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THE BURDEN-SHIFTING IDEA: SHIFTING THE BURDEN OF PROOF FROM PARENTS TO SCHOOL DISTRICTS IN SPECIAL EDUCATION DUE PROCESS PROCEEDINGS

Mary Casper

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I. INTRODUCTION

At the age of four, Frankie was diagnosed with Pervasive Developmental Disorder not otherwise specified, a subtype of Autism. When he was entered kindergarten, he was placed in an Autism support classroom with seven other students, as well as one teacher and two paraprofessionals. Frankie exceeded in this environment and showed great progress throughout his time in kindergarten and first grade. However, when Frankie entered second grade, the school district changed his IEP and he was moved into a general education classroom, consisting of 24 students, one teacher, and no support professionals. The progress Frankie had made the last two years vanished before his parents' eyes and he began to regress. He could no longer hold a pencil, recite the alphabet, or write his name.

His parents pleaded with the school district to move him back into the Autism support classroom or give him a one-on-one aid in the general education classroom. When the school district refused, his parents were forced to enroll Frankie in a private school for individuals with intellectual disabilities. Since the school district failed to provide Frankie with an appropriate IEP, his parents requested the school district cover the tuition of the private school. The school district denied their request and his parents filed for due process, the beginning of their ten year legal battle with the school district for the placement of their son.[1]

Parents typically request due process hearings in an effort to get their child with disabilities mandated services or the necessary support their child needs to succeed in the classroom.[2] Due process proceedings initially were designed to

[1] *See generally* Norristown Area Sch. Dist. v. Frank C., 2014 U.S. Dist. LEXIS 201121 (E.D. Pa. 2014) (Discussing the compensatory education of a ten-year-old child eligible for special education services after his IEP was found to be inappropriate).

[2] Yoav Gonen, *Parents sacrifice savings and careers in fight for special education services*, CHALKBEAT (July 8, 2019, 10:24 AM)

resolve parent disagreements with schools but have now become new obstacles standing between children with disabilities and their access to the appropriate education. Due process proceedings have become time-consuming, costly, and further strain the relationship between parents and the school district.

One parent stated that many parents give up during due process because the "city wants to make them run around in circles." [3] In a survey conducted on special education attorneys regarding due process proceedings, attorneys representing parents generally rated their experience of due process proceedings as more complex and much more akin to a civil trial while the school district attorneys generally found the due process hearings to be fairly simple.[4]

A contributing factor to the issues of due process proceedings is the burden of proof standard under the Individuals with Disabilities Act (IDEA). The IDEA does not assign burden of proof to parents or the school districts, but many states have required that the challenging party, the parents, bear the burden of proving the IEP is inadequate or improper. In the survey referenced above, parent attorneys found that the cases were more complex for them because of the pressure of having to pull together enough evidence to meet a preponderance standard while being limited in their access to evidence.[5]

However, the burden placed on parents in due process proceedings makes it incredibly difficult for parents to succeed since these proceedings are timely and can become expensive rather quickly.[6] However, by shifting this burden back to the

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https://ny.chalkbeat.org/2019/7/8/21108444/parents-sacrifice-savings-and-careers-in-fight-for-special-education-services

[3] *Id.*

[4] Jane R. Wettach & Bailey K. Sanders, *Insights into Due Process Reform: A Nationwide Survey of Special Education Attorneys*, 20 CONNECTICUT PUBLIC INTEREST LAW JOURNAL 239-288 (2021).

[5] *Id.*

[6] Jennifer Smith & Kristen Kinast, *Trends in Due Process Litigation*, FRANCZEK (Jan. 18, 2023), https://www.specialedlawinsights.com/2023/01/trends-in-due-process-litigation/

school districts it could reduce costs and enhance district accountability, making due process proceedings more efficient.[7]

This article will explore the burden of proof standard in special education due process proceedings and explain why school districts are better equipped to handle this burden. As part of this exploration, the article will include results of surveys and policy papers that illustrate the effects this burden has on parents, as well as other statistics states have relied on when introducing legislation that shifts this burden back to the school district.

Part I of the note will delve into the background of special education. It will discuss the origins and development of the IDEA, explain due process proceedings in special education cases, and introduce the burden of proof standard used in due process proceedings. Part II will analyze the burden of proof standard. It will begin by assessing the burden placed on parents and students with disabilities and how this burden has created a power imbalance between parents and school districts. It will then discuss why schools are better equipped to handle this burden. Part III will discuss the reasons for and against shifting the burden from parents to school districts, as well as look at some of the states that have already adopted this burden-shifting standard and the effects it has had on due process proceedings.

II. HISTORY OF SPECIAL EDUCATION AND BACKGROUND OF IDEA

Prior to 1975, children with disabilities were denied access to education and opportunities to learn.[8] Many individuals with disabilities lived in state institutions and the families of these individuals had little say in the planning and

[7] *Bill Placing Burden of Proof on Districts Now Law*, EDUCATION LAW CENTER, (Feb. 5, 2008), https://edlawcenter.org/news/archives/special-education/bill-placing-burden-of-proof-on-districts-now-law.html

[8] *A History of the Individuals With Disabilities Education Act*, IDEA, (Feb. 16, 2024), https://sites.ed.gov/idea/IDEA-History

placement decisions of their child.[9] In the 1950s and 1960s, many families of individuals with disabilities and supporting associations began to develop practices for children with disabilities.[10] Congress attempted to remedy the lack of educational opportunity for children with disabilities by enacting the Elementary and Secondary Education Act of 1965 ("ESEA").[11] This act implemented funding requirements for public school districts so that they would meet the education needs of children with disabilities, especially in lower socio-economic districts.[12] Eventually this act was replaced with the Education of the Handicapped Act ("EHA"), which combined all educational programs for disabled children.[13] Despite the enactment of these acts, failure to implement harsher guidelines for school districts resulted in the continuation of a majority of school districts failing to education children with disabilities appropriately.[14]

However, true legislative change did not come until after the decision of two landmark cases. [15] The courts in *Pennsylvania Association for Retarded Children (PARC) v. Commonwealth of Pennsylvania* and *Mills v. Board of Education of the District of Columbia* were the first to hold that the state could not deny an individual's right to equal access to education based on an intellectual disability, regardless of the additional costs of accommodations for the school.[16]

In *PARC*, the parents of thirteen individual children with disabilities brought a class action against the Commonwealth of Pennsylvania for acting through its local school districts to

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[9] *Id.*
[10] *Id.*
[11] *What constitutes services that must be provided by federally assisted schools under the Individuals with Disabilities Education Ac*t (IDEA) (20 U.S.C.A. §§ 1400 et seq.), 161 A.L.R. Fed. 1.
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *A History of the Individuals With Disabilities Education Act*, IDEA, (Feb. 16, 2024), https://sites.ed.gov/idea/IDEA-History
[16] Pa. Ass'n for Retarded Citizens v. Pennsylvania, 343 F. Supp. 279, (E.D. Pa. 1972); Mills v. Bd. of Educ., 348 F. Supp. 866 (D.D.C. 1972).

exclude their children from education.[17] The attorney general ultimately reinterpreted the meaning of the challenged statutes to support the notion that every child with a disability had the right to free appropriate public education.[18]

In *Mills*, the court held that the school district violated the Due Process Clause of the Fourteenth Amendment by providing education to non-learning disabled children but denying publicly supported education to children with learning disabilities.[19] Following these landmark cases, Congress codified the Education for All Handicapped Children Act of 1975.[20] There were four notable purposes of this act. First, to assure that all children with disabilities have available to them a free and appropriate public education designed to meet their unique needs.[21] Second, to assure that the rights of children with disabilities and their parents are protected.[22] Third, to assist States and localities to provide for the education of all children with disabilities.[23] Lastly, to assess and assure the effectiveness of efforts to educate all children with disabilities.[24] The Act was reauthorized in 1990, formally changing the name to the Individuals with Disabilities Education Act (IDEA). [25]

The IDEA assures that all children with disabilities have available to them a free appropriate public education ("FAPE") that emphasizes special education and related services designed to meet their educational needs, assures that the rights of children with disabilities and their parents are protected, assists states in providing for the education of all children with

[17] Pa. Ass'n for Retarded Citizens, 343 F. Supp. 279, at 282.
[18] *Id.* at 285.
[19] Mills v. Bd. of Educ., 348 F. Supp. 866 (D.D.C. 1972).
[20] 20 U.S.C.S §1400
[21] *A History of the Individuals With Disabilities Education Act*, IDEA, (Feb. 16, 2024), https://sites.ed.gov/idea/IDEA-History
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.*

disabilities, and assesses the effectiveness of efforts to education children with disabilities.[26]

There are three parties involved in due process proceedings: parents, school districts, and the child with disabilities. Each of these parties has a unique relationship with one another. First, there is a relationship between the school district and the child with a disability. The primary goal of the IDEA is to ensure all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living. The right of child to have access to free appropriate public education corresponds to a substantial affirmative obligation on the part of local school districts.[27] Part of this right forces school districts to ensure that students with disabilities are involved in, and make progress I, the general education curriculum. [28] This duty creates the relationship between school districts and the student with a disability. This relationship revolves around the implementation and design of the IEP, which measures the students involvement and progress in the general education curriculum

There are two distinct relationships that surround the IDEA. First, the IDEA has created a new relationship between the school district and the child with a learning disability. This relationship centers on the design and implementation of an individualized education program (IEP).[29] The IEP sets the backdrop for the challenge against the school district. To prevail on a claim under the IDEA challenging the implementation of an

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[26] *What constitutes services that must be provided by federally assisted schools under the Individuals with Disabilities Education Act* (IDEA) (20 U.S.C.A. §§ 1400 et seq.), 161 A.L.R. Fed. 1 (citing 20 U.S.C.A. § 1400(c)).
[27] Joanne Karger, *A New Perspective on Schaffer v. Weast: Using a Social Relations Approach to Determine the Allocation of the Burden of Proof in Special Education Due Process Hearings*, 12 UC DAVIS J. JUV. L. & POL'Y 133 at 146.
[28] *Id.*
[29] *Id.*

individualized education program (IEP), the aggrieved party must show more than a de minimis failure to implement all elements of that IEP , and must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP.[30]

The purpose of an IEP is to address the child's unique learning needs.[31] An IEP typically has to include certain components: (1) a statement of the student's present levels of educational performance; (2) a statement of annual goals and short-term learning outcomes which are responsive to the learning needs identified in an evaluation report; and (3) a statement of the specific special education services and programs and related services to be provided.[32] Other information used for an IEP includes the child's current levels of academic achievement and functional performance including how the child's disability impacts his or her involvement and progress in the general education curriculum.[33] Under the IDEA, an IEP is not required to maximize the disabled child's educational potential.[34] Rather, it's purpose is to guarantee a basic floor of opportunity for all children with disabilities.[35]

Second, a separate relationship exists between the school district and the parent of the child with learning disabilities. The IDEA compels the participation of parents as members of their child's IEP team.[36] Parents have the right to inspect their child's education records, participate in meetings regarding their child's education, and obtain independent

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[30] *What constitutes services that must be provided by federally assisted schools under the Individuals with Disabilities Education Act (*IDEA*)* (20 U.S.C.A. §§ 1400 et seq.), 161 A.L.R. Fed. 1; *See also J.L v. Francis Howell R-3 School Dist.*, 693 F.Supp. 2d 1009 (E.D. Mo. 2010) (Discussing a due process hearing where parents sought reimbursement for the costs of a private school for their child with disabilities).

[31] *Id.*

[32] 43 P.L.E. Schools § 183.

[33] Karger*, supra* note 27.

[34] 43 P.L.E. Schools § 183.

[35] *Id.*

[36] Karger*, supra* note 27.

educational evaluations.[37] While the original intent of the IDEA was for parents and school districts to be partners in the creating of an appropriate education plan for the child with learning disabilities, many parents feel they are secondary in the process and lack the power to have a say regarding their child's education.

The IDEA is inherently vague in the terms "free appropriate public education" causing parents and school districts to disagree on what special education services and placement a child should receive under the law.[38] A free and appropriate public education encompasses special education and similar services that (1) are provided at public expense, under public supervision and direction, and without charge; (2) meet the standards of the state educational agency; (3) include an appropriate preschool, elementary or secondary school education in the state involved; and (4) are provided in conformity with the individualized education program required under 20 U.S.C.A. § 1414(a)(5).[39] Courts have identified numerous services that are required by IDEA to be provided to children with disabilities on the basis that the services fell within the meaning of FAPE, "special education," "related services," or a combination of these terms.[40] While the appropriate placement depends on the unique needs of the child with disabilities, examples of types of appropriate educational placements include: public classroom, special education setting in a public school, alternative public school, private school, residential program, alternative residential program, or home tutoring service or habilitation program.[41]

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[37] *Id.*

[38] Wettach and Sanders, *supra* note 4.

[39] 20 U.S.C.A. § 1401(a)(18).

[40] *What constitutes services that must be provided by federally assisted schools under the Individuals with Disabilities Education Act* (IDEA) (20 U.S.C.A. §§ 1400 et seq.), 161 A.L.R. Fed. 1.

[41] *Id.*; *See also Krinchinsky By and Through Krinchinsky v. Knox County Schools*, 963 F.2d 847 (6th Cir. 1992) (Holding that an administrative agency's findings concerning the appropriateness of an individualized education plan that the public school system proposes for a child with disabilities may be appealed).

The IDEA combats the vagueness in regard to the meaning of FAPE by providing several dispute resolution tools to help resolve differences of opinion. Parents who disagree with the proposed program or placement of their child have the right to request a special education due process hearing.[42] The process begins when a parent files a written complaint against the school and then attends a resolution session.[43] If the parents and school district cannot come to an agreement during the resolution session or mediation, then a due process hearing is held. During this hearing, evidence is presented, and witnesses may be asked to speak and then a decision is made by a hearing officer.[44]

However, there are limitations to these due process proceedings. The IDEA only allows parents to file due process complaints for disputes related to "identification, evaluation, or educational placement of a child with a disability, or the provision of a free appropriate public education [FAPE]."[45] Disputes can be either substantive or procedural. Substantive issues are issues surrounding a child's right to an appropriate education, such as inadequate IEPs, while procedural issues involve the technical aspects of the evaluation or IEP process, such as failure by the school to give prior written notice.[46] But, due process decisions regarding FAPE must be based on substantive issues.[47] Due process hearings function similarly to courtroom trials. During these proceedings, parents have the right to hire a lawyer, present evidence, have witnesses testify or cross-examine school's witnesses.[48] Due process decisions

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[42] *The Process of Due Process for Special Education Students*, MCANDREWS, MEHALICK, CONNOLLY, HULSE, AND RYAN P.C, (last visited Feb. 8, 2024), https://mcandrewslaw.com/publications-and-presentations/articles/the-process-of-due-process-for-special-education-students/

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] Andrew M.I. Lee, *Due process rights: What you need to know*, UNDERSTOOD, (last visited Feb. 9, 2024) (https://www.understood.org/en/articles/due-process-rights-what-you-need-to-know

are not final, so parents have the right to challenge the decision.[49]

A. Overview Special Education Mediation and Due Process Proceedings

The number of due process complaints filed reached an 11-year peak for the fifth consecutive year in 2020-21 at 23,567 filings nationally.[50] Of these 23,567 complaints, only 1,296 resulted in a fully adjudicated hearing in 2020-21.[51]

Generally, when an issue arises between parents and a school over the education of their child, mediation will occur. While each state differs regarding their timeframes, they typically all follow the same process. In New Jersey, a parent or local education agency ("LEA") has two years to file for due process from the date of the alleged complaint. Once the complaint is filed, the LEA is granted 15 days to schedule a resolution session, or mediation, if the parties prefer.[52] Mediation is typically encouraged as it is cost-effective, timely, and less adversarial than due process.[53] During mediation, an impartial, third-party facilitator assists the LEA and parent in identifying areas of disagreement and discussing methods to resolve these disagreements.[54] The parties are not required to

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[49] *Id.*

[50] *Trends in Dispute Resolution (DR) under the IDEA for SY 2021-2022*, CADRE, (Dec. 2023) https://www.cadreworks.org/files/trendsindisputeresolution-ffy2020-21accessiblepdf

[51] *Id.*

[52] Renee A. Davis, *SPECIAL EDUCATION DUE PROCESS: AN ANALYSIS OF DECISIONS IN NEW JERSEY FROM JULY 2005 - JUNE 2012*, ROWAN UNIVERSITY: THESES AND DISSERTATIONS (2022).

[53] *Id.*

[54] *Id.*

mediate, but it is the best option to resolve the dispute because of the time saving and costly nature of the process.[55]

If parents decide to forgo mediation, or a decision cannot be reached, a due process hearing can be requested. However, the IDEA requires parents to formally file for IEP due process within two years of the dispute.[56] Failing to file within this time frame results in parents losing their rights to challenge the IEP.[57] In New Jersey, once a due process hearing is requested, the student will remain in the last agreed-upon placement until the outstanding matters are resolved.[58] The waiting-period associated with this process is critical because the longer the process takes to get resolved, the longer the child goes without receiving the necessary educational services, which will be discussed more in a later section of this note. Prior to the start of the hearing, the parties must formally disclose all evidence they intend to use during the due process proceedings. However, this is a difficult task for parents who do not have access to the vast array of records necessary to prove their case, while school districts can easily access records and individuals who have the information they need to prevail in due process proceedings. Due process cases in New Jersey are heard before an Administrative Law Judge ("ALJ"), which is a neutral party with knowledge of the IDEA.[59]

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[55] *Understanding IEP Due Process*, UNDERSTANDING SPECIAL EDUCATION, (last visited Feb. 18, 2024), *https://www.understandingspecialeducation.com/IEP-due-process.html*

[56] *Id.*

[57] *Id.*

[58] N.J.A.C 6A:14-2.7

[59] Davis, *supra* note 52.

III. BURDEN OF PROOF STANDARD IN DUE PROCESS PROCEEDINGS UNDER THE IDEA

A. Burden of Proof as a Legal Concept

The Burden of Proof consists of two components: the burden of production and the burden of persuasion. The burden of production refers to a party's obligation to provide evidence that proves each element of a claim or cause of action.[60] Generally, this burden is placed on the moving party to introduce evidence that proves each element of its claim.[61] If the party fails to provide sufficient evidence that is strong enough to support their case, they lose. However, if sufficient evidence is presented, the issue is submitted to a finder of fact. In some case, if sufficient evidence is presented, the burden could shift to the opposing party, who is then forced to provide evidence to rebut the initiating party's evidence or present evidence that would establish an affirmative defense.[62] The burden of production has the ability to shift from party to party throughout the case.

On the other hand, the burden of persuasion stays with the same party throughout the fact-finding process. The burden of persuasion involves persuading the finder of fact of the correctness of a party's position.[63] In cases where the evidence is equally divided between the parties, the burden of persuasion is typically outcome-determinative. In these "tie" cases, the tie goes to the litigant who does not have the burden of persuasion.[64]

The standard of review is also tied to the concept of burden of proof. The standard of review refers to the scrutiny with which a higher tribunal reviews the factual findings of a

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[60] Thomas A. Mayes, Perry A. Zirkel & Dixie S. Huefner, *Allocating the Burden of Proof in Administrative and Judicial Proceedings under the Individuals with Disabilities Education Act*, 108 W. VA. L. REV. (2005).
[61] *Id*.
[62] *Id.* at 33.
[63] *Id.* at 34.
[64] *Id.*

lower tribunal.[65] The levels of scrutiny exist on a spectrum, with one end being "de novo" review, meaning the reviewing body gives little or no weight to a lower body's decision. At the other end, a lower body's findings may be reviewed for substantial evidence or abuse of discretion.[66]

B. Burden of Proof and the IDEA

In the context of reviewing an administrative decision made under the IDEA, courts have employed a "modified de novo" standard of review. Under the IDEA, the standard is "preponderance of evidence," meaning the burden of proof must be of greater weight than the evidence favoring the defining party.[67] To put this another way, the party with the burden of proof in a case with "preponderance of the evidence" standard must present evidence that it is more likely than not that the party's position is correct.[68]

This standard of review was first used by the court in *Rowley*, where it was stated that this modified de novo review standard requires the reviewing court to make "independent decisions" as to the issues raised based on the preponderance of the evidence while giving "due weight" to the determinations made during the state administrative proceedings.[69] Furthermore, the court's inquiry under the IDEA requires a procedural and substantive analysis.[70] First, the court must determine whether the school system has complied with the procedures set forth in the IDEA.[71] Second, the court must assess whether the individualized education plan (IEP)

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[65] *Id.*
[66] Thomas A. Mayes, Perry A. Zirkel & Dixie S. Huefner, *Allocating the Burden of Proof in Administrative and Judicial Proceedings under the Individuals with Disabilities Education Act*, 108 W. VA. L. REV. (2005).
[67] *Id.*
[68] *Id.*
[69] Winkelman v. Parma City Sch. Dist. Bd. of Educ., 2009 U.S. Dist. LEXIS 112137 (citing *Rowley*, 458 U.S. at 206)
[70] Nack ex rel. Nack v. Orange City Sch. Dist., 454 F.3d 604 (6th Cir. 2006).
[71] *Id.*

developed through those procedures was reasonably calculated to enable the child to receive educational benefits.[72] Under this analysis, the burden rests on the parents to prove, by a preponderance of the evidence, that the IEP was inadequate.

The IDEA does not allocate the burden of proof in due process proceedings to either party. However, in 2005, the Supreme Court ruled that the party requesting a due process hearing bears the burden of proof under the IDEA unless a state enacts legislation to the contrary.[73] Brian Schaffer was a child who struggled academically as a result of learning disabilities and speech-language impairments.[74] Brian's parents brought suit against the school district and the court placed the burden of proof on them to prove that Brian's IEP was inadequate.[75] However, the parents asked the court to assume that every IEP was invalid and the burden be placed on school districts to demonstrate that it was not.[76] The court rejected this argument and instead held that the party challenging an IEP, the parents, bear the burden of persuasion in a due process hearing.[77] Since this decision, several states and the District of Columbia have effectively overridden Schaffer by creating statutes or other regulatory regimes that generally place the burden of proof is on the public agency.[78] Many of these regulatory regimes state that while the party seeking relief has the burden of proof, the public agency is responsible for proving the appropriateness of the child's program or placement.[79] For example, the District of Columbia states that the party seeking relief has the burden of production and burden of persuasion, except in cases where there is a dispute about the appropriateness of the child's program or placement or when a parent seeks tuition

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[72] *Id.*
[73] Schaffer v. Weast, 546 U.S. 49 (2005).
[74] *Id.* at 54.
[75] *Id*. at 56.
[76] *Id.* at 59.
[77] *Id.* at 62.
[78] Tiffany Clark & Lynne B. Rosen, *The Burden of Proof in Special Education Due Process Hearings*, DEPARTMENT OF LEGISLATIVE SERVICES (2017).
[79] *Id.*

reimbursement for a unilateral parental placement.[80] Other states, such as New Jersey, place the burden of proof and production on the public agency in all cases.[81]

IV. SHIFTING THE BURDEN: EFFECTS OF PLACING THE BURDEN ON PARENTS

While some states have shifted the burden to school districts, many states still hold that the party challenging the IEP, bears the burden of proof in due process proceedings under the IDEA. However, the burden of proof is not the only burden placed on parents during these hearings. Due process proceedings place emotional and financial burdens on parents and make it more difficult for them or the child with disabilities to succeed. In placing the burden of proof on parents, parents are automatically placed in a powerless position and forced to overcome adverse challenges before they even begin the due process proceeding.

The fees for attorneys and experts alone are extremely costly and while the IDEA allows for attorneys' fees, many parents never get this chance because they fail to meet the burden of proof because of the accessibility issue. Also, many parents of children with disabilities are from low-income communities and therefore cannot handle the costs of due process proceedings forcing them to give into the school district. However, school districts are larger and can offset the expenses of due process proceedings much more efficiently than a parent of a child with an intellectual disability.

A. Burden Placed on Parents in Special Education Due Process Proceedings

This section will discuss the burdens placed on parents of children with disabilities and the short- and long-term effects caused by parents having to bear this burden. It will then discuss

[80] *Id.*
[81] *Id.*

several reasons why school districts are better equipped to handle the burden of proof. By placing the burden of proof on families, the inherent issues of the due process system are placed entirely on the parents, rather than the school district. These issues include the unequal balance of accessibility for documents and testimony for the discovery process, as well as the heavy financial strain placed on families throughout this process.

1. Accessibility and Unequal Opportunity for Discovery

School districts have an automatic advantage in due process proceedings because of the unlimited access they have to documents, experts, such as teachers, and other relevant school information.[82] On the other hand, parents entirely lack access to all this information.

In order for due process hearings to be fair, the parents need timely notice and prior access to the evidence.[83] Many parents believe that timely notice prior to their due process hearing is not an issue, but many argue that prehearing activities, such as access to school records pertaining to their child and relevant to the IEP were not made available in an appropriate or timely manner. In a study, only 24% of parents reported that all or nearly all pertinent school records had been made available and another 24% reported that no or nearly no such records had been forthcoming.[84] To make matters worse, 51% of parents claims that schools provided no or almost no explanations of the meaning of the provided records. Keeping in mind that parents are already at a disadvantage during due process hearings and lack the same level of knowledge that the experienced school districts do makes this statistic especially

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[82] *Make Burden of Proof Fair and Equitable*, COUNCIL OF PARENT ATTORNEYS AND ADVOCATES (last visited Mar. 8, 2024), https://www.copaa.org/page/BOP.

[83] Steven S. Goldberg & Peter J. Juriloff, *Evaluating the Fairness of Special Education Hearings*, 57 EXCEPTIONAL CHILDREN 6, 546-555 (May 1991).

[84] *Id.* at 550.

concerning. If parents are given records with no explanation of the contents of the record or how it relates to the IEP, they cannot effectively build their case against the school district and will likely fail to carry the burden of proof, ultimately resulting in the loss of their case. Furthermore, during IEP meetings, which ultimately becomes the basis of the parent's argument against the school district, some parents found that accessing the necessary information was nearly impossible, with one parent stating:

> Not enough information is presented to parents in regard to what services their child is eligible for. We have to find things out the hard way, by investigating ourselves and it is an exhausting experience. Schools should be much more forthcoming with that info. They should be more focused on what the child truly needs to succeed rather than how they can conserve their resources.[85]

Alternatively, although the IDEA mandates parental access to all of the child's educational records and evaluations prior to the due process hearing, these provisions are not comparable to the rigorous discovery requirements in civil litigation.[86] The school district's control a majority of the necessary records that parents need in order to establish their case. This also includes control over important experts to the case, the child's teachers, who are employees of the school district. School districts also possess a level of expertise on academic affairs that parents often do not because they are familiar with due process proceedings and understand what courts typically require of each side.[87]

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[85] Kelli A. Sanderson, "*Be Prepared to Fight Like Hell": Parent Advice for IEP Meetings*, EXCEPTIONALITY 31(3): 1-18, (Feb. 2023).
[86] Jennifer M. Saba, *Undue Deference: Toward a Dual System of Burdens under the Individuals with Disabilities Education Act,* 57 DEPAUL L. REV. 133 (2007).
[87] *Id.*

2. Financial Strain

Another issue with placing the burden of proof on parents during special education due process proceedings is that many parents are unable to afford attorneys or experts, while school districts already have this representation on hand. For reference, if parents decide to receive representation from an attorney, legal fees typically cost an average of $19,000.[88] However, in certain districts and cases, parent attorney fees can be upwards of $75,000.[89] Furthermore, in a survey of special education attorneys, 80% of those interviewed indicated that good results for the student with disabilities require expensive experts and 82% of parent attorneys agreed that in order for parents to prevail in due process hearings, representation by attorneys is a necessity.[90] In a study on the Massachusetts special education due process proceedings, the researcher found that approximately 50% of parents undergoing due process proceedings forgo hiring an attorney in order to minimize expenses.[91] However, Table 5 of the article illustrates that in the 258 cases where parents appeared pro se, 71% of those pro se cases resulted in a loss for the parents and child with disabilities.[92]

These cost of just the essentials, experts and attorneys, illustrates just two barriers for parents without the resources

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[88] *IEP Process vs Due Process and IDEA Compliance*, NATIONAL SPECIAL EDUCATION ADVOCACY INSTITUTE, (last visited Feb. 3, 2024), https://www.nseai.org/iep-vs-due-process

[89] *Id.*

[90] Grace Tatter, *Low-Income Students and a Special Education Mismatch*, HARVARD GRADUATE SCHOOL OF EDUCATION, (Feb. 21, 2019), https://www.gse.harvard.edu/ideas/usable-knowledge/19/02/low-income-students-and-special-education-mismatch#:~:text=In%20their%20analysis%20of%20data,objective%20categories%2C%20like%20hearing%20impairment.https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=6780&context=faculty_scholarship

[91] William & Vivian Blackwell, *A Longitudinal Study of Special Education Due Process Hearings in Massachusetts: Issues, Representation, and Student Characteristics*, SAGE (2015).

[92] *Id.*

and funding necessary to enforce the right of their child to a free and appropriate public education, but they are not the end of a parent's financial hurdles. In some cases, parents may elect for an out-of-district placement of their child, which substantially increases the costs parents have to pay. An out-of-district placement is a specialized school or program that parents opt to send their child to when their school district cannot meet their child's educational needs.[93] These placements are able to provide the appropriate education for a child with disabilities, but they are extremely costly, and school districts will often be reluctant or outright refuse to pay for the costs of the placement.[94] On average, private, out-of-district placements cost around $50,000 a year, and can even reach up to $100,000 in total expenses once transportation and other services are factored in.[95]

Returning to Frankie's case,[96] his parents were forced to decide between keeping their son in a public school with an inappropriate IEP and risk further educational regression, or move him to a private school and cover the expenses themselves. They ultimately decided to place their son in a private special education school.[97] To come up with the money to support their son, they withdrew from their 401(k) account early and put the remaining expenses on a credit card. Frankie's parents were fortunate enough to have the ability to access those assets to immediately place their son in a program that allowed him to flourish educationally and socially, but they faced deep financial strain.

Income disparity adds another dimension to this issue, as low-income parents without resources like a savings account,

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[93] Amanda Morin, Out-of-District Placement: How it Works, UNDERSTOOD, https://www.understood.org/en/articles/out-of-district-placement-how-it-works (last visited xxx).

[94] *See* Lisa Lightner, *How to Get an Out-of-District Placement (IEP and Special Education),* A DAY IN OUR SHOES, https://adayinourshoes.com/iep-private-placement/ (last visited Feb. 8, 2024).

[95] *Id.*

[96] Norristown Area Sch. Dist. v. Frank C., 2014 U.S. Dist. LEXIS 201121 (E.D. Pa. 2014).

[97] *Id.* at *7.

a 401(k), or even room on their credit card are unable to meet the cost of tuition. Research has shown that there is a positive correlation between poverty and special education assignment since children in poverty have experiences that are more heavily associated with disability.[98] Families of children with disabilities have dramatically higher rates of poverty and are less educated than the population as a whole, thus are far less likely to prevail against the school district since they lack the necessary resources.[99]

Of the seven million children receiving special education services under the IDEA, one-quarter live below the poverty line and two-thirds live in households with incomes of $50,000 or less.[100] A study by the American Bar Association found that 60% to 70% of Americans cannot afford lawyers to meet their non-routine legal needs.[101] The costs associated with IDEA highlight the discrepancies between wealthy families and families living below the poverty line. The private school tuition remedy available under the IDEA illustrates just one-way families without means may be overlooked. When public schools fail to provide FAPE, a parent may seek tuition reimbursement if they decide to switch their child into private school.[102] This right is limited for families without financial resources, since many private schools require up-front payments, contracts, deposits, or have other admissions policies in place that have the effect of excluding these families.[103] In cases where families are able to find a private school that would conditionally accept their child, the parents may still have to incur substantial debt to the school

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[98] Laura A. Schifter et al., *Students from Low-Income Families and Special Education*, CENTURY FOUND. (Jan. 17, 2019), https://tcf.org/content/report/students-low-income-families-special-education.

[99] *See* Elisa Hyman et al., *How IDEA Fails Families Without Means: Causes and Corrections From the Frontlines of Special Education*, 20 AM. U. J. OF GENDER SOC. POL'Y AND L. 107, 112-113 (2011).

[100] *Id.* at 113. ("For the poorest parents, legal services are simply not affordable, and limited resources restrict free legal aid to a fortunate few.")

[101] *Id.*

[102] *Id.* at 121.

[103] *Id.*

in order to secure their child's spot. This is not a realistic option for many families, as the remedial processes under IDEA are very lengthy and their debt to the school would only accrue over that time.

Under the IDEA, school districts are responsible for conducting evaluations of children suspected of having disabilities.[104] However, if a school district fails to evaluate or conduct a particular assessment as part of the overall evaluation, the IDEA does not expressly allow a parent to obtain an Independent Educational Evaluation ("IEE").[105] These IEEs are another area where low-income families are burdened. An IEE is an evaluation or assessment conducted by educational professionals who do not work for or are otherwise affiliated with the district .[106] This independent assessment is critical for due process proceedings because it enables parents to obtain evaluative information as well as suggestions on instructional strategies from professionals who are not beholden to district, or under pressure to minimize district spending.[107] Even though this evaluation is a crucial piece of evidence for parents due process proceedings, it is difficult for a parent without financial resources to exercise this right because they typically cannot afford an expert.[108] Under the IDEA, parents have the right to request an IEE, to which the school district must either ensure the IEE is provided, or file an administrative due process hearing of their own to show that its own evaluation is appropriate. Without an independent evaluation contradicting the claims of the district, parents cannot refute these claims.[109]

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[104] *Id.*
[105] Hyman et al., *supra* note 99 at 128.
[106] *Id.* at 126.
[107] *Id.*
[108] *Id.* at 126-27.
[109] *Id.*

3. IDEA's Disproportionate Impact on Impoverished Families

The IDEA offers students with disabilities a substantive right to free appropriate public education, but does not guarantee equal educational outcomes. A students IEP team, comprised of their parents, their teachers, and representatives of the district, make ddecisions regarding placements where a child is to receive specialized instruction, and other related services. However, it's the school districts and not the parents that are in control of designing and structuring these placements, which means that the district's budget, staffing, and state laws all impact what is offered to the child with disabilities.[110] Well-funded school districts typically can handle this structuring with ease, but low-income school districts are less likely to have the same opportunities for integration which leads to higher rates of segregation and poorer academic outcomes .[111] This mismatch between school resources and student needs becomes apparent in overcrowded classrooms, dilapidated facilities, and lower quality services.[112] One study indicated that 90% of low-income school districts lack vital resources, including the ability to hire qualified special education teachers.[113] The lack of adequate resources leads to larger disparities in academic achievement between students with disabilities and those without. For these reasons, students with disabilities in low-income school districts face challenges not only related to their individual disability, but also to the structural shortcomings of the school district. While the IDEA was intended to address issues related to disability, it fails to provide a means of support for these structural shortcomings pervasive in low-income districts.

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[110] Claire S. Raj, *Rights to Nowhere: The IDEA's Inadequacy in High-Poverty Schools*, 53 COLUM. HUM. RTS. L. REV. 409, 426-27 (2022).
[111] *Id.* at 427.
[112] *Id.* at 428.
[113] *Id.*

Childhood is a crucial period to an individual's brain development and growth. In certain situations, delaying children from receiving the appropriate education and services may impact their development growth and educational achievements. Children who grow up in poverty are even more highly affected by their circumstances and their developmental growth is impacted. Research has shown that children who grow up in poverty have significantly less white and cortical grey matter, the actual tissue of the brain, massively impeding their learning capacities at early ages.[114] Furthermore, due to the circumstances that children with poverty deal with, their brains show a substantial deterioration of cognitive capabilities associated with memory, language, and reading.[115] Children with impairments who are not in the appropriate educational setting are likely to be disadvantaged for the rest of their lives.[116]

It is also important to note that the classification of special education students is more likely to identify low-income students, rather than their more affluent peers, specifically in subjective categories like emotional disability.[117] This creates a separate issue, where special education classes are no longer based on need, but rather a failure of the school district to appropriately place the student. Some researchers hypothesize that school districts with more limited resources are misidentifying low-income students as students with disabilities in order to place them in separate classrooms because the general education program of the school district fails to meet the needs of these students.[118] Another theory for why poverty and special education placement so often correlate

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[114] Morgan Marie Auge, *The Effects Poverty Has on Students in Special Education*, (Jul. 2021) (Master's Thesis, Bethel University) (Spark Repository).

[115] *Id.* at 27 (tying the impediment of early childhood brain development to neglect, family stress, and malnutrition).

[116] *Id.*

[117] Tatter, *supra* note 90.

[118] Bruno Youn, *Poverty and Special Education Placement,* INLAND EMPIRE OUTLOOK, Spring 2018, at 15.

is that school districts are intentionally denying services to students with disabilities to avoid paying the cost of providing the services they need.[119] School districts with more low-income students face more financial pressure and thus, have more incentive to deny services. Since the families in these school districts are low-income, the parents of these students presumably are less likely to have access to the legal and financial resources necessary to advocate for the child with disabilities in situations where they feel they are being deprived of the necessary services.[120] For example, school districts may find it more cost-effective to place students in general education classrooms rather than special education classrooms, even though the child's academic achievements and developmental progress would be thwarted in the general classroom. While this violates the IDEA, school districts, specifically those in low-income areas, have found ways around the requirements of the IDEA. Local educational agencies may refuse to identify children who clearly have disabilities, allowing them to avoid any obligation of having to provide the child with the necessary services and aides.[121]

By placing the burden of proof on parents rather than school districts in special education due process proceedings, the IDEA puts further financial strain on low-income parents of children with disabilities. Unable to afford an attorney, parents are forced represent themselves against the districts and their attorneys, walking into an adversarial situation without the resources and knowledge necessary to show that the district failed to comply with the procedures and the substantive provisions of the IDEA.[122]

Aside from the financial burden placed on parents in special education due process proceedings, parents of children with disabilities also face additional financial burdens, such as various therapy services, specialized day cares, and daily living adaptations that make it easier for the child to be successful in

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[119] *Id.* at 19.
[120] *Id.*
[121] *Id.*
[122] *See* Hyman, *supra* note 119 at 144.

day-to-day life.[123] Additionally, families of children with disabilities could have out-of-pocket health-care expenditures that are significantly larger than that of families of children without disabilities.[124]After that, the transaction costs associated with bringing a due process claim are very high and spread unevenly throughout the affected population, deterring many families from ever arguing against an IEP, no matter how inappropriate it may be for their child.

One type of transaction cost is the cost of involvement in educational decisions. Since parents have fewer financial resource, this cost is generally more expensive for them because of the higher cost involved in obtaining sufficient knowledge to participate in these decisions, as well as the additional cost related to loss of time at work to participate in these decisions.[125]

The second type of transaction cost involves the risk associated with raising a claim, which varies with the ease of exiting the school system.[126] Wealthier families are more able to raise individual claims because they can afford to move to a different district, or even into a private school, if their relationship with the school is harmed in the process of complaining.[127] However, lower income families do not have these same options, making it riskier for them to raise complaints against the school district.

Another type of transaction cost involved in due process proceeding and special education litigation, perhaps the most significant cost, is hiring an attorney. To limit the size of this

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[123] Christine Michel Carter, *Effective Tools for Working Parents Raising Special Needs Children,* FORBES (Sep. 8, 2024, 11:50 AM), https://www.forbes.com/sites/christinecarter/2024/09/08/effective-tools-for-working-parents-raising-special-needs-children/

[124] Kimberly Goodwin, PhD, *Financial Challenges of Raising a Child with Disabilities*, NOBLE (Sep. 30, 2018), https://www.mynoblelife.org/2018/09/financial-challenges-of-raising-a-child-with-disabilities/

[125] Eloise Pasachoff, *Special Education, Poverty, and the Limits of Private Enforcement*, 86 NOTRE DAME L. REV. 1413, 1444 (2011).

[126] *Id.*

[127] *Id.*

transaction cost and incentivize attorneys to take these cases, the IDEA includes a provision permitting prevailing parents to obtain attorneys' fees from the other party.[128] However, Supreme Court decisions have limited this effect which explains why the provision has not ameliorated the difficulties low-income families face in finding an attorney.[129]

One such decision from the court came from *Marek v. Chesny*.[130] There the Court ruled that in cases where parents prevail at the conclusion of a proceeding, but the monetary judgment they obtain is less than the settlement offer they previously rejected, they cannot recover attorneys' fees unless they were substantially justified in refusing that offer.[131] Additionally, no attorneys' fees can be awarded for participation in IEP meetings and even more, attorneys' fees can be reduced if the parent or parent's attorney "unreasonably protracted" the proceedings; if the fees or hours are determined to be excessive.[132] These practices restricting the grant of attorneys' fees constrict the supply of practitioners and reduce low-income families' access to lawyers.

An additional level of concern regarding the financial risks to parents revolve around a 2004 Congressional provision that makes parents and their attorneys responsible for the attorneys' fees of the defendant school districts in a variety of circumstances: if the complaint is determined to be frivolous, unreasonable, or without foundation, or if the complaint was presented for "any improper purpose."[133] While these provisions disincentivize parents from making frivolous complaints, many parents could still file a complaint they believe is proper, but crosses the line into unreasonable

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[128] *Id.* at 1445.
[129] *Id.* at 1446.
[130] Marek v. Chesny, 473 U.S. 1 (1985).
[131] *Id.* at 11-12 (1985). *See also* Catherine R. Albiston & Laura Beth Nielsen, *The Procedural Attack on Civil Rights: The Empirical Reality of Buckhannon for the Private Attorney General*, 54 UCLA L. REV. 1087, 1096-97 (2007) (discussing *Marek v. Chesny* as part of a broader effort to curb civil rights claims).
[132] Pasachoff, *supra* note 122 at 1447.
[133] *Id.*

advocacy. This mistake would force parents into the burden of covering the school district's legal fees.[134] Therefore, parents, who face more risks by entering into litigation proceedings, are more likely to decide against raising claims against the school district out of fear that these heavy costs will fall on them in the end.

The financial burden may push parents into alternative dispute resolution forums, like mediation, without an attorney, putting them at an automatic disadvantage against the more knowledgeable and powerful school district.

4. Emotional Pressures

The final burden placed on parents during special education due process proceedings are the emotional pressures that parents must deal with throughout the process. Parents of children with disabilities are prone to psychological distress, such as anxiety and sleep disturbances.[135] In a study analyzing the parental stress in families of children with disabilities, the researchers isolated the risk factors associated with increased emotional burdens and stress. Some of these risk factors included parents' thoughts and emotions associated with worries about current and future situations, educational barriers, perceived judgement from others, and contrasting perspectives regarding the child's needs and proposed solutions.[136] While these are just some of the contributing factors to parent's emotional burdens, adding a complex, expensive legal proceeding to the mix only adds to the emotional toll on parents of children with disabilities.

The initial emotional pressure parents must deal with comes from the stress of challenging the school district and its educators, the people in charge of their child's educational opportunities. Many parents face valid concerns that by

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[134] *Id.*

[135] Andrew W.Y. Cheng & Cynthia Y.Y. Lai, *Parent Stress in Families of Children with Special Educational Needs: A Systematic Review*, FRONTIERS PSYCHIATR, Aug. 2023, at 1.

[136] *Id.* at 5 tbl.1, row 3 (citing Shaffer et al.).

bringing a claim against the school district, they could jeopardize their relationship with the school and prejudice their child's future educational opportunities.[137] The IEP meeting itself is an emotionally draining event that parents have to take part in. While IEP meetings are meant to be collaborative between parents and school boards, many issues may arise over conflicting views on what is best for the child.[138] In a survey of parent experiences during IEP meetings, parents described and rated their past IEP meeting experiences.[139] The study found that the overall IEP experience is overwhelmingly negative for parents.[140] The meetings are student-centered and focused on student progress, and these meetings afford opportunities for parent and student participation, but the positive experience for parents ends there.[141] Over half of the responses in the survey described the IEP experience as negative, citing discontent of IEP team members and school practices.[142] The main areas of dissatisfaction from parents were lack of collaboration, deficit-based meetings, unprofessional behavior, and a broken special education system.[143] Parents also face an additional emotional burden during IEP meetings and due process proceedings as parents build their case with the facts that will illustrate the educational and mental deficits their child deals with.[144] Although the parents are obviously aware of the disabilities their child has, for many parents, hearing negative things about their child is "stressful" and "defeating."[145]

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[137] *See* Pasachoff, *supra* note 122, at 1447.
[138] Kelli A. Sanderson, "*Be Prepared to Fight Like Hell": Parent Advice for IEP Meetings*, EXCEPTIONALITY 31(3): 1, 1 (Feb. 2023).
[139] *Id.*
[140] *Id.* at 14.
[141] *Id.* at 5 tbl.2.
[142] *Id.* at 6.
[143] *Id.*
[144] *See generally* Sanderson, *supra* note 140 at 7 ("Be prepared to fight like hell.").
[145] *Id.*

B. Shifting Burden of Proof: Effects on School

This section will look at the current federal funding system relied on by school districts and argue that even though the current system is flawed, school districts are in a stronger position to cover the expenses associated with special education due process proceedings instead of parents of students with disabilities.

After analyzing the effects of placing the burden of proof on parents, it is appropriate to also address the impacts of placing the burden of proof on school districts. In addressing these effects, it is imperative to look at the issue of the lack of funding towards special education programs across the country.

Special education programs across the United States are consistently underfunded, even as the number of students qualifying for special education services increases to over 7 million students.[146] In 2020-21, over 307,000, or 18.1% of public-school students, received special education programs and services, an increase of 13.9% over the last 12 years.[147] However, the funding for these programs does not align with the growing need for them.

The IDEA is one of the primary "funding statutes" used for public education.[148] The Act provides states with federal funding by granting money to offset a portion of the excess cost of delivering special education and related services to children with disabilities.[149] The IDEA authorized federal funding for 40% of average per-pupil expenditure ("APPE") to pay a

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[146] Mark Lieberman, *How Special Education Funding Actually Works*, EDUCATIONWEEK (Apr. 27, 2023), https://www.edweek.org/teaching-learning/how-special-education-funding-actually-works/2023/04.
[147] PA. SCHOOL BOARDS ASS'N, 2022 STATE OF EDUCATION 13 (2022).
[148] Tammy Kolbe, et al., *More Money is Not Enough: (Re)Considering Policy Proposals to Increase Federal Funding for Special Education*, 129 AM. J. OF EDUC. 79, 80 (Nov. 2022).
[149] *Id.* at 81; 20 U.S.C. § 1411.

portion of expenses for special education services.[150] However, since the IDEA was enacted, federal funding has fallen well below the 40% threshold.[151]

Furthermore, evidence also suggests that there are disparities in the allocation of federal IDEA funding such that states where the number of children aged 3-21 increased over the past two decades received fewer federal dollars per student, and large states received about 12% less funding than small states.[152] These disparities ultimately cause issues that affect the school districts. On average, larger districts with more students received less IDEA funding than small districts, districts in the smallest states had higher per-child federal IDEA funding, and districts with the largest declines in enrollment over the past fifteen years had higher per-child allocations.[153]

This funding gap is a common trend throughout the United States, and in order to make up for this gap in special education funding, most school districts have been forced to pay a larger share of special education expenses entirely from increases in local funding sources, such as property taxes.[154] Figure 1, below, illustrates the growing funding gap that school districts are facing due to the lack of federal and state funding. While this table focuses on Pennsylvania's special education funding gap, this trend is common among many states.[155]

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[150] Katie Graves, *Funding Falls Short for Students with Disabilities*, NAT'L ASS'N OF ELEMENTARY SCH. PRINCIPALS (Nov. 20, 2023), https://www.naesp.org/blog/funding-falls-short-for-students-with-disabilities/.

[151] Lieberman, *supra* note 141.

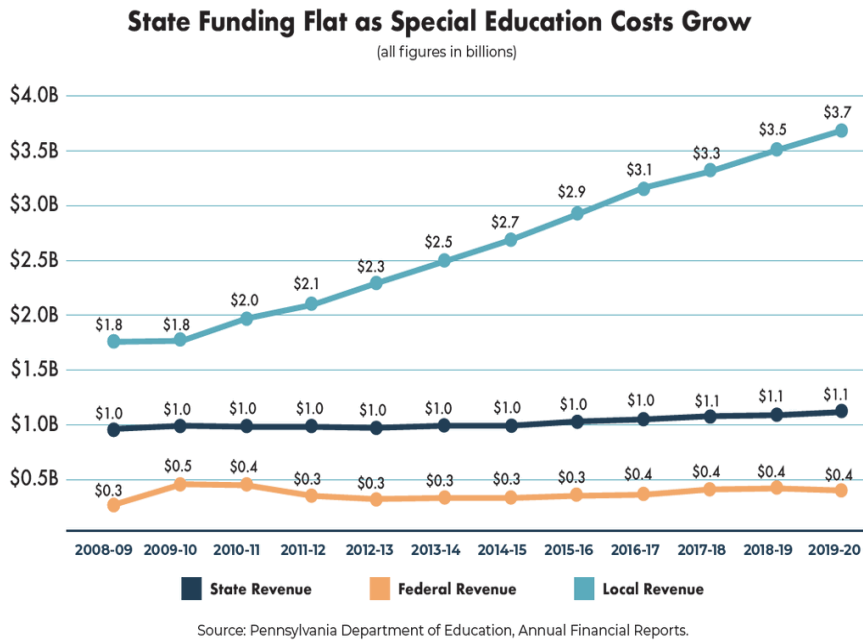
[152] Kolbe, *supra* note 143, at 83.

[153] *Id.*

[154] *See 2022 State of Education*, *supra* note 149, at 29.

[155] Carol Kocivar, *Special Education Costs Flood School Budgets*, ED100 (Feb. 3, 2020), https://ed100.org/blog/special-education-costs-flood-school-budgets (displaying the dismal funding level of special education programs in California, compared to the aspirational funding goals); Lisa Lightner, *How to Get an Out-of-District Placement (IEP and Special Education),* A DAY IN OUR SHOES, https://adayinourshoes.com/iep-private-placement/ (last visited Feb. 8, 2024), (showing the gap in federal funding from 2014-2018 in Washington). *See also* Kristine Goodrich, *Special Education Funding Gaps Growing, Inequitable*, FREE PRESS, (Mar. 3, 2019),

Figure 1: Special Education Funding Gap in Pennsylvania[156]



Despite the fact that these school districts lack adequate funding, they still have other means of offsetting the costs of special education programs, as well as costs that pile up during due process proceedings. In the event that a school district exceeds the amount of federal, state, and local funding to support a child with disabilities, they have access to alternative funding options. Based on a study done by the National Center for Education Statistics, total expenditures for public schools in the United States were $870 billion, averaging to $17,013 per

https://www.mankatofreepress.com/news/local_news/special-education-funding-gaps-growing-inequitable/article_233cb558-3c3e-11e9-b2e7-6ff371a12436.html (illustrating Minnesota's Special education spending gap).

[156] EDUCATION LAW CENTER, FIXING THE SPECIAL EDUCATION FUNDING GAP 2 tbl.1 (2022).

pupil.[157] However, 80% of the current expenditure costs were spent on salaries and employee benefits.

School districts have also argued that the more money the school district must utilize for the defense of legal cases, the less there is to be spent on students to further their academic achievements.[158] To support this argument, the New Jersey School Boards Association ("NJSBA") relied on a study which illustrated the cost of providing special education services in New Jersey. This study found that local, state, and federal special education expenditures in New Jersey totaled $3.3 billion.[159] The primary reasons for the exorbitant costs were out-of-district placements, programs for students with autism, and other related services and resource programs.[160] In 2013, the NJSBA conducted a nationwide survey to determine what regulations and legislation special education directors believed would benefit the school district.[161] Over one-third of school officials surveyed believed that the adjudication process for special education program, especially with regards to the burden of proof and production, was an area in need of change.[162]

Parents are burdened throughout the IDEA's special education due process proceeding. Before the proceeding even commences they must attempt to access records that are completely controlled by the school district. Continuing through the hearing, these parents face various costs that create deep financial strain, all while dealing with the emotional pressures that come with taking this fight on for the sake of their child's education. Conversely, school districts do not face these same problems, and are in a much better position to handle the handle these costs than parents are. First, school districts have much more robust financial means, than parents do and are able to

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[157] N.J. SCHOOL BOARDS ASS'N, SPECIAL EDUCATION: A SERVICE, NOT A PLACE 17-18 (2014).
[158] *Id.* at 17.
[159] *Id.*
[160] *Id.*
[161] *Id.* at 23.
[162] *Id.*

better offset the litigation expenses. They also generally do not have the personal stake in the special education due process proceedings that a parent does, and can build their case without the emotional burden that parents struggle with through the process. Finally, school districts have almost complete control and access to all of the records needed to establish their case in support of their own IEP. It would be far more efficient if the burden of proof was on the school district to defend their own IEP as adequate to the needs of the child, rather than asking parents to try and get these same records from the schools to show that it is inadequate.

C. Rationales and Effects of Current Legislation Shifting the Burden to School Districts

Realizing the strain that the burden of proof places on parents, many advocacy groups have made efforts to shift the burden of proof to the school districts through legislation. This legislation has been introduced in several states, including Alaska, Hawaii, and Virginia.[163] Maryland, in particular, is one state that is currently challenging the current burden of proof in special education due process hearings.[164] As it stands in Maryland, the burden of proof is on the moving party, but proponents of House Bill 294 argue that the burden should be on the school districts.[165] Delegate Vanessa Atterbeary, co-sponsor of the bill, logically explained why the burden of proof should be shifted to school districts, stating:

> The burden should be on the school system, to show by a preponderance of evidence, that they

[163] Christina A. Samuels, *Some States Shift IEP Burden of Proof to School Districts*, EDUCATIONWEEK (Jan. 28, 2008), https://www.edweek.org/teaching-learning/some-states-shift-iep-burden-of-proof-to-school-districts/2008/01.
[164] Hannah Cechini, *Md. Lawmakers Seek to Flip Burden of Proof in Special Education Disputes*, WMDT (Feb. 8, 2023), https://www.wmdt.com/2023/02/md-lawmakers-seek-to-flip-burden-of-proof-in-special-education-disputes/.
[165] *Id.*

> are essentially providing what is required and that they're doing what they should be and doing right by that child. Parents need a fair shot to advocate for their child. You cannot do that if you're going up against an entire in-house legal system.[166]

However, this introduction to the burden shifting process has been extremely slow. One reason for this is that all the efforts are being made at the state level rather than through federal law.[167] Many states rely on the holding from *Schaffer v. Weast*, in arguing that the burden should be placed on parents during IEP due process hearings, since it would place IEP disputes on the same level as other disputes.[168] However, this logic is flawed. IEP disputes are not like other disputes because the controlling evidence for these proceedings is almost entirely in the hands of the opposing party.

In 2008, Pennsylvania attempted to pass House Bill 2438.[169] This bill proposed shifting the burden of proof from parents back to Local Education Agencies. Supporters of this bill relied on the original legislative intent of the IDEA and Chapter 14, which were to develop safeguards and protections to provide students with disabilities FAPE.[170] They also reasoned that by shifting the burden of proof back onto the school districts, it will incentivize them to actually offer programs that provide free appropriate public education with all necessary supports and services, ensuring more accountability for the LEAs and less responsibility on families.[171]

Nevada also proposed legislation to shift the burden of proof back to school districts.[172] Nevada offered similar

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[166] *Id.*

[167] Samuels*, supra* note 157.

[168] *Id.*

[169] H.B. 2438, 2007-2008 Gen. Assemb., Reg. Sess. (Pa. 2008).

[170] *Hearing on H.B. 2438 Before the H. Subcomm. on Special Educ.*, 2008 Leg., Reg. Sess. (Pa. 2008) (testimony of Ken Oakes on behalf of The ARC of Pennslyvania).

[171] *Id.*

[172] A.B. 318, 76th Leg., Reg. Sess. (Nev. 2011).

rationale as Pennsylvania's policymakers, citing reasons such as the greater accessibility to resources for school districts and the importance of leveling the playing field between parents and the school district.[173] Nevada also provided statistics to support their push for a shift in the burden of proof. In the data reviewed by policymakers and supporters of the bill, from 2000 to 2005, there were 22 hearings in Nevada; parents won seven of these cases, while school districts won the remainder.[174] From 2006 to 2011, there were 13 hearings, all of which were won by the school districts.[175]

Washington has also recently proposed a bill to establish burden of proof requirements for special education due process hearings.[176] Essentially, the bill proposes that with minor exceptions, the school district has the burden of proof, including the burden of persuasion and production, whenever it is a party to a due process hearing that concerns the identification, evaluation, reevaluation, classification, educational placement, disciplinary action or provision of a free appropriate public education for a student with a disability.[177] The public testimony in support of the bill explains that placing the burden of proof on school districts is essential because due process hearings are complicated and create unnecessary barriers for families.[178] Moreover, supporters clearly cite the disadvantage parents have in accessing information to build their cases by explaining that school districts have access to all of the documents since they create the IEPs.[179] Therefore, it is inherently easier for them to prove their case by a preponderance of the evidence, especially if they are confident in the IEPs they craft and in the services they provide.[180] Finally, supporters of the Washington

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[173] SUMMARY OF ASSEMBLY BILL NO. 318, LEGAL AID CTR. S. NEV. (2011) (on file with author).
[174] *Id.*
[175] *Id.*
[176] S.B. 5883, 68th Leg., Reg. Sess. (Wash. 2024).
[177] *Id.*
[178] H. 68-24, Reg. Sess., at 2 (Wash. 2024).
[179] *Id.*
[180] *Id.*

bill found that the shift in the burden of proof incentivizes resolution, allowing more cases to resolve more quickly.[181]

While some states, like Maryland and Washington, are currently proposing bills to shift the burden of proof to school districts, there are many states that have legislation in place that effectively places the burden of proof on the school district, regardless of who disputes the IEP.[182]

For example, Connecticut's statute places the burden of going forward with the evidence on the party seeking relief, while the public agency (the school district) has the burden of showing the appropriateness of the child's program or placement.[183] Likewise, the District of Columbia carves out exceptions to the general rule that the party disputing the IEP, typically the parent, bears the burden of proof. The statute in the District of Columbia places the burden of production and the burden of persuasion on the party seeking relief, except where there is a dispute about the appropriateness of the child's program or placement, or where a parent seeks tuition reimbursement for a unilateral parental placement.[184] However, New York has instituted a statute contrary to the District of Colombia's, placing the burden of proof on the public agency, including the burden of persuasion and the burden of production, except in a case where a parent seeks tuition reimbursement for a unilateral parental placement.[185]

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[181] *Id.*

[182] *See Burden of Proof Legislation—Burden of Proof, Ho. Co. 2-22*, HOWARD CNTY. PUB. SCH. SPECIAL EDUC. CITIZENS' ADVISORY COMM., https://www.ptachc.org/wp-content/uploads/2021/11/Burden-of-Proof-Legislation-Explanation.pdf (last visited Nov. 27, 2024) (organizing all fifty states' current burden of proof laws into three categories: (1) No change: Burden continues to be on school district; (2) No Change: Burden continues to be on the moving party; and (3) Change: Burden is on the moving party).

[183] Tiffany Clark & Lynne B. Rosen, *The Burden of Proof in Special Education Due Process Hearings*, DEP'T OF LEGIS. SERVS, *Issue Papers: 2017 Legislative Session* 91, 92 (2016), https://www.mabe.org/wp-content/uploads/2017/01/2017rs-Issue-Papers-SpecEdBofP.pdf (last visited Nov. 27, 2024).

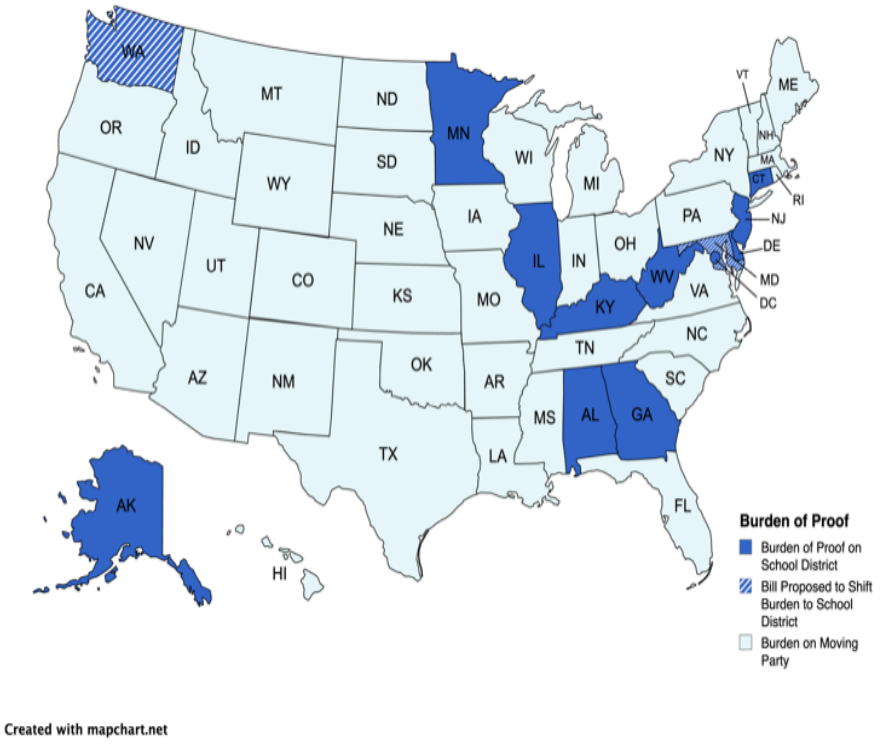
[184] *Id.*

[185] *Id.*

New Jersey has been a major proponent in creating legislation to ease the burden on parents with respect to special education due process proceedings. Most recently, a settlement agreement may alter how school districts' individualized education program team decisions are reviewed.[186] According to the settlement agreement, the Office of Special Education ("OSE") will investigate school district determinations with respect to evaluation, placement, and provision of a FAPE to student with disabilities.[187] This essentially will provide an opportunity for a low or no cost review of IEP team determination that can be used in lieu of, or in addition to, special education due process proceedings.[188] This is significant because it provides an option for parents, especially those who may not be able to afford to go through with the due process proceeding. A settlement like this could have enormous implications for future special education litigation. First, since the agreement proposes a requirement to investigate placement and what constitutes FAPE, the number of requests for complaint investigations will increase.[189] Second, this process would afford parents of children with disabilities a means for low-cost review, and if appropriate, alteration of IEP team decisions as a first step in an appeal process and, if successful, eliminates the need for costly litigation.[190]

[186] John Worthington, *NJDOE Agrees to Major Revisions to State Complaint Process in Special Education*, N.J. PRINCIPALS & SUPERVISOR ASS'N (Sept. 7, 2023), https://njpsa.org/njdoe-agrees-to-major-revisions-to-state-complaint-process-in-special-education/.
[187] *Id.*
[188] *Id.*
[189] *Id.*
[190] *Id.*

Figure 2: Who Has the Burden of Proof in Each State [191]



V. CONCLUSION

Although school districts raise valid arguments against shifting the burden of proof and production onto them, this issue creates a balancing problem that legislators must assess when making these decisions. School districts fairly argue that this burden shifting negatively impacts their allocation of resources and eats up a large amount of their funding. However, the alternative option in this case is to keep the burden of proof and production on parents. Looking solely at the resources

[191] Adapted from *Make Burden of Proof Fair and Equitable,* COPAA, https://www.copaa.org/page/BOP

accessible to both parties, it is obvious that school districts are more equipped to handle the financial and emotional burdens associated with due process burden of proof. While the burden may strain the school district's resources, the alternative would prevent many parents of children with disabilities from getting a chance to go through due process proceedings, resulting in the child with disabilities remaining in a placement that is not appropriate for them and impacting their growth and development for the future. Furthermore, one could argue that shifting the burden of proof to school districts could ultimately save them money since costs of litigation are reduced when schools have the burden of proof. Therefore, if school districts are in the wrong, quicker resolutions and lower attorneys' fees for parents would save the district money long-term.

States that have implemented legislation which shifts the burden of proof to school districts have proven that the burden shifting leads to quicker resolution of disputes.[192]Shifting the burden of proof to school districts would not only lead to better resolution of disputes, but also would hold districts accountable for implementing appropriate individualized education programs for students with disabilities in their district. Placing the burden of proof on school district also favors equity since students and families of children with disabilities are at an inherent disadvantage in due process proceedings since they do not have immediate access to data, legal representation, or expertise regarding the IEP. For all these reasons, implementing this procedural change would level the playing field between school districts and parents.

[192] Ramona Hattendorf, *Make Due Process in Special Education Fair*, PUBLIC POLICY: IDEAS TO SUPPORT PEOPLE WITH IDD (2024).