Schaffer v. Weast’s Effects on California Special Education Hearing Decisions

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Schaffer v. Weast’s Effects on California Special Education Hearing Decisions

Tiina Itkonen, PhD¹, Bryan Tomlin, PhD¹, Manuel G. Correia, PhD¹, Luis A. Sanchez, PhD¹, Tracie Schneider, BA¹, and Kellie Kooker, BA¹

Abstract
This research examined the associations between Schaffer v. Weast (2005) and special education due process hearing decisions in California. Using a database we coded from the state’s due process hearings for cases which reached a decision (years 1995–2019), this study analyzed (1) how legal representation and the filing party affected the probability of the student fully or partially prevailing in these cases, and (2) how Schaffer affected student representation and the prevailing party before and after this ruling. The results indicate that while students were statistically as likely to be plaintiffs and/or represented by an attorney before and after the 2005 time break in the study, the decision raised the bar for students as the likelihood of favorable outcomes for students fell significantly in the wake of the ruling.

Keywords
Schaffer, burden of persuasion, special education law, due process hearings, IDEA

The 2005 Supreme Court decision Schaffer v. Weast (hereinafter: Schaffer) changed not only special education due process hearings but also court cases in many jurisdictions by placing the responsibility for building and presenting a case on the party that filed for a hearing. The decision sparked legal scholarship which argued that the ruling would hurt low-income parents who did not have the means to retain an attorney to build and argue their case (Hyman et al., 2011; Karger, 2008; Thomason, 2007; Wilson, 2007). The Individuals With Disabilities Education Act (IDEA) does not address the matter, and in fact, prior to Schaffer, the burden of persuasion allocation varied across states (Yell, Katsiyannis, et al., 2009). Some states, for example, those that fall under the Ninth Circuit Court of Appeals’ jurisdiction (e.g., California) assigned the responsibility solely to the districts regardless of which party filed the claim. The Schaffer decision changed this practice unless the states explicitly maintained their policy assigning the responsibility to the district, as was done, for example, in Connecticut, New Jersey, and New York (Council of Parent Attorneys and Advocates [COPAA], 2016).

The purpose of this study was to examine the relationships among due process variables before and after California’s shift in the burden of persuasion designation from districts (pre-Schaffer) to the plaintiff (post-Schaffer). Although there is a vast research literature on due process hearings and special education litigation more broadly (e.g., Seligmann & Zirkel, 2013; Zirkel, 2012, 2014; Zirkel & Hetrick, 2017), there is a gap in research examining the cumulative trends in hearing decisions before and after Schaffer. Our research partially addresses this gap but uses data consisting only of cases that reached a decision. This is a particular limitation given that approximately 60% of due process complaints are resolved without an actual hearing (Granelli & Sims, 2018; U.S. Office of Special Education Programs [OSEP], 2020). Indeed, a parent filing (or threatening to file) for a hearing often serves as the impetus for the district to offer what the parties could not reach an agreement about at the individualized education program (IEP) meeting (Weber, 2014). A survey conducted by the American Association of School Administrators (Pudelski, 2016) further found that districts were more likely to settle, when the parents’ request was less costly to implement, or when the requested relief was less than the costs of moving forward with litigation. Given that our data did not capture settlements, we are therefore unable to provide estimates for the effects of representation, plaintiff-identify, and prevailing parties for cases that were settled before or during a hearing. Our result likely suffer from selection bias: We only observed cases in which both parties considered it worthwhile to fully pursue litigation (and not settle). Thus, the central questions of whether and to what extent a parent

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prevails if they settle because the district awarded what the parent had requested for their child are therefore not possible to be analyzed from our data.

Despite this limitation, our longitudinal study utilized explanatory modeling to systematically analyze the extent to which the time period before and after Schaffer was associated with overall due process hearing patterns in cases which reached a decision.

Legislative Context

The IDEA affords children and youth with disabilities the right to a free, appropriate public education (FAPE) which is tailored to the child’s individual needs (IDEA, 2004). The law further awards students with disabilities and their parents a variety of procedural safeguards with regard to the provision of such education. When parents and school districts disagree about an aspect of FAPE, they have several dispute resolution options through which to resolve the issue(s): due process hearings, mediation, and formal complaints. The due process option grants the parties the right to file for a hearing (IDEA Regulations, 2006, 34 C.F.R. § 300.511). Hearings are court-like proceedings in which the parties present the facts of the case in front of an impartial hearing officer who then issues a legally binding ruling on the matter. The hearing decision, however, sets no precedent. The party that bears the burden of proof presents their case first. This consists of two steps: (a) burden of production in which the party builds and presents the case with sufficient evidence and (b) burden of persuasion in which the responsible party attempts to convince the trier of the fact, in this case the hearing officer by proving their claim with a preponderance of evidence (Karger, 2008, p. 161). The Supreme Court noted that the Schaffer case concerned only the burden of persuasion (Schaffer, 546 U.S. 49, 56 [2005]).

If the plaintiff fails to meet the burden of production, the case may be dismissed and will not go forward. If the evidence presented is equal between the parties as determined by the hearing officer, the party which holds the burden of persuasion will not prevail. Once the hearing officer has issued a decision, the losing party can appeal it to the next level. In a one-tier system (the majority of states, including California), the party appeals directly to court, unlike in a two-tier system in which the losing party appeals to a designated state agency first (Zirkel & Scala, 2010). According to OSEP (2020), the majority of all dispute resolution requests received in 2017–2018 consisted of due process complaints (n = 19,337). Of those, most were resolved without a hearing (59.5%), while 9.9% of requests lead to a hearing in which a written decision was issued.

A resolution meeting was added to the IDEA (2004) reauthorization as an additional procedural step for parents and school districts to try to resolve the due process complaint before they headed to a formal hearing (IDEA Regulations, 2006, 34 C.F.R. § 300.510[2]). A resolution meeting is required after a due process request has been filed, although if both parties agree, it can be waived (IDEA, 2004). Attorneys can be present only if both parties have representation. However, resolution meetings are not bound by confidentiality and discussions among the parties can therefore be used as evidence, should the case proceed to a hearing.

The 1997 IDEA reauthorization added mediation as another option for schools and parents to resolve disagreements, largely due to the costs and emotional toll of due process hearings (Yell et al., 2006). Mediation was further strengthened in the 2004 reauthorization (Mueller, 2009). This process continues to be voluntary, however, and does not take away parental rights to file for a hearing (IDEA Regulations, 2006, 34 C.F.R. §300.506). Mediation must occur in a timely manner upon the receipt of a due process request, be held in a mutually convenient location, document agreements in writing, and keep all discussions confidential (IDEA, 2004). In the 2017–2018 school year, mediation requests were the second most frequently used dispute resolution option across states (n = 11,613) (OSEP, 2020). A total of 33.2% of all mediation requests were related to due process complaints, while 24.5% were about other, non-due process matters. Notably, 34% of mediation requests were withdrawn or otherwise not completed (OSEP, 2020).

The third avenue to work through disagreements is by filing a written complaint stating that the public agency has violated a requirement of Part B of IDEA (IDEA Regulations, 2006, 34 C.F.R. § 300.153[b][1]). Any individual or organization, with the exception of the school district is eligible to file a complaint with their state educational agency (Zirkel, 2019). Musgrove (2013) clarified the main differences between hearings and state complaints. First, the content of the written complaint differs from due process. State complaints are a written letter to report a violation of IDEA or state law, whereas due process tries to settle a dispute about a student’s identification, evaluation, educational placement, or a provision of FAPE. A parent though can file a complaint on any of those matters and the state agency is required to respond. Finally, there are some procedural differences between state and due process complaints regarding the statute of limitations and the time frame by which the state must respond to the complainant. State complaints were the least frequently utilized dispute resolution method (OSEP, 2020). During the 2017–2018 school year of the signed written complaints filed (n=5,228), the majority (65.1%) resulted in a report from the state responding to the complaint while 32.1% were withdrawn or dismissed (OSEP, 2020).

Despite mediation and complaints to the state, and the many alternative dispute resolution strategies and procedures used across states (Feinberg et al., 2002; Mueller,
2009), hearings are still the most prevalent dispute resolution method employed, making up half of the total number of complaints filed (U.S. Government Accountability Office [GAO], 2019).

**Empirical Research on Due Process**

The due process provision in special education has been contentious since the law’s passage (Melnick, 1995). Some researchers have found that hearings are excessive (e.g., Pudelski, 2016; Zirkel & Johnson, 2011; Zirkel et al., 2007). In California, the Legislative Analyst’s Office (LAO) (2019) reported that there has been an increase in disputes, as the number of cases increased by 84% between 2006–2007 and 2016–2017 (these data combined both hearings and mediations). Other studies found that due process hearings accounted for 43% of all disputes in California (Almazan et al., 2017). Yet some research has suggested the opposite, that special education hearings are rare, if ratios are calculated using the total number of students served under IDEA (GAO, 2003, 2019). There is variability across states: the due process complaints accounted from less than 1 annual hearing (Nebraska) to as many as 252 (District of Columbia) per 10,000 special education students served (GAO, 2019). Almazan et al. (2017) reported that for every 1,000 students in the United States, only 2.6 due process hearings were filed. For every 100,000 students, only 34 resulted in a full hearing and a decision (Almazan et al., 2017).

Despite these findings on whether hearings are excessive or rare and their variability across states, several studies have unanimously concluded that they are costly (Blackwell & Blackwell, 2015; Chambers et al., 2003). Districts spend over $90 million annually on conflict resolution (Mueller, 2009). Some estimates place the cost of one hearing to school districts at $15,924 (Pudelski, 2016). Other studies found that an IDEA due process hearing costs on average from $50,000 (Mueller, 2009) to $95,000 (Chambers et al., 2003). Occasionally, the costs reach the mainstream media’s attention and extreme cases are reported in the news. One California district was reported to have paid $610,000 to a law firm to cover its own legal fees in addition to the amount it had paid to reimburse the prevailing families’ attorney fees (Taketa, 2019). Besides the actual monetary losses, additional types of costs that districts and parents accrue from due process hearings include the enormous amount of time they take (Blackwell & Blackwell, 2015; Pudelski, 2016) and the devastating impact they have on the relationships between parents and school personnel due to the adversarial, divisive nature of the proceedings (Blackwell & Blackwell, 2015; Cope-Kasten, 2013).

Another avenue of research suggests the opposite to the negative aspects of hearings, and instead, argues for the need to strengthen due process access to disadvantaged families (Hoagland-Hanson, 2015). Studies in this line of research argue that individual parental wealth plays too much of a role in special education: Wealthier parents are more successful in affecting their child’s special education program than are those lacking resources (Colker, 2013, 2018; Ong-Deun, 2009; Phillips, 2008), including the frequency with which they file for due process hearings (GAO, 2019). The law’s structure further places less privileged parents at a disadvantage because the remedy provisions are inequitable for families who cannot afford to pay a bill up front (Hyman et al., 2011; Pasachoff, 2011). The way IDEA is structured is that in due process hearings, parents’ attorney fees are reimbursed only if the parents prevail (IDEA 20, U.S.C. § 1415 (i)(3)(B)(I)). Parents who lack the ability to pay for an attorney retainer and bill are therefore at a disadvantage, given that IDEA due process hearings legal fees can range from $10,000 to $100,000 (Brief of the Council of Parent Attorneys and Advocates, 2007). Other studies have reported even higher amounts; $121,421 in an Illinois case which was appealed to federal courts (American Bar Association, 2011). These estimated and average sums are important because research has consistently indicated that legal representation matters; parents who are represented by an attorney are more likely to fully or partially prevail than those who represent themselves (Cope-Kasten, 2013; Hoagland-Hanson, 2015; Lukasik, 2016; Schandling et al., 2017; Zirkel et al., 2007).

**Supreme Court Decisions**

The somewhat rare Supreme Court decisions in special education are of critical importance because special education directors take policy implementation cues from them, and the rulings are binding on hearing officers at the local level and on all lower courts (Yell & Katsiyannis, 2019). The following discussion reviews three Supreme Court decisions, which ruled on an aspect of special education litigation. This section is based on the Court’s rulings and Itkonen (2009) unless otherwise noted. The case facts and procedural histories are covered in detail elsewhere (see Colker, 2013; Yell et al., 2008), but it should be noted here that by the time the Supreme Court heard these appeals, each case was preceded by years of disagreements at the IEP team level, some with both multiple due process complaints and appeals and remainders between lower courts.

**Schaffer v. Weast**

In *Schaffer v. Weast* (2005), the Supreme Court held that the party who files for the hearing bears the burden of persuasion. The case involved a student, Brian Schaffer, who was diagnosed with a learning disability as well as speech and language impairments. He had been educated in a private school through seventh grade but experienced academic
difficulties. The private school suggested that Brian be placed at a different school, at which point the parents sought a public-school placement. The initial IEP proposed a placement in one of the two middle schools in the district. The parents, however, believed that the class sizes were too large for Brian. They enrolled him in another private school and filed for due process challenging the IEP and seeking tuition compensation. This began complex, lengthy litigation. The hearing officer ruled in favor of the school district, holding that the parents had not proved an IDEA violation and that they bore the burden of persuasion in this case. The parents brought a civil action to the U.S. District Court for the District of Maryland, which reversed the hearing officer’s decision and remanded the case back to the hearing officer for reconsideration.

Around this time, the school district offered Brian a placement in a high school in a more individualized setting. The parents accepted but the lawsuit continued because the parents sought tuition reimbursement for the private school expenses. The hearing officer, after re-examining the case in light of the district court’s ruling now ruled in favor of the parents. The school district appealed the hearing officer’s second decision to the Fourth Circuit Court of Appeals, which vacated and remanded the appeal so that it could consider the issue of burden of persuasion and the case merits on a later appeal. The district court reaffirmed its earlier ruling on the burden of persuasion party (which it had ruled to be the school district). On appeal, the Fourth Circuit reversed the lower court’s decision, concluding that the normal rule should hold whereby the plaintiff—the parents in this case—bear the burden of persuasion since they initiated the proceedings. The parents appealed to the Supreme Court. The High Court held on November 14, 2005, in a 6 to 2 opinion (Chief Justice Roberts recused himself from hearing the case) that the party seeking relief bears the burden of persuasion.

**Arlington Central School District Board of Education v. Murphy**

The Supreme Court ruled in *Arlington Central School District Board of Education v. Murphy* (2006) (*Murphy*) that parents’ expert witness fees were not recoverable. Although the Court acknowledged that IDEA entitled parents to recover reasonable attorney fees upon prevailing in a case, it determined that the fee reimbursement did not extend to expert witnesses and lay advocates. The educational history of Joseph Murphy reveals academic struggles throughout his elementary and middle school years (Colker, 2013). The due process dispute began when the parents rejected Joseph’s ninth-grade IEP on the basis that it would not allow him to make educational progress. The parents had by that time obtained an independent speech-language evaluation and paid for private therapy for Joseph. They filed a due process complaint, asking the Arlington Central School District to cover the cost of the private education and the independent evaluation. A non-lawyer advocate represented the parents during the hearing. The hearing officer ruled in favor of the parents, finding that the school district’s proposed IEP was not adequate, and ordered the school district to partially reimburse the parents (not including the private speech-pathology services).

The parents then sought fee reimbursement for the consultant they had hired for the hearing. The school district argued that the consultant was not an expert, and that although IDEA had statutory language on attorney fee reimbursements, it did not specify that lay advocates could recover fees. The federal district court ruled for the parents, and the Court of Appeals for the Second Circuit affirmed. But the Supreme Court, on June 26, 2006, reversed this decision in a 6 to 3 opinion. It based the reversal on the fact that while IDEA authorizes reimbursement of attorney fees, it is silent on expert witness fees. The decision was an application of the “American rule,” which holds that courts will not award fees unless explicitly authorized to do so by Congress (U.S. Department of Justice, 1998).

**Winkelman v. Parma City School District**

A third Supreme Court ruling relating to special education litigation was rendered in *Winkelman v. Parma City School District* (2007). This ruling established that parents have enforceable rights under IDEA and can represent their child in due process hearings and in court even though they may not be licensed attorneys (i.e., act as pro se litigants). The case began when the parents of a preschooler, Jacob Winkelman disagreed with the Parma City School District’s proposed IEP and placement for Jacob’s Kindergarten, which the parents alleged did not meet their child’s needs. In the due process hearing that followed, both the hearing officer and the state-level review officer ruled in favor of the district on the appropriateness of the IEP. The parents then appealed without attorney representation to the U.S. District Court for the Northern District of Ohio. While waiting for the decision, they enrolled Jacob in a private school which they believed would better address his needs. The suit in the district court sought to reverse the hearing officers’ decisions and obtain reimbursement for private school expenses and attorney fees. The district court ruled in favor of the district. The Winkelmanns then appealed the district court’s decision to the Sixth Circuit Court of Appeals and chose to appear in court pro se. The Sixth Circuit dismissed the appeal unless the parents obtained an attorney.

The parents appealed to the Supreme Court. It decided the matter on May 21, 2007, in a 7 to 2 ruling. The decision reversed the Sixth Circuit’s decision and held that (a), parents have independent, enforceable rights under IDEA, which are not limited to procedural or reimbursement
matters, but encompass the entitlement to a FAPE for their child; and (b), parents can pursue IDEA claims on their own behalf. The decision was said to be of great significance because it extended FAPE to include parents (Yell, Ryan, et al., 2009).

To explore the due process hearings which reached a decision, the following two questions guided this study:

1. How does legal representation and the filing party relate to the probability of the student fully prevailing or receiving partial relief?

2. How is the general time period of Schleifer associated with student representation and the prevailing party before and after the time break of December 31, 2005?

**Method**

We chose California as a case example because it is among the top seven states which account for 93% of all special education due process hearings (Center for Appropriate Dispute Resolution in Special Education, 2017). Second, California’s mere size provides a rich source of data. Currently, there are about 6.2 million students of whom approximately 12.6% receive special education services (California Department of Education [CDE], 2021a). California also provides a geographically diverse context with its 1,037 urban, suburban, and rural districts (CDE, 2021a). Finally, California was purposefully selected because the state has not passed policies to allocate the burden of persuasion to the school district post-Schleifer. Hence, due process decisions before and after the time break of 2005/06 reflect the Supreme Court’s ruling on burden of persuasion.

We constructed a novel database from publicly available hearing decisions covering the time period where decisions were electronically accessible (1995–2019). Due process hearings that reached a decision were filed in the California Special Education Administrative Hearing Decisions (California SEAHD) (1995–2005, n = 1,163) and the California Office of Administrative Hearings (California Office of Administrative Hearings [OAH], 2021) (2006–2019, n = 1,573). We included all hearing decisions in the state’s database, with the exception of decisions on appeal that were issued by a federal district court or the Ninth Circuit Court of Appeals (which the state’s databases list). We also excluded any procedural orders (e.g., orders granting motion). Hearing decisions follow a fairly uniform structure under state law. We coded each hearing for (a) who filed for the hearing (plaintiff), (b) the defendant, and (c) whether the parent was represented by counsel, represented by an advocate (non-attorney), self-represented, or did not show for the hearing, as found in the first two paragraphs of the decisions. Located at the end of the decision, we documented the date the case was decided. We also coded whether the district or the parents had prevailed, and if both parties prevailed on some item(s), we coded the case as a “split decision.” We were able to word-search and locate the prevailing party section in the decision text as hearing decisions must indicate the extent to which each party prevailed on each issue heard and decided (Education Code, 1980/2008). As such, data coding required much review, but little interpretation of the decisions. We also calculated descriptive statistics on student plaintiffs and lawyer representation, and case outcomes pre/post 2005. An independent rater coded a random 18% of the data set for intercoder reliability (O’Neill et al., 2011), which yielded interobserver agreements of 100% (plaintiff), 98% (defendant), 90.5% (representation), 100% (decision year), and 98.7% (case outcome).

The study’s methodological time break was set for December 31, 2005, but the three Supreme Court decisions discussed earlier may well be reflected in the results, which our data set did not capture (e.g., if the parent utilized an expert witness or was a pro se litigant). We will discuss this in the limitations section of this article. To examine the associations of the Schleifer decision on the probability of receiving full or partial relief, we ran a multinomial logistic regression controlling for student representation, whether the student was the plaintiff, and whether the decision was reached pre- or post-Schleifer on three outcome categories: district prevailing on all orders, student prevailing on all orders, or “split” where each party prevailed on at least one issue of the case. For ease of interpretability, similar analyses were performed using a linear probability model and a logistic regression (logit) model with the binary outcome: student prevailed on any orders.

**Results**

We first report the descriptive distribution in the data. The search of the California SEAHD (1995–2005) and OAH (2006–2019) yielded a total of 2,736 cases which reached a decision. An examination of the student plaintiff status and lawyer representation pre- and post-2005 indicated that students were plaintiffs in 69.65% of the cases which reached a decision before December 31, 2005, and 71.39% after 2005 (years 2006–2019). Students had lawyer representation in 60.53% of the cases prior to December 31, 2005, and in 61.54% cases after. Table 1 summarizes these descriptive frequencies.

Table 2 depicts the outcome distribution of hearing officer decisions in which the district prevailed; a split decision was rendered in which both parties prevailed on some item(s) heard, and student fully prevailed. The total n before and after 2005 is different from Table 1 (plaintiff status and lawyer representation) because the results reported in Table 1 were agnostic to the outcome resulting in more observations (i.e., including cases where neither party prevailed).
As seen in Table 2, districts prevailed in 44.39% of the cases between 1995 and the end of 2005, and 53.51% between 2006 and 2019. The hearing officer issued a split decision in 37.91% of the cases prior to December 31, 2005, and in 32.04% of the decisions afterward. Finally, students prevailed in 17.70% of the cases in the time period leading to end of 2005, and 14.45% of the cases post-2005. To examine significance of this categorical outcome variable, we ran a χ² test, which showed that the distributions before and after 2005 were non-identical (χ² = 21.8243, p < .001).

We next examined the probability of receiving full or partial relief. Using a multinomial logistic regression in which the base outcome was a split decision (see Table 3), we found that districts were significantly more likely to prevail after December 31, 2005, in cases reaching a decision, controlling for plaintiff identity and representation (p < .01). Lawyer representation was very influential on outcomes, with students being far more likely to obtain a split decision (relative to the district prevailing on all issues) when they were represented by an attorney. The student being the plaintiff also served to decrease the likelihood of the district fully prevailing, though it did not increase the likelihood of the student prevailing outright; instead, cases in which the student was the plaintiff were significantly more likely to result in a split decision.

The analysis on California cases reaching a decision between 1995 and 2019, as presented in Table 4, shows that post-December 31, 2005, students were 9.7% less likely to receive a favorable outcome than they were pre-2005 (p < .001), controlling for representation and plaintiff identity. Being represented by an attorney was highly beneficial; students with legal representation were 23.2% more likely to obtain a favorable outcome than those who were not (p < .001). Although students were less likely to fully prevail post-2005, student plaintiffs were more successful than student defendants. Students who were the plaintiffs in these cases were 16.2% more likely to obtain a favorable outcome than those who were defendants (p < .001).

**Discussion**

This research provides empirical evidence that following the time break in the study, students prevailed less often, even when controlling for plaintiff status and the use of an attorney. The results thus suggest that while students were statistically just as likely to be plaintiffs and/or represented by counsel pre- and post-*Schaffer*, the decision raised the bar for students, as the likelihood of favorable outcomes for them fell in the wake of the Supreme Court’s ruling.

Given that our data were restricted to cases which reached a decision, we were unable to provide estimates for the effects of representation, plaintiff-identify, and disputes that were settled before or during a hearing. However, the lack of settlement data in our analysis does not render our results unreliable or unrealistic. Cases that reached a decision are those in which districts opted not to settle, presumably under the belief that the expected benefit of seeing the case through to a decision outweighed the expected costs (Pudelski, 2016). As such, our sample is restricted to cases in which school districts believed that they had a strong likelihood of success and/or the outcome was of great significance for them, regardless of whether the case took place before or after 2005. This makes our finding that students were significantly less likely to be successful post-2005 all the more startling. What our results suggest is that among cases in which districts already believed that they had a high likelihood of winning or a district-favorable decision was important, the *Schaffer* decision further
increased the advantage held by districts. For this reason, we suspect that our estimates may provide a lower bound for the influence of the Supreme Court decision on the likelihood of student success in special education due process hearings.

The fact that the change in burden of persuasion made districts more likely to prevail in hearings reaching a decision suggests that either (a) districts are still choosing to litigate the same type of cases as before Schaffer but prevailing became easier; or that (b) districts are choosing to litigate more cases, including those that are “easy” to win but would have been more expensive to litigate prior to Schaffer (or both). While we cannot determine whether students are faring better or worse overall after 2005 because our data set did not include settlement information, we can nonetheless conclude that the landscape of special education due process hearings which reached a decision changed in a manner that advantaged districts. This finding is consistent with earlier studies which have documented that hearing decisions are skewed in the districts’ favor: districts won 59% of the hearings although parents initiated 85% of them (Mueller & Carranza, 2011); prevailed fully in 55% and predominantly in an additional 9% of hearings (thus totaling 64% in favorable outcomes) (Zirkel, 2012); won in 60% of the cases (Zirkel et al., 2007); and prevailed by a 3:1 ratio (Zirkel & Hetrick, 2017). Similarly, Schanding et al. (2017) reported that between 2011 and 2015, districts in Texas prevailed in 71.94% of hearings. Our results not only support these existing research findings on district advantage but suggest that Schaffer has exacerbated this disparity.

A more fundamental concern, and the challenge with rights-based legislation and its private enforcement more broadly, is that decisions are on individual cases as opposed to correcting systemic issues (Bagenstos, 2009). While the decisions remedy individual grievances, they raise equity concerns for those who do not bring forward a claim. Reliance on private enforcement may then result in under enforcement of the law, if beneficiaries with fewer financial resources file fewer due process claims than their wealthier counterparts (Pasachoff, 2011). Put another way, wealthier parents in special education will use due process as an enforcement mechanism while disadvantaged parents who lack the resources (money, time, expertise) will not bring forward a claim. Another potentially disadvantaged parent group, including in California, consists of the linguistically diverse families and the extent to which they can equitably bear the burden of persuasion. California has more English learners (ELs) and a higher proportion of ELs than any

### Table 3. Multinomial Logistic Estimate of the Effect of Student Characteristics on Likelihood of Student or District Prevailing in a Case Reaching Decision 1995–2019

<table>
<thead>
<tr>
<th>Variable</th>
<th>Student prevailed</th>
<th>District prevailed</th>
</tr>
</thead>
<tbody>
<tr>
<td>Post-2005</td>
<td>-0.097**</td>
<td>0.429**</td>
</tr>
<tr>
<td>Lawyer representation</td>
<td>0.232**</td>
<td>-0.977**</td>
</tr>
<tr>
<td>Student plaintiff</td>
<td>-0.69**</td>
<td>-0.960**</td>
</tr>
<tr>
<td>Constant</td>
<td>-0.257</td>
<td>1.430**</td>
</tr>
<tr>
<td>Adjusted R²/Pseudo R²</td>
<td>.099</td>
<td>0.097</td>
</tr>
</tbody>
</table>

Note. N = 2,653. Base outcome = split decision.

*a*Yes = 1, No = 0.  
**p < .01.

### Table 4. Effect of Student Characteristics on Likelihood of Student Receiving Any Favorable Outcome in a Case Reaching Decision 1995–2019

<table>
<thead>
<tr>
<th>Variable</th>
<th>Model 1: Linear probability</th>
<th>Model 2: Logit</th>
</tr>
</thead>
<tbody>
<tr>
<td>Post-2005</td>
<td>-0.097**</td>
<td>-0.431**</td>
</tr>
<tr>
<td>Lawyer representation</td>
<td>0.232**</td>
<td>0.986**</td>
</tr>
<tr>
<td>Student plaintiff</td>
<td>0.162**</td>
<td>0.713**</td>
</tr>
<tr>
<td>Constant</td>
<td>0.302**</td>
<td>-0.856**</td>
</tr>
<tr>
<td>Adjusted R²/Pseudo R²</td>
<td>.099</td>
<td>.075</td>
</tr>
</tbody>
</table>

Note. N = 2,653.

*a*Yes = 1, No = 0.

**p < .01.
other state (Santibañez & Umansky, 2018). Approximately 37% of the state’s students (about 2.3 million) who enter the school system speak a home or primary language other than English (CDE, 2020, 2021b). An unintended policy consequence of not allocating the burden of persuasion to districts may therefore inadvertently be the creation of a system in which districts are able to propose IEPs with fewer and less effective services for disadvantaged students because there is less of a concern that the IEP will be successfully challenged.

**Limitations**

Our research has several limitations. First, we cannot claim that *Schaffer* accounts for the results presented in this study; only that the time period following the decision is associated with the results we presented. As discussed earlier, three relevant Supreme Court decisions were issued relatively close to one another and therefore, it is conceivable that their combined effect is reflected in the results. Second, there are other policy changes in IDEA which may contribute to the marked “before/after” impact evident in our data, such as the IDEA 2004 reauthorization and subsequent regulations that strengthened mediation and added a resolution session requirement. The IDEA 2004 also added a requirement that special education services be based on evidence-based practices, which may have been at dispute in some hearings or guided the hearing officer’s decision in the case but is not reflected in our data coding. Third, our research did not examine access to, or effective strategies of mediation and pre-hearing advocacy (Burke & Goldman, 2017). Fourth, as discussed earlier, our data did not include disputes that were settled by the school districts (e.g., Pudelski, 2016). Hence, our results are based on measures of wins and losses only insofar as they appear in the state’s hearing database on cases which reached a decision, and therefore do not capture the behind-the-scenes negotiations. Fifth, while we coded the prevailing party, we did not examine the extent to which the item was important to that party. For example, if both the parent and the district prevailed on some item of the case, we coded the case as a “split” victory but were not able to determine the items’ procedural or substantive nature or the significance to the individual parties. Finally, although our data consisted of cases across a longitudinal period in a state which serves nearly 800,000 special education students across many different types of school districts, our analyses came only from one state.

**Future Research**

Despite the study’s limitations, we believe that our use of exploratory modeling contributes to the empirical literature on due process hearing research (Firebaugh, 2008; Shnueli, 2010). Future research should replicate our single-state analysis to examine whether similar post-*Schaffer* hearing decision patterns are found in other states. Studies could further analyze post-*Schaffer* legislation across states that shifted back the burden of persuasion to districts to more cleanly estimate the effect of burden of persuasion on litigation outcomes. Future research should also incorporate settlement information to examine whether the findings of this study hold when settlement data are included in the analyses. Studies could also analyze settlement offers more closely to examine whether they have become less generous over time given the advantage that districts hold in hearings, whether district have become “bolder” (less likely to settle), parents “more careful” (less likely to litigate in the first place), and the district advantage’s effect on parental decision on when and for what to settle. The data in our analyses further did not tell the story of the types of districts where the losses and wins occurred for either party. Future research could unpack our aggregated results to further analyze where cases both do and do not occur within a state, to examine what makes some districts “repeat players” (Galanter, 1974, p. 98) and what practices allow some others to avoid hearings all together. Understanding who sues, for what, and where, may assist in deliberations on educational and social opportunities in a state’s special education policy development and implementation in solving disputes between parents and districts in ways that are equitable and equally accessible for all.

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