The stay-put provision, however, merely preserves the status quo. It would work to the advantage of the child and the parents when the school seeks to cut services offered under a previously established IEP. True, Congress did not require that "a child be given the educational placement that a parent requested during a dispute." *Ibid*. But neither did Congress require that the IEP advanced by the school district go into effect during the pendency of a dispute.

officials' resolve to choose a course genuinely tailored to the child's individual needs.[2]

The Court acknowledges that "[a]ssigning the burden of persuasion to school districts might encourage schools to put more resources into preparing IEPs." *Ante*, at 9. Curiously, the Court next suggests that resources spent on developing IEPs rank as "administrative expenditures" not as expenditures for "educational services." *Ibid.* Costs entailed in the preparation of suitable IEPs, however, are the very expenditures necessary to ensure each child covered by IDEA access to a free appropriate education. These outlays surely relate to "educational services." Indeed, a carefully designed IEP may ward off disputes productive of large administrative or litigation expenses.

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

Notably, nine States, as friends of the Court, have urged that placement of the burden of persuasion on the school district best comports with IDEA's aim. See Brief for

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[2] The Court observes that decisions placing "the *entire* burden of persuasion on the opposing party at the *outset* of a proceeding . . . are extremely rare." *Ante*, at 8. In cases of this order, however, the persuasion burden is indivisible. It must be borne *entirely* by one side or the other: Either the school district must establish the adequacy of the IEP it has proposed or the parents must demonstrate the plan's inadequacy.

Virginia et al. as *Amici Curiae*. If allocating the burden to school districts would saddle school systems with inordinate costs, it is doubtful that these States would have filed in favor of petitioners. Cf. Brief for United States as *Amicus Curiae* Supporting Appellees Urging Affirmance in 00–1471 (CA4), p. 12 ("Having to carry the burden of proof regarding the adequacy of its proposed IEP . . . should not substantially increase the workload for the school.").[3]

One can demur to the Fourth Circuit's observation that courts "do not automatically assign the burden of proof to the side with the bigger guns," 377 F. 3d, at 453, for no such reflexive action is at issue here. It bears emphasis that "the vast majority of parents whose children require the benefits and protections provided in the IDEA" lack "knowledg[e] about the educational resources available to their [child]" and the "sophisticat[ion]" to mount an effective case against a district-proposed IEP. *Id.*, at 458 (Luttig, J., dissenting); cf. 20 U. S. C. §1400(c)(7)–(10). See generally M. Wagner, C. Marder, J. Blackorby, & D. Cardoso, The Children We Serve: The Demographic Characteristics of Elementary and Middle School Students with Disabilities and their Households (Sept. 2002), available at http://www.seels.net/designdocs/SEELS_Children_We_Serve_Report.pdf (as visited Nov. 8, 2005, and available in Clerk of Court's case file). In this setting, "the party with the 'bigger guns' also has better access to information, greater expertise, and an affirmative obligation to provide the contested services." 377 F. 3d, at 458 (Luttig, J., dissenting). Policy considerations, convenience, and fairness, I think it plain, point in the same direction. Their collective weight warrants a rule requiring a school district, in "due process" hearings, to explain persuasively

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[3] Before the Fourth Circuit, the United States filed in favor of the Schaffers; in this Court, the United States supported Montgomery County.

why its proposed IEP satisfies IDEA's standards. *Ibid.* I would therefore reverse the judgment of the Fourth Circuit.