No. _____

In the Supreme Court of the United States

M.M., by and through her parent, L.R.,
Petitioners,

v.

Special School District No. 1, Minneapolis,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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Questions Presented

1. Are states entitled to legislatively assign the burden of proof in special education administrative hearings?

2. Are the results below, adopting the default rule despite a state statute assigning the burden of proof to the school districts, consistent with this Court's decision in *Schaffer v. Weast ex rel Weast* , 546 U.S. 49, 126 S.Ct. 528 (2005)?

3. Does the Supreme Court's decision in *Schaffer v. Weast ex rel Weast* , 546 U.S. 49, 126 S.Ct. 528 (2005) stand for the conclusion that the American default burden of proof rule applies despite a state statute to the contrary?

4. Did the court below properly apply the standard of review for special education administrative decisions and district court decisions?

Table of Contents

Table of Authorities

Citations of Opinions and Orders

The published decision *per curiam* decision denying Petitioners' petition for re-hearing and re-hearing *en banc*, affirming the Eighth Circuit Court of Appeals panel decision, is set forth in Appendix hereto (App. 1).

The published decision of the United States Court of Appeals for the Eighth Circuit in *Special School District No. 1, Minneapolis v. M.M., et al.*, decided on 4 January 2008 reversing the District Court's decision granting summary judgment in favor of the Petitioners, is set forth in Appendix hereto (App. 2).

The published decision of the United States District Court for the District of Minnesota in *Special School District No. 1, Minneapolis v. M.M., et al.*, (Civil File No. 05-2270), decided on 18 July 2006, granting the Petitioners' motion for summary judgment, is set forth in the Appendix hereto (App. 22).

The unpublished decision on 1 September 2005 by the Minnesota Department of Education appointed Administrative Law Judge granting the Petitioners the relief requested through the special education administrative hearing is set forth in the Appendix hereto (App. 108).

Basis for Jurisdiction in this Court

The decision of the Eighth Circuit Court of Appeals reversing the United States District Court's decision granting Petitioners' motion for summary judgment was entered on 4 January 2008 (App. 2); and its order denying the Petitioners' timely filed petition for re-hearing and for re-hearing *en banc* was filed on 28 February 2008 (App. 1). This petition for writ of certiorari is filed within ninety (90) days of the date of the Court of Appeal's denial of petitioners' timely filed petition for re-hearing and re-hearing *en banc*. 28 U.S.C. Section 2101(c). Revised Supreme Court Rule 13.3. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

Statutory Provisions Implicated by this Petition:

Minn. Stat. § 125A.091, subd. 16

Statement of the Case

Petitioners brought a special education administrative hearing on 16 May 2005 which resulted in a favorable decision for the Petitioners on 1 September 2005. The state appointed Administrative Law Judge ("ALJ") concluded, after multiple days of hearing, that the Respondent violated Petitioners' right to a free appropriate public education in the least restrictive environment in violation of the Individuals with Disabilities Education Act ("IDEA"). As a result of this conclusion, Petitioners received an order requiring

Respondents to convene an IEP team meeting to design an individualized education program that was consistent with up-to-date information, recommendations from the independent educational evaluators and with direct service minutes designated to specific areas of need. The ALJ also ordered the Petitioner's behavior intervention plan be modified consistent with the recommendations by the IEP team and, moreover, that the modifications include consideration of a change to the city-wide disciplinary policy. Finally, the ALJ ordered compensatory education services in the amount of 188 hours for past deprivations.

The Respondent appealed the ALJ decision to the United States District Court, which adopted the Magistrate's Report and Recommendation. The Report and Recommendation upheld the ALJ decision with nominal exceptions to the amount of compensatory education services to be awarded to the Petitioners.

The Respondent appealed the District Court's decision to the Eighth Circuit Court of Appeals, which reversed the District Court's decision, finding that: 1) the United States Supreme Court's decision in *Schaffer v. Weast ex rel Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005) stands for the default rule despite Minnesota's statutory assignment of the burden of proof to the school district; and 2) the ALJ and the United States District Court facts on the administrative record supporting the denial of a free appropriate public education were in error, as was the application of the standard for a denial of a free appropriate public education.

Petitioners sought a re-hearing and re-hearing *en banc*, which were denied on 28 February 2008, with three justices agreeing to grant the petition for re-hearing *en banc*.

Argument Supporting Allowance for Writ

I. The Right to Educate Citizens is Primarily the Provenance of the States Save for the Rights and Liberties Guaranteed by the federal Constitution and federal laws.

As the district court in South Carolina in its 1951 decision in *Briggs v. Elliott*, 98 F.Supp. 529, 532 (Dist. S.C. 1951), citing Supreme Court language, eloquently stated:

> One of the great virtues of our constitutional system is that, while the federal government protects the fundamental rights of the individual, it leaves to the several states the solution of local problems. In a country with a great expanse of territory with peoples of widely differing customs and ideas, local self government in local matters is essential to the peace and happiness of the people in the several communities as well as to the strength and unity of the country as a whole. It is universally held, therefore, that each state shall determine for itself, subject to the observance of the fundamental rights and liberties guaranteed by the federal Constitution, how it shall exercise the police power, i.e. the power to legislate with respect to the safety, morals, health and general

> welfare. *And in no field is this rights of the several states more clearly recognized than in that of public education.* As was well said by Mr. Justice Harlan, speaking for a unanimous court in *Cumming v. County Board of Education*, 175 U.S. 528, 545, 20 S.Ct. 197, 201 (1899) 'while all admit that the benefits and burdens of public taxation must be shared by citizens without discrimination against any class on account of their race, the education of the people in schools maintained by state taxation is a matter belonging to the respective states, and any interference on the part of Federal authority with the management of such schools cannot be justified except in the case of a clear and unmistakable disregard of rights secured by the supreme law of the land.'

Briggs at 532, citing *Cumming v. County Board of Education*, 175 U.S. 528, 545, 20 S.Ct. 197, 201 (1899) (Emphasis added).

This field of rights and obligations in public education as articulated in *Cumming* continues to apply not only to education in general, but also to the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400, *et seq.* in specific. The IDEA specifically sets a procedural and substantive floor for which states are responsible in order to receive federal funding. 20 U.S.C. § 1415.

As this Court in the very decision that has given rise to the present controversy asserted:

> IDEA is "frequently described as a model of 'cooperative federalism.' " *Little Rock School Dist. v. Mauney,* 183 F.3d 816, 830 (8th Cir.

> 1999). It "leaves to the States the primary responsibility for developing and executing educational programs for handicapped children, [but] imposes significant requirements to be followed in the discharge of that responsibility." *Board of Ed. of Hendrick Hudson Central School Dist., Westchester Cty. v. Rowley,* 458 U.S. 176, 183, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982).

Schaffer v. Weast ex rel Weast , 546 U.S. 49, 126 S.Ct. 528, 531-32 (2005). The IDEA specifically lacks the imposition of the burden of proof. This Court examined in *Schaffer* the assignment of the burden of proof for those states with no specific statutory assignment. This Court specifically and carefully declined to examine the issue of a statutorily assigned burden of proof. As this Court stated:

> We granted certiorari, 543 U.S. 1145, 125 S.Ct. 1300, 161 L.Ed.2d 104 (2005), to resolve the following question: At an administrative hearing assessing the appropriateness of an IEP, which party bears the burden of persuasion?

Id. at 533. This Court in reaching the conclusion that the "normal default rule applies" specifically declined to examine those states which had overridden the default rule and statutorily assigned the burden of proof to the school district:

> Several States have laws or regulations purporting to do so, at least under some circumstances. See, *e.g.*, Minn. Stat. § 125A.091, subd. 16 (2004); Ala. Admin. Code

> Rule 290-8-9-.08(8)(c)(6) (Supp.2004); Alaska Admin. Code, tit. 4, § 52.550(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.

Schaffer at 537. Despite this clear statement that such a state override of the default rule was not being decided, the court below erroneously concluded that *Schaffer* stood for proposition the default rule applies in special education administrative hearings without consideration to a state's legislative override of the default rule. *App. 4-5.*

The Supreme Court took pains to decline to consider the burden of proof wherein a state specifically assigned the burden:

> Finally, respondents and several States urge us to decide that States may, if they wish, override the default rule and put the burden always on the school district. Several States have laws or regulations purporting to do so, at least under some circumstances. See, *e.g.*, Minn.Stat. § 125A.091, subd. 16 (2004); Ala. Admin. Code Rule 290-8-9-.08(8)(c)(6) (Supp.2004); Alaska Admin. Code, tit. 4, § 52.550(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.*

> We hold no more than we must to resolve the case at hand . . .

Schaffer v. Weast, 546 U.S. at 61-62 (emphasis added).

Despite this clearly articulated caution, the court below usurped the state Legislature's authority, under the IDEA's doctrine of cooperative federalism, by elevating *dicta* in a footnote in an Eighth Circuit decision (*Renollett*)[1], in which the Minnesota state statute assigning the burden of proof was neither considered nor examined as controlling authority.

The IDEA consists of "skeletal federal provisions designed as minimum standards" for the education of children with disabilities. *Pink v. Mt. Diablo Unified Sch. Dist.*, 738 F.Supp. 345, 346 (N.D. Calif. 1990) *quoting Town of Burlington v. Dept. of Educ. Com. of Mass*, 736 F.2d 773, 785 (1st Cir. 1984), *aff'd sub nom.*, 471 U.S. 359 (1985). In passing the IDEA:

> Congress drew the procedural and substantive contours of education for disabled children, but left the shading and tinting of the details largely to the states. States are responsible for filing in the numerous interstices with the federal Act through their own states and regulations.

Burlington, 736 F.2d at 785; *Taylor v. Vermont Dept. of Educ.*, 313 F.3d 768, 777 (2nd Cir. 2002).

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[1] *Sch. Bd. of Indep. Sch. Dist. No. 11 v. Renollett*, 440 F.3d 1007 (8th Cir. 2006).

II. The Minnesota State Legislature Has Statutorily Assigned the Burden of Proof to School Districts Thus Rendering Inapplicable this Court's Decision in *Schaffer v. Weast.*

The Minnesota state Legislature statutorily assigned the burden of proof to school districts. Minn. Stat. § 125A.091, subd. 16 states:

> **Burden of proof.** The burden of proof at a due process hearing is on the district to demonstrate, by a preponderance of the evidence, that it is complying with the law and offered or provided a free appropriate public education to the child in the least restrictive environment. . .

Prior to the decision in *Schaffer v. Weast ex rel Weast*, 546 U.S. 49, 126 S. Ct. 528 (2005), the Eighth Circuit Court of Appeals determined that the burden of proof at administrative due process hearings was properly assigned to school districts. *Blackmon v. Springfield R-XII School Dist.*, 198 F.3d 648, 658 (8th Cir 1999), *rehearing denied* 2000, citing *E.S. v. Ind. Sch. Dist. No. 196,* 135 F.3d 566, 569 (8th Cir. 1998). This was affirmed in 2006 by the United States District Court in its decision *Independent School Dist. No. 701, Hibbing Public Schools, v. J.T.,* 2006 WL 517648, *6, n. 6 (D.Minn. 2006)(unpublished).

Nevertheless, the Eighth Circuit's opinion determined that *dicta* found in a footnote in *Board of Indep. Sch. Dist. No. 11 v. Renollett*, 440 F.3d 1007 (8th Cir. 2006) was controlling. The *dicta* footnote stated:

> In *Schaffer ex rel. Schaffer v. Weast*, the Supreme Court held that the burden of persuasion in an administrative hearing challenging an IEP is properly placed upon the party seeking relief, whether that is the disabled child or the school district. 546 U.S. 49, ----, 126 S.Ct. 528, 537, 163 L.Ed.2d 387 (2005). At the time of the administrative proceedings in this case, however, the law in our Circuit placed the burden on the school district. *E.g. Blackmon ex rel. Blackmon v. Springfield R-XII Sch. Dist.*, 198 F.3d 648, 658 (8th Cir.1999); *E.S. v. Indep. Sch. Dist., No. 196*, 135 F.3d 566, 569 (8th Cir. 1998). Here, Josh sought relief, and the burden of persuasion was placed on the District. In light of *Schaffer*, it was error to place the burden on the District, but the error was harmless because the District prevailed.

Renollett, at 1010, n. 3. With all due respect to the *Renollett* decision, the footnote without consideration to the statutory assignment of the burden of proof or the Supreme Court's refusal to determine such a statutory assignment in *Schaffer*, appears to be a throw-away line which, as the footnote identifies, is not related to the decision. As such it is *dicta* and not controlling.

The district court below was correct when it concluded in its Report and Recommendation:

> As a Court of inferior jurisdiction, we do not disregard the guidance of our Court of Appeals, even if the guidance is expressed in *dicta*. However, given the absence of any discussion

> concerning the Minnesota statutory framework, or the Supreme Court's express decision not to address a State's authority to statutorily assign the burden of proof, we are unable to attribute to the Court's analysis, in *Renollett*, an intention to extend the rule in *Schaffer* to situations where the State has specifically allocated the burden of proof by statute.

App. 56.

III. Other Circuit Courts Have Misapplied *Schaffer v. Weast*.

Those circuit courts which have had the opportunity to review the *Schaffer* decision have summarily concluded that *Schaffer* stands for the conclusion that the default rule applies without consideration to any state statute assigning the burden of proof. See *Fairfax County School Bd. v. Knight*, 261 Fed. Appx. 606, 608, 2008 WL 152571, *1 (4th Cir. 2008) (concluding that *Schaffer v. Weast* "stands for the proposition that the party challenging the IEP has the burden of proof"); *County Sch. Bd. v. Z.P.*, 399 F.3d 298, 309 & n. 7 (4th Cir. 2005); *M.H. ex rel. A.H. v. Monroe-Woodbury Cent. School Dist.*, 250 Fed. Appx. 428 (2nd Cir.2007) ("holding that the burden of proof in an IDEA impartial hearing rests on the party seeking relief"); *R.B., ex rel. F.B. v. Napa Valley Unified School Dist.*, 496 F.3d 932, 939 (9th Cir. 2007) ("party seeking IDEA relief bears burden of persuasion"); *Board of Educ. of Tp. High School Dist. No. 211 v. Ross*, 486 F.3d 267, 279-71 (7th Cir. 2007)("We note as well that at the administrative

level, the Supreme Court has held that the burden of proof in a hearing challenging an educational placement decision is on the party seeking relief."). See *Schaffer ex rel. Schaffer v. Weast,* 546 U.S. 49, 126 S.Ct. 528, 531 (2005). With the exception of the case before the Court, no other circuit court of appeals has addressed the application of *Schaffer* wherein a state statute has assigned the burden of proof to school districts.

It is difficult to comprehend how such learned colleagues and courts could miss this Court's carefully crafted exception in its *Schaffer* decision and adopt without consideration to the exception the conclusion that the default rule applies. No reference to the exception appears in the decisions, just as it appears minimally in the decision below.

IV. The Eighth Circuit Court of Appeals Declined to Apply the Requisite Standard of Review for Administrative and District Court Decisions.

The Eighth Circuit Court of Appeals disregarded the standard of review, cherry-picked facts, and misapplied the law to support its reversal of the administrative and district court decision. Given the significant findings and conclusions reached by the administrative law judge and the district court, unraveling the errors in law and fact requires more space than is permitted. Consequently, Petitioners' must necessarily rely upon the record before this Court and specific examples to illuminate the errors.

In its seminal decision *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley,* 458 U.S.

176 (1982), the Supreme Court rejected the petitioners' contention that the courts are given limited authority to review the state's procedural compliance under the Act and that the courts had no power to review the substance of the state program. *Id.* at 205. The Court explained that "Congress expressly rejected provisions that would have so severely restricted the role of reviewing courts" and, instead, decided "that courts were to make independent decision[s] based on a preponderance of the evidence." *Id.* at 205-06. (Citations omitted).

On the other hand, the Court cautioned reviewing courts not to adopt a "free hand to impose substantive standards of review which cannot be derived from the Act itself." *Id.* at 206. "[T]he provision that a reviewing court base its decision on the 'preponderance of the evidence' is by no means an invitation to the court to substitute their own notions of sound educational policy for those of the school authorities which they review." *Id.* Therefore, the Court reasoned, the requirement "that the reviewing court 'receive the records of the [state] administrative proceedings' carries with it the implied requirement that due weight shall be given to those proceedings." *Id.*

From the *Rowley* case itself, courts, on pure questions of law, are to interpret the statute when the statute expressly defines the substantive provision in question. *Rowley*, 458 U.S. at 187. However, on substantive issues not defined in the Act, but requiring interpretation of educational policy, reviewing courts are to give "due weight" to the determinations of the administrative proceedings. *Id.* at 206.

A. The Standard of Review for Special Education Administrative and District Court Decisions.

The standard of review in the Eighth Circuit for the appeal of administrative and district court special education decisions is:

> Because judges are not trained educators, judicial review under the IDEA is limited. When reviewing outcomes reached through the administrative appeals procedures established by 20 U.S.C. §§ 1415(b) and (c), the district court must give "due weight" to the results of those proceedings, resisting any impulse to "substitute [its] own notions of sound educational policy for those of the school authorities." *Rowley,* 458 U.S. at 206, 102 S.Ct. at 3051. At the appellate level, the question of an IEP's adequacy is a mixed question of law and fact, reviewed de novo. *See Fort Zumwalt Sch. Dist. v. Clynes,* 119 F.3d 607, 611 (8th Cir. 1997). In the absence of a mistake of law, the district court's answer to this mixed fact/law question is reviewed for clear error. *See Yankton Sch. Dist. v. Schramm,* 93 F.3d 1369, 1374 (8th Cir. 1996). At the administrative level, the District clearly had the burden of proving that it had complied with the IDEA. *See Clyde K. v. Puyallup Sch.*

> *Dist. No.3,* 35 F.3d 1396, 1398-99 (9th Cir. 1994). On appeal, the party challenging the outcome of state administrative hearings has the burden of proof. *See id.; Board of Educ. of Community Consolidated Sch. Dist. No. 21 v. Illinois State Bd. of Educ.,* 938 F.2d 712, 716 (7th Cir. 1991).
>
> Whether an IEP is reasonably calculated to provide some educational benefit is a mixed question of law and fact and our review is de novo, *Fort Zumwalt Sch. Dist. v. Clynes,* 119 F.3d 607, 611 (8th Cir.1997), *cert. denied,* 523 U.S. 1137, 118 S.Ct. 1840 (1998), although the district court's findings of fact are binding unless clearly erroneous. *Yankton Sch. Dist.* 93 F.3d at 1374.

Gill v. Columbia 93 Sch. Dist., 217 F.3d 1027,1035 (8th Cir. 2000). In this case, the court below overturned the district court by misapplying the law, cherry-picking the facts, and, consequently, erroneously concluding clear error in the district court decision. This was accomplished by overturning the district court's decision against the weight of the evidence in the record and without according the administrative decision the due weight required under the review standard.

The case law that has evolved from the IDEA in this Court and the Supreme Court of the United States establishes a unique standard of review for special education administrative decisions, as well as

decisions from the district courts. Unfortunately, the Eighth Circuit Court of Appeals utterly disregarded this unique standard and, notably, cited no standard of review by which it was being guided. Instead, the lower court did precisely that which this unique standard of review cautions against – supplanted its own notions of sound educational policy in the stead of the school authorities, which includes the special education administrative hearing system. Notable is the significant time devoted by the lower court to the "misdeeds" of the child rather than her educational needs.

B. The Lower Court Misapplied the Law and the Facts.

By substituting its own notions of sound educational policy, the lower court's opinion misunderstood and misapplied the most fundamental legal tenets found in the law. The lower court's opinion clearly focused significant space and time on the misbehavior of the child rather than on the legal obligations to such students under the law. This misapplication of the law and limited view of the facts is evident in the follow examples:

1. The lower court incorrectly concluded that a pattern of suspensions was not a change in placement violative of the stay-put provision under the IDEA.

2. The lower court incorrectly concluded that the parent rejected Barton Open when

> the record reflects it was, in fact, never offered.

The lower court's opinion correctly cites the legal conclusion from *Honig v. Doe*, 484 U.S. 305 (1988) that a suspension of *less than* 10 days does not constitute a unilateral change in placement. *App. at 15.* However, the lower court's opinion went astray when it concluded as follows:

> The ALJ concluded that the District violated this duty by failing to provide M.M. educational services during the days she was suspended between January and April 2005, ignoring the undisputed fact that L.R. rejected the District's offers of home schooling services during this period.

App. at 15-16. In reaching this conclusion, the Eighth Circuit panel substituted its own notions of what should take place between parents and schools, i.e., an agreement for alternative services, in doing so seriously misunderstood that the suspensions in excess of 10 days from her stay-put represent a *unilateral* change in placement no matter the alternative services offered. The lower court did not understand that suspensions in excess of ten days trigger very specific procedural safeguards under the IDEA that must be followed. 20 U.S.C. §§ 1415(j); 1415(k); 34 C.F.R. §§ 300.519; 300.520. In this case, the offer of alternative services, determined inappropriate to meet the needs of the student, i.e.,

"home-schooling"[2](sic) services, directly contradicts the child's right to an education in the least restrictive environment. As reflected in the administrative decision, home bound instruction is the most restrictive education services available under the IDEA and was rejected by the parent for that purpose. *App. 133, ¶ 53.* The history of the IDEA is predicated on keeping children in the education environment and not relegating them to institutions or home, thus severing contact with their peers. See, *Independent School Dist. No. 284 v. A.C.*, 258 F.3d 769, 778-79 (8th Cir. 2001).

As the ALJ correctly found:

> The student was suspended for approximately 38 days during the 2004-05 school year. The repeated suspensions of the student for periods of less than 10 days between January 2005 and April 2005 constitute a pattern because they cumulate to approximately 30 days and because the length of each removal, the total amount of time the student was removed, and the proximity of the removals to one another. These suspensions constitute a change in placement made by the district without the consent of the parent, in violation of 20 U.S.C. § 1415(f).

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[2] The Panel refers to "home-schooling" when the offer of services was "homebound instruction," a significant difference under the law, as the former is delivered by the parents and the latter is delivered by the school.

App. 145, ¶ 11.

As previously noted, the lower court cherry-picked facts from the administrative record in what appears to be a concerted efforts to create the appearance of a child far more dangerous than the record would, in fact, support. For example, the lower court wrote that "M.M. almost immediately incurred a *five*-day suspension for using mace in a *fight with another student.*" *App. at 18* (emphasis added). The lower court is in clear factual error in that the administrative record itself reflects that "the student was suspended for *four* days for *having a can of mace at school,* refusing to turn it over to district staff, and assaulting the administrator who tried to take it from her." *App. 127, ¶ 38* (emphasis added).

The lower court also incorrectly cites the administrative record when it found:

> The March 28, 2005, mediation agreement provided that L.R. would promptly visit Barton to learn about its Setting III program. L.R. made an informal visit and few days later, talked to one teacher, told the District that the Barton program was unacceptable, and later refused to reconsider her decision. With the parent having adamantly rejected a Setting III placement at Barton, the District did not violate the IDEA by failing to offer this placement "formally" before the due process hearing . . .

App. 19-20.

The administrative record reflects the confusion regarding the offer of the Barton program and the Parent's visit as follows:

> At this meeting [January 18, 2005](*App.125-26,* ¶ 35), the parent learned that the district had another SPAN program for middle school girls at Barton Open School, which the parent wanted to see. The social worker attempted to set up an informational meeting there, but the district refused to do so because there were no openings at Barton.

App. 126, ¶36. The District, according to the administrative record, continued to offer the Jordan Park program throughout the events leading up to the hearing, an offer the IEP team had agreed was inappropriate. *App. 125-26, 129,* ¶¶*35, 40.* This situation led the administrative law judge to correctly conclude:

> It is not clear whether there was ever an opening at the Barton SPAN program or whether such a placement was offered to the parent before the hearing.

App. 130-31, ¶ *47.*

Nevertheless, in direct contradiction to the facts in the administrative record, the lower court imprecates the parent for not accepting a placement

at Barton Open: again the record reflects that the Administrative Law Judge was unable to determine if it was ever offered.

The lower court's opinion is replete with examples of these kinds of misapplication and misinterpretation of the facts and law in this case creating what appears to be a retrospective marshalling of the facts and law in order to support a decision *fait accompli.*

Conclusion

For all the reasons and arguments stated herein, a writ of certiorari should issue to review and vacate the judgment in the Eighth Circuit Court of Appeals, remanding the matter back to the Eighth Circuit Court of Appeals to reinstate the District Court's decision.

Respectfully submitted,

Dated: 28 May 2008

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