Journal of the National Association of Administrative Law Judiciary

Volume 35 | Issue 2 Article 1

4-1-2016

Has the Supreme Court's Schaffer Decision Placed a Burden on Hearing Officer Decision-Making Under the IDEA?

Cathy A. Skidmore

Perry A. Zirkel

Has the Supreme Court's *Schaffer* Decision Placed a Burden on Hearing Officer Decision-Making Under the IDEA?

Cathy A. Skidmore & Perry A. Zirkel*

I. INTRODUCTION

In the fall of 2005, an eleventh grade student with mobility needs transferred to a new high school in Alaska where the parents sought door-to-door transportation service as part of the student's special education program.[1] Initially, the new school district provided the requested service, but in March 2006 its administrators decided to discontinue it.[2] The parents filed a due process complaint under the Individuals with Disabilities Education Act (IDEA),[3] claiming that the district's decision to eliminate those transportation services constituted a violation of the student's right to a free appropriate public education (FAPE) to which students with disabilities are entitled.[4] The impartial hearing officer (IHO) ruled in favor of the parents.[5] In the IHO's decision, he acknowledged that in light of the Supreme Court's decision in *Schaffer v. Weast*,[6] Alaska had changed its state law, effective May 20, 2006, shifting the burden of proof (BOP)[7] from the school district to the party requesting the hearing.[8] However, because the parties had presented all of the evidence prior to the May 20 effective date, and because the school district's counsel appeared to have accepted the BOP, the IHO had placed the BOP on the district.[9] On appeal to the federal district court, one of the district's arguments for reversal was that the IHO erred in not placing that burden on the parents, in accordance with *Schaffer*, since

---

*Cathy A. Skidmore is a full-time special education hearing officer with the Office for Dispute Resolution in Pennsylvania. Perry A. Zirkel is a university professor emeritus of education and law at Lehigh University. Both authors previously served as review officers in Pennsylvania during the seventeen-year period that the state had a two-tier system of IDEA administrative adjudication.

1 Anchorage Sch. Dist. v. N.S. *ex rel*. R.P., 2007 WL 8058163 at *2 (D. Alaska Nov. 8, 2007).

2 *Id.* at *3.

3 20 U.S.C. §§ 1401–1482 (2012).

4 Anchorage Sch. Dist., 2007 WL 8058163 at *3.

5 *Id.* at *1.

6 Schaffer *ex rel.* Schaffer v. Weast, 546 U.S. 49 (2005) (ruling that the burden of persuasion in an impartial hearing under the IDEA is on the party challenging the Individualized Education Program (IEP)).

7 The use of "BOP" here, and throughout this article, is to the burden of persuasion, as contrasted with the burden of production.

8 Anchorage Sch. Dist, 2007 WL 8058163 at *5.

9 *Id.*

they filed for the hearing.[10]

This case exemplifies the importance of the *Schaffer* holding in IHO decisions under the IDEA and, consequently, potential appealable error in those cases that proceed to court.[11] The principal purpose of the IDEA and its predecessor statutes was to afford full educational opportunity to children with disabilities[12] in the form of FAPE.[13] In providing an array of protections to children with disabilities and their parents,[14] each of the laws contained a framework for dispute resolution that included administrative due process hearings.[15] Thus, the administrative due process hearing had been a procedural safeguard for parents and local education agencies (LEAs) since the 1975 predecessor to the IDEA[16]—thirty years before *Schaffer*. Prior to *Schaffer*, there was no generally accepted approach to, or basis for, assigning the BOP to one party or the other in IDEA cases.[17]

An impartial hearing is the initial and, in many cases, the final adjudication for resolving the broad range of disputes under the

---

10 *Id.*

11 In the illustrative case from Alaska, if the court concluded that the IHO erred in the placement of the BOP and that the error was prejudicial, the result could be remand or outright reversal. In other cases, questionable treatment of the BOP might increase the odds of or grounds for appeal, thus defeating one of the purposes of prompt final dispute resolution.

12 20 U.S.C. § 1400 (2012) (originally enacted as Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142 § 3, 89 Stat. 773).

13 *Id.*

14 20 U.S.C. §§ 1412-1415 (2012). These protections extend to "any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child," *id.* § 1415(b)(6), and include locating and evaluating children who may have a disability, developing an Individualized Education Program (IEP) for children who are eligible, and placement in the least restrictive environment that is appropriate for the child's needs. *Id.* § 1412(a).

15 20 U.S.C. § 1415(f) (2012). Additional dispute resolution processes include mediation, *id.* §§ 1415(b)(5), 1415(e) and the state-complaint resolution process. 34 C.F.R. § 300.151.

16 The original statute was the Education for All Handicapped Children Act (EHA), which Congress has reauthorized and amended on several occasions. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142 § 3, 89 Stat. 773 (codified as amended at 20 U.S.C. § 1400). The 1997 statute renamed the legislation the IDEA, Individuals with Disabilities Education Act Amendments for 1997, Pub. L. No. 105-17, 111 Stat. 37 (codified as amended at 20 U.S.C. § 1400). The current version of the statute, the Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108, 118 Stat. 2647 (codified as amended at 20 U.S. C. § 1400), became effective in 2005. For a comprehensive synopsis of the EHA, *see, e.g.*, MARK C. WEBER, SPECIAL EDUCATION LAW AND LITIGATION TREATISE 1:4-1:7 (2008). For a brief summary of the various amendments, *see, e.g.*, Perry A. Zirkel, *Who Has the Burden of Persuasion in Impartial Hearings Under the Individuals with Disabilities Education Act?*, 13 CONN. PUB. INT. L. J. 1 (2013).

17 *See* Schaffer, 546 U.S. at 49.

IDEA.[18] Based on the ample latitude provided to the states under the IDEA's scheme of "cooperative federalism,"[19] the state systems for the administrative hearing process vary widely in many respects,[20] but the IDEA provides for judicial appeal of those administrative decisions directly to courts.[21] Despite the requirements for prompt resolution of these disputes at the administrative level,[22] the gradual direction since the passage of the original version of the IDEA in 1975 has been in the direction of increasing "judicialization,"[23] including a single tier composed of full-time administrative law judges (ALJs).[24] This increased judicialization includes the issue of which party bears the BOP, more specifically the burden of persuasion as differentiated from the burden of production.[25]

This article provides a systematic examination of the BOP in hearing officer decisions both before and after *Schaffer*. Part II examines the legal basis for the BOP both before and after the U.S. Supreme Court decision, resulting in the questions for this study. Part III explains the method used to collect and analyze the data, and

---

18 20 U.S.C. § 1415(f) (2012). These adjudications are final in many cases because most states have opted for a single tier administrative process, with appeals directly to state or federal court. *See infra* note 20 and accompanying text. Costs and other considerations likely lead many parties to forego further litigation of an IHO decision. *See* Perry A. Zirkel, *Judicial Appeals for Hearing/Review Officer Decisions under IDEA: An Empirical Analysis*, 78 EXCEPTIONAL CHILD. 375, 376 (2012) (describing process of appealing an IDEA-administrative decision as "costly and 'ponderous'" (quoting Burlington Sch. Comm. v. Dep't of Educ., 471 U.S. 359, 370 (1985)).

19 *See, e.g.*, Schaffer, 546 U.S. at 52.

20 The variations include whether the state employs a one or two-tiered process and whether the hearings are conducted by special education IHOs or Administrative Law Judges who also hear other types of matters. *See, e.g.* Perry A. Zirkel & Gina Scala, *Due Process Hearing Systems Under the IDEA: A State-by-State Survey*, 21 J. DISABILITY POL'Y STUD. 3 (2010). For research on the longitudinal trends in the frequency and outcomes of IHO decisions, *see, e.g.*, Perry A. Zirkel & Cathy A. Skidmore, *National Trends in the Frequency and Outcomes of Hearing and Review Officer Decisions Under the IDEA: An Empirical Analysis*, 29 OHIO ST. J. ON DISP. RESOL. 525, 527–40, 550–56 (2014) (providing an extensive literature review as well as updated findings).

21 For judicial appeals, the IDEA provides concurrent jurisdiction for state and federal courts. 20 U.S.C. § 1415(i)(2) (2012).

22 20 U.S.C. § 1415(f)(1)(B)(ii) (2012); 34 C.F.R. § 300.515(a).

23 *See, e.g.*, Perry A. Zirkel, Zorka Karanxha & Anastasia D'Angelo, *Creeping Judicialization in Special Education Hearings?: An Exploratory Study*, 27 J. NAT'L ASS'N ADMIN. L. JUDICIARY 27 (2007).

24 Zirkel & Scala, *supra* note 20, at 7.

25 *See, e.g.*, Thomas A. Mayes, Perry A. Zirkel & Dixie Snow Huefner, *Allocating the Burden of Proof in Administrative and Judicial Proceedings under the Individuals with Disabilities Education Act*, 108 W. VA. L. REV. 27, 35–36 (2005) (noting the relationship and distinctions among but distinctions between burden of proof and standard of review, as well as quantum of proof).

Part IV presents the results that answer the specific research questions. Part V discusses those results and the implications of the findings for special education dispute resolution and provides recommendations for further study.

II. FRAMEWORK

Neither the IDEA nor the predecessor versions of the statute made any provision specifying which party bore the BOP at the due process hearing.[26] It was not until 2005 in *Schaffer v. Weast*[27] that the U.S. Supreme Court first addressed this issue. Thus, the framework for this study consists of two successive time periods, with *Schaffer* as the dividing line.

During the pre-*Schaffer* stage, the approaches for answering this question varied widely based on state laws, court decisions, and—especially in the absence of such authority—IHO interpretations.[28] These approaches included (1) placing the BOP on the district generally, and (2) placing the BOP on the filing party, i.e., the one seeking to change the status quo.[29] The legal literature was replete with advocacy urging Congress or the Supreme Court to adopt one approach or another.[30]

In *Schaffer*, the Court started its analysis by clarifying that its focus was the burden of persuasion and noting that the IDEA omits

---

26 For a discussion of other procedural matters that the IDEA did not address, *see, e.g.*, Mayes et al., *supra* note 25, at 30 n.8 (identifying four "unanswered 'procedural' questions" in the IDEA: (1) the standard of review at the second-tier administrative level; (2) the introduction of additional evidence on judicial review; "(3) the availability of money damages as a remedy for IDEA violations;" and (4) representation of parties by lay advocates). *Id.*

27 Shaffer, 546 U.S. 49.

28 For a synthesis of the various approaches at the administrative and judicial levels, by Circuit, *see, e.g.*, Mayes et al., *supra* note 25.

29 *Id*.

30 Anne Johnson, *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, 613–22 (2005) (suggesting a split approach wherein the party challenging the program would bear the burden on substantive issues and the school district would bear the burden on procedural issues); Mayes, et al., *supra* note 25, at 45–57 (recommending that Congress place the burden on school districts in most cases); *see, e.g.*, Christopher T. Leahy & Michael A. Mugmon, *Allocation of the Burden of Proof in Individuals with Disabilities Education Act Due Process Challenges*, 29 VT. L. REV 951, 963–72 (2005) (recommending that the Supreme Court place the burden on school districts due to their information advantage and specialized expertise, Congressional intent in the IDEA to protect children, and the affirmative obligation the IDEA places on school districts).

any reference to which party has this burden.[31] Within this framework, the Court relied on "the ordinary default rule that plaintiffs bear the risk of failing to prove their claims,"[32] to hold that "[t]he burden of proof in an administrative hearing challenging an [Individualized Education Program] IEP is properly placed upon the party seeking relief."[33] In limiting the holding to the FAPE issue of the underlying case, the Court did not directly address which party has the BOP for other IDEA issues.[34] Moreover, because it was not an issue in the case,[35] the Court expressly declined to address whether a state may adopt a different approach for the burden of persuasion in impartial hearings, such as placing it generally on school districts.[36] Finally, the *Schaffer* Court pointed out that the BOP issue should rarely be outcome determinative, because "very few cases will be in evidentiary equipoise."[37]

During the post-*Schaffer* stage, the pertinent legal literature has been much more limited in quantity and scope.[38] For example, Zirkel canvassed state laws and lower court cases post-*Schaffer*, and recommended that Congress provide a clear and comprehensive resolution as to the burden of persuasion, specifically by placing this

---

31 Schaffer, 546 U.S. at 56.

32 *Id*.

33 *Id*. at 62. This holding assumes that the party seeking relief and the party challenging an IEP are necessarily the same; however, a school district may file a due process complaint in which it seeks relief without presenting a challenge to its IEP. Zirkel, *supra* note 16, at 5 n.27.

34 Schaffer, 546 U.S. at 62.

35 The case arose in Maryland, a state that did not have a statute or regulation governing the BOP in administrative proceedings under the IDEA. *Id.* at 61.

36 The Court referenced MINN. STAT. § 125A.091, subdiv. 16 (2004); ALA. ADMIN. CODE r. 290-8-9.08(8)(c)(6) (Supp. 2004); ALASKA ADMIN. CODE tit. 4, § 52.550(e)(9) (2003); and DEL. CODE ANN., tit. 14, § 3140 (West 1999). For a more comprehensive and current canvassing of pertinent state laws, *see, e.g.*, Zirkel, *supra* note 16, at 6–12.

37 Schaffer, 546 U.S. at 58. In his dissent, Justice Breyer similarly described the case of "perfect evidentiary equipoise" as "*rara avis*." *Id*. at 69 (Breyer, J., dissenting).

38 *See, e.g.*, Jennifer M. Burns, *Schaffer 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) (defending the *Schaffer* decision as harmonious with the policies of the IDEA); Luke Hertenstein, *Assigning the Burden of Proof in Due Process Hearings: Schaffer v. Weast and the Need to Amend the Individuals with Disabilities Education Act*, 74 MO. L. REV. 1043 (2006) (recommending that Congress amend the IDEA to place the burden of proof on parties according to the issue presented, such as requiring the party opposing an evaluation or proposing a change in the program to bear the burden).

burden on the district except for specified circumstances.[39] Although legal scholars have, in the abstract, disagreed as to the impact of the burden of persuasion on IHO decisions,[40] the relevant literature lacks a systematic examination of IHO treatment of the burden of persuasion pre and post-*Schaffer*.

The purpose of this article is to compare, on a national basis, a representative sample of IHO decisions published in the INDIVIDUALS WITH DISABILITIES EDUCATION LAW REPORT (IDELR)[41] before and after *Schaffer* with respect to the treatment of the burden of persuasion. More specifically, the research questions are as follows:[42]

1.Did the percentage of the cases where the IHO identified or applied the BOP change significantly from the pre-*Schaffer* to the post-*Schaffer* period?

2.In the cases where the IHO identified or applied the BOP, (a) what was the specified basis pre and post-*Schaffe*r, and (b) was there a significant difference in the basis between the two periods?

3.In the cases where the IHO identified or applied the BOP, (a) what was the specified approach pre and post-*Schaffer*, and (b) was there a significant difference in the approach between the two periods?

4.In the cases where the IHO identified or applied the BOP, was there a significant difference between the pre-*Schaffer* and post-*Schaffer* cases in terms of (a) which party filed for the hearing, and (b) on which party the IHO assigned the BOP?

5.In what percentage of cases where the IHO identified or applied the BOP was the BOP explicitly outcome determinative, both pre and

---

39 Zirkel, *supra* note 16, at 17. In the meanwhile, he recommended that IHOs rely on the burden of persuasion in their written decisions only rarely, specifically only when the case is carefully found to be in equipoise. *Id.* at 18.

40 *Compare* Zirkel, supra note 16, at 18 (recommending a limitation on making BOP determinations to those few circumstances where such analysis is necessary), *with* Leahy & Mugmon, *supra* note 30, at 957 (characterizing the allocation of the BOP as critical to the outcome). *Cf.* Debra Chopp, *School Districts and Families under the IDEA: Collaborative in Theory, Adversarial in Fac*t, 32 NAT'L ASSN. OF ADMIN. L. JUDICIARY 423, 446 (2012) (concluding that the *Schaffe*r decision will particularly impact indigent families); Terrye Conroy, Mitchell L. Yell, & Antonis Katsiyannis, *Schaffer v. Weast: The Supreme Court on the Burden of Persuasion When Challenging IEPs*, 29 J. REMEDIAL & SPECIAL EDUC.,108 (2008) (examining the implications of *Schaffe*r and suggesting that schools focus on the more important obligation of providing an appropriate education rather than on who bears the burden of persuasion in the hearing process).

41 The IDELR is a specialized reporter available from LRP Publications, whose database is generally accessible through a subscription to SPECIAL ED CONNECTION®, http://www.specialedconnection.com (last visited December 30, 2015).

42 In light of the overall comparison purpose of this study, the wording of each research question is in terms of pre and post-*Schaffer*.

post-*Schaffer*?

6.Did the prevailing party outcome (based on previous article determination of prevailing party status) change significantly from the pre-*Schaffer* to the post-*Schaffer* period?

III. METHOD

To evaluate the impact of *Schaffer*, the authors utilized the random sample of decisions from Zirkel and Skidmore's 2014 frequency and outcomes analysis,[43] supplemented with cases from 2013 obtained via the same selection procedure. Next, given the retroactive effect of *Schaffer*, which the Court issued on November 14, 2005, the authors eliminated the only IHO decision in the original Zirkel-Skidmore sample in 2005 issued after that ruling[44] so as to have a clear partition between the pre- and post-*Schaffe*r subsamples.[45] As a result, the two subsamples consisted of 192 and 65 cases, respectively.

The coding of these cases proceeded in three steps. The first step was the development and refinement of the coding spreadsheet and protocol (i.e., coding instructions) via joint pilot testing with a small sampling of the cases. The second step was each author's independent coding of a second sampling of the cases for the related purposes of finalized, fine-tuning of the protocol and obtaining acceptable inter-rater reliability.[46] The third step was for each author to code approximately half of both the pre and post-*Schaffer* subsamples to complete the spreadsheet.[47]

After the identifying information for each case,[48] the initial

---

43 Zirkel & Skidmore, *supra* note 20, at 540-42 and n.98 (including an explanation of the representative sample size and selection procedure). That sample spanned a thirty-five year time period beginning on January 1, 1978 and concluding on December 31, 2012.

44 The IHO issued this decision two days after *Schaffe*r, and the written opinion does not indicate whether the IHO was aware of the *Schaffer* ruling. Baltimore Cnty. Pub. Sch., 46 IDELR ¶ 57 (Md. SEA 2005). There were no other 2005 decisions following *Schaffer* in the sample.

45 Because the focus was IHO decisions, the authors also excluded the 112 review officer decisions in the Zirkel and Skidmore, *supra* note 20, sample.

46 The requisite standard was a minimum of 90% agreement for each of the coded variables.

47 A copy of the final spreadsheet, along with the protocol or coding instructions, is available from the first author upon request.

48 The identifying information comprised the first three of the initial columns on the spreadsheet, which consisted of the IDELR citation, the year of the decision, and the jurisdiction (i.e., the state or, in one case, the District of Columbia).

columns of the spreadsheet consisted of entries for the filing party and whether the IHO directly identified or applied the BOP.[49] The entries for the subsequent enumerated spreadsheet columns were limited to those cases where the IHO identified the BOP, specifically listing the cited support, if any;[50] the BOP approach;[51] the party on whom the IHO placed the BOP;[52] and whether the BOP was clearly outcome determinative.[53] The final two columns on the spreadsheet were for the case outcome[54] and clarifying or supplementary comments.[55]

The analysis of the spreadsheet entries followed the sequence of the aforementioned[56] research questions. For the purpose of determining statistical significance, the authors used the chi-square test with the requisite level being a minimum of .05.[57]

IV. RESULTS

This section provides the findings for each of the six research questions in seriatim. The results are based on the total sample of 257 cases, 192 pre-*Schaffer* and 65 post-*Schaffer*. With the exception

---

49 The search terms were "burden" and " prove" (without the quotation marks but with the space inserted before the second term). In a separate test during the pilot phase, the authors found that this combination yielded the same relevant results as a much more extensive set of search terms with significantly fewer false positives to eliminate. During the collection or coding stage, the authors differentiated into separate columns the "identified" and "applied" variants, but at the analysis stage the authors conflated them based on their overlap in the data.

50 The support, or basis, categories were: (a) state law or court decision, (b) *Schaffer*, (c) other federal court decisions, (d) miscellaneous other (specified in the spreadsheet's comments column), or (e) unknown/not specified.

51 The pilot phase yielded six categories of approaches, based on sufficient frequencies, of BOP placement: (a) on the district; (b) on the parent; (c) on the filing party, (d) on the party seeking a more restrictive placement; (e) miscellaneous other (specified in the Comments column); or (f) unknown.

52 The coding categories for this variable were: (a) the district, (b) parent, (c) both parties, and (d) unknown.

53 This category required review of the IHO's treatment of the BOP as it related to the IHO's ultimate conclusion.

54 Imported from the Zirkel & Skidmore study, the case outcomes were based on prevailing party status. For an explanation of this basis, see Zirkel & Skidmore, *supra* note 20, at 547–50.

55 Where specific to one or more of the previous entries, the letter of the applicable column(s) preceded the comment.

56 *See supra* text accompanying note 42.

57 A Chi Square is an inferential statistic, providing a criterion for determining whether a difference is of statistical significance or is a reflection of a mere chance occurrence. In general, if an event would occur by chance only 5% of the time or less, the probability that it would occur for reasons other than chance is expressed as $p < .05$. Thus, a designation of $p < .001$, as in Tables 1, 2, and 3 *infra*, means that the probability of an event occurring other than by chance is less than .1%. For a more detailed explanation of Chi Square, *see, e.g.*, PRISCILLA E. GREENWOOD & MIKHAIL S. NIKULIN, A GUIDE TO CHI-SQUARED TESTING (1996).

of Table 1, the results reflect the number of IHO decisions that met the criteria for each successive question, thereby omitting decisions that did not reflect the BOP.

A. Did the percentage of the cases where the IHO identified or applied the BOP change significantly from the pre-Schaffer to the post-Schaffer period?

Table 1 includes all 257 IHO cases in the sample, identifying those that did and did not identify or apply the BOP.[58] Since the authors could determine the answer to this question for each case in the sample, the two rows in Table 1 account for all 257 cases.

Table 1: Chi-Square Analysis of BOP Identification/Application Before and After *Schaffer*

BOP Identified/Applied?	**Pre-*Schaffer*** (n=192)	**Post-*Schaffer*** (n=65)	**Chi Square**
Yes	60 (31%)	50 (77%)	χ^2 = 41.38**
No	132 (69%)	15 (23%)	

** $p < .001$

Review of Table 1 shows that the IHOs identified or applied the BOP in less than a third of the cases before *Schaffer* and more than three quarters of the cases after *Schaffer*. This was a statistically significant difference at a high level.

58 *See supra* note 49.

B. *In the cases where the IHO identified or applied the BOP, (a) what was the specified basis pre and post-Schaffer, and (b) was there a significant difference in the basis between the two periods?*

Table 2 comprises only those IHO decisions where the IHO identified or applied the BOP.[59] Thus, Table 2 is based on 110 of the total 257 cases.[60] Moreover, the three rows in Table 2 represent conflated categories because of the small numbers in the sample.[61] The Miscellaneous Other row consists of cases that did not rely on state or federal law, such as where the basis was not specified,[62] and where the basis was a specific section of the IDEA.[63]

---

59 The first row in Table 1 provided the number of cases included in Table 2; the authors omitted the second row in Table 1.

60 Thus, the total for this table corresponds to the "Yes" row of Table 1.

61 *See supra* note 50.

62 *See, e.g.*, Stanislaus Cnty. Office of Educ./Ceres Unified Sch. Dist., 27 IDELR 409 (Cal. SEA 1997).

63 *See, e.g.*, Me. Sch. Admin. Dist. #161, 41 IDELR ¶ 172 (2007) (placing the BOP on the school district to establish that a child's behavior was not a manifestation of the child's disability, citing previous versions of the IDEA and federal regulations).

Table 2: Chi-Square Analysis of BOP Basis Before and After *Schaffer*

Basis for BOP (Where Specified)	**Pre-*Schaffer*** (n=60)	**Post-*Schaffer*** (n=50)	**Chi Square**
State Law or Court Decision	11 (18%)	4 (8%)	χ^2 = 22.37**
Federal Court Decision	26 (43%)	43 (86%)	
Miscellaneous Other	23 (38%)	3 (6%)	

** $p < .001$

Examination of Table 2 reveals that federal case law shifted from a plurality position (i.e., 43% of the cases that specified the BOP basis) before *Schaffer* to the predominant position (i.e., 86%) after *Schaffer*. This shift was statistically significant at a level clearly exceeding the designated[64] confidence level. For the federal basis pre-*Schaffer*, the leading cited case was the Fifth Circuit's decision in *Tatro v. Texas*.[65] By contrast, *Schaffer* accounted for 42 of the 43 cited federal court basis cases after 2005.[66]

---

64 *See supra* text accompanying note 57.

65 Tatro v. Texas, 703 F.2d 823 (5th Cir. 1983), *aff'd in part and rev'd in part on other grounds sub nom.* Irving Indep. Sch. Dist. v. Tatro, 468 U.S. 883 (1984). Specifically, fourteen of the pre-*Schaffer* decisions, more than half of those that identified the BOP based on a federal court decision, cited the Fifth Circuit *Tatro* decision. The next most frequently cited federal case for the BOP, accounting for only three cases in the sample, was *Oberti v. Board of Education*, 995 F.2d 1204 (3d Cir. 1993).

66 For the single case not citing *Schaffer*, *see* Metro. Nashville Pub. Sch. Sys., 49 IDELR ¶ 144 (Tenn. SEA 2007) (citing McLaughlin v. Holt Pub. Sch. Bd. of Educ., 320 F.3d 663, 669 (6th Cir. 2003), (ruling without elaboration, that the parents bore the BOP). Conversely, in the various cases citing *Schaffer*, one IHO placed the BOP on the parents who filed for the hearing but with an exception for the independent educational evaluation (IEE) claim based on the IDEA regulation for IEEs. Chicago. City

C. In the cases where the IHO identified or applied the BOP, (a) what was the specified approach pre and post-Schaffer, and (b) was there a significant difference in the approach between the two periods?

Table 3 provides a compilation of the IHO's party allocation of the BOP in the cases where, as in Table 2, the IHO identified or applied that standard. The first row represents the approach of putting the BOP on the district in general, whereas the second row corresponds to the *Schaffer* approach of putting the BOP on the filing party.[67] The Miscellaneous/Other category conflated other variations, such as placing the BOP on both parties[68] or on the party seeking a change of placement,[69] and also where the IHO did not identify the basis for the approach.[70]

Sch. Dist., 57 IDELR ¶ 29 (Ill. SEA 2011) (citing Bd. of Educ. v. Murphysboro, 41 F.3d 1162 (7th Cir 1994) to support this IEE exception).

67 Conversely, as also reflected in legal commentary, none of the IHO decisions adopted a position that placed the BOP on the parent generally.

68 *See, e.g.*, Douglas Cnty. Sch. Dist. RE-1, 35 IDELR ¶ 295 (Colo. SEA 2001) (placing the BOP, pre-*Schaffer*, on the school district to establish that the placement proposed is appropriate, while the parents bore the BOP with respect to the appropriateness of the IEP). All of the cases in this subcategory predated *Schaffer*.

69 *See, e.g.*, Child with Disability, 401 IDELR 239 (Tenn. SEA 1988) (placing the BOP on the party seeking a change in placement). Again, all of the cases in this subcategory predated *Schaffer*.

70 *See, e.g.*, Bentonville Sch. Dist., 53 IDELR ¶ 276 (Ark. SEA 2009) (assigning the BOP to the parents, who were the filing party, but without citing authority or explaining the reasons for doing so).

Table 3: Chi-Square Analysis of BOP Approach Pre and Post-*Schaffer*

Approach (Where Specified)	**Pre-*Schaffer*** (n=60)	**Post-*Schaffer*** (n=50)	**Chi Square**
District Generally	13 (22%)	3 (6%)	
Filing Party	18 (30%)	44 (88%)	χ^2 = 37.93**
Miscellaneous/Other	29 (48%)	3 (6%)	

** $p < .001$ with Yates correction[71]

In Table 3, again based only on the decisions where the IHO identified or applied the BOP, there was a significant difference in the approach between the two time periods. Most prominently, the IHO placed the BOP on the filing party in nearly 90% of cases after *Schaffer*[72] compared to only 30% of cases prior to that decision.

71 The purpose of the Yates correction is to avoid an overestimate of statistical significance with a small result, specifically when one cell has a count of less than five such as in the first and last post-*Schaffer* rows in Table 3. *See, e.g.*, Michael Haber, *A Comparison of Some Continuity Corrections for the Chi-Squared Test on 2 × 2 Tables*, 75 J. AM. STAT. ASS'N 510 (1980).

72 In one notable post-*Schaffer* exception, the IHO placed the BOP on the district to prove that it offered FAPE without citation to *Schaffer*. Christina Sch. Dist., 62 IDELR ¶ 97 (Del. SEA 2012).

D. In the cases where the IHO identified or applied the BOP, was there a significant difference between the pre-Schaffer and post-Schaffer cases in terms of (a) which party filed for the hearing, and (b) which party the IHO assigned the BOP?

Again based on those cases where the IHO identified or applied the BOP, Table 4 provides a comparison between pre and post-*Schaffer* for (a) the parties who filed for the hearing[73] and (b) the party on whom the IHO assigned the BOP. This Table separately summarizes the results for each of these sub-questions.

Table 4: Chi-Square Analysis of Filing Party and BOP Party Pre and Post-*Schaffer*

		Pre-*Schaffer*	**Post-*Schaffer***	**Chi Square**
Filing Party	Parent	51 (88%)	39 (81%)	$\chi^2 = .42$ ns
	District	7 (12%)	9 (19%)	
BOP Party	Parent	30 (57%)	36 (73%)	$\chi^2 = 3.17$ ns
	District	23 (43%)	13 (27%)	

ns = not statistically significant (at the .05 level)

Table 4 shows that for both time periods the parent was the filing party in more than 80 percent of the cases and the BOP party in a weaker majority of the cases.[74] Moreover, the difference was not

73 For all cases in the sample, the filing party was the Parent in 86% of the pre-*Schaffer* cases and 81% of the post-*Schaffer* cases. This limited difference was not statistically significant, thus attributable to chance, such as measurement error.

74 The total number of cases in the Filing Party rows of Table 4 does not equal 110 because, for each time period, the authors omitted the few cases where the filing party was unknown or both parties filed a complaint. Similarly, the authors excluded the cases where the IHO placed the BOP on both parties from the BOP rows in Table 4.

statistically significant for either sub-question 4(a) or sub-question 4(b).

E. In what percentage of cases where the IHO identified or applied the BOP was the BOP explicitly outcome determinative, both pre and post-Schaffer?

The BOP was not explicitly outcome determinative in any of the cases across both time periods. More specifically, the IHO did not state in any cases that the BOP was a significant reason for the resulting decision in light of the closeness of the case.

F. Did the prevailing party outcome (based on previous article determination of prevailing party status) change significantly from the pre-Schaffer to the post-Schaffer period?

Table 5 provides the prevailing party outcome[75] for all cases in the sample except for the two that the authors coded as inconclusive, i.e., as that they only addressed preliminary adjudicative issues with the ultimate issues preserved for a future proceeding.[76] Thus, Table 5 is based on 255 cases.

---

75 *See* Zirkel & Skidmore, *supra* note 20, at 547-50, 555-56 (for the specific definition and determination of "prevailing."). "Prevailing" in this context refers to the outcome of the case, rather than its separate rulings where the case has multiple issues. The basis, by analogy, is the case law concerning attorney's fees under the IDEA.

76 The omitted two cases were *Encinitas Union Sch. Dist.*, 31 IDELR ¶ 198 (Cal. SEA 1999) (denying the school district's motion for a continuance, admission of an attorney *pro hac vice*, and consolidations, and partially granting request for a subpoena for production of evidence) and *Secaucus Bd. of Educ.*, 41 IDELR ¶ 81 (N.J. SEA 2004) (granting a parent's motion to dismiss the complaint without prejudice and dismissing the school district's counterclaim).

Table 5. Chi-Square Analysis of Prevailing Party Pre and Post-*Schaffer*

Prevailing Party	**Pre-*Schaffer*** (n=190)	**Post-*Schaffer*** (n=65)	**Chi Square**
Parent	87 (46%)	25 (38%)	χ^2 = 1.06 ns
District	103 (54%)	40 (62%)	

ns = not statistically significant (at the .05 level)

Table 5 reveals that the outcome of the decisions based on prevailing party status did not change significantly from before *Schaffer* or after *Schaffer*. School districts were the prevailing party in a moderate majority of the 255 conclusive cases for both time periods. The difference was due to measurement and other extrinsic, chance factors rather than the *Schaffer* ruling.

V. DISCUSSION

This section summarizes and discusses the findings for each of the questions presented. Additionally, the authors provide recommendations for future research and end by returning to the case in the introduction of the Article.

In response to the first question, the authors found that the percentage of cases where the IHO identified or applied the BOP increased dramatically from 31% before *Schaffer* to 77% after *Schaffer*. This finding is statistically significant but not surprising since the *Schaffer* decision was the first time the U.S. Supreme Court addressed the issue of which party had the BOP in special education administrative hearings.[77] Thus, increased awareness and

77 Schaffer, 546 U.S. at 62.

incorporation of this issue may be reasonably expected in IHO decisions. However, *Schaffer* may not be the only reason for this change; the continuing trend toward judicialization of the IHO process, as illustrated by the gradual shift among the states toward a single tier of full-time ALJs, is another likely contributing factor.[78]

It is also noteworthy that in nearly one-fourth of the decisions after *Schaffer*, the IHO did not identify or apply the BOP.[79] It is more likely that the IHO opted not to mention a non-determinative and potentially distracting factor in the case[80] rather than that the IHO was not aware of the new, relatively uniform *Schaffer* rule,[81] although this matter awaits further research. Such empirical exploration may include follow-up analysis using a larger sample and more nuanced search terms[82] as well as surveys and in-depth interviews with IHOs.[83]

In response to the second question that compared the basis for the BOP where an IHO identified or applied it pre and post-*Schaffer*, the similarly significant shift from 43% to 86% in favor of reliance on federal case law additionally and more specifically aligns with *Schaffer's* impact. The shift away from the Miscellaneous category fits with this new, major precedent, but the similar yet lesser reduction for the State category may only be temporary. A variation to *Schaffer*, which the Court declined to address,[84] is retention or adoption of a different approach via state legislation or regulations. All four of the cases in the post-*Schaffer* subsample relying on state law, two from Connecticut,[85] one from Alaska,[86] and another from

---

78 *See* Zirkel & Scala, *supra* note 20 and accompanying text.

79 *See supra* Table 1 (23%).

80 *See, e.g.*, Zirkel, *supra* note 16, at 18 (suggesting that IHOs reserve identifying and applying BOP for the relatively rare cases where the evidence is, using *Schaffer*'s terminology, in "equipoise.").

81 The qualifier of "relatively uniform," as explained *infra*, refers to varying interpretations as to whether *Schaffer* is limited to IEP/FAPE cases or applies generically to the whole range of IDEA issues.

82 The conflation here of "identify or apply" merits careful differentiation upon a more robust sample and more nuanced coding.

83 Such more direct approaches extend from quantitative to qualitative research approaches.

84 *See supra* notes 35-36 and accompanying text.

85 Ridgefield Bd. of Educ., 63 IDELR ¶ 143 (Conn. SEA 2013); *In re* Student with a Disability, 53 IDELR ¶ 67 (Conn. SEA 2009) (relying on CONN. AGENCIES REGS. § 10-76h-14 (2013), placing the burden of proof in a due process hearing on the public agency). This regulation pre-dated *Schaffer*.

86 Anchorage School District, 54 IDELR ¶ 67 (Alaska SEA 2010) (relying on ALASKA ADMIN. CODE tit. 4 § 52.550(i)(11) (2013), placing the burden of proof on the party requesting the hearing). This regulation was post-*Schaffer*.

Tennessee,[87] had state statutes or regulations that specified a procedure that either varied from or conformed to the *Schaffer* rule.

In response to the third question, the shift was similarly significant from the District-Generally and Miscellaneous categories to the Filing Party approach. This shift may be attributable to *Schaffer*, not only within its specific IEP/FAPE scope[88] but also extending usually without any specific analysis to a wide variety of other issues.[89] Issues in this 88% category included the appropriateness of a district evaluation,[90] an eligibility determination,[91] a manifestation determination,[92] and a removal to an interim alternate educational setting.[93] In contrast, prior to *Schaffer*, the filing party, or default rule, approach only accounted for 30% of the cases, with the other alternatives being widely varying.[94] As a reflection of some variability in application of *Schaffer* in states without their own provisions, the IHO placed the BOP on the District in two parent-initiated cases in the post-*Schaffer* sample where the issue related to an IEE[95] and to provision of FAPE.[96] In the majority of sample cases where the IHO did not place the BOP on the filing party post-*Schaffer*, he or she did not specify the approach. However, our research focused on overall quantitative trends, not in-depth legal analysis. Further research is recommended to examine the nuanced analysis and application of the BOP.

In response to the fourth question, for the cases where the IHO identified or applied the BOP, the pre-*Schaffer* subsample did not differ significantly from the post-*Schaffer* subsample in terms of

---

87 Metro Nashville Pub. Sch.. 51 IDELR ¶ 116 (Tenn. SEA 2008) (relying on TENN. COMP. R. & REGS. 1360-04-01-.02 (2013), providing that the moving party usually bears the burden of proof in an administrative hearing). This regulation pre-dated *Schaffer*.

88 *See supra* text accompanying note 33.

89 *See, e.g.*, Zirkel, *supra* note 16, at 7, 12-13 (discussing whether, in states without their own BOP provisions, *Schaffer* extends to IDEA issues generally, and finding that the answer appears to be yes).

90 *See, e.g.*, Lancaster Sch. Dist., 47 IDELR ¶ 118 (Cal. SEA 2006).

91 *See, e.g.*, Sch. Dist. of Springfield, 49 IDELR ¶ 177 (Mo. SEA 2007).

92 *See, e.g.*, Twp. High Sch. Dist. 54 IDELR ¶ 107 (Ill. SEA 2010).

93 *See, e.g.*, California Montessori Project, 56 IDELR ¶ 308 (Cal. SEA 2011).

94 *See supra* Table 2.

95 Chicago Sch. Dist. 299, 57 IDELR ¶ 29 (Ill. SEA 2011) (relying on Bd. of Educ. of Murphysboro v. ISBE, 41 F.3d 1162 (7th Cir. 1994)).

96 Christina Sch. Dist., 62 IDELR ¶ 97 (Del. SEA 2013) (placing BOP on school district without citation or elaboration).

which party filed for the hearing and to which party the IHO assigned the BOP. The parents were in the majority position for filing and for the BOP across both periods. The finding for the filing sub-question suggests that, contrary to some scholarly predictions,[97] placing the BOP on parents does not seem to have resulted in a decline in parent-requested due process hearings, at least proportionately.[98] The same appears to be true for school districts. The finding for the BOP sub-question also seems to temper the significance of *Schaffer* in that the parties were essentially in the same obligated position before and after the decision. Again, however, research that extends to more nuanced and direct sources of *Schaffer*'s impact is warranted for more definitive and detailed answers.

In response to the fifth question, in both time periods, there were no cases where the BOP was clearly and explicitly outcome determinative. One interpretation of this finding is that IHOs during both periods have shared the *Schaffer* Court's observation that BOP is a "rara avis" reserved for the unusual cases that are in "equipoise."[99] Another interpretation, however, is that IHOs are identifying or applying BOP so much more often after *Schaffer*[100] that it is having some unknown effect on the outcome of the case, whether intentionally or subconsciously, by setting forth this posture for the decision-making. Although the authors drew the line at language that expressly determined the case to be in the equipoise category, perhaps merely reciting the BOP—particularly in words suggesting not just identification but application—reflected an influential effect on the outcome.[101] Given the limitations of this exploratory study, this area is another useful direction for follow-up research.

Further suggesting the limited effect of BOP as a result of

---

97 *See, e.g.*, Leahy & Mugnon, *supra* note 30, at 965-66 (predicting that parents of children would be discouraged from filing a due process complaint if assigned the BOP).

98 *See supra* Table 4 and note 73. Our analysis, however, was limited to adjudicated cases, not extending to the frequency of filings. For the difference between filings and adjudications at the hearing officer level, *see, e.g.*, Perry A. Zirkel, *Longitudinal Trends in Impartial Hearings under the IDEA*, 302 EDUC. L. REP. 1 (2014) (finding that the ratio of filings to adjudications approximately doubled for the post-*Schaffer* period of 2006–2007 to 2011–2012).

99 *See supra* note 37 and accompanying text.

100 *See supra* Table 1 (77%).

101 In some decisions in the sample, the IHO discussed the BOP while noting its application only when the evidence is in equipoise. *See, e.g.*, Harrisburg City Sch. Dist., 55 IDELR ¶ 149 (Pa. SEA 2010).

Schaffer, the finding—in response to the final question—was that the prevailing party outcomes moderately favored school districts both before and after *Schaffer*, with a not statistically significant, i.e., generalizable, difference between the two periods. Thus, the impact of *Schaffer* appears to be negligible, with the overall outcome distribution remaining stable upon moving from various approaches to the *Schafer* filing-party approach for BOP, without significantly changing the proportion of cases in which parents or districts were the filing party. A more nuanced and in-depth analysis of IHOs decisions, particularly using a more differentiated outcome scale for issue rulings as the unit of analysis,[102] a corresponding analysis of BOP identification and application on an issue-by-issue basis, and a systematic examination of other related variables may reveal a more subtle and meaningful effect.

In any event, the qualified overall conclusion of this empirical analysis is that *Schaffe*r has not been particularly onerous on IHO decision-making in terms of its overt effect. In the Alaska case introduced at the beginning of this article,[103] the federal district court resolved the school district's BOP challenge by concluding that (1) *Schaffer* "[did] not necessarily invalidate state rules,"[104] which arguably applied in the case and which had put the burden on the school district, and, (2) even if in error, the IHO's placement of the BOP on the district was harmless because—with due deference to the IHOs fact finding—the evidence for the parents was more persuasive than that for the district.[105] This Alaska case is an illustration of a relatively inconsequential impact of the BOP at the IHO level on the outcome of a case, even upon appeal.[106] The question presented in the title of this article merits further research and exploration. Our

---

102 *See, e.g.*, Zirkel & Skidmore, *supra* note 20, at 545.

103 *See supra* notes 1–7 and accompanying text.

104 Anchorage Sch. Dist., 2007 WL 8058163, at * 6.

105 *Id*.

106 For another example of such a disposition, *see* Bd. of Educ. of Skokie-Evanston Cmty. Consol. Sch. Dist. v. Risen, 61 IDELR ¶ 130 (N.D. Ill. 2013) (concluding, in relevant part, that the IHO's misapplication of the BOP was harmless error in terms of the case outcome). Examining IDEA court decisions regarding the BOP issue would be an additional instructive avenue for follow-up research. In some cases, BOP as it applies to the IHO level arises significantly at the court level for the first time, i.e., even when the IHO decision was silent with regard to BOP. *See, e.g.*, Morgan M. v. Penn Manor Sch. Dist., 64 IDELR ¶ 309 (E.D. Pa. 2014) (ruling, in relevant part, that the IHO committed reversible error for awarding compensatory education without finding preponderant evidence, expressed in terms of the parent meeting the BOP, for the prerequisite denial of FAPE).

results, however, suggest that *Schaffer* has not imposed a noticeably arduous burden on IHOs deciding IDEA issues.