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Who Has the Burden of Persuasion in Impartial Hearings Under the Individuals with Disabilities Education Act?

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In mid-May 2012, the parents of an Illinois tenth-grader with autism unilaterally placed the child in a residential facility in Utah after 1) their repeated expressions of dissatisfaction with the mainstream services that their Illinois school district had provided, and 2) the child's emergency hospitalization for attempted suicide.[1] They filed for an impartial hearing under the Individuals with Disabilities Education Act (IDEA)[2] and the corollary state law in Illinois,[3] seeking reimbursement for the costs of the

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[1] St. Charles Sch. Dist., Case No. 2013-0107 (Mar. 30, 2013), http://perma.cc/B596-LQDV.

[2] 20 U.S.C. §§ 1400 *et seq.* (2012).

[3] 105 ILL. COMP. STAT. 5/14–1.01 *et seq.* (2012).

residential placement along with other relief.[4] In a not atypical decision, the hearing officer set forth the burden of proof, first by referencing the Supreme Court's holding that the burden of persuasion lies with the filing party but then concluding that Illinois law has engrafted "a heightened burden" on the school district.[5] Applying these standards to his factual findings, the hearing officer concluded that the district failed to meet its burden, including proving that its evaluation had been appropriate and that the parents had "substantially met their required burden of proof," thus awarding the requested reimbursement as well as other relief, including compensatory education.[6] This decision rather readily illustrates and stimulates the need to understand the role of burden of proof in impartial hearing officers' decisions, which is the first tier of adjudication under this much-litigated statute.

The Individuals with Disabilities Education Act (IDEA)[7] dates back to 1975, when Congress passed the first version of this special education funding legislation.[8] Throughout the subsequent history of amendments,[9] the central obligation under IDEA is the provision for "free appropriate public education" (FAPE)[10] via an individualized education program

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[4] The parents also requested revisions in the individualized education program for the child and prospective funding of the residential placement. St. Charles Sch. Dist., Case No. 2013-0107 (Mar. 30, 2013), http://perma.cc/5FNC-YYFD.

[5] *Id.* at *21.

[6] *Id.* at *23.

[7] 20 U.S.C. §§ 1400 *et seq*. (2012). For the related regulations, see 34 C.F.R. §§ 300.1 *et seq*. (2012).

[8] The original name was the Education for All Handicapped Children's Act, also known as the Education of the Handicapped Act and Pub. L. No. 94–142. For an overview of its original history, see, e.g., DIXIE S. HUEFNER & CYNTHIA M. HERR, NAVIGATING SPECIAL EDUCATION LAW AND POLICY 43–45 (2012).

[9] The successive reauthorizations included the 1986 amendments of the EHA, also known as the Handicapped Children's Protection Act, Pub. L. No. 99 § 457, 100 Stat. 1145 (1986) (amended 1990), which included attorneys' fees for prevailing parents; the 1990 amendments, Education of the Handicapped Act Amendments of 1990, Pub. L. No. 101 § 476, 104 Stat. 1103 (1990) (amended 1991), which provided, *inter alia*, the IDEA as the new name for the original Education of the Handicapped Act; the 1997 amendments, Individuals with Disabilities Act Amendments of 1997, Pub. L. No. 105 § 17, 111 Stat. 37 (1997) (amended 2004), which included major provisions for discipline of students with disabilities; and the most recent 2004 amendments, Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108, § 446, 118 Stat. 2647 (2004), which included fine-tuning to several provisions of the Act. *See, e.g.*, MITCHELL YELL, THE LAW AND SPECIAL EDUCATION 53–60 (2012).

[10] 20 U.S.C. § 1401(9) (2012). For this metaphor to characterize FAPE, *see, e.g.*, Systema v. Acad. Sch. Dist. No. 11, 538 F.3d 1306, 1312 (10th Cir. 2008) ("The FAPE concept is the central pillar of the IDEA statutory structure."); *cf*. Petit v. United States, 675 F.3d 769, 772 (D.C. Cir. 2012) ("The cornerstone of the Act is that schools provide children with a '[FAPE].'"); M.A. v. State-Operated Sch. Dist., 344 F.3d 335, 338 (3d Cir. 2005) ("The cornerstone … under the IDEA is the substantive right of disabled children to a '[FAPE]'").

(IEP)[11] for each student with a disability.[12] The IDEA provides that the delivery of FAPE will be in the least restrictive environment (LRE).[13] The adjudicative dispute resolution system under IDEA starts with an impartial due process hearing, continues by offering states the option of a second review officer tier, and then provides concurrent jurisdiction for judicial review via state and federal courts.[14] Litigation under the IDEA has been the major growth area in the case law specific to K-12 education.[15] Major overlapping segments of this frequent litigation include FAPE and the principal remedies for denials of this central obligation[16]—tuition reimbursement[17] and compensatory education.[18]

Burden of proof is one of the adjudicative issues in special education law.[19] This burden can be significant in terms of the outcome of the impartial hearing, which is the first and—for many litigants—the last step

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[11] 20 U.S.C. §§ 1401(14), 1414(d) (2012). Because the IEP is the operational vehicle for FAPE, courts often characterize it with the same or similar metaphors. *See, e.g.*, Honig v. Doe, 484 U.S. 305, 311 (1988) (characterizing the IEP as "the primary vehicle" of the IDEA); White v. Ascension Parish Sch. Bd., 343 F.3d 373, 378 (5th Cir. 2003) ("The cornerstone of the IDEA is the IEP"); Hines v. Tullahoma City Sch. Sys., 156 F.3d 1229 at *2 (6th Cir. 1998) ("The IEP is the cornerstone of the Act").

[12] 20 U.S.C. §§ 1401(3), 1412(a)(1)(A) (2012).

[13] *Id.* § 1412(a)(5).

[14] *Id.* §§ 1415(i)–(l). The trend at the administrative level of this hierarchy has been a marked increase in single tier systems of full-time administrative law judges, although there continues to be marked variety among the states. *See, e.g.*, Perry A. Zirkel et al., *The Creeping Judicialization of Special Education Hearings: An Exploratory Study*, 27 J. NAT'L ASS'N ADMIN. L. JUDICIARY 27 (2007).

[15] *See, e.g.*, Perry A. Zirkel & Brent L. Johnson, *The "Explosion" in Education Litigation: An Update*, 265 EDUC. L. REP. 1 (2011). For a broad sampling of the published court decisions under the IDEA, see Perry A. Zirkel, *Case law under the IDEA*, *in* IDEA: A HANDY DESK REFERENCE TO THE LAW, REGULATIONS, AND INDICATORS 669–751 (2012).

[16] Other categories include eligibility, LRE, related services, discipline, and attorneys' fees. *See* Zirkel, *supra* note 15.

[17] 20 U.S.C. § 1412(a)(10)(C)(ii); 34 C.F.R. § 300.148(c); Florence Cnty. Sch. Dist. Four v. Carter, 510 U.S. 7 (1993); Sch. Comm. of Burlington v. Dep't of Educ. of Mass., 471 U.S. 359 (1st Cir. 1985). For an empirical analysis of the tuition reimbursement case law, *see* Thomas Mayes & Perry A. Zirkel, *Special Education Tuition Reimbursement Claims: An Empirical Analysis*, 22 REMEDIAL & SPECIAL EDUC. 350 (2001).

[18] The statute does not expressly mention compensatory education, but the case law has clearly established it under the Act's grant of broad equitable authority to adjudicators. *See, e.g.*, Perry A. Zirkel, *Compensatory Education: An Annotated Update of the Law*, 251 EDUC. L. REP. 501 (2010). For the analogy-based relationship of compensatory education with tuition reimbursement, *see* Perry Zirkel, *Compensatory Education Under the Individuals with Disabilities Education Act: The Third Circuit's Partially Mis-Leading Position*, 110 PENN. ST. L. REV. 879 (2006).

[19] For the effect on judicial review, compare, N.M. v. Cent. Tork Sch. Dist., 55 IDELR 229 (M.D. Pa. 2010), *rev'd* 55 IDELR 260 (M.D. Pa. 2010) with Bd. of Educ. of Evanston-Skokie Cmty. Consol. Sch. Dist., 61 IDELR 130 (N.D. Ill. 2013). Other such litigation practice issues include exhaustion, statute of limitations, stay-put, finality, additional evidence, attorneys' fees, expert witness costs, and mootness. The texts in special education law provide limited and varying attention to such issues. *See, e.g.*, THOMAS GUERNSEY & KATHE KLARE, SPECIAL EDUCATION LAW 187–277 (2004); MARK WEBER, ET AL., SPECIAL EDUCATION LAW: CASES & MATERIALS 412–56 (2004).

in adjudicating special education disputes under the Individuals with Disabilities Education Act (IDEA) and its corollary state laws.[20] Within the generic phrase "burden of proof," it is the burden of persuasion—as distinguished from the burden of production[21]—that is of particular interest with regards to the outcome, rather than process, of the hearing.[22] The purpose of this Article is to provide a current snapshot of the state of the law with regard to the burden of persuasion under the IDEA. Part I provides an overview of the Supreme Court's landmark decision in *Schaffer v. Weast*.[23] Part II identifies the major groupings of state special education laws as to whether and how they address burden of persuasion in the current post-*Schaffer* era, with special attention to the connected case law. Part III recaps the resulting unsettled issues, with specific recommendations for their resolution. Finally, Part IV adds overall recommendations.

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[20] *See, e.g.*, Perry A. Zirkel & Anastasia D'Angelo, *Special Education Case Law: An Empirical Trends Analysis*, 161 EDUC. L. REP. 731 (2002) (tabulating the outcomes of impartial hearings as well as court decisions); Perry A. Zirkel & Karen Gischlar, *Due Process Hearings Under the IDEA: A Longitudinal Frequency Analysis,* 21 J. SPECIAL EDUC. LEADERSHIP 22, 27 (2008) (tabulating the frequency of impartial hearings in each state); Perry A. Zirkel & Amanda C. Machin, *The Special Education Case Law "Iceberg": An Initial Exploration of the Underside*, 41 J.L. & EDUC. 483, 510 n.136 (2012) (estimating that approximately 9% of due process hearings result in adjudicated court appeals); Perry A. Zirkel & Gina Scala, *Due Process Hearing Systems Under the IDEA: A State-by-State Survey*, 21 J. DISABILITY POL'Y STUD. 3 (2010) (providing an overview of the states' impartial hearing and review officer systems under the IDEA).

[21] For the distinction between these two burdens, see, e.g., Thomas Mayes, Perry A. Zirkel, & Dixie Snow Huefner, *Allocating the Burden of Proof in Administrative and Judicial Proceedings Under the Individuals with Disabilities Education Act*, 108 W. VA. L. REV. 27, 33–36 (2005). The distinguishable concept of quantum of proof is preponderance of the evidence in civil cases generally and IDEA cases specifically. *Id.* at 35. Standard of review under the IDEA is another such separate concept. *Id.* at 35–36. They are beyond the scope of this brief Article, which focuses on burden of persuasion.

[22] Although the burden of production may provide a tactical advantage in the hearing, burden of persuasion plays a more direct and overt role in the decision. For example, it is not uncommon for the written decision to set forth the burden of persuasion, and—unlike the burden of production—for it to be reversible error on appeal. *See, e.g.*, W. Platte R-II Sch. Dist. v. Wilson, 439 F.3d 782, 785 (8th Cir. 2006); Brian S. v. Vance, 86 F. Supp. 2d 538 (D. Md. 2000); Greenwood v. Wissahickon Sch. Dist., 44 IDELR ¶ 34 (E.D. Pa. 2006). Moreover, the limited court discussion of burden of proof in this context mixes the two burdens. *See, e.g.*, Gagliardo v. Arlington Cent. Sch. Dist., 418 F. Supp. 2d 559, 572 (S.D.N.Y. 2006), *rev'd on other grounds*, 489 F.3d 105 (2d Cir. 2007) (recognizing that "[w]hen one does not have the burden of proof [in an IDEA due process hearing], sound litigation strategy might well dictate that certain questions not be asked, that record matters left open by an opponent not be clarified, that witnesses whose testimony would otherwise be necessary not be called, and that exhibits that could have been relied on not be introduced").

[23] Schaffer v. Weast, 546 U.S. 49 (2006).

I. *SCHAFFER V. WEAST*

In its 2005 decision in *Schaffer v. Weast*,[24] the U.S. Supreme Court addressed the issue of burden of proof at the impartial hearing stage under the IDEA.[25] First, the Court clarified that burden of proof encompasses "two distinct burdens: the 'burden of persuasion,' i.e., which party loses if the evidence is closely balanced, and the 'burden of production,' i.e., which party bears the obligation to come forward with the evidence at different points in the proceeding."[26] Next, limiting its decision to the first of these two concepts, the Court held that for the issue of FAPE, the burden of persuasion in a due process hearing under the IDEA is on the party challenging the appropriateness of the IEP.[27] Finally, the Court acknowledged but did not address the interplay with state laws that provided a different approach to the burden of persuasion in the special education context, such as those in Alabama and Minnesota.[28] In contrast, two Justices dissented, each with a separate opinion.[29] Justice Ginsburg would have placed the burden of persuasion on the school district based on "[p]olicy considerations, convenience, and fairness."[30] Justice Breyer would have left the matter to state law or, in the absence thereof, to the impartial hearing officer's discretion in relation to the state's general administrative law procedures.[31]

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[24] *Id.* at 61–62.

[25] For the variety of jurisdictional approaches for IDEA cases prior to *Schaffer*, *see, e.g.*, Mayes et al., *supra* note 21, at 46–57; *see also* Anne E. Johnson, *Evening the Playing Field: Tailoring the Burden of Proof at IDEA Due Process Hearings to Balance Children's Rights and Schools' Needs*, 46 B.C. L. REV. 591 (2005) (canvassing the divergent views pre-*Schaffer* before advocating a modified burden-shifting approach).

[26] *Schaffer*, 546 U.S. at 56.

[27] *Id.* at 62. ("The burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief.") Showing its fit with the traditional "default rule," the *Schaffer* Court explained: "[T]he ordinary default rule [is] that plaintiffs bear the risk of failing to prove their claims . . . . Absent some reason to believe that Congress intended otherwise, . . . we will conclude that the burden of persuasion lies where it usually falls, upon the party seeking relief." *Id.* at 56–58. Given the peculiarities of the IDEA, this holding provides apparently unintended tension by referring to both "challenging an IEP" and seeking relief even within the limited context of FAPE cases. In most such cases, the parent files for the hearing, thus clearly bearing the burden of persuasion because both phrases point in the same direction. However, occasionally a district files for an impartial hearing to show its proposed IEP is appropriate or to change the student's placement. *See, e.g.*, MM v. San Ramon Valley Unified Sch. Dist., 61 IDELR ¶ 39 (N.D. Cal. Apr. 22, 2013) (rejecting district's filing to implement its proposed IEP over parent's objection); Sharon Pub. Sch., 45 IDELR ¶ 75 (Mass. SEA 2006) (placing the burden of persuasion on the district upon its seeking to effectuate a 45-day interim alternate educational setting for the child based on the statutory dangerousness exception). In these limited situations, the more generic "seeking relief" standard would appear to be controlling.

[28] *Schaffer*, 546 U.S. at 61:

> Finally, [the district defendants] and several States urge us to decide that States may, if they wish, override the default rule and put the burden always on the school district. Several States have laws or regulations purporting to do so, at least under some circumstances. See, *e.g.,* Minn. Stat.. § 125A.091, subd. 16 (2004); Ala. Admin. Code Rule 290-8-9-.08(8)(c)(6) (Supp. 2004); Alaska

II. STATE LAWS AND RELATED CASE LAW

Given the structure of "cooperative federalism" of the IDEA,[32] which allows for customized state variation added to the federal foundation, the corollary special education statutes and regulations in some states address or at least appear to address the burden of persuasion at the impartial hearing level.[33] Unlike those jurisdictions that adopted a rule that was superseded by *Schaffer*,[34] the state laws contrary to *Schaffer*'s approach pose the issue that the Court identified but declined to decide—whether states may "override the default rule and put the burden always [i.e., regardless of who files for the hearing] on the school district."[35] The state laws continue to vary in relevant respects, but most of them fit into a few identifiable groupings, as shown in the next four subsections.

A. The Silent Majority

First, the majority of state laws are silent with regard to burden of

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> Admin. Code, tit. 4, § 52.550(e)(9) (2003); Del. Code Ann., tit. 14, § 3140 (1999). Because no such law or regulation exists in Maryland, we need not decide this issue.

Another separable issue is the burden of persuasion upon judicial appeal. Courts have agreed that the under the IDEA, the party challenging the outcome of the impartial hearing bears the burden of persuasion in the district court. *See, e.g.*, Marshall Joint Sch. Dist. No. 2 v. C.D., 616 F.3d 632, 636 (7th Cir. 2010).

[29] Chief Justice Roberts did not participate in the decision. Schaffer v. Weast, 546 U.S. 49, 62 (2006).

[30] *Id.* at 67 (Ginsburg, J., dissenting). Justice Stevens' concurring opinion "agree[d] with much of what Justice Ginsburg has written about the special aspects of this statute" but considered the majority's reasons plus the deference owed to school authorities as outweighing such considerations. *Id.* at 62 (Stevens, J., concurring).

[31] *Id.* at 71 (Breyer, J., dissenting) ("Most importantly, Congress has made clear that the Act itself represents an exercise in 'cooperative federalism'").

[32] *See, e.g., id.* at 52 (citing Little Rock Sch. Dist. v. Mauney, 183 F.3d 816, 830 (8th Cir. 1999)).

[33] This structural doctrine provides for state special education laws that supplement the federal foundation of the IDEA with customized additions. Except where the IDEA expressly allows for such state variations, it is generally understood that the additions must be in the direction of the child with a disability, not the district or the state.

[34] *See, e.g.*, Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811 (9th Cir. 2007) (applying *Schaffer* to FAPE as implemented, not just proposed); J.D.G. v. Colonial Sch. Dist., 748 F. Supp. 2d 362, 380 (D. Del. 2010) (interpreting *Schaffer* as reversing Third Circuit rule only for challenging an IEP). *But cf.* M.B. v. S. Orange-Maplewood Bd. of Educ., 55 IDELR ¶ 18 (D.N.J. 2010) (in discussing whether *Schaffer* extends to eligibility cases under the IDEA, reasoning that "guided by the well-settled Third Circuit precedent placing the burden on the school district to prove compliance with the IDEA and the limited holding of *Schaffer* to proceedings in which an IEP has been challenged, the Court holds that the School District bears the burden of demonstrating that it complied with the IDEA in deeming [the child] to be ineligible for special education services"); Anello v. Indian River Sch. Dist., 52 IDELR ¶ 11, 43 (D. Del. 2009) (ruling similarly for child find issue), *aff'd on other grounds*, 355 F. App'x 594 (3d Cir. 2009).

[35] Schaffer v. Weast, 546 U.S. 49, 61 (2006).

persuasion. Some historically did not address it because it was a technical issue for which the IDEA legislation and regulations have not provided the lead or because case law in their jurisdiction resolved the issue.[36] Other states had specified the burden of persuasion for FAPE or for IDEA issues generally but, in the wake of *Schaffer,* revised their law to no longer address the issue on the theory that *Schaffer* provided the answer.[37] For these states, the only major issue is whether *Schaffer* extends beyond FAPE cases based on its default rationale.[38]

B. The Default Group[39]

A second group of state laws expressly align with the *Schaffer* approach, typically extending it beyond FAPE cases.[40] This group includes some states that had previously put the burden of persuasion on the district but revised their laws to the opposite position, thus resolving the conflict with *Schaffer*.[41] For example, Alabama,[42] Minnesota,[43] and the District of Columbia[44] changed their respective laws from putting the burden on the

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[36] For a snapshot of the various state approaches, including those states that only addressed this issue, if at all, in terms of court decisions, see Mayes et al., *supra* note 21, at 45–72. For example, Pennsylvania's special education regulations, which had their origin in the *PARC* consent decree, are in the silent category, with conflicting federal court and state court interpretations pre-*Schaffer*. *Id.* at 56–57.

[37] For example, compare Mayes et al., *supra* note 21, with current state special education laws, Iowa, Montana, and Nebraska—which all had put the burden on the filing party—fit in this category.

[38] For the resolution of this and other such residual questions, see *infra* Part III.

[39] For the *Schaffer*-connected meaning of "default" in this context, see *supra* note 27.

[40] *See, e.g.*, ALASKA ADMIN. CODE tit. 4, § 52.550(i)(11) (2012) ("The party that requests the hearing has the burden of proving the party's claim by a preponderance of the evidence."); 511 IND. ADMIN. CODE 7-45-7(i)(2) (2012) ("The party requesting the due process hearing . . . has the burden of persuading the hearing officer of its position."). As noted in *Schaffer*, Alaska had previously placed the burden on the district. 546 U.S. at 61.

[41] Moreover, as shown by the cited examples, they typically use a more generic default standard than "challenging the IEP," thus avoiding the latent tension in the *Schaffer* holding. *See supra* note 27.

[42] *Compare* Kerry M. v. Manhattan Sch. Dist. No. 114, 46 IDELR¶194 (N.D. Ill. 2006) (citing Alabama's predecessor provision, which was that "a school district must 'assume the *burden of proof* regarding the appropriateness of services proposed or provided'"), *with* ALA. ADMIN. CODE r. 290-8-9.08(9)(c) (2011) ("The party filing the hearing request has the burden of proof with respect to any claimed violation or request for relief").

[43] *Compare Kerry*, 46 IDELR ¶ 194 (citing Minnesota's predecessor provision, which was that "[t]he *burden of proof* at a due process hearing is on the district …."), *with* MINN. STAT. ANN. § 125A.091(16) (West 2011) ("The burden of proof at a due process hearing is on the party seeking relief"). This revision in the regulation occurred earlier in the year of the *Schaffer* decision, likely attributable to the Eleventh Circuit's decision that came to the same conclusion. Escambia Cnty. Bd. of Educ. v. Benton, 406 F. Supp. 2d 1248, 1264 (N.D. Ala. 2008) (citing Devine v. Indian River Cnty. Sch. Bd., 249 F.3d 1289, 1292 (11th Cir. 2001).

[44] *Compare* Gellert v. D.C. Pub. Sch., 435 F. Supp. 2d 18, 22 n.3 (D.D.C. 2006) (citing former regulation that "[the District of Columbia Public Schools] bears the burden of proof, based solely upon the evidence and testimony presented at the hearing, that the action or proposed placement is adequate to meet the education needs of the student"), *with* D.C. MUN. REGS. tit. 5, § 3030.14 (2012) ("The

district to a generalized *Schaffer* default approach. As a variation, Georgia changed its law from a hybrid approach to the default approach.[45]

During the interim between *Schaffer* and the changes in these four jurisdictions' laws, the apparent conflict and possible preemption arose in respective court cases. In Alabama, the court sidestepped, deciding the issue based on the particular posture of the case.[46] However, for the cases arising in Minnesota, the Eighth Circuit addressed the conflict by applying federal preemption.[47] More specifically, the appellate court first ruled in a one-sentence footnote that *Schaffer* was controlling[48] and subsequently reaffirmed this ruling without a detailed analysis.[49] Representing the opposite cursory conclusion before the District of Columbia changed its regulation, the federal district court cited the *Schaffer* Court's declined issue and then concluded, without further explanation or analysis: "Thus, the recent ruling in *Schaffer* does not affect the validity of the District of

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burden of proof shall be the responsibility of the party seeking relief"). The original regulation, as Mayes et al., *supra* note 21, at 46 explained, dates back to the pre-IDEA seminal case of *Mills v. Board of Education of District of Columbia*, 348 F. Supp. 866, 881 (D.D.C. 1972).

[45] *Compare* W.C. *ex. rel.* Sue C. v. Cobb Cnty. Sch. Dist., 407 F. Supp. 2d 1351, 1359 (N.D. Ga. 2005) (citing former regulation that the burden was on the district except where parent sought more restrictive placement and, in any event, allocating discretion to the hearing officer), *with* GA. COMP. R. & REGS. 160-4-7-.12(3)(n) (2012) (placing burdens of production and persuasion on the party seeking relief).

[46] Escambia Cnty. Bd. of Educ. v. Benton, 406 F. Supp. 2d 1248, 1263–64 (N.D. Ala. 2008):

> The [school district] does not posit that the *Schaffer* rule would override any Alabama law or regulation to the contrary; therefore, the Court will not *sua sponte* raise that argument . . . . To the extent that the [district] asks this Court to ascribe error to the Hearing Officer's failure to adhere to an amended regulation that did not take effect until nearly eight months after the Administrative Decision was issued, that argument must fail. The Hearing Officer cannot be faulted for adhering to the burden of proof scheme set forth in the Alabama regulations at the time of the due process hearing, and for failing to predict and preemptively apply the amendment altering that framework more than half a year ahead of time. The [district] proffers no argument or authority whatsoever to support the proposition that the Hearing Officer's November 2004 ruling must be reviewed through the prism of the post-July 1, 2005 version of the regulation. Nor does the [district] suggest that such a regulation was intended to have retroactive effect, or that it is legally applicable to cases on judicial review as of its effective date. Once again, the Court declines to consider arguments that the [district] has not articulated.

[47] Sch. Bd. of Indep. Sch. Dist. No. 11 v. Renollett, 440 F.3d 1007, 1010–11 (8th Cir. 2006)

[48] *Id.* at 1010 n.3 ("In light of *Schaffer*, it was error to place the burden on the District, but the error was harmless because the District prevailed.").

[49] M.M. *ex rel*. L.R. v. Special Sch. Dist. No. 1, 512 F.3d 455, 459 (8th Cir. 2008):

> Our decision in *Renollett* is controlling until overruled by our court en banc, by the Supreme Court, or by Congress. Though the district court described our discussion of the issue as "cursory," our opinion in *Renollett* cited the page in *Schaffer* that left the question open, and we then decided the question for the courts of this circuit.

For a subsequent case where the district court in Minnesota similarly ruled that the hearing officer's error in placing the burden on the school district was harmless because the district prevailed, see P.K.W.G. v. Indep. Sch. Dist. No. 11, 50 IDELR ¶ 158, 686 (D. Minn. 2008).

Columbia's regulation placing the burden of proof at the administrative level on [the District of Columbia Public Schools]."[50] After the District of Columbia changed its regulations to put the burden of persuasion on the party challenging the IEP, but before it further revised its regulations to apply the default rule more generally,[51] its federal district court concluded that this approach did not extend to the calculation of the compensatory education award in the wake of a FAPE denial.[52] However, the court did not place the burden on the defendant district, instead merely denying its motion for dismissal and reserving the crafting of the award for the adjudicator, i.e., the hearing officer or the court, not the parties.[53]

In the final case in these four states,[54] the federal district court in Georgia avoided deciding the preemption issue by concluding that the Georgia regulation did not conflict with *Schaffer*, because although it generally placed the burden of persuasion on the district, (1) it had an exception where the parent—as in the case in question—sought a more restrictive placement, and (2) it left the matter ultimately to the discretion of the hearing officer.[55]

C. The On-District Group

A third, smaller group of states currently place the burden of persuasion on the district either as a result of keeping their earlier laws after *Schaffer* or by responding to *Schaffer* with a law that fills its gap.[56]

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[50] Gellert v. D.C. Pub. Sch., 435 F. Supp. 2d 18, 22 n.3 (D.D.C. 2006). In some other cases at the time, the court missed the applicable D.C. regulation altogether. *See, e.g.*, Hester v. District of Columbia, 433 F. Supp. 2d 71, 76 (D.D.C. 2006), *rev'd on other grounds*, 505 F.3d 1283 (D.C. Cir. 2007); Savoy-Kelly v. E. High School, 45 IDELR ¶ 184, 825 (D.D.C. 2006).

[51] For the latest revision, see *supra* note 44.

[52] Henry v. District of Columbia, 750 F. Supp. 2d 94, 98 (D.D.C. 2010) (interpreting the regulation that "the party seeking relief present[ ] sufficient evidence to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a [FAPE]"). It is unclear whether this ruling continues to be valid in light of the regulatory extension of the burden and the unsettled state of the case law in the District of Columbia concerning the determination of compensatory education. *See, e.g.*, Gill v. District of Columbia, 770 F. Supp. 2d 112 (D.D.C. 2011). For a broader examination of this issue, see, e.g., Perry A. Zirkel, *The Two Competing Approaches for Calculating Compensatory Education Under the IDEA*, 257 EDUC. L. REP. 550 (2012).

[53] *Henry*, 750 F. Supp. 2d at 98 ("The task of 'designing [the student's] remedy will require a fact-specific exercise of discretion *by either the district court or a hearing officer*,' not by the parties themselves.") (citation omitted). In this case, the court opted to remand the matter to the hearing officer for an expedited determination. *Id.* at 99.

[54] *Compare* W.C. *ex. rel.* Sue C. v. Cobb Cnty. Sch. Dist., 407 F. Supp. 2d 1351, 1359 (N.D. Ga. 2005) (citing former regulation that the burden was on the district except where parent sought more restrictive placement and, in any event, allocating discretion to the hearing officer), *with* GA. COMP. R. & REGS. 160-4-7-.12(3)(n) (2012) (placing burdens of production and persuasion on the party seeking relief).

[55] *W.C.* ex. rel. *Sue C.*, 407 F. Supp. 2d at 1359.

[56] *See, e.g.*, N.J. STAT. ANN. § 18A:46-1.1 (West 2012) (as of 2008 "Whenever a due process hearing is held . . . regarding the identification, evaluation, reevaluation, classification, educational

For example, Delaware's special education law has long put the burden of persuasion on the school district.[57] The post-*Schaffer* court decisions in Delaware under the IDEA and its corollary state special education regulations have not addressed its validity.[58] Similarly, Connecticut's regulation placing the burden of persuasion on the district pre-dates *Schaffer*.[59] The federal district court decisions in Connecticut have addressed interplay with *Schaffer* with a lack of clarity and consistency.[60] Representing another variation within this group of states, New York responded to *Schaffer* by reallocating the burden of proof to the school district but with a limited exception in tuition reimbursement cases.[61] Prior to *Schaffer*, the Second Circuit had ruled that the burden of persuasion was on the parent for both appropriateness steps—the district's proposed IEP and that for the parent's unilateral placement.[62] However, after *Schaffer*,[63]

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placement, the provision of a [FAPE], or disciplinary action, of a child with a disability, the school district shall have the burden of proof and the burden of production."); W. VA. CODE R. § 126-16-11-.3(A) (2012) (maintained since prior to *Schaffer* "The burden of proof as to the appropriateness of any proposed action, as to why more normalized placement could/could not adequately and appropriately service the individual's education needs, and as to the adequacy and appropriateness of any test or evaluation procedure, will be upon the school personnel recommending the matter in contention.").

[57] DEL. CODE ANN. tit. 14, § 3140 (2010) ("The burden of proof and persuasion in [the impartial hearing] shall be on the district or state agency which is a party to the proceeding."). This statute pre-dated *Schaffer*. *See, e.g.*, Mayes et al., *supra* note 21, at 56.

[58] *See, e.g.*, J.D.G. v. Colonial Sch. Dist., 748 F. Supp. 2d 362, 380 n.20 (D. Del. 2010) (noting the state law while applying *Schaffer* to reverse Third Circuit precedent for IEP cases); Anello v. Indian River Sch. Dist., 52 IDELR ¶ 11, 43 (D. Del. 2009) (reciting this same judicial interplay without explicit recognition of the state law); D.M. v. Red Clay Consol. Sch. Dist., 48 IDELR ¶ 43, 208 (Del. Fam. Ct. 2007) (reciting rule based on precedent without explicit recognition of the state law).

[59] CONN. AGENCIES REGS. § 10-76h-14(a) (2012) (as of 2000 "the public agency has the burden of proving the appropriateness of the child's program or placement, or of the program or placement proposed by the public agency.").

[60] M.K. v. Sergi, 554 F. Supp. 2d 201, 221 (D. Conn. 2008) (putting the "initial burden of persuasion," per its interpretation of *Brennan v. Regional School District No. 1 Board of Education*, on the parents, who challenged the IEP); Brennan v. Reg'l Sch. Dist. No. 1 Bd. of Educ., 531 F. Supp. 2d 245, 267 (D. Conn. 2008) (adopting Breyer's dissenting opinion to fill the gap left by the *Schaffer* majority but relying on the parent's burden of production); P. v. Newington Bd. of Educ., 48 IDELR ¶ 280 (D. Conn. 2007), *aff'd on other grounds*, 546 F.3d 111, 122 (2d Cir. 2008) (seeming to follow the state regulation, although acknowledging prior decisions adopting the default approach). The problems in this line of cases derive from variably mixing (1) the burden of persuasion with the burden of production and (2) state law and federal court decisions in the jurisdiction.

[61] For tuition reimbursement cases under the IDEA, the courts have developed, and Congress has codified, a multi-part test for tuition reimbursement cases under the IDEA, which includes whether the district's proposed IEP is appropriate, whether the parent's unilateral placement is appropriate, and the equities, including timely parental notice. *See, e.g.,* Perry A. Zirkel, *Tuition and Related Reimbursement Under the IDEA: A Decisional Checklist*, 282 EDUC. L. REP. 785 (2012). New York's legislation limited the exception to "the appropriateness of [the parent's] placement." *See infra* note 65 and accompanying text. However, without explanation—and arguably in error—the courts have extended this exception to the equities step. *See, e.g.*, R.E. v. N.Y.C. Dep't of Educ., 694 F.3d 167, 184 (2d Cir. 2012); P.G. v. N.Y.C. Dep't of Educ., 61 IDELR ¶ 258 (S.D.N.Y. July 22, 2013).

[62] Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 112 (2d Cir. 2007).

the New York legislature reallocated the burdens as follows:

> [The district] shall have the burden of proof, including the burden of persuasion and burden of production, in . . . [the] impartial hearing, except that a parent . . . seeking tuition reimbursement for a unilateral parental placement shall have the burden of persuasion and burden of production on the appropriateness of [the unilateral] placement.[64]

Subsequent to this change, the Second Circuit avoided determining whether *Schaffer* preempted the reallocation for the district's appropriateness step in light of the structural posture of the case.[65] Similarly and more recently, a federal district court in New York sidestepped deciding whether this exception, which placed the burden of persuasion for the parent's appropriateness step, was in accord with *Schaffer*. Explaining its reasoning, the court explained that it "need not address the question of who bears the burden of proof in this matter [i.e., as to the appropriateness of the unilateral placement] because the outcome would be the same."[66]

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[63] This new law went into effect on October 14, 2007. *See, e.g.,* J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 641 n.29 (S.D.N.Y. 2011).

[64] N.Y. EDUC. LAW § 4404(c)(1) (McKinney 2012). For recognition of this change, which was effective October 14, 2007, see, e.g., *J.G*., 777 F. Supp. 2d at 641 n.29.

[65] M.H. v. N.Y.C. Dep't of Educ., 685 F.3d 217, 225 n.3 (2d Cir. 2012). New York is one of the relatively few states that have two administrative tiers under the IDEA—a hearing officer and a review officer. In light of this structure the Second Circuit's reasoning was as follows:

> We need not, however, resolve the question the Supreme Court left open in *Schaffer*—whether the State has the power to override the IDEA burden scheme. Because the State Review Officers in the cases at bar concluded that the IEPs were proper, and the courts are bound to exhibit deference to that decision, the burden of demonstrating that the respective Review Officers erred is properly understood to fall on the plaintiffs.

In the same footnote, the court declined to address which party had the burden of persuasion at the review officer level, because this issue is relevant only "if the evidence was in equipoise," which it was not in this case. *Id.* Subsequent lower court decisions reflected a similar disinclination to decide the issue for the hearing officer level. *See, e.g*., T.B. v. Haverstraw-Stony Point Cent. Sch. Dist., 933 F. Supp. 2d 554, 565 n.6 (S.D.N.Y. 2013) (waiver and, alternatively, lack of equipoise); D.C. v. N.Y.C. Dep't of Educ., 61 IDELR ¶ 25 (S.D.N.Y. Mar. 26, 2013) (lack of equipoise); E.W.K. v. Bd. of Educ. of Chappaqua Cent. Sch. Dist., 884 F. Supp. 2d 39, 47 n.6 (S.D.N.Y. 2012) (not close case); W.T. v. Bd. of Educ. of Sch. Dist. of N.Y.C., 716 F. Supp. 2d 270, 287 (S.D.N.Y. 2010) (deference to review officer). In other New York cases, the federal courts seemed to miss the state law altogether in ancillary commentary that did not appear to be outcome determinative. *See, e.g.*, T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 252 (2d Cir. 2009) (citing precedent prior to change in state law); T.L. v. N.Y.C. Dep't of Educ., 938 F. Supp. 2d 417, 432 (S.D.N.Y. 2013) (citing *T.P.* for both appropriateness steps); S.M. v. Taconic Hills Cent. Sch. Dist., 60 IDELR ¶ 217 (N.D.N.Y. 2013); M.W. v. N.Y.C. Dep't of Educ., 869 F. Supp. 2d 320, 336 (E.D.N.Y. 2012) (citing *Schaffer* in dicta that the burden of proof lies with the party seeking relief).

[66] A.L. v. N.Y.C. Dep't of Educ., 812 F. Supp. 2d 492, 501 n.3 (S.D.N.Y. 2013).

D. The Ambitious Others

A final limited but notable group consists of state laws that are ambiguous, providing language that does not definitively affix the burden of persuasion.[67] One illustrative variant is where the state law refers to the burden of production with possibly more generalizable language. For example, the Illinois statute specific to impartial hearings under the IDEA includes the following provision:

> The school district shall present evidence that the special education needs of the child have been appropriately identified and that the special education program and related services proposed to meet the needs of the child are adequate, appropriate, and available.[68]

In an unpublished decision, a federal district court in Illinois that interpreted this state law as addressing the burden of production, without affecting the burden of persuasion. Specifically, the court concluded:

> Section 8.02(h) states only a district's obligation to present evidence, it does not place a burden of proof on the district. *Schaffer*, 126 S. Ct. at 533-34 (distinguishing burden of production from burden of persuasion). As such, § 8.02(h) does not contain the explicit burden of proof language necessary to override the default rule that Plaintiffs, as the party challenging the IEP, bore the burden of proof.[69]

III. UNSETTLED ISSUES

For the state laws in the silent group, the residual issue is whether *Schaffer* fills the gap by extending to other IDEA issues generally?[70] The

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[67] Ark. Dep't of Educ. Rules and Regulations Governing Special Education and Related Services § 10.01.31.1 (July 2008), http://perma.cc/L77D-ZCB5 ("At the beginning of the hearing, the hearing officer shall determine which party bears the burden of proof in regard to the particular issues raised," then specifying that if the hearing officer decides to allow opening statements said party will have the opportunity to go first).

[68] 105 ILL. COMP. STAT. 5/14-8.02a(g-55) (2011).

[69] Kerry M. v. Manhattan Sch. Dist. No. 114, 46 IDELR ¶ 194 (N.D. Ill. 2006). Further reinforcing this conclusion, the Seventh Circuit has straightforwardly applied *Schaffer* in Illinois cases. *See, e.g.*, Bd. of Educ. of Twp. High Sch. Dist. 211 v. Ross, 486 F.3d 267, 271 (7th Cir. 2007).

[70] See *supra* text accompanying note 38. The same issue and—based on the two applicable reasons—answer would apply to states in the default group that limited this approach to FAPE cases, despite the state's choice of a narrow application of the *Schaffer* principle in the absence of some alternate choice for the remaining issues. However, this situation seems to be theoretical because states in the default group typically opt for the broad approach, indirectly reinforcing the gap-filling

answer appears, on balance, to be "yes," based on the (1) the rationale of *Schaffer*, and (2) the prevailing, albeit limited, weight of the pertinent lower court decisions to date. First, the *Schaffer* Court relied on the "ordinary default rule" in the absence of the requisite indication of contrary congressional intent for IDEA to present an exception.[71] Second, courts in the silent states have concluded that *Schaffer* extends to additional IDEA issues, such as eligibility,[72] LRE,[73] and the parent-placement step in tuition reimbursement cases.[74] Thus, it would appear that—unless Congress changes the provisions of the IDEA to provide a broad or narrower exception—the burden of persuasion is on the filing party for the various issues in the jurisdiction of impartial hearings.[75]

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conclusion. See *supra* text accompanying notes 40–45. The court decision that arose in the District of Columbia that arose during the transition from a narrow to broad default regulation does not change this conclusion, because it was limited to the remedial issue of determining the extent of the compensatory education award and appeared to be rooted in the burden of production and, in any event, dissolved rather than reversed the burden of persuasion. See *supra* text accompanying notes 52–53.

[71] *See* Schaffer v. Weast, 546 U.S. 49, 57 (2006).

[72] Antoine M. v. Chester Upland Sch. Dist., 420 F. Supp. 2d 396 (E.D. Pa. 2006). *But cf.* M.B. v. S. Orange-Maplewood Bd. of Educ., 55 IDELR ¶ 18 (D.N.J. 2010) (limiting *Schaffer* in light of Third Circuit precedent but missing altogether the applicable New Jersey law, N.J. STAT. ANN. § 18A:46-1.1 (West 2012)); *cf.* Anello v. Indian River Sch. Dist., 52 IDELR ¶ 11 (D. Del. 2009) (child find – limiting *Schaffer* in light of Third Circuit precedent but missing altogether the applicable Delaware law).

[73] L.E. v. Ramsey Bd. of Educ., 435 F.3d 384 (3d Cir. 2006). This case arose before New Jersey filled its silence, effective 2008, by putting the burden on the district. N.J. STAT. ANN. § 18A:46-1.1 (West 2012). As a result, the Third Circuit reasoned as follows: "Because this case is brought solely under the IDEA and arises in a state lacking a statutory or regulatory provision purporting to define the burden of proof in administrative hearings assessing IEPs, *Schaffer* controls. *Id.* at 391.

[74] Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105 (2d Cir. 2007). Prior to *Schaffer*, the Second Circuit had ruled that in tuition reimbursement cases the burden of persuasion was on the district to show that its proposed IEP was appropriate but that the burden shifted to the parents to show that their unilateral placement was appropriate. *See, e.g.*, M.S. v. Bd. of Educ., 231 F.3d 96 (2d Cir. 2000), *cert. denied*, 532 U.S. 942 (2001). For another limited or indirect extension of the default principle in *Schaffer*, *see* Ridley Sch. Dist. v. M.R., 680 F.3d 260, 270 (3d Cir. 2012) ("We now join our sister circuits in holding that the party challenging the administrative decision bears the burden of persuasion before the district court as to each claim challenged").

[75] 20 U.S.C. § 1415(b)(6)(A)(15) (2006) (stating that "any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a [FAPE]"). These issues would seem to extend to the relatively specialized issues of implementation (as contrasted with formulation) of an IEP and, per *id.* § 1415(k)(1)(E) (2006), manifestation determinations in the wake of disciplinary changes in placement. The federal courts have thus far avoided the implementation situation. *See, e.g.*, C.B. v. Haw., No. 10-00317, 2010 WL 5389785, at *7 (D. Haw. Dec. 22, 2010). For manifestation determinations, the commentary accompanying the IDEA regulations take the position that "[t]he concept of burden of proof is not applicable" but confines this interpretation to the required group determination at the district level, as contrasted with the impartial hearing. 71 Fed. Reg. 46,723 (Aug. 14, 2006). In decisions at the hearing level, burden of persuasion has been a notable factor. *See, e.g.*, Perry A. Zirkel, *Manifestation Determinations Under the New Individuals with Disabilities Education Act: An Update*, 31 REMEDIAL & SPECIAL EDUC. 378 (2010). One final special circumstance that does not seem to warrant variance with the default approach is where the district files for an expedited impartial hearing seeking a 45-day interim alternate setting based on the belief "that maintaining the current placement of the child is substantially likely to result in injury to the child or others." 20 U.S.C. § 1415(k)(1)(G)(3) (2006).

The group of state laws that expressly place the burden of persuasion on the district present the issue that the *Schaffer* Court declined to address—"[whether] States may, if they wish, override the default rule and put the burden always on the school district."[76] The Eighth Circuit decision is of negligible weight for other jurisdictions because its conclusion was devoid of any explanation or authority and is arguably dicta in light of its nonbinding effect.[77] Similarly, the opposing footnote of the federal district court in the District of Columbia does not provide guidance of any notable weight.[78] The other potentially pertinent court decisions either avoided the issue, sometimes by not even recognizing the contrasting state law,[79] or addressed it without clarity and consistency.[80]

Instead, careful consideration of the relevant factors suggests that *Schaffer* does not preempt state laws that allocate the burden of persuasion on the district regardless of which party filed for the hearing. First and foremost, the general doctrine of preemption applies, in this context, to a conflict between federal and state law.[81] Additionally, for areas traditionally reserved to the states—such as education—the conflict with congressional purpose must be clear and manifest.[82] For the IDEA, which has the purpose of identifying students with disabilities and providing them with FAPE and an array of related procedural protections,[83] including the impartial hearing, the requisite conflict would be for a state law that provided a lesser entitlement to the child.[84] In contrast with the relatively few state laws invalidated for going in the other direction,[85] a state law that

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[76] *See supra* text accompanying note 28.

[77] *See supra* text accompanying notes 47–49.

[78] *See supra* text accompanying note 50.

[79] *See supra* text accompanying notes 58, 65–66.

[80] *See supra* text accompanying note 60.

[81] *See, e.g.*, Note, *Preemption as Purposivism's Last Refuge*, 126 HARV. L. REV. 1056, 1057 (2013) (distinguishing the varieties of preemption, including conflict preemption, with congressional purpose as the ultimate touchstone).

[82] *See, e.g.*, N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 655 (1995).

[83] *See, e.g.*, 20 U.S.C. § 1400(d) (2006) (The purposes of the IDEA include "(1)(A) to ensure that all children with disabilities have available to them a FAPE . . . that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; [and] (B) to ensure that the rights of children with disabilities and parents of such children are protected.").

[84] Reinforcing this general understanding, the IDEA explicitly requires states to identify their regulations, rules, and policies that go beyond its provisions. 20 U.S.C. § 1406(a)(2). In doing so, they do not prohibit such state-imposed requirements. Similarly, the IDEA expressly provides that its regulations and agency interpretations may not violate or contradict its statutory provisions, or provide lesser protections than its previous regulations. *Id.* §§ 1407(b) and 1407(d)

[85] *See, e.g.*, Sarah M. v. Weast, 111 F. Supp. 2d 695 (D. Md. 2000) (discussing a state law for notice to district that inhibited the parent's ability to obtain tuition reimbursement); Doolittle v. Meridian Joint Sch. Dist. No. 2, 919 F.2d 34 (Idaho 1996) (discussing a state constitutional provision regarding parochial schools that was in direct conflict with IDEA's tuition reimbursement provisions).

puts the burden of persuasion on the district reinforces or increases the protection for the child, thus not amounting to the requisite conflict. Examples of such additions to or extensions of the IDEA include state laws that provide for corresponding protections to gifted students,[86] a higher substantive standard for FAPE,[87] and—according to the policy interpretations of the IDEA's administering agency, the Office of Special Education Programs (OSEP)—various procedures of the impartial hearing ranging from discovery[88] to sanctions.[89] In contrast, Congress has largely reserved its clear and express allowances for variations to IDEA requirements to issues, such as the statute of limitations for filing for an impartial hearing[90] or for completing the initial evaluation, where the side that provides more protection to the child is entirely ambiguous.[91] More specifically, it may be equally argued that lengthening (or shortening) these periods provide more protections to the child in terms of the ultimate purpose of receiving FAPE.[92]

The remaining question is whether there are issue-specific exceptions to the *Schaffer* default approach regardless of the state law grouping.[93] First, even more consistently than for the foregoing preemption question, the courts have avoided deciding the permissibility of allocating to the parent the burden of persuasion for the second appropriateness step of the tuition reimbursement test.[94] However, the answer seems inevitable because this allocation squares, not conflicts, with not only the *Schaffer*

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[86] *See generally* PERRY A. ZIRKEL, THE LAW ON GIFTED EDUCATION (The National Research Center On The Talented And Gifted rev. ed. 2005).

[87] *See, e.g.*, David D. v. Dartmouth Sch. Comm., 775 F.3d 411, 418–19 (1st Cir. 1985) (holding the federal right to a FAPE incorporates substantive rights authorized by state special education law beyond the minimum, skeletal IDEA standards).

[88] *Letter to Stadler*, 24 IDELR 973 (OSEP 1996).

[89] *Letter to Armstrong*, 28 IDELR 303 (OSEP 1997).

[90] 20 U.S.C. § 1415(b)(6) (2006) (stating that "[a complaint] which sets forth an alleged violation that occurred not more than two years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the complaint, or, if the State has an explicit time limitation for presenting such a complaint under this part, in such time as the State law allows.")

[91] *Id.* § 1414(a)(10)(C)(i) (stating that "within 60 days of receiving parental consent for the evaluation, or, if the State has established a timeframe within which the evaluation must be conducted, within such timeframe.")

[92] One side provides FAPE more speedily, which benefits the child with a disability by meeting unique needs on a timely basis, whereas the other side provides more time, which also benefits the child in terms of remedial relief or accurate evaluation, respectively.

[93] Even for states in the default group, preemption by an express IDEA provision to the contrary is a viable issue.

[94] *See*, A.L. v. N.Y.C. Dep't of Educ., 812 F. Supp. 2d 492, 501 n.3 (S.D.N.Y. 2013); Ark. Dep't of Educ. Rules and Regulations Governing Special Education and Related Services § 10.01.31.1 (July 2008), http://perma.cc/L77D-ZCB5 ("At the beginning of the hearing, the hearing officer shall determine which party bears the burden of proof in regard to the particular issues raised," then specifying that if the hearing officer decides to allow opening statements said party will have the opportunity to go first).

default principle, but it also aligns with the parent's particular knowledge.[95]

Second, a more limited range of issues remain as unresolved questions. These narrow issues under the IDEA pose special but infrequent problems in terms of burden of persuasion.[96] For example, if the parent requests an independent educational evaluation (IEE) at public expense,[97] the IDEA regulations specify that if the district opposes payment, it should, "without unnecessary delay . . . [f]ile a due process complaint to request a hearing to show that its evaluation is appropriate.[98] However, in some cases where the district does not deny payment or file for a hearing, the parent does so to effectuate this conditional right.[99] In such cases, where the court does not find the district's failure to file fatal,[100] which side has the burden of persuasion in a default jurisdiction? Similarly, for a case filed by either party, if "stay-put" [101] becomes an interim issue subject to a written decision, which party has the burden of persuasion?

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[95] This double rationale is implicit in the provisions of the New York law. *See,* M.H. v. N.Y.C Dep't of Educ., 685 F.3d 217, 225 n.3 (2d Cir. 2012). It also aligns with the long-standing Third Circuit precedent, which was based on the additional rationales of FAPE and LRE. *See, e.g.*, Carlisle Area Sch. Dist. v. Scott P., 62 F.3d 520, 533 (3d Cir. 1995) (putting the burden of persuasion to show that the parent's unilateral placement was inappropriate would be contrary to (1) "[*Westchester Cnty. v.*] *Rowley* [458 U.S. 176 (1982)] and its progeny to the extent that such a general rule would effectively necessitate proof that a district's IEPs were the best rather than simply proof that they conferred some educational benefit" and (2) the strong presumption in favor of the more inclusionary placement).

[96] In contrast, other special issues are rather readily resolvable. *See*, 105 ILL. COMP. STAT. 5/14-8.02a(g-55) (2011).

[97] As the *Schaffer* majority recognized, the IDEA legislation provides parents with the right to an IEE, but only the regulations provide for the conditional right to have the district pay for it. Schaffer v. Weast, 546 U.S. 49, 60 (2005). In a recent decision, a federal appellate court upheld the validity of this IDEA regulation in relation to the statute's purpose. Phillip C. v. Jefferson Cnty. Bd. of Educ., 701 F.3d 691, 697 (11th Cir. 2012).

[98] 34 C.F.R. § 300.502 (2012). For a systematic analysis of the relevant regulation and case law, *see e.g.*, Perry A. Zirkel, *Independent Educational Evaluation Reimbursement: An Update*, 231 EDUC. L. REP. 21 (2008). Coincidentally, the *Schaffer* Court cited the IDEA's IEE provision as countering the special knowledge rationale of the on-district approach, thus supporting the ordinary default approach. *Schaffer,* 546 U.S. at 60–61("IDEA thus ensures parents access to an expert who can evaluate all the materials that the school must make available, and who can give an independent opinion. They are not left to challenge the government without a realistic opportunity to access the necessary evidence, or without an expert with the firepower to match the opposition.").

[99] *See, e.g.*, Bd. of Educ. of Murphysboro Cmty. Unit Sch. Dist. v. Ill. St. Bd. of Educ., 41 F.3d 1162 (7th Cir. 1994); Evans v. Dist. No. 17 of Douglas Cnty., 841 F.2d 824 (8th Cir. 1988); K.B. v. Haledon Bd. of Educ., 54 IDELR ¶ 230 (D.N.J. 2010).

[100] *See, e.g.*, P.R. v. Woodmore Local Sch. Dist., 49 IDELR ¶ 31 (6th Cir. 2007); Dudley v. Lower Merion Sch. Dist., 58 IDELR ¶ 12 (E.D. Pa. 2011); A.L. v. Chi. Pub. Sch. Dist. 299, 57 IDELR ¶ 276 (N.D. Ill. 2011); Myles v. Montgomery Cnty. Bd. of Educ., 824 F. Supp. 1549, 1561 (M.D. Ala. 1994).

[101] 20 U.S.C. § 1415(j) (2006) (stating that ". . . unless the State or local education agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child . .

IV. FINAL OVERALL RECOMMENDATIONS

The foregoing residual issues and suggested solutions in the wake of *Schaffer* are all in the context of the present provisions of the IDEA, which have not been amended since the year before the Supreme Court's decision.[102] A pair of remaining recommendations will respectively mitigate or eliminate these problems. First, in the next reauthorization of the IDEA, Congress should consider providing a clear and comprehensive resolution as to the burden of persuasion. The various policy considerations, including the imbalance of resources and expertise,[103] would seem to suggest putting the burden of persuasion on the district, with (1) exceptions for specified issues, such as the appropriateness of parents' unilateral placements in tuition reimbursement cases[104] (2) delegation to the discretion of IHOs based on the circumstances of the individual case for the limited remaining specialized issues;[105] and (3) the authorization for state law alternatives that do not defeat the FAPE purpose of the IDEA.[106]

. "). For a comprehensive overview, see generally, Perry A. Zirkel, *"Stay-Put" Under the IDEA: An Annotated Overview*, 288 EDUC. L. REP. 12 (2013).

[102] The successive reauthorizations included the 1986 amendments of the EHA, also known as the Handicapped Children's Protection Act, Pub. L. No. 99 § 457, 100 Stat. 1145 (1986) (amended 1990), which included attorneys' fees for prevailing parents; the 1990 amendments, Education of the handicapped Act Amendments of 1990, Pub. L. No. 101 §476, 104 Stat. 1103 (1990) (amended 1991), which provided, inter alia, the IDEA as the new name for the original Education of the Handicapped Act; the 1997 amendments, Individuals with Disabilities Act Amendments of 1997, Pub. L. No. 105 § 17, 111 Stat. 37 (1997) (amended 2004), which included major provisions for discipline of students with disabilities; and the most recent 2004 amendments, Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108, § 446, 118 Stat. 2647 (2004), which included fine-tuning to several provisions of the Act. *See, e.g.*, MITCHELL YELL, THE LAW AND SPECIAL EDUCATION 53–60 (2012).

[103] *See, e.g.*, Schaffer v. Weast, 546 U.S. 49, 60 ("Petitioners' most plausible argument is that '[t]he ordinary rule, based on considerations of fairness, does not place the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary'"); *see also id.* at 64–66 (Ginsburg, J., dissenting) (noting that the school has greater expertise, better access to relevant information, and greater control over potentially persuasive witnesses); *id.* at 69 (Breyer, J., dissenting) ("the technical nature of the subject matter, its human importance, the school district's superior resources, and the district's superior access to relevant information"). For these considerations and additional policy arguments, see e.g., Mayes et al., *supra* note 21, at 74–82.

[104] *See* 105 ILL. COMP. STAT. 5/14-8.02a(g-55) (2011).

[105] *See supra* notes 96–101 and accompanying text.

[106] Borrowing from the language for limitation and evaluation periods, see, 20 U.S.C. § 1415(b)(6) (2006); *see also*, *id.* § 1414(a)(10)(C)(i). These exceptions would not only minimize preemption problems but also preserve the primary purpose of the Act, *supra* notes 82–85 and accompanying text. In partial contrast, another commentator's proposal for a pure state-by-state approach for determining the burden of persuasion failed to address directly the preemption doctrine. Lara Gelbwasser Freed, *Cooperative Federalism Post*-Schaffer*: The Burden of Proof and Federal Preemption in Special Education*, 2009 B.Y.U. EDUC. & L.J. 103 (advocating that states have the right to determine the burden of proof as a matter of "cooperative federalism"). Moreover, her proposal relied—in the absence of congressional amendment—on the too thin reed that the *Schaffer* majority "has left room for a variant of Justice Breyer's dissent to emerge in practice." *Id.* at 128.

Second and especially, although not exclusively, in the absence of a systematic congressional solution, impartial hearing officers under the IDEA may minimize the overall problem by reserving determinations based on burden of persuasion to the rare cases where it is necessary; as both the *Schaffer* majority and dissent recognized: "very few cases will be in evidentiary equipoise."[107] For example, in the illustrative case at the opening of this Article, the impartial hearing officer had no reason to rely on burden of persuasion; his analysis of the case shows that it was not a close call.[108] Moreover, in setting forth the applicable framework, his reference to a "heightened burden"[109] based on Illinois law[110] confused burden of production with burden of persuasion, as applicable case law in Illinois clarified in relation to *Schaffer*.[111] Finally, the hearing officer's global conclusion that the parents "substantially" met their burden of persuasion added a non-fitting nuance, missing the more appropriate distinction of the separable appropriateness steps of tuition reimbursement analysis.[112] For more persuasive decision-making, the stakeholders in the IDEA from Congress to impartial hearing officers have the burden to attain more jurisprudential clarity; the proof is in the "putting."

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[107] *Schaffer,* 546 U.S. at 58; *id.* at 65 n.2 (Ginsburg, J., dissenting); *id.* at 69 (Breyer, J., dissenting) (characterizing such a case as "'*rara avis'*" (rare)).

[108] For similar confusion by the same hearing officer that the reviewing court excused as harmless error, see Bd. of Educ. of Evanston-Skokie Cmty. Consol. Sch. Dist. No. 65 v. Risen, 61 IDELR ¶ 130 (N.D. Ill. 2013).

[109] *See,* St. Charles Sch. Dist., Case No. 2013-0107, at *21 (Mar. 30, 2013), http://perma.cc/S3J5-8SWC.

[110] *See* Kerry M. v. Manhattan Sch. Dist. No. 114, 46 IDELR ¶ 194 (N.D. Ill. 2006). *See, e.g.*, Bd. of Educ. of Twp. High Sch. Dist. 211 v. Ross, 486 F.3d 267, 271 (7th Cir. 2007).

[111] *See Kerry M.*, 46 IDELR ¶ 194.

[112] *See* M.H. v. N.Y.C. Dep't of Educ., 685 F.3d 217, 225 n.3 (2d Cir. 2012). *See, e.g.*, Carlisle Area Sch. Dist. v. Scott P., 62 F.3d 520, 533 (3d Cir. 1995). *See also* 105 ILL. COMP. STAT. 5/14-8.02a(g-55) (2011).