

A Step In The Wrong Direction: How the Holdings in *Schaffer* and *Arlington Central* Have Strayed From IDEA's Purpose

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Abstract

This paper examines how the combined decisions of *Schaffer v. Weast* and *Arlington Central School District v. Murphy* place a heavy burden on parents who bring an IDEA action to challenge the adequacy of an Individualized Education Program (IEP): First, parents have the burden of proof to demonstrate that an IEP is inadequate; second, parents who prevail in their action cannot recover costs for expert witnesses. These decisions may have the adverse effect of preventing parents from successfully challenging school districts that provide inadequate IEPs. The author proposes and critiques a novel solution that could potentially alleviate this unfair burden.

Introduction

Parents raising a child with a disability are burdened with many challenges, including coping with their child's physical, mental, and/or emotional disability on a daily basis, managing the stress that accompanies caring for a child with a disability, financing medical expenses, and ensuring that their child receives a sound education. Challenges faced by these parents in the educational environment include becoming familiar with laws related to special education that directly affect their child, obtaining necessary accommodations so their child can function in a classroom, and ensuring that their child is benefiting from the educational program that has been created by the school.¹ The Supreme Court, in two recent groundbreaking decisions, has added yet another challenge to the plight of parents, with regard to actions brought under the Individuals with Disabilities Education Act (IDEA). Together, the holdings in *Schaffer v. Weast*² and *Arlington Central School District Board of Education v. Murphy*³ place a heavy burden on parents who bring an IDEA action to challenge the adequacy of an Individualized Education Program (IEP):

First, parents have the burden of proof to demonstrate that an IEP is inadequate; second, parents who prevail in their action cannot recover costs for expert witnesses.

Many scholars have examined the *Schaffer* decision, concluding, as this author concludes, that the burden of persuasion should be placed on the school district, rather than on parents, to demonstrate the adequacy of an IEP.⁴ However, scholars have not yet considered the effects of both the *Arlington Central* and *Schaffer* decisions on parental ability to pursue an action contesting an IEP. These two Supreme Court holdings may have the adverse effect of preventing parents from successfully challenging school districts that provide inadequate IEPs because of the cost of hiring an expert. Consequently, the Supreme Court has strayed from the IDEA's purpose of providing parents with a reasonable avenue to contest an inadequate IEP so that their child may receive a quality education.

This article will explore the novel issue of the combined effect of the *Arlington Central* and *Schaffer* decisions. Part I will provide a historical overview of IDEA and the IEP process. Part II will discuss issues concerning burden of proof within the context of these decisions. Part III will examine the reasoning of the court in *Schaffer* and *Arlington Central*. In Part IV, the costs and benefits of the Supreme Court's approach in these decisions will be debated. Part V will present alternative approaches to placing the burden of proof on parents and disallowing reimbursement for expert witness fees. In Part VI, this author will consider scholarly proposals in the literature and will present a unique proposal that will help parents deal with the ramifications of these combined decisions. Part VII will examine the costs and benefits of this author's proposal.

I. IDEA and the IEP Process

This section will provide an overview of the history and purpose of the IDEA, the IEP process, and procedural safeguards that have been put in place to ensure the adequacy of an IEP.

A. The History of the IDEA

IDEA was first passed in 1970 as part of the Education of the Handicapped Act,⁵ and was substantially amended in the Education for All Handicapped Children Act of 1975.⁶ Before the

1975 Act, the educational needs of millions of children with disabilities were not being met: These children were excluded from the public school system and were not receiving an appropriate education.⁷ The lack of adequate resources within the public schools required families to locate services outside the public school system.⁸ Furthermore, children with undiagnosed disabilities were prevented from having a successful educational experience.⁹ Two seminal cases in the 1970's opened the door for children with disabilities to attend public schools, holding against discriminatory practices of exclusion: *Pennsylvania Ass'n for Retarded Children (P.A.R.C.) v. Commonwealth*¹⁰ and *Mills v. Board of Education*.¹¹ The IDEA "codifies *Mills* and *PARC*, and moves well beyond those cases in the rights it affords to disabled children."¹² Congress has reauthorized the Act several times, including a title change to IDEA in 1990.¹³ In the 1997 reauthorization of IDEA, a provision was added requiring that mediation be offered to parents as an alternative method of resolving disputes with a school.¹⁴ IDEA was again reauthorized and amended in 2004 by the Individuals with Disabilities Education Improvement Act.¹⁵

IDEA allows the States to develop educational programs for disabled children; however, it imposes particular requirements that must be followed by States.¹⁶ For instance, States must certify to the Secretary of Education that policies and procedures are in place to meet the conditions of IDEA.¹⁷ Local educational agencies will receive IDEA funds only with certification to a State educational agency that policies and procedures are being followed.¹⁸

B. The Purpose of the IDEA

As set forth in U.S.C.S. § 1400(d)(1)(A), the purpose of this Act is "to ensure that all children with disabilities have available to them a free appropriate public education (FAPE) that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living."¹⁹ Additional purposes include ensuring that the rights of these children and their parents are protected,²⁰ and assisting States, localities, educational and federal agencies with providing education for all children with disabilities.²¹

C. The IEP Process

Once a child is identified as being a child with a disability, IDEA requires school districts to create an IEP for each disabled child, including (1) a statement of the child's current level of academic achievement and functional performance, (2) measurable annual academic and functional goals for the child, (3) a description of how progress towards meeting such goals will be measured, (4) a statement of special education, related services and program modifications that will be provided, (5) an explanation of the extent to which the child will not participate with non-disabled children, (6) individual accommodations needed to measure academic achievement, and (7) the projected date for initiating services and modifications, including the anticipated frequency, location, and duration of such services.²²

Parents are involved in the IEP process, and they are members of the "IEP Team," which is composed of a group including the child's teacher; a qualified and knowledgeable representative of the local educational agency; a person who is able to interpret evaluation results; those individuals who have knowledge or special expertise regarding the child; and when appropriate, the child with a disability.²³

D. Procedural Safeguards

The procedural safeguards in the IDEA provide information to parents about their child's IEP in addition to providing parents with procedures to dispute an inadequate IEP.²⁴ Parents have a right to examine records relating to their child, and may obtain an independent educational evaluation of their child.²⁵ Furthermore, parents must be provided with written notice prior to any changes in an IEP.²⁶ Parents may request an impartial due process hearing if they believe their child's IEP is inappropriate.²⁷ Safeguards for parties to a hearing include the right to be advised by legal counsel and by those with special knowledge of children with disabilities; the right to present evidence and to cross-examine witnesses; and the right to a written record and decision of the hearing.²⁸ The decision rendered in a hearing may be appealed by any party to the State educational agency, and an impartial review of the findings would be conducted in such a case.²⁹ Any party who is displeased with the decision made at the due process hearing or appeal may file a civil action in a state or district court.³⁰ Prevailing parties in an administrative proceeding may

recover attorney fees.³¹ IDEA is silent as to which party bears the burden of proof during a hearing challenging the IEP.

II. Burden of Proof

This section will briefly define and discuss burden of proof as it relates to the *Schaffer* and *Arlington Central* decisions involving the IDEA, outlining what the parties must prove to satisfy the burden of proof using the *Rowley* standard.

A. Burden of Proof Defined

The term burden of proof refers to “the necessity or duty of affirmatively proving a fact or facts in dispute on an issue raised between the parties in a cause.”³² Two parts of burden of proof include the burden of persuasion and production.³³ First, the burden of production involves the obligation of a party to produce enough evidence on a particular issue in order to proceed with a case.³⁴ Once this burden is satisfied, a party has the burden of persuasion, which involves the obligation of a party “to convince the trier of fact of all elements of his case.”³⁵ The *Schaffer* decision concerns only this second burden, determining which party bears the burden of persuasion in an administrative hearing to assess the appropriateness of an IEP; therefore, the term “burden of proof” is equated to burden of persuasion hereafter.³⁶

In making a decision of which party carries the burden of proof, courts first determine if the legislature has specified that a particular party bear the burden within the statute at issue.³⁷ In a case like *Schaffer*, however, where the legislature is silent, courts must make the decision of which party should be allocated the burden of proof.³⁸ The Supreme Court in *Schaffer* chose to utilize the “ordinary default rule,” placing the burden of persuasion on the plaintiff who is the party seeking relief, which is the usual assumption of the Supreme Court.³⁹ There are exceptions to this rule however, evidenced by cases where the burden of persuasion has been placed on the defendant.⁴⁰ In considering which party should bear the burden of proof, courts may recognize factors including policy considerations, convenience, and fairness.⁴¹ Policy considerations require examining the underlying purpose of statutory provisions, and supports placing the burden of proof on the party whose claim furthers the legislature’s purpose.⁴² Fairness and convenience

considerations require determining which party has greater control over evidence and greater “knowledge of a matter in issue”, and supports placing the burden of proof on such party.⁴³

B. The *Rowley* Standard

When a parent contests the adequacy of their child’s IEP, a hearing officer must determine whether the child received a FAPE.⁴⁴ The decision in *Board of Education v. Rowley* set forth the standard for determining if a State has complied with the requirements of Congress to provide a child with a FAPE.⁴⁵ First, the State must have complied with the Act’s procedural requirements.⁴⁶ Second, the IEP must be “reasonably calculated to enable the child to receive educational benefits.”⁴⁷ In applying this standard to the burden of proof, the party who carries the burden must prove whether or not the *Rowley* standard has been met.⁴⁸ For instance, parents who contest the adequacy of an IEP bear the burden of proving that the IEP does not satisfy the standard outlined in *Rowley*.⁴⁹ If school districts were to bear this burden however, they would have to prove that the *Rowley* standard has been met, and that the IEP is not inadequate.

III. Reasoning Within the *Schaffer* and *Arlington Central* Decisions

This section will examine the reasoning of the court within the *Schaffer* and *Arlington Central* decisions, and will identify key issues that were either disregarded or not fully considered by the court including the greater advantage of the school district as compared to parents, costs for expert witnesses, and the legislative history of the IDEA.

A. *Schaffer v. Weast*

The Supreme Court in *Schaffer* held that in an administrative hearing challenging the adequacy of an IEP, the party seeking relief bears the burden of proof.⁵⁰ Because IDEA is silent on allocating this burden, the court used the “ordinary default rule” that plaintiffs bear the burden of persuasion.⁵¹ The court reasoned that assigning the burden of proof to school districts might encourage schools to put more resources into IDEA administration and litigation, including preparing IEPs and presenting evidence, when Congress has repeatedly amended IDEA in order to reduce such costs.⁵² Furthermore, the court stated that the IDEA did not support a conclusion that every IEP was invalid until the school district demonstrated that it was not.⁵³ Rather, in order

to meet its goals, IDEA relies upon the expertise of school districts, and includes a provision requiring a child to remain in his current educational placement while an IDEA hearing is pending, instead of requiring that a child be given the placement requested by a parent.⁵⁴

In addressing the advantage of school districts in terms of information and expertise, the court stated that schools were obliged to safeguard the procedural rights of parents, and to share information with them, including the right to review records, and the right to an independent educational evaluation.⁵⁵ The court negated the school districts' advantage, stating:

IDEA thus ensures parents access to an expert who can evaluate all the materials that the school must make available, and who can give an independent opinion. They are not left to challenge the government without a realistic opportunity to access the necessary evidence, or without an expert with the firepower to match the opposition.⁵⁶

Although the court noted prevailing parents' ability to recover attorney's fees as another protection against the school's informational advantage,⁵⁷ there was no discussion within the opinion of the potential costs for expert witnesses, or which party would bear the burden of paying for experts. The issue of recovery for expert witness fees was later decided in *Arlington Central*.

B. Arlington Central School District v. Murphy

Certiorari was granted in *Arlington Central* to resolve a conflict among the circuits of whether Congress authorized prevailing parents in IDEA actions to recover fees for services rendered by experts.⁵⁸ In this case, parents who prevailed in their action under IDEA sought fees for services provided by an educational consultant during the proceedings, relying on 20 U.S.C. § 1415(i)(3)(B), an IDEA provision providing that a court "may award reasonable attorneys' fees as part of the costs" to prevailing parents.⁵⁹ The Supreme Court held that section § 1415(i)(3)(B) does not authorize prevailing parents in IDEA actions to recover expert fees.⁶⁰ The majority reasoned that it was necessary to ask whether IDEA provided clear notice of the obligation for States to compensate prevailing parents for expert fees.⁶¹ This is because Congress enacted IDEA pursuant to the Spending Clause, and as such, was required to attach unambiguous conditions to a State which accepts federal funds, so that the funds are accepted knowingly and

voluntarily.⁶² The court determined that because the text of the statute did not mention an award of expert fees, clear notice was not provided to the States regarding this matter.⁶³

The court attributed the statutory language stating that attorney fees may be granted “as part of the costs” to recoverable costs listed in 28 U.S.C. § 1920, the statute governing the taxation of costs in federal court, rather than to the costs of expert fees.⁶⁴ The recovery of witness fees under § 1920 was limited by 28 U.S.C. § 1821, which authorized travel reimbursement and a \$40 per diem.⁶⁵ In addition to considering the text of IDEA, the court also relied on their reasoning in previous decisions to support their position that the term “costs” in 20 U.S.C. § 1415(i)(3)(B) is defined by the expenses outlined in § 1920, and to reinforce their conclusion that IDEA does not unambiguously authorize prevailing parents to recover expert fees.⁶⁶ The court dismissed arguments regarding IDEA’s goals and procedural safeguards as “too general,” stating that the IDEA “obviously” does not intend to promote these broad goals at the expense of fiscal considerations.⁶⁷ The court also disregarded relevant legislative history demonstrating Congress’ intent for prevailing parents to receive compensation for expert fees as “simply not enough” to overcome the text of IDEA.⁶⁸

IV. Costs and Benefits of the Supreme Court’s Approach

This section will discuss the costs and benefits of the Supreme Court’s reasoning within the *Schaffer* and *Arlington Central* decisions, with an emphasis on the combined effect of both decisions. Costs include the unfair advantage held by school districts, undesirable effects on economically disadvantaged parents, a straying from the purpose of the IDEA and the intent of Congress, and ineffectual enforcement of IDEA compliance. A benefit includes the curbing of costs related to IDEA litigation.

A. Costs

1. The Unfair Advantage of School Districts

In *Schaffer*, the court describes protections that “ensure that the school bears no unique informational advantage.”⁶⁹ However, the school district has distinct advantages over parents: (1) A greater knowledge of available educational resources and (2) Greater funding for expert

witnesses. This second advantage was made possible by the court in its decision in *Arlington Central*, holding that losing school districts do not have to pay the fees of expert witnesses in special education lawsuits. Therefore, school districts have the advantage over many parents in being able to afford the cost of hiring an expert.

The court in *Schaffer* concedes that school districts have a “natural advantage” in information and expertise, however, states that because parents have access to an expert who can evaluate materials made available by the school, this school advantage is removed.⁷⁰ This reasoning is flawed. First, the court in *Schaffer* failed to consider the costs involved with hiring an expert. Since many parents are unable to afford an expert, the school district is allowed to keep their advantage. Although parents are entitled to an independent educational evaluation (IEE) at public expense, such an evaluation is not equivalent to an expert who will evaluate all of the materials provided by the school in preparation for a hearing.⁷¹ An IEE is defined as “an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question.”⁷² An evaluator who performs an IEE can be likened to a “fact witness”, one who gives opinion testimony based on facts or data, such as the evaluation results.⁷³ Unlike fact witnesses, expert witnesses can respond to hypothetical questions and form conclusions on facts or data relied on by experts in the field.⁷⁴ Evaluators who conduct IEEs are not required to be licensed by the State,⁷⁵ whereas an expert retained by a parent would likely be licensed for greater credibility.

Second, the majority in *Schaffer* failed to consider the range of superior advantages held by the school district. These advantages include greater access to relevant educational information, ready access to persuasive experts who have been involved with the child’s education, and greater educational expertise by the school district as compared to the parents.⁷⁶ For instance, a school district has knowledge of the entire range of educational facilities within the area.⁷⁷ School districts are responsible for creating IEPs for all disabled children, and with their superior resources, are better able to demonstrate an IEPs adequacy than parents are able to demonstrate its inadequacy.⁷⁸

2. Undesirable Effects on Economically Disadvantaged Parents

These two Supreme Court decisions potentially have the adverse effect of preventing parents from successfully challenging school districts that provide inadequate IEPs because of the costs involved with hiring an expert. Furthermore, as a result of these decisions, parents who are low-income are at a greater disadvantage in their ability to contest the adequacy of an IEP than parents who have a higher income. Clearly, it could not have been the intent of Congress to have economic disparity be a determining factor in its procedural safeguards.

One reason low-income parents may be unwilling to put up the costs for hiring an expert is the strong likelihood that school districts will challenge a parental claim of IEP inadequacy. School districts have an incentive to challenge such claims in order to conserve resources.⁷⁹ Moreover, since many experts for IDEA proceedings are on staff, the costs for experts is minimal and can be taken from the school district's budget, as compared to the costs of experts for parents.⁸⁰ Parents of children with disabilities are more likely to feel the burden of the costs involved with obtaining experts, and have a great need for reimbursement, as evidenced by the fact that in 2000, almost one in four students with disabilities were living in poverty, and more than one-third of such students lived in households with incomes of \$25,000 or less.⁸¹ Therefore, parents are placed at a disadvantage by being required to bear the financial burden of expert fees, and may sacrifice the services of educational experts because of the inability to finance the cost.

Parents who are unable to afford the cost of expert witnesses when contesting the adequacy of an IEP are at a disadvantage, as parents who call expert witnesses are more likely to prevail in an administrative hearing.⁸² The National Council on Disability (NCD) has stated, "parents suing districts under the IDEA have virtually no chance of winning without the use of expert witnesses."⁸³ Expert witnesses are necessary for testimony regarding appropriate programs and services that are needed by a child.⁸⁴ Because school districts will call educators, psychologists, therapists, and administrators to testify on their behalf, it is necessary for parents to have their own experts to challenge the school district and to justify an educational placement

sought by parents.⁸⁵ Experts are especially important in assisting parents to meet their burden of proof. This is because the *Rowley* standard makes it difficult for parents to prove that an IEP is inadequate, whereas schools simply have to demonstrate that some benefit has been provided to a student.⁸⁶

It is unfair for disadvantaged parents to have to bear the burden of proving that an IEP is inadequate in addition to bearing the costs of experts when such costs would not have been borne if the IEP was originally adequate.⁸⁷ Furthermore, contrary to the legal axiom that a winning plaintiff should be made whole, prevailing parents will be made partial rather than whole.⁸⁸

3. Straying From the Purpose of the IDEA and the Intent of Congress

The court in *Arlington Central* gave little deference to Congress' intent and to the IDEA's purpose, focusing instead on the text of the IDEA. In reviewing the legislative history and procedural safeguards of the IDEA, however, it is evident that an award of expert fees furthers the IDEA's purpose, whereas the denial of such reimbursement by the court strays from the IDEA's purpose by imposing costs for what should be a *free* appropriate education, and by diminishing procedural protections for parents.⁸⁹

Congress' intent for prevailing parents to be compensated for expert fees is evident in the legislative history relating to § 1415(i)(3)(B), which includes a Conference Committee Report stating, "The conferees intend that the term 'attorneys' fees as part of the costs' include reasonable expenses and fees of expert witnesses and the reasonable costs of any test or evaluation which is found to be necessary for the preparation of the...case."⁹⁰ The purpose of this legislation was to reverse the Supreme Court's holding that prevailing parents were not entitled to attorneys' fees in *Smith v. Robinson*.⁹¹ A further indication that Congress recognized that expert costs are recoverable is that Congress directed the General Accounting Office (GAO), as a provision of the Handicapped Children's Protection Act of 1986, to report on "the specific amount of attorneys' fees, costs, and expenses awarded to the prevailing party" in IDEA proceedings, the number of hours spent by consultants in these proceedings, and the expenses incurred by the

parties.⁹² Clearly, it is evident that the intent of Congress was for “costs” to cover expenses incurred by parents in IDEA proceedings, including the costs for expert witnesses.⁹³

The majority in *Arlington Central*, rather than considering the relevant legislative history, focused on the fact that the IDEA was enacted pursuant to the Spending Clause, and that States must clearly be told of the conditions that accompany the receipt of federal funds.⁹⁴ Justice Breyer, in his dissent, persuasively combats the majority’s adherence to the requirement of unambiguous State notification by arguing that there is not a single case which “suggests that *every spending detail* of a Spending Clause statute must be spelled out with unusual clarity.”⁹⁵ Rather, the Supreme Court has held that in legislation regarding “the remedies available against a noncomplying State,”⁹⁶ the *Pennhurst* requirement that Congress provide unambiguous conditions when granting federal money does not always apply.⁹⁷ Furthermore, if States were given clear notice of the condition that prevailing parents are to receive reimbursement for expert witness costs, the States likely would still have accepted the government’s funds.⁹⁸ Therefore, it appears that the more important focus of the majority should have been on the legislative history and the purpose of the IDEA rather than on unambiguous conditions that may have been given to the States.

The IDEA guarantees a free, appropriate public education for all children with disabilities.⁹⁹ It is therefore contrary to the IDEA’s purpose for parents to have to incur costs in order to ensure that their child receives an appropriate education.¹⁰⁰ Furthermore, Congress clearly could not have intended for parents to have to pay for the protection of a procedural safeguard. One such safeguard in § 1415(h)(1) provides that in addition to the right to legal counsel, parents have a right to be accompanied by “individuals with special knowledge or training with respect to the problems of children with disabilities.” This safeguard is the IDEA’s assurance that parents may obtain the help of experts.¹⁰¹ It is contrary to public policy for parents not to be able to recover the costs of experts because this removes a procedural safeguard that was intentionally created by Congress.

4. Ineffectual Enforcement of IDEA Compliance

The combined decisions of *Schaffer* and *Arlington Central*, by placing a greater burden on parents and potentially reducing their likelihood of contesting an inadequate IEP, in effect alters one of the enforcement mechanisms built into the IDEA through its procedural safeguards. Levels of enforcement provided by the IDEA include governmental (federal and state) and parental enforcement.¹⁰² Parents, as equal members of the IEP team, are provided with safeguards that are methods of parental enforcement, such as the right to a due process hearing when there is a complaint regarding the adequacy of an IEP.¹⁰³ Federal governmental enforcement is through the Office of Special Education Programs (OSEP) under the U.S. Department of Education, which monitors state compliance with the administration of grant funds.¹⁰⁴ States monitor the IDEA compliance of local school districts.¹⁰⁵ Enforcement involves the U.S. Secretary of Education withholding funds from a noncompliant State, or referring the matter to the Department of Justice.¹⁰⁶ There is evidence, however, of poor governmental enforcement of the IDEA, as “there is not a state in the nation in compliance with IDEA.”¹⁰⁷ Because of federal-level and state ineffectiveness in monitoring compliance of the IDEA requirements, it is up to parents to enforce and monitor the school district’s compliance with creating an adequate IEP.¹⁰⁸ Characteristics of parents that may interfere with enforcement include a fear of retaliation against their child, a desire to maintain positive relations with the school, cultural norms that regard school officials as unquestionable authority figures, and a feeling of powerlessness.¹⁰⁹ Still, the only meaningful enforcement authorized by IDEA is the parental complaint system.¹¹⁰ Therefore, it is unfortunate that parent-level enforcement is thwarted by the Supreme Court’s holding in *Schaffer* and *Arlington Central*, as parents face a heavy burden in attempting to challenge a school district’s decisions. As a result of these decisions, the oversight of school districts is diminished, and non-compliance may be undetected rather than punished by the withholding of funds.

B. Benefits

1. The Curbing of Costs

An objective of the amendments to the IDEA was to reduce the litigation costs for schools under the Act.¹¹¹ Costs involved with IDEA compliance include litigation expenses, expert testimony, reimbursing parents for private school placements, administration and support services, and expenditures for the assessment and education of special education children.¹¹² The majority in *Schaffer* has argued that assigning the burden of proof to school districts will result in an increase in administrative and litigation-related costs.¹¹³ The expenses of litigating a due process complaint are already high, “costing schools approximately \$8,000-to-\$12,000 per hearing.”¹¹⁴ Schools might be encouraged to utilize greater resources to prepare IEPs and present evidence if assigned the burden of proof.¹¹⁵ Moreover, school districts do not have unlimited resources to spend, and money allocated towards litigation, including the payment to parents of expert witness fees, cannot be spent on the education of students.¹¹⁶ Therefore, the benefit of allocating the burden of proof to parents contesting an IEP as well as not reimbursing parents for the costs of expert witnesses is the prevention of increased litigation costs of the school district. Interestingly, Justice O’Connor, in delivering an opinion for a unanimous court in *Florence County School District IV v. Carter* stated:

There is no doubt that Congress has imposed a significant financial burden on States and school districts that participate in IDEA. Yet public educational authorities who want to avoid reimbursing parents for the private education of a disabled child can do one of two things: give the child a free appropriate public education in a public setting, or place the child in an appropriate private setting of the State's choice. This is IDEA's mandate, and school officials who conform to it need not worry about reimbursement claims.¹¹⁷

Therefore, school districts can curb costs related to parental reimbursement and litigation expenses by following the requirements of the IDEA.

V. Alternatives to Placing the Burden of Proof on Parents and Disallowing Parental Reimbursement for Expert Witness Fees in IDEA actions.

Scholars have discussed alternative approaches to the Supreme Court’s decisions in *Schaffer*, which include placing the burden on the school district or utilizing a burden-shifting scheme. These two approaches will be discussed within this section, as well as an alternative to

the approach in *Arlington Central*, which is to reimburse parents for the costs of expert witnesses. A discussion of the costs and benefits of these approaches will follow.

A. Burden on the School District

Scholars proposing an alternative approach of placing the burden on the school district reason that the statutory language and fairness supports the allocation of this burden to the district.¹¹⁸ Congress, by statutorily imposing affirmative duties on school districts, required educational agencies to implement its policies to educate children with disabilities.¹¹⁹ Although Congress was silent in allocating the burden of proof, the duties imposed on educational agencies, as well as the fact that school districts are responsible for developing IEPs, support placing the burden on school districts to demonstrate that their statutory obligations have been met.¹²⁰

Proponents of assigning the burden of proof to school districts state that procedural safeguards such as designating parents as members of their child's IEP Team with rights to attend IEP meetings and to inspect documents, do not "level the playing field" for parents.¹²¹ This is because parent involvement is not a certainty, and such involvement is often greater during the child's elementary school years as compared to later years when involvement decreases.¹²² Furthermore, the level of involvement is correlated to parental socioeconomic status; parents of a lower socioeconomic status are less likely to participate in IEP meetings than parents of a higher socioeconomic status.¹²³ If IDEA's procedural protections are not consistently implemented in practice, as evidenced by parental lack of involvement, the result is that parents and school districts are not on equal footing.¹²⁴ This unfortunate result remains the same, even if parents do participate in IEP meetings and utilize IDEA's safeguards, because parents will be unable to gain an equivalent level of knowledge as school administrators.¹²⁵ As it is, many parents view the IDEA as a maze-like process which they have difficulty navigating.¹²⁶ Moreover, parents have difficulty deciphering the language used by school administrators, and cannot match the expertise of school districts in evaluating educational placements.¹²⁷ Therefore, because of this uneven playing field, the school district "with the bigger guns" should be assigned the burden of proof.¹²⁸

B. Burden-Shifting Approaches

Scholars have proposed different versions of the burden-shifting model. One proposal provides that parents should carry the initial burden of proving that their child is demonstrating a lack of progress under the IEP developed by the school district, and if this initial burden is met, the burden should then shift to the school district to demonstrate that it has satisfied the two-part *Rowley* test.¹²⁹ A second proposal supports splitting the burden of proof on procedural and substantive issues, whereby the school district would bear the burden of proving procedural compliance with the IDEA and the parents would bear the burden of proving that a meaningful educational benefit has not been achieved.¹³⁰ A third proposal follows the approach used in the reasonable accommodation provision of the Americans with Disabilities Act, where a parent would first establish a prima facie case that their child's disability falls into a statutorily protected category, and then the burden would shift to the school district to prove that the child's disability was accommodated by providing an adequate IEP.¹³¹

C. Allowing Prevailing Parents to Recover Expert Witness Fees

An alternative approach to the *Arlington Central court's* method of focusing primarily on the text of the IDEA, which provides for an award of "attorneys' fees as part of the costs" to prevailing parties, is to consider the purpose of the statute and the IDEA's legislative history.¹³² This history, as discussed in Part IV.A.3 above, includes a House Conference Report specifically stating the conferees intent for reasonable expert witness fees to be included as part of attorneys' fees.¹³³ In addition, the IDEA was created to protect parents and children, and to provide children with disabilities with a FAPE.¹³⁴ A consideration of these factors, in addition to the text of the IDEA and the Supreme Court's requirement that parents bear the burden of proof, could have led to a decision in favor of recovery of expert fees by prevailing parties.

D. Costs and Benefits of Suggested Alternative Approaches to the Supreme Court decisions in *Schaffer* and *Arlington Central*.

1. Costs and Benefits of Placing the Burden of Proof on the School District or Adopting a Burden-Shifting Approach

By placing the burden on the school district, costs include the possibility that schools will be required to spend increased time and money in litigation-related matters than on creating and executing appropriate IEPs.¹³⁵ Benefits of all of these approaches include evening the playing field between parents and school districts by requiring the district with its greater knowledge and resources to demonstrate the adequacy of an IEP. Furthermore, school districts are likely already prepared to manage this burden without substantially increasing their workload since they are statutorily required to ensure that children receive a FAPE, and the monitoring of IEPs is ongoing.¹³⁶ Benefits of the first burden-shifting model discussed above (with parents carrying an initial burden prior to the burden shifting to the school) include the increased fairness of assigning an initial minimal burden, rather than the full burden on the moving party who is at a disadvantage by not possessing the knowledge or financial means to effectively carry the full burden.¹³⁷ A cost of this model is that parents must provide evidence that their child is not making progress, and this can be difficult to prove under the *Rowley* standard, which provides that only *some* educational benefit must be conferred upon a disabled child.¹³⁸ A cost of the second burden-splitting model discussed above (splitting the burden of proof on procedural and substantive issues) is that parents are still assigned a burden of persuasion which they may be unable to meet without effective resources. In addition, it can be difficult to divide substance and procedure, and “introducing this division in IDEA due process hearings would add a layer of complexity to an already intricate proceeding.”¹³⁹ A benefit of the third proposed approach following the ADA model is that each party carries a burden for which they possess relevant information; i.e. the parent typically has greater knowledge about a child’s disability, and the school district has the experience and resources that are required to determine how to meet a child’s need with an appropriate IEP.¹⁴⁰ A cost of this approach is that not all parents fully understand their child’s disability and how the disability should be accommodated under the IDEA, and this can be a disadvantage in establishing a prima facie case.¹⁴¹

2. Costs and Benefits of Allowing Recovery of Expert Witness Fees

A cost of awarding recovery of expert witness fees is the possibility that the IDEA will be abused by parents in order to obtain costly expert witness fees.¹⁴² Benefits of allowing recovery include furthering the IDEA's clear purpose and removing an additional burden that could result in a parent's inability to challenge an insufficient IEP because of expert costs. A "watershed of parent complaints" is improbable, as few parents request a due process hearing, and there are many school districts that do not have disputes resulting in a hearing.¹⁴³ Furthermore, an abuse of a system that allows the awarding of expert fees is not likely to occur, as parents would still be required to prevail in their action in order to obtain recovery.¹⁴⁴ Moreover, "the attorney of a parent who files a complaint or subsequent cause of action that is frivolous, unreasonable, or without foundation" is deterred by having to pay attorney's fees to the local educational agency.¹⁴⁵

VI. Post Schaffer and Arlington Central: Proposed Alternatives to Deal with the Ramifications of These Combined Decisions

This section will first present proposals provided by scholars that may be effective in assisting over-burdened parents with challenging inadequate IEPs following the *Schaffer* and *Arlington Central* decisions. A cost and benefit analysis of these proposals will also be discussed. This author will then present a novel approach to dealing with the effects of these combined decisions.

A. Proposals in the Literature

One scholar has suggested an end to the "damaging battle of the experts," proposing a model similar to the *guardian ad litem* that is used by courts in child abuse and neglect cases.¹⁴⁶ This model would involve the selection of a neutral expert with input from both parents and the school, to make recommendations to a hearing officer.¹⁴⁷

Another scholar has proposed that law school clinics specializing in special education could play an important role in teaching self-advocacy skills to parents, and in helping parents to understand their legal rights.¹⁴⁸ There is a significant need for legal services within this area, as there is a shortage of attorneys that are available for special education representation.¹⁴⁹ Considerations involved with clinic representation include a determination of the target client

population and case selection.¹⁵⁰ For instance, clinics may choose to represent only low-income families, receive referrals from courts or public agencies without considering income, or serve children with a particular type of disability.¹⁵¹ An interdisciplinary clinic model is especially advantageous in offering resources for parents in one place, such as counseling and evaluations by a social worker, psychologist and a pediatrician in addition to law professors and law students.¹⁵² Part-time law students can be well-suited to providing assistance to parents, as they are often older and may be parents themselves.¹⁵³ Since these students often work during the day and are unable to participate in summer internships, a clinic that facilitates evening and weekend meetings with parents can be beneficial to both students and parents who work.¹⁵⁴

Funding mechanisms for alleviating the costs involved in operating a clinic include monetary contributions by parents (such as a sliding scale), utilizing the parents right to an independent educational evaluation at the expense of the district, seeking experts who provide services on a pro bono or low-cost basis, and using accumulated attorneys' fees awards.¹⁵⁵

B. Costs and Benefits of the Neutral Expert and School-Clinic Models

1. Disadvantages of a Neutral Expert

A neutral expert, although helpful in assessing a child's overall need for educational and related services, has a risk of imposing his or her own bias, depending on past experiences, prior dealings with the school district, and the source of funding for the expert. Even if each party pays an equal share, or obtains an expert from public funds, there is a danger of bias towards the party with the greater resources, which is the school district.¹⁵⁶ An expert's commitment to particular theories within his or her own discipline further affects the expert's outlook, and brings into question neutrality.¹⁵⁷ In addition, a neutral expert would likely be required to present his or her own facts and determinations, and the expert's conclusions may not support a parent's challenge to an IEP. Therefore, a neutral expert, although selected with input from the parent, is not equivalent to an expert selected solely by the parent to advocate for a particular outcome.

2. Disadvantages of a School-Clinic Model

A clinic program developed by a law school, although helpful in providing guidance to many parents of children with disabilities, cannot satisfy the needs for all of these parents. Clinics, like agencies that provide free legal services to parents, have staff and funding limitations, and are therefore required to select some cases and not others. Case selection and the targeting of populations (i.e. low-income parents) therefore exclude many parents in need as it is impossible to serve all parents under this model.¹⁵⁸ In addition, a school-clinic model that teaches advocacy skills to parents does not provide the same benefits of an attorney who legally represents a child in a due process hearing. Further, by providing legal services to parents for IDEA-related matters, a school-clinic model with local control does not place accountability with the federal government, who should be contributing to the assistance of over-burdened parents.

3. Benefits of a Neutral Expert

A neutral expert would reduce the adversarial nature of due process hearings in terms of eliminating one party's need to rebut the other party's expert witness testimony. Rather, a neutral expert, chosen by both the parents and the school district, would facilitate a step toward cooperation, since the expert's opinion would likely be valued by both parties. A neutral expert would provide parents with a greater ability to prove the inadequacy of an IEP, if the expert also determines the IEP to be invalid. Moreover, a neutral expert would help to level the playing field between the school district and the parents, as parents would not be required to compete with a school district that has greater access to expert witnesses who are on staff and greater funding for experts. In light of the *Arlington Central* decision, the availability of a neutral expert would improve the position of many parents who would not be able to otherwise afford the cost of an expert.

4. Benefits of a School-Clinic Model

A school-clinic model is beneficial for those parents who lack sufficient access to legal representation or who cannot afford the costs of an attorney and need to be advised of their rights.¹⁵⁹ Not all parents will prevail, and only those who prevail will receive reimbursement of attorney fees.¹⁶⁰ School clinics can aid with IEP enforcement by empowering parents and

helping them recognize when a school is failing to comply with an IEP. Moreover, these clinics can assist parents with meeting their burden of proof. An interdisciplinary clinic model can further assist parents, alleviating the stress of contacting professionals in multiple locations by providing a variety of services at minimal or no cost in one location.¹⁶¹ Special education clinics also have a benefit of being relatively inexpensive to maintain, aside from the typical operating expenses of providing legal services.¹⁶² In addition to serving the community and providing advocacy training to many parents, law school clinics make a difference by engaging in legislative advocacy.¹⁶³ Further, by participating in a special education clinical experience, law students benefit by gaining a greater awareness about disabilities.¹⁶⁴

E. This Author's Proposal: An Expert Witness Panel Funded by the Federal Government and Controlled by the State.

It is evident that Congress needs to amend the IDEA to provide clarity regarding which party bears the burden of proof and whether parents should be reimbursed for the cost of expert witnesses. If this does not occur, Congress should alleviate the burden on parents that has been created by judicial interpretation of the IDEA. This author's proposal will enable Congress to take action in light of these Supreme Court decisions that have strayed from the IDEA's purpose.

In creating a proposal to deal with the ramifications of the *Schaffer* and *Arlington Central* decisions, it is important to consider the purpose of the IDEA, and how parties are affected as a result of these holdings. This paper has examined these issues, and it is clear that parents have been placed at a disadvantage as compared to school districts when contesting the adequacy of an IEP. As a result of these decisions, parents have the burden of proof to demonstrate that an IEP is inadequate and even if they prevail in their action, expert witness costs are unrecoverable. It is contrary to the purpose of the IDEA to require parents to pay for what is supposed to be a *free* appropriate public education for their child. In order to prevent future unsuccessful challenges of inadequate IEPs and the potentially adverse effect of parents foregoing such a challenge because of the excessive cost of needed experts, it is necessary to level the playing field between the school district and parents. Therefore, this author suggests the creation of an

expert witness team by Congress, consisting of professionals that will be available for parents as an additional safeguard when challenging an invalid IEP. It is further proposed that the federal government provide funding to the States for expert panels, designating the funds specifically for this use.

In proposing an expert panel that would be available for parents rather than school districts, this author considered the current advantage held by school districts in terms of information, in-house accessibility to experts, and greater funding. Under this model, experts could be available to parents to (1) assess the best interests of their child with a disability, (2) determine whether the *Rowley* standard has been satisfied, including making an assessment of whether the school district has complied with the IDEA's procedural requirements and whether the educational program enables the child to receive educational benefits, (3) review documents, including evaluations provided by the school district to determine IEP adequacy, (4) educate parents about alternative educational programs or services if necessary, that would enable their child to receive an educational benefit, (5) provide expert testimony articulating findings and recommendations, and/or (6) assist parents with understanding IDEA procedures, and the language used by school administrators. Since the State would be authorized by Congress to create an expert panel, the State could determine whether the role of the expert should be broad, encompassing all of the above duties, or limited, encompassing few duties. It is recommended that the principal role of the expert be to provide an opinion of whether the IEP does not satisfy the standard outlined in *Rowley*, because this is the primary issue, and is what parents must prove. These experts could empower parents and help them to meet their burden of proof in a hearing contesting the adequacy of an IEP, if an expert witness determines that the IEP does not satisfy the *Rowley* standard. It is because of this parental burden of proof (as parents are more likely to contest an IEP than a school district who created the IEP) that an expert team for parents is recommended. A neutral expert team could be valuable in determining what is in the best interest of the child with a disability; however, such a model is better served in a process such as mediation or a system that does not place the burden of proof on the overburdened parent.

This proposal suggests funding of experts by the federal government rather than the State because States already are paying a greater percentage of costs related to special education as compared to the federal government's contribution of 40%.¹⁶⁵ Furthermore, Congress created procedural safeguards for parents, including an enforcement mechanism, and funding should be provided by the federal government to ensure that parents have the ability to utilize the safeguard in order to successfully challenge an insufficient IEP. Funding of this proposal by the local school district is likewise not proposed, as schools already are significantly burdened financially with IDEA-related matters, as discussed in Part IV.B.1 above. Just as it is unfair for parents to have to bear the cost for expert witnesses, it would similarly be unfair to place the burden of parental expert costs on school districts.

Creating a panel of professional experts admittedly has its challenges. Considerations include which professionals to include in the team, expert credentials, and procedures for parents to obtain such experts. It is suggested that an expert panel include professionals that would normally work directly with a family or child with a disability in an educational environment, including a special education teacher, psychologist, social worker, occupational, physical, and speech therapist. These are also professionals that schools would typically present as expert witnesses.¹⁶⁶ One or more members of this proposed panel of experts would be responsible for traveling within the State to hearings when requested by parents.

Regarding expert credentials, each witness should meet the general qualification standards for an expert: "A witness who has sufficient knowledge, skill, experience, training, or education to assist the trier of fact is qualified as an expert."¹⁶⁷ For credibility purposes, experts included in the panel should be licensed in addition to satisfying requirements for eligibility to practice by each expert's own professional licensing board.¹⁶⁸ Under this model, it is proposed that experts have experience working with the special needs population, and be able to articulate his or her opinion regarding analysis of documents provided by the school district and the adequacy of the IEP. It is necessary for witnesses to keep up to date with developments in their area of expertise.¹⁶⁹ Further, panel experts should be familiar with various educational placement

offerings within the State in order to be able to compare schools. It is proposed that parents have access to experts as soon as possible after determining that an IEP is inadequate, as early retention allows experts to be used as consultants who can request relevant data from the school district and assist with mediation or in a hearing.¹⁷⁰ Experts should be available to parents for a reasonable length of time as determined by the State, and may be restricted to a certain number of visits or a practical number of hours to curb costs and encourage efficiency. A procedure for parents to obtain an expert could be facilitated by a designated State official serving as a liaison between parents and experts. The official would be responsible for obtaining further information regarding whether one or more experts is needed, depending on services received by the child and experts being presented by the school district. One expert or a team of experts could then perform designated duties, review documents, and assess whether the IEP is insufficient. Alternatively, to conserve costs, it is suggested¹⁷¹ that a special education expert be responsible for the initial review of documents, bringing in other experts on the panel as needed, following guidelines created by the State.

VII. Costs and Benefits of This Author's Proposal

This section will discuss the costs and benefits of implementing a state-created team of expert witnesses funded by Congress and accessible to parents who are contesting an insufficient IEP.

A. Costs of This Proposed Model

It is recognized that this model, in providing greater access to experts by parents, continues to facilitate the adversarial nature of due process hearings. The positioning of parents and school districts against each other creates this environment.¹⁷¹ This model is therefore better suited for a hearing that requires parents to establish their burden of proof rather than a mediation process, where adversarial experts and parties are more likely to disagree and arrive at conclusions that benefit their own interests.¹⁷² Alternatively, a similar model that provides a neutral expert who is available to both parties might reduce the "battle of the experts," and would promote increased cooperation between both parties, facilitating mediation.

This proposed model encourages increased involvement by Congress which reduces local control, and places an additional administrative burden on States to create a panel of experts representing multiple disciplines, with guidelines outlining duties of these experts. In addition, school districts might view this additional safeguard as unfair, being concerned about the possibility of an increase number of claims contesting the adequacy of IEPs. Finally, Congress might view this model as impractical, since an amendment to the IDEA allowing for parental recovery of expert witnesses would achieve the same outcome without the financial costs that this model would certainly impose on the federal government.

B. Benefits of This Proposed Model

This model provides parents with an opportunity to increase their likelihood of contesting an insufficient IEP in the aftermath of two Supreme Court decisions that have placed undue responsibilities on parents who have children with disabilities. Adopting this proposal would remove at least one of these burdens, the inability to recover the costs of expert witness fees, and would eliminate the unfairness of low-income parents being required to bear the burden of proof without expert witnesses. Unlike the school clinic model described above, this model protects *all* parents who require assistance rather than selected parents. Regarding concerns that this model might lead to an increase in the number of lawsuits initiated by parents; this is not likely to occur, as there are costly consequences for those who file frivolous, unreasonable actions.¹⁷³ By implementing this model, Congress would demonstrate that the term 'costs' in §1415(i)(3)(B) should include the fees of expert witnesses. Furthermore, the federal government would exhibit an increased level of accountability, by funding a procedural safeguard that would aide parents in their responsibilities of enforcing IEPs, rather than continuing to delegate this duty without providing resources to parents. Moreover, autonomy of the state is preserved without the burden of additional expenditures, by allowing states to independently create an expert witness team with funds provided by the federal government.

With the assistance of expert witnesses, parents can challenge an inadequate IEP “with the firepower to match the opposition,” as the *Schaffer* court assured.¹⁷⁴ Although a neutral expert

panel would eliminate the “battle of the experts,” there is a risk of bias towards the school district with such a model, as described in Part VI.B.1. Within this proposed model, however, it is the federal government that is funding the cost for witnesses, and with the State creating an expert team authorizing experts to advocate for parents, the risk of bias is minimized. Parents have a significant need for an expert witness team, as they are at a greater disadvantage than the school district given the burden of proof allocation, the district’s greater accessibility to in-house experts, and its greater knowledge of IDEA procedures. A model providing parental access to a team of expert witnesses is in line with the purpose of IDEA, to provide children with disabilities a FAPE, and to protect the rights of parents. Regarding any concerns by Congress about the financial costs involved, this model could be used during an interim period until another amendment to the IDEA is passed removing the excessive burdens that have been placed on parents.

VIII. Conclusion

The combined decisions of *Schaffer* and *Arlington Central* have imposed a heavy burden on parents who need to contest an insufficient IEP, and could prevent parents from bringing forth a valid action under the IDEA. Consequently, the Supreme Court has strayed from the purpose of the IDEA to provide all children with disabilities with a *free* appropriate public education and to protect the rights of these children and their parents. As a result of these decisions, school districts have an unfair advantage over parents who contest the adequacy of an IEP, especially those who are economically disadvantaged. In addition, enforcement mechanisms built into the IDEA are further diminished. It is now necessary to even the playing field between parents and school districts. Until Congress amends the IDEA, as it should, to alleviate the unfair burdens imposed on parents, this author has proposed an alternative solution in an effort to remedy the potentially detrimental effects of these decisions. Parents raising a child with a disability have enough challenges. It is therefore essential to keep in mind the purpose of the IDEA and the importance of achieving a balance between resources available to parents and school districts, so that parents are provided with fair procedures when contesting an inadequate IEP.

Endnotes

- ¹ See, e.g. *Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982) (requesting that child be provided with a sign-language interpreter for academic classes).
- ² *Schaffer v. Weast*, 126 S. Ct. 528 (2005).
- ³ *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 126 S. Ct. 2455 (2006).
- ⁴ See, e.g., Kevin Pendergast, Comment, *Schaffer's Reminder: IDEA Needs Another Improvement*. 56 CASE W. RES. 875 (2006).
- ⁵ *Schaffer*, 126 S. Ct. at 531.
- ⁶ *Id.*
- ⁷ Individuals with Disabilities Education Act, 20 U.S.C.S. § 1400(c)(2) (2006).
- ⁸ 20 U.S.C.S. § 1400(c)(2)(D).
- ⁹ § 1400(c)(2)(C).
- ¹⁰ *Pa. Ass'n for Retarded Children v. Commonwealth*, 334 F. Supp. 1257 (E.D. Pa.1971) (enjoining the Commonwealth of Pennsylvania, state officials, and local school districts from denying mentally retarded children access to a free public program of education and training).
- ¹¹ *Mills v. Bd. of Educ.*, 348 F. Supp. 866 (D.D.C. 1972) (enjoining the Board of Education of the District of Columbia from excluding disabled children from public schools, and ordering the Board to provide the children with a free and appropriate publicly-supported education regardless of the degree of the child's disability or impairment).
- ¹² MARK G.YUDOF, et. al. EDUCATIONAL POLICY AND THE LAW 703 (4th ed. 2002).
- ¹³ Education of the Handicapped Amendments of 1990, P. L. No. 101-476, § 1, 104 Stat. 1103.
- ¹⁴ Individuals With Disabilities Education Act Amendments of 1997, P. L. 105-17, §1, 111 Stat. 37.
- ¹⁵ Individuals With Disabilities Education Improvement Act of 2004, P.L. 108-446, §1, 118 Stat. 2647.
- ¹⁶ *Schaffer*, 126 S. Ct. at 531 (citing *Rowley*, 458 U.S. at 183).
- ¹⁷ *Schaffer*, 126 S. Ct. at 531 (citing 20 U.S.C. § 1412(a)).
- ¹⁸ *Schaffer*, 126 S. Ct. at 531 (citing 20 U.S.C. § 1413(a)(1)).
- ¹⁹ 20 U.S.C.S. § 1400(d)(1)(A).
- ²⁰ § 1400(d)(1)(B).
- ²¹ § 1400(d)(C).
- ²² § 1414(d)(1)(A).
- ²³ § 1414(d)(1)(B).
- ²⁴ 20 U.S.C.S. § 1415 (2006).
- ²⁵ § 1415(b)(1).
- ²⁶ § 1415(b)(3).
- ²⁷ § 1415(f).
- ²⁸ § 1415(h).
- ²⁹ § 1415(g).
- ³⁰ § 1415(i)(2)(A). A party bringing a civil action has 90 days from the date of the decision rendered by the hearing officer to bring such action. § 1415(i)(2)(B).
- ³¹ § 1415(i)(3)(B).
- ³² BLACK'S LAW DICTIONARY 135 (6th ed. 1991).
- ³³ See Sandra M. Di Iorio. Comment, *Breaking IDEA's Silence: Assigning the Burden of Proof at Due Process Hearings and Judicial Proceedings Brought By Parents Against a School District*, 78 TEMP. L. REV. 719, 726 (2005).
- ³⁴ BLACK'S LAW DICTIONARY 135 (6th ed. 1991). The burden of production is "The obligation of a party to introduce evidence sufficient to avoid a ruling against him on the issue...Such burden is met when one with the burden of proof has introduced sufficient evidence to make out a prima facie case, though the cogency of the evidence may fall short of convincing the trier of fact to find for him." *Id.*
- ³⁵ *Id.*

³⁶ *Schaffer*, 126 S. Ct. at 533-534.

³⁷ Di Iorio, *supra* note 33, at 727.

³⁸ *Id.*

³⁹ *Schaffer*, 126 S. Ct. at 534. The Supreme Court has held that the default rule applies in a number of areas. See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (holding that plaintiffs have the burden of establishing standing). See also *Cleveland v. Policy Management Systems Corp.*, 526 U.S. 795, 806 (1999) (holding that an ADA plaintiff bears the burden of proof to show she is a "qualified individual with a disability").

⁴⁰ See *Alaska Dept. of Environmental Conservation v. EPA*, 540 U.S. 461, 494 (2004) (holding that defendant EPA bears the burden of proof after considering factors such as which party "has made the "affirmative allegation" or "presumably has peculiar means of knowledge." (quoting 9 J. Wigmore, *Evidence* § 2486 at 288, 290 (J. Chadbourn rev. ed. 1981))).

⁴¹ *Schaffer*, 126 S. Ct. at 537 (Ginsburg, J., dissenting) (citing 2 J. Strong, *McCormick on Evidence* § 337 at 415 (5th ed. 1999)).

⁴² Di Iorio, *supra* note 33, at 728.

⁴³ *Id.*

⁴⁴ § 1415(f)(3)(E).

⁴⁵ Di Iorio, *supra* note 33, at 731. See also *Rowley*, 458 U.S. 176 (1982).

⁴⁶ *Rowley*, 458 U.S. at 206.

⁴⁷ *Id.* at 206-207.

⁴⁸ Di Iorio, *supra* note 33, at 732.

⁴⁹ *Id.* See also *Pendergast*, *supra* note 4, at 880.

⁵⁰ *Schaffer*, 126 S. Ct. at 537.

⁵¹ *Id.* at 534 (citing 2 J. Strong, *McCormick on Evidence* § 337 at 412 (5th ed. 1999)).

⁵² *Schaffer*, 126 S. Ct. at 535.

⁵³ *Id.* at 536.

⁵⁴ *Id.* (citing § 1415(j)).

⁵⁵ *Schaffer*, 126 S. Ct. at 536 (citing §1415(b)(1)).

⁵⁶ *Schaffer*, 126 S. Ct. at 536.

⁵⁷ *Id.* (citing §1415(i)(3)(B)).

⁵⁸ *Arlington Cent.*, 126 S. Ct. at 2458.

⁵⁹ *Id.* at 2458.

⁶⁰ *Id.* at 2457.

⁶¹ *Id.* at 2459.

⁶² *Id.* (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)).

⁶³ *Arlington Cent.*, 126 S. Ct. at 2460.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at 2462-63. See *Crawford Fitting v. J.T. Gibbons, Inc.*, 482 U.S. 437 (1987) (holding that the term "costs" in the Federal Rule of Civil Procedure 54(d) is defined by the list provided in § 1920). See also *W. Va. Univ. Hosp., Inc. v. Casey*, 499 U.S. 83 (1991) (holding that 42 U.S.C. § 1988, with wording almost identical to §1415(i)(3)(B) in terms of awarding "a reasonable attorney's fee as part of the costs," did not authorize the award of expert fees to a prevailing party).

⁶⁷ *Arlington Cent.*, 126 S. Ct. at 2463.

⁶⁸ *Id.* Legislative history of §1415(i)(3)(B) includes a Conference Committee Report stating, "The conferees intend that the term 'attorneys' fees as part of the costs' include reasonable expenses and fees of expert witnesses and the reasonable costs of any test or evaluation which is found to be necessary for the preparation of the...case." *Id.* (quoting H.R. Conf. Rep. No. 687, 99th Cong., 2nd Sess. 5 (1986)).

⁶⁹ *Schaffer*, 126 S. Ct. at 537.

⁷⁰ *Id.* at 536.

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- ⁷¹ § 1415(b) provides parents of a child with a disability to obtain an independent educational evaluation of the child.
- ⁷² 34 C.F.R. § 300.502(a)(3)(i) (2006).
- ⁷³ Maureen Molloy, et. al. Article, *Five Steps To Using Expert Witnesses Effectively: Part I*. 22 VER. B. J. & L. DIG. 10 (1996).
- ⁷⁴ *Id.*
- ⁷⁵ 34 C.F.R. § 300.502 (2006).
- ⁷⁶ *Schaffer*, 126 S. Ct. at 538 (Ginsburg, J., dissenting) (citing *Oberti v. Bd. of Ed. of Clementon Sch. Dist.*, 995 F.2d 1204, 1219 (CA3 1993). *See also* *Lascari v. Bd. of Ed. of Ramapo Indian Hills Reg'l High Sch. Dist.*, 116 N. J. 30, 45-46 (1989) (holding that the school district should bear the burden of proving that an IEP is appropriate, as the school district has “better access to relevant information”; the sole obligation of parents “should be merely to place in issue the appropriateness of the IEP.”).
- ⁷⁷ *Schaffer*, 126 S. Ct. at 538, (Ginsburg, J., dissenting).
- ⁷⁸ *Id.*
- ⁷⁹ *Id.* at 539 (Ginsburg, J., dissenting).
- ⁸⁰ *Arlington Cent.*, 126 S. Ct. at 2469, (Breyer, J., dissenting).
- ⁸¹ M. Wagner, et. al. *The Children We Serve: The Demographic Characteristics of Elementary and Middle School Students with Disabilities and Their Households*, DEPT. OF EDUC. 28 (2002), available at http://www.seels.net/designdocs/SEELS_Children_We_Serve_Report.pdf (reporting that students with disabilities are more likely to be living in poverty than students in the general population). *See also* *Arlington Cent.* at 2469 (Breyer, J., dissenting).
- ⁸² Peter J. Kuriloff, et. al. *Is Mediation a Fair Way to Resolve Special Education Disputes? First Empirical Findings*. 2 HARV. NEGOT. L. REV. 35, 40 (1997).
- ⁸³ DISABILITY COMPLIANCE BULLETIN, *Agency says parents have a lot to lose in Supreme Court expert fee case*, 32 n.5, May 11, 2006, LEXIS. The NCD is an independent federal agency appointed by the President of the United States and confirmed by the U.S. Senate. NAT'L COUNCIL ON DISABILITY, *Individuals with Disabilities Education Act Burden of Proof: On Parents or Schools?* 4 (August 9, 2005).
- ⁸⁴ Patricia A. Massey et. al. Article, *Disability matters: Toward A Law School Clinical Model For Serving Youth With Special Education Needs*, 11 CLINICAL L. REV. 271, 324 (2005).
- ⁸⁵ Di Iorio, *supra* note 33, at 738.
- ⁸⁶ Pendergast, *supra* note 4, at 888.
- ⁸⁷ *See Burlington Sch. Comm. v. Massachusetts Dept. of Educ.*, 471 U.S. 359, 370-371 (1985) (holding that parents who rejected a proposed IEP should be granted reimbursement for their child's private special education schooling; these expenses should have been paid by the school “all along and would have been borne in the first instance had it developed a proper IEP.”).
- ⁸⁸ Keith Roshangar, *Reaction: Arlington Central School District v. Murphy*, Medill News Service, Medill-On the Docket, June, 2006, LEXIS (quoting Charles Fox, a Chicago attorney).
- ⁸⁹ *Arlington Cent.* at 2469 (Breyer, J. dissenting).
- ⁹⁰ *Id.* at 2463 (quoting H.R. Conf. Rep. No. 687, 99th Cong., 2nd Sess. 5 (1986). Section §1415(i)(3)(B) was added by Congress when it enacted the Handicapped Children's Protection Act in 1986. Brief of Respondents at 1, *Arlington Cent. Sch. Dist. v. Murphy*, 126 S. Ct. 2455 (2006) (No. 05-18).
- ⁹¹ *Arlington Cent.*, 126 S. Ct. at 2465 (Ginsburg, J., concurring). *See* *Smith v. Robinson*, 468 U.S. 992 (1984).
- ⁹² *Arlington Cent.*, 126 S. Ct. at 2460. *See also* Respondents' Brief at 34-42, *Arlington Cent.* (No. 05-18) (describing in detail the drafting history of § 1415(i)(3)(B) and bipartisan consensus in the House and Senate to authorize recovery of expert costs for prevailing parents).
- ⁹³ Respondents' Brief at 2, *Arlington Cent.* (No. 05-18).
- ⁹⁴ *Arlington Cent.*, 126 S. Ct. at 2470 (Breyer, J., dissenting).
- ⁹⁵ *Id.* at 2470-71 (Breyer, J. dissenting).

⁹⁶ *Id.* at 2471 (Breyer, J. dissenting) (quoting *Bell v. New Jersey*, 461 U.S. 773, 790 (1983)).

⁹⁷ *Arlington Cent.*, 126 S. Ct. at 2471 (Breyer, J., dissenting). See *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1 (1981).

⁹⁸ *Arlington Cent.*, 126 S. Ct. at 2471 (Breyer, J., dissenting).

⁹⁹ § 1400(d)(1)(A).

¹⁰⁰ See *Arlington Cent.*, 126 S. Ct. at 2468 (Breyer, J., dissenting).

¹⁰¹ *Id.* at 2469 (Breyer, J., dissenting).

¹⁰² *Massey et. al.*, *supra* note 84, at 275.

¹⁰³ *Id.* at 278.

¹⁰⁴ *Id.* at 275.

¹⁰⁵ *Massey et. al.* *supra* note 84, at 275-76.

¹⁰⁶ *Pendergast*, *supra* note 4, at 889.

¹⁰⁷ NAT'L COUNCIL ON DISABILITY, *Individuals with Disabilities Education Act Burden of Proof: On Parents or Schools?* 7 (August 9, 2005).

¹⁰⁸ *Massey et. al.* *supra* note 84 at 276.

¹⁰⁹ *Id.* at 280.

¹¹⁰ *Pendergast*, *supra* note 4, at 889.

¹¹¹ *Schaffer*, 126 S. Ct. at 535.

¹¹² Brief for Respondents at 37, *Schaffer v. Weast*, 126 S. Ct. 528 (2005) (No. 04-698).

¹¹³ *Schaffer*, 126 S. Ct. at 535.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ Respondents' Brief at 37, *Schaffer* (No. 04-698).

¹¹⁷ *Florence County Sch. Dist. IV. v. Carter*, 510 U.S. 7, 15 (1993) (ordering reimbursement to parents for private school tuition and costs because the school district breached its duty to provide a student with a FAPE).

¹¹⁸ See *Di Iorio*, *supra* note 33, at 733-34. See also NAT'L COUNCIL ON DISABILITY, *Individuals with Disabilities Education Act Burden of Proof: On Parents or Schools?* 1 (August 9, 2005) (stating the National Council on Disability's position that school districts should bear the burden of proof in special education litigation related to IEPs, placement, and eligibility).

¹¹⁹ *Di Iorio*, *supra* note 33, at 733.

¹²⁰ *Id.* at 733-734.

¹²¹ *Id.* at 734.

¹²² *Id.*

¹²³ *Id.* at 735.

¹²⁴ *Id.*

¹²⁵ *Id.* at 736.

¹²⁶ *Nat'l Council on Disability Issues Statement Regarding Supreme Court Arlington Central School District Case*. U.S. Fed. News, April 19, 2006, LEXIS.

¹²⁷ *Di Iorio*, *supra* note 33, at 737.

¹²⁸ *Id.* at 734-735.

¹²⁹ *Id.* at 739.

¹³⁰ Anne E. Johnson, Note, *Evening the Playing Field: Tailoring the Allocation of the Burden of Proof At IDEA Due Process Hearings To Balance Children's Rights and Schools' Needs*, 46 B.C.L. REV. 591, 608 (2005).

¹³¹ *Id.*

¹³² See Kathryn H. Crary, Comment, *Necessary Expertise: Allowing Parents to Recover Expert Witness Fees Under the Individuals With Disabilities Education Act*, 77 TEMP. L. REV. 967 (2004).

¹³³ H.R. Conf. Rep. No. 687, 99th Cong., 2nd Sess. 5 (1986).

¹³⁴ § 1400(d)(1)(A).

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- ¹³⁵ See Jennifer M. Burns, Note, *Shaffer v. Weast: Why the Complaining Party Should Bear the Burden of Proof in an Administrative Hearing to Determine the Validity of an IEP Under IDEA*, 29 *HAMLIN L. REV.* 567, 598 (2006).
- ¹³⁶ Christopher T. Leahy et. al. Article, *Allocation of the Burden of Proof in Individuals With Disabilities Education Act Due Process Challenges*, 29 *VT. L. REV.* 951, 966 (2005).
- ¹³⁷ Di Iorio, *supra* note 33, at 740.
- ¹³⁸ *Rowley*, 458 U.S. at 200.
- ¹³⁹ William D. White, Comment, *Where To Place the Burden: Individuals with Disabilities Education Act Administrative Due Process Hearings*, 84 *N.C.L. REV.* 1013, 1042 (2006).
- ¹⁴⁰ Johnson, *supra* note 126, at 611.
- ¹⁴¹ Leahy et. al., *supra* note 136, at 973.
- ¹⁴² Crary, *supra* note 132, at 997.
- ¹⁴³ *Nat'l Council on Disability Issues Statement Regarding Supreme Court Arlington Central School District Case*. U.S. Fed. News, April 19, 2006, LEXIS. The GAO reports "only 5 due process hearings per 10,000 students who receive special education." *Id.* (citing GAO 03-897, 2003).
- ¹⁴⁴ Crary, *supra* note 132, at 997.
- ¹⁴⁵ § 1415(i)(3)(B).
- ¹⁴⁶ Miriam Kirtzig Freedman et. al., *Special Education at 30: Dreams, Realities and Possibilities*, *EDUC. WK.*, at 51 (Nov. 30, 2005).
- ¹⁴⁷ *Id.*
- ¹⁴⁸ Massey et. al. *supra* note 84 at 271. The author describes 3 types of clinics: "System-focus clinics" offer special education advocacy for youth with disabilities who are already involved in the legal system; "child advocacy clinics" offer representation to a child in need of any kind of assistance; and "special education-only clinics" offer special education representation. The following law schools offer special education only clinics: Stanford, Rutgers-Newark, State University of New York at Buffalo, University of San Diego, Whittier and Pepperdine. *Id.* at 295-298.
- ¹⁴⁹ *Id.* at 273.
- ¹⁵⁰ *Id.* at 299-300.
- ¹⁵¹ *Id.*
- ¹⁵² The University of Michigan Child Advocacy Clinic utilizes such an interdisciplinary model. Graduate students in the Rutgers Child Advocacy Clinic provide psychological, nursing and social work services. *Id.* at 305.
- ¹⁵³ *Id.* at 321.
- ¹⁵⁴ *Id.* at 321-322. Evening and weekend work encompasses fact-gathering and parent training rather than court-related matters. *Id.*
- ¹⁵⁵ *Id.* at 323-324.
- ¹⁵⁶ Thomas M. Crowley, Article, *Help Me Mr. Wizard! Can We Really Have "Neutral" Rule 706 Experts?* 1998 *DET. C.L. REV.* 927, 953 (1998) (questioning the notion that 'neutral' experts exist).
- ¹⁵⁷ *Id.* at 956.
- ¹⁵⁸ Massey et. al. *supra* note 84, at 299-300.
- ¹⁵⁹ *Id.* at 271.
- ¹⁶⁰ § 1415(i)(3)(B).
- ¹⁶¹ Massey et. al. *supra* note 84, at 305.
- ¹⁶² *Id.* at 324.
- ¹⁶³ *Id.* at 285.
- ¹⁶⁴ *Id.* at 294.
- ¹⁶⁵ Ashley Oliver, *Should Special Education Have a Price Tag? A New Reasonableness Standard for Cost*, 83 *DENV. U.L. REV.* 763, 765. (2006).
- ¹⁶⁶ Di Iorio, *supra* note 33, at 738.

¹⁶⁷ David H. Kaye, et. al., *The New Wigmore: Expert Evidence* §2.1 (2004) (quoting Fed. R. Evid. 702).

¹⁶⁸ An expert may be qualified even if unlicensed, not a member of a learned profession, or not having published in his field. However, some experts, including accountants and medical experts need to demonstrate formal education and training “if they are testifying to matters that require the highly specialized expertise of their professions.” *Id.* at §2.1.1.

¹⁶⁹ *Id.* at §2.4.

¹⁷⁰ Molloy, et. al., *supra* note 73 at 11 (discussing the importance of selecting a qualified expert as soon as possible).

¹⁷¹ Jonathan A. Beyer, *A Modest Proposal: Mediating Idea Disputes Without Splitting The Baby*, 28 J.L. & EDUC. 37, 40 (1999).

¹⁷² Erik S. Knutsen, Article, *Science-Policy Disputes: Resolution Through Data Mediation*, 2001 J. DISP. RESOL. 301, 316 (2001) (discussing the challenge of using adversary experts in a mediation environment).

¹⁷³ § 1415(i)(3)(B).

¹⁷⁴ *Schaffer*, 126 S. Ct. at 536.

Bibliography

- Alaska Dept. of Environmental Conservation v. EPA, 540 U.S. 461 (2004).
- Anne E. Johnson, Note, *Evening the Playing Field: Tailoring the Allocation of the Burden of Proof At IDEA Due Process Hearings To Balance Children's Rights and Schools' Needs*, 46 B.C.L. REV. 591 (2005).
- Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 126 S. Ct. 2455 (2006).
- Ashley Oliver, *Should Special Education Have a Price Tag? A New Reasonableness Standard for Cost*, 83 DENV. U.L. REV. 763 (2006).
- BLACK'S LAW DICTIONARY (6th ed. 1991).
- Bd. of Educ. v. Rowley, 458 U.S. 176 (1982).
- Brief for Respondents, *Shaffer v. Weast*, 126 S. Ct. 528 (2005) (No. 04-698).
- Brief of Respondents, *Arlington Cent. Sch. Dist. v. Murphy*, 126 S. Ct. 2455 (2006) (No. 05-18).
- Burlington Sch. Comm. v. Massachusetts Dept. of Educ.*, 471 U.S. 359 (1985).
- Christopher T. Leahy et. al., Article, *Allocation of the Burden of Proof in Individuals With Disabilities Education Act Due Process Challenges*, 29 VT. L. REV. 951 (2005).
- Cleveland v. Policy Management Systems Corp.*, 526 U.S. 795 (1999).
- Crawford Fitting v. J.T. Gibbons, Inc.*, 482 U.S. 437 (1987).
- David H. Kaye, et. al., *The New Wigmore: Expert Evidence* §2.1 (2004)
- DISABILITY COMPLIANCE BULLETIN, *Agency says parents have a lot to lose in Supreme Court expert fee case*, 32 n.5, May 11, 2006, LEXIS.
- Erik S. Knutsen, Article, *Science-Policy Disputes: Resolution Through Data Mediation*, 2001 J. DISP. RESOL. 301 (2001).
- Florence County Sch. Dist. IV. v. Carter*, 510 U.S. 7 (1993).
- Individuals with Disabilities Education Act, 20 U.S.C.S. § 1400.
- Jennifer M. Burns, Note, *Shaffer v. Weast: Why the Complaining Party Should Bear the Burden of Proof in an Administrative Hearing to Determine the Validity of an IEP Under IDEA*. 29 HAMLINE L. REV. 567 (2006).
- Jonathan A. Beyer, *A Modest Proposal: Mediating Idea Disputes Without Splitting The Baby*, 28 J.L. & EDUC. 37 (1999).

Kathryn H. Crary, Comment, *Necessary Expertise: Allowing Parents to Recover Expert Witness Fees Under the Individuals With Disabilities Education Act*, 77 TEMP. L. REV. 967 (2004).

Keith Roshangar, *Reaction: Arlington Central School District v. Murphy*, Medill News Service, Medill-On the Docket, June, 2006, LEXIS.

Kevin Pendergast, Comment, *Schaffer's Reminder: IDEA Needs Another Improvement*. 56 CASE W. RES. 875 (2006).

Lascari v. Bd. of Ed. of Ramapo Indian Hills Reg'l High Sch. Dist., 116 N. J. 30, 45-46 (1989).

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).

M. Wagner, et. al. *The Children We Serve: The Demographic Characteristics of Elementary and Middle School Students with Disabilities and Their Households*, DEPT. OF EDUC. (2002), available at http://www.seels.net/designdocs/SEELS_Children_We_Serve_Report.pdf.

MARK G. YUDOF, et. al. EDUCATIONAL POLICY AND THE LAW (4th ed. 2002).

Maureen Molloy, et. al. Article, *Five Steps To Using Expert Witnesses Effectively: Part I*. 22 VER. B. J. & L. DIG. 10 (1996).

Mills v. Bd. of Educ., 348 F. Supp. 866 (D.D.C. 1972).

Miriam Kirtzig Freedman et. al., *Special Education at 30: Dreams, Realities and Possibilities*, EDUC. WK., at 51 (Nov. 30, 2005).

NAT'L COUNCIL ON DISABILITY, *Individuals with Disabilities Education Act Burden of Proof: On Parents or Schools?*(August 9, 2005).

Nat'l Council on Disability Issues Statement Regarding Supreme Court Arlington Central School District Case. U.S. Fed. News, April 19, 2006, LEXIS.

Pa. Ass'n for Retarded Children v. Commonwealth, 334 F. Supp. 1257 (E.D. Pa.1971).

Patricia A. Massey et. al. Article, *Disability matters: Toward a Law School Clinical Model For Serving Youth With Special Education Needs*, 11 CLINICAL L. REV. 271 (2005).

Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1 (1981).

Peter J. Kuriloff, et. al. Article, *Is Mediation a Fair Way to Resolve Special Education Disputes? First Empirical Findings*. 2 HARV. NEGOT. L. REV. 35 (1997).

Sandra M. Di Iorio, Comment, *Breaking IDEA's Silence: Assigning the Burden of Proof at Due Process Hearings and Judicial Proceedings Brought By Parents Against a School District*, 78 TEMP. L. REV. 719 (2005).

Schaffer v. Weast, 125 S. Ct. 528 (2005).

Smith v. Robinson, 468 U.S. 992 (1984).

Thomas M. Crowley, Article, *Help Me Mr. Wizard! Can We Really Have "Neutral" Rule 706 Experts?* 1998 DET. C.L. REV. 927 (1998).

W. Va. Univ. Hosp., Inc. v. Casey, 499 U.S. 83 (1991).

William D. White, Comment, *Where To Place the Burden: Individuals with Disabilities Education Act Administrative Due Process Hearings*, 84 N.C.L. REV. 1013 (2006).

20 U.S.C.S. § 1414 (2006).

20 U.S.C.S. §1415 (2006).

34 C.F. R. § 300.502(a)(3)(i) (2006).