

Some States Shift IEP Burden of Proof to School Districts

By **Christina A. Samuels**

New Jersey lawmakers recently changed state law to require schools to bear the burden of proving, if there is a dispute with parents, that the educational plans they create for students with disabilities are appropriate.

The state's action, which follows a similar move by New York state in August, is considered a success by parents and advocacy groups interested in chipping away at the public-policy change made by a 2005 U.S. Supreme Court decision on the issue.

In *Schaffer v. Weast*, the high court held that the party that has a complaint about an individualized education program—most often, the parents—bears the responsibility of proving that the plan is insufficient.

That's unfair to parents, who don't have the expert resources at their disposal that a school district does, argues state Sen. Stephen M. Sweeney, a Democrat, and one of the co-sponsors of the New Jersey legislation. It was signed into law Jan. 13.

The schools' staff members are arrayed against parents, Mr. Sweeney said. And, because of another recent Supreme Court decision that does not require schools to reimburse parents for expert witnesses even if the parents prevail in a dispute, it's even harder to fight, Mr. Sweeney believes.

"Parents are not sophisticated enough and don't even know where to start," he said. "Basically, it's like tying both hands behind their back."

Fighting Back

The New Jersey School Boards Association fought the change in state law, saying that the Supreme Court had made the right decision in *Schaffer*. The new law requires districts to prepare to defend every aspect of a student's educational program, the association said, without knowing exactly what the parents had a problem with.

The association "believes the process of complaint and due process would better serve everyone if parents were required to identify the central issue or issues they are challenging," Barbara Horl, one of the association's lobbyists, said in testimony to the legislature on the bill.

Individualized education programs, or IEPs, are required for students with disabilities under the main federal special education law, the Individuals with Disabilities Education Act.

Though *Schaffer v. Weast* decided the burden-of-proof question, it was silent on whether states were free to adopt their own statutes that could place the burden on school districts, regardless of which side was disputing the educational plan.

"We hold no more than we must to resolve the case at hand," the high court stated in its ruling.

That left an opening for parents and groups like the Towson, Md.-based Council of Parent Attorneys

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and Advocates, or COPAA, to lobby states individually to make changes in their laws. There have been efforts to shift the burden of proof to schools through legislation introduced in Alaska, Hawaii, and Virginia.

Slow Process

But the District of Columbia school board, meanwhile, voted in March 2007 to change its law so that it would be in line with the Supreme Court decision, contrary to previous practice that had placed the burden of proof on schools. Washington's public school district, which has 49,000 students, plans to re-evaluate the change after a year.

Jessica Butler, the chairwoman of the board of directors of COPAA, acknowledges that nibbling away at the law is a slow process. The school boards' associations in the various states strongly support the Supreme Court decision and oppose efforts to nullify its effect at the state level.

"At present, all of the efforts are on the state level, and that's very difficult," Ms. Butler said. "But the parents and advocates are really trying to rebalance the inequities."

"I do think parents have a movement going," Ms. Butler continued. "It's just going to take a different form than when you have a lot of lobbyists working on an issue."

Schaffer v. Weast revolved around a dispute over an IEP developed for a student in the 139,000-student Montgomery County, Md., district.

Brian Schaffer's parents sought to have the district reimburse the family for their son's private school tuition because they claimed the IEP offered was inappropriate.

Fewer Talks?

An administrative-law judge hearing the case decided that the evidence presented on both sides was so evenly matched that he could decide only by determining which party had to prove its case. He ruled that it was the parents' burden to prove that their plan was better, and so in this case the school district prevailed.

The Supreme Court concurred, saying that such a move places IEP disputes on the same level as other civil disputes.

"Petitioners in effect ask this court to assume that every IEP is invalid until the school district demonstrates that it is not. The [Individuals with Disabilities Education Act] does not support this conclusion," the court found.

Some states, like Illinois and Minnesota, have statutes that place the burden of proof on schools at all times, even if the parents are the party disputing the IEP.

Common practice in New Jersey was to do the same, but there was no statute on the books codifying it. Therefore, the *Schaffer* decision prompted a change in the state, said Ruth Deale Lowenkron, a senior attorney with the Newark, N.J.-based Education Law Center.

Ms. Lowenkron said she has heard anecdotal reports of school districts' reduced willingness to negotiate with parents in the wake of *Schaffer*.

"We have heard that districts have simply said, 'No, we're not going to do what you want, so sue us. And you have the burden of proof,'" Ms. Lowenkron said. Parents would often feel unwilling to press a dispute any further, she added. Frank Belluscio, the director of communications for the New Jersey School Boards Association, said the *Schaffer* decision did not take away any of the safeguards for students and parents that are outlined under federal law.

"School districts still have to meet federal requirements and state requirements," Mr. Belluscio said. "There's nothing that prevents a parent from still contesting an IEP."

Though some states have changed their laws since the *Schaffer* decision, there wasn't much discussion of the case after it was decided, said Naomi E. Gittins, the senior staff attorney for the National School Boards Association in Alexandria, Va. That may be because few circuit courts and relatively few states had ever placed the burden of proof solely on schools, she suggested. Most states followed the procedure outlined in *Schaffer*, or did not have statutes on the matter.

Mr. Sweeney, the legislator who sponsored the successful New Jersey measure, said he would like to continue discussions with the New Jersey School Board Association and others that opposed the new law. He believes a neutral arbiter could be created in the state to handle special education disputes, without the need for lawyers.

"I think now the school boards will be more willing to listen to us," Mr. Sweeney said.

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