

What's the Big IDEA?

By Areva D. Martin

Knowing when to compromise and to accept a school district's offer of placement and related services often proves challenging for most parents of children with autism. Despite the availability of improved medical diagnostic tests over the past half-century, some physicians opine that they have limited abilities to

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meaningfully differentiate autism from pervasive developmental disorder or in some instances, even mental retardation. The inability of experts to agree on a diagnosis and the use of confusing terminology only complicates parents' and educators' ability to develop an educational program that meets the unique needs of the child as mandated by the Individuals with Disability Education Act.

And although the act is unequivocal in providing that children with autism are entitled to a "free appropriate public education that fits his unique needs," the interpretation of this clause has been the subject of much debate and litigation and two opinions from the United States Supreme Court, *Schaffer v. West* and *Arlington v. Murphy*, make parents' decision to litigate when there is disagreement with school districts a tough call at best.

Prior to 2005, parents had what litigators would characterize as a *slight advantage* in special education lawsuits. More specifically, when parents challenged their school district's offer of placement and related services for a child with autism or a similar disorder, the district had the burden of proof despite the fact that the parent may have initiated the action. Fast-forward three years and the litigation landscape completely changed.

In November 2005, the U.S. Supreme Court issued the infamous *Schaffer v. West* decision. Justice Sandra Day O'Connor wrote for the majority that the

burden of proof in an administrative hearing challenging an Individual Education Program is properly placed upon the party seeking relief. Consequently, in *Schaffer*, the parents of a student with attention deficit disorder, who placed him in a private school after determining that the public school placement offered by their local school district was inappropriate, had the burden of proving that they were entitled to reimbursement for the tuition. The court applied what it termed "the normal default rule" that places the burden of persuasion on the plaintiff (or moving party) to prove the essential elements of his claim.

Despite the fact that the act is silent as to who has the burden of proof at administrative hearings, in support of its decision, the court noted that the Individuals with Disability Education Act provides parents with a plethora of safeguards, including the right to review all records that the school possesses on their child and the right to an "independent educational evaluation of the [i]r child at public expense if the parent disagrees with an evaluation obtained by the public agency." According to the court, pursuant to the Individuals with Disability Education Act, school districts are also required to provide parents with written notice and/or answer the subject matter of a due process complaint in writing, and to provide parents with the reasoning behind the disputed action, details about the other options considered and rejected by the Individual Education Program team and a description of all evaluations, reports and other factors that the school used in coming to its decision.

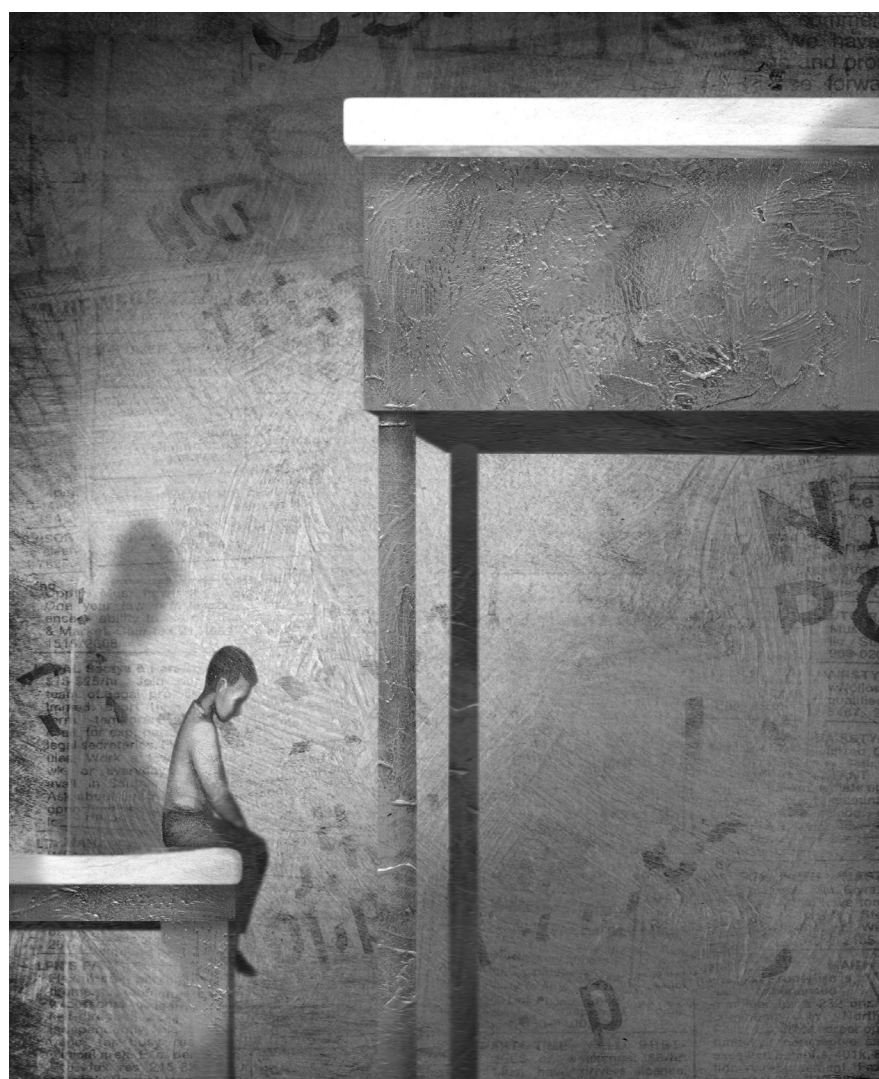
On the heels of *Schaffer*, the Supreme Court issued the *Arlington v. Murphy* decision on June 26, 2006. In *Arlington*, the court determined that expert fees incurred by parents during a due process challenge are not recoverable from the school district, even when the parents are deemed the prevailing party. Several federal courts had previously decided that such fees were not recoverable, while some disagreed, including the 3rd Circuit in *Arlington*, which had ruled that such fees warranted reimburse-

ment. As a result of the split amongst the circuit courts, the Supreme Court decided to resolve the issue of whether the Individuals with Disability Education Act should be read to allow recovery of expert fees.

As the prevailing party, the parents sought reimbursement for attorney fees and fees of an educational consultant and expert that had been retained to assist with the case. The parents argued that the Individuals with Disability Education Act provides in relevant part, that "In any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents of a child with a disability who is the prevailing party." The district opposed the parents' claim, arguing that the consultant, who also acted as an advocate for the family, was not eligible to receive attorney fees because she was not a licensed attorney. The district also asserted that the parents were not entitled to reimbursement of any expert fees because they cannot be recovered under the Individuals with Disability Education Act.

The appellate court affirmed the decision and ordered the district to pay that portion of the consultant's fees, which were related to "expert services." That court also decided that a broader, contextual reading of the Individuals with Disability Education Act was appropriate. Specifically, the 2nd Circuit looked to the House Conference Committee Report on the Individuals with Disability Education Act, and dicta in the Supreme Court's decision in *West Virginia University Hospital, Inc. v. Casey*, and concluded that attorney fees was "a term of art" that required a different interpretation from the text of the statute.

Although *Schaffer* and *Arlington* collectively have been widely criticized by parents' rights and advocacy groups, they do not eradicate parents' ability to be successful in special education litigation. Without doubt, these decisions force parents to be more selective about the decision to initiate litigation when there is disagreement over



placement or related services for a child with autism or a related disorder. Unfortunately, experts are critical in the decision-making process, and given that expert fees are not reimbursed to parents even if they prevail, unlike attorney fees, the careful selection of a knowledgeable expert on not only autism, but the federal statutory and decisional law can be the determining factor in prevailing at a hearing. Moreover, it is imperative that parents seek free district based and in some cases, independent evaluations. Such evaluations can be used to assist parents in presenting their case at mediations, which typically occur before hearings and can provide the basis for a favorable result at hearing.

With the litigation cost of a special education hearing topping six figures, it's clearly in the best interest of parents and educators to make every reasonable effort

to reach a compromise when disputes arise that are in the best interest of the child. There are no one-size-fits-all programs for children on the autism spectrum. When the life of a child with autism is involved, neither *Schaffer* nor *Arlington* has proven to be a barrier strong enough to prevent parents from seeking an educational program that provides children with an opportunity to learn in an environment that will lead to the ability to live independently and to pursue higher education as described in the preamble to the Individuals with Disability Education Act 2004.

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Judicial System Must Evolve, Adapt in Order to Meet Demand

By Rick Seabolt

As discussed in a previous article, several reasons illustrate why courts should switch from a master calendar system for scheduling trials to the direct/independent calendar system. In a master calendar system, cases are

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handled pretrial by a law and motion judge (and perhaps a discovery commissioner) and on the date set for trial are assigned from the master calendar department to an open trial department. In a direct calendar or independent calendar system, cases are assigned at the beginning of the case to a designated judge, who then handles all pretrial conferences and

motions up to and through trial.

More courts should adopt the direct/independent system. First, assigning a judge to a case from its inception inevitably leads to that judge possessing a greater understanding of the issues that are central to the dispute. The summary judgment process can be used to familiarize the trial judge with issues that will arise again in addressing motions in limine and jury instructions. In addition, the direct/independent calendar system tends to facilitate setting the case for trial with a date certain, instead of allowing the trial to "trail" while witness, client and lawyer schedules are reworked and, of course, legal costs accumulate as preparations must be repeated for each new trial date. Alone, these problems caused by a master calendar system indicate the need for a different approach. However, sev-

eral additional reasons support the adoption of the direct/independent calendar system.

Next to waiting for a jury to return a verdict, few things are more nerve-racking during the course of trial than waiting in the master calendar department for a case to be assigned to trial. The judicial assignment is a major decision over which the lawyer has no control other than the limited option of exercising a single peremptory challenge. Unlike the 10-day period available to evaluate a judge assigned under the direct calendar system, a master calendar system requires investigating the tendencies and possible biases of every judge to whom the case could be assigned so counsel can make an informed decision about whether to exercise a peremptory challenge. To add to the pressure, California Code of Civil Procedure Section 170.6(a)(2) requires that in the master calendar system such a peremptory challenge be made to the master calendar judge at the time the case is assigned to a particular trial judge. No time exists to investigate the single judge assigned to the case; rather, all potential judges must be investigated in advance of the trial date. And, if a telephone standby system is used, some counties require that the challenge be communicated during the telephone call that identifies the newly assigned judge. See Matthew Bender Practice Guide, California Trial and Post-Trial Civil Procedure 4.15[1]. The master calendar trial judge assignment process resembles a game of chance with but a moment to decide whether to accept or challenge the person in whose hands the trial is entrusted. Today there is a widespread perception that courtesy and civility are decreasing within the profession. Judges and commissioners complain about un-

necessary and unnecessarily contentious discovery disputes. Experience strongly suggests that misbehavior by counsel will be discouraged and cooperation will be encouraged if counsel recognizes that he or she will not be

the expenses and inefficiencies that are built into the system.

If the master calendar system was used by all large superior courts for more than 50 years, then there is a strong, recent trend toward direct/independent calendar systems. Undoubtedly, counties such as Los Angeles, Orange and San Diego faced major challenges in moving to a direct assignment system. Yet, with the kind of advance planning that counties such as Alameda have undertaken, the transition can be made so that the advantages of a direct/independent calendar system can be realized with no adverse consequences to the functioning of the courts. Most judges with whom I have spoken prefer the direct/independent calendar system and the associated increased ability to actively manage their cases to trial or resolution.

It is critical that the courts become as efficient as possible in resolving the disputes that arise in our society. Many ADR options provide effective and efficient alternatives to the public courtroom. Although the retention of an ADR "private judge" involves the extra expense of the fees payable to the ADR provider, ADR offers the ability to select a retired judge of the parties' choosing and the ability to set dates that are fixed and certain. A recent *Journal of Empirical Legal Studies* article on the "vanishing trial," concludes that "[o]ne of the most prominent explanations of the decline of trial is the migration of cases to other forums." If the public judicial system is to flourish in the face of stiff ADR competition, the system must evolve and adapt to the needs of the "consumers" of judicial services.

Abandoning the master calendar system for all but the most routine cases and adopting a direct or independent calendar system would help improve the effectiveness and efficiency of the state court system.

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