

THE GREAT BURDEN ON AMERICAN DISABLED STUDENTS: THE AFTERMATH OF SCHAFFER V. WEAST

By Nicole Thompson*

In response to the great difficulties that students with disabilities face, Congress passed the Individuals with Disabilities Education Act (“IDEA”) in 1975.¹ IDEA guarantees that “all children with disabilities have available to them a free appropriate public education.”² The statute delineates the roles and responsibilities of schools and parents and details how programs for children with disabilities should be developed and, subsequently, how they can be challenged.³ Yet, the statute fails to address which party bears the burden of proof in determining the appropriateness of the Individualized Education Program (“IEP”), the curriculum that a school develops for an individual student.⁴ The assignment of the burden of proof is important because in the case that both parties provide no evidence or equally persuasive evidence, the court will find for the party that does not bear the burden. In November of 2005, the United States Supreme Court heard the case of Maryland student Brian Schaffer, in which his parents tried to prove that Brian’s Montgomery County school should bear the burden of proof in IDEA hearings. The Court issued its opinion disagreeing with the Schaffers and held that the challenging party holds this burden at all stages of review of an IEP; the challenging party is almost always the parents of the student participating in the IEP.⁵ This article addresses the potential impact of that decision on the seven million disabled students currently receiving benefits through IDEA and focuses particularly on those students in lower income families. The article also considers the broader long term effects of the *Schaffer* case on society.

BACKGROUND

BACKGROUND OF IDEA

The United States education system has a history of severely neglecting the needs of students with physical, mental, and learning disabilities.⁶ In *Schaffer*, the Supreme Court acknowledged that disabled children were “either totally excluded from school or sitting idly in regular classrooms awaiting the time when they were old enough to drop out.”⁷ This left disabled children totally unprepared for secondary education or the job market.⁸ In an attempt to change this pattern of neglect, Congress passed IDEA in 1970 as part of the Education for the Handicapped Act.⁹

To carry out its aim, IDEA places an affirmative obligation on the states to provide adequate programs for each disabled child.¹⁰ Schools must determine whether the attendant child has disabilities as defined under 20 U.S.C. § 1401(3) and assess what special needs the child may have.¹¹ Once the school identifies a child with disabilities and his or her corresponding special needs, the school must both develop IEPs that serve this child’s

particular needs and review the IEPs annually to ensure that the child’s needs are being met at each stage of the child’s development.¹²

Although IDEA places the responsibility of properly educating disabled children on the school, the parents of the child with disabilities are also involved.¹³ The parents must be informed if their child is identified as possibly disabled and must give consent in order for the child to be tested for disabilities.¹⁴ Furthermore, parents are included as members of the team that approves the IEP the school board develops for the child.¹⁵ Parents have the right to examine any records or test scores for their child and have the right to request an independent evaluation.¹⁶ If the par-

In Schaffer, the Supreme Court acknowledged that disabled children were “either totally excluded from school or sitting idly in regular classrooms awaiting the time when they were old enough to drop out.”

ents do not approve the IEP, whether during the initial development or any other stage, they may seek an administrative “impartial due process hearing.”¹⁷ If a party is displeased with the result of the due process hearing, the party has the right to bring a civil action.¹⁸ Some jurisdictions have ruled that in civil actions, parents who are not attorneys may not appear pro se on behalf of their child and must therefore be represented by counsel.¹⁹

Without proper direction from the legislature, the states split on the issue of who bears the burden of proof in a parent-initiated hearing. The Second, Third, Seventh, Eighth, Ninth and D.C. Circuits have placed the burden on the school district while the Fifth, Sixth, and Tenth Circuits have placed the burden on the parents.²⁰ In February of 2005, the Supreme Court accepted this issue and granted cert to *Schaffer v. Weast*.²¹

FACTS IN SCHAFFER V. WEAST

Brian Schaffer attended a private school from kindergarten until seventh grade where he consistently struggled academically.²² He was subsequently diagnosed with learning and speech-language disabilities, leading his parents to seek an appropriate public educational environment to meet Brian’s needs.²³ The Schaffers contacted their local school district, Montgomery County of the Maryland Public School System (“MCPSD”), and informed them of Brian’s situation and his pending public school enrollment. MCPSD evaluated Brian and

offered an IEP in which a special education teacher would assist Brian and five other disabled students in a classroom filled with twenty-five students without disabilities.²⁴ Fearing that this IEP “would have been like throwing him in a lion’s den,”²⁵ the Schaffers rejected the school district’s plan and requested an administrative hearing to challenge the proposed IEP.²⁶

IDEA specifies that when an administrative hearing is initiated to determine the appropriateness of an IEP, the child remains in the learning environment he or she was in before the IEP was developed.²⁷ Since both parties agreed that the traditional classroom environment was an inappropriate environment for Brian,²⁸ the Schaffers enrolled Brian in a private school for the duration of the proceedings, where Brian was taught in smaller classes received greater attention for his disability.²⁹

PROCEDURAL HISTORY OF SCHAFFER

Under IDEA, the Schaffers sought an “impartial due process hearing”³⁰ before an Administrative Law Judge (hereinafter “ALJ”).³¹ The ALJ, though noting the evidence to be in equipoise, sided with the Fourth Circuit’s reluctance in *Tice v. Bote-tourt County School Board*.³² to “second-guess the judgment of education professionals” and ruled that the Schaffers should bear the burden of proof and that the proposed IEP was appropriate.³³

The Schaffers subsequently challenged the ALJ’s ruling in the Montgomery County District Court of Maryland.³⁴ The District Court found for the Schaffers and held that in IDEA cases where the parents are challenging an initial IEP, the burden should always be on the school.³⁵ However, in cases where an existing IEP is challenged, the burden should be on the challenging party.³⁶ The court reasoned that since IDEA was enacted to protect the interests of disabled students, and so, placing the burden on the school was therefore the best way to ensure that the needs of disabled students were properly safeguarded.³⁷ MCPSD appealed the District Court’s ruling to the United States Court of Appeals for the Fourth Circuit.³⁸ While the appeal was pending, Brian’s parents accepted a different IEP from MCPSD.³⁹ Brian was enrolled in the new public school, but the case remained active to determine tuition reimbursement and the issue of which party should bear the burden in future cases.⁴⁰ Pending the appeal, the ALJ reviewed the case and found for the Schaffers, and the District Court subsequently affirmed that the burden should be on the school district.⁴¹ Later, the Court of Appeals granted the appeal and found for MCPSD, reasoning that Congress’ lack of direction indicates that the traditional placement of the burden should apply.⁴²

In turn, the Schaffers appealed to the United States Supreme Court, which granted cert.⁴³ Though the Supreme Court rejected all the Schaffers’ arguments and ultimately held that the party challenging the IEP has the burden of showing that the IEP is inappropriate, there were differing opinions as to the where the burden should lie.⁴⁴ Justice O’Connor, writing for the majority, relied on the traditional placement of the burden of proof and

deferred to the school district’s opinion.⁴⁵ Justice Breyer dissented, arguing that in light of the legislature’s silence, each state should decide the issue on its own.⁴⁶ Justice Ginsberg’s dissent pointed out the difficulties parents will face and that the true purpose of IDEA was to protect the interests of disabled children.⁴⁷ Justice Stevens concurred, agreeing with most of Justice Ginsberg’s arguments but ultimately deferring to the opinion of the school district.⁴⁸

IMPLICATIONS OF LOFTON ON LOWER INCOME STUDENTS

EVIDENTIARY STANDARDS FOR PARENTS CHALLENGING IEPs

Parents challenging an IEP must prove the program is inappropriate by a preponderance of the evidence.⁴⁹ In order to meet this standard, the judge must find that the facts are more probable for that party.⁵⁰ For parents, satisfying the burden of proof is not merely evidentiary procedure, but also takes a psychological and financial toll. Proving an IEP to be inadequate will require a thorough showing of the child’s educational records and test scores, testimony of outside experts in regards to regarding the child’s particular situation, and the assistance of counsel. Parents will need to invest a great deal of money and time into meeting this burden, especially when facing a well-resourced school board that is likely to have already tested and observed the child in developing the IEP and have staff experts ready to testify. Before their case reached the Court of Appeals, the

Schaffers reported spending over \$35,000 in attorney fees alone.⁵¹ Parents in lower income families often do not have the resources for such an undertaking, let alone the luxury to take time from work to invest the time and effort necessary to meet such

parents will have to pay for attorneys’ fees...whether they win or lose.

a burden. Considering these factors, it is not difficult to see how the evidentiary burden set forth by the Supreme Court deters parents from challenging the school’s IEP even if their child is being severely disadvantaged.

COUNSEL

As the state is not required to provide parents with counsel, parents will have to pay for attorneys’ fees. Unlike plaintiffs in injury suits, the parents will have to pay these fees whether they win or lose. While the language of IDEA states that parents may be able to recover litigation costs at the judge’s discretion, there are restrictions on the payment of the fees.⁵²

In *Winkelman v. Parma City School District*, the Supreme Court ruled that plaintiff have the right to represent themselves and their child without the assistance of counsel in IDEA cases that reach federal court.⁵³ *Winkelman* highlights the fact that many parents are overwhelmed by the expenses of attempting to meet this burden. Even though this ruling allows parents to cut to costs of attorney fees, parents will be at an unfair disadvantage facing school districts that have the aid of experienced counsel and learning experts. Furthermore, without counsel representing the parents, the process would likely be much longer,

more expensive and more burdensome for the court and the schools; parents representing themselves pro se would have no experience in a courtroom or in education law, thereby requiring more time and court assistance to work through the process.

EXPERTS

In order to meet the burden of proof, parents also must hire experts to test the child and evaluate the school's plan and testify at trial in order to respond to the school district staff likely to testify as expert witnesses. This cost can be prohibitive, as exemplified by The Brain Clinic in New York, which charges \$200 an hour for child evaluations and estimates that an average analysis costs around \$1700.⁵⁴ This estimate does not include the costs of trial preparation and time testifying that would likely increase the price. Furthermore, in *Arlington Central School District v. Murphy*, the Supreme Court recently ruled that parents do not have the right to recover the costs of experts, witnesses or non-lawyer consultants hired in the course of trial.⁵⁵ Thus, these costs would compound other incurred costs for parents regardless of the merits or outcome of the case.

EFFECTS ON SOCIETY OVERALL UNDERMINE THE PURPOSE OF IDEA

IDEA was enacted to promote the interests of disabled students and ensure these children receive a free, appropriate education.⁵⁶ Without an appropriate education that meets the learning needs of the disabled child, he or she will not have the skills required for secondary education or the job market. As seen above, many families with legitimate claims may be discouraged from challenging IEPs. Although schools are likely working in good faith to provide quality education in accordance with IDEA, it is foreseeable that schools are going to make mistakes, especially in the face of limited time and resources. Furthermore, even with all the testing and observation, schools may not be able to understand a child as well as a parent does. Even though most parents are not learning experts, they often have the most contact with their child and have a different understanding than that of a school official.

Unfortunately, if a school does make a mistake and develops and assigns an inappropriate IEP, the outcome can be life-changing for a child. By placing the burden of proof on the parents, IDEA fails to afford the education system with a meaningful set of checks and balances to ensure the child is receiving the

...the drop-out rate of identified disabled students who have been assigned IEPs is 41% higher than that of non-disabled students

proper educational assistance, weighting the appeals process in favor of the school to the disadvantage of the child.

With no meaningful opportunity for many parents to chal-

lenge an inappropriate IEP, there will likely be an increase in school drop-out rates for students with disabilities. A recent report prepared for the U.S. Department of Education by the National Dropout Prevention Center for Students with Disabilities found that in some states, the drop-out rate of identified disabled students who have been assigned IEPs is 41% higher than that of non-disabled students.⁵⁷ This disparity clearly demonstrates that, even with current IDEA legislation, schools are still not meeting the needs of disabled students. A student assigned an inappropriate IEP will not be able to flourish academically and will likely be held to a low level of performance. As stated above, identified disabled students are at a high risk for dropping out already; thus, being a disabled student with poor school performance puts a student at even greater risk for dropping out.⁵⁸ Furthermore, the risk is even greater for a disabled student of low socioeconomic status with poor school performance as a result of an inappropriate IEP.

Another likely result of the decision in *Schaffer* is a de-

Some disabled children of higher socioeconomic status may be able to overcome these hurdles with the help of private tutoring and college test preparation, but students without access to these resources will be left behind.

creased rate of college enrollment by disabled students. If a disabled child with an inappropriate IEP does not drop out and manages to struggle through high school and graduate, she will still not have the skills necessary to enter college. Some disabled children of higher socioeconomic status may be able to overcome these hurdles with the help of private tutoring and college test preparation, but students without access to these resources will be left behind. Without the prospect of college, the disabled individual will be forced to enter the job market and may face many hurdles in becoming a fully productive member of society. This exclusion not only has negative effects on an individual's self-esteem, but may also shift a great burden onto society overall. Without a college degree or the basic academic skills and abilities developed in high school, the individual will be unable to compete in the job market and may have to rely on government support through programs such as welfare, Medicaid, and unemployment. The public costs of supporting an individual are well over the costs of ensuring the individual receives an appropriate education.

Although the burden assigned by *Schaffer* will be shared by many disabled students and their families, it is clear this burden will not be shared equally. During the 2000 Congressional Hearings concerning IDEA, Senator Simon noted, "when a parent is poor, of a minority group, or not well-versed in the intricacies of the law and regulations, the inequities of the situation are greatly increased."⁵⁹ Furthermore, this investigation found that 16% of

elementary and middle school-aged disabled students speak a language other than English at home.⁶⁰ As members of Congress have conceded, it is clear that disadvantaged populations, including racial and ethnic minorities and non-English speakers, have an even greater battle to fight in IDEA cases and will be disproportionately affected by the Supreme Court's decision.

THE WAY FORWARD

In order for IDEA to be effective and to ensure that disabled children receive appropriate education, it is imperative that the focus is placed on the interest of the students. There are different approaches Congress may take to help ensure that disabled students are receiving the education they need.

The most effective way to ensure the rights of disabled students are protected would be for Congress to rewrite IDEA so that it clearly and affirmatively places the burden of proof on the school district in all IDEA hearings. This change would give all parents a realistic opportunity to ensure the rights of their child are protected at every stage. Drawing from the opinion of the Fourth Circuit, Congress could also rewrite the legislation to place the burden affirmatively on the school district in all cases involving an initial IEP, but place the burden on the challenging party in cases involving a reviewed IEP.⁶¹ Finally, another option is for Congress to rewrite IDEA to enact a burden-shifting scheme. First, parents would be required to present a prima facie case in order to show that an IEP is inappropriate, and the burden would then be placed on the school district to prove otherwise. This would alleviate much of the burden on parents as they would not have to gather all the resources need to completely prove their case; yet, it would also serve as a safeguard for the school district to ensure that there is substantial issue at hand before having to present the evidence. Although these proposals provide varying degrees of protections at different levels of IEP review, any would be an improvement from the current status of IDEA and would help to bring the focus back to disabled students.

CONCLUSION

The Supreme Court in *Brown v. Board of Education* stated:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for

education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. 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. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.⁶²

Just 50 years later, in *Schaffer*, the Supreme Court departed from this logic and imposed a tremendous hurdle for parents to overcome in order to ensure their disabled child receives an appropriate education.

Throughout the arguments presented by the school district and the Supreme Court's opinion, there is one consistent theme: money. The school district's primary argument is that they just cannot handle any additional burdens of IDEA, and sadly, this may be true. When IDEA was enacted in 1975, Congress committed the federal government to provide 40% of the funding for

programs with the states supplementing the rest.⁶³ Year after year, the federal government has failed to meet this goal. In 2007, the authorized amount of funding was \$16.9 billion, yet Congress appropriated only \$10.7 billion. This amount leaves the state with the tremendous challenge of providing

an extra 37% of the funding for these programs because the federal government failed to keep its promise.⁶⁴ Without proper resources, school districts cannot meet the requirements of IDEA. As a result, and with *Schaffer* as their means, the school districts have shifted some of this burden to families. If the federal government provided adequate funding, school districts may not have so many of the existing problem in creating appropriate IEPs, accepting the burden of proof in IDEA cases and, overall, preserving the best interest of each disabled child. Unfortunately, until these resources are provided and the burden is shifted, disabled students will not be provided the education they have been guaranteed.

it is clear that disadvantaged populations, including racial and ethnic minorities and non-English speakers, have an even greater battle to fight in IDEA cases and will be disproportionately affected

ENDNOTES

* Nicole Thompson is a Washington University of St. Louis graduate. She is currently completing her third year of law school at the American University Washington College of Law.

¹ 20 U.S.C. § 1400 et seq. (2008).

² *Id.* at § 1400 (d)(1)(A).

³ *Id.* at § 1415.

⁴ *Id.* at § 1414 (d).

⁵ *Schaffer v. Weast*, 546 U.S. 49 (2005)

⁶ *Schaffer*, 546 U.S. at 52.

ENDNOTES CONTINUED

⁷ *Id.* (quoting H.R. Rep. No. 94-332, p. 2 (175)).

⁸ *Id.*

⁹ *Id.*

¹⁰ 20 U.S.C. § 1400.

¹¹ *Id.* at § 1414 (a)(1)(c).

¹² *Id.* at § 1414 (d)(1)(a).

¹³ 20 U.S.C. § 1401 (19).

¹⁴ 20 U.S.C. § 1414 (e)(3).

¹⁵ *Id.* at § 1414 (d)(1)(B).

¹⁶ *Id.* at § 1415 (b)(1).

¹⁷ *Id.* at (f).

¹⁸ *Id.* at (i)(2).

¹⁹ See Cavanaugh v. Cardinal Local Sch. Dist., 409 F.3d 753 (6th Cir. 2005); see also Collinsgru v. Palmyra Bd. of Educ., 161 F.3d 225 (3d Cir. 1998).

²⁰ Second, Third, Seventh, Eighth, Ninth and D.C Circuits include Alabama, Arizona, California, Connecticut, Delaware, Hawaii, Idaho, Indiana, Illinois, Iowa, Missouri, Minnesota, Montana, Nebraska, Nevada, New Jersey, New York, North Dakota, Oregon, Pennsylvania, South Dakota, Vermont, Washington, and Wisconsin. Fifth, Sixth, Tenth Circuits include Colorado, Kansas, Kentucky, Louisiana, Maryland, Michigan, Mississippi, New Mexico, North Carolina, Ohio, Oklahoma, South Carolina, Tennessee, Texas, Utah, Virginia, West Virginia, and Wyoming; See, e.g., Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 122 (2d Cir. 1998); E.S. v. Independent Sch. Dist., 135 F.3d 566, 569 (8th Cir. 1998); Carlisle Area Sch. v. Scott P., 62 F.3d 520, 533 (3d Cir. 1995), cert. denied, 517 U.S. 1135 (1996); Clyde K. v. Puyallup Sch. Dist., 35 F.3d 1396, 1398 (9th Cir. 1994); Salley v. St. Tammany Parish Sch. Bd., 57 F.3d 458, 467 (5th Cir. 1995); Doe v. Board of Educ., 9 F.3d 455, 458 (6th Cir. 1993), cert. denied, 511 U.S. 1108 (1994); Johnson v. Independent Sch. Dist., 921 F.2d 1022, 1026 (10th Cir. 1990), cert. denied, 500 U.S. 905 (1991).

²¹ *Schaffer*, 546 U.S. at 49.

²² *Id.* at 54.

²³ *Id.*

²⁴ Interview with Jocelyn Schaffer (2006).

²⁵ Ken Millstone, *Schaffer v. Weast: Potomac's Family's Case to be Heard by Supreme Court*, THE CONNECTION NEWSPAPERS, Oct. 7, 2005, <http://www.connectionnewspapers.com/article.asp?archive=true&article=67462&paper=70&cat=190> (last visited March 5, 2008).

²⁶ *Schaffer*, 546 U.S. at 55.

²⁷ See *cf.* 20 U.S.C. § 1415 (k).

²⁸ *Schaffer*, 546 U.S. at 55.

²⁹ *Id.*

³⁰ 20 U.S.C. § 1415 (f).

³¹ *Schaffer*, 546 U.S. at 55.

³² Tice v. Botetourt County Sch. Bd., 908 F.2d at 1200, 1207 (4th Cir. 1990).

³³ Brian S. v. Paul L. Vance, 86 F. Supp. 2d 538, 540-541 (D. Md. 2000).

³⁴ *Id.*

³⁵ *Id.* at 545.

³⁶ *Id.* at 545.

³⁷ *Id.*

³⁸ Weast v. Schaffer, 377 F.3d 449 (4th Cir. 2004)

³⁹ *Schaffer*, 546 U.S. at 55.

⁴⁰ *Id.*

⁴¹ Jerry Weast v. Brian Schaffer, 240 F. Supp. 2d 396 (D. Md. 2002).

⁴² *Weast*, 377 F.3d at 453.

⁴³ *Schaffer*, 546 U.S. at 49.

⁴⁴ *Id.*

⁴⁵ *Id.* at 51-62.

⁴⁶ *Id.* at 69.

⁴⁷ *Id.* at 63.

⁴⁸ *Schaffer*, 546 U.S. at 63.

⁴⁹ 20 U.S.C. § 1415 (i)(2)(B)(iii).

⁵⁰ BLACK'S LAW DICTIONARY 712 (7th ed. 1999).

⁵¹ Interview with Jocelyn Schaffer (2006).

⁵² 20 U.S.C. § 1415(i)(3)(B)-(G).

⁵³ Winkelman v. Parma City Sch. Dist., 127 S. Ct. 1994, 1995 (2007).

⁵⁴ See The Brain Clinic Frequently Asked Questions, available at <http://www.thebrainclinic.com/faq.html#faq3> (last visited March 5, 2008).

⁵⁵ Arlington Central Sch. Dist. v. Murphy, 126 S. Ct. 2455 (2006).

⁵⁶ *Schaffer*, 546 U.S. at 51.

⁵⁷ U.S. DEPT. OF EDUC., NATIONAL DROPOUT PREVENTION CENTER FOR STUDENTS WITH DISABILITIES (April 2006), http://www.ndpc-sd.org/assistance/docs/Indicator_2--Dropout.pdf (last visited March 5, 2008).

⁵⁸ *Id.*

⁵⁹ U.S. DEPT. OF EDUC., *Twenty-Second Annual Report to Congress of the Implementation of the Individuals with Disabilities Education Act* at II-37 (2000), <http://www.ed.gov/about/reports/annual/osep/2000/chapter-2.pdf>.

⁶⁰ *Id.*

⁶¹ *Weast*, 240 F. Supp. 2d at 402.

⁶² Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

⁶³ 20 U.S.C. § 1411 (a).

⁶⁴ 10.7 billion is 64% of 16.9 billion.

THE MODERN AMERICAN CONGRATULATES

VINCENT ENG (WCL '95)

AND

AMY TAI (WCL '08)

ON RECEIVING THE SERVICE AWARDS IN RECOGNITION OF THEIR
COMMITMENT, LEADERSHIP AND SERVICE TO
THE ASIAN PACIFIC AMERICAN COMMUNITY

GIVEN BY

WCL'S ASIAN PACIFIC AMERICAN LAW STUDENT ASSOCIATION
AT WCL'S APA AND THE LAW DINNER