

BEFORE THE WASHINGTON STATE
OFFICE OF THE SUPERINTENDENT OF PUBLIC INSTRUCTION

In re:)
)
) MEMORANDUM IN SUPPORT OF
) PETITION FOR RULEMAKING TO
6 C.F. ,) CHANGE THE BURDEN OF PROOF IN
a Washington State resident;) SpEd DUE PROCESS HEARINGS TO
) SCHOOL DISTRICTS
7 The Fred T. Korematsu Center for Law and)
8 Equality, Seattle University School of Law;)
9 Disability Rights Washington;)
10 Seattle Special Education PTSA;)
11 The Arc of Washington State;)
12 The Arc of King County;)
13 Open Doors for Multicultural Families;)
14 Roots of Inclusion;)
15 Washington Autism Alliance;)
16 Washington Alliance for Special Education;)
17 Washington Multicultural Services Link;)
18 Peace NW;)
19 Attorneys for Education Rights (AFER);)
20 TeamChild;)
21 American Civil Liberties Union)
of Washington)
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I. INTRODUCTION

This Memorandum in Support of the petition for rulemaking is submitted by the Ronald A. Peterson Law Clinic at Seattle University School of Law on behalf of Ms. C.F., parent of a student receiving special education services; The Fred T. Korematsu Center,¹ Disability Rights Washington, TeamChild, the American Civil Liberties Union of Washington, and AFER, legal advocacy organizations that represent clients to advance justice and equality; and Seattle Special Education PTSA, The Arc of Washington State, The Arc of King County, Open Doors for Multicultural Families, Roots of Inclusion, Washington Autism Alliance, Washington Alliance for Special Education, Washington Multicultural Services Link, and Peace NW, organizations that support, empower, and connect families and children with disabilities in seeking equity, dignity, and quality education and services.

The Office of Superintendent of Public Instruction (OSPI) can better support children with disabilities and their families by adopting a rule that places the burden of proof on school districts in all special education (SpEd) due process hearings. Prior to 2005, the burden of proving that an Individualized Education Plan (IEP) provided an appropriate education to the student was always on the school districts in Washington state rather than on the child's parents.² However, in a 2005 case, *Schaffer v. Weast*, the United States Supreme Court held that the burden of proof in an administrative hearing under the Individuals with Disabilities Education Act (IDEA) should be on the party seeking relief.³ If a parent is the party seeking relief for their child, as is most often the case in these hearings, then the burden falls on the parent. The Supreme Court, however, declined

25 ¹The Korematsu Center does not, in this brief or otherwise, represent the official views of Seattle University.

26 ² *Seattle Sch. Dist., No. 1 v. B.S.*, 82 F.3d 1493, 1498 (9th Cir. 1996) citing *Clyde K. v. Puyallup Sch. Dist.*, 35 F.3d 1396, 1398 (9th Cir.1994).

³ 546 U.S. 49 (2005)

1 to address whether States may decide to override the default rule and instead place the burden on
2 school districts.⁴ As a result, individual states are able and have promulgated rules and statutes
3 that change the burden from the default rule in *Schaffer* to create a more fair and equitable hearing
4 system for children with disabilities. We ask the OSPI to do just that – promulgate a new rule
5 assigning the burden of proof to school districts in all SpEd hearings.
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7 As will be shown, the need for a new rule putting the burden on school districts has become
8 even more urgent with the pandemic and its negative impact on children receiving special
9 education services. Even without the disastrous impact of the pandemic on learning, the current
10 rule in Washington State placing the burden of proof on parents in administrative due process
11 hearings creates a mountain of inequity against disabled children. It discourages parents from
12 challenging school districts’ decisions and from seeking an appropriate education for their
13 children. In addition to the difficulty of attempting to prove that their child’s academic curriculum
14 is insufficient, parents often lack the resources necessary to adequately represent their children in
15 the hearing and lack access to the vital information and expert testimony needed to prove their
16 case for educational services. The school district is better suited, has superior resources, and has
17 access to the information and expertise, making it far easier for it to prove what is required at
18 administrative due process hearings. As will be shown, placing the burden on the school district
19 will alleviate the mountain of inequity in administrative due process hearings while efficiently
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23 ⁴ *Id.* at 61. “Finally, respondents and several States urge us to decide that States may, if they wish, override the default
24 rule and put the burden always on the school district. Several States have laws or regulations purporting to do so, at
25 least under some circumstances. See, *e.g.*, Minn. Stat. §125A.091, subd. 16 (2004); Ala. Admin. Code Rule 290–8–
26 9–.08(8)(c)(6) (Supp. 2004); Alaska Admin. Code tit. 4, §2.550(e)(9) (2003); Del. Code Ann., Tit. 14, §3140
(1999). Because no such law or regulation exists in Maryland, we need not decide this issue today. Justice Breyer
contends that the allocation of the burden ought to be left *entirely* up to the States. But neither party made this
argument before this Court or the courts below. We therefore decline to address it.”

1 getting children with disabilities the appropriate education to which they are entitled. OSPI's rules
2 should require that result.

3 This Memorandum demonstrates that adopting the proposed rule is necessary for three
4 primary reasons. First, OSPI can promulgate this rule because *Schaffer* and its progeny do not
5 restrict states from changing the burden back to school districts via rulemaking, many states have
6 successfully done so, and Washington's OSPI statute and the Administrative Procedures Act give
7 the Superintendent the specific authority to regulate in the area of administrative hearing procedure
8 and burden of proof; at least 13 other Washington State agencies have done exactly what we are
9 requesting by promulgating over 20 rules that set the burden of proof in their administrative
10 hearings using this general rulemaking authority. Second, OSPI should promulgate this rule
11 because placing the burden of proof on school districts would even the unequal power dynamic in
12 hearings; it would make the hearing system more efficient; it would make the hearing system more
13 equitable; and it would better align with OSPI's intent, mission, and values to have this fair and
14 just rule in place. Lastly, OSPI should adopt the proposed rule in order to comply with the
15 Washington State Constitution and IDEA. The proposed rule will facilitate a more racially
16 equitable and just administrative hearing process that will ultimately provide children with
17 disabilities the appropriate education they deserve and require as a right.
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20 **II. COVID-19 AND STRUCTURAL RACISM IMPACTS ON SPED**

21 This past two years, our nation has experienced an unprecedented global pandemic along with
22 a racial justice movement. These events have allowed us to take a step back and reflect upon the
23 structural racism and barriers that face our communities, and in this case, our students. This is the
24 time to examine our education system, and it is crucial to assess the ways in which it plays a part
25 in the institutional racism that plagues our nation today, and then to make the necessary changes
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1 to alleviate such practices moving forward. OSPI Superintendent Chris Reykdal stated in the 2020
2 Washington Voter’s pamphlet that he would like us to “emerge from COVID-19 better connected”
3 and “enhance mental health and other student supports.”⁵ To do so, it is essential to view this
4 proposed rule change petition through a racial justice lens.

5
6 The issues around placing the burden on parents of students with disabilities rather than
7 the school district in SpEd hearings described below are exacerbated by the effects of COVID-19
8 on families and disproportionately harm Black and other minority students. Changing the burden
9 through this rulemaking will help to alleviate the racial inequity in SpEd due process hearings and
10 in the provision of needed educational services to children with disabilities.

11 **III. PROPOSED RULE**

12 Petitioners request that the following proposed rule be placed in Washington
13 Administrative Code (WAC) Chapter 392-172A: RULES FOR THE PROVISION OF SPECIAL
14 EDUCATION, specifically, between WAC 392-172A-05080 and WAC 392-172A-05125, the
15 section that governs due process hearing procedures:
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- 17 *(1) The party who has the burden of proof is the party who has the responsibility to*
18 *provide evidence to persuade the ALJ that a position is correct under the standard*
19 *of proof required.*
20 *(2) In all due process hearings, the burden of proof is on the School District. The*
21 *standard of proof required to be met is by a preponderance of the evidence.*
22 *(3) The ALJ decides if a party has met the burden of proof.*
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⁵ Official Publication Secretary of State, Voter’s Pamphlet Washington State Elections (2020).

1 **IV. ARGUMENTS FOR GRANTING THIS PETITION**

2 **A. OSPI has the power to change the SpEd burden of proof to school districts via**
3 **rulemaking.**

4 In Washington State, the legislature has given specific statutory authority to the
5 Superintendent of Public Instruction to regulate the procedures in SpEd due process hearings.⁶

6 Where a child with disabilities...has been denied the opportunity of a special
7 educational program by a local school district there shall be *a right of appeal to the*
8 *parent or guardian of such child to the superintendent of public instruction*
*pursuant to procedures established by the superintendent...*RCW 28A.155.080.
(emphasis added.)

9 Using this statutory authority, the Superintendent has already issued regulations governing these
10 important hearing procedures at WAC chapter 392-172A.⁷ With this statutory authority and no
11 statute or other law addressing or prohibiting a change in the burden to school districts,
12 Superintendent Reykdal has the full authority to grant this petition and promulgate an additional
13 procedural rule assigning the burden of proof in SpEd hearings to school districts that protects
14 children with disabilities from being wrongfully denied educational benefits.
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16 Burden of proof is considered by most courts to be a procedural rule. For example, in *PNGI*
17 *Charles Town Gaming, LLC v. West Virginia Racing Com'n*, 234 W.VA 352, 765 S.E.2d 241
18 (2014), the court looked to the West Virginia Administrative Procedure Act and found that the
19 burden of proof rule governed the presentation of evidence in hearings, and therefore was held to
20 be a procedural rule. *Id.* at 360. The court cited to a number of other state agency rule examples to
21 support the holding that West Virginia’s “burden of proof for administrative proceedings is
22 commonly established by procedural rule.” See *Id.* at 360-61. The burden of proof has also been
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26 ⁶ See RCW 28A.155.080 and 090 giving OSPI the specific statutory authority to regulate the procedures in SpEd
hearings (as long as the procedures comport with statutes).

⁷ See WAC 392-172A-05080 through WAC 392-172A-05125 – OSPI Due Process Hearing Procedures.

1 held to be procedural in other areas of law. See e.g. *Mann v. GTCR Gold Rauner, L.L.C.*, 483 F.
2 Supp.2d 884, 902 (2007) (court held that the business judgement rule, which defines the burden
3 of proof, is a procedural rule), *In re Estate of Cuneo*, 334 Ill.App.3d 594, 598, 780 N.E.2d 325
4 (2002) (court held in a deed dispute that burden of proof is a “procedural matter”), and *Babcock v.*
5 *Chesapeake and O. Ry. Co.*, 83 Il.App.3d 919, 929, 404 N.E.2d 265 (1979) (court noted that in
6 Michigan burden of proof in contributory negligence cases is a “procedural law”).
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8 Similarly, in Washington State over 13 other state agencies have found that the burden of
9 proof in their administrative hearings is procedural and set that burden in their agency hearing
10 rules. These state agencies have promulgated over 20 rules setting the burden in their hearings
11 using either the general authority of the Washington APA, RCW 34.05.220,⁸ or a specific agency
12 statute granting general hearing procedural rulemaking authority like OSPI’s statute. Like OSPI,
13 none of these state agencies had statutes that specifically set who had the burden in that agency’s
14 administrative hearings; that was left to the discretion of the state agency to place in rule. For
15 example, the hearing procedure for the denial of teacher certification due to lack of good moral
16 character is heard before the Professional Educator Standards Board; the burden of proof in those
17 hearings is set in WAC 139-86-170.⁹ Like here, the PESB statute gives general hearing procedure
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20 ⁸ RCW 34.05.220(1)(a): (1) In addition to other rule-making requirements imposed by law:

21 (a) Each agency may adopt rules governing the formal and informal procedures prescribed or authorized by this
chapter and rules of practice before the agency, together with forms and instructions.

22 ⁹ WAC 139-86-170- **Burden and standard of proof.**

The following burden and standard of proof shall be applicable:

- 23 (1) If an application for certification or reinstatement has been denied for lack of good moral character or personal
24 fitness, the evidence submitted by the applicant must prove by clear and convincing evidence that he or she is of
25 good moral character and personal fitness or the application will be denied.
26 (2) In a suspension or revocation proceeding, the superintendent of public instruction must prove by clear and
convincing evidence that the education practitioner is not of good moral character or personal fitness or has
committed an act of unprofessional conduct.
(3) In all other proceedings, including reprimand, the standard of proof shall be a preponderance of evidence.

1 rulemaking authority to the agency but does not set the burden of proof, leaving that to the
2 discretion of the Board.

3 There are numerous other examples of Washington State agencies setting the burden of
4 proof in their administrative hearings under the general authority granted in the agencies' statute
5 or in the APA RCW 34.05.220 and without a specific statute setting the burden: the Health Care
6 Authority in WAC 182-16-066 and WAC 182-32-066 (Public Employee Benefits hearings);
7 Department of Retirement Systems in WAC 415-08-420, WAC 415-104-155, WAC 415-105-072
8 (appeals of deferred compensation decisions); Personnel Appeals Board in WAC 358-30-170
9 (appeals from layoff, reduction in force, dismissal, etc.); Forest Practices Hearing Board in WAC
10 332-08-245 (appeals from Department of Natural Resources notice to comply).¹⁰ These
11 Washington State agency examples alone should give assurance to OSPI that it has the legal
12 authority to grant this petition to set the burden of proof in SpEd hearings on the school district via
13 its rulemaking authority.
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16 OSPI also has the specific authority to change the burden of proof via rulemaking in SpEd
17 hearings to the school district. Courts have repeatedly upheld a state's ability to change the burden
18 of proof to school districts via statutes or rules, and many other states have done so since *Schaffer*.
19 When *Schaffer* was argued, the respondent State of Maryland Montgomery County Public School
20 System asked the Supreme Court to confirm that states could choose to override the default burden
21 and put the burden of proof back on the school district.¹¹ Because Maryland did not have such a
22 statute or regulation, the majority refused to decide the issue.¹² However, in his dissent Justice
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25 ¹⁰ See Attachment #1: *Partial List of WA State Agency Rules Assigning Burden of Proof in Hearings* for a more
complete list of state agencies and their burden of proof rules.

26 ¹¹ *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 61, 126 S. Ct. 528, 537, 163 L. Ed. 2d 387 (2005).

¹² *Id.*

1 Breyer concluded that, because the IDEA involved cooperative federalism, states have the ability
2 to make the burden of proof assignment as they see fit.¹³ Since *Schaffer*, the U.S. Supreme Court
3 has not addressed the issue of if or how states can change the burden of proof, but lower court
4 decisions have assumed that a state can change the burden of proof, and many have.¹⁴

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6 Currently, at least six states have changed the burden of proof to school districts instead of
7 parents by passing statutes.¹⁵ Most recently during the 2021 legislative session, the state of New
8 Hampshire passed legislation that puts the burden of proof firmly on the district in all SpEd
9 hearings.¹⁶ New Jersey passed a statute in 2008 putting the burden of proof fully on the school
10 district. It changed the burden because it felt the goals of the IDEA required the burden to be on
11 the school district.¹⁷ Nevada also changed the burden of proof to school districts via statute.¹⁸ It
12 did so because it recognized the lack of parity of information between the parents and school
13 districts and the damage that litigation costs can do to families. In the wake of the change, the
14 number of due process hearings filed have dropped and it has incentivized school districts to settle,
15 as discussed in greater detail below.

16
17 Some states have used rulemaking rather than legislation to assign the burden of proof in
18 SpEd hearings. Although most of these states have set the burden on the moving party,¹⁹ the use
19 of agency rulemaking by these states shows that agencies can and do use their power without a
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22 ¹³ *Id.* At 541 (Justice Breyer dissenting)

23 ¹⁴ *See* A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 492, 501 (S.D.N.Y. 2011)

24 ¹⁵ Del. Code Ann. tit. 14, § 3140 (2011); 105 Ill. Comp. Stat. Ann. 5/14-8.02a(g) (2009); N.J. Stat. Ann. § 18A:46-
1.1 (West 2011); N.Y. Educ. Law § 4404(1)(c) (McKinney 2011); Nev. Rev. Stat. § 388.467 N.H. House Bill 581.
<https://legiscan.com/NH/text/HB581/id/2238192>.

25 ¹⁶ *See* N.H. House Bill 581; New Hampshire, <https://legiscan.com/NH/text/HB581/id/2238192>

26 ¹⁷ [N.J. Rev. Stat. § 18A:46-1.1 \(2008\)](https://legiscan.com/NJ/text/18A:46-1.1/2008);

¹⁸ Nev. Rev. Stat. § 388.467.

¹⁹ *See e.g.* Alaska, State Board of Education and Early Development, 4 AAC 52.550(i)(11); Alabama State Board of
Education, Alabama Administrative Code 290-8-9-.08-9(c).

1 specific state statute setting the burden. One notable exception is the state of Connecticut. Before
2 the *Schaffer* decision, the Connecticut Department of Education required that “In all cases... the
3 public agency (school district) has the burden of proving the appropriateness of the child's program
4 or placement, or of the program or placement proposed by the public agency.”²⁰ This burden shall
5 be met by a preponderance of the evidence...”.²¹ Connecticut’s education agency did so using its
6 general authority to make due process hearing procedural rules in statute. Connecticut’s agency
7 rule remains the only law governing the burden of proof in SpEd hearings since *Schaffer*.²²
8

9 OSPI should follow the lead of Connecticut and the other six states that have placed the
10 burden of proof in SpEd hearings on school districts by exercising its rulemaking authority to
11 protect children with disabilities in the administrative hearing process.
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13 **B. Pandemic impacts, equity, efficiency, racial justice, OSPI’s mission, the State**
14 **Constitution, and the rationale for burden of proof assignment require a new rule**
15 **placing the burden on school districts.**

16 ***1. The COVID-19 pandemic requires additional protections for parents in SpEd***
17 ***due process hearings.***

18 Changing the burden is even more critical now as special education students have been
19 navigating school from home during the 2020-21 school year/global pandemic and some into the
20 2021-22 school year. The United States Government Accountability Office (GAO) conducted a
21 study regarding the challenges of “distance learning” on students with disabilities during the
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25 ²⁰ Conn. Agencies Regs. Sec. 10-76h-14

26 ²¹ *Id.*

²² See, Research Report to the Conn. General Assembly, Feb. 3, 2010 for a write up on the burden of proof rule history,
<https://www.cga.ct.gov/2010/rpt/2010-R-0054.htm>.

1 COVID-19 pandemic.²³ As of September 21, 2020, “74 of the 100 largest school districts in the
2 United States” chose to do distance learning during the 2020-2021 school year.²⁴

3 While a school’s special education services may not be up to the same standard as prior to
4 the pandemic, the Department of Education directed that “each student with a disability is provided
5 the special education and related services identified in the student’s IEP.”²⁵ This study found that
6 it was “difficult to deliver special education services during distance learning” due to varying
7 student needs and the varying levels of ability of caregivers to provide support in the home.²⁶ The
8 study noted that the varying educational plans previously established for students with disabilities
9 made it “difficult for school districts to plan and schedule the delivery of such supports” once
10 distance learning began.²⁷ Further, the research showed that schools often responded to the
11 pandemic by shortening the school day, which posed difficulties for schools to provide the allotted
12 time for “individualized special education.”²⁸ Additionally, some school officials were worried
13 that educational services that “involved hands-on instruction” such as occupational and physical
14 therapy were restricted by distance learning.²⁹ Since much of the responsibility was placed on
15 caregivers to provide “additional support,” the study showed that parents became “overwhelmed
16 with the number of roles they were being asked to assume.”³⁰ At the time of the study, schools
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22 ²³ GAO-21-43 1 (2020-11-19) Distance Learning: Challenges Providing Services to K-12 English Learners and
23 Students with Disabilities during COVID-19.

24 *Id.*

25 *Id.* at 7.

26 *Id.* at 14.

27 *Id.*

28 *Id.* at 16.

29 *Id.*

30 *Id.*

1 were still trying to find ways to ensure students with disabilities were receiving the necessary
2 support when they had parents who were unable to assume the role schools were asking of them.³¹

3 To address the challenges posed by distance learning, eight out of the fifteen districts
4 surveyed noted “the goals and activities of existing IEPs would be modified with manageable
5 goals, given the logistics of the new learning environment.”³² Currently, an IEP team may create
6 a “student continuous learning plan” which allows for “temporary reductions or
7 adjustments...during a temporary, unplanned, emergency school facility closure.”³³ However,
8 OSPI has made clear that “[d]istricts may also not request or require that families ‘waive’ aspects
9 of IDEA during COVID-19.”³⁴ Therefore, schools are still under the same obligations regarding
10 their students in special education. The IEP modifications that occurred and may still be occurring
11 during the 2021-22 academic year may not be meeting these obligations which could have a large
12 impact on the number of families challenging the adequacy of their child’s special education.
13 Parents have the ability to request due process hearings to challenge current IEPs and to help their
14 children catch up on the education they missed during the pandemic.
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17 OSPI has acknowledged that “[m]any students did not make appropriate progress on pre-
18 COVID IEP goals due to facility closures, missed or delayed services, or barriers accessing remote
19 instruction, despite efforts of school districts, educators, families and students.”³⁵ It advises that
20 school district IEP teams should address the disparities in students’ learning that occurred as a
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22 ³¹ *Id.* at 16-17.

23 ³² *Id.* at 17.

24 ³³ Washington Office of Superintendent Public Instruction, Questions and Answers: Provision of Services to Students
25 with Disabilities During COVID-19 in the 2020-21 School Year (2020)
[https://www.k12.wa.us/sites/default/files/public/specialed/pubdocs/Providing-Services-SWDs-School-Closures-
QandA.pdf](https://www.k12.wa.us/sites/default/files/public/specialed/pubdocs/Providing-Services-SWDs-School-Closures-QandA.pdf)

26 ³⁴ *Id.*

³⁵ [https://www.k12.wa.us/sites/default/files/public/specialed/pubdocs/WA-Roadmap-SpEd-Recovery-Services-
2021.pdf](https://www.k12.wa.us/sites/default/files/public/specialed/pubdocs/WA-Roadmap-SpEd-Recovery-Services-2021.pdf)

1 result of COVID-19 by determining what recovery services are necessary to place students in the
2 “position they would have been in, had the student not been deprived of special education and
3 related services.”³⁶ There will likely be a large number of parents filing hearing requests to contest
4 the recovery services and new IEPs developed to make up for the educational losses resulting from
5 COVID. These parents and students should not be required to bear the additional burden of proving
6 at hearing the inadequacy of the districts’ plans.

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8 **2. OSPI should change the burden because doing so would make hearings**
9 **challenging SpEd decisions more equitable.**

10 The burden of proof determines “which party loses if the evidence is closely balanced...
11 which party bears the obligation to come forward with the evidence at different points in the
12 proceeding.”³⁷ Generally, the burden is on the party seeking relief.³⁸ However, the burden can and
13 does shift to the non-moving party when “vulnerable interests are at stake,” For example, courts
14 have placed the burden on the government in deportation hearings, involuntary commitment,
15 attorney disbarment cases, and the revocation of a broadcasting license.³⁹

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17 When courts change the burden of proof onto a party other than the plaintiff, they consider
18 three different factors. First and foremost, the courts consider “who ought to be favored when
19 comparing the risks and social costs between two potentially wrong decisions.”⁴⁰ Next, the courts
20 consider which of the parties is in the greater position of power in the litigation and thus, what is
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24 ³⁶ *Id.*

25 ³⁷ *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 56, 126 S. Ct. 528, 533–34, 163 L. Ed. 2d 387 (2005).

26 ³⁸ *Id.* at 534.

³⁹ Lisa Brodoff, *Lifting Burdens: Proof, Social Justice, and Public Assistance Administrative Hearings*, 32 N.Y.U.
Rev. L. & Soc. Change 131, 176 (2008).

⁴⁰ Lisa Brodoff, *Lifting Burdens: Proof, Social Justice, and Public Assistance Administrative Hearings*, 30 J. Nat'l
Ass'n Admin. L. Judiciary 601, 610 (2010).

1 a more equitable allocation of the burden.⁴¹ Finally, courts consider which party has “the best and
2 easiest access to the information that is relevant in the case.”⁴² The courts’ goal in considering
3 these factors is to promote efficiency and consider the difficulty and costs to the parties of
4 acquiring the information.⁴³

5 Here, all three of these considerations favor OSPI promulgating a rule putting the burden
6 on the school district. School districts have better access to resources and expertise; the costs to
7 parents of bearing the burden of proof is extremely high and those costs are more fairly placed on
8 school districts; and the equity issues resulting from placing the burden on parents challenging
9 district educational decisions fall disproportionately on minority and low- income families. C.F.’s
10 story below illustrates why the burden should shift to school districts in all SpEd hearings.

11
12 ***3. Negative impacts of carrying the burden fall disproportionately on low-income
13 and minority families.***

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15 During these last two years, we have seen national recognition and examination of all
16 systems for the elimination of structural racism. Unfortunately, racism within the special education
17 system goes back many years.⁴⁴ A researcher in the 1960s “found that between sixty to eighty
18 percent of students” who were considered to be students with disabilities “were children who came
19 from low-socioeconomic backgrounds or were classified as African American/Black.”⁴⁵ It was not
20 until the 1997 IDEA amendments where Congress began to recognize and look into the fact that
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⁴¹ *Id.*

25 ⁴² *Id.*

26 ⁴³ *Id.*

⁴⁴ See Natasha M. Strassfeld, *The Future of IDEA: Monitoring Disproportionate Representation of Minority Students in Special Education and Intentional Discrimination Claims*, 67 Case W. Res. L. REV. 1121, 1123 (2017).

⁴⁵ *Id.* at 1131.

1 minority children were being overrepresented in special education.⁴⁶ According to one article
2 published in 2018, “African American children are more than twice as likely to be identified” as
3 having a mental disability as are white children, “more likely to be identified as having a severe
4 emotional disturbance, and over twice as likely to be identified as having a broad development delay.”⁴⁷
5 Congress has noted that “the mislabeling of minority students has ‘significant adverse consequences’
6 because of the stigma attached to labeling a child with a disability, the decreased self-perception of the
7 labeled child, and the reduced curriculum that eligible children often receive.”⁴⁸ This data displays how
8 our special education system disproportionately affects our Black and other minority students. As a
9 result, carrying the burden of proof is heavier on students of color because they are overrepresented
10 in special education overall. We have the power to assist in dismantling these harmful institutional
11 procedures through changing the burden via a rule change.
12

13 Children from low-income families are also overrepresented in the special education
14 system.⁴⁹ A study from 2004 showed that 32% of children receiving special education lived in
15 households with an annual income less than \$25,000, and 37% lived in households with an annual
16 income of less than \$50,000.⁵⁰
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18 Although low-income families have a disproportionate number of children in special needs
19 programs, these parents often do not take advantage of the due process system to appeal decisions
20 negatively impacting their children’s education. According to one study, the need to pay for
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22 ⁴⁶ Nicholas Gumas, *Socioeconomic and Racial Disparities in Public Special Education: Alleviating Decades of*
23 *Unequal Enforcement of the Individuals with Disabilities Education Act in New York City*, 8 Colum. J. Race & L.
24 398, 414 (2018).

⁴⁷ *Id.* at 415.

⁴⁸ Robert A. Garda, Jr., *The New Idea: Shifting Education Paradigms to Achieve Racial Equality in Special Education*,
25 56 Ala. L. Rev. 1071, 1082-83 (2005).

⁴⁹ Anjaleck Flowers, *The Implied Promise of A Guaranteed Education in the United States and How the Failure to*
26 *Deliver It Equitably Perpetuates Generational Poverty*, 45 Mitchell Hamline L. Rev. 1, 30 (2019).

⁵⁰ Claire Raj & Emily Suski, *Andrew F.’s Unintended Consequences*, 46 J.L. & Educ. 499, 505 (2017)

1 attorneys and witnesses, the need to take time off work to attend due process hearings, and feeling
2 disadvantaged by the school district's knowledge and financial resources were the main reasons
3 parents were reluctant to file due process complaints.⁵¹ Even of those who initially file, they often
4 cannot follow through to hearing because they cannot afford the process of going to hearing.
5 OSPI's own statistics show that in the 2017-2018 school year, parents filed 119 due process
6 complaints.⁵² Only 18 of the complaints were settled through resolution meetings; 91 were
7 withdrawn, dismissed, or resolved without a hearing; and only 12 hearings were fully
8 adjudicated.⁵³ Similarly, in 2016-2017, 112 due process complaints were filed; 88 were dismissed,
9 withdrawn, or resolved without a hearing; 16 were resolved in resolution meetings, and only 8
10 hearings were fully adjudicated.⁵⁴ Given the statistics on low-income families playing a prominent
11 role in special education hearings, it is likely that most of the complaints that were withdrawn or
12 dismissed were done so because parents did not have access to the resources they needed to fully
13 pursue the hearing. Placing the burden of proof on the school district would make this process less
14 costly and less onerous, as described above. Thus, more families would be able to move forward
15 with their complaints and have them heard on the merits.

18 Removing the substantive barrier of bearing the burden of proof makes the hearing process
19 more easily accessible to low-income and minority children with disabilities. Very high-income
20 school districts were more likely to have a due process complaint filed than very low-income
21

23 ⁵¹ U.S. Government Accountability Office, *41st Annual Report to Congress on the Implementation of the Individuals
with Disabilities Education Act, 2019* (August 2014). <https://www.gao.gov/assets/670/665434.pdf>.

24 ⁵² Washington Office of Superintendent of Public Instruction, *State Special Education Data Collection Summaries:
Part B Dispute Resolution*, (March 26, 2020), <https://www.k12.wa.us/student-success/special-education/special-education-data-collection/state-special-education-data-collection-summaries>.

25 ⁵³ *Id.*

26 ⁵⁴ *Id.*

1 school districts.⁵⁵ In addition, very low minority school districts were more likely to have a due
2 process complaint filed than very high minority school districts. *Id.* The American Association of
3 School Administrators (AASA) claims that, “the cost and complexity of a due process hearing
4 hinders low- and middle-income parents from exercising the procedural protection provisions to
5 which they are entitled...IDEA’s complex protocols and mandates disproportionately benefit
6 wealthy, well-educated parents, who can deftly and aggressively navigate the due process system
7 with the aid of private counsel and paid education experts.”⁵⁶ Changing the burden helps these
8 parents better access due process protections for their children challenging SpEd decisions.
9

10 **4. OSPI should shift the burden of proof to school districts because it makes the**
11 **hearing system less costly and more efficient, and improves education for all**
12 **students.**

13 Litigating a due process complaint is an expensive affair, costing schools approximately
14 \$8,000 to \$12,000 per hearing.⁵⁷ The AASA claims that the average costs to school districts of
15 expenditures associated with negative decisions from the due process hearing, attorney fee
16 compensation to parents, and general costs associated with the litigation to be up to be
17 \$45,678.02.⁵⁸ The AASA data also demonstrates that the average costs for districts that choose to
18 settle with a parent prior to the adjudication is \$23,827.34—a savings of nearly \$22,000. *Id.*
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21 ⁵⁵ See U.S. Government Accountability Office Patty Murray & Robert Scott, IDEA Dispute Resolution Activity in
22 Selected States Varied Based on School Districts' Characteristics U.S. Government Accountability Office (2019),
<https://www.gao.gov/assets/710/702514.pdf> (last visited Mar 31, 2020).

23 ⁵⁶ The American Association of School Administrators, S. Pudelski, Rethinking Special Education Due Process: A
24 proposal for the next reauthorization of the Individuals with Disabilities Act, p 7 (April 2016),
https://www.aasa.org/uploadedFiles/Policy_and_Advocacy/Public_Policy_Resources/Special_Education/AASAR_ethinkingSpecialEdDueProcess.pdf.

25 ⁵⁷ See Department of Education, J. Chambers, J. Harr, & A. Dhanani, What Are We Spending on Procedural
26 Safeguards in Special Education 1999-2000, p 8 (May 2003) (prepared under contract by American Institutes for
Research, Special Education Expenditure Project).

⁵⁸ The American Association of School Administrators, S. Pudelski, Rethinking Special Education Due Process: A
proposal for the next reauthorization of the Individuals with Disabilities Act, p 3 (April 2016),
MEMORANDUM IN SUPPORT OF OSPI

1 Although litigating due process complaints costs school districts on average \$8,000 to
2 \$12,000 per filed hearing, only five out of every ten thousand children who receive special
3 education services under the IDEA request due process hearings.⁵⁹ Ninety-four percent of all
4 school districts have never had a single IDEA hearing. In 2018 in Washington State, for example,
5 119 complaints were filed, which amounted to approximately nine cases per 10,000 students.⁶⁰ In
6 comparison, the national figure was 26 complaints per 10,000 students.⁶¹ In the same year, 12 of
7 the 119 complaints filed were remedied through fully adjudicated hearings, accounting for .8 or 1
8 case per 10,000.⁶² The national average, on the other hand, shows that 1,286 of the 18,001
9 complaints were fully adjudicated via due process hearings.⁶³

11 Significantly, states that adopted regulations or statutes placing the burden of proof on
12 school districts were less likely to fully adjudicate a due process hearing and more likely to have
13 an agreement at a resolution meeting.⁶⁴ For example, nearly 69% of resolution meetings held in
14 the state of Nevada, a state that places the burden on the school district, came to an agreement,⁶⁵
15 compared to Alabama (19.2%), a state that puts the burden on parents. Nevada's law produces
16

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18
19 https://www.aasa.org/uploadedFiles/Policy_and_Advocacy/Public_Policy_Resources/Special_Education/AASAR_ehinkingSpecialEdDueProcess.pdf.

20 ⁵⁹ See U.S. Government Accountability Office Patty Murray & Robert Scott, IDEA Dispute Resolution Activity in
21 Selected States Varied Based on School Districts' Characteristics U.S. Government Accountability Office (2019),
<https://www.gao.gov/assets/710/702514.pdf> (last visited Mar 31, 2020).

22 ⁶⁰ CADRE, *IDEA Dispute Resolution Data Summary for: Washington 2008-09 to 2017-18*, SPP/APR Data Resources
23 (Oct.15,2019).<https://www.cadreworks.org/sites/default/files/resources/2017-18%20DR%20Data%20Summary%20-%20Washington.pdf>.

24 ⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

25 ⁶⁴ CADRE, *IDEA Dispute Resolution Data Summary for: Alabama 2008-09 to 2017-18*, SPP/APR Data Resources
26 (Oct.15,2019), https://www.cadreworks.org/sites/default/files/resources/2017-18%20DR%20Data%20Summary%20-%20Alabama_0.pdf.

⁶⁵ *Id.*

1 agreements between school districts and parents at a remarkably higher rate.⁶⁶ Shifting the burden
2 of proof to school districts encourages the districts to settle faster, decreasing the costs associated
3 with conducting a fully adjudicated hearing to both the district and parents.

4 States have an interest in making sure parents are able to be actively involved and effective
5 in the decisions concerning the education of their children.⁶⁷ The Supreme Court recognizes a
6 parent's right to direct their child's education.⁶⁸ The amicus brief filed and signed on to by
7 Washington State in *Schaffer* argues that shifting the burden to school districts is a practical
8 measure to ensure this right.⁶⁹ Shifting the burden empowers parents to pursue appeals when they
9 have good faith disagreements about their child's education. Without the shift in burden, the school
10 district's judgment as to the education of the child will always come before the parent's, which
11 negates the parents' right to direct their child's education recognized by the Supreme Court.⁷⁰

12
13
14 **5. OSPI should change the burden of proof to align more with its stated duties,
mission, and values.**

15 According to OSPI's website, its vision is to have "[a]ll students prepared for post-
16 secondary pathways, careers, and civic engagement." Its mission is to "[t]ransform K-12
17 education to a system that is centered on closing opportunity gaps and is characterized by high
18 expectations for all students and educators. We achieve this by developing *equity-based policies*
19 and supports that empower educators, families, and communities." (*Emphasis added.*) To achieve
20 this mission, OSPI states its values are "Ensuring Equity, Collaboration and Service, Achieving
21 Excellence through Continuous Improvement, and Focus on the Whole Child." It defines equity
22

23
24 ⁶⁶ *Id.*

25 ⁶⁷ Brief of the Commonwealth of Virginia and Eight Other States as Amici Curiae in Support of the Petitioners, p. 8,
Schaffer v. Weast, 546 U.S. 49 (2005).

26 ⁶⁸ See Amicus Brief in *Schaffer v. Weast*, citing *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925)

⁶⁹ *Id.* at 9.

⁷⁰ *Id.*

1 as “[e]ach student, family, and community possess[ing] strengths and cultural knowledge that
2 benefits their peers, educators, and schools.”

3 These values all align with placing the burden on school districts to ensure equity-based
4 policy in the hearing context. As discussed above, having the burden on parents widens the
5 opportunity gap for parents to state their case and especially disadvantages minorities. OSPI’s own
6 definition of ensuring equity recognizes this imbalance of power. Its website states:
7

8 (Ensuring equity) (g)oes beyond equality; it requires education leaders to examine
9 the ways current policies and practices result in disparate outcomes for our students
10 of color, students living in poverty, students receiving special education and
English Learner services, students who identify as LGBTQ+, and highly mobile
student populations.

11 (It) (r)equires education leaders to develop an understanding of historical contexts;
12 engage students, families, and community representatives as partners in decision-
13 making; and *actively dismantle systemic barriers*, replacing them with policies and
practices that ensure all students have access to the instruction and support they
need to succeed in our schools.⁷¹ (*Emphasis added.*)

14 As the foregoing shows, the current burden assignment perpetuates the imbalance of power
15 between parents and the school district. If ensuring equity is ensuring students and their families
16 possess the strengths and cultural knowledge that benefits their community, then a burden shift to
17 school districts to show why their educational plan meets FAPE standards rather than on parents
18 to prove why it did not further OSPI’s mission to eliminate systemic barriers, particularly in light
19 of the statistical likelihood that people of color and low-income communities are most impacted.
20 Thus, OSPI should grant this petition for rulemaking to change the burden of proof to align more
21 with its values of ensuring equity, achieving excellence through continuous improvement, and
22 focusing on the whole child.
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⁷¹<https://www.k12.wa.us/about-ospi/about-agency>
MEMORANDUM IN SUPPORT OF OSPI
PETITION FOR RULEMAKING - 20 OF 27

1 **6. The Washington State Constitution supports OSPI changing the burden of proof.**

2 OSPI should place the burden of proof on the school district because strict scrutiny requires
3 the State to bear the burden whenever it is accused of restricting a fundamental constitutional right.
4 The Washington State Constitution imposes a “paramount duty to make ample provisions for the
5 education” of all children who live in Washington State.⁷² This gives all students in Washington a
6 fundamental right to a free and appropriate education.⁷³ The provision of special education to
7 children with disabilities is also a part of Washington’s constitutional obligation.⁷⁴ The state
8 Supreme Court “has recognized a constitutional right of parents to direct the education of their
9 children.”⁷⁵ Both of these rights are implicated in SpEd due process hearings.
10

11 Whenever a state is accused of restricting or interfering with a fundamental right of its
12 citizens, the due process clause requires a court to apply strict scrutiny to determine if the rights
13 are violated.⁷⁶ Strict scrutiny puts the burden on the state to show that the challenged restriction
14 serves a compelling state interest and is narrowly tailored to achieve that interest.⁷⁷ Strict scrutiny
15 puts the burden on the state to show it did not violate a fundamental right. In due process hearings,
16 the state (school district) is accused of restricting a student’s access to the fundamental right of a
17 free and appropriate education. Therefore, there is a strong state constitutional argument that the
18 burden must be on the district to show it either is not restricting this right, or that there is a
19
20
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23 ⁷² *McCleary v. State*, 173 Wash. 2d 477, 518, 269 P.3d 227, 247–48 (2012) quoting *Seattle Sch. Dist. No. 1 of King*
24 *Cty. v. State*, 90 Wash. 2d 476, 585 P.2d 71 (1978)

25 ⁷³ *Id.*

26 ⁷⁴ *Sch. Districts’ All. for Adequate Funding of Special Educ. v. State*, 149 Wash. App. 241, 246, 202 P.3d 990, 993–
94 (2009), *aff’d*, 170 Wash. 2d 599, 244 P.3d 1 (2010).

⁷⁵ See Amicus Brief in *Schaffer v. Weast*, citing *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925).

⁷⁶ *Washington v. Glucksberg*, 521 U.S. 702, 720, 117 S. Ct. 2258, 2267, 138 L. Ed. 2d 772 (1997).

⁷⁷ *Elster v. City of Seattle*, 193 Wash. 2d 638, 642, 444 P.3d 590, 593 (2019).

1 compelling state interest and the restriction is narrowly tailored. Under the Washington State
2 Constitution, OSPI should change the burden in due process hearings to be on the school districts.

3 **V. PETITIONER C.F.’ STORY IS EMBLEMATIC OF PARENTS OF CHILDREN**
4 **WITH DISABILITIES IN SpEd HEARINGS AND DEMONSTRATES WHY**
5 **THIS RULE IS NEEDED**

6 Petitioner C.F.’s experience with challenging her daughter’s school district’s inadequate
7 educational plan starkly demonstrates how requiring parents to bear that burden rather than school
8 districts has dire consequences for children with disabilities and their families. OSPI has the ability
9 to remedy this by adopting this petition’s proposed rule. Ms. F. ’s daughter was diagnosed with
10 high-functioning autism through an Individualized Education Evaluation (IEE). The evaluation
11 was requested by Ms. F., and initially resisted by the school district, because Ms. F. observed her
12 daughter struggling in school. An IEP was created to address the concerns of Ms. F., but the plan
13 proved to be inadequate.

14
15 Ms. F. ’s daughter has significant social and learning disabilities. These disabilities led to
16 a cumbersome environment at school, which has led to mental health issues that have compounded
17 the learning difficulties. These issues have prevented her daughter from learning and achieving
18 her educational goals. When Ms. F. ’s daughter began to fail some of her classes, she developed
19 even more mental health issues because she believed she had “insufficient intelligence.” Her
20 daughter, unsure of herself and overcome with mental anguish, eventually resorted to self-harm.

21
22 Ms. F. frequently pleaded with the school for a new IEP as it was apparent to her that the
23 current one just wasn’t working for her daughter. Yet, the school had done the minimum it believed
24 it was required, so the school denied her request. Later, Ms. F. requested a paraeducator to work
25 with her daughter in her more challenging classes. The school district denied her request. Finally,
26

1 Ms. F. asked the school to place her daughter in a part-time private school program with an autism
2 specialty. The school again denied her request.

3 When the school district refused to reevaluate her daughter and provide a new IEP, Ms. F.,
4 doing whatever she could to get her daughter the appropriate education she deserves, enrolled her
5 daughter part-time in the private school at her own expense. Many families do not have this option.
6 For many families, the financial burden of placing their child in a specialized private school is too
7 expensive a cost to bear. Luckily for Ms. F., she was able to afford the school even though it put
8 her family in an extraordinary amount of financial stress.
9

10 To search for some help to pay for the private school, Ms. F. researched and found a law
11 firm that specializes in representing students with disabilities. The firm often represents students
12 who need special education services from their school districts so that they can receive a free
13 appropriate education. The law firm recommended that Ms. F. file a due process hearing to
14 challenge the school district's failure to cover the costs of the private school and the para-educator.
15 To reiterate, Ms. F. was in a fortunate position at this point; not only was she able to take out loans
16 with her home as collateral to pay for school and a lawyer, but she also had the resources (time,
17 money, and support) to fight a battle that many families do not have the ability to undertake.
18

19 At the due process hearing held by the Washington State Office of Administrative Hearings
20 (OAH), Ms. F. bore the burden of proving that her daughter's education was inadequate. This
21 meant that Ms. F. and her legal team had to pay for multiple experts to evaluate the current IEP
22 and to provide opinions about what would constitute a more appropriate education for her
23 daughter. Ms. F. paid for the additional depositions and discovery process out of her own pocket.
24

25 The hearing process, due to discovery and the time for preparation, took over half of the
26 school year. The due process complaint was filed in October of 2018 and decided in November of

1 2019, lasting nearly the entire school year. All the while, Ms. F.'s daughter continued to struggle
2 in her public school setting and was deprived of an appropriate education. While waiting for a
3 decision as part of the IEP process, the school district agreed to provide a new independent
4 evaluation to discern the daughter's educational needs. The new evaluation echoed the requests
5 Ms. F. pleaded for months earlier and that she argued for in the hearing. Indeed, the new evaluation
6 found the IEP to be inadequate, and that her daughter needed part-time specialized private
7 schooling and part-time public school. Still, the school district did not settle.

9 Five months after the conclusion of the hearing, and into the following school year, OAH
10 decided in favor of Ms. F. and her daughter. The school district was required to pay for the part-
11 time private school, and it would reimburse Ms. F. for 90% of her legal fees, which had added up
12 to nearly six figures.

13 Shifting the burden of proof in the due process hearing to the school district will help ensure
14 that Ms. F.'s experience of huge legal expense, long waits for relief, delays in her child getting
15 the education she is entitled to, is minimized or eliminated. Shifting the burden of proof to school
16 districts will:

- 18 • advance the timing and settlement opportunities to ensure the child does not bear the brunt
19 of the IEP and legal process
- 20 • reduce upfront costs to parents and reduce large costs to the school district post-hearing
- 21 • compel the school district to look at earlier settlement options
- 22 • compel the school district to provide evidence in support of and to defend its IEP as meeting
23 FAPE instead of forcing the parent to prove the negative— that the school district's plan
was inadequate
- 24 • compel the school district to reevaluate the student's needs at a much earlier time so that
25 it can insure it is able to meet its burden

- negate the burden placed on parents to incur the full discovery expenses and attorney’s fees for a two-week trial, and
- minimize the burden placed on parents appearing *pro se*, which is the vast majority of appellants who do not have the resources to hire an attorney, by requiring the school district to prove its case at the onset.

The ultimate goal, of course, is to provide children with disabilities the appropriate education they deserve under the IDEA and the Washington Constitution. Shifting the burden will resolve cases sooner so that children and students with disabilities do not suffer while they wait for a court to decide whether their education is appropriate. This was the story of C.F. and her daughter. This is the story of families who have children in need of special education doing whatever they can to get their child the education they deserve.

VI. CONCLUSION

OSPI should adopt this petition’s proposed rule allocating the burden of proof solely to the school districts in OAH due process hearings rather than continuing to require parents seeking an appropriate education for children with disabilities to carry this additional heavy burden. OSPI has the power to do this by rule; doing so makes the hearing system more efficient and equitable, and aligns with its mission and values; and OSPI should change the burden because our State

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1 Constitution's fundamental right to a free and appropriate education for all requires school districts
2 to prove this right has not been violated.

3
4 DATED this _____ day of _____, 2022.

5
6 Ronald A. Peterson Law Clinic
Attorneys for Petitioners*

7
8 By:

9 /s/ Lisa Brodoff
Lisa Brodoff, WSBA #11454

10 *Michaela Peterick and Nicolas Carrillo,
11 former Administrative Law Clinic legal
12 interns, made significant contributions to
this petition and memo.

13 *Research Assistant Maciel Mata made
14 significant contributions to this petition and
15 memo.

Attachment #1:

Partial List of WA State Agency Rules Assigning Burden of Proof in Hearings

- Criminal Justice Training Commission: [WAC 139-03-070](#)
- Professional Educator Standards Board: [WAC 181-86-170](#)
- Health Care Authority: [WAC 182-16-066](#)
- Health Care Authority: [WAC 182-32-066](#)
- Department of Enterprise Services: [WAC 200-320-740](#)
- Office of Minority and Women’s Business Enterprises: [WAC 326-08-095](#)
- Office of Minority and Women’s Business Enterprises: [WAC 326-20-160](#)
- Board and Department of Natural Resources: [WAC 332-08-245](#)
- Board and Department of Natural Resources: [WAC 332-08-355](#)
- Office of--State Human Resources Director Financial Management: [WAC 357-52-110](#)
- Personnel Appeals Board: [WAC 358-30-170](#)
- Department of Retirement Systems: [WAC 415-08-420](#)
- Department of Retirement Systems: [WAC 415-104-155](#)
- Department of Retirement Systems: [WAC 415-105-072](#)
- Department of Retirement Systems: [WAC 415-105-120](#)
- State Patrol: [WAC 446-08-405](#)
- State Patrol: [WAC 446-30-050](#)
- University of Washington: [WAC 478-121-247](#)
- Utilities and Transportation Commission: [WAC 480-07-540](#)