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**THE BURDEN OF PROOF UNDER IDEA: SCHAFFER V WEAST****Overview**

The *Individuals with Disabilities Act (IDEA 2004)* requires that all children included in the Act (*i.e.*, eligible children) be provided with access to a free appropriate public education (FAPE), including necessary related services, in the least restrictive environment (LRE). 20 U.S.C 1400, *et seq.* From the statute's initial implementation in 1975 until now, the courts (federal and state) have been busy with a variety of special education cases, because Congress did not clearly define all aspects of the law. Alexander and Alexander (2005) What is clear, however, is that "IDEA requires that special education services provided pursuant to the statute be 'provided at public expense,' 20 U.S.C. 1401 (8)(A) and 'at no cost to parents,' 20 U.S.C. 1401 (25). Thus parents cannot be required to pay for any part of the special education of their children." Weber, Mawdsley, and Redfield (2004) However, the law also is clear that "local education agencies (LEAs) have no responsibility to pay for special education and related services on-site in private schools where parents have elected private placements for their children, provided that the public agency has made FAPE available at its public site." Weber, Mawdsley, and Redfield (2004)

One result of the continuous stream of litigation over the past quarter century is a sustained strengthening of the rights of parents in the decision-making process. As the United States Supreme Court opined more than twenty-years ago, this Act has become the exclusive avenue through which parents assert equal protection claims to publicly financed special education programs for their children. Smith v Robinson (1984) Regarding the accomplishments of the past twenty-five years, Mark Weber has observed, "One of the central innovations of the special education law, and a key to its success, is that it empowers parents to participate in designing programs for their children and to challenge school district decisions about educational services and placement." Weber (2005)

**The IEP: Key to Educational Benefit.**

In the early literature experts referred to the *IEP* as a "cornerstone" and "management tool." Hayes and Higgins (1978) Five years after IDEAs implementation (as the *Education for All Handicapped Children Act* of 1975), the United States Court of Appeals for the Third Circuit Court characterized the *IEP*, as the "heart" of the new law. Battle v Pennsylvania (3rd Cir. 1980) In my opinion the *IEP (Individualized Educational Program)*

remains the essential and indispensable element of *IDEA 2004*. It captures the spirit of the law, breathes life into its intent, and facilitates its implementation.

A team created written plan, an *IEP* is tailored to the unique needs of an eligible child. Intended to produce *educational benefit*, Board of Education v Rowley (1982), an *IEP* contains all aspects (academic, social, developmental, and functional) of the child's free appropriate public education (*FAPE*); including necessary related services, and the site (*LRE*) where the program will be delivered. *IDEA 2004* mandates that (1) parents sign the *IEP*, (2) all future adjustments in the plan must be acceptable to parents, and (3) local education agencies (*LEAs*) provide, free of charge, the agreed to special education and related services. Vacca and Bosher (2003)

Related IEP Issues. Over the past twenty-five years, IEPs have been the source of numerous complaint filings, due process hearings, mediations, and court cases. Generally, the recorded causes of IEP disputes between parents and school officials can be placed in the following categories: allegations of (1) improper committee composition, (2) improper development procedures, (3) timeline violations, (4) omissions of required sections, (5) teaching methodologies and/or related services not being provided as specified, (6) unnecessary delays in reaching targeted goals, and (7) financial obligations not being met. Vacca and Bosher (2003) There also have been recent disputes where parents have challenged the appropriateness of their child's placement. L.B. v Nebo School District (10th Cir. 2004) In these cases parents allege that the public school, classroom, or program do not meet the least restrictive environment (*LRE*) requirement of *IDEA*. De Vries v Fairfax County School Board (4th Cir. 1989) Because judges are reluctant to interfere in such matters as IEP team discretion and decision-making, and subsequent student program placement decisions, most disputes are settled through alternatives to litigation. However, in special education disputes that go to court judges consistently apply the traditional analysis found in Karl v Board of Education (2nd Cir. 1984). In Karl the judicial review was limited to the procedural aspects of the case. Beginning in the 1990's, however, some judges broke with tradition and began to probe the substantive aspects of a case. This change in judicial attitude came on the heels of the United States Supreme Court's benchmark decision in Florence County School District v Carter (1993). In Carter the primary issue before the high court was not procedural. It involved the "appropriateness" of the student's IEP goals.

### **Parent Challenges to FAPE**

Beginning in the early 1980s, some parents dissatisfied with their child's individualized educational program (*IEP*) and/or placement unilaterally took their child out of the public school setting and enrolled him or her in a private school. Claiming a denial of *FAPE*, these parents turned around and demanded that the local school system (*LEA*) pay the tuition and costs of the private school setting. More often than not, litigation was spawned when the public school system denied the request. Where such situations went into court, the judge was faced with the daunting task of determining, by virtue of the evidence presented and the arguments of the attorneys, whether or not the educational program and services provided in the public school setting satisfied the *FAPE* requirements for that particular child. If *FAPE* requirements were being met in the public school setting the parents' request for payment of tuition and costs was denied.

*The Burlington Standard*. It is settled law that parents cannot expect (*i.e.*, are not entitled to) automatic reimbursement for a private school placement of their choice. The standard relied on by judges to determine whether or not parents are entitled to reimbursement for expenditures incurred was crafted by the United States Supreme Court in Burlington School Committee v Department of Education (1985). In resolving the dispute a court asks the following questions: (1) Is the public school system's placement of the child pursuant to his/her

*IEP* appropriate? (2) Is the private school placement desired by the parent appropriate? If the answer to the first question is “No,” there is no need to move to the second question, and a public school system (LEA) can be ordered by the court to reimburse parents for tuition and costs. Cypress-Fairbanks I.S.D.v Michael (5th Cir. 1997) This order can include retroactive reimbursement as well.

Until this past year, a disconcerting factor in *FAPE* cases involved the question of which party carried the burden of proof. In 2005, the United States Supreme Court answered the question.

### **The United States Supreme Court Speaks: Schaffer v Weast (2005)**

On writ of certiorari to the United States Court of Appeals for the Fourth Circuit, the United States Supreme Court decided Schaffer v Weast (2005), a case that involved the Montgomery County, Maryland, Public School System. The question presented in Schaffer is which party bears the burden of proof in due process hearings initiated pursuant to section 1414(f) of *IDEA*?

*The Facts.* Brian Schaffer was enrolled in a private school when he was diagnosed with a non-severe learning disability. Contacted by Brian’s parents, the Montgomery County Public Schools developed an IEP for him. Even though Brian’s parents were involved in the development of the IEP they rejected it. Ultimately the parents filed a due process complaint against the school system and asked for tuition reimbursement from the school system. Initially an administrative judge held for the school system. Brian’s parents next went to a federal district court where the judge held that the burden of proof should have been placed on the school officials. On remand, the administrative judge held for the parents and ordered the school system to reimburse the parents. An appeal was taken to the United States Court of Appeals for the Fourth Circuit, where the district court was reversed. Citing *IDEA* 1415(f), the Fourth Circuit held that the burden of proof should be on the party initiating the action. 377 F.3d 449 (4th Cir. 2005) Subsequently, the United States Supreme Court granted certiorari. 125 S.Ct. 1300 (2005)

*The Opinion:* In an opinion written by Justice Sandra Day O’Connor, the majority relied on and reiterated the customary federal rule that the party that initiates the hearing and seeks relief bears the burden of proof in that proceeding. In doing so, the majority placed the burden directly on the parents in the Schaffer case. “ If parents believe their child’s IEP is inappropriate, they may request an impartial due process hearing.” But, stated Justice O’Connor, “[t]he Act is silent, however, as to which party bears the burden of persuasion at such a hearing. We hold that the burden lies, as it typically does, on the party seeking relief.” Schaffer v Weast (2005)

It should be pointed out to the reader that the Supreme Court majority left the legal door ajar when it suggested that the Schaffer decision does not preclude states from assigning the burden of proof through the application of existing statutes, or through the enactment of new statutes. It therefore behooves the reader to look to appropriate state law for guidance.

### **Policy Implications**

There is little doubt that *FAPE* disputes will continue to spring up in communities across this nation. Parents of students with educational disabilities who are dissatisfied with their child’s *IEP* and/or placement likely will challenge local school officials both through the administrative process and through litigation.

While the Schaffer decision undoubtedly will have a positive impact on the confidence level of local public school officials, administrators, and professional staff, the implications for local school system policy remain

clear. What follow are some suggestions to consider as existing policies are revisited and new policies are considered. Policies must make it clear that:

- The intent of the school board, administration, and staff is to work toward meeting the specific needs of eligible students with educational disabilities.
- The intent of the school board, administrators, and professional staff is to comply with and implement federal and state special education law and regulations.
- Parents of students with educational disabilities will be involved in all phases of their child's educational program.
- All decisions involving identification, evaluation, program development, placement, and assessment of students with educational disabilities will be based on substantive, valid, reliable, and up-to-date information (e.g., educational, social, medical, psychological).
- The school system will, when the specific case requires, cooperate with other community agencies and professionals to provide access to educational opportunities appropriate to the student involved and designed to produce an educational benefit for that student.
- Where parents and school officials cannot agree on the educational plan and placement of a student, the board initially will seek to resolve the dispute through non-adversarial means such as mediation.

A final postscript must be added. The *burden of proof* has two parts. First, there is a *burden of production* (i.e., a burden to produce evidence). Second, there is a *burden of persuasion* (i.e., a burden to persuade the hearing officer or judge by a preponderance of the evidence produced). Sound procedures and solid evidence remain the foundations on which successful cases are built.

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Note: The views expressed in this commentary are those of the author.