IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

A.R. and S.R. o/b/o T.R., Plaintiffs,	:	**Hon. Freda L. Wolfson**
v.	:	**Civil Action No. 06-cv-03849(FLW)**
FREEHOLD REGIONAL HIGH SCHOOL BOARD OF EDUCATION, Defendant.	:	

BRIEF IN SUPPORT OF PLAINTIFFS' MOTION TO REVERSE ON INTERLOCUTORY APPEAL ON BEHALF OF AMICI CURIAE NEW JERSEY SPECIAL EDUCATION PRACTITIONERS, ALLIANCE FOR THE BETTERMENT OF CITIZENS WITH DISABILITIES, AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY, ARC OF NEW JERSEY, ASSOCIATION FOR CHILDREN IN NEW JERSEY, EDUCATION LAW CENTER, CHERRY HILL SPECIAL EDUCATION PTA, ESSEX COUNTY BAR ASSOCIATION, EXCELLENT EDUCATION FOR EVERYONE, NEW JERSEY PROTECTION & ADVOCACY, INC., NEW JERSEY PTA, SPECIAL EDUCATION CLINIC AT RUTGERS UNIVERSITY SCHOOL OF LAW-NEWARK, SPECIAL EDUCATION LEADERSHIP COUNCIL OF NEW JERSEY, STATEWIDE PARENT ADVOCACY NETWORK

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INTRODUCTION

In this case of first impression which has arisen in the wake of the Supreme Court's decision in *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528 (2005), Proposed *Amici Curiae*[1], a group of organizations which advocate on behalf of children with disabilities in New Jersey, including children with disabilities who are poor, homeless or abused and neglected, submit this brief in support of the right of these children to the "free appropriate public education" they are guaranteed under the Individuals with Disabilities Education Improvement Act, 20 U.S.C. § 1400 *et seq.* ("IDEA").

Proposed *Amici Curiae* respectfully request that this Court reverse the decision of the administrative law judge ("ALJ") which requires these children to bear the burden of proof in every due process hearing requested to review the appropriateness of a change proposed by a school district to their IDEA-mandated "individualized education program" ("IEP"). The ALJ's decision not only violates the *Schaffer* decision and established principles of burden of proof jurisprudence, as well as public policy and doctrines of fairness, but it undermines the entire statutory scheme of IDEA which Congress enacted to protect the rights of children with disabilities and their parents. By establishing a burden that these children cannot meet, and by relieving school districts of any obligation to justify their actions if the children are unable to meet the burden, the ALJ's decision denies these children the right to a "free appropriate public education" as mandated by IDEA.

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[1] A description of each of the Proposed *Amici Curiae* is annexed hereto as Exhibit A.

ARGUMENT

I. AT A DUE PROCESS HEARING ASSESSING THE APPROPRIATENESS OF AN EXISTING IEP, THE PARTY SEEKING TO CHANGE THE IEP BEARS THE BURDEN OF PROOF

At issue in this case is which party bears the burden of proof when the school district seeks to change an existing IEP which had previously been agreed to by both parties. Both IDEA and *Schaffer* mandate that the burden of proof be placed on the party seeking to change the IEP.

In enacting IDEA's predecessor in 1975, Congress sought to "assure that all … children [with disabilities] have available to them … a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, [and] to assure that the rights of … children [with disabilities] and their parents or guardians are protected." *Honig v. Doe*, 484 U.S. 305, 309 (1988). The core of IDEA is the "cooperative process that it establishes between parents and schools" for the development of the IEP, *Schaffer,* 126 S. Ct. at 532, with the IEP being the "primary vehicle" for implementing the goals of IDEA, *Honig*, 484 U.S. at 311. IDEA establishes "comprehensive procedures for preparing and changing an IEP," *P.N. v. Greco*, 282 F. Supp.2d 221, 234 (D.N.J. 2003), as well as "procedural safeguards that guarantee parents both an opportunity for meaningful input into all decision affecting their child's education and the right to seek review of any decisions they think inappropriate." *Honig*, 484 U.S. at 311-312. Such review may be sought through an "impartial due process hearing," *Schaffer*, 126 S. Ct. at 532, at which an administrative law judge ("ALJ")[2] must determine whether the child has received a "free appropriate public education." 20 U.S.C. § 1415(f)(3)(E)(i).

[2] IDEA refers to a "hearing officer," 20 U.S.C. § 1415(f)(3)(E), while New Jersey utilizes the term "administrative law judge," N.J.A.C. 6A:14-2.7(a).

IDEA sets forth the central components of a due process hearing, including minimal pleading standards and the right to be represented by counsel, the right to present evidence, the right to confront, cross-examine and compel the attendance of witnesses, and the right to file an appeal to a state or federal court, but IDEA does not address the burden of proof. *Schaffer*, 126 S. Ct. at 532-533. The Supreme Court in *Schaffer* held that the burden of proof in a due process hearing assessing the appropriateness of an existing IEP lies with the party "wish[ing] to change an existing IEP…." *Id.* at 537. In *Schaffer*, it was the parents who challenged the existing IEP, and thus who carried the burden. However, *Schaffer* emphasized that "the rule applies with equal effect to school districts: If they seek to challenge an IEP, they will in turn bear the burden of persuasion before an ALJ." *Id.* Such is the case presented here, and the burden of proof should therefore properly be placed upon the defendant school district.

ALJ Stein appears to have misinterpreted the discussion in *Schaffer* regarding changes to an existing IEP. ALJ Stein held that the parents bear the burden of proof "since … [they] have brought this action and challenge the proposed IEP." *A.R. and S.R. on behalf of T.R. v. Freehold Reg. High School Dist.*, OAL Dkt. No. EDS 4311-06, Letter Order dated July 12, 2006. In fact, it was the District which "challenge[d]" the IEP. To the extent it can be said that the parents did any "challeng[ing]," they "challenge[d]" the *proposed* IEP, not the *existing* IEP. By finding that the parents challenged the IEP, and by focusing on the *proposed* IEP rather than the *existing* IEP, ALJ Stein's Order violates *Schaffer*.[3] If ALJ Stein's decision is allowed to stand, the burden in cases challenging changes to IEPs will always rest on the parents in New Jersey. As set forth in

[3] It was also error for ALJ Stein to have based his decision for allocating the burden of proof on the party who "brought the action." As the Supreme Court cautioned, "looking for the burden of pleading is not a foolproof guide to the allocation of the burdens of proof. The latter burdens do not invariably follow the pleadings.…" *Alaska Dept. of Envtl. Conservation v. Environmental Protection Agency*, 540 U.S. 461, 494 n.17 (2004) (quoting 2 J. Strong, McCormick on Evidence, § 337 (5th ed. 1999)).

greater detail below, the district is always the party that "proposes" the IEP, and the parent, if s/he disagrees, will always be the party that must commence the action to "challenge" the "proposed" IEP.

Under IDEA, the IEP must be developed through the collaborative IEP process. 20 U.S.C. § 1414(d). At least annually, the existing IEP must be reviewed and revised by the IEP team, which consists of school district personnel and parents. *Id.* If a parent and school district agree to change the IEP, the change will be incorporated into a revised IEP. *Id.* On the other hand, if the parent and school district disagree with regard to any recommended change to the IEP, IDEA allows the IEP to be challenged at a due process hearing. 20 U.S.C. § 1415(b)(6) and (f)(1)(A). In *Schaffer*, Justice O'Connor assumed, that the party who seeks to change to the IEP is the party who will request a hearing if that party wishes to pursue the desired change:

> If parents believe that an IEP is not appropriate, they may seek an administrative 'impartial due process hearing' [*cite omitted*] School districts may also seek such hearings, as Congress clarified in the 2004 amendments. [*cites omitted*]. They may do so, for example, if they wish to change an existing IEP but the parents do not consent . . . .

Schaffer 126 S. Ct. at 532.

This is not, however, how the administrative review process is initiated in New Jersey when a school district proposes to change an existing IEP and the parent disagrees. In New Jersey, when a school district proposes a change to the existing IEP, the proposed change will automatically go into effect after 15 days, even if the parent disagrees with the change, unless the parent initiates a due process hearing to review the appropriateness of the IEP.[4] N.J.A.C. 6A:14-

[4] This is not so in every State. For example, in California, no proposed change to the IEP can go into effect unless the parents and school district agree. Calif. Ed. Code § 56346(e)-(f). As contemplated in *Schaffer*, a school district in California must initiate a due process hearing if it wishes to pursue a change opposed by the parent.

3.7(m), 2.3(f) and (h)(3)(ii). Consequently, in New Jersey, whenever there is a disagreement about a proposed change to the IEP, it is incumbent upon the parent to request a hearing if an impartial review is desired, regardless of who seeks the proposed change to the IEP. Conversely, with one rare exception,[5] school districts in New Jersey are never required to request a hearing in special education disputes related to a child's existing IEP.[6]

Should the Court affirm ALJ Stein's ruling -- because of the way due process hearings are initiated in New Jersey -- the burden of proof will not rest, as intended by *Schaffer,* equally upon parents and schools districts, but virtually always on the parent in any dispute over the appropriateness of an IEP. Accordingly, ALJ Stein's decision violates *Schaffer* and should be reversed.

II. PLACING THE BURDEN OF PROOF ON THE SCHOOL DISTRICT, WHEN IT SEEKS TO CHANGE AN EXISTING IEP, IS FAVORED BY TRADITIONAL BURDEN OF PROOF JURISPRUDENCE, PUBLIC POLICY AND DOCTRINES OF FAIRNESS

[5] The one exception to this rule is where a school district seeks an order from an ALJ placing a child whom it believes violated its code of student conduct, but whose conduct did not involve "weapons," "illegal drugs" or "serious bodily injury," in an "interim alternative educational setting" for 45 days because it believes that maintaining the current placement of the child is substantially likely to result in injury to the child or to others. 20 U.S.C. § 1415(k)(3)(b)(ii)(II). In all other situations in which a child with a disability is removed from school for disciplinary reasons, the parents must request a hearing if they wish to challenge the school district's actions. 20 U.S.C. § 1415(k)(1).

[6] In fact, the only other times a school district in New Jersey is required to request a due process hearing in the event of a disagreement with a parent is to a) justify an evaluation it proposed, b) justify its denial of the parent's request for an independent evaluation, or c) overcome the parent's withholding of consent to disclose pupil records. N.J.A.C. 6A:14-2.7(b). Based on statistics provided by John Worthington, Esq. of the New Jersey Department of Education, and annexed hereto as Exhibit B, cases involving these issues constituted only 17.89% of the cases decided by the Office of Administrative Law during the period January 1, 2001 through April 17, 2006. And, the percent may be less if one could disaggregate the cases which may have been filed by parents regarding these issues. In any event, the statistics show that, at a minimum, parents must initiate the hearing process in more than 80% of the cases.

In addition to violating the law established in *Schaffer*, placing the burden of proof in due process hearings on the student, when it is the school district that seeks to change the existing IEP*,* violates basic burden of proof jurisprudence, public policy and doctrines of fairness.

A. Children With Disabilities Have Exceedingly Limited Access To The Evidence Necessary To Support Their Claims, And Thus Should Not Bear The Burden Of Proof In Due Process Hearings Where The District Seeks To Change The Existing IEP

The Supreme Court has held that allocations of the burdens of proof may depend on which party has "'peculiar means of knowledge.'" *Alaska Dept. of Envtl. Conservation,* 540 U.S. at 494 n.17 (citations omitted). S*ee also International Bhd. of Teamsters v. United States*, 431 U.S. 324, 359 n. 45 (1977) (courts often assign the burden of proof "to conform with a party's superior access to the proof"); *United States v. New York, N.H. & Hartford R.R. Co.*, 355 U.S. 253, 256 n.5 (1957) ("The 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.") Since children with disabilities have exceedingly limited information with which to challenge a school district's proposed change to the existing IEP, and since they have limited opportunities to obtain the information, and since districts, on the other hand, have complete access to all such information, the burden of proof at due process hearings should be placed on the districts.

Only the school district is fully aware of the rationale behind its decision to change the existing IEP, and only it has full, unfettered access to all relevant information. *See, e.g., Lascari v. Board of Educ. of the Ramapo Indian Hills Sch. Dist.*, 116 N.J. 30, 45 (1989) (noting that the school district "generally has extensive records pertaining to a … child [with a disability]"). A school district that has unilaterally decided to change a student's program or placement possesses all the information which led it to propose such a change to the existing IEP, what alternatives it

considered and the factors which caused it to propose the change. Parents do not possess this critical information. The school district possesses information about its past experience with the program or placement it has decided upon, as well as information about the needs of other students it has placed there. It has had unlimited time to explore the program or placement and available alternatives, and it has the professional staff to gather information about the program or placement. Many out-of-district schools serving students with disabilities will not even speak with parents about their program or services except in the presence of their home district's staff.

IDEA contemplates that development of an IEP will be a collaborative process, with parents participating as equal members throughout the process which is to culminate each year in an IEP. 20 U.S.C. § 1414(d). IDEA further provides that a child's IEP is to be developed at an IEP meeting and through discussion involving the parents and the child's teacher(s) and case manager. Id. However, many districts prepare an IEP, including changes to the child's program and placement, in advance, and bring the near-final or even final IEP document to the meeting. Thus, parents may walk into an IEP meeting with little or no advance warning that the school district has unilaterally decided to make drastic changes in their child's IEP, which might include removing their child from his neighborhood school and placing him in a segregated school for students with disabilities, eliminating their child's speech language and occupational therapy or declassifying their child altogether. *See infra* at pp. 8-9.

It is difficult enough for parents to satisfy the burden placed on them by the *Schaffer* Court -- to prove that the IEP which is currently in place has not provided their child with an appropriate education. At least in such circumstances, the parents have had some experience with their child's program or placement. In addition, since the parents are the ones seeking to change their child's IEP, they are not restricted to preparing their case in a 15-day period,

pursuant to the "stay-put" regulation, N.J.A.C. 6A:14-2.3(h)(3)(ii), but rather can try to obtain the information and witnesses they need to support their position before they file for due process.

The disadvantage to parents is multiplied many times, however, when the burden is on a parent to prove the negative -- that an unknown program or placement proposed by the school district, often without any discussion or involvement of the parent, would not provide their child with an appropriate education, and then to do this within 15 days of receipt of the district's proposed IEP. The following examples starkly demonstrate how children with disabilities will suffer should ALJ Stein's decision be upheld.

> De-Classification. A parent in a recent New Jersey case is told at the annual review IEP meeting that her son, who will be entering his senior year and has been classified since third grade, is no longer eligible for special education and related services. The child's school performance had not changed and, if anything, had deteriorated. No new standardized testing had been conducted. When asked why the district had decided to declassify him, the parent is told he received passing grades for the previous school year (albeit C's, D's and even some F's). Should this parent, who under New Jersey procedures must file for a due process hearing within 15 days of receiving notice of the proposed declassification, have to prove that the school district's unilateral decision to discontinue her son's eligibility does not comply with federal and state requirements?
>
> Out-of-District Placements. A few years ago -- before the burden of proof was changed -- an urban district with many non-English speaking parents unilaterally decided it was going to terminate the placements of over 20 students attending an out-of-district school for students with disabilities and, instead, educate the students in various schools operated by the district. As each parent arrived for their child's annual IEP meeting, they were given an IEP which already set forth the change in placement. Many of the new IEPs did not even indicate which in-district school or program the student was expected to attend.
>
> With the assistance of *pro bono* counsel, the 20 parents filed due process petitions which stopped the IEPs from going into effect. The fact that, at that time, the school district had the burden of proving that its unilateral, proposed IEPs would offer each child a "free appropriate public education" must have been at least partially responsible for causing the district to reconsider, revoke the unilateral, proposed IEPs and go through the process of considering the appropriateness of each child's IEP with the participation of the parent. Today, if this same scenario were to occur, and if ALJ Stein's ruling is upheld, each parent would face the

> insurmountable task of proving that the district's unilateral IEP would not provide their child with a "free appropriate public education."
>
> Least Restrictive Environment. School District seeks to remove Student from inclusive general education classroom and place him in a segregated out-of-district school for children with disabilities. School District is required by IDEA to ensure that Student is educated in the least restrictive environment ("LRE"). 20 U.S.C. § 1412(a)(5); 34 C.F.R. §§ 300.114 and 300.116. Should School District or Student bear the burden of proving, as required by *Oberti v. Board. of Educ. of Clementon Sch. Dist.*, 995 F.2d 1204, 1217-1218 (3d Cir. 1993), that Student's presence in the general education class has had a negative effect on the education of the other students in the class? It is extremely difficult for Student to prove a negative, i.e. that Student has not negatively impacted the education of the other students in the class. Moreover, School District has all available relevant information, as well as the legal obligation to ensure LRE.

Not only do children with disabilities lack the information, in the first instance, which might contradict or undermine the appropriateness of the changes to the IEP sought by the district, but they also have no way to obtain this information. Among the factors that impede children with disabilities are: limited entitlement to discovery, limited time to obtain information, limited access to experts, limited access to independent evaluators and limited access to counsel.

Limited Discovery -- New Jersey provides for no formal discovery in special education hearings, *see* N.J.A.C. 1:6A-10.1, which makes the task of accessing information even more onerous for parents. Depositions of those district staff or private school staff who might have knowledge of the proposed program is not allowed. At most, the parties may exchange some documents, and even that need not occur until five business days before the hearing begins. In fact, districts often refuse to provide any documents other than those which are considered to be "school records" of the parent's child. Even then, school records are usually limited to those documents containing personally identifying information with respect to the parent's child. Districts refuse to provide documents in their possession which show how other students have fared in the proposed placement, or highlight the characteristics and needs of the other students

in the program, contending that releasing such information would violate the privacy of the other students. *See, e.g., L.E. v. Ramsey Bd. of Educ.*, Civil Case No. 03-CV-2605 (D.N.J. 2004). Only 24% of parents responding to a survey stated that their school district provided them with all or nearly all of the records requested, while another 24% reported not receiving any requested records. S. Goldberg & P. Kuriloff, *Evaluating the Fairness of Special Education Hearings*, 57 Exceptional Children 546, 550 (1991).

In some cases, the parent is only provided with the name of the proposed out-of-district school. Or worse yet, the district does not even specify a particular out-of-district school. The only information a parent may have about a proposed placement may be what is included in the IEP, and this may consist only of a statement that the district is proposing to change the placement from the student's neighborhood school and attendance in general education classes to an out-of-district school for students with disabilities, yet to be determined. It is impossible for a parent to prove the proposed placement is inappropriate given this little information.

If the burden is removed from the district when it seeks to change the existing IEP, it no longer needs to be concerned about whether it can prove the appropriateness of the changes it proposes. Moreover, it may be to the district's advantage to hedge its bets and proffer three different schools as possible placements, and even after the parents and staff have visited the three schools, fail to tell the parent whether it considers all three to be appropriate or only one or two. This exponentially multiplies the efforts parents will need to make, requiring them to prove that not one but three proposed placements are inappropriate.

<u>Limited Time to Obtain Evidence</u> -- Inadequate time to gather evidence is also central to the difficulty faced by parents in proving that a school district's proposed change to the existing IEP would deprive their child of "free appropriate public education." During the 15-day period

afforded by N.J.A.C. 6A:14-2.3(h)(3)(ii) before the district's proposed program goes into effect, the parents must not only try to observe the proposed program or placement and decide whether they object to it, but if they do object, they must also seek legal counsel, retain experts and see that a timely due process petition is filed.

In addition, new IEPs are often given to the parents in the few weeks before school is out. A parent may not have the opportunity to observe the proposed class or school while school is in session, much less have the time to retain an expert who can review the proposed placement before school closes for the summer.

Limited Access to Experts -- It is highly unlikely that a parent will prevail in a special education hearing without one or more experts. Even if the parent has the funds to hire an expert, it will take more than 15 days to locate the appropriate expert, assess the student, review records, observe the proposed and current program/placements and prepare reports. And while parents must pay for experts, school districts can rely on their own employees to act as experts. P. Kuriloff & S. Goldberg, *Is Mediation a Fair Way to Resolve Special Education Disputes? First Empirical Findings*, 2 Harv. Negot. L. Rev. 35, 62 (1997). In light of the United States Supreme Court's recent decision in *Arlington v. Murphy*, __U.S. __, 126 S. Ct. 2455 (2006) which disallowed reimbursement for expert witness fees when the parent prevails, placing the burden on parents, and in particular on poor, under-educated parents or children in foster care, is even more daunting.

Limited Access to Independent Evaluators -- In instances where the school district has recently evaluated the child, a parent may claim the right to an independent evaluation at the district's expense, 20 U.S.C. § 1415(b)(1), which may, at least to some extent counteract the parent's inability to obtain an expert. However, even if an independent evaluation is paid for by

the school district, it would not cover the cost of the evaluator testifying at a hearing. In addition, many districts are either ignoring the parents' requests for independent evaluations completely, or filing for due process in a separate proceeding, contending that the district's evaluation is appropriate or insisting that the parent only use district-approved evaluators. In one case, a parent -- determined to obtain an independent evaluator -- participated in two IDEA mediation sessions, filed an IDEA complaint investigation request and went to the first day of a due process hearing, and over three months elapsed before the school district agreed to pay for a portion of an independent evaluation which has yet to be completed. Districts know that many parents lack the time or the perseverance, and that if the district can prevent or even delay the independent evaluation, the parent is left with no expert(s) to demonstrate the inappropriateness of the district's proposed change to the existing IEP. Again, the negative impact of the district's tactics is far greater on those low-income parents who lack the resources to pay for the independent evaluation and then seek reimbursement from the district.

Limited Access to Counsel -- As Senator Kennedy noted, school districts are "much more likely to bring an attorney to a hearing than parents," and "[m]ost parents don't have access to any attorney…." 150 Cong. Rec. S5350-51 (daily ed. May 12, 2004). Data collected between 1998 and 2002 in Illinois found that parents with attorneys succeeded 50% of the time, while parents without attorneys were successful only 16% of the time. Melanie Archer, Ph.D., *Access and Equity in the Due Process System: Attorney Representation and Hearing Outcomes in Illinois*, 1997-2002, available at http://www.dueprocessillinois.org/Access.pdf (last visited September 28, 2006). Notably, this was prior to the *Schaffer* and *Arlington* decisions which have made it even more difficult for parents to prevail, particularly those who are unrepresented by

counsel and are facing the uphill battle of proving that the district's proposed changes would not provide their child with a "free appropriate public education."

B. Children With Disabilities Are Vulnerable And Discriminated Against, And Thus Should Not Bear The Burden Of Proof In Due Process Hearings Where The District Seeks To Change The Existing IEP

The Supreme Court has held that the proper allocation of the burden of proof is a "question of policy and fairness." *Keyes v. School Dist. No. 1*, 413 U.S. 189, 209 (1973), (quoting 9 J. Wigmore, *Evidence*, § 2486, at 275 (3d ed. 1940)). Moreover, as the New Jersey Supreme Court recognized in *Lascari,* 116 N.J. at 45, "the allocation of the burden of proof protects the rights of … children [with disabilities] to an appropriate education." Because "the assignment of the burden of proof is a rule of substantive law," *Director, Off. Workers' Comp. Programs v. Greenwich Collieries,* 512 U.S. 267, 271 (1994), ordinary principles of statutory interpretation require that the Court allocate the burden of proof in a manner that supports, rather than undermines, the statutory purpose.

In addition to having to contend with limited access to information, children with disabilities are saddled with being among the most vulnerable and discriminated against in society. When Congress authorized IDEA's predecessor statute in 1975, "a majority of … children [with disabilities] in the United States 'were either totally excluded from schools or were sitting idly in regular classrooms awaiting the time when they were old enough to 'drop out.'" *Board of Educ. v. Rowley*, 458 U.S. 176, 179 (1982) (quoting H.R. Rep. No. 94-332, p. 2 (1975)). More recently, IDEA referenced "one million children" who were "excluded entirely from the public school system" because of their disabilities. 20 U.S.C. § 1400 (c)(2)(C)(1997). In enacting the Americans with Disabilities Act in 1990, Congress declared that "discrimination

against individuals with disabilities persists in … education." 42 U.S.C. § 12101(a)(3). *See also Tennessee v. Lane*, 541 U.S. 509, 525 (2004) (finding that court decisions "document a pattern of unequal treatment in the administration of a wide range of public services, programs, and activities, including … public education….")

As recently as 2000, almost one in four students with disabilities (24%) in this country were living in poverty, compared to only 16% of non-disabled students. M. Wagner *et al., The Children We Serve: The Demographic Characteristics of Elementary and Middle School Students with Disabilities and their Households* (Sept. 2002), 28, available at http://www.seels.net/designdocs/SEELS_Children_We_Serve_Report.pdf (as visited September 28, 2006) ("Wagner-I").[7] Statistics are equally grim in New Jersey. The 45,888 children classified for special education services in the State's poorest "Abbott" districts make up 21% of the 214,907 classified students statewide. *See* http://www.state.nj.us/njded/data/enr/enr06/stat_doc.htm (as visited October 12, 2006). Instead of spending more money to educate poor students with disabilities, districts spend the least amount of money on them. Fran O'Reilly *et al.*, Improving Results for Students with Disabilities at page 43, Abt Associates, (September 2006) available at http://www.abt.sliidea.org (as visited October 9, 2006).

African Americans are disproportionately represented in many of the disability categories. Thirty-five percent of students with mental retardation, 27% of students with emotional disturbances, 30% of students with multiple disabilities, and 28% of students with traumatic brain injuries were African American, compared with the incidence of African

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[7] Children with disabilities are also more likely to live in one-parent households -- 37%, compared to 27% for the general population. M. Wagner *et al., The Individual and Household Characteristics of Youth with Disabilities: A Report from the National Longitudinal Transition Study-2,* 3-1 (2003).

Americans in the general population which is 17%. Wagner I at 13. Moreover, more than half of African American students (51%) lived in poverty, as did 41% of Latino students -- significantly more than the 14% of white students who lived in poverty. *Id.* at 28.

Students with disabilities are significantly more likely than their non-disabled counterparts to have parents with limited education. Thirty eight percent of the mothers of students with disabilities, and 36% of their fathers, completed only a high school education, compared with 30% of the mothers and fathers of non-disabled students. Wagner I at 23. Only 20% of students with disabilities had fathers who were college graduates, and only 16% of students with disabilities had mothers who were college graduates, compared with 34% of fathers and 25% of mothers of non-disabled students. Id. at 24.

Most parents of children with disabilities are unaware of their rights under IDEA. D. Engel, *Law, Culture, and Children with Disabilities: Educational Rights and the Construction of Difference*, 1991 Duke L.J. 166. *See also S-1 v. Turlington*, 635 F.2d 342, 349 (5th Cir.) ("in most cases, the … students [with disabilities] and their parents lack the wherewithal either to know or to assert their rights" under IDEA), *cert. denied* 454 U.S. 1030 (1981). No doubt related thereto, poorer parents of children with disabilities are less likely than their wealthier counterparts to request due process hearings. Government Accounting Office, *Report to the Ranking Minority Member, Committee on Health, Education, Labor and Pensions, U.S. Senate* (Sept. 2003).

Children in foster care manifest higher rates of disability and developmental delay than children in the general population, even when compared to children with similar backgrounds. Mark D. Simms *et al.*, *Health Care Needs of Children in the Foster Care System,* 106 Pediatrics

908, note 11, at 912 (2000).[8] Children with disabilities in foster care are more likely to be referred for special education when they should not be, and less likely to be referred for special education when they should be, both resulting in harmful consequences. Cynthia Godsoe, *Caught Between Two Systems: How Exceptional Children in Out-of-Home Care are Denied Equality in Education*, 19 Yale L. & Pol'y Rev. note 34, at 99 (2000). *See also White House Task Force For Disadvantaged Youth, Final Report* 110 (2003).[9] It is inconceivable that any burdens, let alone such weighty ones as burdens of proof, should be placed on children who do not even have parents to advocate for them.

The New Jersey Supreme Court in *Abbott v. Burke*, 119 N.J. 287, 385-386 (1990) recognized that low-income children with disabilities frequently are not able to obtain appropriate special education services, and the ALJ's decision would even further limit the rights of such children to the "thorough and efficient education" mandated by Abbott. *See id*. Similarly, if the ALJ's decision is upheld, children's rights to a "free appropriate public

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[8] Specifically, 50% of the infants and toddlers in foster care have substantial delays in cognitive, speech and behavioral development. Sheryl Dicker, *The Promise of Early Intervention for Foster Children and their Families* in Interdisciplinary Report on At Risk Children and Families 2 (1999). Between 40% and 85% of children entering foster care have significant emotional / behavioral health problems or mental health disorders, Andrew J. Baer *et al.*, *Early Intervention and Special Education Advocacy: Challenges in Representing Children, Parents, and the Department of Education*, 195 Practicing L. Inst. 97, 110 (2003) (*citing* Youth Law Center, California Juvenile Court Special Education Manual 38 (1994)); Lisette Austin, *Mental Health Needs of Youth in Foster Care: Challenges and Strategies*, 20 The Connection 6 (2004).

[9] Although IDEA provides for the appointment of a surrogate parent when the child's biological parent cannot be located or when parental rights have been terminated, 20 U.S.C. § 1415(b)(2); 34 C.F.R. 300.519, IDEA does not mandate state monitoring to ensure that a surrogate parent is in fact appointed. There are no provisions, and no funds, for retaining an attorney to represent children in foster care and protect their rights. Children in foster care generally do not have anyone to advocate for them regarding their educational programs. Vera Institute for Justice, Foster Children And Education: How You Can Create A Positive Educational Experience For The Foster Child Part One: Meeting The Challenges, 4, 9 (2003).

education" under IDEA will not only depend upon the vigilance of their parents in violation of *M.C. v. Central Reg'l Sch. Dist.*, 81 F.3d 389, 397 (3d Cir. 1996), but will also depend upon the parents' financial resources and their ability to extract from school districts the information needed to prove that the district's proposed change to the existing IEP would not offer their children an appropriate education. This is clearly not what Congress had in mind when it enacted IDEA and its predecessors.

III. PLACING THE BURDEN OF PROOF ON THE SCHOOL DISTRICT, WHEN IT SEEKS TO CHANGE AN EXISTING IEP, WILL NOT UNFAIRLY DISADVANTAGE THE SCHOOL DISTRICT

Placing the burden of proof on the school district will not unfairly disadvantage the district when the issue at the hearing is the appropriateness of a change to the child's existing IEP proposed by the school district. Requiring the school district to carry the burden of proof under the circumstances presented here merely asks it to demonstrate that the changes it proposes are consistent with its own goal of delivering a free appropriate public education to the child, and does no more than require the school district to present the evidence that it should already have gathered before it proposed the change to the parent.

By the time the school district proposes any significant change to a child's IEP, it should have completed a comprehensive review of the child's circumstances, *see* 20 U.S.C. §§ 1414(d)(4)(A), (3)(A) and (1)(A), and, based on that review, made whatever recommendations it believes are necessary to ensure that the child receives a free appropriate public education. Thus, the school district should be familiar with all the evidence in support of the proposed changes, and is uniquely positioned to bear the burden of proof when it seeks to change the child's existing IEP. Especially in cases such as the one at bar, where the school district, only one year

earlier, maintained that the existing IEP was appropriate, it stands to reason that the district must be in a position to justify the proposed changes.

Moreover, if a school district knows that it will ultimately bear the burden of proof at a due process hearing, it will work harder to avoid an erroneous determination when changing the *status quo* for the child. *See, e.g.,* D. Neal & D. Kirp, *The Allure of Legalization Reconsidered: The Case of Special Education*, 48 Law & Contemp. Probs. 63, 77 (1985). This will, of course, greatly benefit the child for whom a denial of needed services will cause a "substantial setback in the child's development." 121 Cong. Rec. 37412, 37416 (daily ed. Nov. 19, 1975) (statement of Sen. Stafford). *See also Town of Burlington v. Department of Educ.*, 736 F.2d 773, 798 (1st Cir. 1984) (delay in special education services is "likely to be highly injurious" to children with disabilities), *aff'd*, 471 U.S. 359 (1985). Avoiding erroneous determinations will also benefit society at large. *See, e.g., Rowley*, 458 U.S. at 201 n. 23 ("providing appropriate educational services now means that many of these individuals will be able to become a contributing part of our society, and they will not have to depend on subsistence payments from public funds.")[10] And, avoiding erroneous determinations will even benefit school districts, since early intervention is typically less expensive than later intervention. *Burlington*, 763 F.2d at 798.[11]

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[10] Allocating the burden to school districts will also promote governmental accountability. As nine states recently advised the United States Supreme Court in an *amicus* brief in the *Schaffer* case, placing the burden on school districts is best for states as the states are ultimately accountable for the delivery of special education services, and requiring school districts to bear the burden of proof is one way to ensure that a state meets it mandate to ensure local compliance with special education laws. Brief of the Commonwealth of Virginia and Eight Other States as *Amici Curiae* in Support for Petitioners, 2005 WL 1031635.

[11] In addition, as the New Jersey Supreme Court recognized in *Lascari*, 116 N.J. at 45-46 "it is not asking too much to require ... [the district] to carry the burden of proof" since special education matters are "initiated as administrative proceedings and reviewed by a court sitting without a jury," and, "[c]onsequently, the allocation of the burden of proof may not be as important to trial strategy as it would be in other proceedings, such as a jury trial." The *Lascari*

CONCLUSION

For the reasons set forth herein, as well as the reasons set forth in Plaintiffs' Brief, the burden of proof in IDEA administrative proceedings should be placed on the district when it is the one seeking to change an existing IEP.

Respectfully,

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Court similarly recognized that it was acceptable to place the burden on the district because, while the district and the child might disagree on some issues at a due process hearing, they share the common goal of ensuring that the child with a disability receives a free appropriate public education, and, therefore, "the adversary nature of the proceedings should yield to obtaining the right result for the … child [with the disability]." 116 N.J. at 46.

EXHIBIT A

DESCRIPTION OF PROPOSED *AMICI CURIAE*

1. THE NEW JERSEY SPECIAL EDUCATION PRACTITIONERS ("NJSEP") are an association of attorneys and advocates who practice in the area of special education in New Jersey. The NJSEP is primarily focused on matters related to the representation of parents and children under the Individuals with Disabilities Education Improvement Act ('IDEA') and the Americans with Disabilities Act ('ADA'). Membership in the NJSEP is restricted to those attorneys and advocates who only represent parents and students in matters related to special education and the rights of individuals with disabilities.
2. THE ALLIANCE FOR THE BETTERMENT OF CITIZENS WITH DISABILITIES ("ABCD") is a New Jersey based non-partisan organization whose mission is to affect the development and implementation of public policy and to support the member agencies whose specific purpose is to improve the lives of people with multiple physical and developmental disabilities so that they have the opportunity to attain the highest level of purpose and dignity. ABCD's fifteen (15) member agencies -- Bancroft NeuroHealth Children's Specialized Hospital, Cerebral Palsy League, Cerebral Palsy of North Jersey, Elwyn-New Jersey, Jawanio, LADACIN Network, Lifespire New Jersey, Matheny Medical and Educational Center, Passaic County Elks Cerebral Palsy Treatment Center, Spectrum for Living, Spina Bifida Association of the Tri-State Region, The Center for Family Support, Project Freedom and United Cerebral Palsy of Hudson County -- provide a wide array of community-based supports and services to more than 9,000 individuals with developmental disabilities and their families, and provide educational

information to more than 20,000 New Jerseyans.

3. THE AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY ("ACLU-NJ") is a private non-profit, non-partisan membership organization dedicated to the principle of individual liberty embodied in the New Jersey and United States Constitutions. Founded in 1960, the ACLU-NJ has approximately 15,500 members in the State of New Jersey. The ACLU-NJ is the state affiliate of the American Civil Liberties Union, which was founded in 1920 for identical purposes, and is composed of over 500,000 members nationwide. The ACLU-NJ strongly supports the right of all students to obtain a thorough and efficient education and to be free from discrimination, including on the basis of disability. The ACLU-NJ has participated in numerous cases involving the right to a public education and, specifically, the implementation of IDEA.

4. THE ARC OF NEW JERSEY is the largest statewide advocacy organization for individuals with intellectual and developmental disabilities and their families. The Arc of New Jersey was founded in 1947 by a group of parents who had a vision of building a better quality of life for people with intellectual disabilities and their families. The Arc of New Jersey has an affiliated local Chapter in every county of the state, serves over 18,000 member families statewide, and advocates on behalf of more than 200,000 individuals with developmental disabilities in New Jersey. The Arc of New Jersey is affiliated with The Arc of the United States. The Education Advocacy Department at the Arc of New Jersey advocates on behalf of students with developmental disabilities to ensure that they receive a free and appropriate public education in the least restrictive environment.

5. THE ASSOCIATION FOR CHILDREN OF NEW JERSEY ("ACNJ") is a statewide

non-profit child advocacy organization, dedicated to advancing children's rights and to improving programs and policies for New Jersey's children and families. ACNJ, as it exists today, was organized in 1978, but its roots go back over a century to the founding of one of its parent organizations, the Newark Orphan Asylum, in 1847. ACNJ advocates on behalf of children and families on all state issues that affect them, including special education, early care and education, child welfare, juvenile justice, health, and supports for low-income families. An underlying theme in all of these issues is to advocate for those children who are at particular risk of harm. ACNJ conducts its advocacy efforts through public policy analysis and monitoring, research, and community outreach and education.

6. THE CHERRY HILL SPECIAL EDUCATION PTA ("CHSEPTA") is a district-wide PTA serving over 1700 families with children who are either classified or have a 504 plan. The mission of the CHSEPTA is to encourage programs and activities that promote socialization and inclusion of all students; provide education and support for parents, educators and the community and foster collaboration among parents, educators and administrators to ensure an appropriate education for children with special needs. One of the primary goals of the CHSEPTA is to advocate for the free and appropriate education for special needs children. The CHSEPTA supports laws that allow parents to have reasonable access to legal remedies without undo financial hardship and equal advantage to resources such as those that schools have readily available.

7. THE EDUCATION LAW CENTER ("ELC") is a not-for-profit law firm in New Jersey specializing in education law. Since its founding in 1973, ELC has acted on behalf of disadvantaged students and students with disabilities to achieve education reform, school

improvement and protection of individual rights. ELC seeks to accomplish these goals through research, public education, technical assistance, advocacy and legal representation. In addition to serving as lead counsel to 300,000 urban school children who are the plaintiffs in New Jersey's school funding case, Abbott v. Burke, ELC provides a full range of direct legal services to parents involved in disputes with public school officials. ELC serves approximately 600 individual clients each year, primarily in the area of special education law.

8. THE ESSEX COUNTY BAR ASSOCIATION ("ECBA") is an organization of 3,000 member attorneys. Organized in 1899, ECBA is the largest county bar in New Jersey and also the most diverse. Since its inception, ECBA has enthusiastically implemented programs and aggressively embraced positions to meet the needs and concerns of the Essex County legal community and the community-at-large. Its Committee on the Rights of Persons with Disabilities, in existence since 1984, is the only committee in the state devoted exclusively to supporting the rights of persons with disabilities. The committee engages in education and advocacy on behalf of persons with disabilities.

9. EXCELLENT EDUCATION FOR EVERYONE ("E3") is a coalition of New Jersey citizens from across the political spectrum, from all races, all religions, all ethnic groups and all regions of the State. The mission of E3 is to encourage an ongoing dialogue among parents, educators, community leaders, business people, clergy and government officials on the best ways to assure an Excellent Education for Everyone and to ensure that all parents, regardless of income, have the power and the resources to decide where and in what way their children are educated.

10. NEW JERSEY PROTECTION & ADVOCACY, INC. ("NJP&A") is responsible for

protecting and advocating for the human, civil and legal rights of persons with disabilities under the Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. §§ 15041 to 15045; the Protection and Advocacy System for Individuals with Mental Illness Act, 42 U.S.C. § 10801 to 10851; and the Vocational Rehabilitation Act, 29 U.S.C. § 732 (Client Assistance Program), § 794e (Protection and Advocacy of Individual Rights Program) and § 2201 et seq. (Technology Assistive Resource Program).

11. NEW JERSEY PTA, founded in 1900, represents approximately 200,000 New Jersey parents in over 750 schools across the state. New Jersey PTA is non-partisan, nonsectarian organization with a threefold mission: (1) To support and speak on behalf of children and youth in the schools, in community, and before governmental bodies and other organizations that make decisions affecting children; (2) To assist parents in developing the skills they need to raise and protect their children; and (3) To encourage parent and public involvement in the public schools of this nation.

12. THE SPECIAL EDUCATION CLINIC AT RUTGERS UNIVERSITY SCHOOL OF LAW-NEWARK was created in 1995, with a grant from the New Jersey State Bar Foundation, to address the critical shortage of legal assistance available to indigent parents of children with disabilities in New Jersey. Since its inception, the Clinic has developed into an influential program with three goals: to provide free legal representation and advocacy to indigent parents and caregivers of children with disabilities seeking to obtain appropriate early intervention and special education programs and services; to train law students in this vital area; and to educate parents, advocates and others involved in the lives of children with disabilities about the early intervention and special education systems, and the rights of parents and children to

access needed services. In recent years, the Clinic received a grant to offer training statewide to court personnel and other professionals working in the child welfare system on how to meet the educational needs of children with disabilities in foster care. Additionally, the Clinic regularly provides information, consultation and direct legal representation for persons advocating on behalf of children with disabilities who are involved in the child welfare system.

13. THE SPECIAL EDUCATION LEADERSHIP COUNCIL OF NEW JERSEY ("SELC-NJ") is a statewide organization comprised of special education parent leaders and advocates. The primary goal of SELC-NJ is to advocate for the rights of students with disabilities and their families throughout the State. SELC-NJ works to accomplish this by providing educational programs and advocacy work to enable parent leaders to better support students and families.

14. THE STATEWIDE PARENT ADVOCACY NETWORK ("SPAN") is New Jersey's federally funded Parent Training and Information Center for families of children with disabilities. SPAN provides information, training, technical assistance, advocacy and support for tens of thousands of parents in New Jersey on education issues affecting their children with special needs. SPAN assists families to resolve concerns regarding their children's education, and to advocate on their children's behalf.

EXHIBIT B