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## Education Law into Practice

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**BURDEN OF PROOF UNDER THE IDEA: DOES IT MAKE A DIFFERENCE IN DUE PROCESS DECISIONS?<sup>a1</sup>****I. Introduction**

The burden of persuasion, which herein is referred to by way of shorthand under the more general term “burden of proof” (BOP), under the Individuals with Disabilities Education Act (IDEA) has been a subject of continuing controversy despite the Supreme Court’s 2005 decision in *Schaffer v. Weast*, which resolved the split among the federal circuits.<sup>1</sup> This brief article (a) traces the contours of the *Schaffer* decision, (b) identifies subsequent state laws that vary from *Schaffer*’s approach; (c) synthesizes the previous empirical analysis of the differences since *Schaffer*, and (d) presents the findings of the latest empirical study of the relationship between BOP and due process hearing (DPH) decisions under the IDEA.

**II. The *Schaffer* Decision**

The 6-2 majority opinion in *Schaffer* relied on “the ordinary default rule that plaintiffs bear the risk of failing to prove their claims,” 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.”<sup>2</sup> In dicta, the majority added two caveats. First, because it was not an issue in the case,<sup>3</sup> the Court expressly declined to address whether a state may adopt a different approach for the BOP in impartial hearings, such as placing it \*30 generally on school districts.<sup>4</sup> Second, the Court pointed out that the BOP should rarely be outcome determinative, because “very few cases will be in evidentiary equipoise.”<sup>5</sup>

Although the Court’s holding was specific to challenges to IEPs, or by obvious implication, claims based on the IDEA’s central obligation for school districts to provide a free appropriate public education (FAPE), lower courts have rather uniformly interpreted it as applying to IDEA issues more generally.<sup>6</sup> The reason is *Schaffer*’s reliance on the general default rule, which places the BOP on the filing party.<sup>7</sup>

**III. State Laws**

The handful of state laws that are exceptions to the general rule and that fit in the unaddressed issue in *Schaffer*<sup>8</sup> currently fall into two categories.<sup>9</sup> The first category comprises the few states that put the BOP on school districts in IDEA DPHs generally.<sup>10</sup> The second category consists of various hybrids that place the BOP on the district to a specified, and in most states a substantial, extent.<sup>11</sup>

The case law specific to the unaddressed preemption issue in *Schaffer* has been negligible.<sup>12</sup> The Eighth Circuit briefly ruled that *Schaffer's* general rule preempted a Minnesota law that put the BOP on the district.<sup>13</sup> Since then, Minnesota changed its law to expressly place the burden on the party seeking relief.<sup>14</sup> Without specifically addressing preemption, the federal court in the District of Columbia had inconsistently upheld the jurisdiction's regulation that placed the BOP on the district during the brief period before its change in 2006 to align with *Schaffer*.<sup>15</sup> More recently, specifically as of July 1, 2016, D.C. legislation changed to its above-cited hybrid approach.<sup>16</sup>

\*31 In partial contrast, a federal district court ruled that the Illinois law that placed the BOP on the district to “present evidence” was not sufficiently specific to raise a conflict with *Schaffer*.<sup>17</sup>

#### IV. Previous Empirical Analysis

In 2015, Skidmore and Zirkel compared random samples of DPH decisions before (n=165) and after (n=92) *Schaffer*.<sup>18</sup> Their findings included the following:

- 1) The percentage of the DPH decisions that identified or applied the BOP was significantly higher post-*Schaffer*.<sup>19</sup>
- 2) For 110 cases that identified or applied the BOP, the percentage placing the burden on the filing party significantly changed from 30% to 88%.<sup>20</sup>
- 3) Also for those 110 cases, there was no statistically significant difference between the pre- and post-*Schaffer* periods for the parent-district outcome distributions for (a) the filing party or (b) the party on whom the hearing officer expressly put the BOP.<sup>21</sup>
- 4) In none of the 267 DPH decisions did the hearing officer state that the BOP as outcome determinative due to the closeness of the case.<sup>22</sup>
- 5) Similarly, there was not a statistically significant difference in the proportion of prevailing party status between the pre- and post-*Schaffer* DPH decisions.<sup>23</sup>

Qualified by the authors' recommendations for follow-up research, including a more nuanced outcomes scale than the binary prevailing party categorization,<sup>24</sup> their overall conclusion was that “*Schaffer* has not been particularly onerous on IHO decision-making in terms of its overt effect.”<sup>25</sup>

#### V. Present Empirical Analysis

The purpose of the present study was to determine whether there was a statistically significant (i.e., generalizable) difference in the outcomes of DPH decisions depending on whether the jurisdictional approach, as applied, put the BOP on the school district or the parent.<sup>26</sup>

A. Method

The DPH decisions were a nationally representative sample for the relatively recent period. Specifically, we used the randomly sampled 250 DPH decisions from a published analysis of the outcomes according to a three-category scale--conclusively for district, \*32 mixed, and conclusively for parent--for the six-year period 2013-2018.<sup>27</sup>

Based on that earlier article's finding that New York was a clear outlier,<sup>28</sup> we analyzed the outcomes both with and without New York. For most of the DPH decisions, the placement into the on-parent or on-district category for the BOP fit whether the jurisdiction followed the *Schaffer* approach or, at the time of the DPH decision, had a state law that took the opposite approach. However, there were two special situations that warranted special placement. First, for school-district filings in states that followed the *Schaffer* approach, we placed the decision in the on-district BOP category.<sup>29</sup> Second, for the states in the hybrid category for BOP, which included New York,<sup>30</sup> we counted the entry for the DPH decision according to whether the ruling was within the scope of the on-district or the on-parent side of the burden.<sup>31</sup>

For analysis of whether the outcome distributions of the two jurisdictional approaches to BOP were statistically different, we used the same approach as the aforementioned article: (a) a chi-square test of independence to determine whether the outcomes distribution for the on-district and on-parent categories were significant at a high level of probability,<sup>32</sup> and (2) if the difference was statistically significant, follow-up with a Cramer's V effect size test to determine the magnitude of said difference.<sup>33</sup>

\*33 B. Findings

Table 1 provides the outcomes distribution according to the three-category scale for the opposite BOP positions for the national sample including New York. Per the previous article, the parenthetical n's are after weighting for jurisdictional proportionality.<sup>34</sup>

Table 1. DPH Decision Outcomes According to BOP: With NY

	CONCLUSIVELY FOR PARENT	MIXED OUTCOME	CONCLUSIVELY FOR DISTRICT
BOP on the Parent	45% (n=168)	20% (n=77)	34% (n=128)
BOP on the District	77% (n=542)	7% (n=47)	17% (n=117)
$\chi^2 = 112.73, p<.001$ ; Cramer's V=.32			

This table shows that with New York included, the post-*Schaffer* outcome distributions for the DPH decisions differ significantly depending on whether the BOP is on the school district or the parent based on the applicable approach in the case's jurisdiction.

This difference appears to shift the parent-favorable skew from a modest to robust level upon putting the BOP on the district rather than the parent. The magnitude of this effect is small according to the follow-up Cramer's V analysis.<sup>35</sup>

However, given New York's status as an outlier, accounting for a distinctly high proportion of the DPH decisions in the nation and a distinctly parent-favorable skew in their outcomes,<sup>36</sup> and its inclusion in the minority of jurisdictions that put the BOP on the district for all or most issues,<sup>37</sup> we re-did the analysis excluding New York. Table 2 presents the corresponding analysis.

Table 2. DPH Decision Outcomes According to BOP: Without NY

	CONCLUSIVELY FOR PARENT	MIXED OUTCOME	CONCLUSIVELY FOR DISTRICT
BOP on the Parent	24% (n=62)	30% (n=77)	46% (n=119)
BOP on the District	14% (n=8)	19% (n=11)	67% (n=38)
$\chi^2 = 7.91, p<.02$ ; Cramer's V=.16			

The results in Table 2 reveal that without New York, the difference in the outcomes distributions between the two BOP positions is still statistically significant but at a much lower level of probability, and the magnitude of the effect is of no practical significance. Moreover, with the overall skew being in favor of the district without the New York decisions,<sup>38</sup> the difference represented an increased district-favorable skew upon putting the BOP on the district rather than the parent.

C. Discussion

\*34 This limited empirical analysis adds to the previous evidence that BOP under the IDEA does not make a forceful difference on the outcomes of DPH decisions.<sup>39</sup> Indeed, our major finding is that upon removing the outlier jurisdiction of New York, the seemingly dramatic but practically small effect of the increase of parent-favorable outcomes reversed in favor of a more modest and practically insignificant increase in *district-favorable* outcomes.<sup>40</sup>

Other factors may well be in play,<sup>41</sup> including jurisdictional differences in the settlement rate and in DPH systems.<sup>42</sup> Moreover, other dependent variables, such as the frequency of filings for IDEA impartial hearings, merit empirical investigation.<sup>43</sup> However, any policy argument of parent or district advocates that changing the *Schaffer* approach at the federal or state level to put the BOP on school districts for FAPE or all cases will make it easier for parents to win at the DPH level is clearly questionable.<sup>44</sup> We invite and welcome more empirical research to inform policy choices with regard to more equitable and effective dispute resolution under the IDEA.<sup>45</sup>

Footnotes

- a1 *Education Law Into Practice* is a special section of the Education Law Reporter sponsored by the Education Law Association. The views expressed are those of the author and do not necessarily reflect the views of the publisher or the Education Law Association. Cite as 425 Educ. L. Rep. 29 (August 29, 2024).
- aa1 Dr. Zirkel is a retired professor of education law and a past president of the Education Law Association, who shares his work at *perryzirkel.com*. Dr. Holben is associate professor of professional & secondary education at East Stroudsburg University.
- 1 *Schaffer v. Weast*, 546 U.S. 49 (2005). For the distinctions among burden of persuasion, burden of production, and quantum of proof and, prior to Schaffer, the varied approaches to and BOP and their policy reasons, see 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 (2005); see also Mitchell L. Yell, Antonis Katsiyannis, Joseph B. Ryan, & Kimberly A. McDuffie, *Schaffer v. Weast: The Supreme Court on the Burden of Proof in Special Education Hearings*, 44 Intervention & Sch. Clinic 241, 242 (2009).
- 2 *Schaffer v. Weast*, 546 U.S. at 62. The Chief Justice did not participate in the decision, and one member of what was here briefly counted as the majority wrote a brief concurrence explaining his decision “to join the Court’s disposition of this case, not only for the reasons set forth in [the majority] opinion, but also because ... we should presume that public school officials are properly performing their difficult responsibilities under this important statute.” *Id.* at 62-63.
- 3 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.
- 4 *Id.* at 61-62.
- 5 *Id.* at 58. In his dissent, Justice Breyer similarly described the case of “perfect evidentiary equipoise” as “rara avis.” *Id.* at 69 (Breyer, J., dissenting).
- 6 E.g., *Mr. P. v. W. Hartford Bd. of Educ.*, 885 F.3d 735, 742, 352 Educ. L. Rep. 961 (2d Cir. 2018) (child find); *Seth B. v. Orleans Parish Sch. Bd.*, 810 F.3d 961, 971, 326 Educ. L. Rep. 620 (5th Cir. 2016); *E.M. v. Pajaro Valley Unified Sch. Dist.*, 758 F.3d 1162, 1171, 307 Educ. L. Rep. 713 (9th Cir. 2014) (eligibility); *L.E. v. Ramsey Bd. of Educ.*, 435 F.3d 384, 392 (3d Cir. 2006) (least restrictive environment).
- 7 *Supra* note 2 and accompanying text.
- 8 *Supra* notes 3-4 and accompanying text.
- 9 For an earlier snapshot of the categories and frequencies of state laws, see 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).
- 10 14 Del. Admin. Code § 926(11.10); Nev. Rev. Stat. § 388.467; N.J. Rev. Stat. § 18A:46-1.1.
- 11 Conn. Agencies Regs. § 10-76h-14(a); N.H. Rev. Stat. § 196-C:16-b(III-a) (putting BOP on the district only for “appropriateness of the child’s [existing or proposed] program or placement”); N.Y. Educ. Law § 4404(1)(c); Wash. Rev. Code § 28A.155.0001 (providing a limited exception for the second appropriateness step in tuition reimbursement cases); D.C. Code § 38-2571.03(6A) (putting the BOP on the parents including for the second appropriateness step of tuition reimbursement cases, with the overall exception being for “appropriateness of the child’s IEP or placement or of the program or placement proposed by the [district]” after the parents establish

a prima facie case); *cf.* Ga. Comp. R. & Regs. 16-4-7-.12(3)(n) (following *Schaffer*, but with a narrowly limited exception for “unique or unusual circumstances” within the discretion of the hearing officer).

12 *Supra* note 4.

13 *M.M. v. Special Sch. Dist. No. 1*, 512 F.3d 455, 458-59, 228 Educ. L. Rep. 684 (8th Cir. 2008).

14 Minn. Stat. § 125A.091, subd. 16.

15 *See, e.g., N.G. v. District of Columbia*, 556 F. Supp. 2d 11, 17 n.3, 234 Educ. L. Rep. 660 (D.D.C. 2008); *see also* Lara Gelbwasser Freed, *Cooperative Federalism Post-Schaffer: The Burden of Proof and Preemption in Special Education*, 2009 B.Y.U. Educ. & L. J. 103, 123 nn.91-92).

16 *Supra* note 11.

17 *Kerry M. v. Manhattan Sch. Dist. #114*, 2006 WL 2862118, at \*4 (N.D. Ill. Sept. 29, 2006).

18 Cathy A. Skidmore & Perry A. Zirkel, *Has the Supreme Court's Schaffer Decision Placed a Burden on Hearing Officer Decision-Making under the IDEA?* 35 J. Nat'l Ass'n Admin. Judiciary 284 (2015).

19 *Id.* at 292.

20 *Id.* at 296. The post-*Schaffer* DPH decisions in the remaining 12% were largely attributable to state laws that placed the BOP on the district. *Id.* at 294.

21 *Id.* at 297.

22 *Id.* at 298.

23 *Id.* at 299.

24 *Id.* at 303.

25 *Id.*

26 As explained *infra* notes 29-31 and accompanying text, the placement of the DPH decisions in these two polar BOP categories required care in two relatively limited situations: (1) district-filed cases in jurisdictions that follow the *Schaffer* approach of putting the BOP on the party seeking relief (i.e., the filing party) and 2) applying the variants for the four jurisdictions that adopted the hybrid approach.

27 Perry A. Zirkel & Diane M. Holben, *The Outcomes of Fully Adjudicated Impartial Hearings under the IDEA: A Nationally Representative Analysis with and without New York*, 44 J. Nat'l Ass'n Admin. Judiciary 126 (2024). The decisions from the four high-frequency jurisdictions were weighted based upon a statistical estimation of the minimum number of cases needed to

adequately represent the proportion of each of the four high-volume states in the overall pool of all cases nationally decided within the six-year window. *Id.* at 132. The significantly different overall outcomes distributions for the 50 states and D.C. were as follows:

	FOR PARENT	MIXED	FOR DISTRICT
With New York	67%	11%	22%
Without New York	26%	26%	48%

For New York alone, the distribution was 12% for district, 5% mixed, and 84% for parent. *Id.* at 135-36.

- 28 *Id.* at 137-42. New York accounted for twice as many DPH decisions during the six-year period of the analysis than all the other states and D.C. together, and its outcomes pattern was distinctly different. Closer analysis revealed that 96% of its decisions were attributable to New York City, which had its own DPH system, a staggering backlog of cases, a predominant set of distinctive issues, and a high proportion of short uncontested decisions. *Id.*
- 29 There were seventeen such decisions, including five in weighted jurisdictions (*supra* note 27)--four in California and one in Pennsylvania.
- 30 *Supra* note 11 and accompanying text. Because Washington state did not pass its law until 2024, we categorized its DPH decisions in our sample in accordance with the *Schaffer* approach. Conversely, the District of Columbia continued after *Schaffer* an inconsistently applied regulation that placed the BOP on the district until the July 1, 2016 effective date of the cited, new legislation. The other state laws cited as exceptions to the general *Schaffer* approach were passed well before the six-year period of our analysis.
- 31 For Connecticut or New Hampshire, if the decision concerned FAPE (i.e., challenge to the IEP or the placement), we counted its outcome in the on-district category, but for other issues, such as eligibility, we counted its outcome in the on-parent category. For New York, if the case reached the second appropriateness step of tuition reimbursement, we counted the outcomes as .5 in the in-district and .5 in the on-parent category. For the District of Columbia, the July 1, 2016 effective date of its revised state law served as the dividing line (*supra* note 30). We counted the decisions issued prior to that date in the in accordance with *Schaffer* and those after that date in the on-district category if the ruling was specific to the appropriateness of the district's present or proposed program or placement (*supra* note 11).
- 32 A chi-square test for independence compares frequency distributions for two categorical variables to determine the degree to which the proportions for each variable significantly differ. *See, e.g.*, Brian S. Gordon, *Chi-Square Test*, in Sage Encyclopedia of Educational Research, Measurement, and Evaluation 268, 269 (Bruce B. Frey ed., 2018). The conventional prerequisite levels of probability for statistical significance are  $p < 0.5$  or  $p < 0.1$ . *See, e.g.*, Hyung Won Kim, *p Value*, in Sage Encyclopedia of Educational Research, Measurement, and Evaluation 1195 (Bruce B. Frey ed., 2018).
- 33 In contrast to the p-value, which indicates the statistical significance of differences in the chi-square distribution, *supra* note 32, the calculation of effect size measures the magnitude of the difference, which provides the researcher with a sense of the practical effects of any statistically significant differences. *See, e.g.*, Jacob Cohen, *Things I Have Learned (So Far)*, 45 Am. Psych. 1306, 1310 (1990). The Cramer's V test uses the results of the chi-square algorithm to estimate the practical effects of these differences. *See, e.g.*,

Christopher J. Ferguson, *An Effect Size Primer: A Guide for Researchers and Clinicians*, 40 Pro. Psych. Res. & Prac. 532, 533-34 (2009). Although various fields of study differ in their interpretations of effect sizes, we used Ferguson's framework for the social sciences, which identified a minimum effect size of .2 for small effect, .5 for moderate effect, and .8 for large effect. *Id.* at 533.

34 *Supra* note 27.

35 Ferguson, *supra* note 33.

36 *Supra* notes 27-28.

37 *Supra* notes 10-11 and accompanying text.

38 *Supra* note 27.

39 *Supra* notes 21-23 and accompanying text.

40 Additionally, two observations are incidental but important. First, national analyses of DPH trends, including frequency data, warrant a dual approach that differentiates New York. *See, e.g.,* Perry A. Zirkel & Elizabeth Zagata, *CADRE's National Data on the Frequency of Due Process Hearing Decisions: Suggested Adjustments*, 422 Educ. L. Rep. 4 (2024). Second, neither *Schaffer* nor the majority of state laws that take a different approach place the BOP entirely on either parents or school districts, thus warranting less absolute policy arguments in favor of one party or the other. *Infra* note 44.

41 *See, e.g.,* Freed, *supra* note 15, at 108 (explaining that the significance of BOP in IDEA DPHs extends beyond outcome-determinative considerations).

42 Putting the BOP on the district may, for example, increase the propensity for the district to settle those cases for which the outcome odds are not particularly favorable, thus skewing the ones that go to decision toward the likely winners. However, this hypothesis is an open question that has not been subject to empirical research in the IDEA context. Similarly, only speculative at this point, whether a jurisdiction uses a central panel, specialized full-time attorneys, or parttime contractual hearing officers--and whether the parents' bar is relatively robust--may well affect the role of BOP on the DPH decisions.

43 Other outcome-related jurisdictional factors include the extent of DPH decisions for district filings. *See, e.g.,* Perry A. Zirkel, *District-Initiated Due Process Decisions under the IDEA: A Follow-Up Analysis*, 398 Educ. L. Rep. 584 (2022) (finding that approximately 80% of the district-initiated decisions address the BOP, with approximately 40% applying it, 16% not mentioning it at all, and none according it a tie-breaking effect); Perry A. Zirkel & Diane M. Holben, *District-Initiated Due Process Decisions under the IDEA: Frequency and Outcomes*, 398 Educ. L. Rep. 8 (2022) (finding the proportion of district-filed DPH decisions to average 3%, within a wide range of 0% to 44% per jurisdiction, and their overall outcomes distribution to be 17% for parents, 4% mixed, and 70% for districts).

44 For the policy arguments more generally in favor of federal or state laws to change *Schaffer*, see Selene A. Almazan, Andrew A. Feinstein, & Denise S. Marshall, *Quality Education for America's Children with Disabilities: The Need to Protect Due Process*, 5 Child & Family L.J. 1, 24 (2017); Terrye Conroy, Mitchell L. Yell, & Antonis Katsiyannis, *Schaffer v. Weast: The Supreme Court on the Burden of Persuasion When Challenging IEPs*, 29 Remedial & Special Educ. 108 (2008); Luke Hertenstein, Note, *Assigning the Burden of Proof in Due Process Hearings: Schaffer v. Weast and the Need to Amend the Individuals with Disabilities Education Act*, 74 U.M.K.C. L. Rev. 1043 (2006) (advocating Congressional reversal to put the BOP on school districts); *cf.* Freed, *supra* note 15, at (advocating state law modifications of *Schaffer* as a matter of cooperative federalism). *But see* Jennifer M. Burns, Note, *Schaffer*



*v. West: Why the Complaining Party Should Bear the Burden of Proof in an Administrative Hearing to Determine the Validity of an IEP under the IDEA*, 29 Hamline L. Rev. 567 (2006) (advocating no change in the *Schaffer* approach).

- 45 One example would be a time-series frequency analysis of the DPH filings and decisions before and after the relatively new laws in D.C. and Washington state, which each changed from a *Schaffer* on-filing-party to a largely on-district approach. *Supra* note 30. Comparison jurisdictions to consider for such analyses respectively are Pennsylvania and Oregon.

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