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To Challenge Education Plans, Take Advantage of 'Safeguards'

Focus Column

By David M. Grey

The party that challenges an "individualized educational program" - a program created by a public school to accommodate a student's special needs - has the burden of proving the program's inadequacy in an administrative hearing, according to the recent U.S. Supreme Court decision of *Schaffer v. Weast*, 2005 DJDAR 13287.

The Individuals with Disabilities Education Act, 20 U.S.C. A. Sections 1400, et seq., was enacted by Congress to ensure that "all children with disabilities have available to them a free appropriate public education." The individualized educational program is the vehicle by which the disabled student is afforded a free appropriate education under the act.

The act charges the school with both identifying and evaluating disabled children and developing individualized educational programs for them. The programs must include an assessment of the child's current educational performance, articulate measurable educational goals and specify the nature of the special services that the school will provide.

Historically, disabled children found themselves either excluded from schools or sitting idly in regular classrooms awaiting a time when they were old enough to "drop out." The Individuals with Disabilities Educational Act was intended to reverse this history of

neglect. As of 2003, nearly 7 million disabled children received education under the Individuals with Disabilities Educational Act.

When the school and parent cannot agree as to the appropriateness of an individualized educational program, either side can launch a challenge by filing a request for a due process hearing. As a practical matter, most hearing requests challenging the individualized educational program come from parents.

Schaffer was one such challenge by parents contesting the appropriateness of their child's individualized educational program. Brian Schaffer suffered from learning disabilities and speech-language impairments.

Brian, who had been struggling academically in private school from pre-kindergarten through seventh grade, sought a public school placement when his private school advised his parents that they needed a school that could better accommodate his needs. The public school evaluated Brian and generated an initial individualized educational plan offering to place Brian in one of two middle schools. Brian's parents were dissatisfied with the offer because they believed that their son needed smaller classes and a more intensive program than was being offered.

Brian's parents placed him in another private school and initiated due process challenging the individualized educational program, seeking compensation for the cost of Brian's new private school.

After a three-day hearing, an administrative law judge deemed the evidence close but held that the parents had the burden of persuasion and ruled in favor of the school district. The parents brought a civil action challenging the administrative decision in U.S. District Court, which reversed and remanded with a finding that the school, not the parent, had the burden of persuasion.

At this point, the school offered Brian placement in a high school with a special learning center, and Brian enrolled in that program, where he stayed until graduation. Brian's parents continued to press for reimbursement for the costs of the private schooling. The school, meanwhile, appealed to the 4th U.S. Circuit Court of

Appeals.

While this appeal was pending, the administrative law judge reconsidered the case and deemed the evidence truly in "equipoise" and ruled in favor of the parents. The 4th Circuit vacated and remanded the appeal so that it could consider the burden-of-proof issue along with the merits on a later appeal.

The District Court reaffirmed its ruling that the school had the burden of proof. The 4th Circuit reversed, concluding that the petitioners offered no persuasive reason to "depart from the normal rule of allocating the burden to the party seeking relief."

The U.S. Supreme Court granted review and made clear that the party challenging the individualized educational program has the burden of persuasion. The Supreme Court noted that burden of proof includes both the burden to persuade and the burden to produce evidence, but limited its analysis to burden of persuasion.

The Supreme Court noted that the Individuals with Disabilities Educational Act is silent on the allocation of the burden of persuasion. It went on to say that the ordinary default rule requires the plaintiffs to bear the risk of failing to prove their claim, and that unless there were some reason to believe otherwise, the court would conclude that the burden of persuasion lies where it usually falls - upon the party seeking relief.

The Schaffers first argued that the phrase "due process" as used in the act should be read in light of its constitutional meaning. The Supreme Court, however, quickly dispensed with this argument and reasoned that, outside of criminal law, burden of persuasion is not a federal constitutional issue.

Next, the Schaffers urged that in drafting the act, Congress implemented many procedural safeguards contained in several lower court opinions. Putting the burden of persuasion on the school is consistent with the other procedural safeguards adopted by Congress, they argued. The Supreme Court rejected this position, stating that it would not conclude that Congress intended to adopt ideas not written into the statute.

The Schaffers also contended that saddling the school with the

burden of persuasion would further the Individuals with Disabilities Educational Act's purpose by ensuring that disabled children had access to a free, appropriate public education. Once again, the Supreme Court disposed of this argument, correctly noting that very few cases will be in evidentiary "equipoise." Moreover, the court was not willing to assume that every individualized educational program was invalid until the school demonstrates otherwise. The court was also very concerned about the inherent cost to the schools in shifting to them the burden of persuasion.

The Schaffers' final and most compelling argument was that the facts justifying an individualized educational program as appropriate are within the superior knowledge, experience and expertise of the school. Given the school's superior knowledge, fairness dictates that it should have the burden of persuasion instead of the parents challenging the individualized educational program.

The Supreme Court also rejected this argument. While the court agreed the school has a natural advantage in information and expertise, the justices found that Congress had built procedural safeguards into the act that, in effect, level the playing field between parents and the school. Among those safeguards protecting the parent are the right to review all records that the school possesses in relation to the child, and the right to an independent educational evaluation at public expense under the act. According to the Supreme Court, this independent educational evaluation gives parents a realistic opportunity to access the necessary evidence to match the firepower of the opposition.

Additional procedural safeguards for parents include the right to a detailed written answer to their due process complaints. In these written answers, schools must provide reasoning behind their actions and detail other options considered and rejected by the individualized educational program team - along with descriptions of all evaluations, reports and other factors the school considered in its decisions.

In addition, parties must disclose the evaluations and recommendations upon which they will rely at any due process

hearing. These protections, according to the Supreme Court, ensure that the school has no special informational advantage, and render moot any unfairness in putting the burden of persuasion on the parent.

Schaffer makes clear that the party requesting due process has the burden of persuasion. This holds true whether due process is initiated by the school or the parent. Practical reality dictates that the school is unlikely to challenge as inappropriate an individualized educational plan that it has crafted; thus the parent will usually be the party making the challenge and carrying the burden of persuasion.

So what should parents and their advocates keep in mind in light of *Schaffer*?

For one, because the party with the burden of proof usually puts on its case first, parents may have a chance to sculpt the case to their advantage by deciding which witnesses to call and exactly how the evidence will be presented. Administrative law judges rarely will find the evidence in "precise equipoise"; consequently, "going first" and controlling the proceedings can offer an advantage.

In addition, *Schaffer* elevates the procedural safeguards written into the Individuals with Disabilities Educational Act, such as the independent educational evaluation, as powerful tools to mitigate any unfairness to the parents in not placing the burden of persuasion on the more knowledgeable schools. Consideration should be given to effective use of these procedural safeguards to support the challenge of an individualized educational program as inadequate.

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