No. 05-18

IN THE
Supreme Court of the United States

ARLINGTON CENTRAL SCHOOL DISTRICT
BOARD OF EDUCATION,

Petitioner,

v.

PEARL MURPHY and THEODORE MURPHY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Does the attorneys' fees shifting provision of the Individuals with Disabilities Education Act (the "IDEA"), 20 U.S.C. § 1415(i)(3)(B), authorize a court to award expert fees to the parents of a child with a disability who is a prevailing party under the IDEA?

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STATUTE INVOLVED IN THIS MATTER

This case turns on the interpretation and application of the IDEA's attorneys' fees shifting provision, 20 U.S.C. § 1415(i)(3)(B).

> **Title 42 United States Code, Section 1415(i)(3)(B). Award of attorneys' fees.**
>
> 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.

INTRODUCTION

The IDEA, 84 Stat. 175, as amended, 20 U.S.C. § 1400, *et seq.*, is a Spending Clause statute that seeks to ensure that "all children with disabilities have available to them a free appropriate public education," *see* 20 U.S.C. § 1400(d)(1)(A).[1] Under the IDEA, school districts must create an "individualized education program" ("IEP") for each disabled child. *See* 20 U.S.C. § 1414(d). If parents believe their child's IEP is inappropriate, they may request an "impartial due process hearing." *See* 20 U.S.C. § 1415(f). The Court recently held that at such a hearing the party seeking relief bears the burden of proving its entitlement to the relief requested. *See Schaffer v. Weast*, 546 U.S. __, 126

1. The IDEA was recently amended by the Individuals with Disabilities Education Improvement Act of 2004 ("IDEIA"), Pub. L. No. 108-446, 118 Stat. 2647 (Dec. 3, 2004), which took effect on July 1, 2005. Because the events related to this case occurred prior to the IDEIA's effective date, all statutory citations refer to the IDEA, as codified prior to the enactment of the IDEIA. *See Lillbask v. State of Conn. Dep't of Educ.*, 397 F.3d 77, 80 n.1 (2d Cir. 2005).

S. Ct. 528, 535 (2005). A party aggrieved at the conclusion of an impartial due process hearing may seek further administrative review of the dispute by the state educational agency, *see* 20 U.S.C. § 1415(g), and, if still aggrieved, pursue a civil action in either state or federal court, *see* 20 U.S.C. § 1415(i)(2)(A). A 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." *See* 20 U.S.C. § 1415(i)(3)(B).[2] The issue is whether or not the IDEA additionally authorizes prevailing parents to recover from public school districts the costs of experts whom parents have secured to participate in litigation over IEPs. The Court should hold that the text of the IDEA unambiguously authorizes only the award of attorneys' fees – and not expert fees – to parents who prevail in IDEA litigation. *See* 20 U.S.C. § 1415(i)(3)(B).

STATEMENT OF THE CASE

I. Statutory Background

IDEA is "frequently described as a model of 'cooperative federalism.' " *Little Rock Sch. Dist. v. Mauney*, 183 F.3d 816, 830 (8th Cir. 1999). It "leaves to the States the primary responsibility for developing and executing educational programs for handicapped children, [but] imposes significant requirements to be followed in the discharge of that responsibility." *Board of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 183 (1982).

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2. This subsection of the IDEA has not been altered since the 1997 Amendments. *See Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.*, 402 F.3d 332, 333 n.1 (2d Cir. 2005), *cert. granted*, 126 S. Ct. 978 (2006). While certain portions of the 1997 Amendments did not take effect until 1998, the 1997 revision to Section 1415 took effect immediately upon passage. See IDEA Amendments of 1997, Pub. L. No. 105-17, § 201(a), 111 Stat. 37, 156.

Congress first passed the IDEA as part of the Education of the Handicapped Act in 1970 ("EHA"), 84 Stat. 175, and amended it substantially in the Education for All Handicapped Children Act of 1975, 89 Stat. 773. In 1986, Congress again amended the EHA with the Handicapped Children's Protection Act of 1986, 100 Stat. 796, to, *inter alia*, authorize the award of reasonable attorneys' fees to certain prevailing parties and to clarify the effect of the EHA on rights, procedures and remedies under other laws relating to the prohibition of discrimination. In 1997, Congress reauthorized the (now renamed) IDEA, 111 Stat. 37, and codified that attorneys' fees may not be awarded relating to any meeting of the IEP Team (with exceptions not relevant here) and authorized reductions in amounts of attorneys' fees under certain circumstances. Congress most recently amended the IDEA in 2004, 118 Stat. 2647, renamed the Act the Individuals with Disabilities Education Improvement Act ("IDEIA") and provided that state or local educational agencies may recover their reasonable attorneys' fees if a due process complaint is found to be frivolous, unreasonable or without foundation, *see* IDEIA § 615(i)(3)(B)(i)(II).

II. Statement of Facts

The Arlington Central School District ("District") is a public school district duly organized, existing and operating consistent with the Education Law of the State of New York. *See* N.Y. Educ. Law § 1804 (McKinney Supp. 2005). Under the IDEA, the District is a "local educational agency," *see* 20 U.S.C. § 1401(15)(A), responsible for the identification and evaluation of children with disabilities residing within its territorial boundaries, *see* 20 U.S.C. § 1412(a)(3)(A). The IDEA aims "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs." 20 U.S.C. § 1400(d)(1)(A). Once the children are identified, the District is responsible to provide resident children

with disabilities between the ages of 3 and 21 with a "free appropriate public education." *See* 20 U.S.C. § 1412(a)(1)(A).

As Congress found in 2004, since the statute was originally enacted in 1975, IDEA "has been successful in ensuring children with disabilities and the families of such children access to a free appropriate public education and in improving educational results for children with disabilities." *See* IDEIA § 601(c)(3). Today, more than 6.4 million children – 13.4 percent of the public school enrollment in America – receive special education services through IDEA. *See* U.S. Dep't of Educ., *Digest of Education Statistics 2003*, Table 54 (Dec. 2004). The Board of Education members volunteer their time and the District's teachers, administrators, and related service providers (e.g., school psychologists, school social workers, school nurses, occupational therapists, physical therapists, assistive technology personnel, etc.) devote their efforts daily to the education of children with disabilities to fulfil the requirements of IDEA and, more to the point, to provide the best education possible to those in their care.[3]

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3. The District spent $15,673 per pupil for special education and $5,741 per pupil for general education. *See* New York State School District Report Card, Fiscal Accountability Supplement for Arlington Cent. Sch. Dist. (2002/03 school year), *available at http://emsc32.nysed.gov/repcrd2004/supplement/131601060000.pdf* (last visited Feb. 1, 2006). The national average spending per pupil for special education is about $12,600 a year – more than $8,000 of which is for special education services; the national average is $6,500 for general education students. *See* U.S. Dep't of Educ., *Twenty-fourth Annual Report to Congress on the Implementation of the IDEA*, I-22, I-26 (2002).

The vast majority of IDEA-related spending is paid for by state and local governments. In the 1999/00 school year, for example, school districts received only $3.7 billion in federal assistance under (Cont'd)

According to statistics compiled and published by the New York State Education Department ("NYSED"), as of the 2003/04 school year, the District had a total K-12 enrollment of 10,102 students. *See* New York State School District Report Card, *Comprehensive Information Report*, Form-A (March 3, 2005), *available at http://emsc32.nysed.gov/repcrd2004/cir/131601060000.pdf* (last visited Feb. 1, 2006). The District's classification rate, or number of students classified under the IDEA as children with disabilities, for the 2003/04 school year was 11.9 percent, equivalent to the statewide average. *See* New York State School District Report Card, *Information about Students with Disabilities for Arlington Cent. Sch. Dist.*, *available at http://emsc32.nysed.gov/repcrd2004/supplement/131601060000.pdf* (last visited Feb. 1, 2006). As of December 1, 2003, less than 20 percent of the District's classified students spent more than 60 percent of their time outside of a regular education classroom. *See id.*

The core of the statute is the cooperative process that it establishes between parents and schools. *See Rowley*, 458 U.S. at 205-206. ("Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process, . . . as it did upon the measurement of the resulting IEP against a substantive standard"). "The central vehicle for this collaboration is the IEP process." *Schaffer*, 126 S. Ct. at 532. State educational authorities must identify and evaluate disabled children, *see* 20 U.S.C. §§ 1414(a)-(c), develop an IEP for each one, *see* 20 U.S.C. § 1414(d)(2), and review every IEP at least once a

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(Cont'd)
IDEA, or about $605 per student. *See* U.S. Dept. Of Educ., *Twenty-fourth Annual Report to Congress on the Implementation of the IDEA*, I-32 to I-33 (2002). This amounts to only 10.2 percent of the added costs imposed by IDEA. *See* id at I-33 n.16.

year, *see* 20 U.S.C. § 1414(d)(4). Each IEP must include an assessment of the child's current educational performance, must articulate measurable educational goals, and must specify the nature of the special services that the school will provide. *See* 20 U.S.C. § 1414(d)(1)(A).

"Parents and guardians play a significant role in the IEP process." *Schaffer*, 126 S. Ct. at 532. They must be informed about and consent to evaluation of their child. *See* 20 U.S.C. § 1414(c)(3). Parents are included as members of "IEP teams." *See* 20 U.S.C. § 1414(d)(1)(B).[4] They have the right to examine any records relating to their child, and to obtain an "independent educational evaluation of the[ir] child," *see* 20 U.S.C. § 1415(b)(1), "at public expense," 34 C.F.R. § 300.502(b)(1). They must be given written prior notice of any changes in an IEP, *see* 20 U.S.C. § 1415(b)(3), and be notified in writing of the procedural safeguards available to them under the Act, *see* 20 U.S.C. § 1415(d)(1). If parents believe that an IEP is not appropriate, they may seek an administrative "impartial due process hearing." *See* 20 U.S.C. § 1415(f). School districts may also seek such hearings, as Congress clarified in the 2004 amendments. *See* S. Rep. No. 108-185, p. 37 (108th Cong. 1st Sess.) (Nov. 3, 2003). "They may do so, for example, if they wish to change an existing IEP but the parents do not consent, or if parents refuse to allow their child to be evaluated." *Schaffer*, 126 S. Ct. at 532. "As a practical matter, it appears that most hearing requests come from parents rather than schools." *See id.*

The underlying claim from which the writ stems is for tuition reimbursement for the unilateral placement of the

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4. In New York State, the "IEP Team" is called a Committee on Special Education (the "CSE"), whose members are appointed by *the board of education or trustees of the school district.* See N.Y. Educ. Law § 4402(1)(b)(1) (McKinney Supp. 2005).

student by his parents during the 1998/99 and 1999/00 school years in a private institution that predominantly services disabled students. His parents unilaterally enrolled him in the Kildonan School in Amenia, New York ("Kildonan") prior to a scheduled meeting of the CSE held on July 30, 1998. Kildonan has not been approved by NYSED to instruct student with disabilities. By letter dated September 3, 1998, the parents requested an impartial hearing to determine whether or not the District should be required to reimburse them for the costs associated with the unilateral placement along with costs associated with private speech/language therapy secured by them at their own expense during the 1997/98 school year.

III. Procedural History

Following the parents' hearing request, the District appointed an impartial hearing officer ("IHO") from a list of certified hearing officers published by NYSED. The parents were represented during the hearing by Marilyn Arons, who described herself throughout the hearing as a "non-lawyer representative." At the hearing, Ms. Arons performed many functions traditionally attributed to licensed attorneys. She made an opening statement, she conducted direct and cross examination of witnesses, she made a motion for a directed verdict, she raised objections and she prepared a post-hearing memorandum of law. After a lengthy hearing, the IHO determined that the District had not afforded the student a free appropriate public education, held that the parents appropriately placed him at Kildonan, and awarded reimbursement for Kildonan's tuition and private speech/ language therapy secured by them at their own expense during the 1997/98 school year.

With respect to due process hearings, the IDEA permits each state to determine whether it will provide a single-tier

or two-tier administrative review process. *See* 20 U.S.C. § 1415(g). New York has opted for the two-tier approach. N.Y. Educ. Law § 4404 (McKinney Supp. 2005). The District appealed the IHO's decision to the State Review Officer ("SRO"). While that appeal was pending, the parents commenced an action in the Northern District of New York which was subsequently transferred to the Southern District of New York. The parents sought an order enforcing the IHO's ruling and compelling the District to fund the student's attendance at Kildonan pending the outcome of the SRO appeal.

While the parents' case was pending before the district court, the SRO sustained the IHO's determination to award the parents tuition reimbursement for their unilateral placement of Joseph at Kildonan for the 1998/99 school year. *See Application of the Bd. of Educ. of the Arlington Cent. Sch. Dist.*, Appeal No. 99-65 (SRO Dec. 14, 1999). In light of the timing of the SRO's decision, which was rendered in excess of the thirty day timeframe set forth in 34 C.F.R. § 300.511(b) and during the middle of the 1999/00 school year, the parents amended their complaint to request declaratory and injunctive relief. Specifically, the parents asked the district court to hold that the SRO's decision on their claim for the 1998/99 school year created an agreement, by operation of 34 C.F.R. § 300.514(c), between them and the State for their son's continued placement at Kildonan for the 1999/00 school year and beyond.

On March 1, 2000, *Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.*, 86 F. Supp. 2d 354 (S.D.N.Y. 2000), the district court held that under the IDEA the District was obligated to reimburse the parents tuition from September 17, 1999 to the date of the order, and to continue to fund the tuition as long as Kildonan remained the current educational placement. The District appealed. The Second Circuit affirmed. *Murphy*

v. Arlington Cent. Sch. Dist. Bd. of Educ., 297 F.3d 195 (2d Cir. 2002).

By several letters dated January and February 2003, the parents requested that the district court order the District to pay fees and costs incurred during the course of the impartial due process hearing. Included among the parents' expenses were $29,350 in fees for the services of Ms. Arons. Omitted from the parents' January and February 2003 applications were any fees or expenses (other than mileage) for Gerald Brooks, a speech and language pathologist who evaluated the student, prepared a report of his findings and testified on the parents' behalf at the impartial hearing (23a-32a, 35a-38a). In March 2003, the District opposed the parents' application for Ms. Arons' fees, arguing in part that there is no statutory authority for payment of experts' fees.

By Memorandum Opinion and Order, dated July 22, 2003, the district court granted the parents' application in part, and denied it in part. *See Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.*, No. 99 Civ. 9294, 2003 WL 21694398 (S.D.N.Y. July 22, 2003). The district court reasoned that at impartial due process hearings, a party has "the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities" and that the IDEA provides that a district court, in its discretion, may award a "prevailing party" "reasonable attorneys' fees." *See Murphy*, 2003 WL 21694398 at *4 (*citing* 20 U.S.C. § 1415(d)(1) and (e)(4)(B)). In reconciling these provisions, the district court concluded that unlicensed individuals such as Ms. Arons cannot collect "attorneys' fees" for doing work similar to that of an attorney, but instead, can collect for related work as "expert consulting services." *See id.* at *4.

Rather than conduct an analysis of Ms. Arons' alleged expertise, the district court stated that it was "in general

agreement" with the district courts in *Borough of Palmyra Bd. of Educ. v. R.C.*, No. 97 Civ. 6119, 31 IDELR ¶ 3 (D.N.J. July 29, 1999) and *Connors v. Mills*, 34 F. Supp. 2d 795 (N.D.N.Y. 1998) that Ms. Arons is an expert and that, insofar as the parents' claim for Ms. Arons' fees was allowable, it was "subject to substantial discount." *See Murphy*, 2003 WL 21694398 at *8. The district court found that Ms. Arons' December 20, 2002 and March 18, 2003 "certifications" of services allegedly rendered were sufficient records of the time she spent on the matter, notwithstanding the fact that Ms. Arons kept no contemporaneous time records.

The district court then determined that Ms. Arons' fees for consulting serves were compensable from the time the parents requested an impartial hearing on September 3, 1998, until the parents became "prevailing parties" under the IDEA on March 1, 2000, the date of the district court's ruling in their favor. *Id.* at *9.

It then considered which of Ms. Arons' services, within these dates, were compensable under the IDEA based on the standards set forth in *Palmyra* and *Conners*. *See Murphy*, 2003 WL 21694398 at *9-*10. The district court conducted no independent inquiry of a "market rate" for Ms. Arons' services. Instead, it relied solely on the *Palmyra* court's finding that the market rate for Ms. Arons' services is $200 per hour. *See Murphy*, 2003 WL 21694398 at *10. It determined that the parents' claims for mileage costs due to Ms. Arons' lack of a driver's license were not compensable. *See id.* at *11. Because the parents had not yet paid Ms. Arons, it ruled that an award of pre-judgement interest was not warranted. *See id.* It concluded that the parents were entitled to recover $8,650 for Ms. Arons' fees from the District. *See id.*

On August 20, 2003, the District timely filed a notice of appeal from the district court's July 22, 2003 Memorandum Opinion and Order.

IV. The Second Circuit's Decision

The court of appeals affirmed. *Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.*, 402 F.3d 332, 333 (2d Cir. 2005), *cert. granted*, 126 S. Ct. 978 (2006). The court acknowledged that in *West Virginia Univ. Hosp., Inc. v. Casey*, 499 U.S. 83 (1991), this Court had held that identical language in the then-current version of 42 U.S.C. § 1988 did not authorize award of expert fees, because "there was no 'explicit statutory authority' indicating that Congress intended for that sort of fee-shifting." *Murphy*, 402 F.3d at 336 (*quoting Casey*, 499 U.S. at 87). The court found, however, that a statement in the House Conference Committee Report on IDEA's predecessor, the Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372, 100 Stat. 796, that "[t]he conferees intend that the term 'attorneys' fees as part of the costs' include reasonable expenses and fees of expert witnesses and the reasonable costs of any test or evaluation which is found to be necessary for the preparation of the . . . case," demonstrated that Congress intended that expert fees be compensable under IDEA. *See id.* at 336-337 (*quoting* H.R. Conf. Rep. No. 687, 99th Cong., 2nd Sess. 5 (1986)). The court of appeals concluded that this Court's reference in *Casey* to the IDEA's legislative history, in dicta in a footnote, required it to distinguish IDEA from Section 1988 as construed by *Casey*. *See Murphy*, 402 F.3d at 337 (*quoting Casey*, 499 U.S. at 92 n.5).

The court of appeals recognized that its decision in this case directly conflicts with the holdings of the Seventh and Eighth Circuits that expert fees are not compensable under IDEA, but stated that its reading of the statute and this Court's cases required it to reject those decisions and, instead,

claimed to join the Third Circuit in ruling that expert fees are compensable. *See id.* at 336 (*citing Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1022 (8th Cir. 2003); *T.D. v. LaGrange Sch. Dist. No. 102*, 349 F.3d 469 (7th Cir. 2003); *Arons v. New Jersey State Bd. of Educ.*, 842 F.2d 58 (3d Cir.), *cert. denied*, 488 U.S. 942 (1988)).[5]

The court of appeals also found it "instructive" that after *Casey*, Congress amended Section 1988 to allow recovery of expert fees in civil rights actions, but took no "similar action with respect to the IDEA." *See id.* The court "believe[d] it reasonable to infer that Congress, on the basis of the Supreme Court's decision in *Casey*, saw no need to amend the IDEA because the Court had recognized that, in enacting the IDEA, Congress had sufficiently indicated in the committee report that prevailing parties could recover expert fees under the Act." *Id.* In addition, the court reasoned, awarding expert fees was consistent with IDEA's purpose of ensuring that all children with disabilities obtain a free appropriate public education. *See id.* at 338.

After the Second Circuit issued its decision in this case, a divided panel of the District of Columbia Circuit held – in accordance with the rule of the Seventh and Eighth Circuits – that IDEA does not authorize an award of expert fees to prevailing parties. *See Goldring v. District of Columbia*, 416 F.3d 70, *reh'g en banc denied* (D.C. Cir. Nov. 10, 2005). In so holding, the District of Columbia Circuit specifically acknowledged the Second Circuit's contrary ruling in this case and the conflict in the circuits. *See id.* at 73.

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5. While the Second Circuit interpreted the Third Circuit's decision in Arons as holding that expert fees are recoverable under the IDEA's fee-shifting provision, *see Murphy*, 402 F.3d at 338-339, the Third Circuit did not directly address whether IDEA itself authorizes the award of such fees to prevailing parties, *see Arons*, 842 F.2d at 62.

SUMMARY OF THE ARGUMENT

Expert witness fees are not recoverable under the IDEA, which provides only for shifting of "reasonable attorneys' fees as part of the costs" associated with a proceeding under the Act. The IDEA contains no explicit statutory authority for the recovery of expert fees. The IDEA is legislation that arises from Congress' spending power and its terms must be narrowly construed and read according to their plain meaning. The Second Circuit erred in relying on one sentence of a conference committee report to construe the IDEA as providing for the recovery of expert fees. Contrary to the Second Circuit's reasoning, this Court's analysis in *Casey* does not authorize a departure from the language of the statute. The majority of the circuits do not construe the plain meaning of the IDEA's attorneys' fees provision as allowing for expert fees, given the absence of explicit statutory authority for such relief. Public policy does not require the recovery of expert fees in IDEA proceedings.

ARGUMENT

I. The Second Circuit erred in holding that the IDEA's attorneys' fees shifting provision authorizes a court to award expert fees to the parents of a child with a disability who is a prevailing party under the IDEA.

IDEA is Spending Clause legislation that conditions federal financial assistance on compliance with the Act's requirements. *See Schaffer*, 126 S. Ct. at 531-532; *Cedar Rapids Comm. Sch. Dist. v. Garret F.*, 526 U.S. 66, 83 (1999) (Thomas, J., joined by Kennedy, J., dissenting) ("because IDEA was enacted pursuant to Congress' spending power, our analysis of the statute in this case is governed by special rules of construction."); *Rowley*, 458 U.S. at 190 n.11 & 204 n.26 (1982). One special rule of construction of a Spending Clause statute is that the Court "must interpret Spending

Clause legislation narrowly, in order to avoid saddling the States with obligations that they did not anticipate." *See Garret F.*, 526 U.S. at 84 (Thomas, J., joined by Kennedy, J., dissenting).

The IDEA does not authorize prevailing parents to recover from public school districts the costs of experts whom parents have secured to participate in litigation over IEPs. Expert witness fees are not recoverable under the IDEA, which provides explicit statutory authority only for shifting of "reasonable attorneys' fees as part of the costs" associated with a proceeding under the Act. Language of statutes emanating from Congress' Spending Power must be construed strictly according to the plain meaning of their terms to avoid saddling the States with obligations that they did not anticipate.

The Second Circuit erred first by looking at legislative intent, in the absence of any ambiguity, to determine the meaning of a statute and then by concluding that Congress intended to authorize reimbursement of expert fees in IDEA actions based on a single sentence in the 1986 House Conference Report accompanying the IDEA. While this sentence states that the "conferees intend" to permit expert fees, this legislative history cannot trump the plain language of the statute that Congress enacted into law, which is silent on the issue of expert fees. The legislative history of the IDEA does not unambiguously demonstrate that Congress expressly intended to allow, rather than prevent, prevailing parties to recover the costs of experts. The Second Circuit failed to consider competing legislative history that suggests an intentional omission by Congress of expert fees from recoverable costs under the IDEA, *viz.*, that both the Senate and the House considered and rejected draft bills that would have explicitly provided for expert fees under the IDEA's attorneys' fees provision. *See footnote 10, supra pp. 29-30*.

This Court's analysis of Section 1988's attorneys' fee provision in *Casey*, which discussed in a footnote the IDEA conference report sentence, does not authorize a departure from the language of the statute. In *Casey*, identical language to that found in the IDEA was deemed not to include expert fees. The IDEA is not different from ordinary fee-shifting statutes.

The Second Circuit also erred in making a negative inference from congressional inaction following *Casey*. If congressional intent may be gleaned from legislative inaction, then it is more likely that Congress intended to omit expert fees from the IDEA by declining to amend the IDEA's attorneys' fees provision in the same manner in which it amended Section 1988 following the *Casey* decision, i.e., to expressly provide for the recovery of expert fees.

Every circuit court of appeals that has directly addressed the issue, other than the Second Circuit, has concluded that expert fees are not recoverable under the IDEA given the absence of explicit statutory authorization for the shifting of the cost of expert fees onto the losing party, *see Goldring*, 416 F.3d at 74; *Neosho*, 315 F.3d at 1031; *Missouri Dep't of Elementary and Secondary Educ. v. Springfield R-12 Sch. Dist.*, 358 F.3d 992, 1002 (8th Cir. 2004); *T.D.*, 349 F.3d at 482. This Court should endorse the majority view and reverse the Second Circuit's holding below.

Public Policy does not require recovery of expert fees in IDEA proceedings. The promise of a free appropriate public education is not dependent on parents' ability to recover expert fees. A holding that the IDEA authorizes the award of expert fees would violate Congress' intent to focus resources on teaching and learning while reducing litigation-related costs.

A. The IDEA contains no explicit statutory authority for the recovery of expert fees.

"Fee-shifting provisions in federal statutes are not uncommon – 'numerous federal statutes allow courts to award attorney's fees.'" *A.R. v. New York City Dep't of Educ.*, 407 F.3d 65, 73-74 (2d Cir. 2005) (*quoting Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't of Health & Human Res.*, 532 U.S. 598, 600 (2001)). "Unlike in England, such 'costs' generally had not included attorneys' fees; under the 'American Rule,' each party had been required to bear its own attorneys' fees." *Marek v. Chesny*, 473 U.S. 1, 3 (1985). "The 'American Rule' as applied in federal courts, however, had become subject to certain exceptions by the late 1930s." *Marek*, 473 U.S. at 3. Some of these exceptions had evolved as a product of the "inherent power in the courts to allow attorneys' fees in particular situations." *See Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 260-262 (1975). "But most of the exceptions were found in federal statutes that directed courts to award attorneys' fees as part of costs in particular cases." *Marek*, 473 U.S. at 3.

The IDEA grants courts discretionary power to "award reasonable attorneys' fees as part of the costs to the parents of a child with a disability who is the prevailing party." 20 U.S.C. § 1415(i)(3)(B). "This language assumes, by its construction, that costs include something more than attorneys' fees but the IDEA does not specifically authorize an award of costs or define what items are recoverable as costs." *Neosho*, 315 F.3d at 1031 (internal quotation omitted).

Under Rule 54(d)(1), the prevailing party is presumed to be entitled to an award of costs. *See* Fed. R. Civ. P. 54(d)(1). The term "costs" in Rule 54(d)(1) is a term of art. *See* 10 Moore's Federal Practice, §§ 54.103(1), (3)(a) (Matthew Bender 3d ed.). "Absent a specific definition of costs, [courts] look to the general provisions providing for

the taxation of costs in federal courts as a matter of course." *Neosho*, 315 F.3d at 1031. Rule 54(d)(1) does not provide any authority for taxing items not specifically permitted by 28 U.S.C. § 1920. *See Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 441-445 (1987).

"Title 28 U.S.C. § 1920(3) provides for payment of witness fees, and 28 U.S.C. § 1821(b) limits that payment to a $40 per day attendance fee." *See Crawford*, 482 U.S. at 441-445. "These sections, read together, permit district courts to tax certain fees as costs against the non-prevailing party." *See Brillon v. Klein Indep. Sch. Dist.*, 274 F. Supp. 2d 864, 871-872 (S.D. Tex. 2003), *aff'd in part & rev'd in part*, 100 Fed. Appx. 309 (5th Cir. 2004). "They do not provide for an additional tax for expert fees." *See id.*

This Court has held that "when a prevailing party seeks reimbursement for fees paid to its own expert witnesses, a federal court is bound by the limit of § 1821(b), absent contract or explicit statutory authority to the contrary." *Crawford*, 482 U.S. at 439. That is, the actual expenses incurred by the party for the witness's testimony are not recoverable as costs. *See id.* at 437. There is "no authority to support the counter-intuitive assertion that the term 'costs' has a different and broader meaning in fee-shifting statutes than it has in the costs statutes that apply to ordinary litigation." *Casey*, 499 U.S. at 87 n.3. There is no doubt that Congress knows how to specify a shifting of expert witness fees. *See id.* at 88-89 (noting that "at least 34 statutes in 10 different titles of the United States Code explicitly shift attorney's fees and expert witness fees"), *superseded by statute*, 42 U.S.C. § 1988(c) (2003) (explicitly providing for an award of expert witness fees).

The Second Circuit's first, and primary, error was its failure to address the lack of "explicit statutory authority"

for shifting of expert witness fees. As cited above, the IDEA's fee provision states:

> In any action or proceeding brought under this section, the court, in its discretion, may award *reasonable attorney's fees as part of the costs* to the parents of a child with a disability who is the prevailing party.

20 U.S.C. § 1415(i)(3)(B) (emphasis added).

Had the Second Circuit considered whether or not the IDEA provides "explicit statutory authority" for recovery of expert witness fees, it could not have rationally concluded *other* than that the IDEA does not authorize the recovery of expert witness fees beyond the amounts provided in 28 U.S.C. § 1821(b). *See Goldring*, 416 F.3d at 74; *T.D.*, 349 F.3d at 481-482; *Neosho*, 315 F.3d at 1031-33. The text of the IDEA's fee-shifting provision conclusively demonstrates that Congress authorized reimbursement of only attorneys' fees.[6] This conclusion flows not simply from the plain meaning of the statute but also from the cannon of statutory construction, *expressio unius est exclusio alterius*, to expressly include one or more of a class in a written instrument must be taken as an exclusion of all others. *See TRW, Inc. v. Andrews*, 534 U.S. 19, 29 (2001).

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6. That conclusion is bolstered by Section 1415(i)(3)(F), which directs a court to reduce "the amount of attorneys' fees awarded under this section" whenever it finds certain specified facts that are explicitly directed to "attorneys" and "legal services." *See* 20 U.S.C. § 1415(i)(3)(F). If Congress intended Section 1415(i)(3)(F) to authorize the reimbursement of expert fees as well as attorneys' fees, there is no reason to believe that Congress would have gone to such great lengths in Section 1415(i)(3)(F) to identify circumstances in which an award of attorneys' fees should be reduced but have remained silent as to expert fees.

1. A statute emanating from Congress' Spending Power must be construed narrowly.

The Constitution empowers Congress to "lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States." U.S. Const. Art. I, § 8, cl. 1. "Incident to this power, Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power 'to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives'." *South Dakota v. Dole*, 483 U.S. 203, 206 (1987) (*quoting Fullilove v. Klutznick*, 448 U.S. 448, 474 (1980)).

The Court has repeatedly emphasized that, when Congress places conditions on the receipt of federal funds under the Spending Clause, "it must do so unambiguously." *See, e.g., Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1, 17 (1981); *see also New York v. United States*, 505 U.S. 144, 158 (1992); *South Dakota*, 483 U.S. at 207; *Rowley*, 458 U.S. at 190 n.11. This is because a law that "condition[s] an offer of federal funding on a promise by the recipient . . . amounts essentially to a contract between the Government and the recipient of funds." *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998). As such, "[t]he legitimacy of Congress' power to legislate under the spending power . . . rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.' There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it." *Pennhurst*, 451 U.S. at 17. "It follows that [the Court] must interpret Spending Clause legislation narrowly, in order to avoid saddling the States with obligations that they did not anticipate." *Garret F.*, 526 U.S. at 84 (Thomas, J., joined by

Kennedy, J., dissenting). The Second Circuit's approach turns this Spending Clause presumption on its head.

Applying a "plain meaning interpretation," *see Marek*, 473 U.S. at 9, to the IDEA's attorneys' fees provision will not "produce absurd results," *cf. id.* at 21 (Brennan, J., jointed by Marshall, J., and Blackmun, J., dissenting), since "Congress . . . also took steps to limit the fiscal burdens that States must bear in attempting to achieve [the] laudable goal [of educating handicapped children with nonhandicapped children whenever possible]," *see Garret F.*, 526 U.S. at 84 (Thomas, J., joined by Kennedy, J., dissenting). These steps included requiring States to provide an education that is "appropriate" rather than one which purportedly maximizes the potential of disabled students, *see* 20 U.S.C. § 1400(c); *Rowley*, 458 U.S. at 200, recognizing that placement in the public school environment is not always possible, *see* 20 U.S.C. § 1412(a)(5), placing limitations on tuition reimbursement due to lack of notice or unreasonable conduct by parents, *see* 20 U.S.C. § 1412(a)(10)(A)(iii), and prohibiting the recovery of attorneys' fees in certain circumstances, *see* 20 U.S.C. § 1415(i)(3)(D).

For this reason, the Court has previously recognized that Congress did not intend to "impos[e] upon the States a burden of unspecified proportions and weight" in enacting IDEA. *See Rowley*, 458 U.S. at 176. These federal concerns require the Court to interpret IDEA's attorneys' fees provision as exclusive of experts fees. The Second Circuit's approach to the contrary, *see Murphy*, 402 F.3d at 337-338, "disregards the constitutionally mandated principles of construction applicable to Spending Clause legislation and blindsides unwary States with fiscal obligations that they would not have anticipated," *see Garret F.*, 526 U.S. at 85 (Thomas, J., joined by Kennedy, J., dissenting).

B. The Second Circuit erred in relying on legislative history to construe the IDEA as providing for the recovery of expert fees.

Proper respect for the legislative powers vested in Congress "implies that statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *United States v. Albertini*, 472 U.S. 675, 680 (1985). It is a basic principle of statutory interpretation that the Court need not consider the legislative history of a statute unless the plain language of the statute is ambiguous. *See, e.g., Burlington Northern R.R., Co. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 461 (1987) ("Unless exceptional circumstances dictate otherwise, when we find the terms of a statute unambiguous, judicial inquiry is complete"). "The mere fact that statutory provisions conflict with language in the legislative history is not an exceptional circumstance permitting a court to apply the legislative history rather than the statute." *United States v. Erikson P'ship*, 856 F.2d 1068, 1070 (8th Cir. 1988). "A sentence in a conference report cannot rewrite unambiguous statutory text with a Supreme Court-tested and -approved meaning." *See Goldring*, 416 F.3d at 75.

The purpose of a statute includes not only what it sets out to change, but also what it resolves to leave alone. *See Rodriguez v. United States*, 480 U.S. 522, 525-526 (1987). "The best evidence of that purpose is the statutory text adopted by both Houses of Congress and submitted to the President." *Casey*, 499 U.S. at 98. "Where that contains a phrase that is unambiguous – that has a clearly accepted meaning in both legislative and judicial practice – we do not permit it to be expanded or contracted by the statements of individual legislators or committees during the course of the enactment process." *Id.*; *see also United States v. Ron Pair Enter.*, 489 U.S. 235, 241 (1989) ("[W]here, as here, the

statute's language is plain, 'the sole function of the court is to enforce it according to its terms'") (*quoting Caminetti v. United States*, 242 U.S. 470, 485 (1917)).

"When the statute's language is plain, the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms." *Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004) (internal quotation marks omitted); *see also Ratzlaf v. United States*, 510 U.S. 135, 147-148 (1994) (court should "not resort to legislative history to cloud a statutory text that is clear"); *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 808-809 (1989) ("Legislative history is irrelevant to the interpretation of an unambiguous statute."); Oliver Wendell Holmes, *Collected Legal Papers* at 207 (1920) ("We do not inquire what the legislature meant; we ask only what the statute means.").[7]

"Congress could have made explicit in the statutory language of the IDEA that attorneys' fees include expert fees." *Goldring v. District of Columbia*, No. 02 Civ. 1761, slip op. at 6 (D.D.C. July 21, 2004).[8] "Yet, the fee shifting statute at

7. While "[r]eference to statutory design and pertinent legislative history may often shed new light on congressional intent, notwithstanding statutory language that appears superficially clear," *Natural Res. Def. Council v. Browner*, 57 F.3d 1122, 1127 (D.C. Cir. 1995); *accord, e.g.*, *Sierra Club v. EPA*, 353 F.3d 976, 988 (D.C. Cir. 2004); *Consumer Elec. Ass'n v. FCC*, 347 F.3d 291, 298 (D.C. Cir. 2003), the Court does not confront "superficially clear" language here. In *Casey*, this Court said that the expression "reasonable attorneys' fees as part of the costs" is clear, not just superficially so. *See Casey*, 499 U.S. at 98-99.

8. Indeed, Congress in 2004, considered but did not adopt a bill (the Fairness and Individual Rights Necessary to Ensure a Stronger Society: Civil Rights Act of 2004) that would have amended IDEA and numerous other civil rights statutes to explicitly authorize (Cont'd)

issue here provides no explicit authorization of expert witness fees." *Neosho*, 315 F.3d at 1032. Instead, the IDEA states only that courts "may award reasonable attorneys' fees as part of the costs to the parents of a child with a disability who is the prevailing party." 20 U.S.C. § 1415(i)(3)(B). That language parallels the language of Section 1988 ("reasonable attorneys' fees as part of the costs") that the Supreme Court concluded in *Casey* did not include expert fees within an award. *See Casey*, 499 U.S. at 102. "The statutory language of the IDEA, like Section 1988, is not ambiguous, and therefore legislative history is not relevant to its interpretation." *Goldring v. District of Columbia*, No. 02 Civ. 1761, slip op. at 6 (D.D.C. July 21, 2004). "Even though a single passage in one piece of the legislative history may indicate otherwise, without occasion to consult such legislative history, it does not govern here."[9] *Id*. "Consistent

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(Cont'd)
an award of expert fees. *See* S. 2088, 108th Cong. 2d Sess. (2004); H.R. 3809, 108th Cong. 2d Sess. (2004). The bill explained that its purpose was, *inter alia*, "to allow recovery of expert fees by prevailing parties under civil rights fee-shifting statutes" and that this purpose was "made necessary by the decision of the Supreme Court in [*Casey*]." *See* S. 2088 at §§ 521, 522(1). Specifically, it would have provided that "Section 615(i)(3)(B) of the Individuals with Disabilities Education Act (20 U.S.C. § 1415(i)(3)(B)) is amended by inserting '(including expert fees)' after 'attorneys' fees.'" S. 2088 at § 523(e). If, as the Second Circuit posited below, Congress already allowed for the recovery of expert fees under IDEA's fee-shifting provision, then Congress would have had no need to include IDEA among the civil rights statutes to be amended by the bill. That bill expired at the end of the 108th Congress.

9. If the congressional conferees intended that the IDEA fee provision encompass expert fees as the Second Circuit suggests, they neglected to provide language in the conference bill that would have accomplished this purpose. Any argument that a court should correct a committee oversight "profoundly mistakes" the judicial "role." *See Casey*, 499 U.S. at 100.

with the reasoning in *Casey*, . . . Congress could have included expert costs in attorneys' fees by specifically stating so on the face of the statute." *Goldring v. District of Columbia*, No. 02 Civ. 1761, slip op. at 6 (D.D.C. July 21, 2004). "The fact that Congress did not do so is significant and determinative."[10] *Id*.

C. *Casey* does not authorize departure from the language of the statute.

The Second Circuit erred in construing dicta in *Casey*, which commented on some of the legislative history behind

10. Other legislative history of the 1986 amendment to the IDEA supports the conclusion that Congress purposefully declined to include expert costs in attorneys' fees. Both the Senate and House bills at various times contained language that would have explicitly provided for expert fees. The report accompanying S. 415, the Senate bill to add a fee provision to the IDEA, discloses that the bill as reported out by the Senate Committee on Labor and Human Resources contained the following provision: "[T]he court may, in its discretion, award a reasonable attorney's fees, reasonable witness fees, and other reasonable expenses of the civil action, in addition to the costs to" a prevailing parent. *See* S. Rep. No. 99-112 at 7 (99th Cong. 1st Sess.) (July 25, 1985). On the floor, however, the Senate approved Amendment No. 561 that did not mention witness fees and other expenses, but only attorneys' fees and costs. *See* 131 Cong. Rec. No. 104 S10396, S10465 (99th Cong. 1st Sess.) (July 30, 1985).

In turn, the House's original bill, H.R. 1523, authorized the courts to "award reasonable attorneys' fees expenses, and costs." The "expenses" language was carried forward in the bill as reported out by the House Committee on Education and Labor, and the House Committee Report stated that this language encompassed expert fees. *See* H.R. Rep. No. 99-296 at 1, 6 (99th Cong. 1st Sess.) (Oct. 2, 1985). This language was abandoned, however, in the bill enacted by both Houses of Congress after debates in which no one suggested that the language Congress enacted – "attorneys' fees as part of the costs" – encompassed expert fees. *See* 132 Cong. Rec. No. 93 S9277 (99th Cong. 2d Sess.) (July 17, 1986); 132 Cong. Rec. No. 97 H4833 (99th Cong. 2d Sess.) (July 24, 1986); 132 Cong. Rec. No. 97 H4841 (99th Cong. 2d Sess.) (July 24, 1986).

the IDEA's attorneys fees provision, *see Casey*, 499 U.S. at 91 n.5, as authority to depart from the text of the statute and conclude that Congress intended to allow prevailing parties to recover the costs of experts, *see Murphy*, 402 F.3d at 337; *see also Brillon*, 274 F. Supp. 2d at 872 (similarly reading *Casey* as authorizing courts to depart from the text of IDEA's attorneys' fees provision based on legislative history).[11] "*Casey* in no way endorsed the proposition that attorneys' fees include expert fees under the IDEA or that the legislative history of the IDEA is even relevant to the consideration of whether expert fees are recoverable under the IDEA." *Goldring v. District of Columbia*, No. 02 Civ. 1761, slip op. at 5 (D.D.C. July 21, 2004), *aff'd*, 416 F.3d 70, 75, *reh'g en banc denied* (D.C. Cir. Nov. 10, 2005). "If the [*Casey*] Court had found this one sentence of legislative history compelling, it would have included section 1415 in its catalogue of statutes authorizing a prevailing party to shift attorneys' fees as well as expert fees." *Goldring*, 416 F.3d at 75-76. The Second Circuit's analysis of the fifth footnote in Casey construes the word "apparent" as meaning "obvious" (e.g.,

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11. The Court's fifth footnote in *Casey* states in full:

> WYUH cites a House Conference Committee Report from a statute passed in 1986, stating: "The conferees intend the term 'attorneys' fees as part of the costs' include reasonable expenses and fees of expert witnesses and the reasonable costs of any test or evaluation which is found to be necessary for the preparation of the . . . case." *See* H.R. Conf. Rep. No. 99-687, p.5 (1986) (discussing the Handicapped Children's Protection Act of 1986, 20 U.S.C. § 1415(3)(4)(B)). In our view this undercuts rather than supports WVUH's position: The specification would have been quite unnecessary if the ordinary meaning of the term included those elements. The statement is an apparent effort to depart from ordinary meaning and to define a term of art.

Casey, 499 U.S. at 91, n.5.

an obvious effort to depart from ordinary meaning and define a term of art) when it is equally possible to be read as suggesting something that may not be borne out by more rigorous analysis (e.g., an illusory effort). *See* Merriam-Webster Online for variations of meaning for "apparent," *available at http://www.m-w.com/dictionary/apparent* (last visited February 20, 2006).

In *Casey*, this Court considered whether the Civil Rights Attorneys' Fees Awards Act, 42 U.S.C. § 1988, gave authority to shift expert fees. *See Casey*, 499 U.S. at 84. The former version of Section 1988 contained a fee-shifting provision, almost identical to that in the IDEA (then named the Handicapped Children's Protection Act), allowing "the prevailing party . . . a reasonable attorney's fee as part of costs." *See* 42 U.S.C. § 1988(b), *amended by* 42 U.S.C. § 1988(c) (2003). The *Casey* Court held that this language was not an explicit statutory authorization that allowed shifting of expert witness fees. *See Casey*, 499 U.S. at 102.

In response to an argument that the legislative history of the IDEA provided an indication that Congress intended to include expert fees in "attorneys' fees as part of costs" under Section 1988, the Court observed, in a footnote, that a Conference Committee Report on the IDEA stated that "[t]he conferees intend that the term 'attorneys' fees as part of the costs' include reasonable expenses and fees of expert witnesses and the reasonable costs of any test or evaluation which is found to be necessary for the preparation of the . . . case." *See id.* at 91 n.5 (*quoting* H.R. Conf. Rep. No. 99-687 at 5 (1986), *reprinted in* 1986 U.S.C.C.A.N. 1798, 1808). The Court, in dicta, characterized this portion of the IDEA's legislative history as "an apparent effort to depart from ordinary meaning and to define a term of art," noting that "the specification would have been quite unnecessary if the ordinary meaning of the term included those elements." *See id.*

According to the Second Circuit, this dicta compelled it to conclude that the IDEA's attorneys' fees provision includes expert witness fees. *See Murphy*, 402 F.3d at 337. However, "this 'apparent effort' to define a term of art in legislative history . . . is not the kind of 'explicit statutory' authorization the Supreme Court said in *Crawford* was necessary to exceed the limitations of the general costs statutes." *Neosho*, 315 F.3d at 1032. *Casey* merely referenced the legislative history of the IDEA as an example of the explicit distinguishing of attorneys' fees from expert fees by Congress, not as an endorsement that attorneys' fees include expert fees under the IDEA. *See Goldring v. District of Columbia*, No. 02 Civ. 1761, slip op. at 5 (D.D.C. July 21, 2004).

> While it may be ironic that the legislative history of the IDEA was used as an example in *Casey* of a specification that attorneys' fees include expert fees, it is not inconsistent or contradictory . . . to conclude nevertheless that, according to the logic of *Casey* and governing rules of statutory interpretation, the IDEA's statutory language is clear and does *not* include expert fees within recoverable attorneys' fees.

Id. (emphasis in original).

The Second Circuit misconstrued this Court's citation to the House Conference Report in *Casey* as an endorsement of a method of statutory interpretation it has consistently rejected. The Second Circuit's reading subsumes that the plain meaning of a statutory precept, a meaning consistent with judicial and legislative use, can be set aside by a comment in the Conference Report. The principal purpose of the footnote was not to rule on the efficacy of alleged congressional intent to depart from ordinary meaning and define a term of art, but to point out to the appellant in *Casey* that its citation to the House Conference Report undercut its

argument that experts' fees were ordinarily included under "attorneys' fees" as "costs."

D. The majority view does not construe the plain meaning of the IDEA's attorneys' fees provision as allowing for expert fees, given the absence of explicit statutory authority for such relief.

The majority view on whether Section 1415 "enables a prevailing party to recover expert fees as part of his costs" was most recently articulated by the District of Columbia Circuit in *Goldring*. The court in *Goldring* acknowledged the conflict among the circuits on this issue and expressly considered and rejected the reasoning and holding of the Second Circuit in this case. *See Goldring*, 416 F.3d at 73. Indeed, in rejecting the Second Circuit's approach, the court stated that

> [The] correct decision does not seem to us to be difficult to reach, for the Supreme Court has stated in fairly unequivocal terms that language nearly identical to that used in section 1415 is unambiguous and, more to the point, does not allow a prevailing party to shift his expert fees.

See Goldring, 416 F.3d at 73.

The District of Columbia Circuit reasoned that its conclusion "flows directly from the application of two Supreme Court decisions," namely, *Crawford* and *Casey*. *See Goldring*, 416 F.3d at 74 (citation omitted). As the District of Columbia Circuit explained, *Crawford* held that, in awarding fees to the prevailing party for expert services, a court is limited to the costs allowed by 28 U.S.C. § 1821(b), "absent contract or explicit statutory authority to the contrary." *See id.* at 73 (*citing Crawford*, 482 U.S. at 439).

Casey, in turn, held that language materially identical to IDEA's fee-shifting provision contained in Section 1988 "contains no such 'explicit statutory authority to the contrary.' " *See Goldring*, 416 F.3d at 73 (*quoting Casey*, 499 U.S. at 86).

Accordingly, the court in *Goldring* concluded that the logic of *Crawford* and *Casey* controls whether expert fees are recoverable under IDEA:

> [B]ecause section 1415 and the version of section 1988 construed in *Casey* contain materially identical language and *Casey* held that section 1988's language does not enable a prevailing party to shift his expert fees, we cannot but conclude that section 1415 does likewise. That is the end of the matter for us.

Goldring, 416 F.3d at 74.

In so holding, the court emphatically refused to alter its interpretation on the basis of the conference report accompanying IDEA's fee-shifting provision." *Id.* (*citing* H.R. Conf. Rep. No. 687, 99th Cong. 2d Sess. 5 (1986)). The court explained that "[a] sentence in a conference report cannot rewrite unambiguous statutory text." *Goldring*, 416 F.3d at 75.

The Eighth Circuit took the same approach two years earlier in *Neosho*. It upheld the district court's refusal in that case to award expert fees under the IDEA. The court explained that the "'apparent effort' to define a term of art in the legislative history [was] an unsuccessful one" because Congress had not engaged in the sort of "'explicit statutory' authorization" required under *Crawford* to "exceed the limitations of the general costs statutes." *See Neosho*, 315 F.3d at 1032. The court also explained that "costs" "is an ordinary term with which federal judges are well acquainted"

and that "[a]bsent a specific definition of costs" in the statutory text, courts must "look to the general provisions providing for the taxation of costs in federal courts as a matter of course." *Neosho*, 315 F.3d at 1031.

The Seventh Circuit in *T.D.* expressly "agree[d] with the Eighth Circuit's reasoning and conclusion" in *Neosho*. *See T.D.*, 349 F.3d at 481. It too held that, under *Crawford* and *Casey*, an "explicit statutory authorization was necessary to allow courts to exceed the limitations under 28 U.S.C. § 1821 and § 1920," and that no authorization was present in the IDEA. *See id.* at 482. The court similarly refused to find such authorization in the legislative history of IDEA's fee-shifting provision. *See T.D.*, 349 F.3d at 482.

E. Public policy does not require recovery of expert fees in IDEA proceedings.

The Second Circuit correctly noted that "a prevailing parent in an IDEA case . . . can collect neither compensatory damages, monetary relief, nor punitive damages; rather, their relief rests solely in the appropriate education of their child." *See Murphy*, 402 F.3d at 338; *see also Thompson v. Board of Special Sch. Dist. No. 1*, 144 F.3d 574, 580 (8th Cir. 1998). The Second Circuit reasoned that "absent a fee shifting provision that allows for the recovery of appropriate expert fees, most parents with children with disabilities would have difficulty pursuing their case," *see Murphy*, 402 F.3d at 338, "thereby diminishing their ability to protect their [children's] rights to a free appropriate public education designed to meet their unique needs," *see Brillon*, 274 F. Supp. 2d at 872.[12]

12. While the Second Circuit notes, *en passant*, that "expert testimony is often critical in IDEA cases, which are fact-sensitive inquires," *see Murphy*, 402 F.3d at 338, it is undisputed that Ms. Arons provided no expert testimony during the underlying impartial hearing.

This reasoning is flawed for two reasons: (1) Congress has already imposed painstakingly detailed mandatory obligations on public school districts to notify and educate parents about their legal rights and to shepherd them through the IDEA's administrative process which "level[s] the playing field," *see Weast v. Schaffer*, 377 F.3d 449, 453 (4th Cir. 2004), *aff'd*, 546 U.S. –, 126 S. Ct. 528 (2005) and (2) it ignores that one of the goals of the IDEA, and a key objective of the 2004 Amendments to IDEA, is to reduce the litigation costs for schools under the Act, *see Schaffer*, 126 S. Ct. at 535 (discussing the IDEIA).

1. The promise of a free appropriate public education is not dependent on parents' ability to recover expert fees.

School district may have an advantage in information and expertise, but Congress addressed this when it obligated schools to safeguard the procedural rights of parents and to share information with them. *See School Comm. of Burlington v. Department of Educ.*, 471 U.S. 359, 368 (1985). As noted above, parents have the right to review all records that the school possesses in relation to their child. *See* 20 U.S.C. § 1415(b)(1). They also have the right to an "independent educational evaluation of the[ir] child." *See id.* The regulations clarify this entitlement by providing that a "parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency." *See* 34 C.F.R. § 300.502(b)(1). "IDEA thus ensures parents access to an expert who can evaluate all the materials that the school must make available, and who can give an independent opinion." *Schaffer*, 126 S. Ct. at 536. "They are not left to challenge the government without a realistic opportunity to access the necessary evidence, or without an expert with the firepower to match the opposition." *Id.*

Additionally, in 2004, Congress added provisions requiring school districts to answer the subject matter of a complaint in writing, and to provide parents with the reasoning behind the disputed action, details about the other options considered and rejected by the IEP team, and a description of all evaluations, reports, and other factors that the school used in coming to its decision. *See* IDEIA at § 615(c)(2)(B)(i)(I). Prior to a hearing, the parties must disclose evaluations and recommendations upon which they intend to rely. *See* 20 U.S.C. § 1415(f)(2). "IDEA hearings are deliberately informal and intended to give ALJs the flexibility that they need to ensure that each side can fairly present its evidence." *Schaffer*, 126 S. Ct. at 536. "IDEA, in fact, requires state authorities to organize hearings in a way that guarantees parents and children the procedural protections of the Act." *Id.* at 536-537. Finally, and perhaps most importantly, parents may recover attorneys' fees if they prevail. *See* 20 U.S.C. § 1415(i)(3)(B). "These protections ensure that the school bears no unique informational advantage," *Schaffer*, 126 S. Ct. at 537, which compels recovery of expert fees for prevailing parents.

2. A holding that the IDEA authorizes the award of expert fees would violate Congress' intent to focus resources on teaching and learning while reducing litigation-related costs.

Public policy does not require the Court to depart from ordinary rules of statutory interpretation given that one of the goals of the IDEA, and a key objective of the 2004 Amendments to IDEA, is to reduce the litigation costs for schools under the Act. *See Schaffer*, 126 S. Ct. at 535. Holding that the IDEA authorizes the award of expert fees would have precisely the opposite effect.

"The IDEA is silent about whether marginal dollars should be allocated to litigation and administrative expenditures or to educational services." *Schaffer*, 126 S. Ct. at 535. However, "Congress has . . . repeatedly amended the Act in order to reduce its administrative and litigation-related costs." *Id*. For example, in 1997 Congress mandated that States offer mediation for IDEA disputes.[13] *See* 20 U.S.C. § 1415(e).

One of Congress' primary aims with the 2004 Amendments was to reduce the amount of litigation and promote cooperation with respect to the adoption and implementation of IEPs. *See Schaffer*, 126 S. Ct. at 535. Congress made new findings that "[p]arents and schools should be given expanded opportunities to resolve their disagreements in positive and constructive ways," and that "[t]eachers, schools, local educational agencies, and States should be relieved of irrelevant and unnecessary paperwork burdens that do not lead to improved educational outcomes." *See* IDEIA at §§ 601(c)(8)-(9).

Specifically, the amendments strengthen the notice requirements for due process complaints, *see id*. at § 615(b)(7)(A), establish a two-year statute of limitations for such complaints, *see id.* at § 615(b)(6)(B), encourage the use of voluntary mediation, *see id.* at § 615(e), add a mandatory "resolution session" prior to any due process hearing, *see id.* at § 615(f)(1)(B), and authorize the award of attorneys' fees to the school district if a parent's complaint is frivolous or was filed for an improper purpose, *see id.* at § 615(i)(3)(B).

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13. *See* General Accounting Office, *Special Education: Numbers of Formal Disputes Are Generally Low and States Are Using Mediation and Other Strategies to Resolve Conflicts*, No. GAO 03-897, 13-14 (Sept. 2003) (finding that nearly 80% of all due process hearings nationwide under IDEA occur in just five States and the District of Columbia and that New York has the highest rate of due process hearings per 10,000 students receiving special education benefits of any State).

CONCLUSION

The judgment of the Second Circuit should be reversed. Expert witness fees are not recoverable under the IDEA, which provides only for shifting of "reasonable attorneys' fees as part of the costs" associated with a proceeding under the Act. The IDEA contains no explicit statutory authority for the recovery of expert fees. The IDEA is legislation that arises from Congress' spending power and its terms must be narrowly construed and read according to their plain meaning. The Second Circuit erred in relying on one sentence of a conference committee report to construe the IDEA as providing for the recovery of expert fees. Contrary to the Second Circuit's reasoning, this Court's analysis in *Casey* does not authorize a departure from the language of the statute. The majority of the circuits do not construe the plain meaning of the IDEA's attorneys' fees provision as allowing for expert fees, given the absence of explicit statutory authority for such relief. Public policy does not require the recovery of expert fees in IDEA proceedings. The procedural protections in the IDEA level the playing field between parents and school districts and provide for an independent evaluation at public expense, among other safeguards, to allow the parents access to expert opinion at the point where it best serves the interests of the student, the development of the IEP.

Respectfully submitted,

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