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Cooperative Federalism Post-*Schaffer*: The Burden of Proof and Preemption in Special Education

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COOPERATIVE FEDERALISM POST-*SCHAFFER*: THE BURDEN OF PROOF AND PREEMPTION IN SPECIAL EDUCATION

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Cooperative Federalism has been, to date, a short expression for a constantly increasing concentration of power at Washington in the instigation and supervision of local policies. . . . [T]oday[,] the question faces us whether the constituent States of the [Federal] System can be . . . saved as the vital cells that they have been heretofore of democratic sentiment, impulse, and action.[1]

I. INTRODUCTION

Faced with federal statutory silence as to who bears the burden of proof in a special education due process hearing, the Supreme Court in *Schaffer v. Weast* followed the ordinary "default rule" that plaintiffs bear the risk of failing to prove their claims.[2] The Court allocated the burden of proof[3] to the

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1. Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1, 21, 23 (1950).

2. Schaffer v. Weast, 546 U.S. 49, 56–57 (2005); *see* KENNETH S. BROWN ET AL., MCCORMICK ON EVIDENCE § 337 (5th ed. 1999) ("The burdens of pleading and proof with regard to most facts have been and should be assigned to the plaintiff who generally seeks to change the present state of affairs and who therefore naturally should be expected to bear the risk of failure of proof or persuasion."). *But see Schaffer*, 546 U.S. at 62 (Stevens, J., concurring) ("It is common ground that no single principle or rule solves all cases by setting forth a general test for ascertaining the incidence of proof burdens when both a statute and its legislative history are silent on the question.").

3. While the term "burden of proof" historically encompassed both the "burden of persuasion" (which party loses if the evidence is closely balanced) and the "burden of production" (which party bears the obligation to come forward with the evidence), only the burden of persuasion was at issue in *Schaffer*. 546 U.S. at 55-56. Accordingly, this

party seeking relief—typically, parents challenging a student's individualized education program (IEP) under the Individuals with Disabilities Education Act (IDEA).[4] The Court limited its holding, however, to the "case at hand," where parents of a middle school student with learning disabilities and speech-language impairments challenged an IEP offered by a school district in Maryland.[5] In doing so, the Court left open a question of widespread reach: that is, whether states may override the default rule and always place the burden of proof on the school district at an administrative hearing challenging a student's IEP.[6]

This article posits that state-led legislation expressly indicating who has the burden of proof is the correct result, consistent with the IDEA's statutory text, purpose, and history, and the Supreme Court's holding in *Schaffer*. Thus, while much of the scholarship surrounding *Schaffer* focuses on the proper *allocation* of the burden of proof as between parents and the school district, this article shifts the focus back to the proper *entity* to determine that allocation as between states and the federal government. Clarifying states' right to determine the burden of proof in special education due process hearings is critical to preserving the integrity of states' decision-making as state legislation takes shape.

For many states, *Schaffer* went against a long-standing practice of assigning the burden of proof to the school district, which was believed to be in a better position to defend the appropriateness of an IEP.[7] At the time of *Schaffer*, seven states[8] had statutes or regulations expressly assigning the

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Article refers to the burden of persuasion when using the term "burden of proof."

4. *Schaffer*, 546 U.S. at 61. The IDEA is the primary federal law governing special education services for children with disabilities. *See* 20 U.S.C. §§ 1400–1415. For consistency, this Article refers to both the current federal law and its predecessors as "the IDEA," unless otherwise specified.

5. *Schaffer*, 546 U.S. at 61.

6. *Id.*

7. Among the federal appellate courts that considered the burden of proof question before *Schaffer*, the First, Second, Third, Seventh, Eighth, Ninth, and District of Columbia Circuits had held that school boards bore the burden of proof. States under the jurisdiction of these circuits that did not have state statutes or regulations expressly assigning the burden of proof included Arizona, Arkansas, California, Hawaii, Idaho, Illinois, Iowa, Maine, Massachusetts, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Dakota, Oregon, Pennsylvania, Rhode Island, South Dakota, Vermont, Washington and Wisconsin.

8. Those states were Alaska, Connecticut, Washington D.C. (included as a "state" here for ease of reference), Delaware, Georgia, Minnesota, and West Virginia.

burden of proof to the school district in an IDEA due process hearing.[9] However, because Maryland had no such statute or regulation, the Supreme Court explicitly declined to address whether its allocation of the burden of proof under the IDEA preempted contrary state legislation.[10] To date, Congress has maintained legislative silence on this question. Indeed, the final implementing regulations for the IDEA's most recent amendments simply defer to the Supreme Court's decision in *Schaffer* on the burden of proof allocation and note that "further regulation in this area is unnecessary."[11]

Justice Breyer, dissenting in *Schaffer*, would have left the allocation decision *entirely* to the states, such that an administrative law judge (ALJ) or hearing officer would determine how general state administrative procedures apply in the absence of IDEA-specific burden of proof legislation.[12] Neither party raised this argument in *Schaffer*.

In the wake of *Schaffer*, however, a variant of Justice Breyer's dissent—

respecting states' right to determine the burden of proof as a matter of "cooperative federalism"—has actually begun to

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See ALASKA ADMIN. CODE tit. 4, § 52.550(e)(9) (2003); CONN. AGENCIES REGS. § 10-76h-14 (2005); D.C. MUN. REGS. tit. 5, § 3030.3 (2003); DEL. CODE ANN. tit. 14, § 3140 (1999); GA. COMP. R. & REGS.160-4-7.18(1)(g)(8) (2002); MINN. STAT. § 125A.091, subd. 16 (2004); and W. VA. CODE R. § 126-16-8.1.11(c) (2005). While Alabama's previous administrative code rules, cited in *Schaffer*, provided that the school district assume the burden of proof regarding the appropriateness of services proposed or provided in impartial due process hearings, Alabama's new rules, effective as regular rules on September 15, 2005, shifted that burden. *See* ALA. ADMIN. CODE r. 290-8-9.08(8)(c) (2005) (providing that the party filing the hearing request has the burden to prove his/her allegations to be fact). Illinois' statutes—both at the time of *Schaffer* and currently—refer only to the school district's duty to present evidence in impartial due process hearings, with no express assignment of the burden of persuasion. *See* 105 ILL. COMP. STAT. 5/14-8.02a(g-55) (2007).

9. The IDEA provides parents and school districts with the opportunity for an impartial due process hearing whenever they are involved in a complaint regarding a public school's identification, evaluation, or educational placement of a child, or the provision of a free appropriate public education to such child. 20 U.S.C. § 1415(f) and §1415(b)(6)(A). Section 1415(f) requires that a State or local education agency conduct the hearing, as determined by State law or by the State educational agency. The party requesting the hearing must confine the subject matter of the hearing to issues raised in the due process complaint notice, unless the other party agrees otherwise. 20 U.S.C. § 1415(4)(3)(B). The amount of the hearing officer's discretion to find statutory violations depends upon whether the alleged violations are substantive or procedural. *See infra* note 52.

10. *Schaffer*, 546 U.S. at 61–62.

11. *See* 71 Fed. Reg. 46540, 46706 (Aug. 14, 2006) (to be codified at 34 C.F.R. pt. 300 & 301). The final implementing regulations took effect on October 13, 2006.

12. *Schaffer*, 546 U.S. at 68–69 (Breyer, J., dissenting).

emerge. Lower federal courts have upheld the validity of state statutes and regulations expressly placing the burden of proof on the school district in impartial due process hearings under the IDEA.[13] Meanwhile, states with and without statutory or regulatory IDEA-specific burden-of-proof schemes at the time of *Schaffer* have moved to legislate the burden of proof to either undo or redo the status quo pre-*Schaffer*.

The model of cooperative federalism emerging post-*Schaffer*, however, is only robust to the extent that federal courts uniformly respect states' authority to statutorily assign the burden of proof, while states legislate the burden of proof in response to state and local needs and policy priorities. Departing from this model, the Eighth Circuit recently held it was a "fundamental error" for the ALJ and District Court to assign the burden of persuasion to a Minnesota school district in a special education due process hearing, despite the fact that Minnesota has a statute specifically allocating the burden of proof to the school district at such a hearing.[14] Moreover, some recent state activity regarding the IDEA burden of proof reflects efforts to amend existing legislation or stall proposed legislation based, in part, on compliance with federal law.[15] These efforts are misplaced and counter-productive. The discourse should not be about reconciling "inconsistent" legal principles or "circumventing" the Supreme Court's decision in *Schaffer*, but about holding state legislatures and officials accountable for what remains their decision.

To begin, Part II of this article addresses what is at stake with the placement of the burden of proof in impartial due process hearings, and why it matters who gets to decide. Next, Part III traces the IDEA's statutory design as a model of cooperative federalism and, in keeping with this design, questions the propriety of a national, uniform burden-of-proof rule.

The article then turns to the post-*Schaffer* legal landscape in Parts IV and V. Part IV explores the rationale of federal court decisions that have addressed the preemption question left unsettled by the Supreme Court and Congress. Part V examines the IDEA-specific burden of proof legislation

13. *See infra* Part IV.

14. M.M. v. Special Sch. Dist. No. 1, 512 F.3d 455, 458-59 (8th Cir. 2008).

15. *See infra* Part V.

developing across the states in their efforts to respond to *Schaffer's* change in federal law, and analyzes state policy "choices" as they appear motivated by or hidden behind the need to align state procedure with federal law. Finally, Part VI provides a brief conclusion.

II. WHAT IS AT STAKE

The burden of proof was outcome-determinative in *Schaffer*. Brian Schaffer's parents believed that Brian needed smaller classes and more intensive services, so they initiated a due process hearing to challenge the initial IEP proposed by the Montgomery County Public Schools System (MCPS).[16] After a three-day hearing, "the ALJ deemed the evidence close, held that the parents bore the burden of persuasion, and ruled in favor of the school district."[17] On reconsideration of the case, following the district court's conclusion that the burden properly belonged on the school district, the ALJ deemed the evidence "truly in 'equipoise'" and ruled in favor of the parents.[18] On appeal, a divided panel of the Fourth Circuit reversed, finding no persuasive reason to depart from the normal rule allocating the burden to the party seeking relief.[19] The Supreme Court affirmed.[20]

Cases likes *Schaffer*, where the evidence is in "precise equipoise," should be rare.[21] Indeed, one week after the Supreme Court decided *Schaffer*, a special education lawyer opined that "only a foolhardy parents' lawyer would ever approach a case and factor in [the] burden of proof in strategic decision-making."[22]

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16. *Schaffer*, 546 U.S. at 54–55.

17. *Id.*

18. *Id.* Around the time of the District Court's decision, MCPS offered Brian a placement in a high school with a special learning center. Brian's parents accepted and Brian was educated in that program until he graduated from high school. The suit remained alive, however, because Brian's parents sought compensation for his private school tuition and related expenses.

19. Weast v. Schaffer, 377 F.3d 449, 453 (4th Cir. 2004).

20. *Schaffer*, 546 U.S. at 49.

21. *Id.* at 68 (Breyer, J., dissenting).

22. Posting of Charles P. Fox to Special Education Law Blog, "Schaffer v. Weast: The Sky is Not Falling" (Nov. 21, 2005), http://specialedlaw.blogs.com/home/2005/11/shaffer_v_weast.html (Nov. 21, 2005, 19:30 CST); *see also* Arkansas Governor's DD Center. *Supreme Court Ruling's Impact,* A White Paper, http://www.ddcouncil.org/pdfs/whitepaper.pdf (concluding that placing the burden of persuasion on parents challenging an IEP "should not be a disadvantage

The significance of the burden of proof, however, extends beyond its outcome- determinative nature. Placement of the burden of proof, with its attendant considerations of "policy . . . convenience . . . [and] fairness,"[23] raises the question of how best to balance costs, resources, access to information, and expertise, in the context of ensuring a "free appropriate public education"[24] for all children with disabilities. Answers to this question are, not surprisingly, highly politicized. More than twenty disability organizations and twelve states filed *amicus* briefs with the Supreme Court in *Schaffer*. The United States itself switched sides by the time the case reached the Supreme Court. This flip-flop offers a neat glimpse into the competing policy arguments surrounding the burden-of-proof allocation.

In 2000, the United States filed an amicus brief before the Fourth Circuit, arguing that the District Court correctly placed the burden of proof on the school district to show the adequacy of its proposed IEP at the due process administrative hearing.[25] The United States warned that holding otherwise would "unhinge" the IDEA's statutory framework; that is, a school would be allowed to propose an IEP, and then abstain from the school's statutory obligation to provide a free appropriate public education, by forcing parents who disagree with the IEP to prove that it is inadequate.[26]

[for parents] compared to present (good) practice"). *But see* Gagliardo v. Arlington Cent. Sch. Dist., 418 F. Supp. 2d 559, 572 (S.D.N.Y. 2006), *rev'd on other grounds*, 2007 WL 1545988 (2007) (recognizing that "[w]hen one does not have the burden of proof [in an IDEA due process hearing], sound litigation strategy might well dictate that certain questions not be asked, that record matters left open by an opponent not be clarified, that witnesses whose testimony would otherwise be necessary not be called, and that exhibits that could have been relied on not be introduced"); Antoine M. v. Chester Upland Sch. Dist., 420 F. Supp. 2d 396, 404–05 (E.D. Pa. 2006) (recognizing that parents' decision to present new expert testimony at the district court level may be related to *Schaffer's* shift in the burden of proof at the administrative hearing).

23. MCCORMICK, *supra* note 2, at § 337.

24. A "free appropriate public education" refers to "special education and related services that—A) have been provided at public expense, under public supervision and direction, without charge; (B) meet the standards of the State educational agency; (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and (D) are provided in conformity with the individualized education program required under section 1414(d) of this title " 20 U.S.C. § 1401(9) (2005).

25. Brief for the United States as Amicus Curiae Supporting Appellees Urging Affirmance at *5, Schaffer v. Vance, 2 F. App'x 232 (4th Cir. 2000) (No. 00-1471), 2000 WL 33991818.

26. *Id.*; *see also* N. J. DEP'T OF THE PUB. ADVOCATE, DIV. OF DEV. DISABILITY ADVOCACY, ALLOCATION OF THE BURDEN OF PROOF IN SPECIAL EDUCATION DUE PROCESS HEARINGS 12 (2007) [hereinafter SPECIAL EDUCATION DUE PROCESS].

In rebutting school board association arguments that the IDEA already provides sufficient procedural safeguards for parents, the United States recognized the disconnect between the procedural right to be involved and actual involvement or meaningful input.[27] Unlike school districts which retain taxpayer-financed lawyers and rely on the school's own employees to testify in due process hearings, parents of children with disabilities are often unable to afford legal counsel and expert witnesses.[28] Studies have revealed that most parents describe themselves as "terrified and inarticulate" in IEP meetings, and that professionals acknowledge their use of knowledge and language that parents do not understand.[29] Moreover, while the IDEA provides that parents have access to their child's records and evaluations or recommendations that the school intends to use at a due process hearing,[30] schools are not required to produce evidence of how other similarly situated children have fared in proposed programs or placements. As explained by New Jersey's Public Advocate, for example, a school district would be unlikely to introduce evidence showing that a particular autism program had a history of failures—information that parents may have

27. *Id.* at *15–16; *see also* MARK KELMAN & GILLIAN LESTER, JUMPING THE QUEUE: AN INQUIRY INTO THE LEGAL TREATMENT OF STUDENTS WITH LEARNING DISABILITIES 87 (1997) (studying the IDEA's implementation in local practice).

28. *See* Statement of the Council of Parent Attorneys and Advocates (COPAA) Amicus Committee (Jan. 2006), http://www.copaa.net/news/schaffer.html. *See generally* M. WAGNER, C. MARDER, J. BLACKORBY, & D. CARDOSO, THE CHILDREN WE SERVE: THE DEMOGRAPHIC CHARACTERISTICS OF ELEMENTARY AND MIDDLE SCHOOL STUDENTS WITH DISABILITIES AND THEIR HOUSEHOLDS 23–24, 28–29 (2002), http://www.seels.net/designdocs/SEELS_Children_We_Serve_Report.pdf. While parents now have the right to challenge a school district's IEP in court without legal counsel, Winkelman v. Parma City Sch. Dist., 127 S. Ct. 1994 (2007), that right does not alleviate parents' inability to navigate the IDEA "maze" themselves, from identification and evaluation through hearings and court actions. The Supreme Court's ruling in *Arlington v. Murphy* added to the expense of exercising due process hearing rights, as the Court held prevailing parents cannot recover non-attorney expert fees under the IDEA's fee-shifting provision. 548 U.S. 291, 299–300 (2006).

29. David M. Engel, *Law, Culture, and Children with Disabilities: Educational Rights and the Construction of Difference*, 1991 DUKE L.J. 166, 188–89 (1991); *see also* NAT'L COUNCIL ON DISABILITY, IMPROVING THE IMPLEMENTATION OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT: MAKING SCHOOLS WORK FOR ALL OF AMERICA'S CHILDREN (1995), http://www.ncd.gov/newsroom/publications/1995/95school.htm (reporting parents' testimony that the IEP process is "extremely frustrating, often intimidating, and hardly ever conducive to making them feel that they were equal partners with professionals").

30. 20 U.S.C. § 1414(b)(1) and § 1415(f)(2)(A) (2005).

no other way of accessing.[31] However, if the school district bore the burden of proof to establish the adequacy of an IEP, the district would have to present proof that the program in question works.[32]

In its brief before the Fourth Circuit, the United States conceded that having schools carry the burden of proof regarding the adequacy of a proposed IEP "should not substantially increase the workload for the school."[33] The United States also rejected the school's argument that deference to state and local authorities' expertise creates a presumption in favor of the IEP placement proposed by school districts. According to the United States, applying a presumption of correctness to a draft IEP rejected by parents would "unjustifiably reduce" the IDEA's goal of making parents meaningful participants in the IEP process.[34]

Nonetheless, in June 2005, after a change in administration, the United States changed positions and filed an amicus brief supporting Respondents (the MCPS Superintendent and the Board of Education) before the Supreme Court in *Schaffer*. By way of a footnote in its brief,

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31. *See* SPECIAL EDUCATION DUE PROCESS, *supra* note 26, at 12.

32. *Id.*

33. Brief for the United States as Amicus Curiae Supporting Appellees Urging Affirmance at *12, *Schaffer*, 2 F. App'x. 232 (4th Cir. 2000) (No. 00-1471), 2000 WL 33991818. The school is already required to evaluate (and reevaluate, if necessary) a child's educational needs by consulting with various school officials and other individuals who have knowledge or special expertise regarding the child. 20 U.S.C. §§ 1414(a), 1414(d)(B) (2005). After a school conducts an evaluation of a child, the school must provide the parents of that child with prior written notice that describes the action proposed or refused, the tests and procedures used as a basis for determining that particular course of action, why the school proposed or refused to take the action, and why other options were rejected. 20 U.S.C. § 1415(c)(1) (2005). If the school has not sent a prior written notice regarding the subject matter of a parent's due process complaint, the school must answer such a complaint, in writing, with the same information. 20 U.S.C. § 1415(c)(2)(B)(i)(I) (2005). Moreover, in drafting an IEP, the school must describe, *inter alia*, the child's disability, how the disability affects the child's involvement and progress in the general education curriculum, the special education and related services to be provided, expectations for the child's progress under the IEP, and how that progress will be measured. 20 U.S.C. § 1414(d)(1)(A) (2005).

34. Brief for the United States as Amicus Curiae Supporting Appellees Urging Affirmance at *11, *Schaffer*, 2 F. App'x 232 (4th Cir. 2000) (No. 00-1471), 2000 WL 33991818; *see also* Reply Brief of Petitioners at *6, *Schaffer*, 546 U.S. 49 (No. 04-698), 2005 WL 1812490 (reasoning that when there is only a proposed IEP, with no agreement reached between parents and the school district, there is no official action to which a "presumption of regularity" can attach). Similarly, when there is no previously established IEP, neither side can claim that its proposal represents the status quo. *Id.* at *4.

the United States explained that:

> [a]fter careful review of its administrative practice, the relevant case law, and the text, structure and history of the IDEA, including the 2004 Amendments to the Act, the government is now of the view that, where as here, a State has not placed the burden of proof on school districts as a matter of state law, the traditional rule that the burden of proof falls on the party seeking relief applies to IDEA due process hearings.[35]

The United States now agreed with the school board's argument that the IDEA's procedural safeguards were sufficient to address any policy concerns regarding schools' unfair advantage over parents.[36] According to the United States' new position, Congress' aim to restore trust and reduce litigation with the 2004 IDEA amendments would be undermined by imposing a "non-textual" burden of proof on schools that amounts to a "presumption of invalidity" for actions by public officials and is "foreign to analogous civil and administrative proceedings."[37]

The 2004 IDEA amendments added informal resolution opportunities for parents and schools. Voluntary mediation must now be available, even for matters arising before the filing of a due process hearing request.[38] Due process disputes that are not mediated are subject to a new, mandatory "resolution session" attended by parents, school officials, and

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35. Brief for the United States as Amicus Curiae Supporting Respondent at *6 n.2, *Schaffer*, 546 U.S. 49 (2005) (No. 04-698), 2005 WL 1527082.

36. *Id.* at *26–27. Prior to the 2004 amendments, however, the IDEA already required that parents be informed about and consent to evaluations of their child. 20 U.S.C. § 1414(c)(3) (2005). Parents were already included as members of "IEP Teams." 20 U.S.C. § 1415(b)(1) (2005). Parents had the right to examine all records relating to their child, and to obtain an "independent educational evaluation" of their child. 20 U.S.C. § 1415(b)(1) (2005). Parents had to be given written prior notice of any changes in an IEP, 20 U.S.C. § 1415(b)(3) (2005), and be notified in writing of the procedural safeguards available to them under the IDEA, 20 U.S.C. § 1415(d)(1)(A) (2005). If parents believed an IEP was inappropriate, they had the right to seek an administrative "impartial due process hearing," where they could present evidence and cross-examine relevant witnesses with the assistance of legal counsel. 20 U.S.C. §§ 1415(f) and 1415(h)(1)-(2) (2005). Parents could also appeal an adverse hearing decision to a state review officer, 20 U.S.C. § 1415(g) (2005), where applicable, before challenging an administrative decision in state or federal court, 20 U.S.C. § 1415(i)(2)(A) (2005). Prevailing parents could recover attorneys' fees. 20 U.S.C. § 1415(i)(3)(B)(i)(I) (2005).

37. Brief for the United States as Amicus Curiae Supporting Respondent at *24–25, *Schaffer*, 546 U.S. 49 (2005) (No. 04-698), 2005 WL 1527082.

38. 20 U.S.C. § 1415(e)(1) (2005).

relevant IEP team members, with the possibility of a binding settlement if the parties reach an agreement.[39]

Drawing on Congress' intent to reduce the IDEA's administrative and litigation-related costs with the 2004 amendments, respondents in *Schaffer* argued that placing the burden on schools would encourage litigious parents to "snub the intended IEP process, or turn it into a dry run or fishing expedition for adjudication."[40] The 2004 amendments, however, provide a built-in disincentive against "fishing expeditions" by allowing prevailing schools to recover attorneys' fees if parents are found to have filed a frivolous or improper complaint.[41] Moreover, as warned by those opposing the default rule, assigning the burden to parents could actually increase due process complaints by decreasing schools' accountability—or, alternatively, create a chilling effect on parents' meritorious, due process complaints.[42]

The policy tensions and uncertainty surrounding the burden-allocation question underscore the importance of states' right to decide. The answer need not be the same for all states and all purposes. States may opt for different burden-of-proof allocations in IDEA due process hearings based on states' particular policy priorities and special education needs, shaped by differences in, inter alia, states' incomes, population compositions, parent and teacher training opportunities, in-district placement options, intervention and referral services, and instructional and support services. In their role as "laboratories of experimentation,"[43] states can draft provisions to account for and potentially vary the burden of persuasion, the burden of production, the burden of proof for appeals, the

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39. 20 U.S.C. § 1415(f)(1)(B)(i)–(iii) (2005). The resolution session provides for a mandatory thirty-day cooling off period prior to the initiation of a due process hearing. *Id.* § 1415(f)(1)(B)(ii) (2005).

40. Brief for Respondents at *36, *Schaffer*, 546 U.S. 49 (2005), (No. 04-698), 2005 WL 1505062.

41. 20 U.S.C. § 1415(i)(3)(B)(i)(II)-(III).

42. Oral Argument at *58, *Schaffer*, 546 U.S. 49 (No. 04-698), 2005 WL 2651391; *see also* Reply Brief of Petitioners at *13, *Schaffer*, 546 U.S. 49 (No. 04-698), 2005 WL 1812490; *Schaffer*, 546 U.S. at 65 (Ginsburg, J., dissenting) (quoting *Weast*, 377 F.3d at 459 (Luttig, J., dissenting) ("Saddled with a proof burden in administrative 'due process' hearings, parents are likely to find a district-proposed IEP 'resistant to challenge'")).

43. *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (Brandeis, J., dissenting) ("To stay experimentation in things social and economic is a grave responsibility ... It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory").

burden of proof at different stages of the IEP process, the burden of proof for discipline matters, and/or the burden of proof for unilateral private placement tuition reimbursement requests. States can also accord the ALJ or hearing officer discretion to modify the general burden-of-proof rules in individual cases.

Further, states can gather and analyze data and interview local constituents to assess the educational, social, and economic outcomes of potential burden-allocation schemes, or to study the impact of an allocation scheme already in place. Indeed, disability advocates have proposed statewide surveys to obtain information regarding: (i) whether there has been any appreciable change in the number of due process hearings in states where the burden has been shifted from the school district to the moving party; (ii) the results of special education cases following a change in state burden-of-proof regulations; (iii) the number of parent and teacher IDEA training opportunities and attendees; and (iv) the actual ability or inability of parents to obtain records from their school districts about their own child and to access evaluations by individuals with expertise in their child's disability.[44] New Jersey's Department of the Public Advocate solicited widespread input from government offices, professional associations, school administrators, education professionals, special education attorneys, advocates, service providers, and families to research *Schaffer's* impact in reversing New Jersey's long-standing practice of assigning the burden of proof to the school district.[45] The D.C. Appleseed Center and DLA Piper Rudnick

44. *See, e.g.*, Letter from Sonja D. Kerr, Supervising Attorney, Disability Law Ctr. of Ala., to Comm'r Roger Sampson, Dep't of Educ. & Early Dev. 5 (Feb. 8, 2006).

45. *See* SPECIAL EDUCATION DUE PROCESS, *supra* note 26, at 2 (Jan. 2007) (concluding that the burden of proof should be reallocated to school districts in New Jersey for the following reasons: "(i) [s]chool districts are in a far better position to bear the burden of proof than families; (ii) [a]llowing the burden of proof to remain on parents, who are already disadvantaged in this process, will significantly impede their ability to enforce their child's educational rights under the IDEA, (iii) [t]he limited discovery procedures in due process hearings in New Jersey make it difficult for parents to uncover and obtain evidence needed to satisfy the burden of proof ...; [and] (iv) [a]llocating the burden of proof to school districts will not place an undue burden on school districts or taxpayers, and will not result in an increase in the number of due process proceedings initiated by parents..."). Interestingly, a September 2007 study on special education financing and delivery commissioned by the New Jersey School Boards Association reached the opposite conclusion regarding the appropriate assignment of the burden of proof in a due process hearing challenging a student's IEP. *See* MARI MOLENAAR & MICHAEL LUCIANO, FINANCING SPECIAL EDUCATION IN NEW

LLP are currently performing an outside assessment of the effectiveness of D.C.'s regulatory shift in the burden of proof to the moving party.[46]

Thus, respecting states' right to determine the burden of proof as a matter of "cooperative federalism" is about more than simply reserving education to the states under the Tenth Amendment; it is about leaving room for states to develop best practices for special education by tailoring IDEA substantive and procedural standards to states' policy priorities and needs in a manner that equals or exceeds the federal floor.

III. THE IDEA: A "COOPERATIVE FEDERALISM" PARADIGM

"Cooperative federalism," in theory, is "a system in which . . . divided authority is brought together again" in a way that "enables the cooperating governments to benefit from one another's special capacities while still preserving the value of political pluralism."[47] A scholar in the field of environmental policy recently described the "operative" principle of cooperative federalism as follows: "the federal government establishes a policy . . . and then enlists the aid of the states, through a combination of carrots, such as financial aid, and sticks, such as the imposition of constraints . . . through federal regulation, in pursuing that policy."[48] The IDEA, enacted pursuant to the Spending Clause,[49] fits squarely within this

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JERSEY, Executive Summary, Sept. 2007. The study recommended, *inter alia*, that state special education regulations reflect the *Schaffer* decision and allocate the burden of proof to the plaintiff (usually the parent) because directors of special education services believe that this allocation will help facilitate early dispute resolution while reducing costs to both parents and school districts. *Id.*

46. DLA Piper LLP Pro Bono, Signature Projects, Special Education, http://www.dlapiperprobono.com/impact/signatureprojects/casedetail.aspx?case=87. According to the resolution adopted by the D.C. Board of Education on March 13, 2006, an evaluation of D.C.'s shift in the burden of proof would incorporate the following data: "the number of due process hearings, mediation, success rate of parties seeking relief, the timeliness of responses to parental requests for services, services to students, economic savings, and parental satisfaction." D.C. Bd. of Educ. Res. SR06-20 at 2 (D.C. 2006).

47. MARTHA DERTHICK, THE INFLUENCE OF FEDERAL GRANTS: PUBLIC ASSISTANCE IN MASSACHUSETTS 220 (1970) (analyzing cooperative federalism in the implementation of the Social Security Act).

48. Robert L. Glicksman, *From Cooperative to Inoperative Federalism: The Perverse Mutation of Environmental Law and Policy*, 41 WAKE FOREST L. REV. 719, 754 (2006).

49. U.S. CONST. art. I, § 8, cl. 1. The Supreme Court has acknowledged that the IDEA is, in fact, more than a "simple funding statute," as it confers upon disabled

model by leaving to the states the "primary responsibility for developing and executing educational programs for handicapped children," while imposing "significant requirements to be followed in the discharge of that responsibility" as a pre-requisite for federal financial assistance.[50]

Political accountability, however, is uniquely murky when it comes to deciding the burden of proof allocation in IDEA due process hearings. The cloudiness stems from more than just Congress' conditional grant of funding to the states under the IDEA's Spending Clause structure. The evasion of political accountability in the Spending Clause context has been described before: federal legislators can point to states' voluntary decision to accept federal funds, while states may claim they could not, in practical terms, decline the funds.[51] Neither the IDEA nor its legislative history, however, specifies the burden of proof procedure states must follow in administrative hearings once states have consented to federal regulation.[52] Congress left the IDEA burden-of-proof issue to the judiciary to decide, and the Supreme Court remained silent on whether states have the right to override the Court's own default rule.

In setting the boundaries of its default rule in *Schaffer*, though, the Supreme Court did indicate which arm of the state

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students an enforceable substantive right to public education in participating states. *See* Honig v. Doe, 484 U.S. 305, 310 (1988); *see also Schaffer*, 546 U.S. at 64 (Ginsburg, J., dissenting) ("The IDEA ... casts an affirmative, beneficiary-specific obligation on providers of public education").

50. *Schaffer*, 546 U.S. at 52 (quoting Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester County v. Rowley, 458 U.S. 176, 183 (1982)).

51. *See* Note, *Federalism, Political Accountability, and the Spending Clause*, 107 HARV. L. REV. 1419, 1420, 1436 (1994) (analyzing the Supreme Court's differing levels of deference to congressional authority in the Commerce Clause and Spending Clause contexts, and calling for a "heightened sensitivity to the ways in which conditional grants create impediments to political accountability); *see also* Ann Althouse, *Variations on a Theory of Normative Federalism: A Supreme Court Dialogue*, 42 DUKE L.J. 979, 1018 (1993) (noting that "[c]ooperative federalism can become a tempting device for insulating officeholders at both the state and federal levels").

52. IDEA 2004 provides only that a hearing officer's decision "shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education." 20 U.S.C. § 1415(f)(3)(E)(i) (2005). With respect to matters alleging procedural violations, the Act allows a hearing officer to find that a free appropriate public education was denied where the procedural inadequacies: "i) impeded the child's right to a free appropriate public education, ii) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to the parents' child, or iii) caused a deprivation of educational benefits." 20 U.S.C. § 1415(f)(3)(E)(ii) (2005).

should decide the IDEA burden of proof allocation if left up to the states. The Court referred to the "laws or regulations" of several states that had placed the burden of proof on school districts by citing to statutes and regulations—not court decisions—from those states.[53] Indeed, the Supreme Court's *Schaffer* decision made no mention of any state supreme court that had placed the burden of proof on the school district in a due process hearing challenging a student's IEP.[54] During oral argument in *Schaffer*, Justice Scalia remarked that he was "loath to think that just because a State supreme court says that every school district in the State has to bear the burden of proof, that Congress intended that to be the case."[55]

The Supreme Court has, in the past, cautioned federal courts against imposing their views concerning education on the states, explaining that courts lack the "specialized knowledge and experience" necessary to resolve difficult questions of educational policy.[56] At the same time, federal courts have recognized that reducing all state standards to a federal minimum would conflict with the cooperative federalism that is the "structural principle undergirding the [IDEA]."[57] Calling on judicial respect for federalist principles, Justice Breyer's dissent in *Schaffer* acknowledged the Supreme Court's usual practice of leaving a "range of permissible choices to the States" when interpreting statutes designed to advance cooperative federalism.[58] Thus, interpreting the Supreme Court's *Schaffer* decision to support a preemptive, uniform

53. *Schaffer*, 546 U.S. at 61.

54. Prior to *Schaffer*, the Supreme Court of New Jersey had placed the burden of proof on the school district, regardless of which party sought relief. *See* Lascari v. Bd. of Educ. of Ramapo Indian Hills Reg'l High Sch. Dist., 560 A.2d 1180, 1187–89 (1989), *abrogated by* L.E. v. Ramsey Bd. of Educ., 435 F.3d 384, 391 (3d Cir. 2006), discussed *infra* at note 81.

55. Transcript of Oral Argument, at *49–50, *Schaffer*, 546 U.S. 49 (2005) (No. 04-698), 2005 WL 2651391.

56. *Rowley*, 458 U.S. at 207–08. (quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 42 (1973).

57. David D. v. Dartmouth Sch. Comm., 775 F.2d 411, 419 (1st Cir. 1985). Other circuit courts later followed suit in reaffirming states' authority to exceed the federal floor under the IDEA, and enforcing more stringent state standards through the IDEA. *See e.g.*, Johnson v. Indep. Sch. Dist. No. 4, 921 F.2d 1022, 1029–30 (10th Cir. 1990); Burke County Bd. of Educ. v. Denton, 895 F.2d 973, 982–83 (4th Cir. 1990); Bd. of Educ. of East Windsor Reg'l Sch. Dist. v. Diamond, 808 F.2d 987, 992 (3d Cir. 1986); Blackmon v. Springfield R-XII Sch. Dist., 198 F.3d 648, 658–59 (8th Cir. 2000).

58. *Schaffer*, 546 U.S. at 71 (Breyer, J., dissenting) (quoting Wisconsin Dep't of Health and Family Servs. v. Blumer, 534 U.S. 473, 495 (2002)).

burden-of-proof rule under the IDEA would mean federal interference with states on one level, and judicial interference with legislatures or administrative agencies on another.

While silent on the burden-of-proof allocation, IDEA legislative history makes clear that Congress did not intend to wholly preempt the primacy of states in the field of special education. In explaining the Conference Committee Bill for the IDEA's predecessor in 1975, Senator Stafford remarked: "Make no mistake, educating our children is still very much a State responsibility, and this bill does not change that . . . [59] By its very terms, the IDEA's purpose is to "assist" states in the provision of education for all children with disabilities.[60] The IDEA's provisions reinforce states' traditional authority: each state seeking federal assistance must develop a plan which details the policies and procedures that ensure provision of a free appropriate public education in the least restrictive environment for all children with disabilities;[61] a free appropriate public education, in turn, must "meet the standards of the state educational agency;"[62] each state must also establish the requisite procedural safeguards, including impartial due process hearings where aggrieved parents may present a complaint related to the identification, evaluation, or educational placement of their child, or the provision of a free appropriate public education to their child;[63] each state must further ensure that local educational agencies in the state will establish the individualized education programs required by the Act.[64]

To the extent, then, that the majority in *Schaffer* determined that convenience and fairness considerations do not necessitate a departure from the ordinary default rule for assigning the burden of proof in special education due process hearings, that determination does not and should not bind states. Respondents in *Schaffer*, along with the United States, individual states, and school board associations filing as amici curiae in support of Respondents, agreed that "nothing in the

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59. Town of Burlington v. Dep't of Educ. for Mass., 736 F.2d 773, 785 n.11 (1st Cir. 1984) citing 121 Cong. Rec. 37411 (Nov. 19, 1975).

60. 20 U.S.C. § 1400(d).

61. 20 U.S.C. § 1412(a)(1).

62. 20 U.S.C. § 1401(9)(B).

63. 20 U.S.C. §§ 1412(a)(6)–1415(f).

64. 20 U.S.C. § 1412(a)(4).

Act or applicable regulations prevents a State from going beyond what the IDEA requires and imposing a burden of proof on school systems in administrative hearings."[65] Likewise, individual states filing as amici curiae in support of Petitioners[66] urged the Supreme Court to explicitly recognize that states have the authority, consistent with the constitutional value of federalism, to direct that their local school districts bear the burden of proof in an IDEA administrative hearing.[67]

The rationale offered by Respondents and amici for permitting states to adopt a different rule when dealing with the administration of a federal program ties back largely to the nature of Spending Clause legislation. Such statutes, like the IDEA, condition funding on compliance with minimum federal standards, but allow states to expand on those requirements and "grant additional benefits to their residents."[68] The IDEA restricts states in their educational policy and resource allocation decisions only to the extent that the Secretary of Education does not approve the state plan for eligibility, and/or the state standards conflict with the federal Act's procedures.[69] Notably, the U.S. Department of Education has not reviewed the allocation of the burden of proof in determining states'

65. Brief for the United States as Amicus Curiae Supporting Respondent at *17–18, *Schaffer*, 546 U.S. 49 (2005) (No. 04-698), 2005 WL 1527082; Brief for Respondents at *48–49, *Schaffer*, 546 U.S. 49 (2005) (No. 04-698), 2005 WL 1505062; Oral Argument at *36, *Schaffer*, 546 U.S. 49 (2005) (No. 04-698), 2005 WL 2651391 ("If States wanted to voluntarily assume the burden of proof for their own school districts in [due process] proceedings ... we think that States could do so, and that that would be the rule that applies. We don't quarrel with that); Brief Amici Curiae of the States of Hawaii, Alaska, and Oklahoma and the Territory of Guam in Support of Respondents at *8–11, *Schaffer*, 546 U.S. 49 (2005) (No. 04-698), 2005 WL 1527081; Brief of Virginia School Boards Association and Five Other School Board Associations as Amici Curiae in Support of Respondents at *13 and *17, *Schaffer*, 546 U.S. 49 (2005) (04-698), 2005 WL 1521614.

66. Virginia, Connecticut, Illinois, Kansas, Minnesota, Nevada, Rhode Island, Washington, and Wisconsin filed in support of Petitioners and in favor of placing the burden of proof on the school district. Brief of the Commonwealth of Virginia and Eight Other States as Amici Curiae in Support of the Petitioners at *1, *Schaffer*, 546 U.S. 49 (2005) (No. 04-698), 2005 WL 1031635.

67. *Id.* at *14–17.

68. Brief for Respondents at *49, *Schaffer*, 546 U.S. 49 (2005) (No. 04-698), 2005 WL 1505062; Oral Argument at *36–37, *Schaffer*, 546 U.S. 49 (2005) (No. 04-698), 2005 WL 2651391. States also have plenary power to create school districts and define their powers. *See* Brief of the Commonwealth of Virginia and Eight Other States as Amici Curiae in Support of the Petitioners at *15, *Schaffer*, 546 U.S. 49 (2005) (No. 04-698), 2005 WL 1031635.

69. *See, e.g.*, Battle v. Pa., 629 F.2d 269, 279–80 (3d Cir. 1980).

eligibility for funds under the IDEA.[70]

Ironically, Petitioners' argument in *Schaffer* that the burden of proof is a federal-law question—not open to the states to decide[71] —undercuts Petitioners' preferred burden allocation, in light of the Supreme Court's current default rule. In matters primarily of state concern, however, the Supreme Court has long recognized that while "[t]he scope of a federal right is, of course, a federal question . . . that does not mean that its content is not to be determined by state, rather than federal law."[72] "The fact that Congress specified a number of details governing the IEP process does not indicate an intention to allocate the burden of proof one way or the other,"[73] or to abrogate states' express directive to establish and maintain procedures for special education due process hearings.[74] Justice Breyer's dissent in *Schaffer* noted that the IDEA's minimum federal standards are "unrelated to the 'burden of persuasion' question," and that "[n]othing in the Act suggests a need to fill every interstice of the Act's remedial scheme with a uniform federal rule."[75]

The objection that an inconsistent pattern of burden assignment among the states runs counter to the IDEA's equal protection purpose[76] also does not withstand scrutiny. Comparing the trend in school finance litigation (shifting to more expansive state constitutional rights) to the "burgeoning" trend in the area of special education (shifting to more expansive state statutory rights), the Fourth Circuit, for example, has quoted with approval state court decisions reconciling state law differentiation with the Equal Protection Clause:

> While we must enforce the minimum constitutional standards imposed upon us by the United States Supreme Court's

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70. Brief for the United States as Amicus Curiae Supporting Respondent at *17, *Schaffer*, 546 U.S. 49 (2005) (No. 04-698), 2005 WL 1527082.

71. *See* Oral Argument at *6–7, *Schaffer*, 546 U.S. 49 (2005) (No. 04-698), 2005 WL 2651391; Reply Brief of Petitioners at *11, *Schaffer*, 546 U.S. 49 (2005) (No. 04-698), 2005 WL 1812490.

72. De Sylva v. Ballentine, 351 U.S. 570, 580 (1956).

73. Reply Brief of Petitioners at *12, *Schaffer*, 546 U.S. 49 (2005) (No. 04-698), 2005 WL 1812490.

74. 20 U.S.C. § 1415(a).

75. *Schaffer*, 546 U.S at 70 (Breyer, J., dissenting).

76. *See* Kevin Pendergast, *Schaffer's Reminder: IDEA Needs Another Improvement*, 56 CASE W. RES. L. REV. 875, 884 (2006).

> interpretation of the Fourteenth Amendment, we are free, and we are under a duty, to develop additional constitutional rights and privileges under our . . . [c]onstitution if we find such fundamental rights and privileges to be within the intention and spirit of our local constitutional language . . . We need not stand by idly and passively, waiting for constitutional direction from the highest court of the land. Instead[,] we should be moving concurrently to develop and expound the principles embedded in our constitutional law.[77]

The states who filed as amici curiae in support of Petitioners in *Schaffer* similarly recognized that "the relationship between the IDEA and substantive state law is like the relationship between the United States Constitution and the State Constitutions."[78] Thus, where Congress has chosen not to explicitly allocate the burden of proof in IDEA due process hearings, and when the Supreme Court has established a minimum default rule placing the burden of proof on the moving party in the absence of state legislation, states are then free to adopt more stringent procedures by statute or regulation[79] without running afoul of the Fourteenth Amendment.

IV. FEDERAL COURTS' PREEMPTION ANALYSES POST-*SCHAFFER*

Federal courts have made clear that a state statute or regulation must contain explicit burden-of-proof language to avoid preemption under the IDEA, as interpreted by the Supreme Court in *Schaffer*.[80] Moreover, federal courts have

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77. Conklin v. Anne Arundel County Bd. of Educ., 946 F.2d 306, 323 (4th Cir. 1991) (quoting Baker v. Fairbanks, 471 P.2d 386, 401–02 (Alaska 1970)).

78. *See* Brief of the Commonwealth of Virginia and Eight Other States as Amici Curiae in Support of the Petitioners at *16 n.13, *Schaffer*, 546 U.S. 49 (2005) (No. 04-698), 2005 WL 1031635; *see also* Smith v. Robbins, 528 U.S. 259, 274-75 (2000) (recognizing the Supreme Court's established practice, rooted in federalism, to allow states wide discretion, subject to the minimum requirements of the Fourteenth Amendment, to experiment with solutions to difficult problems of policy).

79. *See infra* discussion of *L.E. v. Ramsey Bd. of Educ.* at note 81.

80. *See* Kerry M. v. Manhattan Sch. Dist. # 114, No. 03 C 9349, 2006 WL 2862118, at *5 (N.D. Ill. Sept. 29, 2006) (holding Illinois' statutes do not expressly place a burden of proof on the school district sufficient to override the default rule in *Schaffer*). Illinois' statute provides only that a school district shall "*present evidence* that the special education needs of the child have been appropriately identified and that the special education program and related services proposed to meet the needs of the child are adequate, appropriate, and available." 105 ILL. COMP. STAT. 5/14-8.02a(g-55) (emphasis added). The District Court in *Kerry M.* (citing section 8.02(h), superseded by section 8.02a for all impartial due process hearings requested on or after July 1,

understood that state statutes or regulations—not state courts—must provide the rule of law in a state that wishes to override the Supreme Court's default rule allocating the burden of proof to the moving party.[81] State legislatures are the arm of the state best equipped to determine the applicable burden of proof, as the legislative process can attract widespread input from state and local constituents, and constituents can hold elected officials accountable for the policy decisions they make.

Nonetheless, in a decision filed in January of 2008, the Eighth Circuit read *Schaffer* to support the IDEA's preemption of Minnesota Statutes Section 125A.091, Subdivision 16, which allocates the burden of proof to the school district in a special education due process hearing.[82] In reversing the decision of the U.S. District Court for the District of Minnesota, the Eighth Circuit in *M.M. v. Special Sch. Dist. No. 1* pointed to its previous decision in *Sch. Bd. of Indep. Sch. Dist. No. 11 v. Renollett*, 440 F.3d 1007 (8th Cir. 2006) as controlling law.[83] The Eighth Circuit in *Renollett* had, in a footnote, adjudged that allocating the burden of proof to the school district was harmless error, in light of *Schaffer*, given that the school district ultimately prevailed on the student's challenge to the district's provision of a free appropriate public education.[84]

1997) read this language to refer to the burden of production, as distinguished from the burden of persuasion. *Kerry M.*, 2006 WL 2862118, at *5.

81. *See L.E.*, 435 F.3d at 391 (rejecting appellants' contention that *Schaffer* does not affect the burden of proof assigned by New Jersey's highest state court, where New Jersey lacks a "statutory or regulatory provision purporting to define the burden of proof in administrative hearings assessing IEPs"); *see also* Fisher v. Stafford Twp. Bd. of Educ., No. 05-2020, 2007 WL 674304, at *11 n.10 (D.N.J. Feb. 28, 2007) (finding that, "in the absence of a New Jersey statute or regulation placing the burden [of proof] on the school district, there is simply no reason to depart from" the Supreme Court's default rule in *Schaffer*).

82. *M.M.*, 512 F.3d at 458–59. MINN. STAT. § 125A.091 (2007), Subdivision 16 provides, in pertinent part: "[t]he burden of proof at a due process hearing is on the district to demonstrate, by a preponderance of the evidence, that it is complying with the law and offered or provided a free appropriate public education to the child in the least restrictive environment."

83. *M.M.*, 512 F.3d at 459. The Eighth Circuit also held that the burden of proof was improperly placed on the school district at an administrative hearing in West Platte R-II Sch. Dist. v. Wilson, 439 F.3d 782, 784–85 (8th Cir. 2006). However, that case did not present a preemption issue since Missouri law applied, and Missouri did not have any statute or regulation allocating the burden of proof in due process hearings under the IDEA. M.M. v. Special Sch. Dist. No. 1, No. 05-2270, 2006 WL 2571229, at *14 (D. Minn. Sept. 5, 2006).

84. 440 F.3d at 1010 n.3.

The District Court in *M.M.* had declined to follow *Renollett* on grounds that the Eighth Circuit neither referenced the Minnesota statutory allocation of the burden of proof, nor addressed the Supreme Court's express decision to set aside the question of states' authority to statutorily assign the burden of proof.[85] On appeal, the Eighth Circuit in *M.M.* explained that its "opinion in *Renollett* cited the page in *Schaffer* that left the question open, and . . . then decided the question for . . . courts [in the Eighth Circuit]."[86] The Eighth Circuit did not, however, offer any explanation as to *why* it interpreted *Schaffer* to preempt Minnesota's statute, given that the Supreme Court's holding was defined in the absence of state legislation allocating the relevant burden of proof.

The District Court's holding in *M.M.*, though overruled, should not be overlooked here. The Court cited case law emphasizing the IDEA's cooperative federalism design in support of the notion that, "for the purposes of the IDEA, where a state law is more stringent than a federal law, the two are consistent and the state law is not subject to federal preemption."[87] Significantly, the District Court observed that the Supreme Court's holding in *Schaffer* was not based on any finding that allocation of the burden of proof to a school district interferes with the IDEA's substantive guarantees.[88] Rather, the Supreme Court held that "[a]bsent some reason to believe that Congress intended otherwise . . . we will conclude that the burden of persuasion lies where it usually falls, on the party seeking relief."[89] In keeping with this logic, the District Court upheld states' authority to establish "more stringent procedures for effectuating the substantive guarantees of the

85. *M.M.*, 2006 WL 2571229 at *14–15. In a decision that post-dated *Schaffer* but pre-dated *West Platte* and *Renollett*, the United States District Court for the District of Minnesota found that the ALJ correctly placed the burden of proof at the administrative level on the school district in accordance with Minnesota law. *See* Indep. Sch. Dist. No. 701 v. J.T., No. Civ. 05-1892 DWFRLE, 2006 WL 517648, at *6 n.6 (D. Minn. Feb. 28, 2006).

86. *M.M.*, 512 F.3d at 459. The Eighth Circuit reversed on the merits both "the ALJ's award of compensatory educational services and the District Court's award of attorneys' fees under the IDEA." *Id.; see also* P.K.W.G. v. Indep. Sch. Dist. No. 11, No. 07-4023, 2008 WL 2405818, *9 (D. Minn. June 11, 2008) (citing *M.M.* and *Renollett* in holding that federal law preempts Minn. Stat. § 125A.091, subd. 16 to the extent it places the burden of proof in an IDEA due process hearing always on the school district).

87. *M.M.*, 2006 WL 2571229 at *16 (internal quotations and citations omitted).

88. *Id.*

89. *Id.* (quoting *Schaffer*, 546 U.S. at 57–58).

IDEA," in the absence of evidence that Congress intended to impose the "default rule" on states which assign the burden differently.[90]

By way of a footnote in two separate cases post-dating *Schaffer*, the U.S. District Court for the District of Columbia similarly upheld the validity of the then-current D.C. regulation[91] placing the burden of proof at the administrative level on the District of Columbia Public Schools (DCPS).[92] The District Court recognized the limited nature of the Supreme Court's *Schaffer* holding, defined in the absence of state legislation specifically allocating the burden of proof in an IDEA due process hearing.[93]

Likewise, the U.S. District Court for the Northern District of Georgia acknowledged the preemption issue left unresolved by the Supreme Court in *Schaffer* and applied Georgia's then-current Board of Education Rules[94] to determine the applicable

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90. *M.M.*, 2006 WL 2571229 at *16. Other post-*Schaffer* federal court decisions have upheld the application of a state statute placing the burden of proof on the school district, without needing to reach the preemption issue. In *Escambia*, for example, the U.S. District Court for the Southern District of Alabama found that Alabama's regulations at the time of the administrative decision specifically imposed the burden of proof on school districts in IEP due process hearings. Escambia County Bd. of Educ. v. Benton, 406 F. Supp. 2d 1248, 1264–65 (S.D. Ala. 2005). The school board did not raise any argument that *Schaffer's* default rule took precedence over Alabama's regulations; rather, the school board unsuccessfully argued that the Court should apply an amendment to Alabama's Department of Education regulations that went into effect more than a year and a half after the hearing officer issued the administrative decision. *Id.* at 1263–65.

91. D.C. MUN. REGS. tit. 5, § 3030.3 (2003) provided: "The [school district] shall bear the burden of proof, based solely upon the evidence and testimony presented at the hearing, that the action or proposed placement is adequate to meet the educational needs of the student." Section 3030.3 was later amended, effective June 30, 2006, to place the burden of proof upon the party seeking relief.

92. *See* Gellert v. D.C. Pub. Sch., 435 F. Supp. 2d 18, 22 n.3 (D.D.C. 2006); Schoenbach v. D.C., No. 05-1591 (RMC), 2006 WL 1663426, at *4 n.3 (D.D.C. June 12, 2006). Note that two earlier cases in this District cited to *Schaffer* for the burden of proof without any mention of D.C. MUN. REGS. tit. 5, § 3030.3. *See* Hester v. D.C., 433 F. Supp. 2d 71, 76 (D.D.C. 2006), *rev'd on other grounds*, Hester v. D.C., 505 F.3d 1283 (D.C. Cir. 2007); Savoy-Kelly v. E. High School, No. Civ.A. 04-1751(GK), 2006 WL 1000346, at *7 (D.D.C. Apr. 14, 2006). Two other cases in this District assumed, without having to decide, the validity of the D.C. regulation placing the burden of proof on the school district. *See* Roark *ex rel.* Roark v. D.C., 460 F. Supp. 2d 32, 39 n.6 (D.D.C. 2006); Jenkins v. D.C., No. Civ.A. 02-01055 HHK, 2005 WL 3371048, at *2 n.4 (D.D.C. Dec. 12, 2005).

93. *Gellert*, 435 F. Supp. 2d at 22 n.3.

94. GA. COMP. R. & REGS. 160-4-7-.18(1)(g)(8)(2000) provided, in pertinent part: "Generally, the [school district] shall bear the burden of coming forward with the evidence and burden of proof at any administrative hearing to establish that the proposed IEP is appropriate and provides FAPE. If the parents propose a placement

burden of proof.[95] In holding that the ALJ properly placed the burden of proof on the parent at the administrative hearing, the District Court reasoned that the case fell within the latter category set forth under the state rule: the parent sought a more restrictive placement than the one provided by the existing, agreed upon IEP.[96]

Even more recently, the U.S. District Court for the District of Connecticut held, in two unrelated decisions, that the burden of proof should be placed upon the school district during an IDEA administrative hearing, in accordance with Connecticut Department of Education regulations providing that the public agency has the burden of proving the appropriateness of a child's existing or proposed educational program or placement.[97]

Thus, the Eighth Circuit's answer to the preemption question left open in *Schaffer* stands alone among the answers of federal courts[98] that have decided the question in the presence of a state statute or regulation expressly assigning the burden of proof to the school district in a special education due process hearing. On October 20, 2008, the U.S. Supreme Court denied a petition for review of the Eighth Circuit's decision in *M.M.*.[99] In denying the petition, the Supreme Court

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that is more restrictive than provided by an existing agreed upon IEP, the parents shall bear the burden of establishing that the more restrictive environment is appropriate." GA. COMP. R. & REGS. 160-4-7-.18(1)(g)(8) was amended effective May 1, 2006, and subsequently amended in the form of section 160-4-7-.12(3)(l) effective July 1, 2007, to eliminate the hybrid structure and place the burden of persuasion and burden of production upon the party seeking relief at the administrative hearing.

95. W.C. *ex. rel.* Sue C. v. Cobb County Sch. Dist., 407 F. Supp. 2d 1351, 1359 (N.D. Ga. 2005).

96. *Id.*

97. P. *ex. rel.* Mr. P. v. Newington Bd. of Educ., 512 F. Supp. 2d 89, 99 (D. Conn. 2007); *see also* Brennan v. Reg'l Sch. Dist. No. 1 Bd. of Educ., 531 F. Supp. 2d 245, 267 (D. Conn. Jan. 4, 2008) (agreeing with Justice Breyer's dissent in *Schaffer*, "which concluded that the IDEA's model of cooperative federalism did not intend to preempt states' abilities to determine the burden of proof for themselves." 546 U.S. at 69–70 (Breyer J. dissenting)). *But see* M.K. v. Sergi, 554 F. Supp. 2d 201, 221 (D. Conn. 2008). The court in *M.K.* confused the burden of persuasion with the burden of production when describing Judge Hall's holding from *Brennan*. Judge Hall recognized that the moving party retains the burden of production – not the burden of persuasion – under Connecticut law. *Brennan*, 531 F. Supp. 2d at 267. Accordingly, while the court in *M.K.* purported to agree with Judge Hall, the court actually reached the opposite finding that plaintiffs, as the parties challenging the adequacy of the IEPs, bore the initial burden of persuasion. *M.K.*, 554 F. Supp. 2d at 221.

98. Notwithstanding the U.S. District Court for the District of Connecticut's decision in *M.K. v. Sergi*, discussed *supra* at note 97.

99. *M.M.*, 2008 WL 2442939 (U.S. Oct. 20, 2008).

passed up an opportunity to both decide states' authority to override the default rule based on the case at hand, and uniformly align federal courts' treatment of state burden of proof statutes and regulations with the IDEA's cooperative federalism design. The issue of states' authority will likely resurface before the Supreme Court, however, given the potential for a split among federal circuit courts faced with applying *Schaffer* in states that have assigned the burden of proof to school districts by statute or regulation.

V. THE SHIFTING LANDSCAPE OF STATE LEGISLATION ON THE BURDEN OF PROOF

The Supreme Court's default rule in *Schaffer* resolved the Circuit Court split on the IDEA burden allocation in line with states that had assigned the burden of proof to the moving party, either by statute[100] or court precedent.[101] Thus, *Schaffer* did not change the customary burden in those states. *Schaffer's* impact, however, has not been limited to states without IDEA-specific burden-of-proof legislation in jurisdictions that had customarily assigned the burden of proof to the school district. Rather, in the wake of *Schaffer*, states with *and* without statutes or regulations allocating the burden of proof have moved to amend or newly legislate the burden assignment to either align with or depart from the Supreme Court's default rule.[102]

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100. *See* 707 KY. ADMIN. REGS.1:340, Section 11(4) (2004), incorporating by reference KY. REV. STAT. ANN. § 13B.090(7) (West 2007) ("In all administrative hearings ... the party proposing the agency take action or grant a benefit has the burden to show the propriety of the agency action or entitlement to the benefit sought"); 511 IND. ADMIN. CODE, 7-30-3 (2003), incorporating by reference IND. CODE § 4-21.5-3-14 (2002) ("... the agency or other person requesting that an agency take action ... has the burden of persuasion and the burden of going forward with the proof of the request ...").

101. Prior to the Supreme Court's *Schaffer* decision, the Fourth, Fifth, Sixth, Tenth and Eleventh Circuits had assigned the burden of proof to the moving party. States under the jurisdiction of these Circuits that did not have state statutes or regulations expressly assigning the burden of proof included: Colorado, Kansas, Louisiana, Maryland, Michigan, Mississippi, New Mexico, North Carolina, Ohio, Oklahoma, South Carolina, Tennessee, Texas, Utah, Virginia, and Wyoming.

102. Of the seven states that had expressly assigned the burden of proof to school districts by statute or regulation at the time of *Schaffer*, four states have maintained that burden allocation to date: Connecticut, Delaware, Minnesota, and West Virginia. (The burden of proof provision in West Virginia now appears under Policy 2419: Regulations for the Education of Students with Exceptionalities, incorporated by reference under W. VA. CODE R. § 126-16-3 (2008)). Alaska, Washington D.C., and

The problem lies in state officials' and interested constituents' efforts to bolster or restrict states' movements based on compliance with the Supreme Court's *Schaffer* decision. An emphasis on compliance diverts attention from states' authority to independently assign the burden of proof, and threatens both the integrity and passage of state legislation.

Following *Schaffer*, the Education Commissioner in Alaska sought to change Alaska's burden of proof regulation, which placed the burden of proof at all due process hearings on the school district, even if the parent requested the hearing.[103] The Commissioner recognized that the Supreme Court specifically mentioned Alaska's burden of proof regulation in *Schaffer*, and was "leaving for another day" the question of whether state laws placing the burden of proof on the school district would be permitted under federal law.[104] Nonetheless, the Commissioner submitted a proposed amendment to Alaska's regulation that would shift the IDEA burden of proof from the school district to the party that requests a hearing, in an effort "to conform to the November 14th U.S. Supreme Court ruling."[105] At a Board of Education meeting where the proposed amendment was later adopted, Alaska's Assistant Attorney General clarified that the amendment would align the state's due process procedures with federal law, but that the change was a matter

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Georgia represent those states that, following *Schaffer*, shifted their regulatory burden of proof in IDEA due process hearings to the moving party. Of those states that did not have any state statute or regulation allocating the burden of proof in special education due process hearings at the time of *Schaffer*, New York, New Jersey, Hawaii, Virginia, California, and Pennsylvania have since moved to legislatively assign the burden of proof to the school district. As of the date this article was submitted for publication, the legislative measures failed in Hawaii, Virginia, and California, and were pending in Pennsylvania. According to New Jersey's Public Advocate, parent movements are building to pass legislation shifting the burden of proof to school districts in Arizona, Illinois, Massachusetts, Oregon, Vermont, and Washington. *See* SPECIAL EDUCATION DUE PROCESS, *supra* note 26, at 17 n.31 (Jan. 2007). Maryland, the jurisdiction of the administrative hearing in *Schaffer*, amended § 8-413 of its Annotated Code, effective July 1, 2006, to mirror the IDEA's provisions regarding hearing officer decisions under 20 U.S.C. § 1415(f)(3)(E)(i)–(ii), without expressly assigning the burden of proof. *See* MD. CODE ANN., EDUC. § 8-413(g)(1)–(2) (West 2008).

103. Memorandum from Roger Sampson, Comm'r to Members of the Ala. State Bd. of Educ. & Early Dev. (Nov. 30, 2005) (discussing attached proposed amendments to ALASKA ADMIN. CODE tit. 4, § 52.550(e)(9), now codified in pertinent part at § 52.550(i)(11) (2008)).

104. *Id.*

105. *Id.*

of policy, not law.[106]

The D.C. Board of Education also drafted a resolution to align D.C.'s burden-of-proof regulation with the *Schaffer* decision. The resolution presented and later adopted by members of the D.C. Board of Education similarly referenced the Supreme Court's holding in *Schaffer*, and stated, in pertinent part: "Title 5, DCMR, Section 3030.3[, requiring the school district to prove the adequacy of its special education plans when challenged by parents,] is inconsistent with the current ruling and should be amended to bring [the District of Columbia Public Schools (DCPS)] into compliance with the Congressional intent of IDEA as interpreted by the US Supreme Court."[107] Interestingly, the Council of Great City Schools, a coalition of large urban public school systems in the United States, submitted a report to DCPS following the *Schaffer* decision that targeted D.C.'s burden-of-proof regulation as a "root" of the problem facing D.C.'s budgeting for special education.[108] Having concluded that D.C.'s special education costs were "warping the school system's overall expenditures," the Council recommended a reversal of D.C.'s burden-of-proof regulation, among other measures, to help reduce costs.[109]

Two years earlier, however, the D.C. Appleseed Center had released a joint report with DLA Piper LLP, finding that an estimated one-third of all due process hearings arose from DCPS's failure to comply with previous hearing officer decisions or to implement settlement agreements.[110] Additional hearing requests were filed because DCPS failed to timely evaluate children, develop IEPs, and/or respond to parents' questions and concerns.[111] Notably, the Appleseed report's

106. Minutes of State Bd. of Educ. and Early Dev. Meeting at 6 (Mar. 16, 2006).

107. D.C. Bd. of Educ. Res. SR06-20 at 1 (D.C. 2006).

108. COUNCIL OF THE GREAT CITY SCH., FINANCING EXCELLENCE IN THE DISTRICT OF COLUMBIA PUBLIC SCHOOLS: REVIEW OF FINANCE AND BUDGET OPERATIONS OF THE D.C. PUBLIC SCHOOLS 57 (2005). The report was requested by then D.C. School's Superintendent Dr. Clifford B. Janey shortly after he took office in September 2004. *Id.* at 53. The Council conducted its site visit to the D.C. Public Schools from February 27 through March 2, 2005. *Id.* at 13.

109. *Id.* at 73.

110. D.C. APPLESEED CTR. & PIPER RUDNICK LLP, A TIME FOR ACTION: THE NEED TO REPAIR THE SYSTEM FOR RESOLVING SPECIAL EDUCATION DISPUTES IN THE DISTRICT OF COLUMBIA 18, 28 (2003), http://www.dcappleseed.org/projects/publications/Special_Ed_Rprt.pdf.

111. *Id.* at 6, 28. *See also* Letter from The Council of Parent Attorneys and

recommendations to DCPS made no mention of shifting the burden of proof away from school districts.[112]

In New York, some time passed before the burden of proof was shifted to the school district by statute. The burden-of-proof legislation signed by former New York State Governor Eliot Spitzer on August 15, 2007[113] revived the bills vetoed by former Governor George Pataki on July 26, 2006.[114] As initially introduced and passed by both houses of the New York State Legislature in 2006, the bills would have placed the burden of proof in impartial due process hearings on the school district or responsible state agency and restored the pre-*Schaffer* status quo in New York.[115] In exercising his veto, Governor Pataki recognized that the Supreme Court declined to reach the question of whether states could shift the burden of proof to school districts.[116] Nonetheless, his veto message set forth the position of opponents to the bill,[117] who argued "that federal law does not authorize shifting the burden of proof in IDEA

Advocates, Inc. (COPAA) to Russell Smith, Executive Dir., D.C. Bd. of Educ. 2 (Apr. 20, 2006) (regarding proposed change to District of Columbia burden of proof municipal regulation, D.C. MUN. REGS. tit. 5, § 3030.3 (2003)).

112. Rather, the report recommended that DCPS and the District government focus on (i) providing the necessary resources to address existing deficiencies in assessment and placement services in D.C. neighborhood schools, (ii) establishing clear lines of authority for special education program responsibilities and holding DCPS personnel accountable for matters assigned to them, (iii) providing and publicizing procedures for resolving disputes at an early stage (such as mediation and facilitation services through an independent dispute resolution organization), and (iv) improving the administration of due process hearings through adequate staffing, training, and organizational restructuring. D.C. APPLESEED CTR. & PIPER RUDNICK LLP, *supra* note 110, at 11–13. The report noted that any short-term increases in spending resulting from the proposed recommendations would be outweighed by substantial long-term cost savings resulting from redirecting funds to the "actual delivery of special education services and in avoiding the escalating costs that occur when children's needs are neglected." *Id.* at 13.

113. *See* Associated Press, *Law puts burden of proof on schools in special education disputes*, NEWSDAY, Aug. 16, 2007. The amendment to § 4404 of New York's Education Law, effective October 14, 2007, provides that the school district bear the burden of persuasion and burden of production in any impartial hearing, except where parents seek tuition reimbursement for a unilateral placement in a private school. N.Y. EDUC. LAW § 4404 (McKinney 2007).

114. *See* Governor George E. Pataki Veto Message No. 286.

115. *See Schaffer v. Weast Passed Both Houses of Legislature*, NYSARC, Inc., (updated July 5, 2006), http://www.nysarc.org/news-info/nysarc-news-view-story-detail.asp?varID=103.

116. *See* Governor George E. Pataki Veto Message No. 286.

117. Governor Pataki noted that the New York State Education Department, the New York City Department of Education, the New York State School Boards Association, and the Conference of Big 5 School Districts all opposed passage of Senate Bill No. 8354. *Id.*

cases."[118] Governor Pataki premised his disapproval of the bill on the fact that final regulations implementing IDEA 2004 were not yet promulgated, and that these regulations could establish a uniform national rule that would preempt any inconsistent state law.[119] The final implementing regulations ultimately did no such thing.[120]

On January 14, 2008, New Jersey Governor Jon Corzine signed into law state legislation which, effective immediately, placed both the burden of persuasion and burden of production on school districts in special education due process hearings.[121] In opposition to the proposed legislation, the New Jersey School Boards Association had frequently characterized the bill as an attempt to "circumvent" a 2005 U.S. Supreme Court ruling.[122]

A similar objection was voiced at a local school board meeting in Virginia, where the Director of Community Relations and Legislative Services for the school district commented that the Virginia Senate bill—intended to assign school districts the burden of persuasion in IDEA administrative hearings—is "inconsistent with current legal principle and/or court decisions."[123] The Virginia Senate ultimately left the bill in the Committee on Education and Health.[124]

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118. *Id.*

119. *Id.*

120. *See* 71 Fed. Reg. 46540, 46706 (Aug. 14, 2006).

121. The Star-Ledger Continuous News Desk, *Legislation Signed, Vetoed by Corzine*, NJ.com, Jan. 15, 2008. *See* N.J. Senate Bill No. 2604, supplementing N.J. STAT. ANN. § 18A:46 (West 2008). The Supreme Court of New Jersey has since upheld the Legislature's allocation of the burden of proof to the local school district in due process hearings concerning the "identification, evaluation, reevaluation, classification, educational placement, [] provision of a free, appropriate public education, or disciplinary action, of a child with a disability." Bd. of Educ. of City of Sea Isle City v. Kennedy, 196 N.J. 1, 20-21 (2008).

122. New Jersey School Boards Association, New Jersey's Weekly Education News Report, Volume XXX Number 28 at 2 (Mar. 8, 2007); *see also* New Jersey School Boards Association, New Jersey's Weekly Education News Report, Volume XXX Number 38 at 1 (May 17, 2007); New Jersey School Boards Association, New Jersey's Weekly Education News Report, Volume XXX Number 39 at 1 (May 24, 2007).

123. *See* Draft Minutes of the School Board of the City of Newport News, Regular Session (Oct. 17, 2006).

124. *See* S.B. 241 Bill Tracking (2007 session), http://leg1.state.va.us/cgi-bin/legp504.exe?071+sum+SB241.

VI. CONCLUSION

The Supreme Court's holding in *Schaffer*—premised on federal statutory silence and defined in the absence of state legislation—has left room for a variant of Justice Breyer's dissent to emerge in practice. States retain the ability to determine their own burden-of-proof rules in special education due process hearings, not through an ALJ's application of general administrative rules, but through a legislative or regulatory process that solicits widespread, IDEA-specific input.

For states to fully realize their roles as "vital cells" of democratic action however, experimentation and accountability must replace efforts to conform. State action or inaction on the burden allocation should reflect actual state policy choices—rather than compliance with the federal default rule—and state legislatures and officials should be held responsible for those choices. At the same time, courts interpreting *Schaffer* should recognize that the IDEA's model of cooperative federalism did not intend to preempt states' abilities to independently assign the burden of proof by statute or regulation. The interests of children, parents, educators, school administrators, disability rights advocates, taxpayers, and state and federal governments are all at stake.