

United States Court of Appeals for the Ninth Circuit

N. H., Parent; S. P. B., Parent,

Plaintiffs-Appellees,

J. H. B., Student,

Plaintiff-Counter-Defendant-Appellee,

— v. —

WASHOE COUNTY SCHOOL DISTRICT,

Defendant-Counter-Claimant-Appellant.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA IN NO. 3:22-CV-00340-ART-CLB
HONORABLE ANNE R. TRAUM

BRIEF FOR *AMICUS CURIAE* COUNCIL OF PARENT ATTORNEYS AND ADVOCATES, INC. IN SUPPORT OF PLAINTIFF-APPELLEE AND AFFIRMANCE

ELLEN MARJORIE SAIDEMAN
LAW OFFICE OF ELLEN SAIDEMAN
7 Henry Drive
Barrington, Rhode Island 02806
(401) 258-7276

SELENE ALMAZAN-ALTOBELLI
COUNCIL OF PARENT ATTORNEYS
AND ADVOCATES, INC.
P.O. Box 6767
Towson, Maryland 21285
(844) 426-7224

Attorneys for Amicus Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26.1 the following disclosure is made on behalf of:

Council of Parent Attorneys and Advocates

1. No amicus is a publicly held corporation or other publicly held entity;
2. No amicus has parent corporations; and
3. No amicus has 10% or more of stock owned by a corporation.

Respectfully submitted,

s/Selene Almazan-Altobelli

SELENE ALMAZAN-ALTOBELLI

COUNCIL OF PARENT ATTORNEYS
AND ADVOCATES, INC.

P.O. Box 6767

Towson, MD 21285

selene@copaa.org

(844) 426-7224

Counsel for Amicus

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STATEMENT OF INTEREST OF *AMICUS CURIAE*¹

Council of Parent Attorneys and Advocates (COPAA) is a national not-for-profit organization for parents of children with disabilities, their attorneys and advocates. COPAA believes effective educational programs for children with disabilities can only be developed and implemented with collaboration between parents and educators as equal parties.

COPAA's attorney members represent children in matters involving the Individuals with Disabilities Education Act, 20 U.S.C. § 1400, *et seq.* (IDEA or Act). COPAA also supports individuals with disabilities, their parents, and advocates, in seeking to safeguard the civil rights guaranteed to those individuals under federal laws, including the Civil Rights Act of 1871, ch. 22, 17 Stat. 13 (codified as amended at 42 U.S.C. § 1983) (Section 1983), Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (Section 504), and the Americans with Disabilities Act, *et seq.* (ADA), 42 U.S.C. 12101, *et seq.*

COPAA's primary goal is to secure appropriate educational services for children with disabilities in accordance with national policy. COPAA provides

¹ Pursuant to Rule 29(a)(4)(E) of the Federal Rules of Appellate Procedure, Amicus states that: (A) there is no party, or counsel for a party in the pending appeal who authored the amicus brief in whole or in part; (B) there is no party or counsel for a party in the pending appeal who contributed money that was intended to fund preparing or submitting the brief; and (C) no person or entity contributed money that was intended to fund preparing or submitting the brief, other than *Amicus* and its members.

resources, training, and information for parents, advocates, and attorneys to assist them in obtaining the free appropriate public education (FAPE) such children are entitled to under the IDEA.²

COPAA brings to the Court the unique perspective of parents, advocates, and attorneys for children with disabilities. COPAA has previously filed as *amicus curiae* in the United States Supreme Court in *A.J.T. v. Osseo Area School*, 605 U.S. 335 (2025); *Perez v. Sturgis Public Schools*, 598 U.S. 142 (2023); *Endrew F. v. Douglas County School District. RE-1*, 580 U.S. 386 (2017); *Fry v. Napoleon Community School*, 580 U.S. 154 (2017); *Forest Grove School District v. T.A.*, 557 U.S. 230 (2009); *Board of Education v. Tom F.*, 552 U.S. 1 (2007); *Winkelman v. Parma City School District*, 550 U.S. 516 (2007), and *Arlington Central School District Board of Education v. Murphy*, 548 U.S. 291 (2006); *Schaffer v. Weast*, 546 U.S. 49 (2005), and in numerous cases in the United States Courts of Appeal.

Both parties have consented to the filing.

SUMMARY OF ARGUMENT

IDEA's central purpose is to ensure that all students with disabilities who need special education to benefit from education receive it. Critically, IDEA imposes a

² “Improving educational results for children with disabilities is an essential element of [the U.S.] national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities.” 20 U.S.C. § 1400(c)(1).

“Child Find” which is devoted to the requirements for state eligibility for funds under IDEA. Congress explicitly placed the “Child Find” duty as a condition of receiving IDEA funds, providing that the obligations extend to all children with disabilities who need special education. IDEA requires that a State (and its school districts) that accepts federal IDEA funds provide each child with a disability with a free appropriate public education tailored to accommodate the child’s disabilities and to achieve educational benefit. *See Board of Educ. v. Rowley*, 458 U.S. 176, 209 (1982). If a school district violates this statutory mandate, a court may, after exhaustion of administrative procedures, “grant such relief as the court determines is appropriate” for violations of the statute. 20 U.S.C. § 1415(i)(2)(C)(iii). This broad grant of remedial authority has twice been interpreted by the United States Supreme Court to authorize a court or hearing officer to order school districts to reimburse parents for their reasonable expenditures on unilateral private special education for a child if the court or hearing officer ultimately determines that such placement, rather than a proposed IEP with a public school placement, is proper under the Act. *See School Comm. of the Town of Burlington v. Department of Educ.*, 471 U.S. 359 (1985); *Florence County Sch. Dist. v. Carter*, 510 U.S. 7 (1993).

To receive federal special education funding, states must develop special education statutes and regulations that are consistent with IDEA and the federal special education regulations. State statutes and regulations may provide more rights

to parents than federal law but **may not take away rights provided by federal law.** Here, Nevada, like nine other states, has provided that the school districts bear the burden of proof in special education due process hearings. As IDEA is silent on the burden of proof, IDEA does not preempt Nevada and other states from imposing the burden of proof on school districts.

ARGUMENT

I. CONGRESS PASSED IDEA TO ENSURE AN APPROPRIATE EDUCATION FOR ALL CHILDREN WITH DISABILITIES WHO NEED SPECIAL EDUCATION

A. IDEA was enacted to ensure that all children with disabilities receive a free appropriate public education and provides powerful legal protections for students with disabilities

IDEA “ensures that children with disabilities receive needed special education services.” *Fry*, 580 U.S. at 157. IDEA thus confers upon students with disabilities “an enforceable substantive right to public education in participating States.” *Honig v. Doe*, 484 U.S. 305, 310 (1988). “To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Endrew F.*, 580 U.S. at 387.

As the Supreme Court has explained, the statute “represents an ambitious federal effort to promote the education of handicapped children, and was enacted in response to Congress’ perception that a majority of handicapped in the United States

‘were either totally excluded from schools or [were] sitting idly in regular classrooms awaiting the time when they were old enough to ‘drop out.’” *Rowley*, 458 U.S. at 178. For decades preceding passage of the Education for All Handicapped Children Act (IDEA’s predecessor), “school districts routinely denied children with disabilities an adequate education. They provided no educational assistance or accommodations to disabled children in school, ‘warehoused’ children in institutions thereby segregating them from their non-disabled peers, or excluded them from school altogether.” Jennifer Rosen Valverde, *A Poor IDEA: Statute of Limitations Decisions Cement Second-Class Remedial Scheme for Low-Income Children in the Third Circuit*, 41 Fordham Urb. L.J. 599, 600-01 (2013).

In the 1970s, Congress held hearings investigating the quality of educational instruction provided to children with disabilities. These hearings established that public school districts throughout the country had wholly excluded millions of children with a multitude of disabilities or placed those children in programs where they received no educational benefit. IDEA, adopted in response to this problem, “seeks to ensure that all children with disabilities have available to them a free appropriate public education [FAPE].” 20 U.S.C. § 1400(d)(1)(A)).

Thus, “IDEA was intended to reverse this history of neglect” for children with disabilities. *Schaffer*, 546 U.S. at 52. As IDEA expressly recognizes in its findings, before IDEA was enacted “the educational needs of millions of children with

disabilities were not being fully met” for a variety of reasons, including some children who “were excluded entirely from the public school system and from being educated with their peers” and others whose “undiagnosed disabilities prevented” them “from having a successful educational experience.” 20 U.S.C. § 1400(c)(2)).

The IDEA provides detailed requirements for the development of an appropriate Individualized Educational Program (IEP) for every student and powerful procedural protections when school districts fail to follow statutory and regulatory directives. The most recent data from 2024 shows that more than eight million students in the United States have an IEP.³

IDEA is a powerful entitlement statute because it “requires school districts to provide the individualized services necessary to get a child to that floor [of access to education], regardless of the costs, administrative burdens, or program alterations required.” *K.M. v. Tustin Unified Sch. Dist.*, 725 F.3d 1088, 1097 (9th Cir. 2013). Thus, the Supreme Court rejected cost as a basis for denying a ventilator-dependent student continuous one-on-one nursing services during the school day, finding that cost was not a factor in construing the term “related services.” *Cedar Rapids Cmty. Sch. Dist. v. Garret F. by Charlene F.*, 526 U.S. 66, 77 (1999).

IDEA confers upon courts and administrative hearing officers broad equitable authority to provide appropriate relief. *Forest Grove Sch. Dist.*, 557 U.S. at 239.

³ <https://www.advocacyinstitute.org/blog/>

Such relief “would include a prospective injunction directing the school officials to develop and implement at public expense an [appropriate] IEP.” *Burlington*, 471 U.S. at 370. For those children whose parent have the means and the opportunity to provide special education and/or related services for their children while pursuing an IDEA remedy, reimbursement of funds spent on unilateral placements and services are available. *Id.*; *Forest Grove Sch. Dist.*, 557 U.S. at 240; *Leggett v. District of Columbia*, 793 F.3d 59, 63-64 (D.C. Cir. 2015) (awarding placement at residential school that met student’s needs when school district failed to identify alternative appropriate placement).

For children whose parents are unable to afford or find alternative services, compensatory education is available as relief. *L.O. v. N.Y. City Dep’t of Educ.*, 822 F.3d 95, 124 (2d Cir. 2016); *B.D. v. District of Columbia*, 817 F.3d 792, 799 (D.C. Cir. 2016) (remanding for calculation of compensatory education to ensure that student is in educational position he would have achieved absent the denial of FAPE); *Douglas v. California Ofc. of Admin. Hrg.*, 650 F. App’x 312, 315 (9th Cir. 2016) (ALJ has authority to order medically necessary occupational services necessary for special education benefit as compensatory education); *Doe v. East Lyme Bd. of Educ.*, 790 F.3d 440, 454 (2d Cir. 2015) (awarding reimbursement and compensatory education for violation of “stay put” protection). Compensatory education “may include services that would not ordinarily be available under IDEA,

such as education beyond age 21.” *B.D.*, 817 F.3d at 800; *see also Ferren C. v. Sch. Dist. of Phila.*, 612 F.3d 712, 720 (3d Cir. 2010).

B. IDEA Places a Child Find Obligation on School Districts In Order to Locate and Serve All Children with Disabilities who Need Special Education

Critically, IDEA imposes a “Child Find” in Section 1412, which is devoted to the requirements for state eligibility for funds under IDEA. Congress explicitly placed the “Child Find” duty as a condition of receiving IDEA funds, providing that the obligations extends to all children with disabilities who need special education:

(3) Child Find

(A) In General. All children with disabilities residing in the State, including children with disabilities who are homeless children or are wards of the State and children with disabilities attending private schools, regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated and a practical method is developed and implemented to determine which children with disabilities are currently receiving special education and related services.

20 U.S.C. § 1412(a)(1)(3). *See also Handberry v. Thompson*, 446 F.3d 335, 347 (2d Cir. 2006).

As the Supreme Court has recognized, with the Child Find mandate, Congress acknowledged the “paramount importance of properly identifying each child eligible for services.” *Forest Grove Sch. Dist.*, 557 U.S. at 245. The Ninth Circuit has explained:

In order to provide a free appropriate public education to all children with disabilities States must, of course, first identify those children and evaluate their disabling conditions. Accordingly, the IDEA requires that every State have procedures in place that are designed to identify children who may need special education services. *Id.* § 1412(a)(3)(A). Once identified, those children must be evaluated and assessed for all suspected disabilities so that the school district can begin the process of determining what special education and related services will address the child's individual needs. *See id.* §§ 1412(a)(7), 1414(a)-(c).

That this evaluation is done early, thoroughly, and reliably is of extreme importance to the education of children. Otherwise, many disabilities will go undiagnosed, neglected, or improperly treated in the classroom. *See id.* § 1400(c).

Timothy O. v. Paso Robles Unified Sch. Dist., 822 F.3d 1105, 1110 (9th Cir. 2016); *see also Forest Grove Sch. Dist.*, 557 U.S. at 245.

II. THE DISTRICT COURT'S DECISION THAT THE BOARD VIOLATED ITS CHILD FIND DUTY WAS CORRECT

Nothing in the legislative history suggests that Congress intended to categorically exclude from the equitable remedy of reimbursement children with disabilities who never received special education under the authority of a public agency if the parents can establish that the school district is not offering an appropriate public education. To the contrary, to the extent this issue was discussed at all, the legislative history confirms that Section 1412(a)(10)(C) was intended to codify the prevailing case law that notice to the school district of an intent to place a child in private school because of dissatisfaction with the proposed IEP is a relevant factor for a court to consider in exercising its remedial discretion. IDEA requires that a State (and its school districts) that accepts federal IDEA funds provide

each child with a disability with a free appropriate public education tailored to accommodate the child's disabilities and to achieve educational benefit. *See Rowley*, 458 U.S. at 209.

If a school district violates this statutory mandate, a court may, after exhaustion of administrative procedures, “grant such relief as the court determines is appropriate” for violations of the statute. 20 U.S.C. § 1415(i)(2)(C)(iii). This broad grant of remedial authority has twice been interpreted by the United States Supreme Court to authorize a court or hearing officer to order school districts to reimburse parents for their reasonable expenditures on unilateral private special education for a child if the court or hearing officer ultimately determines that such placement, rather than a proposed IEP with a public school placement, is proper under the Act. *Burlington*, 471 U.S. 359; *Carter*, 510 U.S. 7.

This equitable authority is rarely invoked, but it is an essential remedy for ensuring that children with disabilities receive timely and appropriate educational services when faced with intransigence or mismanagement by school districts. Contrary to appellant's argument, 20 U.S.C. § 1412(a)(10)(C), first enacted in 1997, did not impose a categorical limitation on the remedies available for violations of the IDEA.

Recognizing that students may be unable to attend school because of their disabilities, Congress defined special education as including instruction conducted

“in the home, in hospitals and institutions, and in other settings.” 20 U.S.C. § 1410(29)(A). Thus, a school district’s obligation to provide special education and related services is not limited to services delivered at school. Further, federal courts have has held that the failure to provide special education services to students whose disabilities prevent them from attending schools may violate IDEA. *See, e.g., Weixel v. Bd. of Educ. of N.Y.*, 287 F.3d 138, 150-51 (2d Cir. 2002).

As the district court noted in its decision, the facts of *Dep’t of Educ. v. Cari Rae S.*, 158 F. Supp. 2d 1190 (2001) closely mirror the facts at issue: “The facts here are analogous to those in *Cari Rae*: this is a child find case, JHB was hospitalized following an acute crisis, and JHB received diagnostic and evaluation services while hospitalized.” *Op.* at 9-10. The award, as detailed in the district court’s decision, should be affirmed.

Indeed, the record is clear that once the school district followed through with its child find obligations, JHB was provided with a disability category (emotional disturbance) and an IEP. Notably, the newly developed IEP required placement in a therapeutic residential facility.” Had the school district not failed in its child find obligations, JHB would have received services in an appropriate placement designed for JHB’s needs. The school district’s failure to comply with its obligations led to JHB’s family seeking those services that the school district failed to locate, evaluate and identify, in essence its child find obligations.

JHB attended Washoe County School District (District) from kindergarten through second grade. During this time, she exhibited multiple episodes of anxiety; JHB was home schooled grades three to four; then, in fifth grade JHB attended a private school through eighth grade. Her eighth-grade year was interrupted by a psychiatric hospitalization. JHB reentered the District in ninth grade. Parents informed the District of JHB's multiple mental health struggles and their impact on accessing education. In ninth grade JHB made a nearly fatal suicide attempt and returned to the hospital. Despite the knowledge of JHB's mental health struggles upon her entry to the District, the District failed to evaluate JHB for eligibility for special education. Furthermore, when informed of the continued interruption to JHB's education due to hospitalization, the District failed to act, thus leaving the parents to withdraw her and subsequently enroll her in residential treatment facilities.

“In order to provide a free appropriate public education to all children with disabilities States must, of course, first identify those children and evaluate their disabling conditions.” *Timothy O.*, 822 F.3d at 1109 (citing *Schaffer*, 546 U.S. at, 52 (2005); § 1412(a)(3)(A). Once identified, *those children must be evaluated and assessed for all suspected disabilities* so that the school district can begin the process of determining what special education and related services will address the child's individual needs. *See id.* §§ 1412(a)(7), 1414(a)-(c) (emphasis added). That this

evaluation is done early, thoroughly, and reliably is of extreme importance to the education of children. Otherwise, many disabilities will go undiagnosed, neglected, or improperly treated in the classroom. *Timothy O.*, 822 F.3d at 1110; *see also Forest Grove Sch. Dist.*, 557 U.S. at 245.

Unfortunately, for JHB and her parents, the irony that JHB was subsequently identified as a student with an emotional disability and in need of residential treatment is bittersweet. But for the negligence of the District, JHB would have been evaluated and identified, well on her way to a therapeutic residential placement and there would have been no need for the parents to seek reimbursement. Contrary to the overstated rhetoric of Appellant and its *amici*, a ruling in favor of the parent in this case should not pose a significant burden on school districts. By contrast, a ruling in favor of the school district would eliminate the only form of relief that can provide redress to parents who correctly act on the fact that a school district refuses to acknowledge their child has a disability *or* proposes an educational program for their child that would not constitute an appropriate education for the child.

III. THE DISTRICT COURT DID NOT ERR WHEN IT UPHELD THE CONSTITUTIONALITY OF NRS 388.467, ASSIGNING THE ENTIRE BURDEN OF PROOF TO SCHOOL DISTRICTS IN ALL IDEA ADMINISTRATIVE HEARINGS.

Nevada state law explicitly provides that, for all due process proceedings held under IDEA to which a school district is a party, “the school district has the burden

of proof and the burden of production.” Nev. Rev. Stat. Ann. § 388.467. At least nine other states and the District of Columbia similarly place the burden of proof on school districts in a wide range of IDEA cases.⁴ The district court correctly rejected the Appellant’s arguments that states were preempted, either expressly or by implication, from placing the burden of proof on school districts by the Supreme Court’s decision in *Schaffer*, 546 U.S. 49. Appellant relies on that case for the proposition that Nevada’s state law is preempted by the IDEA. Yet, in that case, the Supreme Court explicitly recognized that IDEA “is silent, however, as to which party bears the burden of persuasion at such a hearing.” *Id.* at 51. Thus, it cannot be disputed that IDEA is silent as to which party bears the burden of persuasion.⁵ *See also id.* at 54 (“Congress has never explicitly stated, however, which party should bear the burden of proof at IDEA hearings.”). Further, *Schaffer*’s holding is limited to those states in which state law does not prescribe the burden of proof.

In *Schaffer*, the Supreme Court noted that parties and several states had urged the Court to address whether states may override the default rule and put the burden

⁴ See Alaska, Alaska Admin. Code tit. 4 § 52.550(e)(9), Alabama, Ala. Admin. Code R. 290-8-9.08(c)(6)(ii)(I) Connecticut, Conn. Agencies Regs. (RCSA) § 10-76h-14, Delaware, 14 Del. Admin. Code § 926-11.10, District of Columbia, 1. D.C. Mun. Regs. Tit. 5 § 3030.3, New Jersey, N.J.S.A. § 18A:46-1.1, New York, N.Y. Educ. Law § 4404(1)(c), New Hampshire, N.H. Rev. Stat. § 186-C:16-b(III-a), Washington, RCW 28A.155, and West Virginia, W. Va. Code R. § 126-16-8.1.11(c).

⁵ The Supreme Court recognized that the case only concerned the burden of proof and not the burden of production. 546 U.S. at 56.

on the school district. *Id.* at 61. It stated that at least four states (Alabama, Alaska, Delaware, and Minnesota) had placed the burden of proof on states in at least some circumstances. *Id.* Because Maryland did not have such a law or regulation, the Court did not decide the issue; its decision, therefore, was limited to those states that did not prescribe the burden of proof. *Id.* at 61-62. As *Schaffer* explicitly abstained from addressing the issue, it does not support Appellants' argument that the *Schaffer* decision preempts Nevada and other states from imposing the burden of persuasion on school districts.

Since *Schaffer* was decided, Nevada and at least six other states have determined that the burden of proof in IDEA due process cases, at least in some circumstances, should be placed on school districts and have amended their statutes accordingly.⁶

The Supreme Court has made clear that claims of preemption must be analyzed with “the starting presumption that Congress does not intend to supplant state law.” *New York State Conf of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654 (1995). The issue of preemption is one of “statutory construction with the text of the provision in question, and move on, as need to be

⁶ Connecticut, Conn. Agencies Regs. (RCSA) § 10-76h-14; New Jersey, N.J.S.A. § 18A:46-1.11 New York, N.Y. Educ. Law § 4404(1)(c); New Hampshire, N.H. Rev. Stat. § 186-C:16-b(III-a); Washington, RCW 28A.155, and West Virginia, W. Va. Code R. § 126-16-8.1.11(c).

to the structure and purpose of the Act in which it occurs.” *Id.* As Schaffer explicitly recognized, IDEA’s text does not address the burden of proof in due process proceedings. 546 U.S. at 51 & 54.

As for the structure and purpose of the Act, the Supreme Court has long recognized, IDEA is a federal funding statute that creates a partnership between the federal government and state governments. *See Rowley*, 458 U.S. at 180-83. The states are assigned “the primary responsibility for developing and executing educational programs for [disabled] children,” with the federal government imposing “significant requirements to be followed in the discharge of that responsibility.” *Id.* at 183. To receive federal special education funding, states must develop special education statutes and regulations that are consistent with IDEA and the federal special education regulations. State statutes and regulations may provide more rights than federal law, but **may not take away rights provided by federal law.**

State governments, and state legislatures, have considerable solicitude for the burdens that IDEA places on state and local governments and also have solicitude for the concerns of parents. Many states have additional state laws that grant greater autonomy and rights to parents than the minimum standards prescribed by federal law. These topics include timelines for evaluation (Washington), transfer of rights at age of majority (Maryland), eligibility past the age of 22 (Michigan); restraint and

seclusion (27 states); required functional behavior assessments (New York). There are a number of states that have enacted consent laws (eight).

There is nothing in the structure or purpose of the act that would suggest that the states could not make an informed judgment to place the burden of proof on school districts. The Supreme Court noted that the parents had a plausible argument for placing the burden of proof on school districts: “[t]he ordinary rule, based on considerations of fairness, does not place the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary.” 546 U.S. at 609, quoting *United States v. New York, H.H. & H.R. Co.*, 355 U.S. 253, 256, n.5 (1957). Some states have determined that fairness requires placing the burden of proof, in at least some circumstances, on school districts. For example, following *Schaffer*, New York reallocated the burden of proof to provide that the school district generally has the burden of proof in a due proceeding “except that a parent or person in parental relation seeking tuition reimbursement for a unilateral parental placement shall have the burden of persuasion and burden of production on the appropriateness of such placement.” N.Y. Educ. Law § 4404 1.c.

A vital part of IDEA’s success is a fair hearing process. For many children, good special education services make the difference between success and failure. Yet when a school district has failed to provide the free appropriate public education the law requires, parents’ only recourse is to seek a due process hearing if they

cannot convince the school team otherwise. Those states that place the burden of proof on school districts require a school district to do no more than establish for an impartial hearing officer that the IEP or placement it proposes meets the law's minimal standards. Indeed, parents prevail in a hearing only if a school district provides an education so inferior that it fails its legal obligations. *Endrew F.*, 580 U.S. at 402-03,

Yet parents have far fewer resources and are less able to navigate the special education hearing maze than school districts. Under IDEA, parents should play an active role in advocating for their child's education. Nonetheless, even before a hearing, school districts have overwhelming advantages over parents. IEP meetings are inherently intimidating for most parents. They are often outnumbered by school personnel, who control the process and the information. School districts rely on psychologists, service providers, and other employees in IEP meetings to develop IEPs, and then, on these same people (and other paid experts) to testify as witnesses at hearings; school districts also have the resources to hire paid experts.⁷ Parents, on the other hand, are often unable to access or afford expert witnesses. Such costs are not recoverable as attorneys' fees. *See Arlington*, 548 U.S. at 298. In fact, many parents of children with disabilities live in poverty or difficult financial

⁷ Debra Chopp, *School Districts & Families Under the IDEA: Collaborative in Theory, Adversarial in Fact*, 32 J. Nat'l Ass'n Admin. L. Jud. 423, 453 (2012).

circumstances. One-quarter of students with IEPs have families with incomes below the poverty line and two-thirds have family incomes of \$50,000 or less.⁸ Furthermore, school districts have free, unfettered access to relevant information about a proposed placement. Parents do not and are often denied access to these programs in advance of hearings. Even when parents' experts are permitted to observe children in class, observations are often limited. Moreover, while school districts and their personnel are familiar with, and trained in, special education law and hearing procedures, most parents are not. Most parents are not lawyers, and few receive any real training in special education advocacy, let alone education law. School districts also have inherent advantages as repeat players in the process. Most parents have very little experience. At hearings, school districts use their built-in expert witnesses and lawyers (both paid for with tax dollars). On the other hand, many parents are not represented by counsel, know little about the law, and lack the vast resources that the school districts have. In light of these factors, states may determine that it is appropriate to place the burden of proof on school districts.

Appellant's reliance on the Eighth Circuit's decision in *M.M. v. Special School District No. 1*, 512 F.3d 455, 459 (8th Cir. 2008) is misplaced. As the District Court

⁸ Elisa Hyman, *et al.*, *How IDEA Fails Families without Means: Causes and Corrections from the Frontlines of Special Education Lawyering*, 20 Am. U. J. Gender Soc. Pol'y & L 107, 112-13 (2011). *See also* Kelly D. Thomason, Note, *The Costs of a "Free" Education*, 57 Duke L.J. 457, 483-84 (2007).

recognized, *M.M.* simply established that Eighth Circuit precedent, not *Schaffer*, prevented the enforcement of a Minnesota law regarding the burden of proof. The Eighth Circuit, consistent with other courts of appeals, recognized *Schaffer* “left the question open” as to whether state law could shift the burden. *Id.* at 458. The Eighth Circuit’s earlier decision, *Sch. Bd. of Indep. Sch. Dist. No. 11 v. Renollett*, 440 F.3d 1007, 1010 n.3 (8th Cir. 2006) “decided the question for the courts of this circuit.” *M.M.*, 512 F.3d at 459. *M.M.*, by its own terms, is inapplicable to cases outside of the Eighth Circuit. Further, the court in *M.M.* “did not . . . 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.” *Cooperative Federalism Post-Schaffer: The Burden of Proof and Preemption in Special Education*, 2009 BYU L. & Educ. L.J. 103, 121 (2009); ; see also *P. v. W. Hartford Bd. of Educ.*, 885 F.3d 735, 742 n.4 (2d Cir. 2018) (“In *Schaffer*, the Supreme Court left open the question whether the States could always place that burden on school districts, even in cases where a parent seeks to challenge an IEP”); *Kerry M. v. Manhattan Sch. Dist. # 114*, 2006 U.S. Dist. LEXIS 71109, at *15 (N.D. Ill. Sept. 29, 2006) (noting the Illinois statute did not explicitly place the burden of proof on school districts)

In contrast, a West Virginia federal district court applied the state rule placing the burden of proof on school districts. *Bd. of Educ. v. H.A.*, 2011 U.S. Dist. LEXIS

24311 (S.D.W. Va. Feb. 1, 2011). The court explained, “The Court in *Schaffer* very explicitly indicates that it did not address the circumstance wherein a state has a law or regulation overriding the default rule and placing the burden on the school district. *Id.* at *41-42. The court therefore found that the state law “overrides the default rule expressed in *Schaffer*.” *Id.* at *42.

With regard to Defendant’s constitutional due process claim, the Supreme Court in *Schaffer* stated, “the locus of the burden of persuasion is normally not an issue of federal constitutional moment.” *Id.* at 58. Thus, the district court correctly held that the Nevada statute did not violate the Fourteenth Amendment’s due process provision.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed: Parents are entitled to tuition reimbursement.

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Respectfully submitted,
s/Selene A. Almazan-Altobelli
Selene Almazan-Altobelli
Council of Parent Attorneys and Advocates,
Inc.
P.O. Box 6767
Towson, MD 21285
selene@copaa.org
(844) 426-7224

s/ Ellen M. Saideman
Ellen Marjorie Saideman
Law Office of Ellen Saideman
7 Henry Drive
Barrington, RI 02806
esaideman@yahoo.com
401-258-7276

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I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on the 24th day of August 2026. I certify that all participants are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/Selene Almazan-Altobelli
Selene Almazan-Altobelli