SUPREME COURT OF THE UNITED STATES

No. 04–698

BRIAN SCHAFFER, A MINOR, BY HIS PARENTS AND NEXT FRIENDS, JOCELYN AND MARTIN SCHAFFER, ET AL., PETITIONERS *v.* JERRY WEAST, SUPERINTENDENT, MONTGOMERY COUNTY PUBLIC SCHOOLS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

[November 14, 2005]

JUSTICE BREYER, dissenting.

As the majority points out, the Individuals with Disabilities Education Act (Act), 20 U. S. C. §1400 *et seq.*, requires school districts to "identify and evaluate disabled children, . . . develop an [Individualized Education Program] for each one . . . , and review every IEP at least once a year." *Ante*, at 3 (opinion of the Court). A parent dissatisfied with "any matter relating [1] to the identification, evaluation, or educational placement of the child," or [2] to the "provision of a free appropriate public education," of the child, has the opportunity "to resolve such disputes through a mediation process." 20 U. S. C. A. §§1415(a), (b)(6)(A), (k) (Supp. 2005). The Act further provides the parent with "an opportunity for an impartial due process hearing" provided by the state or local education agency. §1415(f)(1)(A). If provided locally, either party can appeal the hearing officer's decision to the state educational agency. §1415(g). Finally, the Act allows any "party aggrieved" by the results of the state hearing(s), "to bring a civil action" in a federal district court. §1415(i)(2)(A). In sum, the Act provides for school board action, followed by (1) mediation, (2) an impartial state due process hearing

with the possibility of state appellate review, and, (3) federal district court review.

The Act also sets forth minimum procedures that the parties, the hearing officer, and the federal court must follow. See, *e.g.,* §1415(f)(1) (notice); §1415(f)(2) (disclosures); §1415(f)(3) (limitations on who may conduct the hearing); §1415(g) (right to appeal); §1415(h)(1) ("the right to be accompanied and advised by counsel"); §1415(h)(2) ("the right to present evidence and confront, cross-examine, and compel the attendance of witnesses"); §1415(h)(3) (the right to a transcript of the proceeding); §1415(h)(4) ("the right to written . . . findings of fact and decisions"). Despite this detailed procedural scheme, the Act is silent on the question of who bears the burden of persuasion at the state "due process" hearing.

The statute's silence suggests that Congress did not think about the matter of the burden of persuasion. It is, after all, a relatively minor issue that should not often arise. That is because the parties will ordinarily introduce considerable evidence (as in this case where the initial 3-day hearing included testimony from 10 witnesses, 6 qualified as experts, and more than 50 exhibits). And judges rarely hesitate to weigh evidence, even highly technical evidence, and to decide a matter on the merits, even when the case is a close one. Thus, cases in which an administrative law judge (ALJ) finds the evidence in precise equipoise should be few and far between. Cf. *O'Neal* v. *McAninch,* 513 U. S. 432, 436–437 (1995). See also Individuals with Disabilities Education Improvement Act of 2004, Pub. L. 108–446, §§615(f)(3)(A)(ii)–(iv), 118 Stat. 2721, 20 U. S. C. A. §§1415(f)(3)(A)(ii)–(iv) (Supp. 2005) (requiring appointment of ALJ with technical capacity to understand Act).

Nonetheless, the hearing officer held that before him was that *rara avis*—a case of perfect evidentiary equipoise. Hence we must infer from Congress' silence (and from the

rest of the statutory scheme) which party—the parents or the school district—bears the burden of persuasion.

One can reasonably argue, as the Court holds, that the risk of nonpersuasion should fall upon the "individual desiring change." That, after all, is the rule courts ordinarily apply when an individual complains about the lawfulness of a government action. *E.g., ante*, at 6–11 (opinion of the Court); 377 F. 3d 449 (CA4 2004) (case below); *Devine* v. *Indian River County School Bd.*, 249 F. 3d 1289 (CA11 2001). On the other hand, one can reasonably argue to the contrary, that, given the technical nature of the subject matter, its human importance, the school district's superior resources, and the district's superior access to relevant information, the risk of nonpersuasion ought to fall upon the district. *E.g., ante*, at 1–5 (GINSBURG, J., dissenting); 377 F. 3d, at 456–459 (Luttig, J., dissenting); *Oberti* v. *Board of Ed.,* 995 F. 2d 1204 (CA3 1993); *Lascari* v. *Board of Ed.*, 116 N. J. 30, 560 A. 2d 1180 (1980). My own view is that Congress took neither approach. It did not decide the "burden of persuasion" question; instead it left the matter to the States for decision.

The Act says that the "establish[ment]" of "procedures" is a matter for the "State" and its agencies. §1415(a). It adds that the hearing in question, an administrative hearing, is to be conducted by the "State" or "local educational agency." 20 U. S. C. A. §1415(f)(1)(A) (Supp. 2005). And the statute as a whole foresees state implementation of federal standards. §1412(a); *Cedar Rapids Community School Dist.* v. *Garret F.,* 526 U. S. 66, 68 (1999); *Board of Ed. of Hendrick Hudson Central School Dist., Westchester Cty.* v. *Rowley,* 458 U. S. 176, 208 (1982). The minimum federal procedural standards that the Act specifies are unrelated to the "burden of persuasion" question. And different States, consequently and not surprisingly, have resolved it in different ways. See, *e.g.*, Alaska Admin.

Code, tit. 4, §52.550(e)(9) (2003) (school district bears burden); Ala. Admin. Code Rule 290–8–9.08(8)(c)(6)(ii)(I) (Supp. 2004); (same); Conn. Agencies Regs. §10–76h–14 (2005) (same); Del. Code Ann., tit. 14, §3140 (1999) (same); 1 D. C. Mun. Regs., tit. 5, §3030.3 (2003) (same); W. Va. Code Rules §126–16–8.1.11(c) (2005) (same); Ind. Admin. Code, tit. 511, 7–30–3 (2003) (incorporating by reference Ind. Code §4–21.5–3–14 (West 2002)) (moving party bears burden); 7 Ky. Admin. Regs., tit. 707, ch. 1:340, Section 7(4) (2004) (incorporating by reference Ky. Rev. Stat. Ann. §13B.090(7) (Lexis 2003)) (same); Ga. Comp. Rules & Regs., Rule 160–4–7–.18(1)(g)(8) (2002) (burden varies depending upon remedy sought); Minn. Stat. Ann. §125A.091, subd. 16 (West Supp. 2005) (same). There is no indication that this lack of uniformity has proved harmful.

Nothing in the Act suggests a need to fill every interstice of the Act's remedial scheme with a uniform federal rule. See *Kamen* v. *Kemper Financial Services, Inc.,* 500 U. S. 90, 98 (1991) (citations omitted). And should some such need arise—*i.e.*, if non-uniformity or a particular state approach were to prove problematic—the Federal Department of Education, expert in the area, might promulgate a uniform federal standard, thereby limiting state choice. 20 U. S. C. A. §1406(a) (Supp. 2005); *Irving Independent School Dist.* v. *Tatro,* 468 U. S. 883, 891–893 (1984); see also *Barnhart* v. *Walton,* 535 U. S. 212, 217–218 (2002); *NationsBank of N. C., N. A.* v. *Variable Annuity Life Ins. Co.,* 513 U. S. 251, 256–257 (1995); *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.,* 467 U. S. 837, 842–845 (1984).

Most importantly, Congress has made clear that the Act itself represents an exercise in "cooperative federalism." See *ante* (opinion of the Court), at 2–3. Respecting the States' right to decide this procedural matter here, where education is at issue, where expertise matters, and

where costs are shared, is consistent with that cooperative approach. See *Wisconsin Dept. of Health and Family Servs.* v. *Blumer*, 534 U. S. 473, 495 (2002) (when interpreting statutes "designed to advance cooperative federalism[,] . . . we have not been reluctant to leave a range of permissible choices to the States"). Cf. *Smith* v. *Robbins,* 528 U. S. 259, 275 (2000); *New State Ice Co.* v. *Liebmann,* 285 U. S. 262, 311 (1932) (Brandeis, J., dissenting). And judicial respect for such congressional determinations is important. Indeed, in today's technologically and legally complex world, whether court decisions embody that kind of judicial respect may represent the true test of federalist principle. See *AT&T Corp.* v. *Iowa Utilities Bd.,* 525 U. S. 366, 420 (1999) (BREYER, J., concurring in part and dissenting in part).

Maryland has no special state law or regulation setting forth a special IEP-related burden of persuasion standard. But it does have rules of state administrative procedure and a body of state administrative law. The state ALJ should determine how those rules, or other state law applies to this case. Cf., *e.g.*, Ind. Admin. Code, tit. 511,7–30–3 (2003) (hearings under the Act conducted in accord with general state administrative law); 7 Ky. Admin. Regs., tit. 707, ch. 1:340, Section 7(4) (2004) (same). Because the state ALJ did not do this (*i.e.*, he looked for a federal, not a state, burden of persuasion rule), I would remand this case.