THE COSTS OF A "FREE" EDUCATION: THE IMPACT OF *SCHAFFER V. WEAST* AND *ARLINGTON V. MURPHY* ON LITIGATION UNDER THE IDEA

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ABSTRACT

The Individuals with Disabilities Education Act guarantees to children with disabilities the right to receive a "free appropriate public education." This Note argues that the Supreme Court decisions Schaffer v. Weast *and* Arlington v. Murphy*, cases dealing with procedural aspects of the Act, undermine a prior trend in IDEA litigation—a trend that had increased the substantive and procedural rights of children with disabilities. Considered together, the* Schaffer *and* Arlington *decisions ignore the realities of the litigation process and impose significant burdens on parents attempting to ensure that their children receive the free appropriate education to which they are entitled.*

INTRODUCTION

The Supreme Court's landmark decision in *Brown v. Board of Education*[1] proclaimed the profound importance of education, recognizing it as a right that must be "made available to all on equal terms":[2]

> [E]ducation is perhaps the most important function of state and local governments. . . . It is required in the performance of our most

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1. Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).
2. *Id.* at 493.

> basic public responsibilities . . . . It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.[3]

Despite this emphatic language, the majority of special needs children[4] in the United States did not receive any form of public education for more than fifteen years after *Brown*.[5] Before the 1970s, parents were left to pay for private educational services for their special needs children or forego educational opportunities altogether.[6] Those few special needs children who were educated in public schools received inadequate educations and were isolated from other students at these schools.[7]

As of 2006, more than 6.5 million children,[8] nearly 14 percent of the total student population, received special education services in public school systems in the United States.[9] These services were provided under the Individuals with Disabilities Education Act (IDEA).[10] The IDEA provides a basic framework within which each

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3. *Id.*

4. The terms "special needs children" and "special education students" are used interchangeably throughout this Note to indicate children with disabilities who are provided with services under the Individuals with Disabilities Education Act (IDEA).

5. *See* Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400(c)(2) (Supp. IV 2004) (stating that before the enactment of the Education for All Handicapped Children Act in 1975, the educational needs of special education students were not met and "the children were excluded entirely from the public school system and from being educated with their peers"). The Education for All Handicapped Children Act of 1975 (EHA) was later amended to become the IDEA. IDEA, 20 U.S.C. § 1400(c)(1) (Supp. IV 2004) (originally enacted as The Education for All Handicapped Children Act of 1975 (EHA), Pub. L. No. 94-142, 89 Stat. 774 (1975)).

6. *See* 20 U.S.C. § 1400(c)(2) ("[A] lack of adequate resources within the public system forced families to find services outside the public school system.").

7. *See id*. (Before the Education for All Handicapped Children Act, "children [with disabilities] did not receive appropriate educational services; the children were excluded entirely from the public school system and from being educated with their peers; [or] undiagnosed disabilities prevented the children from having a successful educational experience.").

8. Amicus Committee Supporting Petitioner, Schaffer *ex rel.* Schaffer v. Weast, 126 S. Ct. 528 (2005), Statement of the Council of the Parent Attorneys and Advocates (Jan. 2006), http://copaa.org/news/schaffer.html [hereinafter Amicus Committee Statement of Parent Attorneys and Advocates].

9. THOMAS D. SNYDER, MINI-DIGEST OF EDUCATION STATISTICS 2006, at 8, *available at* http://nces.ed.gov/pubs2007/2007067.pdf.

10. IDEA, 20 U.S.C. §§ 1400–1482 (Supp. IV 2004).

state must supply special education services to its students.[11] Its stated purpose is "to ensure that all children with disabilities have available to them a free appropriate public education" (FAPE).[12] Adopted under Spending Clause powers, the IDEA requires states accepting federal money for education to provide special education services to children with disabilities.[13] The IDEA's goal—to ensure all children receive a free appropriate public education—is accomplished by developing an individualized education plan (IEP) for each disabled student.[14] If parents are unsatisfied with their child's IEP, they may request an impartial due process hearing.[15] If they are still unsatisfied with the result of that hearing, parents may appeal the decision to the state educational agency[16] or file a civil suit.[17] In this way, parents have a standardized process to ensure their children are receiving an appropriate education in the public schools. Yet despite these dramatic improvements in the provision of special education services, efforts must still be taken to better protect the rights of special education students and their parents, especially as a result of changes in the procedural safeguards of the IDEA and its interpretation by the Supreme Court.

Two Supreme Court decisions from October Term 2005 highlight the ways in which seemingly minute procedural issues can dramatically affect IDEA litigation. First, in *Schaffer v. Weast*,[18] the Supreme Court determined that the "burden of proof in an administrative hearing challenging [the sufficiency of] an IEP is properly placed upon the party seeking relief."[19] Seven months later, in *Arlington Central School District Board of Education v. Murphy*,[20]

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11. Judith M. Gerber & Sheryl Dicker, *Children Adrift: Addressing the Educational Needs of New York's Foster Children*, 69 ALB. L. REV. 1, 16 (2005).

12. 20 U.S.C. § 1400(d)(1)(A).

13. *Id*.

14. *Id.* § 1414(d). An IEP is developed by the student's IEP team, comprised of parents, teachers, a representative of the school district, outside consultants, and others including the child with disability when appropriate. *Id.* § 1414(d)(1)(B). IEPs are created annually and address the child's present levels of functioning, annual academic goals, descriptions of special education services and supports to be provided to the child, and other accommodations. *Id.* § 1414(d)(1)(A).

15. *Id.* § 1415(f).

16. *Id.* § 1415(g).

17. *Id.* § 1415(i)(2).

18. Schaffer *ex rel.* Schaffer v. Weast, 126 S. Ct. 528 (2005).

19. *Id*. at 62.

20. Arlington Cent. Sch. Dist. v. Murphy, 126 S. Ct. 2455 (2006).

the Court determined that although parents who prevail in an IDEA action may recover "reasonable attorneys' fees as part of the[ir] costs,"[21] these costs do not include fees for the services of expert witnesses.[22]

This Note argues that although individually the decisions of *Schaffer* and *Arlington* are justified, when considered together, they impose overwhelming burdens on parents without considering the realities of the litigation process. These cases departed from an established trend in IDEA litigation and signaled a retreat from previous efforts to increase the substantive and procedural rights of parents and their children.[23] Part I provides an overview of the history of special education law and litigation in the United States, with emphasis on the enactment of the IDEA, its basic provisions, and major changes to it through a series of reauthorizations. Parts II and III describe the Supreme Court's decisions in *Schaffer* and *Arlington*, respectively, and discuss the rationales and implications of each decision. Finally, Part IV examines the combined impact of the two cases on parents' procedural due process rights in IDEA litigation and concludes that the Supreme Court has placed an unreasonable obstacle in the path of parents attempting to ensure their child receives a free and appropriate education.

I. BACKGROUND OF THE IDEA

The IDEA embodies the legislative responses to a series of court cases. Litigation concerning the provision of special education services in the United States has encompassed three main phases over several decades. The first phase, emerging in the early 1970s, preceded the IDEA and centered on the establishment of the right to receive a publicly funded special education.[24] This phase of litigation

21. 20 U.S.C. § 1415(i)(3)(B) (Supp. IV 2004).

22. *Arlington*, 126 S. Ct. at 2457.

23. The one case that could be seen as an exception to this trend is *Winkelman v. Parma City Sch. Dist.*, 127 S. Ct. 1994 (2007). In *Winkelman*, the Supreme Court determined that parents enjoy rights under the IDEA and therefore are entitled to prosecute claims on their own behalf. *Id.* at 2006. This case, however, does not represent a wholesale reversal of the Supreme Court's trend of limiting parental rights. *See infra* note 146.

24. *See, e.g.*, Mills v. Bd. of Educ., 348 F. Supp. 866, 878 (D.D.C. 1972) (holding that the school board had an affirmative duty to provide handicapped children with education suited to their needs); Pa. Ass'n for Retarded Children v. Pennsylvania, 334 F. Supp. 1257, 1258 (E.D. Pa. 1971) (holding that Pennsylvania, having undertaken to provide a free public education to all its

led to legislative action codifying a right to special education in the form of the IDEA's predecessor, the Education for All Handicapped Children Act of 1975 (EHA).[25] The second wave of litigation followed the enactment of the EHA,[26] as the U.S. Supreme Court heard several landmark cases in the 1980s and 1990s concerning its implementation.[27] These cases focused primarily on the nature of special education services children were entitled to receive, the responsibilities of school districts to parents, and the definition of a "free appropriate public education."[28] IDEA litigation entered a third phase in the 2000s, with the Supreme Court granting review of four IDEA cases within two years.[29] Before these cases, the Supreme Court had not heard a significant case involving the IDEA in more than six years.[30] The cases in this wave of litigation have not involved major substantive issues in the interpretation of the IDEA, but more technical, procedural issues.[31] Although these issues may not generate much public interest, they have significant effects on the procedural rights of parents who challenge the school district's provision of an appropriate public education for their special needs child.

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children, could not deny mentally retarded children access to that education appropriate to their capacities).

25. *See* S. Rep. No. 94-168, at 6 (1975) (stating that the legislation "followed a series of landmark court cases establishing in law the right to education for all handicapped children").

26. At the time, the IDEA was still titled the Education for All Handicapped Children Act. *See infra* Parts I.B–C.

27. *See* Andrew Trotter, *IDEA Issues Getting Ear of High Court: Justices to Decide Whether Parents Allowed to Represent Their Children in Court Cases*, 26 EDUCATION WEEK, Nov. 8, 2006, at 1, 23 (describing the cases of this second phase as "building blocks that still shape interpretations of the special education law").

28. *Id.*

29. The Court decided *Schaffer v. Weast*, 126 S. Ct. 528 (2005), and *Arlington Cent. Sch. Dist. v. Murphy*, 126 S. Ct. 2455 (2006), in the October 2005 Term. The Court followed with *Winkelman v. Parma Sch. Dist.*, 127 S. Ct. 1994 (2007) in the October 2006 Term, and granted certiorari in *Bd. of Educ. v. Tom F.*, 127 S. Ct. 1393 (2007) for the October 2007 Term.

30. Trotter, *supra* note 27, at 23. Prior to *Schaffer*, the last Supreme Court case to focus on an issue involving the IDEA was *Cedar Rapids Cmty. Sch. Dist. v. Garret F.*, 526 U.S. 66 (1999). *See* Trotter, *supra* note 27, at 23 (providing a timeline of all Supreme Court cases involving the IDEA).

31. *See* Trotter, *supra* note 27, at 23 ("By contrast, the latest IDEA cases in the high court have turned on 'very technical, legalistic fine points that would be interesting [only] to litigators' . . . . [They] do not present 'the major issues people think of when they think of IDEA.'" (quoting Perry Zirkel, professor of education and law at Lehigh University, and Naomi Gittens, senior lawyer at the National School Boards Association)).

A. The Right to a Special Education

Until the early 1970s, public school systems largely ignored the needs of special education students.[32] In 1971, a landmark district court opinion in *Pennsylvania Ass'n for Retarded Children v. Pennsylvania*,[33] (*PARC*), held that "[h]aving undertaken to provide a free public education to all of its children . . . the Commonwealth of Pennsylvania may not deny any mentally retarded child access to a free public program of education and training."[34] This case established that the right to a free public education granted by statute to Pennsylvanian children must be provided to *all* children, including those with mental retardation or special needs.[35] The court found that expert reports indicated all mentally retarded children could benefit from educational programs; therefore school districts must provide programs appropriate to each child's individual capacities.[36] Although the court did not specifically address equal protection claims, later courts used *PARC* to support decisions upholding the right to a special education on equal protection grounds.[37]

PARC was followed one year later by *Mills v. Board of Education*,[38] another district court decision finding a right to a public education for all special education students. In 1972, parents of seven students with disabilities filed an action after the District of Columbia's public school system excluded their children without a hearing.[39] The *Mills* court held that the denial of publicly funded educational opportunities to special needs children violates the Due Process Clause.[40] The court also determined that procedural due process requires the children be provided a hearing prior to exclusion

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32. IDEA, 20 U.S.C. § 1400(c) (2000).

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

34. *Id.* at 1259.

35. *Id.* at 1259–60.

36. *Id.*

37. *E.g.*, Welsch v. Likins, 373 F. Supp. 487, 493 (D. Minn. 1974) (citing *PARC* as support for the proposition that all special needs children can benefit from an education); *see also* NANCY LEE JONES, THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT: CONGRESSIONAL INTENT 4 (1995), *available at* http://digital.library.unt.edu/govdocs/crs//data/1995/upl-meta-crs-7997/95-669A_1995May19.pdf ("The House Report noted that since the decisions in *PARC* and *Mills*, 'there have been 46 cases which are completed or still pending in 28 States.' These decisions were described as 'a nationwide movement in both State and Federal courts . . . .'" (quoting H.R. REP. NO. 94-332, at 3, 10 (1975))).

38. Mills v. Bd. of Educ., 348 F. Supp. 806 (D.D.C. 1972).

39. *Id.* at 868.

40. *Id.* at 875.

from the public schools or termination of special services.[41] Finally, the court rejected the school district's contention that it lacked money to provide this education, holding that insufficient funding cannot excuse a state's duty to provide a publicly supported education for a specific group of students.[42] *PARC* and *Mills* were the beginning of a national judicial movement that established a right to education for handicapped children and procedural due process rights when the provision of those educational services is changed or ended.[43]

B. Education for All Handicapped Children Act

After the advances made by *PARC* and *Mills*, lower court cases sprang up around the country, with litigants seeking improved educational opportunities for special needs children.[44] These cases helped draw public attention to the unmet needs of special education students. Congress addressed the need for improved special education services as a result of four factors: the increased social awareness; the holdings in *PARC* and *Mills*, which mandated the education of children with disabilities as a constitutional requirement; an increased realization that state and local governments could not fund special education without federal assistance; and developing social science theories that educating children with disabilities could enable them to become more productive members of society.[45]

Congress determined that ensuring educational opportunities for the handicapped was an essential element of the national policy of ensuring equality for all citizens as well as a way to promote the self-sufficiency and economic contributions of individuals with disabilities.[46] Additionally, congressional findings indicated that the needs of handicapped children were unmet because they received inappropriate services or were excluded entirely from school.[47] Because schools were not providing adequate services, parents often

41. *Id.*

42. *Id.* at 876.

43. *See* S. REP. NO. 94-332, at 3 (1975) ("Since *PARC* and *Mills* there have been 46 cases which are completed or still pending in 28 States.").

44. *Id.* This report was written during the committee meetings regarding the enactment of the Education for All Handicapped Children Act, less than three years after the decision in *Mills*. *See id.*

45. JONES, *supra* note 37, at 4.

46. IDEA, 20 U.S.C. § 1400(c)(1) (Supp. IV 2004) (originally enacted as Education for All Handicapped Children Act of 1975 (EHA), Pub. L. No. 94-142, 89 Stat. 774).

47. EHA § 3(b)(2)–(5).

sought out other educational opportunities at great personal expense.[48] These findings served as the basic impetus for subsequent congressional action. In 1975, Congress enacted the Education for All Handicapped Children Act (EHA) "to assure that all handicapped children have available to them . . . free appropriate public education . . . to meet their unique needs, to assure that the rights of handicapped children and their parents or guardians are protected, [and] to assist states and localities [in meeting this goal]."[49]

Although the EHA did not explicitly set forth a substantive standard for the education of special needs children, it laid out extensive procedural requirements.[50] The EHA required any state education agency receiving funds through the Act to establish and maintain procedures to protect the rights of children and their parents.[51] The EHA granted parents the right to review all records regarding the education and placement of the child, allowed parents to receive an independent evaluation of the child's capabilities, and required prior written notice whenever the school district intended to change or refused to change the placement of the child.[52] Additionally, the EHA gave parents the right to have information presented in their native language and the right to present any complaints related to the provision of the child's FAPE to the school district.[53] Further, parents were entitled to an impartial due process

48. *Id.* § 3(b)(6).

49. *Id.* § 3(c).

50. The statute defines a "free [and] appropriate education" as

> special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program [required by the Act].

Id. § 4(a)(18). This is a standard that leaves much leeway to the states. Indeed, in the first Supreme Court case to interpret the EHA, the Court stated that the Act "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." Bd. of Educ. v. Rowley, 458 U.S. 176, 183 (1982). *Rowley* determined the requirement to provide a FAPE is satisfied by providing personalized services and the Act "cannot be read as imposing any particular substantive education standard upon the States." *Id.* at 200. The Court concluded the choice of educational theories and the manner in which appropriate education is provided should be left to the legislatures with minimal court oversight. *Id.* at 208.

51. EHA § 615(a).

52. *Id.* § 615 (b)(1).

53. *Id.*

hearing and could appeal the result of that hearing to the state's educational agency.[54] Parents had various rights at these hearings, including the right to counsel and experts, the right to present evidence and cross-examine witnesses, and the right to receive written copies of the proceedings.[55] Another important protection was the so-called "stay-put" provision, which provided that "[d]uring the pendency of any proceedings . . . the child shall remain in the then current educational placement."[56] The stay-put provision prevented school districts from taking unilateral action to change a child's placement.

In 1982, the Supreme Court issued its first decision interpreting the EHA.[57] After considering the many procedural safeguards, the Court concluded that the requirements of the Act were merely "to extend educational services first to those children who are receiving no education and second to those children who are receiving an 'inadequate education.'"[58] The Act did not guarantee a substantive standard of education aside from the basic requirement that the services provide a sufficient benefit to enable the child to make educational progress.[59] Instead, the Court determined the EHA evinced a primary intent to "require the States to adopt *procedures* which would result in individualized consideration of and instruction for each child."[60] The procedures of the IDEA ensure the substantive content of the Act will be met.[61] This focus on the procedural safeguards of the EHA as the primary tool to enforce the substantive educational rights of special education students has continued throughout various amendments and reauthorizations as a primary

54. *Id.* § 615(b)(2)–615(c).

55. *Id.* § 615(d)–(e).

56. *Id.* § 615(e)(3). The 2004 amendments changed this provision by eliminating the requirement when the change of placement is in a disciplinary context. *See infra* Part IV.A.

57. Bd. of Educ. v. Rowley, 458 U.S. 176 (1982).

58. *Id.* at 189.

59. *Id.*

60. *Id.*

61. In *Board of Eductaion v. Rowley*, the Supreme Court articulated this point:

> When the elaborate and highly specific *procedural* safeguards embodied . . . are contrasted with the general and somewhat imprecise *substantive* admonitions contained in the Act, we think that the importance Congress attached to these procedural safeguards cannot be gainsaid. . . . We think that the congressional emphasis upon [procedural safeguards] . . . demonstrates the legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP.

Id. at 205–06 (emphasis added).

focus of the IDEA, although later amendments blurred this sharp focus.

C. The Individuals with Disabilities Education Act

In 1991, Congress changed the title of the EHA to the Individuals with Disabilities Education Act "to reflect an 'individuals first' approach."[62] The IDEA was reauthorized in 1997 and again in 2004.[63] Revisions to the Act continued to reflect congressional emphasis on procedural safeguards for the rights of parents and children. The IDEA requires each state educational agency to "establish and maintain procedures . . . to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of a free appropriate public education."[64] These procedural safeguards include those provided under the original EHA, but also include more specific and detailed requirements.[65] For example, the specific contents of the prior written notice that schools must provide to parents before implementing or refusing to implement a change in the child's educational plan are spelled out explicitly in the statute.[66] The notice must describe the proposed action, detail the reasons for the proposal, and provide a statement of parents' rights and sources to contact to obtain assistance in understanding their rights.[67] In addition to providing more detail regarding previously granted rights, the IDEA provides additional safeguards not included in the original act, such as the right to mediation and the requirement that state educational agencies assist parents in filing complaints.[68]

Congress designed the IDEA's procedural safeguards to ensure that parents are aware of their due process rights and receive meaningful opportunities to participate in decisions affecting their

62. NANCY LEE JONES & RICHARD N. APLING, INDIVIDUALS WITH DISABILITIES EDUCATION ACT: STATUTORY PROVISIONS AND SELECTED ISSUES 2 n.6 (2002), *available at* usinfo.state.gov/usa/infousa/educ/topics/cr012503.pdf.

63. Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105-17, 111 Stat. 37; Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647.

64. IDEA, 20 U.S.C. § 1415(a) (Supp. IV 2004).

65. *Compare* EHA, Pub. L. No. 94-142, § 615, 89 Stat. 773, 788–89 (1975), *with* IDEA, 20 U.S.C. § 1415.

66. 20 U.S.C. § 1415(c).

67. *Id.*

68. *Id.* § 1415(b).

child's education.[69] In fact, without an express definition of FAPE, Congress appears to have intended for the IDEA's procedural protections to serve as the primary method of enforcing the special needs child's right to an education.[70] Yet despite the fact that the procedural protections are an integral part of the act, the Supreme Court decisions in *Schaffer* and *Arlington* narrowed these protections and limited their effectiveness.

II. *SCHAFFER V. WEAST*

A. Background

The IDEA provides parents the right to seek an "impartial due process hearing" conducted by the state or local educational agency whenever they believe their child's IEP is not appropriate.[71] The decision at such a hearing is based on the substantive standard of whether the child is receiving a free and appropriate education.[72] The IDEA addresses many procedural aspects of these due process hearings. It requires pleadings to contain specific elements,[73] provides parties the right to counsel and to present evidence,[74] and enables parents who are unsatisfied with the results of the hearing to bring actions in state or federal courts.[75] The IDEA, however, does not speak directly to the issue of which party bears the burden of persuasion at due process hearings.[76]

Courts interpreted this silence in different ways, as the circuits split on the issue of which party had the burden of proof at a hearing

69. Torrie v. Cwayna, 841 F. Supp. 1434, 1441 (W.D. Mich. 1994); *see also* 20 U.S.C. § 1415 (enumerating due process rights, including those for parents).

70. *See* Bd. of Educ. v. Rowley, 458 U.S. 176, 189 (1982) (finding that Congress's primary intent was to adopt procedures allowing for the individualized consideration of each child rather than to establish a standard for the education of special needs children).

71. IDEA, 20 U.S.C. § 1415(f).

72. *Id.*

73. *Id.* § 1415(b)(7)(A)(ii) (requiring "a description of the nature of the problem" and "a proposed resolution of the problem to the extent known and available").

74. *Id.* § 1415(h)(1)–(2).

75. *Id.* § 1415(i)(2).

76. Schaffer *ex rel.* Schaffer v. Weast, 126 S. Ct. 528, 531 (2005).

challenging the adequacy of an IEP.[77] In 2004, the Fourth Circuit reaffirmed its position placing the burden on the moving party with its decision in *Schaffer*, which highlighted the schism and opened the door for the Supreme Court to issue a conclusive answer.[78]

B. The Schaffer *Decision*

Brian Schaffer experienced learning disabilities and speech-language impairments. He attended a private school until seventh grade, when school officials told his mother he needed a school that could better accommodate his needs.[79] After conducting evaluations

77. The Second, Third, Eighth, and Ninth Circuits found the burden of proof was properly placed on the schools to demonstrate that the IEP was providing a FAPE. *See* Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 122 (2d Cir. 1998) ("[S]chool authorities have the burden of supporting the proposed IEP"); E.S. v. Indep. Sch. Dist. No. 196, 135 F.3d 566, 569 (8th Cir. 1998) ("At the administrative level, the District clearly had the burden of proving that it had complied with the IDEA."); Carlisle Area Sch. Dist. v. Scott P., 62 F.3d 520, 533 (3d Cir. 1995) (citing Oberti v. Bd. of Educ., 995 F.2d 1204, 1219 (3d Cir. 1993) (imposing the burden of proof at administrative hearings on school districts, at least for mainstreaming compliance issues, because of the statutory purpose of the IDEA and practical considerations regarding the school district's informational advantage)); Clyde K. v. Puyallup Sch. Dist. No. 3, 35 F.3d 1396, 1398 (9th Cir. 1994) ("The school clearly had the burden of proving at the administrative hearing that it complied with the IDEA.").

The First, Fourth, Fifth, Sixth, and Tenth Circuits held that the burden of proof was properly imposed on the party challenging the IEP in a due process hearing, typically the parents. *See* Roland M. v. Concord Sch. Comm., 910 F.2d 983, 991 (1st Cir. 1990) (holding the burden rests with the "complaining party"); Cordrey v. Euckert, 917 F.2d 1460, 1466 (6th Cir. 1990) (declining to depart from the "traditional" burden of proof); Johnson v. Indep. Sch. Dist. No. 4, 921 F.2d 1022, 1026 (10th Cir. 1990) (holding the burden rests with the party attacking the IEP); Speilberg v. Henrico County Pub. Sch., 853 F.2d 256, 58 n.2 (4th Cir. 1988) (holding the burden is on the party challenging the state administrative decision); Alamo Heights Indep. Sch. Dist. V. State Bd. of Educ., 790 F.2d 1153, 1158 (5th Cir. 1986) (holding the burden is on the party attacking the IEP).

The D.C. Circuit's stance was unclear. In 1985, the court placed the burden of proof on the school districts when there were procedural deficiencies in an IEP. McKenzie v. Smith, 771 F.2d 1527, 1532 (D.C. Cir. 1985). Three years later, however, the D.C. Circuit again considered the issue and interpreted its previous decision as placing the burden on party bringing suit—the party that lost the administrative hearing. Kerhmam v. McKenzie, 862 F.2d 884, 887 (D.C. Cir. 1988). In the earlier case, the school district had lost in the administrative hearing below, but in the later case the burden of proof was on the parents because they were attempting to overturn the administrative decision. *Id.*

State courts also joined the fray, increasing the confusion. *E.g.*, Lascari v. Bd. of Educ., 560 A.2d 1180, 1188 (N.J. 1989) (placing the burden of proof on the school districts because of their expertise and informational advantages over parents).

78. Weast v. Schaffer, 377 F.3d 449, 452–53 (4th Cir. 2004) (discussing the circuit split on the burden of proof issue before placing the burden of proof on the moving party in IDEA cases—typically the parent).

79. *Schaffer v. Weast*, 126 S. Ct. at 533.

and IEP team meetings, the school district offered Brian placement in either of two middle schools.[80] Brian's parents, however, enrolled Brian in another private school, believing that he needed more intensive services and smaller classes. They then sought compensation for the cost of his private education in a due process hearing challenging the adequacy of the IEP.[81] Because the administrative law judge determined the evidence was "truly in 'equipoise,'" at the due process hearing,[82] the assignment of the burden of proof was determinative of the outcome of the case.

The IDEA does not assign the burden of persuasion; thus, the Supreme Court began with the default rule, placing the burden on plaintiffs.[83] Because decisions placing the burden of persuasion on the opposing party from the outset of litigation are very rare, the Court concluded that without a persuasive reason to believe Congress intended the burden to shift in IDEA cases, the burden would lie with the plaintiffs.[84] The Supreme Court found that a "great deal is already spent on the administration" of the IDEA, and thus, any marginal dollars should be spent on the provision of educational services, not litigation.[85] Assuming that an IEP is invalid unless a school district proves otherwise—the effect of placing the burden of persuasion on school districts—would counteract the presumptions of the IDEA, which relies heavily upon school districts' expertise in order to meet its goals.[86] As an example of this presumption, the Court cited the "stay-put" provision, which requires a student to remain in the "then-current educational placement" during a hearing, because a child's current educational placement is usually the one designated by the school district.[87]

The Court found the parents' most plausible argument was a fairness argument: the school districts have an advantage in information, expertise, and resources and therefore should bear the burden of persuasion.[88] It concluded, however, that Congress already

80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.* at 534.
84. *Id.* at 534–35.
85. *Id.* at 535.
86. *Id.* at 535–36.
87. *Id.* at 536.
88. *Id.*

addressed this informational advantage when it created safeguards for the procedural rights of parents, requiring schools to share all information with them.[89] Accordingly, the Court held that the party seeking relief properly bears the burden of proof at administrative hearings under the IDEA.[90]

C. Implications

Although many parents, advocates, and their attorneys argue that *Schaffer* "risks inviting school districts to ignore or undermine [parents'] rights and deprive their children of a free appropriate public education,"[91] once the realities of the educational laws and litigation process are considered, the decision will likely not have much effect on IDEA litigation in all but one area—the need for expert witnesses. First, the outcome of very few cases will actually depend on which party bears the burden of persuasion because very few cases are truly in equipoise after the presentation of evidence.[92] Additionally, *Schaffer* will not have an effect on IDEA litigation in all jurisdictions. *Schaffer* left states the option of legislatively placing the burden of proof on school districts.[93] Several states already have laws or regulations which place the burden of proof on the school districts.[94] Moreover, the decision will not affect litigation in

89. *Id.*

90. *Id.* at 536–37.

91. Amicus Committee Statement of Parent Attorneys and Advocates, *supra* note 8.

92. *Schaffer*, 126 S. Ct. at 535 ("In truth . . . very few cases will be in evidentiary equipoise."); *see also* Peter W.D. Wright, How Will *Schaffer v. Weast* Affect You? (2005) (unpublished manuscript at 7), *available at* http://www.wrightslaw.com/law/art/schaffer.impact.pwright.pdf ("In general, what controls outcome is not the facts nor the law. It comes down to one thing: Does the Hearing Officer/Administrative Law Judge want to rule in your favor? . . . It is the human emotions of the HO/ALJ and your ability to influence their beliefs and emotions [that] will take you into the end zone, without regard to which side has the burden of proof."). This conclusion was supported by an ALJ in an unrelated IDEA hearing. He stated, "while the parties seemed to place great emphasis on the issue of burden of proof, my decision would remain unchanged even if I had determined that the [school district] carried the burden." Waller v. Bd. of Educ., 234 F. Supp. 2d 531, 538 (D. Md. 2002) (quoting the ALJ decision).

93. *Schaffer*, 126 S. Ct. 537 ("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. Because no such law or regulation exists in Maryland, we need not decide this issue today.").

94. States that statutorily placed the burden of proof on the school district are Alabama, Alaska, Connecticut, Washington, D.C., Delaware, Georgia, Illinois, Kentucky, Minnesota, and West Virginia. Wright, *supra* note 92, at 1, 3–4; *e.g.*, KY. REV. STAT. ANN. § 13B.090(7) (2003); MINN. STAT. § 125A.091(16) (2007).

jurisdictions that already placed the burden of proof on the parents before *Schaffer*.[95] Thus, the decision only affects about half the states.[96]

Schaffer may even benefit parents in one type of IDEA hearing. Previously, when school districts unilaterally changed a child's IEP, parents had the choice of either accepting that IEP or requesting a hearing. When parents did request a hearing, administrative law judges often assumed that the parents were the party seeking change because they had requested the hearing—even when the school district was the one attempting to change the IEP.[97] This led to the placement of the burden of persuasion on parents too frequently. After *Schaffer*, when a school district unilaterally attempts to change an IEP, courts consider it the party "seeking relief," and therefore the district bears the burden of proof.[98]

A final reason that *Schaffer*, alone, is unlikely to have a large impact is that attorneys do not tend to exert less effort in litigation simply because their party does not bear the burden of proof. It is always in advocates' interest to present their best possible case in hopes of prevailing.[99] Thus, the hearing process is unlikely to change solely because parents bear the burden of proof as attorneys will continue to present as compelling a case as possible. Before *Schaffer*, plaintiffs often requested to present their cases first, even when they did not bear the burden of proof; if school districts were required to present first, hearings would take much longer because districts would have to anticipate plaintiffs' cases.[100]

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95. According to Wright's research, the Fourth, Fifth, Sixth, Seventh, and Eleventh Circuits had all previously allocated the burden of proof to the parents. Wright, *supra* note 92, at 3. Thus, the states that will not be affected by *Schaffer* are Colorado, Indiana, Kansas, Louisiana, Maryland, Michigan, Mississippi, New Mexico, North Carolina, Ohio, Oklahoma, South Carolina, Tennessee, Texas, Utah, Virginia, and Wyoming. Wright, *supra* note 92, at 3–4; *see also supra* note 77.

96. Wright, *supra* note 92, at 3–4.

97. *Id.* at 5.

98. *See id.* at 5 ("[Previously,] parents had the burden of proving that the new proposed IEP was not appropriate. The decision in *Schaffer* changed this."); *see also Schaffer*, 126 S. Ct. at 532 (stating that school districts may seek IDEA hearings and thus bear the burden of persuasion "if they wish to change an existing IEP but the parents do not consent, or if parents refuse to allow their child to be evaluated").

99. *See* Wright, *supra* note 92, at 6 ("I always go first. This gives me control over the order of witnesses, and allows me to lay out the case and theme of the case in the manner I prefer.").

100. *See* Wright, *supra* note 92, at 6–7 (describing hearings in other jurisdictions—which did not previously assign the burden of proof to the parents—where Wright asked to go first even when the school district had the burden of proof). When hearing officers refused to allow

Although it imposes a legal burden on the parents, *Schaffer* is unlikely to have much effect on the way litigation actually progresses in all but one area: expert witness testimony. *Schaffer* places a substantial burden on parents by increasing their need for expert witnesses. Placing the burden of persuasion on parents in IDEA proceedings requires parents to retain their own experts to counter the presumption that a child's IEP is appropriate. Because parents have the burden of proving the inappropriateness of the IEP—formulated by the school district's experienced teachers and special education experts—they will often have to provide exceptionally qualified and credible medical or education experts in order to prevail at a FAPE hearing.[101]

As school districts typically have experts on staff in the form of special education teachers, child psychologists, and educational specialists,[102] they have ready access to experts who will support the IEP provided for the child without incurring exorbitant fees for the retention of expert witnesses. Additionally, school districts have much more experience in creating IEPs and educating special needs children. It may be very difficult for parents to overcome judicial deference to the school districts, and indeed may be a nearly impossible task for parents to accomplish without the testimony of

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Wright to present his case first, it resulted in much longer trials because the school district had to anticipate every issue that could arise in the parents' case and therefore attempted to cover every possible issue. *Id*.

101. *See* Brief for The Council of Parent Attorneys & Advocates as Amicus Curiae Supporting Respondents at 3, Arlington Cent. Sch. Dist. v. Murphy, 126 S. Ct. 2455 (2006) (No. 05-18) ("Because, as this Court recently ruled [in *Schaffer*], parents bear the burden of proving that an appropriate IEP is not being provided for their children, and because the presentation of expert evidence is an indispensable part of the process of proof, . . . the Court should not accord a prevailing party an empty victory by forcing the parents to bear the costs of experts, without whose help, they would not have obtained a free appropriate public education for their children."); 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, 968 (2004) ("[T]he use of expert witnesses in these IDEA actions is both necessary and costly. Before filing suit against a school district, special education attorneys recommend that parents obtain 'strong, believable' expert witness testimony, because such testimony . . . is generally necessary to rebut a school district's assertion that a child is receiving a 'free appropriate public education.'").

102. For example, school districts often have autism specialists, program specialists, inclusion specialists, occupational therapists, speech pathologists, and physical therapists, to name a few of the many possible educational specialists.

their own expert witnesses.[103] It was exactly this aspect of IDEA litigation the Supreme Court addressed next.

III. *ARLINGTON V. MURPHY*

A. Background

Although the amendments to the IDEA allow parents who prevail in an action against a school district to recover attorneys' fees,[104] the original version of the Act did not include any such provision.[105] Parents, however, often brought actions for recovery of costs in IDEA cases under other statutes that related to disabled children's right to a FAPE and provided for attorneys' fees for prevailing plaintiffs.[106] In 1984, the Supreme Court foreclosed that possibility by holding explicitly that parents could not use other statutes to recover attorneys' fees under the IDEA.[107] In response, Congress enacted the Handicapped Children's Protection Act of 1986, which made attorneys' fees recoverable by prevailing parents.[108] Congress applied the statute retroactively, demonstrating its commitment to the protection of parents' procedural rights in IDEA litigation by allowing them to recover even expenses previously incurred.[109]

The IDEA provides courts discretion to "award reasonable attorneys' fees as part of the costs" to parents of a child with a

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103. *See Experts Divided over Significance of Expert Fees Ruling*, SPECIAL EDUCATOR (LRP Publ'ns, Alexandria, Va.), July 21, 2006, at 4 ("With rare exception, parents must offer the testimony of expert witnesses in order to prevail in administrative due process proceedings." (quoting attorney Steven Wyner)).

104. IDEA, 20 U.S.C. § 1415(i)(3)(B)(i) (Supp. IV 2004).

105. *See* Education for All Handicapped Children Act of 1975 (EHA), Pub. L. 94-142 § 3(b)(2)–(5), 89 Stat. 774.

106. *See* Stefan R. Hanson, *Buckhannon, Special Education Disputes, and Attorneys' Fees: Time for a Congressional Response Again*, 2003 BYU EDUC. & L.J. 519, 531–32 (remarking that although the EHA had no attorneys' fees provision, parents often recovered their fees under other statutes). The most frequently used statutes were the Rehabilitation Act of 1973, 29 U.S.C. §§ 701–796 (2000 & Supp. IV 2004), and the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988 (2000). *See* Crary, *supra* note 101, at 973.

107. Smith v. Robinson, 468 U.S. 992, 1015 (1984).

108. Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372 § 2(B), 100 Stat. 796.

109. *Id.* § 5; *see also* Mitchell L. Yell & Christine A. Espin, *The Handicapped Children's Protection Act of 1986: Time to Pay the Piper?*, 56 EXCEPTIONAL CHILDREN 396, 401–02 (1990) (discussing the effect of retroactive application).

disability when they are the prevailing party.[110] This language is similar to attorneys' fees provisions in other federal statutes.[111] Yet the IDEA is even more detailed, including specific fee-calculating provisions prohibiting the use of any bonus or multiplier, as well as the recovery of fees or costs for certain services.[112] Notably absent from the IDEA, however, is any provision for the recovery of fees paid to expert witnesses during the litigation. When courts considered actions for the recovery of costs under the IDEA, the attorneys' fees provision gave rise to a division among the circuits as to whether the provision included expert fees in addition to attorneys' fees.[113] The Second Circuit joined the debate in 2005, allowing prevailing parents to recover expert fees,[114] and gave the Supreme Court its second opportunity to consider a technical, procedural IDEA issue during the 2005–2006 term.

B. The Arlington *Decision*

Pearl and Theodore Murphy brought a suit seeking to compel the Arlington Central School District Board of Education to pay private school tuition for their special needs son, Joseph.[115] Throughout the proceedings, the Murphys were assisted by an education consultant whom they paid $29,350 for her services.[116] Upon prevailing on their substantive claims, the Murphys then sought to recover the fees they paid to their expert.[117]

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110. IDEA, 20 U.S.C. § 1415(i)(3)(B)(i)(I) (Supp. IV 2004).

111. *See* Holmes v. Millcreek Twp. Sch. Dist., 205 F.3d 583, 593 n.12 (3d Cir. 2000) (comparing the IDEA attorneys' fees provision to 42 U.S.C. § 1988).

112. 20 U.S.C. § 1415(i)(3)(C)–(D).

113. *Compare* Arons v. N.J. State Bd. of Educ., 842 F.2d 58, 63 (3d Cir. 1988) (finding that although non-lawyers could not recover attorneys' fees despite acting as counsel, experts fell within the confines of the statute), *and* Brillon v. Klein Indep. Sch. Dist., 274 F. Supp. 2d 864, 872 (S.D. Tex. 2003) (finding that expert fees are recoverable in IDEA actions), *and* B.D. v. DeBuono, 177 F. Supp. 2d 201, 208 (S.D.N.Y. 2001) (finding that Congress intended expert fees to be recoverable under the IDEA), *with* Goldring *ex rel.* Anderson v. District of Columbia, 416 F.3d 70, 71 (D.C. Cir. 2004) (holding that expert fees are not recoverable in IDEA actions), *and* T.D. v. LaGrange Sch. Dist., No. 102, 349 F.3d 469, 482 (7th Cir. 2003) (finding that expert fees are not recoverable because there is no explicit authorization in the IDEA), *and* Neosho R-V Sch. Dist. v. Clarke, 315 F.2d 1022, 1033 (8th Cir. 2003) (holding that expert fees are not recoverable in IDEA actions), *and* Hiram C. v. Manteca Unified Sch. Dist., 2004 WL 4999156, at *3–4 (E.D. Cal. Nov. 5, 2004) (holding that expert fees not recoverable).

114. Murphy v. Arlington Cent. Sch. Dist., 402 F.3d 332, 339 (2d Cir. 2005).

115. Arlington Cent. Sch. Dist. v. Murphy, 126 S. Ct. 2455, 2457 (2006).

116. *Id.* at 2458.

117. *Id.* at 2457–58.

Basing its analysis on the premise that Congress enacted the IDEA under its Spending Clause authority, the Supreme Court determined the Act does not permit prevailing parents to recover fees paid to their expert witnesses.[118] When imposing conditions on disbursements of federal money to the states pursuant to its spending clause authority, Congress must set out the conditions attached to these grants unambiguously, and states must accept such conditions voluntarily and knowingly.[119] The Court concluded that the language of the IDEA attorneys' fees provision does not provide states with any warning that expert fees may be included within the costs recoverable by the parents, but merely adds attorneys' fees to the types of costs that are typically recoverable in litigation.[120] Moreover, because the IDEA contains very detailed provisions regarding specific fees that are and are not recoverable as part of attorneys' fees, the absence of any similar provisions pertaining to expert fees indicates they are not authorized by the statute.[121] Absent language in the statute requiring the recovery of expert fees, the Court determined states do not have the necessary clear notice required to attach a condition to the grant of federal money.[122]

The Court also analogized to cases regarding Federal Rule of Civil Procedure 54(d), which authorizes the award of costs to a prevailing party, and the fee-shifting provision in 42 U.S.C. § 1988 governing civil rights actions.[123] In such cases, the Court had determined that nearly identical language in attorneys' fees provisions did not include expert fees absent express authorization by Congress.[124]

Finally, the Court rejected the argument that reimbursing prevailing parents for expert fees furthers the IDEA's primary goal. It determined that the goal of providing a free appropriate education did not prevail over other considerations, such as a school district's

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118. *Id.* at 2458–64.

119. *Id.* at 2459.

120. *Id.* at 2459–60. For a list of typically recoverable costs, see 28 U.S.C. § 1920 (2000).

121. *Arlington*, 126 S. Ct. at 2460–61.

122. *Id.*; *see also* W. Va. Univ. Hosp. v. Casey, 499 U.S. 83, 89 & n.4 (1991) (drawing the same conclusion and listing thirty-five federal statutes that explicitly include expert fees in addition to attorneys' fees).

123. *Arlington*, 126 S. Ct. at 2462.

124. *Id.* (citing Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 439 (1987) and *Casey*, 499 U.S. at 102).

monetary concerns.[125] In light of the statute's plain text, the Court found the legislative intent that expert fees be recoverable by prevailing parties unpersuasive.[126] Accordingly, the Court determined that prevailing parents could not recover fees paid to expert witnesses and consultants as part of their costs in IDEA actions.[127]

IV. UNDERMINING THE IDEA

Although *Arlington* appears to be in line with previous Spending Clause cases requiring clear notice of recoverable costs,[128] and *Schaffer* is consistent with other cases placing the burden of persuasion on the party seeking relief,[129] the impacts of the decisions are compounded significantly when the cases are evaluated together. The decisions have a combined effect that undermines the goals of the IDEA and the rationale used by the Supreme Court in the decisions themselves. First, *Arlington* and *Schaffer*, along with the 2004 reauthorization of the IDEA, represent a distinct departure from prior trends in the Act and its supporting body of case law, which consistently indicated increasing support for rights of parents and students. Second, the decision in *Arlington* undermines the Supreme Court's rationale for placing the burden of proof upon parents in *Schaffer*. Finally, the decisions ignore the realities of the litigation process and the characteristics of many special education parents by imposing unreasonable obstacles in the way of parents' attempts to exercise their due process rights.

A. Bucking the Trend

Prior to 2004, congressional amendments to the IDEA and judicial interpretations of the Act established a trend of increasing

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125. *Arlington*, 126 S. Ct. at 2463.

126. *Id*. The House Report stated, "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." H.R. REP. NO. 99-687, at 5 (1986).

127. *Arlington*, 126 S. Ct. at 2457–58.

128. *Experts Divided over Significance of Expert Fees Ruling*, *supra* note 103, at 4; *see also Casey*, 499 U.S. at 102 (finding that expert fees are not recoverable in a § 1988 action); *Crawford Fitting*, 482 U.S. at 439 (finding that expert fees are not recoverable absent explicit authorization).

129. *See, e.g.*, Cleveland v. Policy Mgmt. Sys. Corp., 526 U.S. 795, 806 (1999) (placing the burden on the party seeking relief); Hunt v. Cromartie, 526 U.S. 541, 553 (1999) (same); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511 (1993) (same).

support for the rights of parents and students, substantively and especially procedurally. These amendments to the IDEA provided increasing amounts of money for special education and significantly expanded the group of students eligible for services under the Act by including additional disabilities.[130] Additionally, the Act focused on increasing the services available to preschool-aged children in an attempt to keep them from falling too far behind before beginning school.[131]

U.S. Supreme Court decisions regarding the IDEA prior to 2004 consistently supported the increasing scope of substantive and procedural rights of children with disabilities—and their parents as well. In 1984, the Supreme Court required a school district to provide services for clean intermittent catheterization during the school day to a student with disabilities as a "related service" in order to allow her to attend school.[132] One year later, the Court determined that parents are entitled to reimbursement for private school tuition and expenses even when they take unilateral action to place their child in that school—technically violating the stay-put provision during a dispute with the school district—if a court later determines the parents' placement was appropriate and the school district's placement was inappropriate.[133] In its next IDEA case, the Court decided that as a result of the stay-put provision and the strong presumption in favor of keeping children in their current educational placements, a school district may not suspend or expel a violent or disruptive child with disabilities without following the due process procedures of the IDEA.[134]

Other Supreme Court decisions determined that parents may be reimbursed for the costs of unilaterally placing a child with disabilities in a private school that provides an appropriate education even when

130. *See* RICHARD N. APLING, INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA): CURRENT FUNDING TRENDS 1 (2004), *available at* http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1036&context=key_workplace (stating that since 1995, "overall IDEA funding has increased by nearly 250%, from $3.2 billion to $11.2 billion" due to increases in the number of children served).

131. Education of the Handicapped Act Amendments of 1986, Pub. L. No. 99-457, 100 Stat. 1145 (expanding preschool programs significantly and emphasizing the early education focus of the act).

132. Irving Indep. Sch. Dist. v. Tatro, 468 U.S. 883, 893 (1984).

133. Sch. Comm. of the Town of Burlington v. Dep't of Educ., 471 U.S. 359, 369–70 (1985).

134. Honig v. Doe, 484 U.S. 305, 328 (1988). This protection was later removed by Congress in the 2004 reauthorization of the IDEA. *See infra* text accompanying note 142.

the school is not approved by the state[135] and that children entitled to IDEA services may be provided those public services by sectarian schools without violating the First Amendment.[136] In its last IDEA case before *Schaffer*, the Supreme Court determined that school districts must provide one-on-one nursing services to students with serious disabilities if those services are necessary in order to allow them to attend school.[137] With one exception, every time the Supreme Court considered an IDEA issue, it found in favor of the parents and students with disabilities, protecting rights by increasing the responsibilities of the school districts.[138] The sole exception is *Smith v. Robinson*,[139] which Congress overturned almost immediately.[140] Lower courts followed the example of the Supreme Court, consistently increasing the substantive and procedural rights of parents and children.[141] These decisions, along with the series of amendments to the IDEA, evinced a trend of increasing substantive and procedural rights afforded to children with disabilities and their parents.

The tide turned in 2004. The reauthorization of the IDEA that year displayed a different focus, as Congress cut back on many of the procedural safeguards that had been the cornerstones of the act. The reauthorized version of the IDEA narrowed the scope of the stay-put provision significantly by giving the local education agency the authority to remove a child to an interim placement upon the determination that the child would be a danger in the current educational setting.[142] This change to the stay-put provision specifically contradicts the holding in *Honig v. Doe*, which found that the provision prohibits school districts from removing children from school simply by claiming they are dangerous.[143] Another amendment

135. Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 9 (1993).

136. Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 3 (1993).

137. Cedar Rapids Cmty. Sch. Dist. v. Garret F., 526 U.S. 66, 68, 79 (1999).

138. *See supra* notes 132–37 and accompanying text.

139. Smith v. Robinson, 468 U.S. 992, 1015 (1984).

140. *See supra* notes 107–09 and accompanying text.

141. *See, e.g.*, Mackey v. Bd. of Educ., 386 F.3d 158, 164–65 (2d Cir. 2004) (allowing parents to recover the costs of tuition because to do otherwise would be inherently unfair); Oberti v. Bd. of Educ., 995 F.2d 1204 (3d Cir. 1993) (holding that children must be placed in a regular classroom with support services and modifications whenever there is any way they can be educated satisfactorily, and if not that efforts must be made to include the children whenever possible); T.D. v. LaGrange Sch. Dist. No. 102, 2005 U.S. Dist. LEXIS 3068 (N.D. Ill. Feb. 25, 2005) (allowing parents to recover fees despite prevailing on only some issues at the hearing).

142. IDEA, 20 U.S.C. § 1415(k)(3)–(4) (Supp. IV 2004).

143. *See* Honig v. Doe, 484 U.S. 305, 323–24 (1988).

in the reauthorized Act allows school districts to recover attorneys' fees from parents upon prevailing in IDEA actions.[144] School districts may recover fees whenever a parent's complaint is frivolous, unreasonable, presented for an improper purpose, or intended to needlessly delay or increase the cost of litigation.[145] Even though school districts may not recover without "bad faith" actions on the part of the parents, this is a significant change in the IDEA, which had always focused on protecting the rights of the parents and students, not the districts.

After these revisions took effect on July 1, 2005, the Supreme Court issued its decisions in *Schaffer* and *Arlington*, the first IDEA decisions to come down in favor of school districts by further narrowing the procedural safeguards and rights of parents. It is unclear whether the Supreme Court will continue this trend limiting the procedural safeguards for parents in IDEA litigation.[146]

B. Undermining Schaffer*'s Rationale*

1. *The Insurmountable Burden of Proof.* In its *Schaffer* opinion, the Supreme Court cited the many procedural safeguards of the IDEA as a major factor in its decision to impose the burden of

144. 20 U.S.C. § 1415(i)(3)(B)(i)(II)–(III) (Supp. IV 2004).

145. *Id.*

146. As noted, *Winkelman v. Parma City School District*, 127 S. Ct. 1994 (2007), may at first glance appear to go against the trend of limiting procedural rights. *See supra* note 23. The Court's opinion in *Winkelman*, however, focused primarily on a textual, plain meaning reading of the IDEA, stating that it "defines one of its purposes as seeking 'to ensure that the rights of children with disabilities *and parents of such children* are protected.'" *Winkelman*, 127 S. Ct. at 2002 (quoting 20 U.S.C. § 1400(d)(1)(B) (Supp. IV 2004)). Thus, although the Court found in favor of the parents in this case, rather than the school district as in *Schaffer* and *Arlington*, the decision gives no indication that the court will do so in regards to any future procedural rights which are subject to interpretation rather than explicitly stated in the IDEA. Moreover, as attorneys' fees are recoverable under the IDEA, 20 U.S.C. § 1415(i)(3)(B)(i)(I), *Winkelman* does not provide a new economic benefit to parents. Parents with meritorious claims, even those with low income levels, would likely be able to find counsel to represent their interests on a contingency basis due to the ability to recover their fees upon success. Thus, although decided in favor of the parents, *Winkelman* remains a hollow victory as it does nothing to reduce the difficulties parents face following *Schaffer* and *Arlington* because they still must carry the burden of persuasion at IDEA hearings while being unable to recover expert fees.

The Supreme Court will have yet another opportunity to consider an IDEA issue in its fall 2007 term. In *Board of Education v. Tom F.*, the Court will decide whether parents may be reimbursed for tuition when students receive special education services from private schools even if the students never received services from public schools. The Supreme Court granted certiorari on February 26, 2007. 127 S. Ct. 1393 (2007).

persuasion on the party seeking relief in IDEA litigation.[147] The Court reasoned that carrying the burden of proof will not harm parents because their rights are sufficiently protected by these procedural safeguards.[148] Furthermore, the Court concluded that the safeguards are sufficient to eliminate the school district's informational advantage.[149] When examined in light of its subsequent decision in *Arlington*, however, the individual safeguards cited by the Court will not adequately protect parent or student rights in IDEA actions.

The first safeguard cited by the Supreme Court is the right of parents to have expert witnesses and opinions at IDEA hearings. The provisions of the IDEA and federal regulations explicitly acknowledge the necessity of expert witnesses by providing parents the right to an "independent educational evaluation of the[ir] child" at public expense.[150] The Court in *Schaffer* emphasized this provision, saying the

> 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.[151]

The Court thus recognized the necessity of parents having their own expert to match the school district. Yet, despite stressing the importance of expert evidence, the Supreme Court seven months later in *Arlington* essentially took away any practical access to this right by eliminating all possibilities of financial assistance for parents who retain experts. Parents are unlikely to find an expert who will work without the possibility of recovering fees from the school district upon prevailing. This decision effectively restricts the possibility of

147. Schaffer *ex rel.* Schaffer v. Weast, 126 S. Ct. 528, 534–35 (2005).

148. *Id.*; *see* Susan Boswell, *U.S. Supreme Court Upholds School Districts in Special Ed Case*, ASHA LEADER, Dec. 27, 2005, http://www.asha.org/about/publications/leader-online/archives/2005/051227/051227c.htm (last visited Oct. 31, 2007) (stating that the "[t]he ruling recognizes . . . that recent IDEA reauthorizations have strengthened procedural safeguards" because parents may have experts to match the school districts' experts).

149. *Schaffer*, 126 S. Ct. at 536.

150. *Id.* For the IDEA's statutory provision of this expert evaluation, see IDEA, 20 U.S.C. § 1415(b)(1) (Supp. IV 2004). The Code of Federal Regulations provides guidelines to assist states in their interpretations of the right to an expert evaluation. 34 C.F.R. § 300.502(b)(1) (2007).

151. *Schaffer*, 126 S. Ct. at 536.

retaining experts—and therefore bringing cases—to only wealthy parents. Thus, although *Schaffer* stresses the opportunities for parents to use experts as a reason to place the burden of persuasion on parents at IDEA hearings, *Arlington* essentially eliminates any feasible chance of realizing that opportunity.

Another procedural safeguard emphasized in *Schaffer* was the attorneys' fees provision. The Court stated, "[f]inally, and perhaps most importantly, parents may recover attorneys' fees if they prevail."[152] At the time of this statement, many courts around the country included expert fees in the attorneys' fees parents could recover upon prevailing. The holding in *Arlington*, which eliminated that possibility, therefore significantly changed and reduced the scope of the safeguard on which the Court placed the most importance in its decision to shift the burden of proof to parents in IDEA litigation.

2. *Undermining Congressional Intent*. In addition to undermining parents' ability to overcome imposition of the burden of proof, the *Arlington* decision contradicts congressional intent, another rationale used to impose the burden of proof on parents in *Schaffer*. The *Schaffer* Court reasoned that Congress already had considered the many disadvantages parents face when challenging school districts in IDEA actions and included sufficient procedural protections in drafting the Act to compensate for those disadvantages.[153] The Court's decision in *Arlington*, however, contradicts one of the protections Congress appears to have intended to include when drafting the IDEA. Two different versions of the bill were introduced in the Senate as it considered amending the EHA to provide for the recovery of attorneys' fees by prevailing parents. The first provided that "the court, in its discretion, may award a reasonable attorney's fee [as part of the costs]" to prevailing parents.[154] The second version of the bill would have provided for the recovery of "a reasonable attorney's fee, reasonable witness fees, and other reasonable expenses of the civil action" to the prevailing parents, but also would have set a cap on the total costs that could be recovered.[155] Although the record shows no objections to the types of costs included in the second bill, there were several objections to the

152. *Id.* at 537.
153. *Id.* at 536–37.
154. S. REP. NO. 99-112, at 15 (1985).
155. *Id*. at 7.

cap on the amount of recoverable fees.[156] This conflict led to the introduction of an alternative, compromise bill, which granted courts discretion to provide a "reasonable attorney's fee in addition to the costs" to prevailing parents. When explaining the effect this version of the bill would have, Senator Lowell Weicker stated that the intent of the Senate was to award "reasonable attorneys' fees, *necessary expert witness fees*, and other reasonable expenses which were necessary for parents to vindicate their claim to a free appropriate public education for their handicapped child."[157] There was no opposition to this statement, and the bill passed in the Senate.[158]

Similar intent to include expert fees was revealed in the House of Representatives when a new version of the bill was introduced allowing for the recovery of "reasonable attorneys' fees, expenses and costs."[159] The House Report stated, "[t]he phrase 'expenses and costs' includes *expenses of expert witnesses* . . . ."[160]

These statements indicate each chamber's intent to provide for the recovery of expert fees in addition to attorneys' fees. In the joint conference on the final version of the bill, legislators gave courts discretion to "award reasonable attorneys' fees as part of the costs."[161] The Joint Explanatory Statement of the Committee of Conference said:

> 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 parent or guardian's case in the action or proceeding, as well as traditional costs incurred in the course of litigating a case.[162]

When the legislative history is considered, it appears that Congress intended to provide for the inclusion of expert and attorneys' fees in the amendment to the EHA. Thus, *Arlington*

156. *See id.* Significantly, this objection to a cap on the amount of recoverable fees again demonstrates Congress's commitment to protecting the interests of children with disabilities and their parents by providing the opportunity for parents to recover *all* of their expenses, not only a portion.

157. 131 CONG. REC. 21390 (statement of Sen. Weicker) (emphasis added).

158. *Id.* at 21390–93.

159. H.R. REP. NO. 99-296, at 1, 5 (1985).

160. *Id.* at 6 (emphasis added).

161. H.R. REP. NO. 99-687 (1986).

162. *Id.* (emphasis added).

eliminates a substantial procedural safeguard Congress intended to include in the IDEA to protect parents involved in litigation with school districts, which have significantly greater information, resources, and expertise. By reducing parents' available procedural safeguards, the Court's decision in *Arlington* undermines the rationale in *Schaffer*, which found the expansive procedural safeguards in the IDEA justified the imposition of the burden of proof on parents in IDEA litigation.

C. *The Combined Effect of the Decisions in Light of Demographic Information*

The effect of the decisions in *Schaffer* and *Arlington* will have a significant impact on parents of children with disabilities. As discussed in Part II.D, the primary way *Schaffer* will affect IDEA litigation is by increasing parents' need for expert witnesses. Once parents have the burden of proof at a hearing—making the use of experts a practical necessity in order to overcome the presumption that the school district's IEP is correct—not allowing parents to recover fees paid to experts severely limits their ability to bring an action.

The impact of these decisions becomes even more significant upon consideration of the demographics of special education students' households. Although the employment patterns of parents of special education students are essentially the same as parents of non–special needs children, they tend to earn less.[163] More than one-third of students with disabilities live in households with annual incomes less than $25,000, and one-quarter of students with disabilities live in poverty.[164] Additionally, only half as many children with disabilities live in households with more than $75,000 in annual income as do other children.[165] This likely occurs because both mothers and fathers of students with disabilities tend to have much lower levels of education than the parents of other students.[166] Finally, approximately one-quarter of students with disabilities receive money

163. MARY WAGNER ET AL., THE CHILDREN WE SERVE: THE DEMOGRAPHIC CHARACTERISTICS OF ELEMENTARY AND MIDDLE SCHOOL STUDENTS WITH DISABILITIES AND THEIR HOUSEHOLDS 24, 28 (2002), *available at* http://www.seels.net/designdocs/SEELS_Children_We_Serve_Report.pdf.

164. *Id.* at 28.

165. *Id.*

166. *Id.* at 23.

from at least one governmental benefit program, such as Temporary Assistance for Needy Families, food stamps, or Supplemental Security Income.[167] Overall, although the parents of children with disabilities are as likely to work as parents of typical children, they are much more likely to have a very low income level, live in poverty, and receive federal assistance.[168]

This demographic information illustrates that the majority of parents with children in special education do not have sufficient income to hire expert witnesses necessary to carry their burden of proof at IDEA hearings. Given the high average cost of expert services,[169] it is not only these low-income families burdened by the change in the IDEA procedural law, but also the many middle-class families who do not have disposable income on hand to hire an expert. Moreover, parents of special education students are especially likely to need expert advice and consultation throughout the process due to their lower-than-average levels of education. It is thus the group most likely to need assistance in IDEA hearings that suffers the greatest harm as a result of *Arlington*.[170]

In contrast to the significant burden it can impose on parents' finances, litigating due process complaints is not the large drain on school districts' educational budgets that the Court seems to suggest.[171] Although attorneys for school districts proclaim that the decision "will save the taxpayers a lot of money,"[172] parents actually request civil hearings very rarely. Only five out of every ten thousand children who receive special education services under the IDEA

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167. *Id.* at 30.

168. *Id.* at 47.

169. *See* Crary, *supra* note 101, at 968 ("[T]he use of expert witnesses in these IDEA actions is both necessary and costly."). For example, in *Arlington*, parents sought reimbursement for $29,350 of expert fees and services. Arlington v. Cent. Sch. Dist. v. Murphy, 126 S. Ct. 2455, 2458 (2006).

170. *See Experts Divided over Significance of Expert Fees Ruling*, *supra* note 103, at 4 ("[T]he ruling will most impact financially disadvantaged families who may be unable to find experts who don't seek to recover fees.").

171. *See* Schaffer *ex rel.* Schaffer v. Weast, 126 S. Ct. 528, 535 (2005) ("Litigating a due process complaint is an expensive affair, costing schools approximately $8,000-to-$12,000 per hearing."). Although these cost figures may be accurate, these hearings occur very infrequently. *See infra* text accompanying notes 173–74.

172. *Experts Divided over Significance of Expert Fees Ruling*, *supra* note 103, at 4 (quoting Ron Wenkart, an attorney for the Orange County Office of Education in Costa Mesa, CA).

request due process hearings.[173] In fact, 94 percent of all school districts have never had a single IDEA hearing, and the total amount spent on all IDEA disputes represents only 0.3 percent of special education spending.[174] Thus, evidence suggests additional costs to school districts from reimbursing expert fees will accrue very rarely, whereas "[w]ithout the ability to recover their expert witness fees, few parents could afford to exercise their constitutional and IDEA rights to challenge [the] denial of FAPE to their children by school districts."[175]

CONCLUSION

Individually rational decisions in *Schaffer* and *Arlington* ignore the realities of the litigation process and combine to impose an unreasonable and nearly insurmountable burden on parents of special education students. In order to carry the burden of persuasion in an IDEA action, parents must present experts to counter the school district's expertise and informational advantage. Expecting parents to present expert witnesses when they are not able to recover witness fees is unrealistic, especially considering the average demographics of parents of special education students. When considered in the context of the history of the IDEA and its previous judicial interpretations, the cases signify a shift in the Court's mentality and a new willingness to restrict the procedural rights and safeguards of parents—a shift unintended by the legislators who drafted these provisions.

Yet, hope remains for special education parents. The Supreme Court left legislatures with several opportunities to circumvent the holdings in these cases and lessen the burden placed on parents. First, in *Schaffer*, the Court left state legislatures the option of statutorily placing the burden of proof on the school districts in IDEA proceedings.[176] By shifting the burden of proof to school districts,

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173. U.S. GEN. ACCOUNTING OFFICE, SPECIAL EDUCATION: NUMBERS OF FORMAL DISPUTES ARE GENERALLY LOW AND STATES ARE USING MEDIATION AND OTHER STRATEGIES TO RESOLVE CONFLICTS 13 (2003).

174. Amicus Committee Statement of Parent Attorneys and Advocates, *supra* note 8. The data come from Department of Education studies and involve costs spent on mediation, school district hearings, and litigation. Individuals with Disabilities Education Improvement Act of 2003, 150 CONG. REC. S5351 (May 12, 2004).

175. Council of Parent Attorneys and Advocates, COPAA Files Amicus Brief in Supreme Court Advocating Upholding Right to Recover Expert Witness Fees, http://www.copaa.org/news/murphy.html (last visited Nov. 2, 2007).

176. *See supra* note 93.

states would greatly reduce the need for expert witnesses, thereby significantly lessening *Arlington*'s impact. Alternatively, *Arlington* left the door open for Congress to mitigate the burdens placed on parents by these decisions, saying, "[t]he ball . . . is properly left in Congress' court to provide, if it so elects, for consultant fees and testing expenses beyond those IDEA and its implementing regulations already authorize."[177] If Congress amends the IDEA to provide for the recovery of expert witness fees, parents with valid claims against school districts would be more likely to find expert witnesses to support their cause, because they would be able to guarantee payment of fees upon prevailing in the action.[178]

Such reforms are crucial to protect the accessibility of education for all students, which the Court recognized as a profoundly important tool for the nation's success in *Brown v. Board of Education* more than fifty years ago.[179] Despite the vast improvements in educational opportunities since *Brown*, especially in special education services, there is still plenty of room for improvement and more must be done to ensure every child has the opportunity to receive a "free appropriate public education." Courts and legislatures must consider the realities of the litigation process and give parents the necessary tools with which to fight for their children's education. When parents must pay for their own experts in order to satisfy the burden of proof in a hearing to guarantee their child's free and appropriate education, that education is no longer free, but rather carries very high costs.[180]

177. Arlington Cent. Sch. Dist. v. Murphy, 126 S. Ct. 2455, 2465 (2006) (Ginsburg, J., concurring).

178. Although some parents might still be deterred by having to front the costs for experts, this deterrence could actually prove to be beneficial as it would serve as a method to weed out less meritorious claims or to encourage settlements. Parents with legitimate claims, however, should still be able to find expert witnesses who recognize the likelihood of prevailing on the merits and therefore will be willing to accept the case on a contingency basis.

179. Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

180. *See Experts Divided over Significance of Expert Fees Ruling*, *supra* note 103, at 4 ("All too soon, we may find that only families that can afford to hire experts to help their failing children will be able to enforce the rights and remedies secured by the IDEA. FAPE is no longer 'free.'").