Burden of Proof Under the Education for All Handicapped Children Act

I. INTRODUCTION

The Education for All Handicapped Children Act (EAHCA)[1] was passed by Congress to assure all handicapped children access to free public education. The Act sets out detailed requirements that states must fulfill, including requirements for involvement of parents or guardians in their child's educational program.[2] To protect parents' rights, the Act contains procedural safeguards allowing parents to request a due process hearing when disagreements arise and ultimately to bring a civil action in state or federal court.[3] The Act specifies that the court will receive the records of the administrative proceeding, hear additional evidence, make a decision based on the preponderance of the evidence, and grant such relief as it deems appropriate.[4] The Act does not address the burden of going forward with the evidence at trial or the burden of persuasion. As a result, courts have based their decisions on various and inconsistent allocations, giving various and inconsistent rationales. Since the educational placements being challenged are not capable of empirically "correct" answers, but rather are based on professional opinions which take into account various factors and which are subject to dispute among experts,[5] the outcome can be affected by where the burden of persuasion lies.

This Note will examine the issues involved in resolving the burden of proof question against the background of the statute and previous cases which address the issue, and will suggest that the burden of persuasion is properly placed on the school. Before addressing the burden of proof issue, this Note will outline the EAHCA as it relates to the burden of proof, including its purpose and the procedural safeguards.

II. EDUCATION FOR ALL HANDICAPPED CHILDREN ACT

A. *General History*

The EAHCA was enacted by Congress in 1975 to provide states with funding to help cover the cost of educating handicapped children.[6] Two principal district court cases recognizing the right of handicapped children to free public

---

1. 20 U.S.C.A. §§ 1400-61 (West 1978 & Supp. 1990).
2. 20 U.S.C.A. § 1412 (West Supp. 1990).
3. 20 U.S.C.A. § 1415 (West 1978 & Supp. 1990).
4. 20 U.S.C. § 1415(e) (1988).
5. "We previously have cautioned that courts lack the 'specialized knowledge and experience' necessary to resolve 'persistent and difficult questions of education policy.' " San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 42 (1973), *quoted in* Hendrick Hudson Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 208 (1982).
6. The need for the legislation is based on the states' lack of financial resources to implement recent court decisions recognizing the right of handicapped children to free public education and on a congressional goal of providing full educational opportunities to all handicapped children. S. REP. No. 168, 94th Cong., 1st Sess. 7-8, *reprinted in* 1975 U.S. CODE CONG. & ADMIN. NEWS 1425, 1431-32. It costs nearly twice as much to educate handicapped children as nonhandicapped children. Comment, *The Education for All Handicapped Children Act of 1975: What's Left After* Rowley*?*, 19 WILLAMETTE L. REV. 715, 719 n.28 (1983).

education preceded the enactment of EAHCA and provided the basis for the Act.[7] In *Pennsylvania Association for Retarded Children v. Commonwealth*,[8] the court enjoined the state from denying "to any mentally retarded child access to a free public program of education and training."[9] The court in *Mills v. Board of Education*[10] held that handicapped children cannot be excluded from regular public school assignment unless an adequate alternative education is provided. The alternative must suit the child's needs and be subject to a prior hearing and to a periodic review of the child's progress and the adequacy of the alternative education.[11] Based on these two cases and the finding that the educational needs of more than half of the eight million handicapped children in the United States were not being fully met, the EAHCA was enacted.[12] The stated purpose of the EAHCA is

> To assure that all handicapped children have available to them . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of handicapped children and their parents or guardians are protected, to assist States and localities to provide for the education of all handicapped children, and to assess and assure the effectiveness of efforts to educate handicapped children.[13]

B. *Requirements Under EAHCA*

The substantive and procedural requirements of EAHCA are designed to promote the goals of the Act. Since the practical goal is to assist states in providing education to handicapped children, the receipt of federal funds is conditioned on compliance with the Act's requirements.[14] The state must demonstrate that it "has in effect a policy that assures all handicapped children the right to free appropriate public education."[15]

The education of each handicapped child must be tailored to the child's needs through an individualized education program (IEP).[16] The IEP is pre-

---

7. *Rowley*, 458 U.S. at 192.

8. 334 F. Supp. 1257 (E.D. Pa. 1971) (suit on behalf of retarded children challenging constitutionality of Pennsylvania statute which excluded them from public school).

9. *Id.* at 1258.

10. 348 F. Supp. 866 (D.D.C. 1972) (suit by handicapped child excluded from the District of Columbia public school).

11. *Id.* at 878.

12. 20 U.S.C.A. § 1400(b)(1) & (2) (West Supp. 1990).

13. 20 U.S.C.A. § 1400(c) (West Supp. 1990).

14. 20 U.S.C.A § 1412 (West Supp. 1990).

15. 20 U.S.C.A. § 1412(1) (West Supp. 1990), which has been interpreted in conjunction with 20 U.S.C.A. § 1401(18). The Court has defined "appropriate education" to mean "educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child 'to benefit' from the instruction." Hendrick Hudson Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 188-89 (1982). The *Rowley* court went on to say that "the Act was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside." *Id.* at 192. This restrictive reading has been criticized. *See, e.g., Id.* at 215 (White, J., dissenting); Comment, *supra* note 6 at 725; Wegner, *Educational Rights of Handicapped Children: Three Federal Statutes and an Evolving Jurisprudence Part I: The Statutory Maze*, 17 J.L. & Ed. 387, 388 (1988).

16. 20 U.S.C. § 1401(a)(19) (1989), defining IEP:

The term "individualized education program" means a written statement for each handicapped child developed in any meeting by a representative of the local educational agency or an intermediate educational unit who shall be

pared by the local education agency with parental input and approval, and must be reviewed annually.[17] Along with the requirement of parental involvement in the development and review of the IEP, the Act requires procedural safeguards, set out at 20 U.S.C. § 1415, to guarantee the rights of handicapped children and their parents.[18]

Parents must be given an opportunity to examine all relevant records,[19] be given written notice prior to any proposed change or a refusal to initiate change of any service required by the Act,[20] be fully informed of the procedures under the Act,[21] and be given the opportunity to present a complaint with respect to any matter covered by the Act.[22] The detailed procedural safeguards emphasize the Act's goal of involving parents in the development of their child's IEP and protecting the rights of handicapped children and their parents.

Disputes often revolve around the child's IEP and changes proposed by either the school or the parents. Once a complaint is made, the Act requires an impartial due process hearing conducted by the state or local education agency.[23] If the hearing is conducted by the local agency, any party can appeal to the state agency which conducts an impartial review and makes an independent decision.[24] At these hearings the parents have the right to be accompanied by counsel, to present evidence, and to receive written findings of fact.[25] "Any party aggrieved by the findings and decision" has a right to a civil suit in respect to the complaint in state or district court.[26]

C. *Standard of Review*

The Act clearly states that the court shall base its decision on a preponderance of the evidence after receiving the record of the administrative proceedings and after hearing any additional evidence the parties wish to present.[27] The

---

qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of handicapped children, the teacher, the parents or guardian of such child, and, whenever appropriate, such child, which statement shall include -

(A) a statement of the present levels of the educational performance of such child,

(B) a statement of annual goals, including short-term instructional objectives,

(C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs,

(D) the projected date for initiation and anticipated duration of such services, and

(E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.

17. *Id.*

18. 20 U.S.C.A. § 1415 (West 1978 & Supp. 1990), establishing a hearing procedure, review by the state educational agency, and a right to a civil action.

19. 20 U.S.C. § 1415(b)(1)(A) (1988).

20. 20 U.S.C. § 1415(b)(1)(C) (1988).

21. 20 U.S.C. § 1415(b)(1)(D) (1988).

22. 20 U.S.C. § 1415(b)(1)(E) (1988).

23. 20 U.S.C. § 1415(b)(2) (1988).

24. 20 U.S.C. § 1415(c) (1988).

25. 20 U.S.C. § 1415(d) (1988).

26. 20 U.S.C. § 1415(e)(2) (1988).

27. *Id.*

United States Supreme Court in *Hendrick Hudson District Board of Education v. Rowley*[28] has interpreted this standard of review not as

> an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities . . . . The fact that Section 1415(e) requires that the reviewing court 'receive the records of the [state] administrative proceedings' carries with it the implied requirement that due weight shall be given to these proceedings.[29]

The Court then went on to find the inquiry requires a two-step process. The first step is to analyze the procedural compliance with the Act;[30] the second step is to analyze the substantive aspects of the IEP and whether it is "calculated to enable the child to receive educational benefits."[31]

This level of review has been interpreted by lower courts as something less than *de novo* review,[32] but something more than the traditional narrow level of review given administrative decisions.[33] It has been suggested that giving "due weight" to an administrative agency finding means "the court is to consider the administrative determination . . . as a factor to take into account in reaching its decision."[34]

The fact that the court is to hear additional evidence of the parties indicates that Congress intended more than the traditional level of judicial review of an agency determination.[35] More comprehensive review will promote administrative efficiency and help to overcome any agency bias.[36] Those who oppose more extensive court review cite courts' lack of expertise in an area such as the education of handicapped children.[37] The current scope of review under EAHCA, as interpreted by *Rowley*, directs the court to give due weight to the agency determination while still following the explicit language of the statute requiring the taking of additional evidence and the making of an independent decision. This scope of review strikes a balance between protecting parental rights and giving due regard to the school's expertise.[38]

---

28. 458 U.S. 176 (1982) (parents of child with only minimal residual hearing brought suit to review administrative process that upheld school district's denial of parents' request that child be provided a sign-language interpreter in all academic classes).

29. *Rowley*, 458 U.S. at 206. This standard has been criticized as contrary to the legislative intent. *See, e.g.*, Rowley, 458 U.S. at 216-18 (White, J., dissenting); Comment, *supra* note 6, at 732.

30. *Rowley*, 458 U.S. at 206.

31. *Id.* at 206-07. The Court emphasized that achieving passing grades and advancing from grade to grade are important factors to consider in determining educational benefit. *Id.* at 207 n.28.

32. "Thus while a trial *de novo* is not called for, the court has some latitude in reviewing the decision of the state hearing officer." Lang v. Braintree School Comm., 545 F. Supp. 1221, 1226 (D. Mass. 1982), *quoted in* Tracey T. v. McDaniel, 610 F. Supp. 947, 948 (N.D. Ga. 1985).

33. Traditionally the courts show significant deference when reviewing administrative agency determinations. B. SCHWARTZ, ADMINISTRATIVE LAW 584-85 (2d ed. 1984).

34. Guernsey, *When the Teachers and Parents Can't Agree, Who Really Decides? Burdens of Proof and Standards of Review Under the Education for All Handicapped Children Act*, 36 CLEV. ST. L. REV. 67, 85 (1988); using the analysis of the Supreme Court in Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951), which held a trial court need not give an examiner's findings "more weight than in reason and in light of judicial experience they deserve" but should be accorded the "relevance that they reasonably command in answering the comprehensive question whether the evidence supporting the Board's order is substantial." *Id.* at 496-97.

35. B. SCHWARTZ, *supra* note 33, at 587.

36. *See* L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 360 (1965).

37. *Cf.* S. BREYER & R. STEWART, ADMINISTRATIVE LAW AND REGULATORY POLICY 307 (1979).

38. Parents can present expert testimony, but may not have as ready access to experts as the school does.

III. BURDEN OF PROOF

A. *Traditional Requirements*

"Nowhere, however, do the statutes or regulations address the basic issue before us, the allocation of the burden of persuasion or proof."[39] As a result, courts are forced to draw on traditional allocations of the burden of proof and persuasion and the legislative intent of the EAHCA.

The burden of proof refers to two issues: the burden of going forward with the evidence and the burden of persuasion.[40] The traditional rule is that the burden of going forward and the burden of persuasion are on the moving party in both court and administrative proceedings.[41] However, there are many exceptions and alternative considerations in allocating the burdens. The court may allocate the burden to the party which has more access to the evidence,[42] the party whose contention goes against the probabilities,[43] or when a statute is relied upon, whether the matter alleged is the exception according to the language of the statute.[44] While the burden of going forward and burden of persuasion often go together, they can be separated. The burden of going forward may even change during the trial. The court will consider the various factors in light of the underlying purpose of the Act in determining where to place the burden.[45]

Using the traditional rule that the burden of production and persuasion lie on the party initiating a change, the burden would often fall on the parents who bring a suit as a result of a complaint under Section 1514(e). Putting the burden on the parents seems contrary to the Act's concern with protecting the rights of parents and their handicapped child and with encouraging parental involvement. Placing the burden on the school would be more in keeping with the purpose of the Act and its extensive procedural safeguards.[46] Shifting the burden to the school can also be justified by the school's greater access to evidence on the appropriateness of the IEP as compared to parents who will be more burdened to find experts able to evaluate the educational program.[47]

The courts have used these traditional principles as a starting point for allocating the burden of proof in EAHCA cases. The burden of going forward has caused less trouble than the burden of persuasion, which is more burdensome on the party. Requiring the party initiating the suit to produce enough evidence for the court to find reasonable grounds to hear the case is generally not an unreasonable burden. However, the allocation of the burden of persua-

---

39. Lascari v. Bd. of Educ., 116 N.J. 30, 43, 560 A.2d 1180, 1187 (1989) ("parents of neurologically . . . impaired child sued school district for reimbursement of tuition and room and board expenses of private [school]"). *Id.* at 30, 560 A.2d 1180.

40. B. SCHWARTZ, *supra* note 33, at 359.

41. *Id.*

42. MCCORMICK ON EVIDENCE 950 (E. Cleary 1984).

43. *Id.*

44. *Id.* at 951.

45. *Lascari*, 116 N.J. at 43-46, 560 A.2d at 1187.

46. *See supra* text accompanying notes 6-13, describing the Act and its purpose.

47. *See S-1 v. Turlington*, 635 F.2d 342, 349 (5th Cir. 1981).

sion can affect whether a suit is brought at all and the outcome of a suit once it is brought. For this reason, the disputes over the proper allocation of the burden generally center around the burden of persuasion; therefore this Note will also focus on the issues involved in allocating the burden of persuasion.

B. *Cases Interpreting EAHCA and Burden of Proof*

"Across the country other courts have struggled with determining which party bears the burden of proving the appropriateness or inappropriateness of the education provided by the district."[48] The courts have placed the burden on the schools, on the parents, or on the party seeking a change. The Supreme Court has not resolved this issue, and it continues to be resolved differently in different courts. The court in *Lenhoff by Lenhoff v. Farmington Public Schools*,[49] refusing to rule on the issue as it would be an advisory opinion,[50] noted that each side has numerous cases to cite for the proposition that the burden lies with the other.[51] This Note will examine the various court decisions addressing the burden of persuasion and explain why the decision to place the burden of persuasion on the school district best carries out the purpose of the EAHCA.

1. *Cases Placing Burden on the School*

The recent Supreme Court of New Jersey decision, *Lascari v. Board of Education*,[52] clearly addresses the burden of persuasion issue, stating that "it is more consistent with the State and federal scheme to place the burden on the school district not only when it seeks to change the IEP, but also when the parents seek the change."[53] The case involved a suit brought by the parents of a neurologically and conceptually impaired child who believed their son was receiving insufficient academic instruction under his present IEP.[54] After the parents and the school were unable to agree on the appropriateness of the IEP, the parents enrolled their son in a private high school specializing in teaching children with severe dyslexia and sought reimbursement for the cost of tuition based on the inappropriateness of the education he was receiving in the public high school.[55] The case had been remanded by the Appellate Division to the Chancery Division with instruction to place the burden of persuasion on the

48. *Lascari*, 116 N.J. at 43, 560 A.2d at 1187.

49. 680 F. Supp. 921 (E.D. Mich. 1988) (parents of an emotionally handicapped child challenge state level decision regarding child's evaluation and placement).

50. *Id.* at 927.

51. *Id.* at 926-27. Favoring the parents, *see* Davis v. Dist. of Columbia Bd. of Educ., 530 F. Supp. 1209, 1211-12 (D.D.C. 1982); Grymes v. Madden, 672 F.2d 321, 322 (3d Cir. 1982); Lang v. Braintree School Comm., 545 F. Supp. 1221, 1228 (D. Mass. 1982). Favoring the school, *see* Doe v. Brookline School Comm., 722 F.2d 910 (1st Cir. 1983); Burger v. Murray County School Dist., 612 F. Supp. 434 (N.D. Ga. 1984); Bales v. Clarke, 523 F. Supp. 1366 (E.D. Va. 1981).

52. 116 N.J. 30, 560 A.2d 1180.

53. *Id.* at 44, 560 A.2d at 1188.

54. Although their son had an IQ of 126, a high average, he was still reading at the second grade level in high school. *Id.* at 37-38, 560 A.2d at 1184.

55. *Id.* at 38-39, 560 A.2d at 1184-85.

parents to prove that the school district was unable to provide an appropriate education.[56]

The state supreme court granted certification[57] and reversed. The court noted that although courts had gone both ways with the issue, "[u]nderlying the . . . federal regulations is an abiding concern for the welfare of handicapped children and their parents. Consistent with that concern, the basic obligation to provide a handicapped child with a free, appropriate education is placed on the local school district."[58] Provisions of the Act and the reasoning of other courts were cited to support the court's allocation.

Placing the burden of persuasion on the school is consistent with the provisions of the EAHCA which place the burden of identifying handicapped children and formulating IEPs on the school.[59] Additionally, the remedial purpose of the EAHCA supports placing the burden of persuasion on the school, as explained in *S-1 v. Turlington.*[60] The court in *S-1* went on to say that the "conclusion is buttressed by the fact that in most cases, the handicapped students and their parents lack the wherewithal either to know or to assert their rights under the [EAHCA]."[61] Without explicitly deciding the issue, the Supreme Court of Virginia assumed that the lower court properly allocated the burden of persuasion to the school in a dispute concerning free appropriate education.[62]

In *Grymes v. Madden,* the Third Circuit affirmed the trial court's allocation of the burden of proof to the school district in deciding whether an appropriate public program existed.[63] The case involved an appeal by the State Board of Education of a district court decision awarding parents reimbursement for private education of their handicapped son during the pendency of proceedings under Section 1415(e).[64] The court gave little explanation except to say that the school district had failed to meet its burden.

The court in *Davis v. District of Columbia Board of Education*[65] held that the school district shoulders the burden of proof to show that its proposal is appropriate during the due process hearing.[66] The rationale used by the court to explain the allocation of the burden during the due process hearing is equally applicable to the allocation to be used at trial. The court relied on the language of the statute and the ruling in *Mills v. Board of Education,*[67] which formed the basis for the statute. The court in *Mills* set out specific procedures which the school district must follow in implementing the court's decree that all chil-

56. *Id.* at 42, 560 A.2d at 1186-87.

57. 110 N.J. 319, 540 A.2d 1295 (1988).

58. 116 N.J. at 44, 560 A.2d at 1188.

59. *Id.*

60. 635 F.2d 342 (5th Cir. 1981) (burden of raising the issue of whether a student's misconduct is a manifestation of the student's handicap invoking the procedural protection of EAHCA is on the school in expulsion proceedings).

61. *Id.* at 349.

62. School Bd. of Campbell County v. Beasley, 380 S.E.2d 884, 889 (1989) (school board challenged reviewing officer's decision that school did not provide handicapped student with free appropriate education).

63. 672 F.2d 321, 322 (3d Cir. 1982).

64. *Id.*

65. 530 F. Supp. 1209 (D.D.C. 1982) (parents sought clarification of placement process under EAHCA).

66. *Id.* at 1211-12.

67. 348 F. Supp. 866 (D.D.C. 1972).

dren excluded from regular public school assignment be provided an adequate alternative and a constitutionally adequate prior hearing. In the hearing required by *Mills*, the "defendants [the school] shall bear the burden of proof as to all facts and as to the appropriateness of any placement, denial of placement or transfer."[68] By comparison, *Davis* involved determination of the the proper issues to be considered at the due process hearing when the parents are seeking reimbursement for tuition.[69] The *Davis* court stated that the only issue properly before the hearing officer is the appropriateness of the school's proposed IEP and the school district has the burden of proving the IEP is appropriate.[70] Reimbursement is not a separate issue except to the extent that the school must pay for whatever placement is appropriate.[71] If a private school is deemed appropriate and the parents have been paying for that school, then the parents will be entitled to reimbursement.[72]

2. *Burden on the Party Seeking the Change*

A number of court decisions have resolved the burden issue by stating that the burden is on the party seeking the change. Interestingly, these cases generally involved a change in the IEP proposed by the school which the parents then sought to prevent.

An exception is *Tracey T. v. McDaniel*[73] which involved parents of a handicapped daughter who challenged her 1981 IEP and sought in advance of trial a ruling on the burden of proof issue.[74] The court cited various cases, discussed below, which placed the burden on the party seeking the change. This allocation is explained as following logically from the fact that the IEP is a placement which both the school and parents at one point agreed was appropriate.[75]

While it is true that the Act requires parental involvement, it is unlikely that the school and the parents play an equal role in its development or have equal ability to judge its appropriateness.[76] Because of the unequal control and expertise, this rationale for placing the burden on the party seeking the change is not as strong as it first appears. In addition, while an IEP may initially appear appropriate, in practice the IEP may not actually be beneficial for the child. Such situations lead to disputes over the IEP's approriateness. The parents' original cooperation with the school and its proposed IEP should not work against the parents should they later seek to challenge the IEP.

The court in *Burger v. Murray County School District*[77] decided the burden of proof issue in the context of a school district that had proposed removing a child from a residential school and placing the child in a self-contained class

68. *Id.* at 881.
69. *Davis*, 530 F. Supp. at 1211.
70. *Id.* at 1211-12.
71. *Id.* at 1212.
72. *Id.*
73. 610 F. Supp. 947 (N.D. Ga. 1985).
74. *Id.* at 948.
75. *Id.* at 949.
76. *See S-1*, 635 F. Supp. at 349.
77. 612 F. Supp. 434 (N.D. Ga. 1984).

within the school district. The parents challenged the change and the court had to decide which party bore the burden of persuasion on the appropriateness of the proposed change.[78] The school district relied on *Bales v. Clarke*[79] for the proposition that the parents bear the burden of proof. The court distinguished *Bales* on the facts and went on to say that the decision was not legally persuasive since no explanation was given for the placement of the burden on the parents.[80] The court surveyed other court decisions addressing the burden of proof issue and chose to adopt the reasoning of those courts placing the burden on the party seeking the change. The court cited *Lang v. Braintree School Committee*[81] and *Doe v. Brookline School Committee*[82] as offering a persuasive rationale for placing the burden on the party seeking the change.[83]

The *Lang* court explained its placing the burden of proof on the school district as a combination of the school's failure to adhere to the procedural requirements of the EAHCA and of the Act's preference for the status quo when the child is already receiving an appropriate education.[84] The case involved a challenge by the parents of a mentally retarded, mentally ill, and epileptic daughter who attended private school paid for by the school district.[85] When the parents moved to Braintree, the district refused to pay for the private school and proposed an IEP which placed the child in the public school. The Langs were not included in the development of the long range IEP.[86] The court's decision to place the burden of proof on the school district was partly based on Section 1415(e)(3) which directs that the child remain in the current educational setting during the pendency of any proceedings under the Act. This provision was interpreted as a preference for the status quo.[87] Moreover, the allocation of the burden to the school district rested largely on the facts of the case, particularly on the fact that the school failed to follow the procedural requirements of the Act.[88] The importance of the procedural safeguards was established in *Rowley*,[89] which held that the analysis of any IEP was a two-step process, one step involving procedure and the other involving the substance of the IEP.[90]

The court in *Doe*[91] placed the burden on the party seeking a modification of the status quo because of the congressional preference for the status quo.[92]

---

78. *Id.* at 434-35.

79. 523 F. Supp. 1366 (E.D. Va. 1981), *discussed in Burger*, 612 F. Supp. at 436. The *Bales* court stated that the handicapped child bears the burden to establish that public school is inappropriate and that no other state facility is appropriate.

80. *Burger*, 612 F. Supp. at 436.

81. 545 F. Supp. 1221 (D. Mass. 1982).

82. 722 F.2d 910 (1st Cir. 1983).

83. *Burger*, 612 F. Supp. at 437.

84. *Lang*, 545 F. Supp. at 1228.

85. *Id.* at 1224.

86. *Id.*

87. *Id.* at 1228.

88. *Id.*

89. *Rowley*, 458 U.S. 176 (1982).

90. *Id.* at 206-07.

91. *Doe*, 722 F.2d 910 (1st Cir. 1983).

92. *Id.* at 919.

The court discussed the preference for maintaining the status quo in the placement of the child during the pendency of the review process; however, the decision limited its holding to cases seeking funding of interim placement.[93] *Doe* involved a challenge by the school to an earlier court decision ordering the school to pay the cost of private tuition to the parents of a child with severe learning disabilities currently enrolled in private school.[94] The court held that since the school was seeking to change the status quo, it had the burden of making a motion for a preliminary injunction to allow it to stop payment.[95] The court went on to state that the party seeking the change — the school — would have the burden of proof on the appropriateness of the education offered by the school district.[96] The case interpreted Section 1415(e)(3) as establishing "a preference, but not a statutory duty, for maintenance of the status quo."[97] The court also cites the legislative history as supporting this view of the Act's preference — not mandate — for the status quo.[98]

The court in *Burger*[99] also relied on the fact that the IEP under attack was a joint effort of the parents and the school as a rationale for placing the burden on the party seeking the change, citing *Tatro v. Texas*.[100] In *Tatro* the court decided whether the need for Clean Intermittent Catheterization (CIC)[101] fell within the related services requirement of EAHCA.[102] The school claimed that it was not a related service and that the child should be moved from her current placement to a residential setting if she required CIC. The court held that the school district should bear the burden of proof because of the presumption developed in *Rowley* in favor of an established IEP.[103] "Moreover, because the IEP is jointly developed by the school district and the parents, fairness requires that the party attacking its terms should bear the burden of showing why the educational setting established by the IEP is not appropriate."[104] The problems with this argument were discussed at the beginning of this section.

The court in *Town of Burlington v. Department of Education*[105] held that "[a]s a general principle . . . the burden of proof is on the party who seeks to overturn the findings . . . of the agency" because this assists courts in reviewing an administrative determination as encouraged in *Rowley*.[106] The court indicated that no burden could be assigned regarding appropriateness of the place-

93. *Id.* at 915.
94. *Id.* at 913.
95. *Id.* at 917.
96. *Id.* at 919.
97. *Id.* at 918.
98. *Id.* Explaining the due process provisions of the bill to the Senate, Sen. Stafford is quoted as stating that the Act is concerned with unnecessary delays in a change of placement; therefore, the Act takes a flexible approach to meet the needs of the child and the state. 121 CONG. REC. 37,412 (1975), *quoted in Doe*, 722 F.2d at 918.
99. 612 F. Supp. 434 (N.D. Ga. 1984).
100. 703 F.2d 823 (5th Cir. 1983).
101. CIC is a procedure for manually draining the bladder. *Id.* at 828 n.5.
102. *Id.* at 825.
103. *Id.* at 830.
104. *Id.*
105. 736 F.2d 773 (1st Cir.), *cert. granted*, 469 U.S. 1071 (1984), *aff'd*, 471 U.S. 359 (1985).
106. *Id.* at 794.

ment for the years *subsequent* to that year for which the state agency ruled, since neither party was appealing the appropriateness of the subsequent placement or an agency decision.[107] The case involved a suit by the school district to reverse only the findings of the administrative agency that a private school placement was appropriate, therefore, the burden was placed on the school regarding the years *prior* to the agency findings. The case was appealed to the Supreme Court, which granted certiorari, but only as to whether Section 1415(e)(2) includes reimbursement to parents for private tuition and whether Section 1415(e)(3) bars such reimbursement to parents who place their child in private school without the consent of local authorities.[108]

3. *Cases Placing the Burden on the Parents*

As a general rule, few cases place the burden of proof on the parents. Cases which do state that generally the burden is on the parent do not give a rationale for this placement. In *Bales v. Clarke*,[109] the court stated that "[p]laintiff [the handicapped child] bears the burden to establish that the Regional School is inappropriate, that no other State facility is appropriate, and that Accotink Academy [the child's private school] is appropriate."[110] The court gives no explanation for placing this heavy burden of proof on the child, a burden which includes not only proving the inappropriateness of the current educational placement, but the inappropriateness of any educational placement which the school could provide.

Other courts have indicated that in challenging the placement and educational program, only that IEP actually offered is under consideration.[111] The best explanation of the *Bales* decision is that the court felt that the parents bringing suit through their handicapped child were asking for more than they deserved and the court wanted to ensure they received nothing. The parents were seeking reimbursement for various expenses they incurred relating to the child, including a summer program for the child and travel expenses for them to visit the child. Another court explained the case as applying only when the parents seek the change and criticized the decision overall for its lack of legal reasoning.[112]

The court in *Cothern v. Mallory*[113] also made a conclusory statement that the parents failed to carry their burden in ruling for the school.[114] The case involved a challenge by the parents of a severely handicapped son of the state

---

107. *Id.*

108. Burlington School Comm. v. Mass. Dep't of Educ., 469 U.S. 1071 (1985). *See infra* note 129 and accompanying text, summarizing the Court's holding.

109. 523 F. Supp. 1366 (E.D. Va. 1981).

110. *Id.* at 1370.

111. *See, e.g.*, Burlington School Comm. v. Mass. Dep't of Educ., 471 U.S. 359, 374 (1985), Hendrick Hudson Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 (1982), Lascari v. Bd. of Educ., 116 N.J. 30, 46, 560 A.2d 1180, 1189 (1989).

112. Burger v. Murray County School Dist., 612 F. Supp. 434, 436 (N.D. Ga. 1984).

113. 565 F. Supp. 701 (W.D. Mo. 1983).

114. *Id.* at 708.

school board's placement of their son in a state school.[115] The court ruled for the state, finding that the parents had "not offered any evidence which suggests that the instruction and services offered by the State are not offered at public expense, [and] do not meet the State's educational standards . . . ."[116] The court gave no explanation for this allocation, and then went on to say that the IEP offered by the school was appropriate.[117] Therefore the court not only looked to see if the parents had proven that the IEP was inappropriate, but went further in finding the state's challenged IEP was indeed appropriate. Placing the burden of proving the appropriateness of the IEP on the school would be more in line with the court's analysis than the allocation the court stated it was using.

The cases which place the burden of persuasion on the parents seem to involve cases where the parents are challenging the current placement and the court eventually rules for the school. These decisions place an additional burden on parents who seek to invoke the protection of the procedural safegaurds of EAHCA and are contrary to a major goal of the Act. The EAHCA seeks to both protect parents and their handicapped children and encourage parental involvement.[118] Parents who seek to use the protection offered by the Act should not be forced to bear the burden of persuasion. If these cases which allocated the burden to the parents involved suits where parents had brought needless challenges, they still could be handled under a system which places the burden on the school district. The school district is able to bear the burden of persuasion on the appropriateness of its education plan far more easily than the parents in valid challenges. If the IEP is clearly appropriate and the parents have brought a needless challenge, the school with its experts and knowledge should be able to demonstrate the appropriateness of the IEP. With the clear purpose of the Act being the protection of handicapped children and their parents, the burden should not be placed on the parents.

C. *Policy*

The EAHCA was enacted by Congress to assist states in funding education for handicapped children.[119] Congress felt that states were doing an inadequate job of educating handicapped children and that lack of funding was a primary reason.[120] The Act's ultimate goal is that all handicapped children will be provided, at state expense, an appropriate education.[121] The Act maintains the traditional role of the state in formulating and executing educational policy,

---

115. *Id.* at 702.

116. *Id.* at 707.

117. *Id.*

118. *See supra* text accompanying notes 14-26.

119. *Id.*

120. *Supra* note 6. Even with federal assistance there is an economic preference for placing handicapped children in public school classrooms due to the high cost of residential placement. Note, *Resolving Placement and Financial Disputes Under the Education for All Handicapped Children Act of 1975*, 62 WASH. U.L.Q. 763, 767-68 n.33 (1985).

121. *See supra* note 15 and accompanying text, giving the definition of "appropriate education" as interpreted by the Supreme Court.

placing the responsibility for formulating the IEP with the state and local agencies with parental involvement.[122] Because the Act left wide discretion to the school and because of the difficulty of measuring the state's compliance, the Act includes a compliance mechanism, in the form of detailed conflict resolution and review procedures, which also serves as procedural protection for the rights of parents and children.[123] In addition to the goal of assuring all handicapped children the right to public education, the Act incudes as its purpose "to assure that the rights of handicapped children and their parents or guardians are protected."[124] Thus, procedural safeguards serve two complementary goals: to ensure the proper use of discretion and to protect parental rights.[125]

A similar area where the burden of persuasion is shifted to the agency based on a desire to protect the individual is in social security disability cases.[126] Under these cases the claimant has the burden of going forward but the burden of persuasion is on the agency.[127] Once the claimant offers probative evidence to indicate he is not able to perform his job because of a disability, he is entitled to receive disability benefits unless the agency meets its burden of persuasion in proving work is available which the claimant can perform.[128]

In light of the important functions of the procedural safeguards, the burden of proof issue needs to be allocated in a way which both enhances the effectiveness of the procedures and promotes the Act's goals. Allocating the burden of persuasion to the school in all cases would serve such a function. With required parental involvement, the school is primarily responsible for the development of the IEP. Once the IEP is challenged, the school should have the burden of proving the appropriateness of the educational program. The school will have easier access to experts in the field and other records pertaining to the development of the educational program to be used as evidence. To require the parents or the party seeking the change, which usually is the parents, to bear the burden of proof in a case brought under an Act designed to protect parental rights and ensure compliance from schools would conflict with the intent of Congress.

Currently parents are unsure what type of a case they need to win when deciding whether to bring a civil suit. This can be important when parents are making the decision to withdraw their child from the public school and place the child in a private school because of an inappropriate educational program at the public school. The Supreme Court has validated the right of parents to reimbursement for tuition when the parents have changed the placement of their child during the pendency of proceedings challenging the IEP if the court ultimately determines that such private placement is appropriate rather than the

---

122. "Historically, the States have had the primary responsibility for the education of children at the elementary and secondary level." 121 CONG. REC. 19,498 (1975) (remarks of Sen. Dole), *quoted in Rowley*, 458 U.S. at 208 n.30.

123. S. REP. No. 198, 94th Cong., 1st Sess. 25, *reprinted in* 1975 U.S. CODE CONG. & ADMIN. NEWS 1425, 1449 [hereinafter S. REP.].

124. 20 U.S.C. § 1400(c) (Supp. 1988).

125. Hyatt, *Litigating the Rights of Handicapped Children To An Appropriate Education: Procedures and Remedies*, 29 UCLA L. REV. 1, 11 (1981).

126. B. SCHWARTZ, *supra* note 33, at 361-62.

127. *Id.* at 361.

128. *Id.* at 362.

school's IEP.[129] Since parents may not be able to afford the high cost of private education, their chance of success in the civil suit may play a major role in their decision whether to place their child in a private school.

One of the goals of the EAHCA is to involve parents in the development of their child's educational plan both as a policy matter and as a monitoring function.[130] The current unsettled state of the law works against the procedural safeguards of the EAHCA. The issue of the burden of persuasion needs to be resolved so parents can make informed choices and so the procedural safeguards can serve the goals of the EAHCA fully. This issue can be permanently resolved by amending the Act which is specific in most parts of the procedural safeguard section to be equally specific as to the burden of proof in cases brought under Section 1415.

IV. CONCLUSION

The EAHCA was enacted to assist states in providing education to all handicapped children. The Act leaves development of the actual educational plan to the state or local education agency with parental involvement. To protect the rights of handicapped children and their parents, and to monitor the state's compliance, the EAHCA contains detailed procedural safeguards. The procedures include the right to a civil suit if a conflict arises between the parents and the school. The Act states that the court shall receive the record of prior administrative proceedings, receive any additional evidence which the parties have, and make an independent decision based upon the preponderance of the evidence. The statute does not indicate which party bears the burden of persuasion and the courts have allocated the burden to the school, the parents, or the party seeking the change. As a result, parents are uncertain what type of case is needed to succeed, and thus the procedural safeguards of the EAHCA do not fully serve their purpose.

The burden of persuasion in suits brought under EAHCA needs to be resolved so that the procedural safeguards will be most effective. Although the courts have made allocations based on differing rationales, most often the burden is allocated to the schools. The courts explain this allocation based on the school's seeking the change, the school's access to information, or the legislative intent of the EAHCA. The position of the schools relative to the parents, and the goals of the EAHCA most strongly justify allocating the burden to the schools. The congressional concern with parents' rights evidenced by the extensive procedural safeguards and stated purpose of the Act are best served when the burden of persuasion is allocated to the schools in a suit brought under the EAHCA.

Elizabeth L. Anstaett

---

129. Burlington School Comm. v. Mass. Dep't of Educ., 471 U.S. 359, 369-74 (1985) (holding that a parent does not waive the right to reimbursement for expenses of a private education by changing the placement of the child during the pendency of proceedings reviewing a challenged IEP).

130. *See* S. REP., *supra* note 123.