IN THE SUPREME COURT OF THE UNITED STATES

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BRIAN SCHAFFER, A MINOR, BY HIS :

PARENTS AND NEXT FRIENDS, JOCELYN :

AND MARTIN SCHAFFER, ET AL., :

Petitioners, :

v. : No. 04-698

JERRY WEAST, SUPERINTENDENT, :

MONTGOMERY COUNTY PUBLIC :

SCHOOLS, ET AL. :

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Washington, D.C.

Wednesday, October 5, 2005

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:03 a.m.

APPEARANCES:

WILLIAM H. HURD, ESQ., Richmond, Virginia; on behalf of the Petitioners.

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

DAVID B. SALMONS, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting the Respondents.

C O N T E N T S

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,

there is a collection of different rules.

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

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

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

[Laughter.]

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

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

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

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

JUSTICE SCALIA: I see.

MR. HURD: -- govern proceedings --

JUSTICE SCALIA: I see.

MR. HURD: -- under the --

JUSTICE SCALIA: So --

MR. HURD: -- under the IDEA.

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

MR. HURD: Your Honor, there are --

JUSTICE SCALIA: -- military schools on military --

MR. HURD: -- DOD schools --

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

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

JUSTICE SCALIA: No?

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

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

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

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

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

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

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

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

JUSTICE O'CONNOR: Do you --

MR. HURD: -- in this case --

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

proof under this statute?

MR. HURD: Your Honor, we think that it is not. We believe it is a Federal question that --

JUSTICE O'CONNOR: Have some States purported to adopt a general rule on this?

MR. HURD: Some have, Your Honor.

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

MR. HURD: Well, we believe -- yes, Your Honor, we believe it is a -- it is a Federal-law question. What we do know, however, is that Maryland has adopted no rule on this question, no statute to allocate the burden, one way or the other. And even if a State has the ability to adopt a rule, if it wishes to do so, that still leaves open the question of what rules should apply in the absence of a State-based rule. Now --

JUSTICE GINSBURG: Mr. Hurd, do you recognize -- to narrow what's at issue -- that the parent objecting to the school's IEP would at least have a burden of coming forward? In other words, I -- are you speaking just of the ultimate persuasion burden? Wouldn't the parents at least be required to come forward with some reason to believe that the State -- the school district's plan is inadequate?

MR. HURD: Your Honor, we don't believe that it's necessary. We do recognize that is a different

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

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

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

MR. HURD: Well --

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

MR. HURD: Your Honor, I would --

JUSTICE O'CONNOR: -- guiding principle.

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

JUSTICE O'CONNOR: Okay, but let --

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

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

MR. HURD: -- congressional intent.

JUSTICE O'CONNOR: -- burden-of-proof cases. What is your closest one where the courts are left to do this? What do we look to?

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

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

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

MR. HURD: Your Honor --

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

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

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

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

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

JUSTICE SCALIA: Sure.

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

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

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

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

these cases. I would understand your argument if the State -- the school district said, "We're not going to educate this kid. Throw him into the pot with everybody else. We won't give you an IEP." That's not what we've got here. And, in fact, if that's what we had here, the burden-of-proof issue would be of no significance, because the State -- the parents would walk in, and the only thing they'd have to do to satisfy "a" burden of proof would be to say, "They didn't come up with an IEP."

MR. HURD: Justice Scalia [sic] --

JUSTICE SOUTER: Instead, what we have here is a fight about whether it's a good IEP or no IEP.

MR. HURD: Justice Scalia, with all due respect, there is no IEP; there's only a proposed IEP. And that is --

JUSTICE SOUTER: Then --

MR. HURD: -- the crucial difference --

JUSTICE SOUTER: -- then we're arguing about words.

MR. HURD: The point, though, is that with --

JUSTICE SOUTER: The State is not saying, "We will not come up with an IEP." The State is saying, "This is what we're going to give you," and the parents say, "It's not good enough."

MR. HURD: Your Honor, that is not an IEP; that

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

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

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

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

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

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

JUSTICE KENNEDY: In all events --

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

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

MR. HURD: They --

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

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

JUSTICE KENNEDY: Then let --

MR. HURD: -- equal partners --

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

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

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

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

MR. HURD: Well, Your Honor --

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

doesn't have the burden of proof?

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

JUSTICE BREYER: That's what I --

MR. HURD: -- because --

JUSTICE BREYER: I do think that, yes.

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

JUSTICE BREYER: There isn't?

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

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

[Laughter.]

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

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

MR. HURD: Well --

JUSTICE BREYER: -- "in equipoise"?

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

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

MR. HURD: In this --

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

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

the burden of proof would go first.

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

MR. HURD: It --

JUSTICE GINSBURG: -- the school district went first.

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

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

MR. HURD: Oh --

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

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

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

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

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

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

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

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

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

Number one has to do with the risk of an erroneous decision. This Court, for example, in Santosky, said: What will happen if there is an erroneous decision? It asked that question in the context of the standard of proof. It is important to ask that same question here.

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

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

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

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

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

MR. HURD: Your Honor, because of --

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

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

JUSTICE STEVENS: Well, that's --

MR. HURD: -- to the child --

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

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

JUSTICE STEVENS: -- not in all cases.

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

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

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

JUSTICE BREYER: This is true.

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

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

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

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

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

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

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

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

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

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

MR. HURD: Yes, sir.

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

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

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

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

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

You have to, instead, we submit, decide the

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

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

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

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

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

JUSTICE STEVENS: Mr. Garre.

ORAL ARGUMENT OF GREGORY G. GARRE

ON BEHALF OF RESPONDENTS

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

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

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

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

JUSTICE O'CONNOR: Yes.

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

JUSTICE GINSBURG: As I understand it --

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

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

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

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

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

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

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

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

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

JUSTICE GINSBURG: I thought --

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

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

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

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

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

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

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

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

JUSTICE SCALIA: Right.

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

JUSTICE SCALIA: Okay.

MR. GARRE: -- school districts can initiate.

The second situation is in -- is where children act up in the classroom. The school -- the statute places restrictions on how the school district can discipline a child if the school district determines that the misbehavior is a manifestation of the child's disability. In that situation, if the -- if the school district believes that more severe discipline is warranted than would be allowed under the statute, the school district has to initiate the hearing in order to get an ALJ to allow it to take more severe action.

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

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

JUSTICE GINSBURG: Mr. Garre, do you have any

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

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

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

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

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

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

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

we've suggested that. In fact --

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

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

JUSTICE BREYER: Oh, it's just --

MR. GARRE: -- unless --

JUSTICE BREYER: -- a default rule.

MR. GARRE: Exactly. That the --

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

MR. GARRE: And that --

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

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

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

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

MR. GARRE: Well --

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

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

JUSTICE BREYER: Well --

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

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

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

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

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

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

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

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

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

JUSTICE KENNEDY: Well --

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

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

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

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

JUSTICE SCALIA: Well, would you --

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

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

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

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

JUSTICE STEVENS: May I --

MR. GARRE: That would be --

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

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

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

JUSTICE STEVENS: Right. I --

MR. GARRE: -- not the --

JUSTICE STEVENS: -- understand.

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

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

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

JUSTICE STEVENS: May I ask this? Are there

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

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

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

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

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

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

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

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

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

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

JUSTICE GINSBURG: Mr. Garre, if you -- if you had a situation, say, under Title 7 -- and you pointed out in your brief that, in most benefit cases, most -- the person -- whether it's Social Security -- the person who is making the claim has the burden of proof. But there is something different about this setup, because the statute does obligate the school district to come up with a plan. And so, I was thinking, if you have a Title 7 case, and the plaintiff prevails on the merits, and then there's a question of remedy, and the employer said, "I propose this -- these changes to remedy the violation," wouldn't the employer in that case have the burden of establishing the adequacy of the plan that it has come up with to remedy the problem?

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

JUSTICE GINSBURG: No, you made --

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

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

MR. GARRE: I --

JUSTICE GINSBURG: -- that the -- that there has been a violation. And then the question is, What remedy? And the employer proposes a remedy. Wouldn't the employer have the burden of showing the adequacy of the remedy that the employer --

MR. GARRE: I think the plaintiff would still bear the burden of showing that he is -- he or she has been discriminated against --

JUSTICE SCALIA: Well, there's no violation here. I mean, this is a totally different --

MR. GARRE: Well --

JUSTICE SCALIA: -- situation. I mean --

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

JUSTICE KENNEDY: -- there hasn't been finding of any violation by the school district. The school district --

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

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

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

JUSTICE KENNEDY: -- I'm interested in Justice Ginsburg's question. Let's assume you show a violation. Is there -- is there any law on who has the burden of showing that the remedy is sufficient?

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

JUSTICE KENNEDY: But when I ask --

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

JUSTICE KENNEDY: You're asking about the --

MR. GARRE: -- a different question.

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

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

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

JUSTICE STEVENS: Of course, the background --

MR. GARRE: -- of --

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

MR. GARRE: Well --

JUSTICE STEVENS: -- in this whole area.

MR. GARRE: But, Your Honor, Congress found that State and local governments would retain the primary responsibility for making educational --

JUSTICE SCALIA: But you say this is --

MR. GARRE: -- decisions under the Act.

JUSTICE SCALIA: -- okay. You say all these horrible consequences are perfectly okay, so long as the States do it.

MR. GARRE: Well --

JUSTICE SCALIA: I mean, if the consequences are that horrible, how can you allow the States to put the burden on the other side?

MR. GARRE: Our position is that -- is that the Federal law creates a floor, Justice Scalia, that Congress established the rules --

JUSTICE SCALIA: Well, I understand that.

MR. GARRE: -- that it thought was appropriate, and then States --

JUSTICE SCALIA: But your -- your parade of horribles just never --

MR. GARRE: But --

JUSTICE SCALIA: -- never gets started, once you -- once you acknowledge that the States can blow the

whistle to start the parade.

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

JUSTICE GINSBURG: Is there any --

MR. GARRE: Here --

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

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

Thank you, Your Honor.

JUSTICE STEVENS: Mr. Salmons.

ORAL ARGUMENT OF DAVID B. SALMONS

ON BEHALF OF THE UNITED STATES

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

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

JUSTICE SCALIA: Absent different disposition

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

MR. SALMONS: Your Honor, the --

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

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

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

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

JUSTICE O'CONNOR: In other words --

MR. SALMONS: -- just establishes a floor.

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

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

JUSTICE GINSBURG: And do you have --

MR. SALMONS: -- improper --

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

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

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

JUSTICE SCALIA: This --

MR. SALMONS: I'm sorry.

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

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

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

JUSTICE O'CONNOR: Do we have to --

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

JUSTICE O'CONNOR: -- decide that here?

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

JUSTICE O'CONNOR: Maryland --

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

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

MR. SALMONS: Maryland --

JUSTICE O'CONNOR: -- such a rule.

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

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

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

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

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

MR. SALMONS: No --

JUSTICE STEVENS: -- position?

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

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

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

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

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

JUSTICE STEVENS: No, I --

MR. SALMONS: -- or the other.

JUSTICE STEVENS: Not the number of States.

MR. SALMONS: But most --

JUSTICE STEVENS: Number of hearings.

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

JUSTICE STEVENS: Yes.

MR. SALMONS: -- in the country --

JUSTICE STEVENS: Yes.

MR. SALMONS: -- occur in jurisdictions --

JUSTICE STEVENS: I think --

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

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

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

JUSTICE STEVENS: Right.

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

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

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

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

JUSTICE STEVENS: Right.

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

JUSTICE STEVENS: And the States that have --

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

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

MR. SALMONS: Well --

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

MR. SALMONS: It --

JUSTICE STEVENS: -- of years?

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

JUSTICE STEVENS: I see what you mean.

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

JUSTICE STEVENS: But those States --

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

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

MR. SALMONS: That's correct.

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

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

JUSTICE STEVENS: Right.

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

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

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

If Your Honors have no more questions, thank you.

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

REBUTTAL ARGUMENT OF WILLIAM H. HURD

ON BEHALF OF PETITIONERS

MR. HURD: Thank you, Your Honor.

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

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

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

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

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

JUSTICE SCALIA: Oh.

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

JUSTICE SCALIA: Oh.

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

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

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

JUSTICE SOUTER: Do you know what the --

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

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

MR. HURD: Per hearing --

JUSTICE SOUTER: Yes.

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

But there's no indication --

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

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

JUSTICE SOUTER: -- the arithmetic?

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

JUSTICE SOUTER: Three- --

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

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

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

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

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

I see my time is up.

Thank the Court.

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