No. _____

In The
Supreme Court of the United States

J.G., by and through his Parents
HOWARD and DENISE GREENBERG,

Petitioners,

v.

STATE OF HAWAII, DEPARTMENT OF EDUCATION, DENISE GUERIN, personally and in her capacity as District Education Specialist; and FRANCOISE WITTENBURG, personally and in her capacity as Principal of Lokelani Intermediate School,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

ROBERT C. THURSTON, ESQ.
THURSTON LAW OFFICES LLC
100 Springdale Road A3
PMB 287
Cherry Hill, NJ 08003
856-335-5291
rthurston@schoolkidslawyer.com

Attorney for Petitioners

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

Under the Individuals with Disabilities Education Act, parents of a child with a disability, who previously received special education and related services from a public agency, may unilaterally enroll their student in a private school and thereafter seek reimbursement for such private placement from the public school. 20 U.S.C. §1412(a)(10)(C)(ii). In *Florence County School District Four v. Carter*, this Court held that parents initially seeking such relief carry the burden of proving "(1) that the public placement violated IDEA, and (2) that the private school placement was proper under the act." 510 U.S. 7, 15 (1993).

This Court again addressed the issue of burden of proof in an initial private placement IDEA case in *Schaffer v. Weast*, 546 U.S. 49 (2005), holding that the "burden of persuasion lies where it usually falls, upon the party seeking relief." *Id.* at 58. Yet, nearly fifteen years on from *Schaffer*, the circuits are desperately divided on the burden of proof when a school district proposes to change the placement of a child with a disability. In this case, the Ninth Circuit, applying the minority position, held that because the parents initiated the administrative proceedings, they bore the burden of proof.

1. Whether the burden of proof shifts when the public agency seeks to change the educational placement of a child with a disability.

LIST OF RELATED CASES

Student v. Department of Education, State of Hawai'i, No. DOE-SY1617-067A, Office of Administrative Hearings, Department of Commerce and Consumer Affairs, State of Hawai'i. Decision entered December 20, 2017.

J.G. ex rel. Howard and Denise Greenberg v. State of Hawaii, Department of Education, et al., No. 17-00503-DKW-KSC, U.S. District Court for the District of Hawaii. Judgment entered August 7, 2018.

J.G., et al. v. State of Hawaii, Department of Education, et al., No. 18-16538, U.S. Court of Appeals for the Ninth Circuit. Judgment entered June 27, 2019, rehearing denied August 21, 2019.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners J.G., by and through his parents Howard and Denise Greenberg, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Memorandum Opinion of the United States Court of Appeals for the Ninth Circuit (Pet. App. 1) is unpublished. The opinion of the United States District Court for the District of Hawaii (Pet. App. 5) is unpublished. The decision of the State of Hawaii Office of Administrative Hearings (Pet. App. 53) is also unpublished.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on June 27, 2019. Pet. App. 1. Petitioners' request for panel rehearing and rehearing *en banc* was denied on August 21, 2019. Pet. App. 116. This Court has jurisdiction under 28 U.S.C. §1254(1).

RELEVANT STATUTORY PROVISIONS

The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400 *et seq.*, requires that any State

educational agency receiving federal funds for special education services must provide "[a]n opportunity for any party to present a complaint with respect to any matter relating to the . . . educational placement of the child." 20 U.S.C. §§1415(a) and (b)(6). IDEA provides the parents or school agency involved in the complaint with "an opportunity for an impartial due process hearing, which shall be conducted by the State educational agency or by the local educational agency, as determined by State law or by the State educational agency." 20 U.S.C. §1415(f)(1).

STATEMENT OF THE CASE

The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400 *et seq.*, requires state educational agencies "to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of a free appropriate public education by such agencies." 20 U.S.C. §1415. One of the key procedural safeguards is to have an impartial due process hearing if parents disagree when a school proposes to change the educational placement of their child with a disability. In IDEA disputes, the party seeking relief bears the burden of proof. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005).

Over the nearly fifteen years since the Court established that general rule, federal courts and state legislatures have developed conflicting bodies of law relating to burden of proof. A minority of courts,

including the Ninth Circuit below, hold that the party filing the administrative complaint is the party seeking relief and therefore bears the burden of proof, while others hold that if a school district changes the educational placement of a child with a disability, the public agency bears the burden of proving compliance with IDEA. Some states have enacted codes to always put the burden of proof on the public agency. Resolving this conflict will provide much-needed consistency in application of this important federal law and guidance to parents and educators as to their respective legal rights and obligations.

A. Legal Background

"The IDEA is a comprehensive educational scheme, conferring on disabled students a substantive right to public education." *Honig v. Doe*, 484 U.S. 305, 310, 108 S.Ct. 592, 98 L.Ed.2d 686 (1988). IDEA requires that public schools receiving federal funds for special education services provide each child with a disability a "free appropriate public education (FAPE)." 20 U.S.C. §§1401(9) and 1412(a)(1). The vehicle for the delivery of FAPE to a child with a disability is an Individualized Education Program (IEP). 20 U.S.C. §§1401(9) and 1414(d)(1).

In an IEP, a child with a disability must, to the maximum extent appropriate, be educated with his/her non-disabled peers and may be removed from the general education classroom "when the nature or severity of the disability . . . is such that education in

regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 20 U.S.C. §1412(a)(5)(A) (the "Least Restrictive Environment" or LRE.) IDEA's regulations make clear that conformity with the LRE requirement might mean placement in a special school. 34 C.F.R. §§300.115, 300.116(a)(2), and 300.118.

If a local educational agency "proposes to [] change . . . the [] educational placement of the child" such public agency must provide "[w]ritten prior notice to the parents of the child." 20 U.S.C. §1415(b)(3). The prior notice "shall include –

A. a description of the action proposed [] by the agency;

B. an explanation of why the agency proposes [] to take the action and a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed [] action;

C. a statement that the parents of a child with a disability have protection under the procedural safeguards of this subchapter . . . ;

D. sources for parents to contact to obtain assistance in understanding the provisions of this subchapter;

E. a description of other options considered by the IEP Team and the reason why those options were rejected; and

F. a description of the factors that are relevant to the agency's proposal or refusal."

20 U.S.C. §1415(c)(1).

If a dispute arises as to the placement of a child with a disability, IDEA authorizes any party to bring a complaint entitling that party to an impartial hearing. 20 U.S.C. §§1415(b)(6), (7), and (f)(1)(A). However, IDEA is silent on which party bears the burden of proof at the hearing.

This Court established the general rule for burden of proof in special education cases in *Schaffer v. Weast*, 546 U.S. 49 (2005). Justice O'Connor writing for the Court held that since IDEA does not statutorily assign the burden of proof, courts fall back to the default rule that "[t]he burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief." 546 U.S. at 62. Noting that "[t]he ordinary default rule, of course, admits of exceptions," 546 U.S. at 57, this Court anticipated that there would be IDEA cases "in evidentiary equipoise" justifying assignment of the burden of proof to schools. 546 U.S. at 58; *see also* 546 U.S. at 62 (Justice Stevens, concurring.) "But the rule applies with equal effect to school districts: If they seek to challenge an IEP, they will in turn bear the burden of persuasion before an ALJ." *Id.* at 62.

What remained an open question following *Schaffer* is what those exceptional cases in evidentiary equipoise looked like. Since the Court did not address that specific issue, the lower courts and some states took the initiative to identify those circumstances.

B. Factual Background

J.G. is a severely autistic child (very low functioning) who requires very substantial support. Pet. App. 63. He is eligible for special education and related services under IDEA. Pet. App. 63. Since 2010, J.G.'s educational placement under IDEA has been at Autism Management Services d/b/a Maui Autism Center (MAC). Pet. App. 64. MAC was stipulated to be J.G.'s placement due to the existing Individualized Education Program (IEP).[1] Pet. App. 14-15.

During the March 16, 2017 IEP meeting to discuss J.G.'s IEP for the 2017-18 school year, representatives of the State of Hawai'i, Department of Education (HIDOE) proposed changing J.G.'s placement from MAC to Po'okela Maui, a newly opened Public Separate Facility. Pet. App. 7-8. Petitioners objected to this change in J.G.'s educational placement and filed an administrative complaint on numerous grounds pursuant to IDEA. Pet. App. 9.

C. Proceedings Below

1. J.G., by and through his parents, challenged the change in placement by filing a special education Due Process Complaint. Pet. App. 9-10. Within the administrative case, Petitioners filed a Motion to Establish Burden of Proof asserting that because HIDOE was the party seeking to change J.G.'s judicially-approved

[1] An "IEP" is a document which describes the special education and related services to be provided to a child with a disability and the reasons therefor. *See* 20 U.S.C. §1414(d)(1)(A).

placement, HIDOE should be assigned the burden of proof. Pet. App. 10. The Administrative Hearings Officer denied the motion and left the burden of proof with Petitioners in the due process case. Pet. App. 10. The Hearings Officer issued her Findings of Fact, Conclusions of Law and Decision on December 20, 2017. Pet. App. 115.

2. Petitioners appealed the burden of proof issue to the district court on October 10, 2017. Pet. App. 11. Through a series of other rulings, the case was finally consolidated in the district court via the Second Amended Complaint. Pet. App. 12. The district court affirmed the AHO's ruling on burden of proof, ruling "the party 'seeking relief' is the party who challenges the IEP. *Cf. Schaffer*, 546 U.S. at 62. This is the settled rule in the Ninth Circuit and elsewhere. Nothing Parents cite provides authority for their contention that the DOE was actually the party seeking relief because Student's 2017 IEP recommended a new public placement even though Student was previously in a private placement pursuant to his IEP for the 2016-17 school year." Pet. App. 21-23.

3. Thereafter, Petitioners appealed several issues, including burden of proof, to the Ninth Circuit. Pet. App. 2. That court affirmed the district court stating, "Although the new IEP changes J.G.'s placement and thereby changes the status quo, J.G.'s parents are challenging the new IEP, meaning they are the 'party seeking relief' and therefore bear the burden of proof," citing *Schaffer*. Pet. App. 2.

4. Petitioner sought panel rehearing and rehearing *en banc*. The Ninth Circuit denied this request. Pet. App. 116.

REASONS FOR GRANTING THE WRIT

The various jurisdictions in this country are in disarray over which party bears the burden of proof when a school district proposes to change the placement of a child with a disability from a judicially-sanctioned private placement. This case presents an excellent opportunity, with a well-developed record and a streamlined legal issue, for this Court to resolve the conflict over this critical question.

I. The Circuits Are In Disarray Over Burden of Proof

This Court established the general rule for burden of proof in special education cases in *Schaffer*. Justice O'Connor, writing for the majority, held that since IDEA does not statutorily assign the burden of proof, courts fall back to the default rule that "[t]he burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief." 546 U.S. at 62.

The majority in *Schaffer* recognized that the party seeking relief is not always the parents. 546 U.S. at 58 (acknowledging that there are cases that "will be in evidentiary equipoise" where the burden should be on

school districts). In his concurring opinion, Justice Stevens wrote, "I do not understand the majority to disagree with the proposition that a court, taking into account 'policy considerations, convenience, and fairness,' . . . could conclude that the purpose of a statute is best effectuated by placing the burden of persuasion on the [school district]." 546 U.S. at 62.

Justice Breyer, dissenting in *Schaffer*, argued that the allocation of burden issue should be left to the states. *See Schaffer*, 546 U.S. at 69-71. To a large extent, it has. However, such "cooperative federalism" has led to a disturbing variance in how administrative agencies assign burden of proof when the school district proposes a change in the educational placement of a student with a disability while Congress has remained silent on the issue.

Four circuits have adopted the approach that a school district proposing a change in placement bears the burden of proving the new placement complies with IDEA. The Eighth and Ninth Circuits held that in light of *Schaffer* the parents bear the burden of proof because they are the parties that filed the administrative complaint. The Fourth Circuit's decision on the issue is unclear, but appears to shift the burden to the school district regarding changes in placement. The remaining circuits do not appear to have addressed this issue post-*Schaffer*.

A. The Conflict

It is not disputed that when "parents of a child with a disability, who previously received special education and related services under the authority of a public agency" unilaterally place the student in a private school, they bear the burden of proving that the public agency did not provide the child with a FAPE and that the private placement is appropriate. *See* 20 U.S.C. §1412(a)(10)(C)(ii); *Florence County School District Four v. Carte*r, 510 U.S. 7, 15 (1993). What remains unresolved is which party is allocated the burden of proof after the parents have won their case for private placement under *Carter* and a school district subsequently changes such approved educational placement.

1. School Districts Are Allocated The Burden of Proof

In a case very similar to the one at bar, the D.C. Circuit held that when the public school endeavored to change the educational placement of a student with a disability from one private school to another private school, the public school had the burden of proving that the change in placement complied with IDEA. *McKenzie v. Smith*, 771 F.2d 1527, 1531-32, 34 (D.C. Cir. 1985) (the district court's finding that D.C. Public Schools did not meet its burden of proof "is unassailable on appeal.") The Fifth Circuit applied the same test. *Tatro v. State of Texas*, 703 F.2d 823, 830 (5th Cir. 1983), *aff'd in part, rev'd in part on other grounds sub nom.*

Irvington Indep. School Dist. v. Tatro, 468 U.S. 883, 104 S.Ct. 3371, 82 L.Ed.2d 664 (1984) (the school district bore "the burden of showing why the educational setting established by the IEP is not appropriate.") In *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 931 F. Supp. 474 (S.D. Tex. 1995), *aff'd as modified*, 118 F.3d 245 (5th Cir. 1997), the court stated "there is a presumption in favor of the educational placement established by a student's IEP, and the party attacking its terms should bear the burden of showing why the educational setting established by the IEP is not appropriate." *Michael F.*, 931 F. Supp. at 477.

For more than twenty-six years, the Third Circuit has held that when the school district seeks to change placement in a child's IEP, the burden must be borne by the public agency. *Oberti v. Board of Educ. of Borough of Clementon School Dist.*, 995 F.2d 1204 (3rd Cir. 1993). That Court reviewed the seminal decision in *Lascari v. Board of Educ.*, 116 N.J. 30, 560 A. 2d 1180 (N.J. 1989) and reasoned "[i]n light of the statutory purpose of IDEA and these practical considerations, we believe that when IDEA's [Least Restrictive Environment][2] requirement is specifically at issue, it is appropriate to place the burden of proving compliance with IDEA on the school." *Oberti*, 995 F.2d at 1219; *see also Grymes v. Madden*, 672 F.2d 321, 322 (3rd Cir. 1982) (accepting district court's decision that the

[2] The *Oberti* court referred to the LRE as the "mainstreaming requirement." The terms are interchangeable.

district had "failed to sustain its burden of proof that an appropriate public program existed.")

While acknowledging that the initial burden after unilateral private placement is on the parents, the Second Circuit recognizes that in all other cases "the school district has the burden of demonstrating the appropriateness of its proposed IEP," which would include a change in placement. *MH v. New York City Dept. of Educ.*, 685 F.3d 217, 224-25 (2nd Cir. 2012) (following New York statutory law.) The Fourth Circuit is less clear. In *AK ex rel. JK v. Alexandria City School*, 484 F.3d 672 (4th Cir. 2007), the court stated that the parents carried the burden when challenging the IEP, *id.* at 679, but "we hold as a matter of law that because [the public agency] failed to identify a particular school, the IEP was not reasonably calculated to enable A.K. to receive educational benefits." *Id.* at 681. It appears the Fourth Circuit shifted the burden to the school district to prove the proposed private school provided a FAPE.

2. Parents Bear The Burden of Proof

Despite a Minnesota statute to the contrary, the Eighth Circuit held that it was error to assign the burden of persuasion to a Minnesota school district in an action to enforce the procedural and substantive requirements of the IDEA. *School Bd. of I.S.D. No. 11 v. Renollett*, 440 F.3d 1007, 1010 n. 3 (8th Cir. 2006). Two years later, that court doubled down on its ruling in *MM ex rel. LR v. Special School Dist. No. 1*, 512 F.3d

455 (8th Cir. 2008). Overruling the district court, the Eighth Circuit said:

> Our decision in *Renollett* is controlling until overruled by our court *en banc*, by the Supreme Court, or by Congress. Though the district court described our discussion of the issue as "cursory," our opinion in *Renollett* cited the page in Schaffer that left the question open, and we then decided the question for the courts of this circuit.

MM, 512 F.3d at 459.

Simply focusing on the party filing the administrative complaint, the Ninth Circuit held "that if the ALJ placed the burden of proof on [the parents], that allocation was correct." *Van Duyn ex rel. Van Duyn v. Baker School Dist. 5J*, 502 F.3d 811, 820 (9th Cir. 2007) ("a challenge to the content rather than the implementation of an IEP . . . is a distinction without a difference.")

None of these cases, however, involved a subsequent change of placement by the school district.

3. Other Circuits

The remaining circuits have not addressed this issue, but some of the lower courts in those jurisdictions have. *Burger v. Murray County School Dist.*, 612 F. Supp. 434, 437 (D.C. Ga. 1984) (canvassing the cases on burden of proof, "the party advocating the [change in placement] should bear the burden of proving its

propriety"); *Lang v. Braintree Comm.*, 545 F. Supp. 1221, 1228 (D.C. Mass. 1982) ("given the seeming preference in [IDEA] for maintaining the status quo where the child is already receiving an appropriate education, the burden must rest with the [school district] to show, by a preponderance of the evidence" that the change in placement provides a FAPE.)

4. State Statutes Add To The Confusion

Several states have placed the burden of proof on the school districts by code.[3] N.J.S.A. §18A:46-1.1 (NJ: school district has the burden of proof and the burden of production in IDEA administrative cases); Conn. Agencies Regs. §10-76h-14 (Conn.: "in all cases . . . the public agency has the burden of proving the appropriateness of the child's program or *placement*, or of the program or *placement proposed by the public agency*"); N.Y. Educ. Law §4404(1) (N.Y.: places burden on the school district in all matters except an initial attempt by parents seeking reimbursement for a unilateral private placement); *see also* Alaska Admin. Code Tit. 4, §52.550(e)(9) (2003); 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) ("If the parents

[3] Hawai'i's Legislature, from which State this case originates, considered two bills, S.B. 2080 and S.B. 2733, in 2006 which would have placed the burden of proof in special education cases on HIDOE. *See* Letter, February 14, 2006, Robert Berlow, COPAA, to Senators Norman Sakamoto and Gary Hooser, https://cdn.ymaws.com/www.copaa.org/resource/collection/43C0A83F-6DE2-44C8-87D1-DE1CB0F2E90A/Haw-COPAA.pdf. The bills must not have passed as they are not current laws.

propose a placement 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."); Minn. Stat. §125A.091, subd. 16 (2004); W. Va. Code R. §126-16-8.1.11(c) (2005).

By contrast, other states have assigned the burden to the party filing the administrative complaint, usually the parents contesting an action by the public agency. *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. . . .") These and other state codes essentially place the burden of proof on the parents as the party filing the administrative action.

B. The Circuit Disparity Is Ripe For Resolution

The question presented has had sufficient time to mature since IDEA was amended in 2004 and this Court decided *Schaffer*. Most of the circuits have weighed in on the issue, together with numerous

states. Yet, the inconsistency of approach and the unanswered issue squeals for elucidation by this Court.

The answer to the question presented depends primarily on the intercourse between the Least Restrictive Environment requirement under IDEA and whether a change in placement constitutes a case "in evidentiary equipoise" from the general rule on burden of proof enunciated in *Schaffer*. 546 U.S. at 58. Absent direction from this Court, it is unlikely that there will be harmony among the numerous jurisdictions in this land, causing disparate results and outcomes that may potentially desecrate IDEA's legislative intent to protect children with disabilities and their families.

II. The Question Presented Is Critical To Children With Disabilities, Their Parents, and School Entities

Parents and educators together create nearly 7 million IEPs each year, all of which must comport with IDEA's requirement of providing FAPE to children with disabilities. Nat'l Ctr. For Educ. Statistics, Digest of Educ. Statistics, *Table 204.30: Children 3 to 21 Years Old Served Under IDEA* (2018).[4] It is imperative that all parties involved in the development of these IEPs have certainty in their legal rights and obligations under IDEA.

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[4] https://nces.ed.gov/programs/digest/d18/tables/dt18_204.30.asp.

A. An Inconsistent Burden Of Proof Is Untenable For All Parties

Congressional intent in the modernization of IDEA was to level the proverbial playing field for parents. "The purposes of [IDEA] are . . . [*inter alia*] to ensure that the rights of children with disabilities and parents of such children are protected." 20 U.S.C. §1400(d)(1)(B). The wisdom behind this goal is because prior "implementation of this chapter has been impeded by low expectations, and an insufficient focus on applying replicable research on proven methods of teaching and learning for children with disabilities." 20 U.S.C. §1400(c)(4). "[I]t is in the national interest that the Federal Government have a supporting role in assisting State and local efforts to educate children with disabilities in order to improve results for such children and to ensure equal protection of the law." 20 U.S.C. §1400(c)(6). To achieve equal protection "[p]arents and schools should be given expanded opportunities to resolve their disagreements in positive and constructive ways." 20 U.S.C. §1400(c)(8).

It is inequitable for the parents to always carry the burden of proof. As the Third Circuit discussed in *Oberti*,

> Requiring parents to prove at the district court level that the school has failed to comply with [IDEA] would undermine the Act's express purpose 'to assure that the rights of children with disabilities and their parents are protected,' 20 U.S.C. §1400(c), and would diminish the effect of the provision that enables

> parents and guardians to obtain judicial enforcement of the Act's substantive and procedural requirements.

Oberti, 995 F.2d at 1219. School districts are "the party better able to meet those burdens [of persuasion and production]." *Oberti*, 995 F.2d at 1219 *citing Lascari*, 560 A. 2d at 1188. In addition, economic disparities create a problem in implementation and enforcement of the IDEA, not least of which is access to legal counsel. *See* Pasachoff, Eloise, *Special Education, Poverty, and the Limits of Private Enforcement*, 86 Notre Dame L. Rev. 1413, 1417-18 (2011).

It is also contrary to precedent to have public agencies always bear the burden of proof. As stated earlier, the Court has held parents bear the burden in an initial unilateral private placement case. *See* 20 U.S.C. §1412(a)(10)(C)(ii); *Carter*, 510 U.S. at 15. Likewise, the parents bear the burden if they are seeking change in an IEP or some action by the public agency, because they are the party seeking relief. *Schaffer*, 546 U.S. at 62.

Any imbalance in allocation of the burden of proof eviscerates the goal of ensuring equal protection under special education law. This is especially true when either parents or a school district seek to change an educational placement of a child with a disability. IDEA requires that placement of a student with a disability must be made by a group of people, including the student's parents, who are knowledgeable about the child, the evaluation data, and the placement options. 20

U.S.C. §1414(e) ("Each local educational agency or State educational agency shall ensure that the parents of each child with a disability are members of any group that makes decisions on the educational placement of their child."). "There is a presumption in favor of the educational placement established by a student's IEP, and the party attacking its terms should bear the burden of showing why the educational setting established by the IEP is not appropriate." *Michael F.*, 931 F. Supp. at 477.

B. Resolving The Burden Of Proof In Subsequent Private Placement Cases Under IDEA Would Restore The Balance Of Interests Intended By Congress

Clarification of the burden of proof in change of placement cases under IDEA would restore certainty in the legal rights of all parties to a special education dispute. Parents desire a consistent standard because they are generally at a disadvantage compared to the school when disputes arise under IDEA. *See* Engel, *Law, Culture, and Children with Disabilities: Educational Rights and the Construction of Difference*, 1991 Duke L.J. 166, 187-94 (1991). Similarly, state educational agencies strive for uniformity under a notion of cooperative federalism. *See generally* Freed, Lara Gelbwasser, *Cooperative Federalism Post-Schaffer: The Burden of Proof and Preemption in Special Education*, Cornell Law Faculty Publications, Paper 983 (2009).[5]

[5] http://scholarship.law.cornell.edu/facpub/983.

J.G.'s case dramatically emphasizes the different outcomes that would occur dependent upon the jurisdiction in which the dispute arose. Had the public agency changed J.G.'s placement in Third Circuit, the SEA would have borne the burden of proof under *Oberti*. Instead, this occurred in the Ninth Circuit and relying upon *Schaffer*, J.G.'s parents bore the burden of proof.

C. This Court Regularly Reviews IDEA Cases To Ensure Clarity In This Critical Law

Since the 2004 amendments to IDEA, this Court has accepted numerous cases acknowledging the crucial purposes of special education law. *See*, *e.g.*, *Winkelman v. Parma City School Dist.*, 550 U.S. 516, 127 S.Ct. 1994 (2007) (parents entitled to assert legal rights on their own behalf under IDEA); *Arlington Central School Dist. Bd. of Ed. v. Murphy*, 548 U.S. 291 (2006) (expert fees as part of costs); *Forest Grove School Dist. v. TA*, 557 U.S. 230 (2009) (tuition reimbursement). Indeed in 2017, this Court issued two seminal cases under IDEA. *See Endrew F. v. Douglas County School Dist.*, 580 U.S. ___, 137 S.Ct. 988, 197 L.Ed.2d 335 (2017) (standard for FAPE); *Fry v. Napoleon Community Schools*, 580 U.S. 743, 137 S.Ct. 743, 197 L.Ed.2d 46 (2017) (exhaustion of administrative remedies).

This Court has not addressed the burden of proof issue in IDEA cases since *Schaffer*. Because the burden of proof in change of placement cases is determinative

as to the educational placement of a child with a disability and acknowledges the cooperative work of an IEP and the importance of a judicial decision on placement, a decision by this Court will provide the necessary uniformity on this case in evidentiary equipoise.

III. This Case Presents An Optimal Opportunity For Resolving The Burden of Proof Issue Under IDEA

The case at bar is an excellent vehicle for this Court to resolve the disarray in the various jurisdictions and provide administrative bodies and lower courts guidance in enforcing the IDEA.

1. The Ninth Circuit's decision is final. Resolution of the question presented will likely be outcome determinative. If the Court holds that Petitioners had the burden of proof, their case is over. By contrast, if HIDOE bore the burden of proving that the change in J.G.'s placement was appropriate under IDEA, the public agency would not have met its burden. The Ninth Circuit recognized that "the new IEP changes J.G.'s placement and thereby changes the status quo," Pet. App. 2, thereby inferentially acknowledging that an alternate set of proofs would be necessary had the burden shifted.

   If this Court determines that the burden shifts when a public agency seeks to change the placement of a child protected by IDEA, the record is sufficient to determine whether HIDOE met its burden of proof and compliance

with IDEA, or the case could be remanded to permit the lower courts to perform a similar analysis.

2. In this case, J.G.'s parents were successful in an initial unilateral private placement of J.G. at MAC. The placement at MAC was adopted into an IEP as stipulated by HIDOE. By placing the burden of proof on Petitioners when HIDOE subsequently sought to change J.G.'s placement, the lower courts disregarded two major principles.

   First, the lower forums ignored the doctrine of *res judicata*. *Res judicata* in the context of special education disputes was discussed in *M.R. v. Ridley School Dist.*, 744 F.3d 112 (3rd Cir. 2014), *cert. denied*, No. 13-1547, 2015 WL 2340858 (S.Ct. May 18, 2015). In that case the Third Circuit stated: To rely on the affirmative defense of *res judicata*, a party must establish three elements: (1) a final judgment on the merits in a prior proceeding that involved (2) the same parties or their privies and (3) the same "cause of action." *M.R.*, 744 F.3d at 121; *see Segal v. American Tel. & Tel. Co.*, 606 F.2d 842, 845 (9th Cir. 1979) (doctrine of issue preclusion prevents relitigation of all "issues of fact or law that were actually litigated and necessarily decided" in a prior proceeding.) Because Petitioners proved that HIDOE had not provided J.G. a FAPE and that MAC was an appropriate placement, *see* Pet. App. 10 *fn*. 5, they were entitled to issue preclusion on these points and the burden should have

> shifted to HIDOE to show that the PSF would be in compliance with the LRE requirement.
>
> Second, when Petitioners were saddled with the burden of proof and thereby had a statutory right to present evidence, such right was denied. "Any party to a [due process] hearing . . . shall be accorded . . . the right to present evidence and confront, cross-examine, and compel the attendance of witnesses." 20 U.S.C. §1415(h)(2). Petitioners sought to have a site visit of the PSF by the AHO as part of their case to prove that it did not comply with IDEA. Pet. App. 10-11. The AHO denied the request. Pet. App. 10-11. While it is difficult to predict at this stage, but perhaps if HIDOE had the burden of proof it would have sought a similar site visit and had the same evidentiary argument.

The combination of legal errors that followed the wrongful allocation of burden of proof could have been avoided. The Ninth Circuit should have followed the majority view that when a public agency seeks to change the educational placement of a child with a disability, that agency bears the burden of proving compliance with IDEA and the LRE requirement. Instead, the Ninth Circuit disregarded the language of this Court in *Schaffer* that there would be factual scenarios where an exception to the general rule applies and that the burden would shift to the school entity. This case very cleanly emphasizes why this Court should clarify the burden of proof standard in special education cases

to ensure the equal protection of the law to parents and states alike.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT C. THURSTON, ESQ.
THURSTON LAW OFFICES LLC
100 Springdale Road A3
PMB 287
Cherry Hill, NJ 08003
856-335-5291
rthurston@schoolkidslawyer.com

Attorney for Petitioners