

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 BRIAN SCHAFFER, A MINOR, BY HIS :

4 PARENTS AND NEXT FRIENDS, JOCELYN :

5 AND MARTIN SCHAFFER, ET AL., :

6 Petitioners, :

7 v. : No. 04-698

8 JERRY WEAST, SUPERINTENDENT, :

9 MONTGOMERY COUNTY PUBLIC :

10 SCHOOLS, ET AL. :

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12 Washington, D.C.

13 Wednesday, October 5, 2005

14 The above-entitled matter came on for oral

15 argument before the Supreme Court of the United States at

16 11:03 a.m.

17 APPEARANCES:

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19 the Petitioners.

20 GREGORY G. GARRE, ESQ., Washington, D.C.; on behalf of the

21 Respondents.

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24 on behalf of the United States, as amicus curiae,

25 supporting the Respondents.

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P R O C E E D I N G S

[11:03 a.m.]

JUSTICE STEVENS: We will now hear argument in
Schaffer against Weast.

Mr. Hurd, you may proceed.

ORAL ARGUMENT OF WILLIAM H. HURD

ON BEHALF OF PETITIONERS

MR. HURD: Justice Stevens, and may it please
the Court:

As Congress recently reaffirmed, the IDEA was
enacted to protect the rights of children with
disabilities, and the rights of their parents. It is an
Act intended by Congress to remedy a long history of
discrimination that once kept these children from the
schoolhouse door. It is an Act intended, as this Court
said in Rowley, to maximize parental involvement and to
ensure that these children have access to an appropriate
education.

Today, the intent of Congress, as shown by the
text, structure, and purposes of the Act, calls for the
burden of proof in administrative hearings to be placed on
the school system, not on the parent.

The Fourth Circuit said that placing the burden
on the party who initiates proceeding is the traditional
rule. But, there is no single traditional rule. Instead,

1 there is a collection of different rules.

2 JUSTICE O'CONNOR: Now, Congress was silent on
3 this subject of the burden of proof, was it not?

4 MR. HURD: Yes, it was, Justice O'Connor.

5 JUSTICE O'CONNOR: Was there -- did you find
6 anything in the legislative history -- I know some members
7 don't care to look at that, but I would be willing --

8 [Laughter.]

9 JUSTICE O'CONNOR: -- that shows any discussion
10 at all about the burden-of-proof question?

11 MR. HURD: We are aware of none, Your Honor.
12 What we -- what we have here is a situation where
13 Congress, when it wishes to allocate the burden of proof
14 one way or the other legislatively, knows how to do so.
15 It did so in the APA, for example, while adopting the rule
16 that the Fourth Circuit said applies in this case. But
17 Congress did not adopt the rule in this case.

18 JUSTICE SCALIA: Excuse me. Why didn't it? I
19 -- why wasn't the APA applicable?

20 MR. HURD: Well, Your Honor, the APA governs
21 Federal agencies, it doesn't --

22 JUSTICE SCALIA: I see.

23 MR. HURD: -- govern proceedings --

24 JUSTICE SCALIA: I see.

25 MR. HURD: -- under the --

1 JUSTICE SCALIA: So --

2 MR. HURD: -- under the IDEA.

3 JUSTICE SCALIA: -- what if it were -- what if it
4 were a school on a Federal base? Are they covered by this
5 Act, by the way? You know --

6 MR. HURD: Your Honor, there are --

7 JUSTICE SCALIA: -- military schools on military
8 --

9 MR. HURD: -- DOD schools --

10 JUSTICE SCALIA: DOD schools. What do you do
11 with them? Are they governed by the APA?

12 MR. HURD: We don't believe so, Your Honor.

13 JUSTICE SCALIA: No?

14 MR. HURD: They are not. And part of the reason
15 for that has to do with this unique structure of the Act.
16 It is a very nontraditional statute. It is --

17 JUSTICE SCALIA: Well, you'd be suing some
18 Federal agency. I mean, it has to be some Federal agency
19 that's running that school, and at least for that kind of
20 a school the burden is clearly going to be on the person
21 challenging the agency action.

22 MR. HURD: I don't agree, Your Honor, and let
23 me explain why, because of the unique structure of this
24 Act, it creates an equal partnership between parents and
25 the school system, with the purpose of that partnership

1 being to produce an Individualized Education Program for
2 the benefit of the child. And, as this Court recognized
3 in Honig, that IEP is the centerpiece of the entire
4 statute.

5 JUSTICE O'CONNOR: Yes, well, what if you had
6 an IEP that the parents had initially agreed with, and
7 then they decide it isn't working well, they want to
8 challenge it. They shouldn't have a burden of proof?

9 MR. HURD: Your Honor, that would be a different
10 situation, and courts below have reached different results
11 on that. We believe that the school system --

12 JUSTICE O'CONNOR: Well, you mean the court has
13 -- every court faced with this problem is supposed to
14 decide, in that particular case, who has the
15 burden?

16 MR. HURD: No, Your Honor. Some courts have
17 decided that, where either party -- the school system or
18 the parents -- challenges an existing IEP or wants to
19 change an existing IEP, some courts have said the burden
20 is always on the school system, some have said the party
21 challenging has the burden. But --

22 JUSTICE O'CONNOR: Do you --

23 MR. HURD: -- in this case --

24 JUSTICE O'CONNOR: -- do you think it's open to
25 a State to adopt a general rule on who has the burden of

1 proof under this statute?

2 MR. HURD: Your Honor, we think that it is not.

3 We believe it is a Federal question that --

4 JUSTICE O'CONNOR: Have some States purported to

5 adopt a general rule on this?

6 MR. HURD: Some have, Your Honor.

7 JUSTICE O'CONNOR: And you think that's invalid?

8 MR. HURD: Well, we believe -- yes, Your Honor,

9 we believe it is a -- it is a Federal-law question. What

10 we do know, however, is that Maryland has adopted no rule

11 on this question, no statute to allocate the burden, one

12 way or the other. And even if a State has the ability to

13 adopt a rule, if it wishes to do so, that still leaves

14 open the question of what rules should apply in the

15 absence of a State-based rule. Now --

16 JUSTICE GINSBURG: Mr. Hurd, do you recognize --

17 to narrow what's at issue -- that the parent objecting

18 to the school's IEP would at least have a burden of coming

19 forward? In other words, I -- are you speaking just of

20 the ultimate persuasion burden? Wouldn't the parents at

21 least be required to come forward with some reason to

22 believe that the State -- the school district's plan is

23 inadequate?

24 MR. HURD: Your Honor, we don't believe that

25 it's necessary. We do recognize that is a different

1 question. In this case, for example, the school system
2 was required to go first, but, initially, the parents were
3 given the burden of proof. It is a -- it is a different
4 question.

5 And let me address, if I may, the different
6 paradigm that this kind of action presents, because it's
7 very different than a traditional statute. It goes back
8 to this unique equal partnership. Congress intends for
9 that child to have an IEP. And there are only two ways to
10 get that IEP. One is a consensus between parent and
11 school system. But if there is an impasse, Congress still
12 wants that child to have an IEP, and there's only one way
13 to carry out that congressional purpose; somebody has to
14 step forward and ask for the hearing officer to make a
15 decision. And it makes little sense to burden a party
16 just because that party is the one who stepped forward to
17 advance the congressional goal by asking for the IE- --
18 hearing officer first.

19 JUSTICE O'CONNOR: What case is your closest one
20 to support the view that the Court should adopt some
21 particular rule here, based on the scheme?

22 MR. HURD: Well --

23 JUSTICE O'CONNOR: What do you rely on? I just
24 don't know where we look for the --

25 MR. HURD: Your Honor, I would --

1 JUSTICE O'CONNOR: -- guiding principle.

2 MR. HURD: -- I would -- Justice O'Connor, I
3 would point, for example, to your opinion in Gebser vs.
4 Lago Vista, where you said that the general rule -- this
5 was not a burden-of-proof case, but, in any event, you
6 said the general rule must yield to the purposes of the
7 statute --

8 JUSTICE O'CONNOR: Okay, but let --

9 MR. HURD: -- in order to figure out --

10 JUSTICE O'CONNOR: -- let's talk about--

11 MR. HURD: -- congressional intent.

12 JUSTICE O'CONNOR: -- burden-of-proof cases.

13 What is your closest one where the courts are left to do
14 this? What do we look to?

15 MR. HURD: Well, Your Honor, the Court, last
16 year, in Alaska versus EPA, said, there is no single rule,
17 or principle, governing the allocation of the burden. And
18 in that case, this Court also said two other things that
19 are important here. One is, it put the burden on the
20 Government in that case, regardless of whether the
21 Government was the plaintiff or the defendant. So, the
22 idea of burdening the party who initiates the proceedings
23 was rejected there, and this Court said it looked at the
24 purposes of the statute and saw no reason to place the
25 burden differently, depending upon whether the Government

1 came to court as the plaintiff or took unilateral action
2 forcing the other side to come to court where the
3 Government would be the defendant.

4 JUSTICE SCALIA: I understand the purposes-of-
5 the-statute argument. The purpose of the statute is
6 always to provide relief to someone who's been injured.
7 And to conclude, from this, that, therefore, the burden
8 should be on the other side, in order -- in order that
9 people who are injured can get relief, is -- I mean --

10 MR. HURD: Your Honor --

11 JUSTICE SCALIA: -- that will always be the
12 case.

13 MR. HURD: Justice Scalia, the purpose of the
14 statute is to obtain for the child an Individualized
15 Education Program.

16 JUSTICE SCALIA: That's fine. I -- that's one
17 sort of relief. But, I mean, you have some relief at
18 issue under every statute. They want a needy person to be
19 given justice. And to say that, since that's their
20 purpose, you should always put the burden on the other
21 side, is -- I just don't understand that argument.

22 MR. HURD: Well, Your Honor, this is a unique
23 statutory scheme. The purposes of the Act are set forth
24 in the law very clearly -- page 6 and 7 of the addendum to
25 the blue brief -- one is to ensure that all children with

1 disabilities have available to them a free, appropriate
2 public education. And --

3 JUSTICE SCALIA: Sure.

4 MR. HURD: -- that purpose is served far more,
5 Justice Scalia --

6 JUSTICE SCALIA: And the Federal Tort Claims
7 Act, for all I know, says, in its prologue -- or, if it
8 doesn't, it should have, or it could have -- the purpose
9 of this is to assure that every person who's been injured
10 by a -- by a Government tort obtains relief.

11 MR. HURD: But let me, then, point out the very
12 different paradigm between the ordinary tort claim statute
13 and this statute. In your ordinary tort claim statute,
14 your ordinary litigation, the law starts out by being
15 neutral with respect to the status quo. And that's the
16 reason why you have this rule -- we don't think it is
17 called "traditional rule" appropriately -- but the general
18 rule that you place the burden on the party who initiates
19 litigation is because the law is neutral with respect to
20 the status quo at the beginning of the lawsuit. Here, the
21 law is not neutral, because the status quo before the
22 hearing is: the child has no Individualized Education
23 Program.

24 JUSTICE SOUTER: That's where I am not
25 understanding your argument. There is an IEP in all of

1 is a proposed IEP. And it is not merely arguing about
2 words; it goes to the heart of the statute. Let me
3 explain why.

4 Three things this Court has said -- or the
5 regulations say. Number one, the regulations say that the
6 parents and the school system are equal partners. This
7 Court said, in the Honig case, that Congress very much
8 intended to strip school systems of the power to act
9 unilaterally with respect to these children. Thirdly,
10 this Court said, in Rowley, the purpose of the statute is
11 to maximize parental involvement.

12 Now, if we're equal partners at the table, what
13 sense does it make for the school system to tell the
14 parents that, "We are equal partners here, but, if you
15 disagree with me once we leave the table, I am presumed
16 correct"?

17 JUSTICE SCALIA: What sense does it make for the
18 parents to tell that to the school system? I mean --

19 JUSTICE SOUTER: In an -- in an equal-
20 partnership argument, nobody's got the burden of proof.

21 MR. HURD: Your Honor, in an equal-partnership
22 argument, nobody has the burden, because they initiated
23 the proceeding to ask for the goal that Congress had in
24 mind --

25 JUSTICE KENNEDY: In all events --

1 MR. HURD: -- that the child have an IEP.

2 JUSTICE KENNEDY: -- in all events, it seems to
3 me that it's still cut against you. This is a statutory
4 scheme where, you point out, the parents have access to
5 some initial consultation. In most instances -- or in
6 many instances, people who are suing an institution don't
7 have that initial access. Here, the parents get much more
8 initial information than most -- than most petitioners do
9 --

10 MR. HURD: They --

11 JUSTICE KENNEDY: -- than most -- than most
12 complainants, than most aggrieved persons do.

13 MR. HURD: Well, Your Honor, actually their
14 discovery rights are less than what they would normally
15 have. But let me go to the idea, then, that we are --

16 JUSTICE KENNEDY: Then let --

17 MR. HURD: -- equal partners --

18 JUSTICE KENNEDY: -- let me point -- let me
19 point out something else. Let's assume a state of affairs
20 -- just assume that school districts -- many of them --
21 independently and, I think, collectively, because school
22 districts talk to each other -- have a growing body of
23 data and expertise about IEP. And this is the basis on
24 which you say that they should come forward. It seems to
25 me that, too, though, cuts against you, because when a

1 school district has expertise, I think it's entitled to a
2 presumption of governmental deregularity. And you have
3 to challenge it.

4 MR. HURD: Your Honor, we disagree with that,
5 because of the structure of the Act. Again, it makes no
6 sense to be equal partners at the table, and, once you
7 reach an impasse, to say, well, you're going to presume
8 one side is right.

9 JUSTICE BREYER: That's a well-established
10 principle of administrative law. I've never seen a case
11 in administrative law where a party -- a private party
12 coming in and challenging a Government's action doesn't
13 bear the burden of proof. And Alaska isn't contrary to
14 that. Alaska, they were citing hornbook law, whether --
15 what happens with the -- if EPA normally does have a
16 burden of proof when it challenges a State action, and
17 that doesn't change, whether they bring it in a State
18 proceeding or whether it's in a Federal proceeding. I
19 didn't think it was quite on point. But maybe you know
20 that I'm wrong on this. And so --

21 MR. HURD: Well, Your Honor --

22 JUSTICE BREYER: -- is there a -- can you think
23 of any instance, in all of administrative law, where you
24 didn't start out with the idea that a person challenging a
25 -- an agency action that's been taken, and so forth,

1 doesn't have the burden of proof?

2 MR. HURD: Your Honor, there is no analogous
3 case, because --

4 JUSTICE BREYER: That's what I --

5 MR. HURD: -- because --

6 JUSTICE BREYER: I do think that, yes.

7 MR. HURD: -- because there is no analogous
8 statute.

9 JUSTICE BREYER: There isn't?

10 MR. HURD: There's no analogous statute. There
11 is no other statute we've been able to find where private
12 citizens are made equal partners with Government in the
13 design and approval of Government actions.

14 JUSTICE BREYER: All right. Does this every
15 come up? I mean, the other thing I wondered about this --
16 it seems to me you have a hearing examiner and a district
17 judge who have actually said what is only a law
18 professor's dream. They say, "Oh, the evidence is
19 precisely and equally in balance." I didn't know that
20 happened in the real world. I --

21 [Laughter.]

22 JUSTICE BREYER: -- I thought that their --
23 that judges normally did their job, which is, you look at
24 complicated evidence, and you say, "This side is a little
25 bit better, or that side is a little bit better." Has

1 this come up in -- a lot, where they say, in this area,
2 "Oh, it's exactly" --

3 MR. HURD: Well --

4 JUSTICE BREYER: -- "in equipoise"?

5 MR. HURD: Your Honor, I don't -- I don't know
6 how many times the hearing officer has said that. I do
7 think the burden of proof is not -- is not -- or the
8 evidence is not balanced on a razor's edge. I think it is
9 a -- is a broader table than that. But let me explain, if
10 I may, three reasons.

11 JUSTICE GINSBURG: May I ask you, before you get
12 to your three reasons, to go back to your -- something
13 that you said? I asked you, Are you dividing the burden
14 of production and persuasion? And you said no, it's all
15 on one side or the other. But it seems to me your
16 description of this proceeding, you said the school
17 district goes first. So --

18 MR. HURD: In this --

19 JUSTICE GINSBURG: -- the school district did
20 come forward. And is that the usual practice in these
21 administrative hearings -- that the first one to go to
22 defend the plan is the school district, not the parents
23 who are attacking it?

24 MR. HURD: Your Honor, I believe that the
25 typical procedure would be that the -- whichever party has

1 the burden of proof would go first.

2 JUSTICE GINSBURG: But you said, in this case --

3 MR. HURD: It --

4 JUSTICE GINSBURG: -- the school district went
5 first.

6 MR. HURD: Yes, Your Honor. In this particular
7 case, the hearing officer had not yet resolved the burden-
8 of-proof issue at the beginning of the hearing, and --

9 JUSTICE GINSBURG: So, now, as a result of the
10 Fourth Circuit's decision, do the parents always go first
11 --

12 MR. HURD: Oh --

13 JUSTICE GINSBURG: -- and not the school
14 district? The school district has a plan that it has put
15 forward. And it seemed to me logical, well, it has a
16 plan, so it should defend it.

17 MR. HURD: Your Honor, the typical rule is,
18 obviously, that whichever party has the burden of proof in
19 that proceeding would go first, but --

20 JUSTICE GINSBURG: So, you think the ALJ -- or
21 the administrative hearing officer in this case told the
22 State to go first -- the school district to go first
23 because he thought that maybe they had burden of proof,
24 and would not have asked them to go first if he didn't?

25 MR. HURD: Your Honor, there was a -- it's

1 unclear why he had them go first. There was some State
2 regulation -- then in effect, no longer in effect -- that
3 suggested that perhaps the State had some initial burden
4 in that case. We're not necessarily asking that the --
5 that the -- that the State be required to go first. What
6 we are asking is that the State -- excuse me, not the
7 State -- the local school system bear the burden of
8 persuasion. And there are three --

9 JUSTICE GINSBURG: So, but you're saying this --
10 this is an ad hoc thing. There is no general practice
11 about which one goes first.

12 MR. HURD: Your Honor, the general practice
13 would be that whoever has the burden of proof, the burden
14 of persuasion, would also be the one to go first and go
15 last. That's the general practice in procedures. And we
16 believe it also applies here. But we're not -- what I'm
17 -- my point is that we are not wedded -- this Court was to
18 decide that the parents should go first, but the school
19 system had the burden of persuasion, that would be fine
20 with us. In the cases where the burden of persuasion is
21 going to be determinative, both sides are going to have
22 substantial evidence before the hearing officer.

23 The question we think is most important here,
24 if I may, is, Which allocation of the burden of proof best
25 advances the purposes of Congress? There are three

1 reasons, at least, why we believe putting the burden on
2 the school system best advances purposes of the
3 Congress.

4 Number one has to do with the risk of an
5 erroneous decision. This Court, for example, in Santosky,
6 said: What will happen if there is an erroneous decision?

7 It asked that question in the context of the standard of
8 proof. It is important to ask that same question here.

9 If the hearing officer makes a mistake and
10 awards the child services that are not really needed, then
11 the child will receive a somewhat better education than
12 the law requires, and the school --

13 JUSTICE SCALIA: It's only play money,
14 right?

15 JUSTICE STEVENS: Well I think it's only right
16 - this isn't the question, Who's going to pay for it?
17 Because this -- doesn't the parent often go ahead and get
18 the other -- the better program, and then they ask for
19 reimbursement for the -- from the Government?

20 MR. HURD: Well, not in that case, where the --
21 my hypothetical was, where the hearing officer has awarded
22 services --

23 JUSTICE STEVENS: Isn't it true that many of
24 these fights occur after much of the education has already
25 taken place --

1 MR. HURD: Your Honor, because of --

2 JUSTICE STEVENS: -- and they're fighting about
3 who pays for it?

4 MR. HURD: -- the wheels of justice grind slowly
5 -- sometimes they do, but they -- the key point here is,
6 look at what happens if the hearing officer denies
7 services the child needs. The child is going to be
8 harmed, and, in the long run, society is going to be
9 harmed, as this Court recognized in Rowley. The harm to
10 the child if the burden is erroneously -- excuse me -- the
11 harm --

12 JUSTICE STEVENS: Well, that's --

13 MR. HURD: -- to the child --

14 JUSTICE STEVENS: -- that's not true if the
15 parents can afford to pay for it, and have, in fact, paid
16 for it. Then the child is the neutral factor in it. Of
17 course, in some cases, what you say would be true, but not
18 in --

19 MR. HURD: Your Honor, in most cases --

20 JUSTICE STEVENS: -- not in all cases.

21 MR. HURD: -- it would be true. These parents
22 were fortunate -- this child was fortunate, that they were
23 able to pay for Brian's services until Montgomery County
24 finally changed its mind and gave him the kind of services
25 he had sought from the beginning, services they gave him

1 once they were given the burden of proof. But most
2 parents are not going to be in that situation. Most
3 parents of children with disabilities are not going to be
4 able to go out and obtain the services they need if the
5 hearing officer does not award --

6 JUSTICE SCALIA: Mr. Hurd, here's --

7 JUSTICE BREYER: This is true.

8 JUSTICE SCALIA: -- here's my problem with your
9 assertion that we have to decide it in the way that
10 furthers the purposes of the statute. We said, in other
11 cases -- and correctly, I think -- that no statute pursues
12 its purpose at all costs, that there are limitations upon
13 its purpose. It, of course, wants students who need this
14 special help to get it, but it also does not want students
15 who don't need this special help to get it. And for you
16 to say, "There's no harm done." You know, "If he -- if
17 he's given it when he doesn't need it. What's the
18 problem? He goes to a better school." The problem is
19 that this is not play money. It's coming from somewhere;
20 and, namely, on the citizens who have to pay for it.

21 MR. HURD: Your Honor, my purpose is not to
22 minimize the monetary interests involved, but it is to
23 focus the Court's attention on the aspect of it that
24 Congress had focused on. Certainly, if we have an
25 erroneous decision either way, there will be some loss.

1 If the loss is on the school system, it will not be
2 unimportant; it will be some money. If the loss is on the
3 child, it will be in the squandering of human potential --

4 JUSTICE BREYER: All right, that's true. That's
5 -- I understand. I sympathize with that point. I'm
6 worried, however, about the fact that this statute doesn't
7 just cover the initial IEP. It covers a whole range of
8 things, including, for example, you have a hyperactive
9 child. The hyperactive child behaves badly in class. The
10 hyperactive child receives discipline related, say, to how
11 it's placed. Well, the parents might -- properly, perhaps
12 -- think that was very unfair and wrong, and they might
13 challenge that disciplinary mark. There can be thousands
14 of different kinds of issues that come up. And, in all of
15 these issues, is it supposed to be the burden of the
16 school board, for example, to show that the teacher who
17 had the child sit in the back of the class or received a
18 bad discipline mark or something? Does the -- does the
19 school board have to prove that the teacher was right?

20 MR. HURD: Well, Your Honor, those cases would
21 not arise under the IDEA --

22 JUSTICE BREYER: Wouldn't it, if it were related
23 to the placement?

24 MR. HURD: Your Honor, your hypothetical did not
25 change the child's placement.

1 JUSTICE BREYER: No, no, I say that there are a
2 number of -- what I'm thinking of is a lot of interim
3 decisions that come up that are affecting how the child is
4 placed -- whether in class, whether in that class, whether
5 with a special teacher, whether without a special teacher,
6 whether with somebody during the recess periods, whether
7 not. I mean, they're -- these are very complicated
8 matters, and there can be important overall matters, and
9 there can be what I'd call interstitial matters.

10 MR. HURD: Your Honor, the initial matters you
11 discussed -- sent to the back of the room -- the IDEA is
12 not implicated there. If the school system tries to
13 change the child's placement, then this Court has already
14 said that the school system bears --

15 JUSTICE BREYER: What I'm driving at is -- and I
16 think it was well expressed in one of these cases, a New
17 Jersey case, perhaps -- that is it the same burden of proof
18 whether the matter is interstitial or whether it's an
19 initial placement or a change of --

20 MR. HURD: Yes, sir.

21 JUSTICE BREYER: -- placement? Do we have the
22 same burden of proof always on the school board, no matter
23 what?

24 MR. HURD: I understand your question, Your
25 Honor. We believe the strongest possible case is,

1 initially, where there is no IEP, where this is equal
2 partnership, and the school system should be required to
3 come forward and demonstrate this program is appropriate.

4 If, however, you have a -- an agreed IEP and the
5 parents say, "Well, now we want to change that," then the
6 case for the parents is, frankly, not so strong. It is a
7 different case. And some courts have said, in those
8 cases, the parents have the burden, as the District Court
9 did, actually, in this case, by way of dictum. Other
10 courts have said, no, the school system always have the --
11 has the burden.

12 The Court need not go so far here as the New
13 Jersey court went in Lascari, and say the school system
14 always has the burden in order to the rule -- rule for the
15 parents in this case and say that, initially, when there
16 is no IEP, only a proposed IEP -- and, Justice Souter,
17 Burlington used that word three times, "IEP proposal,"
18 which we think implies that it was not a real IEP -- this
19 -- the Court need not decide the other issue in order to
20 decide that when there is no IEP, only a proposal, and
21 when you have equal parties before the hearing officer,
22 that it makes no sense to allocate the burden on which one
23 filed for the hearing officer first, who asked for the
24 tiebreaker first. That really makes no sense.

25 You have to, instead, we submit, decide the

1 case based on which allocation of the burden in this
2 situation is most in accord with the purposes of the
3 statute. Two purposes, if I may. Protecting the rights
4 of children with disabilities, and the rights of their
5 parents, is what the statute says.

6 Protect them from whom? What did Congress have
7 in mind? Obviously, to protect them, quite frankly, from
8 the school systems, who had this history of
9 discrimination, who are more powerful, if you will, in
10 terms of both information and resources, and who have a
11 financial incentive, as the Deal court recognized, to
12 minimize the needs of the child. Protecting the side that
13 Congress meant to protect means putting the burden on the
14 other side: the school system.

15 Secondly, more fundamentally, the purpose is to
16 ensure the children have an appropriate education. The
17 law doesn't say "promote." It doesn't say "presume." It
18 doesn't say "risk." It says "ensure."

19 In baseball, there's an old umpires' rule that
20 the tie goes to the runner. In order to carry out
21 purposes of this statute, when the evidence is in
22 equipoise, the tie should go to the child.

23 I'd like to reserve the balance of my time for
24 rebuttal.

25 JUSTICE STEVENS: Mr. Garre.

1 ORAL ARGUMENT OF GREGORY G. GARRE

2 ON BEHALF OF RESPONDENTS

3 MR. GARRE: Thank you, Justice Stevens, and may
4 it please the Court:

5 Petitioners rejected the educational plan found
6 appropriate by local school officials, enrolled their
7 child in an expensive private school, and then filed a
8 due-process complaint seeking reimbursement of \$21,000 in
9 private tuition expenses. The Court of Appeals properly
10 held that petitioners bore the burden of proof in that
11 proceeding, just like --

12 JUSTICE O'CONNOR: This is a case where the
13 parents unilaterally decided to move the child to a
14 private school, and then they sought tuition
15 reimbursement?

16 MR. GARRE: That's correct, Justice --

17 JUSTICE O'CONNOR: Yes.

18 MR. GARRE: -- O'Connor. Petitioners bore the
19 burden of --

20 JUSTICE GINSBURG: As I understand it --

21 JUSTICE STEVENS: You don't contend the rule
22 would be different if we were -- if it was all
23 prospective, do you?

24 MR. GARRE: No. Your Honor, we think the rule
25 is the same in all of the various situations that could

1 arise under the statute -- the complaining party, whether
2 it's the parents, as in this case, or the school district,
3 as in many other instances. And, Justice Breyer, you're
4 right, one of the situations that is covered by this
5 statute is where a child with a disability acts out in
6 class, and the school has to take disciplinary action
7 against that child. In that situation, IDEA regulates the
8 actions that the school district can take. And if the
9 parents believe that the school district has -- take a
10 more severe disciplinary action than is required by the
11 statute, school -- the school district, or the parents,
12 could initiate a challenge in that situation.

13 In fact, there are many parts of the statute
14 that we think speak to the question, or at least --

15 JUSTICE GINSBURG: Before we -- you go onto the
16 argument, your answer to Justice O'Connor, if I remember
17 the facts correctly, wasn't quite right. This child was
18 in private school for years, and the parents weren't
19 asking anybody to do anything, because -- and it's only
20 when the private school said, "We have to -- we can no
21 longer put up with your child. Your child has all these
22 problems" -- at that time, the parents then came to the
23 school district and asked for an IEP.

24 MR. GARRE: Justice Ginsburg, that's correct.
25 The child was in a private school, at which point in time,

1 the private school suggested that they find -- the parents
2 find another environment for the child suitable for what
3 they determined to be "special needs." The parents
4 contacted the local school district, and, at that point,
5 the school district, in conjunction with the parents,
6 devised an educational plan for the child.

7 JUSTICE GINSBURG: Which the parents didn't
8 think was acceptable and, in the interim, placed the child
9 in another private school. But it was not a case that
10 they put the child in a private school first, and then
11 sought reimbursement.

12 MR. GARRE: That is correct, Justice Ginsburg,
13 except that the record does show that, during the time
14 that the IEP was being developed, the parents applied for
15 the child to attend a private school and actually accepted
16 an application fee and enrolled the child in that school,
17 and the ALJ in this case found that the parents had made a
18 predetermined decision to send the student to child -- the
19 student --

20 JUSTICE GINSBURG: I thought --

21 MR. GARRE: -- to private school. But we don't
22 think that the facts of this case bear on the question of
23 who bears the burden of proof in the run of the Mine case.
24 It's --

25 JUSTICE SCALIA: Mr. Garre, you -- or, Mr.

1 Garre, you said, in your earlier statement, that sometimes
2 the school district will be the complaining party. How
3 does that -- how does that come up?

4 MR. GARRE: Your Honor, there are three
5 situations in which the school district can be the
6 complaining party. First, where a parent refuses to
7 subject his child to evaluation for special services under
8 the Act, and the school district disagrees and initiates
9 that action.

10 JUSTICE SCALIA: Now, why would the school
11 district have to take any action? Why wouldn't it just --

12 MR. GARRE: Well, under the statute Congress --

13 JUSTICE SCALIA: -- just say, "The child can't
14 come to class. He's too disruptive," period?

15 MR. GARRE: The Congress placed on school
16 districts the obligation to identify disabled children
17 within their jurisdiction.

18 JUSTICE SCALIA: Right.

19 MR. GARRE: And when they have -- they believe
20 they identified such children, and they request the
21 parents to subject them to the evaluation -- Congress
22 placed on the school districts to at least conduct an
23 evaluation in that situation, and if parents disagree --

24 JUSTICE SCALIA: Okay.

25 MR. GARRE: -- school districts can initiate.

1 The second situation is in -- is where children
2 act up in the classroom. The school -- the statute places
3 restrictions on how the school district can discipline a
4 child if the school district determines that the
5 misbehavior is a manifestation of the child's disability.

6 In that situation, if the -- if the school district
7 believes that more severe discipline is warranted than
8 would be allowed under the statute, the school district
9 has to initiate the hearing in order to get an ALJ to
10 allow it to take more severe action.

11 And the third situation is where the school
12 district disagrees with a parent's request for an
13 independent educational evaluation. Parents can request,
14 as part of the developmental process of an educational
15 plan, to have an independent educational evaluation
16 conducted on their child, paid for at public expense.
17 Most of the times, that's conducted without incidence. In
18 some situations, if school districts believe that that
19 expense was not warranted, they could initiate a
20 proceeding.

21 And in all those cases, we acknowledge that --
22 under the traditional rule, that the complaining party,
23 the party that initiates the action and seeks relief,
24 bears the burden of proof in that proceeding.

25 JUSTICE GINSBURG: Mr. Garre, do you have any

1 numbers, overall, how -- of the incidence of the parents
2 going to the administrative hearing first, as opposed to
3 the school district? Isn't it overwhelming that, in these
4 proceedings, the parents are the one -- ones who initiate
5 the hearing?

6 MR. GARRE: Your Honor, I don't have those
7 statistics. I would -- I think it's probably true that in
8 most instances it's the parents who are initiating the
9 hearing. That would not have been news to Congress,
10 however. Congress, in the statute -- and this is one of
11 the things that we think is important, bearing on the
12 burden of proof -- placed on parents the obligation to
13 plead their case -- that is, to identify both the problem
14 with the educational plan that they've seen -- and this is
15 in 20 U.S.C. 1450(b)(7) -- as well as the proposed
16 solution that they would -- that they would like to see
17 the Court adopt. Now --

18 JUSTICE GINSBURG: Now we go back to the --
19 an answer you gave before, when we were going through
20 what, in fact, happened, the suggestion that maybe the
21 parents were just trying to get the private-school tuition
22 reimbursed, the -- there was a finding, wasn't there, in
23 the District Court, in the -- this is in the Petitioner's
24 appendix, at 46 and 47 -- the district court said, "The
25 parents in no way prevented the IEP from being formulated

1 or otherwise failed, in good faith, to consider it."

2 MR. GARRE: The -- Your Honor, that's correct.
3 I think that the District Court also acknowledged, though,
4 that the parents probably were interested in sending their
5 child to private school. I think, either way, we're not
6 suggesting that the record in this case requires the Court
7 to take one result or another on the fundamental question
8 of who bears the burden of proof. We think that the
9 complaining party bears the burden of proof. That's the
10 rule --

11 JUSTICE BREYER: Well, if I take -- if I accept
12 your view of that, that would be a Federal rule written
13 into the statute. And that would mean that, even if the
14 Department of Education came to a different conclusion, or
15 even if we have a bunch of States that come to a different
16 conclusion, or even if it's in Minnesota, they want to
17 have a rule that "sometimes it's one way, sometimes the
18 other way," we couldn't do that. But if I were a Member
19 of Congress, and never thought about the issue, which I
20 think this void in the statute suggests, I might think it
21 would work out better if we left it up to each State to do
22 it whatever way they wanted here, if we left it up to the
23 Department of Education to promulgate whatever rules they
24 wanted. Now, couldn't we hold that?

25 MR. GARRE: Yes, Your Honor, and, in fact,

1 we've suggested that. In fact --

2 JUSTICE BREYER: Well, you haven't suggested
3 leaving it up to each State, because you're suggesting a
4 uniform rule. So, what -- how would you have it?

5 MR. GARRE: Well, Your Honor, to be clear, we
6 think that this -- that the statute establishes a Federal
7 floor. It is spending clause -- a federal floor -- it is
8 -- or a default rule that --

9 JUSTICE BREYER: Oh, it's just --

10 MR. GARRE: -- unless --

11 JUSTICE BREYER: -- a default rule.

12 MR. GARRE: Exactly. That the --

13 JUSTICE BREYER: All right. If it's just a
14 default rule, that's a big improvement, because any State
15 can do it any way it wants.

16 MR. GARRE: And that --

17 JUSTICE BREYER: But then, why not, here, send
18 it back and say that the ALJ tried to answer the wrong
19 question? He tried to answer the question of what was the
20 Federal law, but what he really should have done was ask
21 about what's the State law. And if he has a hard time
22 figuring it out, perhaps he should look at that evidence
23 harder and see. Maybe --

24 JUSTICE O'CONNOR: Well, is there any doubt,
25 here, that there's no State law?

1 MR. GARRE: No, Your Honor, and I believe you
2 just heard Mr. Hurd acknowledge that there is no statute
3 or regulation on this.

4 JUSTICE BREYER: No, but I've never heard of a
5 State without law. There is no --

6 MR. GARRE: Well --

7 JUSTICE BREYER: -- black hole in the law --

8 JUSTICE O'CONNOR: On the burden of proof in IEP
9 cases --

10 JUSTICE BREYER: Well --

11 JUSTICE O'CONNOR: -- I should have explained.

12 MR. GARRE: And, Your Honor, the Maryland case
13 law adopts a traditional rule for administrative
14 proceedings. We cite the case, in page 18 of the red
15 brief. Importantly, though, what petitioners --

16 JUSTICE SCALIA: These cases are appealed to
17 Federal courts normally, aren't they?

18 MR. GARRE: These cases -- the Congress gave
19 them the right to bring a civil action in Federal court.

20 JUSTICE SCALIA: In Federal courts. And most of
21 these cases are in Federal courts. And you're -- you want
22 to condemn Federal courts to figuring out what the State
23 burden of proof is?

24 MR. GARRE: Well, Your Honor, I think -- we
25 analogize it to the question of the substantive amount of

1 benefits to which parents are entitled under the Act. We
2 think that this spending-clause legislation would allow a
3 State to adopt a higher standard than the standard that
4 this Court established in Rowley for free and
5 appropriate public education, and that that would be the
6 standard that would apply in a proceeding. And so, too,
7 we think, with the question of the burden of proof. If
8 States wanted to voluntarily assume the burden of proof
9 for their own school districts in these proceedings, which
10 this Court has characterized as a substantive rule of law
11 -- the question of who bears the burden of proof -- we
12 think that States could do so, and that that would be the
13 rule that applies. We don't quarrel with that.

14 JUSTICE GINSBURG: It's not hypothetical. Isn't
15 it -- it isn't hypothetical. States -- isn't it true that
16 some States have said that, in these hearings, the school
17 district will have the burden of proof?

18 MR. GARRE: Yes, Your Honor. We believe -- I
19 believe eight States have said that. Three States -- at
20 least three States have said that the burden of proof is
21 on the parents in these proceedings. Some States have
22 taken different views and said if -- I believe it's --

23 JUSTICE KENNEDY: Well --

24 MR. GARRE: -- Minnesota has said that --

25 JUSTICE KENNEDY: -- to the -- to the extent

1 that we're concerned about unnecessarily increasing costs
2 on school districts, and burdens on school districts, why
3 shouldn't we have a uniform Federal rule? In other words,
4 if we agree with your position that ordinary allocations
5 puts this on the complainant, we have to conserve
6 resources, and so forth, why should we allow States to
7 have a different rule, when we're dealing with the
8 administration of a Federal program?

9 MR. GARRE: Well, Your Honor, because of the
10 spending-clause nature of the legislation. That's what we
11 think, that --

12 JUSTICE SCALIA: Well, would you --

13 MR. GARRE: -- this establishes a Federal floor
14 that States can go beyond if they want to assume more
15 costs under the Act.

16 JUSTICE SCALIA: Well, you have a statute that
17 -- you know, it's in -- it's in great detail -- on
18 administrative procedures. It obviously -- you know,
19 decision of hearing officer, administrative procedures,
20 disclosure, evaluations, and recommendations. And you
21 think the Federal Government goes into all this detail and
22 doesn't care who has the burden of proof? That seems, to
23 me, most unlikely.

24 MR. GARRE: Well, Justice Scalia, we agree, in
25 the sense that we think that the statute establishes at

1 least a default rule. And, just to be clear, if the Court
2 holds that Federal law establishes the traditional rule,
3 then, obviously, we would be very happy with that
4 decision. What we -- what we reject to strenuously is
5 petitioner's position that Federal law imposes an unstated
6 burden on the school districts in all proceedings
7 initiated under the Act.

8 JUSTICE STEVENS: May I --

9 MR. GARRE: That would be --

10 JUSTICE STEVENS: -- ask this question? You've
11 described three situations in which you have the burden of
12 at least proceeding, and I guess persuasion, too -- and,
13 of course, there's a difference between the two. And I
14 was just trying to think, if I were a hearing officer, and
15 I thought, well, the issue in this case is whether the
16 parents' objections to the IEP are valid, I think the
17 first thing I'd want to know is, What is the IEP, and
18 who's the best person to tell me about it? And wouldn't
19 the county be in the best position to explain what has
20 been done and, sort of, get the -- get the hearing
21 started, and so forth?

22 MR. GARRE: Well, Justice Stevens, Congress has
23 answered that problem, in the sense that it requires, in
24 response to a complaint, the school district to submit the
25 proposed -- the IEP, the educational plan, it's adopted,

1 as well as the other considerations -- the other options
2 it considered and why it didn't accept those other
3 options. So, that evidence -- and I think we're talking
4 about the burden of production --

5 JUSTICE STEVENS: Right. I --

6 MR. GARRE: -- not the --

7 JUSTICE STEVENS: -- understand.

8 MR. GARRE: -- burden persuasion there -- that
9 evidence already is required to be exchanged and
10 disclosed. Here --

11 JUSTICE STEVENS: But then, at the hearing, who
12 -- who introduces the first exhibit or the first witness?

13 MR. GARRE: Well, the way it's done in the
14 States right now is, where, in the jurisdictions where
15 school districts bear the burden of persuasion, they are
16 required to go first. And that increases the costs and
17 complexity of these trials for school districts, because
18 the -- before the parents have put on their evidence as to
19 why they think an educational plan is inappropriate or is
20 -- in this case, why they think the school district hasn't
21 properly characterized their child's disability, the
22 school district has to go forward and present its case,
23 which is a more complex -- it's -- there's more guesswork
24 involved --

25 JUSTICE STEVENS: May I ask this? Are there

1 any jurisdictions in which the burden of proceeding is
2 different from the burden of persuasion?

3 MR. GARRE: I don't know the answer to that
4 question, Justice Stevens. I think it would be a very
5 unusual rule.

6 JUSTICE STEVENS: I know, analytically, it's a
7 different issue. But it would seem to me the normal rule
8 would be whoever goes first has the burden of the
9 persuasion.

10 MR. GARRE: That's absolutely correct, and
11 that's certainly the way that we think it would -- it
12 would, more preferably, operate under the statute. But
13 the question before the Court in this case is, Who bears
14 the burden of persuasion? That's a very important
15 question under the Act. It's not just, with respect, an
16 academic question about the number of cases in with -- in
17 which the evidence is mathematically in equipoise. It is
18 going not have a much broader impact on the implementation
19 of this statute, because it's going to be decisive, or at
20 least potentially decisive, in cases like this, where
21 you've got a battle of the experts. I think --

22 JUSTICE BREYER: Why? Why should it be? I
23 mean, that's very interesting to me. Why shouldn't the
24 law be such that particularly -- you have evidence on both
25 sides and a neutral decision-maker who sits there -- that

1 it encourages that decision-maker to decide. It's one
2 thing if the record's blank. But not where they have a
3 lot of experts. Decide. Don't retreat to something like
4 announcing, "Oh, it's in equipoise."

5 MR. GARRE: The -- we would agree with you,
6 Justice Breyer, but, in practice, many of these cases, the
7 dispute is over the provision of experimental therapies
8 for children with disabilities, particularly children with
9 autism, where medically and educationally --

10 JUSTICE BREYER: All right, but then to do that
11 is not really to look to the interests of the child or the
12 board. I mean, it is to allow a sort of doctrine from
13 left field, nothing to do with the merits, to decide the
14 case.

15 MR. GARRE: No, Your Honor. We think that what
16 it is to do is to give effect to the traditional
17 presumption of regularity, which is, ultimately -- if you
18 do have a tie, whose judgment ought to be given effect?
19 And under the statute, where Congress recognized that
20 State and local governments would retain the primary
21 authority over educational decisions -- and in the Rowley
22 case, where this Court reaffirmed that -- we think that,
23 combined with the traditional presumption of regularity --
24 which is that the actions and decisions of public
25 officials are presumed to be taken in good faith, and

1 presumed to be correct -- those factors counsel strongly
2 in favor of the traditional rule here. Petitioners --

3 JUSTICE GINSBURG: Mr. Garre, if you -- if you
4 had a situation, say, under Title 7 -- and you pointed out
5 in your brief that, in most benefit cases, most -- the
6 person -- whether it's Social Security -- the person who
7 is making the claim has the burden of proof. But there is
8 something different about this setup, because the statute
9 does obligate the school district to come up with a plan.

10 And so, I was thinking, if you have a Title 7 case, and
11 the plaintiff prevails on the merits, and then there's a
12 question of remedy, and the employer said, "I propose this
13 -- these changes to remedy the violation," wouldn't the
14 employer in that case have the burden of establishing the
15 adequacy of the plan that it has come up with to remedy
16 the problem?

17 MR. GARRE: I think if you're talking about an
18 affirmative defense or something beyond the threshold
19 question of whether there has been discrimination, or as
20 in a Social Security Act case question of whether an
21 eligible person has been denied the benefits --

22 JUSTICE GINSBURG: No, you made --

23 MR. GARRE: -- to which he's entitled --

24 JUSTICE GINSBURG: -- that determination has
25 been made --

1 MR. GARRE: I --

2 JUSTICE GINSBURG: -- that the -- that there has

3 been a violation. And then the question is, What remedy?

4 And the employer proposes a remedy. Wouldn't the

5 employer have the burden of showing the adequacy of the

6 remedy that the employer --

7 MR. GARRE: I think the plaintiff would still

8 bear the burden of showing that he is -- he or she has

9 been discriminated against --

10 JUSTICE SCALIA: Well, there's no violation

11 here. I mean, this is a totally different --

12 MR. GARRE: Well --

13 JUSTICE SCALIA: -- situation. I mean --

14 MR. GARRE: And that's my threshold --

15 JUSTICE KENNEDY: -- there hasn't been finding

16 of any violation by the school district. The school

17 district --

18 MR. GARRE: That's my threshold point --

19 JUSTICE KENNEDY: But I -- but I'm interested in

20 --

21 MR. GARRE: -- that that's --

22 JUSTICE KENNEDY: -- I'm interested in Justice

23 Ginsburg's question. Let's assume you show a violation.

24 Is there -- is there any law on who has the burden of

25 showing that the remedy is sufficient?

1 MR. GARRE: I think when we talk about the
2 burden of proof, we're talking about the essential
3 elements of the claim, whether there's been a violation.
4 So I think --

5 JUSTICE KENNEDY: But when I ask --

6 MR. GARRE: -- so I think we're asking --

7 JUSTICE KENNEDY: You're asking about the --

8 MR. GARRE: -- a different question.

9 JUSTICE KENNEDY: -- about the -- wait a minute.
10 Let's say that the -- we find that there's a violation.

11 MR. GARRE: I don't -- in that situation, there
12 may be -- I mean, in the same way that, in the sentencing,
13 in the criminal context, other considerations come into
14 play, it doesn't resolve it here.

15 Placing the burden of proof on school
16 districts in these proceedings would erode the trust and
17 confidence that Congress placed in the judgments of State
18 and local educational officials. It would create a
19 demoralizing and destabilizing educational regime in which
20 the judgments --

21 JUSTICE STEVENS: Of course, the background --

22 MR. GARRE: -- of --

23 JUSTICE STEVENS: -- of the Act is, Congress was
24 very dissatisfied with most of the judgments being made by
25 local officials --

1 MR. GARRE: Well --

2 JUSTICE STEVENS: -- in this whole area.

3 MR. GARRE: But, Your Honor, Congress found that

4 State and local governments would retain the primary

5 responsibility for making educational --

6 JUSTICE SCALIA: But you say this is --

7 MR. GARRE: -- decisions under the Act.

8 JUSTICE SCALIA: -- okay. You say all these

9 horrible consequences are perfectly okay, so long as the

10 States do it.

11 MR. GARRE: Well --

12 JUSTICE SCALIA: I mean, if the consequences are

13 that horrible, how can you allow the States to put the

14 burden on the other side?

15 MR. GARRE: Our position is that -- is that the

16 Federal law creates a floor, Justice Scalia, that Congress

17 established the rules --

18 JUSTICE SCALIA: Well, I understand that.

19 MR. GARRE: -- that it thought was appropriate,

20 and then States --

21 JUSTICE SCALIA: But your -- your parade of

22 horrors just never --

23 MR. GARRE: But --

24 JUSTICE SCALIA: -- never gets started, once

25 you -- once you acknowledge that the States can blow the

1 whistle to start the parade.

2 MR. GARRE: In that situation, though, States
3 are voluntarily assuming the burden on their own school
4 districts.

5 JUSTICE GINSBURG: Is there any --

6 MR. GARRE: Here --

7 JUSTICE GINSBURG: Now we have a number of
8 States that do put the burden on the school district. Is
9 there any indication that the cost is higher in those
10 States than in States that put the burden on the parents?

11 MR. GARRE: I think that the cost of the
12 hearings -- there are not statistics on that, precisely,
13 but the cost of hearings are going to be greater, because
14 school districts --

15 Thank you, Your Honor.

16 JUSTICE STEVENS: Mr. Salmons.

17 ORAL ARGUMENT OF DAVID B. SALMONS

18 ON BEHALF OF THE UNITED STATES

19 MR. SALMONS: Thank you, Justice Stevens, and
20 may it please the Court:

21 Several features of the IDEA confirm that
22 Congress intended the traditional allocation of the burden
23 of proof to apply to the administrative hearings under the
24 Act, and the most important of these --

25 JUSTICE SCALIA: Absent different disposition

1 by the States? What's the Government's position? Can the
2 States change this burden, just the background, you know
3 -- unless you -- unless you think it's okay to, you know
4 --

5 MR. SALMONS: Your Honor, the --

6 JUSTICE SCALIA: -- have the heavens fall -- we
7 don't want the heavens to fall.

8 MR. SALMONS: Your Honor, the Government has
9 always understood -- and this Court has understood -- that
10 this is spending-clause legislation, and that the
11 requirements of the Act establish a floor, and that that's
12 true with regard with the substantive provisions of the
13 Act, as well as the procedural ones. And let me give you
14 one example. I will concede that this may seem somewhat
15 anomalous, but this an unusual statute. In Rowley, for
16 example, this Court construed the meaning of the term "a
17 free, appropriate public education," and it determined --
18 in fact, it rejected a construction of that term that
19 would have required maximizing the educational benefit to
20 the child.

21 There are States that have adopted that high
22 substantive requirement for their schools. And when
23 someone brings an action, either at a due-process hearing
24 or in Federal or State court, a separate civil action
25 under statute, the courts apply that higher State

1 standard. We think the same would be true with regard to
2 a State's decision to adopt more restrictive -- or more
3 protective, excuse me, procedural provisions for the
4 parents with children with disabilities. It is left up to
5 the States. The Federal law --

6 JUSTICE O'CONNOR: In other words --

7 MR. SALMONS: -- just establishes a floor.

8 JUSTICE O'CONNOR: -- your answer is yes, the
9 States may adopt a burden-of-proof -- here -- standard?

10 MR. SALMONS: States may, and States have. What
11 we think is --

12 JUSTICE GINSBURG: And do you have --

13 MR. SALMONS: -- improper --

14 JUSTICE GINSBURG: -- do you have any
15 information in -- to the question I asked earlier -- in
16 the States that have said, "School district, you bear the
17 burden," do we know whether there's more litigation? Do
18 we know whether there has been a notable increase in the
19 costs in those States that have placed the burden on the
20 school districts?

21 MR. SALMONS: Your Honor, I would say that we
22 don't have any evidence that is as strong as we would like
23 on that. What we do have, and what I would refer the
24 Court to, is the 2003 GAO report on the way in which the
25 -- these provisions have been implemented. That is --

1 it's cited in both respondent's and petitioner's brief,
2 and it was relied on by Congress in the 2004 amendments.
3 And what it -- what it demonstrates is that 80 percent --
4 nearly 80 percent of all due-process hearings nationwide
5 have occurred in just six jurisdictions, five States and
6 the District of Columbia, and that -- and that, in those
7 States -- it happens to be the case at all, but Maryland,
8 which is one of those states -- have clear rules that put
9 the burden of proof on the school districts, and that the
10 costs --

11 JUSTICE SCALIA: This --

12 MR. SALMONS: I'm sorry.

13 JUSTICE SCALIA: These other cases that you
14 refer to, where -- that involve spending legislation,
15 where the States go beyond what is minimally required -- I
16 suspect that they are cases where it really is an
17 imposition on the States, and they accept it. Here, the
18 imposition is not on the States, it's on the local school
19 districts. And very often, the interests of the local
20 school district is quite different from the interests of
21 the people, you know, down-State, in the State capital.
22 I'm -- I am loath to think that just because a State
23 supreme court says that every school district in the State
24 has to bear the burden of proof, that Congress intended
25 that to be the case. I think it's a different -- a

1 different situation, where the spending is money that's
2 coming out of the -- ultimately, out of the pocket of the
3 school district.

4 MR. SALMONS: Your Honor, it may very well be
5 that you would want something more than just a court
6 decision. And I --

7 JUSTICE O'CONNOR: Do we have to --

8 MR. SALMONS: -- and the States that have done
9 it --

10 JUSTICE O'CONNOR: -- decide that here?

11 MR. SALMONS: No, I don't think --

12 JUSTICE O'CONNOR: Maryland --

13 MR. SALMONS: -- we do, Your Honor.

14 JUSTICE O'CONNOR: -- doesn't have --

15 MR. SALMONS: Maryland --

16 JUSTICE O'CONNOR: -- such a rule.

17 MR. SALMONS: -- Maryland does not. And I
18 think, in fact, the only thing -- the only question that's
19 truly presented in this case is whether the Federal
20 statute mandates the unusual burden -- shift of placing
21 the burden on the schools in all cases. And we think that
22 clearly wasn't what Congress intended.

23 And let me point to the provision of the
24 statute we think is the most relevant, and that is the
25 requirement that the parents -- or the complaining party

1 file a complaint to initiate the due-process hearing. And
2 that traditional pleading regime requires that the -- in
3 this context, the parents come forward and identify, with
4 specificity and with supporting facts, the problem with
5 the school's educational program and how they would
6 propose to solve that problem.

7 And, in 2004, Congress went even further and
8 mandated that parents cannot even obtain a due-process
9 hearing until they've first complied with this due-process
10 notice requirement, and that the contents of the parents'
11 complaint will strictly define the subjects that can be
12 addressed at the hearing. And we think that is strong
13 evidence that Congress intended the traditional allocation
14 of the burden of proof.

15 JUSTICE STEVENS: And may I be sure I didn't
16 misunderstand something you said earlier? Did you say
17 that in most jurisdictions the -- by local option, the
18 States have elected to adopt your adversary's --

19 MR. SALMONS: No --

20 JUSTICE STEVENS: -- position?

21 MR. SALMONS: -- no, Your Honor, I did not.
22 What I indicated is that one of the unusual aspects of
23 these due-process hearings is that they occur very
24 infrequently, only about 5 for every 10,000 children
25 receiving educational benefits under the Act nationwide.

1 In certain jurisdictions, there is a very high incidence
2 of these hearings. And Congress, in 2004, was clearly
3 concerned about the costs that those hearings were
4 imposing, and were diverting funds away from the real
5 purposes of the Act.

6 Now, getting back to the statute, we think --

7 JUSTICE STEVENS: I'm not sure you answered my
8 question. Did you not tell us that in the States where
9 there -- the largest volume of these hearings -- in most
10 of those States the burden is on the school board?

11 MR. SALMONS: That's correct, Your Honor. What
12 I was saying is that I can't tell you that more States
13 than not have adopted one rule --

14 JUSTICE STEVENS: No, I --

15 MR. SALMONS: -- or the other.

16 JUSTICE STEVENS: Not the number of States.

17 MR. SALMONS: But most --

18 JUSTICE STEVENS: Number of hearings.

19 MR. SALMONS: -- of the due-process hearings
20 that occur in --

21 JUSTICE STEVENS: Yes.

22 MR. SALMONS: -- in the country --

23 JUSTICE STEVENS: Yes.

24 MR. SALMONS: -- occur in jurisdictions --

25 JUSTICE STEVENS: I think --

1 MR. SALMONS: -- where, either by court or by
2 rule the burden has been placed --

3 JUSTICE STEVENS: And this was -- I wanted to
4 point -- was that mostly -- in those jurisdictions, was it
5 by court or by rule?

6 MR. SALMONS: Your Honor, I don't have that
7 information. Most, I think, of the jurisdictions were --
8 most of the jurisdictions have the burden on the schools,
9 because that's what the courts -- the Federal courts have
10 construed the Federal statute to require. What -- the
11 reason I have a difficult time answering that is because
12 the amount of due process hearings varies so widely from
13 one jurisdiction to another.

14 JUSTICE STEVENS: Right.

15 MR. SALMONS: And part of that is because of the
16 rules and the ways in which it's been adopted.

17 JUSTICE STEVENS: See, this is really a unique
18 statute in so many ways. We've learned, over the years,
19 that discrimination is being treated like everybody else
20 in this -- in this statute, unusual discrimination. And
21 I'm just wondering, it's -- I find it surprising and
22 significant that those who have been free to pick the
23 right rule have picked the rule your opponent --

24 MR. SALMONS: Well, no -- Your Honor, there are
25 several States that have clearly placed the rule -- by

1 rule, on the -- on the -- on the person initiating --

2 JUSTICE STEVENS: Right.

3 MR. SALMONS: -- the hearing. And, in fact, I
4 would say most States probably have a sort of State APA --

5 JUSTICE STEVENS: And the States that have --

6 MR. SALMONS: -- very similar to the Federal
7 APA.

8 JUSTICE STEVENS: -- the States where most of
9 the hearings have taken place and have taken the opposite
10 view, has --

11 MR. SALMONS: Well --

12 JUSTICE STEVENS: -- that been true for a number
13 --

14 MR. SALMONS: It --

15 JUSTICE STEVENS: -- of years?

16 MR. SALMONS: There may be a cause-and-effect
17 issue there, Your Honor. It may be the case that the
18 types -- that by encouraging the type of litigation under
19 the Act by switching the burden of proof has resulted in
20 more cases being brought. The interesting fact --

21 JUSTICE STEVENS: I see what you mean.

22 MR. SALMONS: -- from the 2004 amendments is
23 that Congress sought to reduce the amount of litigation
24 under the Act by, for example, allowing --

25 JUSTICE STEVENS: But those States --

1 MR. SALMONS: -- for the first time --

2 JUSTICE STEVENS: Apparently that's -- this has
3 been -- this is not really a brand-new statute. We're
4 going back to the '70s --

5 MR. SALMONS: That's correct.

6 JUSTICE STEVENS: -- with this statute. And is
7 it true that for most of that period that's been the rule,
8 where most of litigation has taken place --

9 MR. SALMONS: I -- Your Honor, I believe it's
10 the -- I can't answer that. I think it's -- it's most --
11 it's more recent than that. And I think the explosion of
12 litigation under the Act is more recent than that.

13 JUSTICE STEVENS: Right.

14 MR. SALMONS: And Congress has been very
15 concerned about that.

16 Now, by requiring that the parent's due-process
17 complaint define the contours of the hearing, we think
18 Congress has signaled where the burden of proof should be.
19 And, in addition to that, it seems -- it seems to us that
20 it has addressed the policy and fairness concerns the
21 petitioners rely on so much. As this Court recognized in
22 Rowley, it's through the procedural protections of the Act
23 that Congress sought to ensure that parents had sufficient
24 information and resources to defend the interests of their
25 child. And we think, by place -- this complaint notice

1 requirement represents a considered judgment by Congress
2 that those procedural protections will have done their
3 jobs and that parents will be in a strong enough position
4 to adequately defend the interests of their child in any
5 hearing. And that's certainly true if you would compare
6 the position of the parents under this Act with benefits
7 claimants and civil rights plaintiffs in any number of
8 other Federal statutes.

9 If Your Honors have no more questions, thank
10 you.

11 JUSTICE STEVENS: Mr. Hurd, you have about three
12 minutes left.

13 REBUTTAL ARGUMENT OF WILLIAM H. HURD

14 ON BEHALF OF PETITIONERS

15 MR. HURD: Thank you, Your Honor.

16 Let me begin by focusing on the costs of placing
17 the burden on the school system. Five years ago, the
18 United States said, when it was then, in this case, on the
19 side of the parents, that placing the burden on the school
20 district, quote, "should not substantially increase the
21 workload for the school," end quote, page 12 of its brief
22 in 2000.

23 The National School Board Association figures
24 show that the total costs of mediation, due-process
25 hearings and litigation works out to about \$22 per head

1 for every child in special education. That's not a lot of
2 money to devote to the enforcement of civil rights law.

3 JUSTICE SCALIA: For each hearing or -- for each
4 hearing or just --

5 MR. HURD: Total, Your Honor. The total figure,
6 nationwide, is 146.5 million. If you divide that number
7 by the 6.7 children in special ed --

8 JUSTICE SCALIA: Oh.

9 MR. HURD: -- it's about --

10 JUSTICE SCALIA: Oh.

11 MR. HURD: -- \$22 a head. And that --

12 JUSTICE SCALIA: I think it would be more
13 realistic to divide it by the number of hearings, rather
14 than by the number of heads.

15 MR. HURD: Well, Your Honor, the total -- the
16 total figure is 146.5 million. It is a drop in the bucket
17 compared to the 11.4 billion that Congress appropriates.
18 Moreover, Your Honor --

19 JUSTICE SOUTER: Do you know what the --

20 MR. HURD: -- there's no indication --

21 JUSTICE SOUTER: -- do you know what the figure
22 is per hearing?

23 MR. HURD: Per hearing --

24 JUSTICE SOUTER: Yes.

25 MR. HURD: -- Your Honor, is going to vary.

1 But there's no indication --

2 JUSTICE SOUTER: Well, no. You divide the
3 number of hearings by the figure you've just mentioned,
4 and that's the result. Have you -- have you done --

5 MR. HURD: There are about 3,000 --

6 JUSTICE SOUTER: -- the arithmetic?

7 MR. HURD: -- there are about 3,000 --

8 JUSTICE SOUTER: Three- --

9 MR. HURD: -- hearings, but that \$146 million is
10 not just the hearings; it also includes mediation, it
11 includes litigation. And there's no basis to conclude
12 that putting the burden on the parents is going to
13 decrease, rather than increase, hearings. If you let the
14 school systems slide by without being held accountable,
15 they are likely to be less thorough in preparing their
16 IEPs, as they were in this case. And when they're less
17 thorough, there will be more understatement, more
18 disputes, and less consensus.

19 May I also point out, in response to Justice
20 Breyer's point, if there is to be no Federal law on this
21 question, if it is purely State law -- then it ought to be
22 remanded back to the Maryland district court to ascertain
23 what Maryland law is on this point.

24 And, Justice O'Connor, while there is no
25 statute or regulation on point, there are certainly

1 background principles of law that Maryland has, just as
2 we've been arguing here at the Federal level, that would
3 dictate for Maryland where that burden of proof should
4 lie.

5 Now, opposing counsel, the Government, has
6 pointed out that there are these pleading requirements.
7 But these are not traditional pleading requirements, where
8 one side makes allegations and the other side goes,
9 "admit, admit, deny, deny." If you look on page 12 of the
10 addendum, you see the portion of the statute that requires
11 the kind of response the Government must make. It's not
12 admit/deny. It is to give, essentially, a detailed
13 explanation for its position, just as the parents have
14 given a detailed explanation for their position. And,
15 between those two positions, you can tell who should have
16 the burden of proof.

17 I see my time is up.

18 Thank the Court.

19 [Whereupon, at 12:02 p.m., the case in the
20 above-entitled matter was submitted.]

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