No. 05-18

IN THE
Supreme Court of the United States

ARLINGTON CENTRAL SCHOOL DISTRICT
BOARD OF EDUCATION,
Petitioner,
v.
PEARL AND THEODORE MURPHY,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

BRIEF OF RESPONDENTS

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QUESTION PRESENTED

Does the cost-shifting provision of the Individuals with Disabilities Education Act, 20 U.S.C. 1415(i)(3)(B), which provides that a court may "award reasonable attorneys' fees as part of the costs to the parents" who are prevailing parties, authorize an award of expert costs?

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PRELIMINARY STATEMENT

Respondents Pearl and Theodore Murphy are the parents of Joseph Murphy, a child with disabilities. The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400–1487 (2000), obligates school districts to provide children with disabilities a "free appropriate public education." *Id.* 1412(a)(1). When the Murphys and petitioner Arlington Central School District Board of Education reached an impasse over the appropriate educational placement for Joe, the Murphys invoked IDEA's due process provision and prevailed. The Murphys could not have succeeded without their educational expert's assistance.

The question before the Court is whether IDEA's cost-shifting provision, 20 U.S.C. 1415(i)(3)(B), authorizes the Murphys to recover the cost of their expert's participation. The answer is yes. The text, history, and purpose of Section 1415(i)(3)(B) demonstrate that it empowers courts to award parents the costs of experts. Because Congress authorized these awards, petitioner's contention that *West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83 (1991), controls this case misses the mark.

The evidence that Congress authorized prevailing parents to recover expert costs is overwhelming. Congress added Section 1415(i)(3)(B) to IDEA in 1986 when it enacted the Handicapped Children's Protection Act (HCPA) to overturn *Smith v. Robinson*, 468 U.S. 992 (1984). *Smith* had held that attorneys' fees were unavailable to prevailing parents under the then-current version of IDEA. Congress responded in the HCPA first by authorizing awards of "attorneys' fees as part of the costs to the parents" in Section 1415(i)(3)(B). Then, in a provision of the HCPA petitioner disregards, Congress underscored that the phrase "the costs to the parents" includes expert costs by directing the General Accounting Office (GAO) to report on the "attorneys' fees, costs, and expenses awarded" to prevailing parents and "the

number of hours spent by personnel, including attorneys and consultants" in IDEA proceedings. P.L. 99-372, § 4(b)(3), 100 Stat. 796, 797–98 (1986). Taken together, these provisions demonstrate that Congress used "costs" in its ordinary sense — to cover the expenses parents incur in IDEA proceedings, including the costs of consultants and experts — and not as a restrictive legal term of art.

The history of Section 1415(i)(3)(B)'s implementation confirms this reading. Courts uniformly understood IDEA to permit awards of expert costs. The GAO Report recognized that expert costs were recoverable. And during Congress' deliberations on the HCPA, there was bipartisan consensus that prevailing parents should recover the costs of experts — a consensus reflected in uncontradicted statements in the House, the Senate, and the Conference Report.

The Murphys' reading of the statute gives effect to the text of Section 1415(i)(3)(B) and is consistent with IDEA's core goal: providing children with disabilities a free, appropriate public education. The same cannot be said of petitioner's interpretation, which rewrites Section 1415(i)(3)(B) to provide for attorneys' fees and nothing more, and precludes parents from recovering expert costs, even though they need expert assistance to vindicate their right to participate in IDEA proceedings. Petitioner's reading thus imperils the fair resolution of due process hearings and subverts IDEA's core goal of ensuring that children with disabilities receive an education that is both appropriate and free.

STATUTORY PROVISIONS INVOLVED

Petitioner's rendition of the statutes involved omits relevant provisions of the HCPA, P.L. 99-372, 100 Stat. 796, which amended IDEA.[1]

HCPA Section 2 (codified as amended at 20 U.S.C. 1415(i)(3)(B)) provided:

> 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 parent or guardian of a handicapped child or youth who is the prevailing party.

HCPA Section 3 (codified as amended at 20 U.S.C. 1415(*l*)) (citation omitted) provided:

> Nothing in this title shall be construed to restrict or limit the rights, procedures, or remedies available under the Constitution, title V of the Rehabilitation Act of 1973, or other Federal statutes protecting the rights of handicapped children and youth * * * *

HCPA Section 4, *reprinted in* 20 U.S.C. 1415 *note* (citation

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[1] IDEA was reauthorized and amended in 2004. P.L. 108-446, 118 Stat. 2647. The operative language of the cost-shifting provision was not materially changed. It now reads: "In any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys' fees as part of the costs – (I) to a prevailing party who is the parent of a child with a disability . . . ." 20 U.S.C.A. 1415(i)(3)(B) (West 2005). Petitioner does not contend that this change is significant. Unless otherwise noted, citations are to the 2000 United States Code.

omitted), provides:

> (a) The Comptroller General of the United States, through the General Accounting Office, shall conduct a study of the impact of the amendments to the Education of the Handicapped Act made under section 2 of this Act * * * *
>
> (b) The report authorized under subsection (a) shall include the following information: * * * *
>
> > (3) Data, for a geographically representative selective sample of States, indicating (A) the specific amount of attorneys' fees, costs, and expenses awarded to the prevailing party, in each action and proceeding under section 615(e)(4)(B) from the date of the enactment of this Act through fiscal year 1988, and the range of such fees, costs, and expenses awarded in the actions and proceedings under such section, categorized by type of complaint and (B) for the same sample as in (A) the number of hours spent by personnel, including attorneys and consultants, involved in the action or proceeding, and expenses incurred by the parents and the State educational agency and local educational agency.

STATEMENT OF THE CASE

A. Individuals with Disabilities Education Act

In 1986, Congress added the relevant statutory text to IDEA by enacting the HCPA. The HCPA and its history are discussed in detail below. To put the dispute between the Murphys and Arlington Central in context, however, we provide a brief overview of IDEA.[2]

IDEA was enacted to address Congress' concern that "more than one-half of the children with disabilities in the United States do not receive appropriate services." 20 U.S.C. 1400(c)(2)(B). It sought to ensure "that all children with disabilities have

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[2] IDEA's roots trace back to the Education of the Handicapped Act (EHA), P.L. 91-230, 84 Stat. 175 (1970), which was Congress' first effort to address the needs of children with disabilities. But EHA did not stem the tide of overt discrimination in education against these children. Parents and civil rights groups began turning to the federal courts, where they won substantial relief in two path-breaking decisions: *Mills v. Board of Education of the District of Columbia*, 348 F. Supp. 866 (D.D.C. 1972) and *Pennsylvania Ass'n for Retarded Children v. Pennsylvania* (*PARC*), 334 F. Supp. 1257 (E.D. Pa. 1971), and 343 F. Supp. 279 (E.D. Pa 1972). The courts in these cases concluded (*PARC* through a consent decree) that systematic discrimination against children with disabilities in the provision of public education violated the equal protection and due process guarantees of the Fourteenth Amendment. *Mills*, 348 F. Supp. at 875; *PARC*, 343 F. Supp. at 279. The courts ordered an end to discrimination and entered broad injunctive relief. *Id.* In the wake of these decisions, Congress substantially overhauled the EHA with the passage of the Education for All Handicapped Children Act of 1975 (EAHCA), P.L. 94-142, 89 Stat. 773. For a detailed history of the statute's early evolution, including the impact these cases had on the EAHCA, see *Hendrik Hudson Central School District Board of Education v. Rowley*, 458 U.S. 176, 179–80 (1982). In 1990, Congress changed the title of the statute to the Individuals with Disabilities Education Act. P.L. 101-476, § 901(a)(1), (3), 104 Stat. 1103, 1141–42.

available to them a free appropriate public education" and "that the rights of children with disabilities and parents of such children are protected." *Id.* 1400(d)(1)(A)–(B). As this Court has recognized, IDEA "confers upon disabled students an enforceable substantive right to public education." *Honig v. Doe*, 484 U.S. 305, 310 (1984); *see also Rowley*, 458 U.S. at 180, 192–200.

Two provisions of IDEA are relevant here. First, Section 1414 sets forth procedures to identify and evaluate children with disabilities and determine what constitutes an appropriate education. Once a child with disabilities has been identified, IDEA requires the school district to prepare an "individualized educational program" (IEP) that, among other things, describes the educational and related services to be provided to the child, establishes annual goals to assess whether the child is making progress, and determines the child's appropriate educational placement. 20 U.S.C. 1414(d). Congress intended parents to participate in the development of their child's IEP. *Id.* 1414(d)(1)(B)(i).

Second, anticipating that disagreements would arise between parents and schools, Section 1415 establishes procedural protections that must be afforded to the parties. Parents are entitled to written notice whenever a school either proposes or refuses "to initiate or change" a child's IEP. *Id.* 1415(b)(3). If an impasse arises over any element of the IEP, parents have the right to "an impartial due process hearing." *Id.* 1415(f)(1). Due process hearings are initiated by the submission of a formal complaint, to which the school must respond. *Id.* 1415(b)(6)–(7). In the event that dispute resolution fails, a due process hearing is held before an impartial hearing officer independent of the school. *Id.* 1415(f)(1), (3).

Section 1415 also establishes a number of "safeguards" to ensure procedural fairness during hearings. Parties have "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." *Id.* 1415(h)(1). In practice, parents are often unrepresented by counsel in IDEA hearings, although school districts generally have counsel.[3] Parties have "the right to present evidence and confront, cross-examine, and compel the attendance of witnesses." *Id.* 1415(h)(2). A complete transcript or recording must be made of the hearing and provided to parents on request, and findings of facts and decisions must be in writing. *Id.* 1415(h)(3)–(4). In states like New York, which opt for a two-tier system, adverse rulings may be appealed to the state educational agency. *Id.* 1415(g).

Any party aggrieved by the results of the administrative process may file suit in either federal or state court. *Id.* 1415(i)(2)(A). Judicial review is based on the record of the due process hearing, with limited opportunity for supplementation. *Id.* 1415(i)(2)(B). Courts generally resolve IDEA cases on summary judgment, even when evidence compiled during the due process hearing is conflicting. *See, e.g.*, *Beth B. v. Van Clay*, 282 F.3d 493, 496 n.2 (7th Cir. 2002).[4]

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[3] *See* 150 Cong. Rec. S5351 (daily ed. May 12, 2004) (reporting that parents are represented by counsel in about one-third of the due process hearings held in New York and Illinois, while school districts have lawyers in virtually all cases); *see also* Am. Bar Ass'n, Comm'n on Nonlawyer Practice, *Nonlawyer Activity in Law Related Situations: A Report with Recommendations* 81 (1995) (reporting that "[i]n many communities there appear to be few, if any, lawyers experienced or willing to handle" IDEA cases for parents).

[4] *Rowley* held that courts must give "due weight" to the findings of the state administrative proceeding and should not "substitute their own

(continued...)

B. Proceedings Below

1. The Murphys' son Joe is a child with learning disabilities.[5] The Murphys live in upstate New York and have modest means, with a total income of around $47,000.[6] This controversy arose in September 1997, when Joe was in eighth grade. At the beginning of the school year, a speech/language specialist found Joe to be "severely functionally language disordered." *SRO Decision* at 6. A neuropsychologist also evaluated Joe and reported that he had a "near total incapacity to process language, written or oral." *Id.* At the end of eighth grade, Arlington Central's speech/language evaluator concluded that Joe was a

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(...continued)
notions of sound educational policy for those of the school authorities they review." 458 U.S. at 206; *see also Shore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 201 (3d Cir. 2004); *L.B. v. Nebo Sch. Dist.*, 379 F.3d 966, 974 (10th Cir. 2004). Ordinarily, parties are not permitted to supplement the record or to have witnesses testify in review proceedings unless they can show prejudice or that the evidence was unavailable at the time of the state hearing. *See, e.g.*, *West Platte R-II Sch. Dist. v. Wilson*, No. 05-1973, 2006 WL 488410, at *2 (8th Cir. Mar. 2, 2006); *Springer v. Fairfax County Sch. Bd.*, 134 F.3d 659 (4th Cir. 1998); *Town of Burlington v. Dep't of Educ.*, 736 F.2d 773 (1st Cir. 1984).

[5] This recitation is drawn from the decision of the State Review Officer (SRO), which is in the record (*see* Exhibit A to the Status Report filed by Arlington Central on Dec. 28, 1999 (Docket Entry 8)), and is available at http://www.sro.nysed.gov/1999/99-065.htm (last visited on Mar. 22, 2006) (*SRO Decision*).

[6] *See* Joint Appendix in *Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.*, CV-00-7358, 297 F.3d 195 (2d Cir. 2002), at 19 (certification of Pearl Murphy, dated Aug. 6, 1999, attached to plaintiff's motion to show cause, dated Sept. 7, 1999); *id.* at 110 (transcript of hearing on plaintiff's show cause motion in *Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.*, No. CV-99-1258 (Sept. 7, 1999)).

"high risk" student both academically and emotionally and recommended that he be placed in a residential school for language impaired students. *Id.* at 8.[7]

Arlington Central nonetheless proposed an IEP that would place Joe in Arlington High School in classes with other students with disabilities. *Id.* at 9. To help them evaluate Joe's educational options, the Murphys retained Marilyn Arons, an educator who has worked on special education matters since 1963.[8] Arons reviewed Joe's evaluations, conducted her own assessment, attended IEP meetings and met with school officials to urge Arlington Central to provide Joe with more intensive speech/language training. *Id.* When Arlington Central failed to do so, the Murphys enrolled Joe in the Kildonan School, a private school for learning disabled students. At the same time, the Murphys filed an IDEA administrative complaint *pro se* seeking a due process hearing to establish Kildonan as Joe's appropriate placement and to compel Arlington Central to reimburse his tuition. *Id.*

The Murphys did not have counsel at the due process hearing, which stretched over six days in October 1998 and was

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[7] Joe's problems in school had started years earlier. He had "attention difficulties" in kindergarten, he was "diagnosed by a neurologist as having Attention Deficit Hyperactivity Disorder" in second grade, and he had to repeat third grade. *SRO Decision* at 1–2. By fourth grade, Joe was classified as "learning disabled." *Id.* at 3. The SRO Decision gives a full account of Joe's difficulties in school. *Id.* at 1–6.

[8] Arons holds a masters degree in early childhood education and had been qualified as an expert in prior proceedings. *Borough of Palmyra Bd. of Educ. v. R.C.*, No. 97-6199, 31 IDELR ¶ 3 (D.N.J. 1999); *see* Pet. App. at 21a–22a, 35a.

reconvened for several more days in April 1999. *Id.* at 9–10.[9] Arlington Central had counsel. *Id.* Arons did not testify at the hearing but did assist the Murphys in reviewing Joe's educational evaluations, framing questions for the school board's experts, and preparing their affirmative case. JA 23a–28a; 63a–66a. On July 7, 1999, the impartial hearing officer held that the Kildonan School, not Arlington High School, was the appropriate placement for Joe. *SRO Decision* at 9–10. The ruling required Arlington Central to reimburse the tuition the Murphys had already paid for the 1998–1999 school year. *Id.* Arlington Central appealed to the State Review Officer (SRO) on August 18, 1999, thereby staying the reimbursement order.

2. Meanwhile, the start of the 1999–2000 school year was approaching and the Murphys could not afford to continue to pay Joe's tuition. Still proceeding *pro se*, the Murphys filed an action in district court to require Arlington Central to pay Joe's tuition while its appeal to the SRO was pending. Before the district court ruled, the SRO affirmed. *Id.* at 13–16. Arlington Central did not reimburse the Murphys for the 1998–1999 tuition until the district court issued a show cause order in late January 2000 —

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[9] New York law permits non-lawyers to assist parents to advocate their claims in due process hearings. *SRO Decision* at 9. Arons helped the Murphys in this capacity as well. *Id.* Arons' certification, submitted in support of the Murphys' request for costs, makes clear that compensation was sought only for those services rendered in her capacity as an expert in special education matters, not as an advocate. JA at 20a–33a; 63a–66a. In so doing, Arons followed the line between compensable and non-compensable activities drawn in *Arons v. New Jersey State Board of Education*, 842 F.2d 58, 62–63 (3d Cir. 1988) (finding educational expert may receive fees as an expert consultant or witness, but may not for legal services).

halfway into the next school year.[10]

The parties remained divided over Joe's placement (and the liability for his tuition) for the 1999–2000 school year. To resolve that issue, the Murphys requested a new due process hearing and, in the still-pending district court action, invoked IDEA's "stay put" provision to require Arlington Central to pay Joe's tuition. The Murphys contended that the SRO's ruling had changed Joe's IEP to provide that his placement was Kildonan; Arlington Central argued that the SRO's ruling applied only to the prior school year. The district court agreed with the Murphys and directed Arlington Central to pay Joe's tuition pending a final determination of the Murphys' IDEA claim. *Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.*, 86 F. Supp. 2d 354, 358–359 (S.D.N.Y. 2000). The Second Circuit affirmed. 297 F.3d 195 (2d Cir. 2002).[11]

3.a. Following that ruling, with all other issues now resolved, the Murphys filed a motion in the district court to recover $29,350 for the services that Arons provided as an expert.

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[10] *See Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.*, No. CV-99-9294 (S.D.N.Y. Jan. 24, 2000). Arlington Central challenged the SRO's decision in state court and lost. *See In re Arlington Cent. Sch. Dist. v. State Review Officer*, Index No. 1212/2002 (N.Y. Sup. Ct. Dutchess County, Sept. 13, 2002).

[11] The Murphys had counsel on the 2002 appeal to the Second Circuit. As noted, they proceeded *pro se* in all other proceedings. The undersigned counsel of record participated as counsel for amici in support of the Murphys' position in the 2005 Second Circuit appeal and became counsel for the Murphys after Arlington Central filed its petition for certiorari.

JA at 20a–33a; 63a–66a.[12] The district court accepted Arons' qualifications as "'a professional educator [who] … specializes in curriculum development for exceptional children.'" Pet. App. 21a (quoting *Arons*, 842 F.2d at 62–63). But it cut the request substantially, not because the Murphys sought compensation for Arons' advocacy efforts as petitioner suggests, but because her services as an expert were rendered either before the commencement of the due process hearing (September 1998) or after the district court's initial ruling in the Murphys' favor (March 2000). In the court's view, only services provided between these two events were rendered in an "action or proceeding," as IDEA requires. *Id.* at 37a–38a. The judge added, "nothing I have said in this opinion or the result I have reached should be regarded as a denigration of Marilyn Arons's abilities or the devoted services she rendered to the Murphy family. I have no doubt that those services were worth over $29,000." *Id.* at 41a–42a.

The district court found that Arons spent 43.25 hours assisting the Murphys prepare for and participate in the due process hearing. *Id.* at 38a. The court concluded that Arons' work helping the Murphys understand the submissions of the school board's experts, reviewing technical materials that would be relied on in the hearing, and formulating questions to use in cross-examining the school board's experts, qualified as reimbursable expert costs. *Id.* at 22a, 39a–40a. Finding $200 per hour a proper valuation of Arons' expert services, *id.* at 40a–41a, the court awarded the Murphys $8,650. *Id.* at 41a. Arlington Central appealed; the Murphys did not cross appeal.

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[12] For reasons not apparent in the record, the Murphys did not seek reimbursement for the costs of the services provided by Gerald Brooks, a speech/language pathologist, who prepared a report and testified on their behalf. *SRO Decision*, at 11–12.

3.b. The Second Circuit affirmed, holding that the IDEA authorizes courts to award expert costs to prevailing parents. Pet. App. at 2a. It first examined this Court's rulings in *Crawford Fitting Co. v. J.T. Gibbons, Inc*., 482 U.S. 437 (1987), and *West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83 (1991), which held that, unless Congress specifies otherwise, a statutory authorization for attorneys' fees does not encompass expert costs. Pet. App. at 8a–9a. The court noted that, in contrast to 42 U.S.C. 1988, the statute at issue in *Casey*, Congress had left no doubt that expert costs were to be reimbursed to prevailing parents under the IDEA. Pet. App. at 9a–10a. This conclusion was based in part on the Joint Statement of the Conferees, which made explicit that expert costs were recoverable under IDEA. *Id.* at 9a. The court also observed that "[e]xpert testimony is often critical in IDEA cases, which are fact-intensive inquiries about the child's disability and the effectiveness of the measures school boards have offered to secure a free appropriate public education." *Id.* at 12a. The availability of expert costs would thus be in keeping with IDEA's remedial purpose. *Id.* at 13a–14a.

SUMMARY OF ARGUMENT

The question in this case is whether parents like the Murphys may recover the costs of the expert who assisted them in a due process hearing involving the highest stakes imaginable — their child's future. The statute's text, history, and purpose all point to the conclusion that IDEA authorizes prevailing parents to recover expert costs.

I. IDEA provides that "in any action or proceeding brought" under the Act, "the court, in its discretion, may award reasonable attorneys' fees *as part of the costs to the parents* of a child with a disability...." 20 U.S.C. 1415(i)(3)(B) (emphasis added). The

most natural reading of the phrase "the costs to the parents" encompasses all expenses parents incur in IDEA proceedings, including the cost of experts.

This reading is confirmed by Congress' direction to the GAO to study the legislation's fiscal impact and to report to Congress on the "amount of the attorneys' fees, costs, and expenses" awarded in IDEA litigation, as well as the number of compensable hours spent by "attorneys and consultants" involved in the proceeding. This instruction would make no sense unless Congress intended expert consultants to be reimbursed. The GAO Report states that "[e]xpert witness fees" are "examples of reimbursable expenses" under the Act.

This reading also gives substance to IDEA's overarching goals of ensuring that children with disabilities are provided "a free appropriate public education" and that the rights of children and parents are safeguarded. Reading IDEA's cost-shifting provision to *exclude* expert costs would be manifestly at odds with the Act's requirement that schools provide a "free" education. *See, e.g.*, *Burlington Sch. Comm. v. Mass. Dep't of Educ.*, 471 U.S. 359, 369 (1985). Parents need expert assistance to challenge school determinations, *Schaffer v. Weast*, 126 S. Ct. 528, 536 (2005), but many parents cannot afford to pay experts. If costs for experts are unavailable, these parents will be deprived of their right to challenge school decisions that deny their child's right to an appropriate education, a result Congress could not have possibly intended. *Burlington*, 471 U.S. at 369.

Petitioner's reading violates several cardinal rules of statutory construction. Petitioner analyzes the language of IDEA through the lens of 42 U.S.C. 1988, even though the two statutes are quite different in language and purpose. Petitioner argues that Section 1415(i)(3)(B) authorizes the award of *only* attorneys' fees,

thereby rendering the phrase "as part of the costs to the parents" meaningless. And petitioner's reading undermines IDEA's goals by precluding parents from recovering the costs of expert assistance, even though that assistance is essential to the fair resolution of IDEA due process hearings.

II. The history of Section 1415(i)(3)(B)'s implementation confirms that Congress authorized parents to recover expert costs. The GAO read it in that manner. And courts uniformly held that it empowered them to award expert costs. Indeed, for fifteen years following Section 1415(i)(3)(B)'s enactment, courts were nearly unanimous in holding that it provides for the payment of expert costs. This history belies petitioner's central claim that Section 1415(i)(3)(B) "unambiguously" fails to authorize courts to award expert costs to prevailing parents.

The drafting history of the HCPA reaffirms that Congress authorized the award of expert costs to parents. Although there were controversial issues that slowed the HCPA's passage, there was bipartisan agreement in both Houses at every stage of Congress' deliberations that prevailing parents should recover expert costs. The Joint Statement crystallizes Congress' judgment: "The 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 necessary to the preparation of" the parents' case, "as well as traditional costs incurred in the course of litigating a case." H.R. Conf. Rep. No. 99-687, at 5 (1986).

III. Contrary to petitioner's claim, nothing in *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437 (1987), or *West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83 (1991), informs the meaning of Section 1415(i)(3)(B). *Casey* involved statutes that are different in text and language from IDEA, and the

HCPA was enacted before either case was decided. "[Courts] are to read the words of [statutory] text as any ordinary Member of Congress would have read them." *Chisom v. Roemer*, 501 U.S. 380, 405 (1991) (Scalia, J., dissenting); *see MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 228 (1994). Nothing in the language or history of the HCPA suggests that the "ordinary Member[s] of Congress" who participated in its enactment anticipated the narrow, term-of-art meaning these later rulings gave to the phrase "attorneys' fees as part of costs." This point takes on special force because *Casey* rejected the argument (not presented here) that expert fees are recoverable as part of the attorneys' fees parties incur in federal court litigation, not as part of the "the costs … parents" incur in state administrative proceedings.

Nor does *Casey*'s rationale apply to IDEA. *Casey* held that 28 U.S.C. 1821(b) and 1920 — which fix compensation for witnesses in federal court proceedings — govern expert fees in civil rights cases because Congress did not express an intent to repeal these provisions when it enacted Section 1988. 499 U.S. at 83. But *Casey*'s repeal-by-implication rationale has no application to IDEA. Sections 1821 and 1920 apply only in *federal court* actions, not in state due process proceedings. If accepted, petitioner's argument would deprive parents of *any* opportunity to recover the costs they incur in due process hearings — a result flatly at odds with Congress' clear intent.

IV. Petitioner's invocation of the Spending Clause is untimely, incorrect, and beside the point. It was not raised below and thus is forfeited. It is incorrect because neither the HCPA nor IDEA is *exclusively* a Spending Clause statute. *See, e.g.*, *Cedar Rapids County Sch. Dist. v. Garrett F.*, 526 U.S. 66, 76–77 (1999); *Burlington*, 471 U.S. at 369; *Rowley*, 458 U.S. at 180, 192–200. And it is beside the point because the Spending Clause

requires Congress to give states fair notice of their fiscal obligations when they accept federal grants. Section 1415(i)(3)(B) did just that.

ARGUMENT

I. The Text of IDEA Confirms That Expert Costs May Be Recovered By Prevailing Parents.

A. Section 1415(i)(3)(B) Authorizes the Payment of Expert Costs.

1. Statutory language is the starting point in any case of statutory construction. *Leocal v. Ashcroft*, 543 U.S. 1, 8 (2004). Section 1415(i)(3)(B) of IDEA provides that, "[i]n 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." (emphasis added).

Statutory language should be given its most natural reading. *Rousey v. Jacoway*, 125 S. Ct. 1561, 1568 (2005); *see also Chisom*, 501 U.S. at 405 (Scalia, J., dissenting) ("Our job begins with a text that Congress has passed and the President has signed. We are to read the words of that text as any ordinary Member of Congress would have read them … and apply the meaning so determined.") (citation omitted). Read in this light, the words "attorneys' fees as part of the costs to the parents" authorize reimbursement of all costs parents incur in IDEA proceedings, including expert costs. The language is categorical. There is no textual basis for distinguishing the cost of hiring an expert from any other cost parents incur in IDEA proceedings. Expert costs, like attorneys' fees, are indisputably "part of the costs" parents incur in an action or proceeding brought under IDEA. Experts

are not provided to parents free-of-charge under IDEA. Nor are experts good Samaritans who volunteer their services without compensation. Reading IDEA's text in accordance with its "ordinary or natural reading," *Leocal*, 543 U.S. at 1, 9 (2004), yields only one conclusion: Expert costs are reimbursable because they are "*part* of the costs to the parents." *See also Consumer Elecs. Ass'n v. FCC*, 347 F.3d 291, 298 (D.C. Cir. 2003) ("[S]tatutes written in broad, sweeping language should be given broad, sweeping application") (citation omitted).

2. The GAO report provision confirms this reading. In the HCPA, Congress directed the GAO to study and report on the "attorneys' fees, costs, and expenses awarded to the prevailing party" in a representative sample of states, and to include information about "the number of hours spent by personnel, including attorneys and *consultants*, involved in the action or proceeding." P.L. 99-372, § 4(b)(3), 100 Stat. 796, 797–98 (1986) (emphasis added).

This Court has repeatedly stressed that the "[i]nterpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis." *Dolan v. United States*, 126 S. Ct. 1252, 1257 (2006).[13] Nonetheless, petitioner and the United States ignore this provision, even though it sheds considerable light on Section 1415(i)(3)(B). By instructing the GAO to study the "attorneys' fees, costs and expenses" awarded in IDEA cases, including the time spent by "attorneys and consultants," Congress signaled that

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[13] *See also Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 60 (2004) ("Statutory construction is a 'holistic endeavor.'") (citations omitted); *Leocal*, 543 U.S. at 9 ("[T]he Court construes language in its context and in light of the terms surrounding it.").

it expected Section 1415(i)(3)(B) to be read broadly to cover these expenses. Indeed, Congress' direction to the GAO would be inexplicable if Congress did not anticipate that the expenses for "consultants" would be recoverable. The GAO certainly understood the statute in that way. Its Report states that "[e]xpert witness fees, costs of tests or evaluations found to be necessary during the case, and court costs for services rendered during administrative and court proceedings are examples of reimbursable expenses" under the Act. U.S. Gen. Accounting Office, *Special Education: The Attorney Fees Provision of Public Law 99-372* 13 (Nov. 1989) (GAO Report).[14]

3. Petitioner also fails to grapple with Section 1415(*l*)

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[14] Congress' use of "consultant" rather than "expert" is readily understood. Congress intended that the phrase "the costs to the parents" reach not only expert costs, but also "expenses" and the costs of tests and evaluations associated with the development of the IEP. Thus, Congress used the term "consultant" to ensure that the GAO also studied the costs to parents of having these tests administered and evaluated and that other services rendered by non-testifying experts were reimbursed. Dictionaries define the terms as synonyms. *See, e.g.*, *Webster's Third New International Dictionary* 490 (1981 ed.). Petitioner contends that because Arons did not testify at the due process hearing, her services would be non-compensable even if the Murphys prevail. Pet. Br. at 30 n.12. This Court denied certiorari on this issue, but petitioner's argument is without merit in any event. Section 4 of the HCPA recognizes that "expenses" and the cost of "consultants" would be reimbursed. The Joint Statement accompanying the HCPA also identifies as compensable expenses expert witness fees, costs of tests and evaluations, and all other litigation costs and expenses reasonably expended by the parents, which plainly includes consultant fees. Finally, courts have routinely reimbursed parents for the costs of non-testifying experts. *See, e.g.*, *Bd. of Educ. v. Summers*, 358 F. Supp. 2d 462, 473 (D. Md. 2005); *Lamoine Sch. Comm. v. Ms. Z*, 353 F. Supp. 2d 18, 44 (D. Me. 2005); *Noyes v. Grossmont Union High Sch. Dist.*, 331 F. Supp. 2d 1233, 1251 (S.D. Cal. 2004); *Turton v. Crisp County Sch. Dist.*, 688 F. Supp. 1535, 1540 (M.D. Ga. 1988).

(Section 3 of the HCPA), which overturned *Smith* by providing that claims under the Constitution and the Civil Rights and Rehabilitation Acts may be joined with claims under IDEA. This provision is significant because, at the time the HCPA was enacted, it was understood that courts could award expert costs in Civil Rights and Rehabilitation Act cases. *See Bradley v. City of Richmond Sch. Bd.*, 416 U.S. 696, 706–710 (1974). Thus, from the vantage point of the Congress that enacted the HCPA, the ordinary usage of the word "costs" would have subsumed the costs of experts.

B. IDEA's Key Substantive Provisions Confirm that Expert Costs May Be Awarded to Prevailing Parents.

The conclusion that expert costs are reimbursable is also in keeping with IDEA's overarching goals: (1) to ensure that children with disabilities receive a "free appropriate public education" and (2) to safeguard the rights of parents to challenge school decisions that adversely affect their child. This Court routinely looks to IDEA's "overall statutory scheme" in interpreting its provisions. *See, e.g.*, *Garret F.*, 526 U.S. at 73; *see generally Koons Buick*, 543 U.S. at 60.

1. IDEA's core goal is to assure that "all children with disabilities have available to them . . . a free appropriate public education." 20 U.S.C. 1400(c). This assurance is deeply ingrained in the Act. *See, e.g.*, *id.* 1400(d)(1)(A), 1412(a)(1)(A), 1415(a); *see also* 1401(8)(A) (defining "free appropriate public education" as one "provided at public expense" and "without charge"); 1401(25) (defining "special education" to mean "specially designed instruction, at no cost to parents"). This Court has faithfully implemented Congress' instruction that an appropriate education be provided to children with disabilities "without charge" and "at no cost to parents." For instance, in

Garret F., 526 U.S. at 73, and *Irving Independent School District v. Tatro*, 468 U.S. 883, 888–91 (1986), the Court invoked IDEA's commitment to a *free* appropriate education in construing the "related services" provision to require schools to provide nursing care to students, notwithstanding the expense. *Id.*

In *Burlington*, the Court relied on IDEA's promise of a "free" appropriate education in interpreting IDEA's grant of equitable authority. 471 U.S. at 368–70. *Burlington* held that this provision empowered courts to require school districts to reimburse parents for the costs of unilateral placements in private schools if the court ultimately determines that such placement was warranted under the Act. *Id.* Then-Justice Rehnquist's opinion for a unanimous Court makes exactly the point that the Murphys make here, emphasizing that it would be "an empty victory" for parents to pay for the placement but "to have a court tell them several years later that they were right but that these expenditures could not in a proper case be reimbursed by the school officials." *Id.* at 370. Such a result would be at odds with "the child's right to a free appropriate public education, the parents' right to participate fully in developing a proper IEP, and all of the procedural safeguards" built into the Act, a result "Congress undoubtedly did not intend." *Id*. at 360, 370; *see also Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 11–14 (1993); *Rowley*, 458 U.S. at 188–92.

The same logic applies here. Apart from attorneys' fees, the most significant expense parents incur in IDEA cases is the retention of an expert and the cost of the tests and evaluations the expert performs. For parents like the Murphys who cannot afford counsel, expert costs are the most significant expense. The availability of experts to enable parents to contest adverse decisions is essential to the fair resolution of due process hearings. If parents like Pearl and Ted Murphy cannot recover

the costs of experts, IDEA's guarantees of both a *free* and *appropriate* public education would be substantially eroded, if not altogether eliminated.

2. IDEA also seeks to enable parents to challenge school decisions that adversely affect their child. *See, e.g.*, 20 U.S.C. 1400(d)(1), 1412, 1414, 1415; *Burlington*, 471 U.S. at 370. Parents in IDEA proceedings are fighting for their child's future. Unlike litigants in other civil rights actions, parents who win IDEA cases generally collect no monetary compensation and there is no recovery that can be used to offset the expenses of an expert. The availability of fees for experts is an indispensable element of IDEA's remedial scheme.

Expert assistance is pivotal to parents in IDEA cases. Due process hearings turn on questions involving the nature and extent of the child's disability and the suitability of the measures the school district proposes to provide the child an appropriate education. *See SRO Decision* at 11–13; *see also Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840, 850–51 (6th Cir. 2004); *T.R. v. Kingwood Twp. Bd. of Educ.*, 205 F.3d 572, 577–78 (3d Cir. 2000); *Oberti v. Bd. of Educ.*, 995 F.2d 1204, 1216 (3d Cir. 1993). Consider the view of District Judge Pratt, sitting by designation, in his dissent in *Neosho R-V School District v. Clark*, 315 F.3d 1022 (8th Cir. 2003). Judge Pratt noted that schools "employ many education and child experts" and "[a]s one might expect," in due process hearings they "look to their in house experts to testify on behalf of the school district's position." *Id.* at 1036. Parents "who lack the resources to hire an expert witness to evaluate and testify on behalf of their child" are at a serious disadvantage, and the "school district's expert, therefore, goes unchallenged," dooming the child's case. *Id.* To "deny a prevailing parent the right to recover the fees paid to an expert witness forecloses the likelihood that many

underprivileged children will receive the free appropriate public education to which they are entitled." *Id.* at 1036–37.[15]

Because of the resource imbalance, the playing field in IDEA due process hearings tilts decidedly in favor of schools. *Burlington*, 471 U.S. at 368. *Schaffer* holds that, unless a state provides otherwise, parents bear the burden of proof in IDEA hearings challenging the appropriateness of IEPs. 126 S. Ct. at 528. *Schaffer*'s premise is that IDEA hearings are structured to "ensure that the school bears no unique informational advantage." *Id.* at 537. But the problem parents face is not so much an *informational* deficit as an *expert* deficit. School districts have on staff teachers, guidance counselors, psychologists, and other specialists — all of whom qualify as, and may testify as, experts. Parents, in contrast, have to retain experts to challenge school district decisions. *See id.* at 536.

Relying on *Schaffer*, petitioner and the United States suggest that the imbalance in access to experts is addressed by IDEA's requirement that schools provide parents an opportunity for an independent, expert evaluation of their child at public expense. Pet. Br. at 31; *see also* U.S. Br. at 11 n.3. To be sure, *Schaffer* underscores the centrality of expert assistance, noting that it would be unfair to force parents to do battle with school districts "without an expert with the firepower to match the opposition." 126 S. Ct. at 536. But petitioner and the United States go too far in suggesting that IDEA *requires* school districts to supply

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[15] Many district judges share this perspective. *See, e.g.*, *Brillon v. Klein Ind. Sch. Dist.*, 274 F. Supp. 2d 864, 872 (S.D. Tex. 2003), *rev'd on other grounds*, 100 Fed. Appx. 309 (5th Cir. 2004); *Gross v. Perrysburg Exempted Vill. Sch. Dist.*, 306 F. Supp. 2d 726, 739 (N.D. Ohio 2004); *Pazik v. Gateway Reg'l Sch. Dist.*, 130 F. Supp. 2d 217, 221 (D. Mass. 2001); *P.G. v. Brick Twp. Bd. of Educ.*, 124 F. Supp. 2d 251, 267 (D.N.J. 2000).

experts to parents at public expense.

First, independent evaluations and the retention of an expert are different things. Evaluators do not act as experts for parents; they are "independent." Parents do not have free rein in selecting evaluators; the school district generally furnishes the parents with a short list from which they may choose. 34 C.F.R. 300.502(a)(2) (2005). It is not the independent evaluator's job to help parents understand the school's technical evidence, frame questions to challenge the school's experts, or perform the other tasks one expects of a party-retained expert. Nor is there any expectation that the evaluator will testify on the parents' behalf at the due process hearing, let alone a requirement that such testimony would come at public expense.

Moreover, neither IDEA nor the regulations guarantee parents an independent evaluation *at public expense*. IDEA accords parents only the "*opportunity*," not the *right*, to "obtain an independent educational evaluation of the child." 20 U.S.C. 1415(b)(1) (emphasis added). Although the regulations give parents a conditional right to a publicly-funded evaluation if they disagree with the school's evaluation, the regulations also give schools the option to deny parents' request when the school believes that existing evaluations are adequate. 34 C.F.R. 300.502(b)(2)(ii) (2005). Denials force parents into full-scale due process hearings on whether, under the circumstances, an independent evaluation is in fact necessary. *Id.* The volume of litigation over school refusals to pay for independent evaluations suggests that denials are common.[16]

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[16] *See, e.g.*, *Seattle Sch. Dist. No. 1 v. B.S.*, 82 F.3d 1493,1500 (9th Cir. 1996) (school board's refusal to pay for an independent evaluation improper); *Murphysboro Bd. of Educ. v. Ill. State Bd. of Educ.*, 41 F.3d (continued...)

Thus, the possibility that parents will obtain a publicly-funded independent evaluation in no way rectifies the expert imbalance Congress has recognized. Rather, the imbalance is addressed in Section 1415(i)(3)(B), which gives parents an assurance that the expert costs they incur in IDEA proceedings will be reimbursed if they prevail.

C. Neither Petitioner Nor the United States Offers a Coherent Reading of Section 1415(i)(3)(B).

The interpretations of Section 1415(i)(3)(B) put forth by petitioner and the United States are irreconcilable with the provision's text. They contend that Section 1415(i)(3)(B) authorizes the "reimbursement of *only* attorneys' fees," and that, to the extent that "costs" are available to prevailing parents, those costs are independently authorized under Sections 1821 and 1920, *not* IDEA. Pet. Br. at 18 (emphasis added); *see also* U.S. Br. at 10–12. That construction is not faithful to the language of Section 1415(i)(3)(B).

1. To start, by contending that Section 1415(i)(3)(B)'s reference to "costs" is *limited* by the phrase "attorneys' fees," petitioner and the United States reverse the provision's actual language, which authorizes an award of attorneys' fees "as *part* of the costs to the parents." The phrase "part of the costs" is not a phrase of *restriction* that limits the provision to expenses lawyers charge in litigating cases. It is instead a phrase of

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1162, 1169 (7th Cir. 1994) (same); *Hudson v. Wilson*, 828 F.2d 1059, 1065 (4th Cir. 1987) (same); *Raymond S. v. Ramirez*, 918 F. Supp. 1280, 1290–91 (N.D. Iowa 1996) (same); *Seals v. Loftis*, 614 F. Supp. 302, 305–06 (E.D. Tenn. 1985) (same); *cf. Ms. M. ex rel. K.M. v. Portland Sch. Comm.*, 360 F. 3d 267, 271 (1st Cir. 2004) (school district did not appeal ruling that it should have paid for an independent evaluation).

inclusion that covers "the costs to the parents," of which attorneys' fees are but one part.

Even worse, their construction takes an eraser to Section 1415(i)(3)(B). They contend that this Court should rewrite Section 1415(i)(3)(B) to say that "the court, in its discretion, may award reasonable attorneys' fees to the parents of a child with a disability who is the prevailing party." That rewriting *deletes* entirely the phrase "*as part of the costs*" from Section 1415(i)(3)(B). It not only renders the phrase surplusage, *see Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 489 n.13 (2004); *Duncan v. Walker*, 533 U.S. 167, 174 (2001), but deleting five words from a provision that has only thirty-eight words is hardly a trivial modification. As this Court has admonished, "parties should not seek to amend [a] statute by appeal to the Judicial Branch." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 462 (2002).

Finally, petitioner and the United States rest their argument almost exclusively on the fact that there are similarities between the language in Section 1415(i)(3)(B) and Section 1988. But there are significant differences as well, which they overlook. *Casey* rejected the argument that expert fees are part of "attorneys' fees" to parties in Section 1988 district court litigation. That is not the Murphys' argument. The claim here is that the costs of experts are recoverable, not as part of an attorney's fees (indeed, the Murphys proceeded *pro se*), but because expert costs are "part of the costs to parents" in IDEA administrative proceedings. As we explain in Part III, these textual differences underscore that rough similarities in language do not justify reading statutes with different text and different aims as if they were the same.

2. To bolster its interpretation, petitioner argues that the

explicit inclusion of attorneys' fees reflects Congress' deliberate exclusion of expert costs. Pet. Br. at 18. This contention is also refuted by the text of Section 1415(i)(3)(B). The phrase "as *part* of the costs to the parents" makes plain that attorneys' fees are not the *exclusive* "costs" authorized under the Act; to the contrary, it drives home that *additional* costs are authorized as well. Petitioner's argument is indistinguishable from the contention this Court rejected in *Barnhart v. Peabody Coal*: "We do not read the enumeration of one case to exclude another unless it is fair to suppose that Congress considered the unnamed possibility and meant to say no to it." 537 U.S. 149, 168 (2003) (citing *United Dominion Indus., Inc. v. United States*, 532 U.S. 822, 836 (2001)).

3. Both petitioner and the United States claim that Section 1415(i)(3)(F) supports their reading of Section 1415(i)(3)(B). Section 1415(i)(3)(F) permits a court to reduce attorneys' fee awards when parents or lawyers unreasonably protract the controversy, or when lawyers charge unjustifiably high fees. They contend that, had Congress intended to authorize recovery of expert costs, "Congress would [not] have gone to such great lengths in Section 1415(i)(3)(F) to identify the circumstances in which an award of attorneys' fees should be reduced but have remained silent as to expert fees." Pet. Br. at 18 n.6; *see also* U.S. Br. at 11.

Congress had good reason to treat lawyers and experts differently in this regard. Section 1415(i)(3)(F) signals that courts should scrutinize attorneys' fee applications closely to guard against abusive legal tactics and inflated attorneys' fees. H.R. Conf. Rep. No. 99-687, at 6 (1986). Lawyers and parents have considerable power to engage in delay-inducing tactics. Experts do not. Experts do not decide what services they will provide or whether they will testify; lawyers or parents make

those determinations. Moreover, Section 1415(i)(3)(B) confers ample power on the courts to control expert costs, as this case demonstrates. The district court reduced a request for expert costs exceeding $29,000, which it thought was a fair valuation of the services provided, to less than $9,000 to conform with Section 1415(i)(3)(B)'s mandate. Thus, Section 1415(i)(3)(F)'s emphasis on abusive litigation tactics by parents and their lawyers is in no way inconsistent with Congress' decision in Section 1415(i)(3)(B) to authorize awards of expert costs.

4. The evidence contradicts the unsupported claims made by petitioner and the United States that Section 1415(i)(3)(B) must be construed narrowly to avoid imposing a fiscal burden on school districts. Pet. Br. at 30–34; U.S. Br. at 23. Awards of expert costs are generally modest. Many reported cases do not specify the amount of expert costs, but in those that do, the costs range from a few hundred dollars to a few thousand dollars.[17]

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[17] *See, e.g.*, *S. v. Timberlane Reg'l Sch. Dist.*, 2004 U.S. Dist. Lexis 4032, at *25 (D.N.H. 2004) ($825); *Noyes v. Grossmont Union High Sch. Dist.*, 331 F. Supp. 2d 1233, 1251 (S.D. Cal. 2004) ($328.33); *McC. v. Corrigan-Camden Ind. Sch. Dist.*, 909 F. Supp. 1023, 1033 (E.D. Tex. 1995) ($500); *Turton v. Crisp County Sch. Dist.*, 688 F. Supp. 1535, 1540 (M.D. Ga. 1988) ($415.62); *see also R.E. v. N.Y. City Bd. of Educ.*, 2003 U.S. Dist. Lexis 58, at *8–9 (S.D.N.Y. 2003) ($ 2,119.51); *J. v. Bd. of Educ.*, 98 F. Supp. 2d 226, 242–243 (D. Conn. 2000) ($2,622); *P.G. v. Brick Twp. Bd. of Educ.*, 124 F. Supp. 2d 251, 267 (D.N.J. 2000) ($1,207.50); *B. v. Weston Bd. of Educ.*, 34 F. Supp. 2d 777, 784 (D. Conn. 1999) ($3,450); *Poynor v. Cmty. Sch. Dist.*, 1999 U.S. Dist. Lexis 1883, at *5 (N.D. Ill. 1999) ($7,600); *Field v. Haddonfield Bd. of Educ.*, 769 F. Supp. 1313, 1323–24, 1329 (D.N.J. 1991) ($1,801); *Hirsch v. McKenzie*, 1988 WL 78859, at *3 (D.D.C. 1988) ($200). There appear to be only three reported cases in which expert awards exceed $10,000. *See Bd. of Educ. v. Summers*, 358 F. Supp. 2d 462, 472–473 (D. Md. 2005) ($13,974); *B.D. v. DeBuono*, 177 F. Supp. 2d 201, 208–09 (S.D.N.Y. 2001) ($104,784 in settlement of complex, multi-party proceeding); *K.Y.*

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Awards in excess of $10,000 are rare. Shifting expert costs is crucial to parents like the Murphys, for whom a few thousand dollars is a fortune, and could well be decisive to parents in determining whether to run the financial risk of hiring an expert. But there is no evidence that permitting parents to recover expert costs imposes a fiscal burden on school districts.

II. The History Of Section 1415(i)(3)(B) Demonstrates That It Authorizes The Payment Of Expert Costs.

When Congress enacted the HCPA, it understood that Section 1415(i)(3)(B) authorized parents to recover not just their attorney's fees, but the full costs incurred in the due process hearing, including expert costs. That understanding is reflected in the text of Section 1415(i)(3)(B), as well as the HCPA's provision requiring the GAO study and report. It is also reflected in both the implementation history of Section 1415(i)(3)(B) and the drafting history of the HCPA, each of which demonstrates that, at the time Section 1415(i)(3)(B) was enacted, there was no doubt that it authorized the recovery of expert costs.

A. The Implementation History of Section 1415(i)(3)(B) Confirms the Availability of Expert Costs.

Conspicuously omitted from the briefs of petitioner and the

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v. Me. Twp. High Sch. Dist. No. 207, 1999 U.S. Dist. Lexis 2123, at *13 (N.D. Ill. 1999) ($11,190). The modest amounts awarded in expert costs drive home that petitioner's cost-based objections are especially hollow. Had the Murphys had counsel in this matter, which spanned five years, involved multiple administrative proceedings, and resulted in two published Second Circuit opinions, seven district court opinions, and one ruling by a state court, the attorneys' fees would have dwarfed the modest costs awarded by the district court.

United States is any account of Section 1415(i)(3)(B)'s initial implementation. The most reliable sources for interpreting a statute are contemporaneous ones — when recollections are fresh and source materials easy to find — not those nearly twenty years removed. *See Amoco Prod. Co. v. S. Ute Indian Tribe*, 526 U.S. 865, 873–74 (1999); *MCI Telecomms.*, 512 U.S. at 228. Nonetheless, petitioner and the United States ignore all of the pre-2002 sources because, until 2002, the issue had been resolved overwhelmingly in the parents' favor.

To start with, the GAO Report submitted to Congress just three years after the HCPA's passage made explicit that consultant costs, expert witness fees, and the costs of tests or evaluations necessary to the parents' case are reimbursable under the Act. GAO Report at 13. This contemporaneous interpretation of the Act should be accorded deference. *Cf. Norwegian Nitrogen Prods. Co. v. United States*, 288 U.S. 294, 315 (1933).

The initial judicial constructions of the Act also uniformly favored coverage of expert costs. During the first five years after Section 1415(i)(3)(B) was enacted, *every* court to consider the question concluded that IDEA authorizes the reimbursement of expert fees. Foremost among these decisions was the Third Circuit's 1988 ruling in *Arons*, 842 F.2d at 63. At least six district courts in four different circuits reached the same conclusion.[18]

This Court's 1991 decision in *Casey* had little impact on the

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[18] *See Field*, 769 F. Supp. at 1323–24; *Kattan v. District of Columbia*, 1991 U.S. Dist. Lexis 14543, at *9–10 (D.D.C. 1991), *aff'd*, 995 F.2d 274 (D.C. Cir. 1993); *Doe v. Watertown Sch. Comm.*, 701 F. Supp. 264, 266 (D. Mass. 1988); *Chang v. Bd. of Educ.*, 685 F. Supp. 96, 100 (D.N.J. 1988); *Turton*, 688 F. Supp. at 1540; *Hirsch*, 1988 WL 78859, at *3.

way lower courts viewed Section 1415(i)(3)(B). During the decade following *Casey* (1991–2001), no court of appeals and only a handful of district courts (acting in response to *Casey*) held that expert costs were not recoverable under the statute.[19] On the other hand, during the same time-frame, twenty-nine district judges found expert costs compensable under IDEA.[20] Thus,

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[19] Prior to 2002, only four cases squarely held that Section 1415(i)(3)(B) does not authorize reimbursement of expert fees. *Brandon K. v. New Lenox Sch. Dist*., 2001 U.S. Dist. Lexis 20006, at *9–12 (N.D. Ill. 2001); *Eirschele v. Craven County Bd. of Educ.*, 7 F. Supp. 2d 655, 659 (E.D.N.C. 1998); *Cynthia K. v. Bd. of Educ.*, 1996 U.S. Dist. Lexis 4054, at *6 (N.D. Ill. 1996); *Jennings v. Duval County Sch. Bd.*, 1992 U.S. Dist. Lexis 20575, at *41–42 (M.D. Fla. 1992). One court said so in *dicta*, *Mayo v. Booker*, 56 F. Supp. 2d 597, 599 (D. Md. 1999), but other courts in the same district have rejected *Mayo*. *See Summers*, 358 F. Supp. 2d at 472–73 (and case cited therein). In *Shanahan v. Bd. of Educ.*, 953 F. Supp. 440, 446 n.9 (N.D.N.Y. 1997), the court denied expert costs on the ground that the plaintiff had failed to submit any "authority for awarding a prevailing party expert fees" under IDEA, even though, at the time, there was contrary case law. *See, e.g.*, *Straube v. Fla. Union Free Sch. Dist*., 801 F. Supp. 1164, 1182 n.17 (S.D.N.Y. 1992).

[20] **First Circuit**: *Pazik v. Gateway Reg'l Sch. Dist*., 130 F. Supp. 2d 217, 221–22 (D. Mass. 2001); *Gonzalez v. P.R. Dept. of Educ*., 1 F. Supp. 2d 111, 116–17 (D.P.R. 1998); *Arunim v. Foxborough Pub. Sch*., 970 F. Supp. 51, 55 (D. Mass. 1997); *P.S. v. Contoocook Valley Sch. Dist*., No. 95-154-M, 24 IDELR ¶ 1141 (D.N.H. Sept. 30, 1996); *Fenneman v. Town of Gorham*, 802 F. Supp. 542, 544, 548–49 (D. Me. 1992). **Second Circuit**: *B.D. v. DeBuono*, 177 F. Supp. 2d 201, 208–09 (S.D.N.Y. 2001); *J. v. Bd. of Educ*., 98 F. Supp. 2d 226, 242–43 (D. Conn. 2000); *P.L. v. Norwalk Bd. of Educ*., 64 F. Supp. 2d 61, 64 (D. Conn. 1999); *B. v. Weston Bd. of Educ*., 34 F. Supp. 2d 777, 784 (D. Conn. 1999); *Connors v. Mills*, 34 F. Supp. 2d 795, 808 (N.D.N.Y. 1998); *C.G. v. New Haven Bd. of Educ*., 988 F. Supp. 60, 68 (D. Conn. 1997); *Straube,* 801 F. Supp. at 1182. **Third Circuit**: *P.G. v. Brick Twp. Bd. of Educ*., 124 F. Supp. 2d 251, 267 (D.N.J. 2000); *Woodside v. Phila. Bd. of Educ*., 2000 U.S. Dist. Lexis 568, at *16–17 (E.D. Pa. 2000); *Borough of Palmyra Bd. of Educ.*

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from 1986 until 2001 — ten years after *Casey* and fifteen years after Section 1415(i)(3)(B) was added to IDEA — the Third Circuit and thirty-five district judges concluded that the Act authorized awards of expert costs, while only a handful of district judges saw the matter otherwise.

Even the United States recognized that expert costs are covered by Section 1415(i)(3)(B). In a Federal Register notice published after the 1997 IDEA amendments, the Department of Education modified its attorneys' fees regulation, 34 C.F.R. 300.513, "to make it clear that the prohibition against using Part B funds for attorney's fees also applies to the related costs of a party in an action or proceeding, *such as depositions, expert witnesses, settlements, and other related costs*." 64 Fed. Reg.12,406, 12,615 (Mar. 12, 1999) (emphasis added); *see also* 65 Fed. Reg. 53,808, 53,812 (Sept. 5, 2000).

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v. R.C., No. 97-6199, 31 IDELR ¶ 3 (D.N.J. July 29, 1999); *B.K. v. Toms River Bd. of Educ.*, 998 F. Supp. 462, 474 (D.N.J. 1998); *S.D. v. Manville Bd. of Educ.*, 989 F. Supp. 649, 657 (D.N.J. 1998); *E.M. v. Millville Bd. of Educ.*, 849 F. Supp. 312, 317–318 (D.N.J. 1994). **Fifth Circuit**: *McC. v. Corrigan-Camden Ind. Sch. Dist.*, 909 F. Supp. 1023, 1033 (E.D. Tex. 1995). **Seventh Circuit**: *Koswenda v. Flossmoor Sch. Dist. No. 161*, 227 F. Supp. 2d 979, 996–98 (N.D. Ill. 2002); *Poynor v. Cmty. Unit Sch. Dist. No. 300*, 1999 U.S. Dist. Lexis 18831, at *5 (N.D. Ill. 1999); *K.Y. v. Me. Twp.*, 1999 U.S. Dist. Lexis 2123, at *3 (N.D. Ill. 1999); *Dale M. v. Bd. of Educ.*, 29 F. Supp. 2d 925, 929 (C.D. Ill. 1998), *rev'd on other grounds*, 237 F.3d 813 (7th Cir. 2001); *Hunger v. Leininger*, 1993 U.S. Dist. Lexis 3080, at *24 (N.D. Ill. 1993). **Eighth Circuit**: *Ind. Sch. Dist. No. 283 v. S.D.*, 948 F. Supp. 892, 897 n.4 (D. Minn. 1996). **Ninth Circuit**: *Ash v. Lake Oswego Sch. Dist. No. 7J*, 1992 U.S. Dist. Lexis 5235, at *2–3 (D. Or. 1992), *aff'd*, 980 F.2d 585 (9th Cir. 1992). **D.C. Circuit**: *Calloway v. District of Columbia*, 1999 U.S. Dist. Lexis 13751 (D.D.C. 1999); *Bailey v. District of Columbia*, 839 F. Supp. 888, 892 (D.D.C. 1993); *Aranow v. District of Columbia*, 791 F. Supp. 318, 318 (D.D.C. 1992).

Petitioner and the United States presumably begin their account in 2002 to coincide with the Eighth Circuit's two-to-one decision in *Neosho R-V School District v. Clark*, 315 F. 3d 1022, that *Casey* precludes expert costs under IDEA. Following *Neosho*, the Seventh Circuit in *T.D. v. LaGrange School District*, 349 F.3d 469 (2003), a divided D.C. Circuit in *Goldring v. District of Columbia*, 416 F.3d 70 (2005), and one district court, *Hiram C. v. Manteca Unified School District*, 2004 U.S. Dist. Lexis 29177, at *9–10 (E.D. Cal. 2004), joined the no-expert-costs camp. However, a majority of courts, including the Second Circuit in *Murphy* and nine district courts in the First, Second, Fourth, Fifth, Sixth, and Ninth Circuits, have rejected the reasoning in *Neosho* and held that expert costs are available.[21]

The point here is not that the majority rules. Rather, it is that these decisions belie petitioner and the United States' central claim that Section 1415(i)(3)(B) "unambiguously" excludes the award of expert costs. In *Casey*, the Court closely examined opinions in Civil Rights Act cases "at the time the provision was enacted" and found that they cut against the conclusion that Congress intended that expert costs be recoverable under Section 1988. *See Casey*, 494 U.S. at 94–97 (reviewing cases). Here, the

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[21] *Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.*, 402 F.3d 332, 336 (2d Cir. 2005); *Czarniewy v. District of Columbia*, 2005 U.S. Dist. LEXIS 5161, at *15–16 (D.D.C. 2005); *Summers*, 358 F. Supp. 2d at 472–473; *Gross v. Perrysburg Exempted Vill. Sch. Dist.*, 306 F. Supp. 2d 726, 738–739 (N.D. Ohio 2004); *Noyes v. Grossmont Union High Sch. Dist.*, 331 F. Supp. 2d 1233, 1251 (S.D. Cal. 2004); *S. v. Timberlane Reg'l Sch. Dist.*, 2004 U.S. Dist. Lexis 4032, at *22–25 (D.N.H. 2004); *R.E. v. N.Y. City Bd. of Educ.*, 2003 U.S. Dist. Lexis 58, at *8–9 (S.D.N.Y. 2003); *E.R. v. Vineland Bd. of Educ.*, 2003 U.S. Dist. Lexis 26722 (D.N.J. 2003); *Brillon v. Klein Ind. Sch. Dist.*, 274 F. Supp. 2d 864, 870–872 (S.D. Tex. 2003), *rev'd on other grounds*, 100 Fed. Appx. 309 (5th Cir. 2004); *see also Lamoine Sch. Comm. v. Ms. Z*, 353 F. Supp. 2d 18, 44 (D. Me. 2005) (awarding fees to educational consultant).

evidence of contemporary judicial understanding cuts in the opposite direction and is unequivocal; it confirms the Murphys' reading of Section 1415(i)(3)(B). It is implausible to contend, as do petitioner and the United States, that all of these decisions, the GAO, and indeed, the Department of Education, are wrong because the statute "unambiguously" forbids the conclusion they reached.

B. The Drafting History of HCPA Confirms Congress' Intent that Prevailing Parents are Entitled to Recover Expert Costs.

The drafting history of the HCPA reinforces the straightforward, textual reading of Section 1415(i)(3)(B) set forth above. *See Scheidler v. Nat'l Org. for Women*, 126 S. Ct. 1264 (2006); *Exxon Mobil Corp. v. Allapattah Servs*., 125 S. Ct. 2611, 2625–27 (2005). It demonstrates that at every stage of Congress' deliberations there was a bipartisan consensus in both Houses to authorize prevailing parents to recover their expert costs.

1. Congress enacted the HCPA to respond to *Smith v. Robinson*, 468 U.S. 992 (1984), which held that, in light of the comprehensiveness of IDEA's remedial scheme, it provided an exclusive remedy and, for that reason, parents could not recover attorneys' fees by joining claims under the Civil Rights or Rehabilitation Acts. Justice Brennan's dissent, joined by Justices Marshall and Stevens, urged Congress to revisit the issue. *Id.* at 1030–31.[22]

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[22] Only recovery of "attorneys' fees" under the Civil Rights Act and Section 504 of the Rehabilitation Act were at issue in *Smith*. It did not address whether IDEA's provision for equitable relief, 20 U.S.C. 1415(i)(3)(C)(iii), authorized the reimbursement of expenses parents incur in IDEA proceedings. But this provision is relevant as well, because it reflects Congress' understanding that IDEA empowered courts to make

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Congress did just that. Nineteen days later, identical bills were introduced in both the House and Senate to overturn *Smith*. The bills provided, among other things, that "[i]n any action or proceeding brought under this subsection, the court, in its discretion, may award a reasonable attorney's fee as part of the costs to a parent or legal representative of a handicapped child or youth who is the prevailing party." *See, e.g.*, S. 2895, 98th Cong. 2 (1984). No hearing was held in either House during 1984.

On February 6, 1985, Senator Lowell Weicker introduced a bill, identical to that introduced in 1984, before the 99th Congress. *See* Handicapped Children's Protection Act of 1985, S. 415, 99th Cong. (1985). On March 7, Representative Pat Williams introduced a modified version of the original bill in the House designed to address concerns that were raised the previous year. *See Hearing on H.R. 1523 Before the Subcomm. on Select Education of the H. Comm. on Education and Labor*, 99th Cong. 2–3 (1985) (*House Hearings*). Hearings were then held, and many witnesses emphasized that the fair resolution of IDEA

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prevailing parents whole. As noted above, in *Burlington*, this Court unanimously interpreted IDEA's equitable provision broadly, to require school boards to reimburse parents for their expenditures on unilateral placements ultimately found warranted. IDEA's equitable provision was enacted in the fall of 1975, just a few months after this Court's decision in *Alyeska Pipeline Services Co. v. Wilderness Society*, 421 U.S. 240 (1975), had disapproved the use of non-statutory equitable factors to reimburse attorneys' fees, but before Congress had reacted to *Alyeska* by enacting the Civil Rights Act of 1976. Nothing in *Alyeska* — or *Smith* — spoke to the question of reimbursing expenses for expert assistance, a practice that had been approved by this Court as an element of equitable relief as recently as *Bradley v. City of Richmond School Board*, 416 U.S. 696, 723 (1974). It did not become clear until this Court's decisions in *Crawford* and *Casey* that expert costs were similarly affected.

cases depends on parents having expert assistance.[23] No witness disagreed. Nor did anyone suggest that prevailing parents should not be reimbursed for expert costs.[24]

Following the hearings, a substitute version of the Senate bill was proposed that provided that a court may award "a reasonable attorney's fee, reasonable witness fees, and other reasonable expenses of the civil action, in addition to the costs" to a parent who is the prevailing party. *See* S. Rep. No. 99-112, at 7 (1985) (*Senate Report*); *see also id.* at 4–11. But the substitute also included a provision capping the fees that could be awarded legal services lawyers, which was opposed by House and Senate

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[23] *See, e.g.*, *House Hearings*, at 42 (testimony of Beverly J. Galarza); *id.* at 44 (testimony of Henry W. Christopher); *see also Hearing on S. 415 Before the Subcomm. on the Handicapped of the S. Comm. on Labor and Human Resources*, 99th Cong. 10–11 (1985) (*Senate Hearings*) (testimony of Edward Abrahamson); *id.* at 35 (testimony of Edwin W. Martin); *id.* at 92–93 (statement of the Florida Governor's Commission on Advocacy for Persons with Disabilities); *id.* at 113–14 (additional comment of E. Richard Larson).

[24] The National School Board Association (NSBA) testified and submitted a prepared statement during the House hearings and submitted extensive comments for the record of the Senate Hearing. NSBA made known its concerns about the fiscal impact the amendments might have and about the availability of attorneys' fees for due process hearings, which, in NSBA's view, might make them more adversarial. At no point, however, did the NSBA express concern about permitting prevailing parents to recover expert fees. *See House Hearings*, at 23–28; *Senate Hearings*, at 61–79. This was not an oversight. NSBA's Senate submission expressed concern about authorizing recovery of "the costs of experts during the I.E.P. conference," which is non-adversarial, *id.* at 70, but raised no objection to shifting the costs of experts used during adversarial due process hearings.

Democrats, as well as other controversial provisions. *Id.*[25] These provisions — not expert costs — prompted a bipartisan group of senators, led by Senators Hatch, Weicker, and Dole, but also including Senators Kerry, Kennedy, and Metzenbaum, to propose a streamlined substitute bill, referred to as the Hatch-Weicker substitute. *Id.* at 15–16. Hatch-Weicker provided for discretionary awards of "a reasonable attorney's fee in addition to the costs to a parent" of a child with a disability. 131 Cong. Rec. 21389.

Hatch-Weicker (Amendment No. 561) was accepted on motion by Senator Dole at the outset of the Senate debate. *Id.* Senator Weicker explained that Hatch-Weicker had been "developed in conjunction with and agreed to by the Department of Education and the Department of Justice." *Id.* He characterized the cost and fee provision as consistent with "more [than] 130 fee shifting statutes" already enacted, *id.* at 21390, and then described it as follows:

> S. 415 will enable courts to compensate parents for whatever reasonable costs they had to incur to fully secure what was guaranteed to them by the EHA. As in other fee shifting statutes, it is our intent that such awards will include, at the discretion of the court, reasonable attorney's fees, necessary expert witness fees, and other reasonable expenses which were necessary for parents to vindicate their claim to a free appropriate public education for their handicapped child.

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[25] *See, e.g.*, *Senate Report*, at 17–18 (additional views of Senators Kerry, Kennedy, Pell, Dodd, Simon, Metzenbaum and Matsunaga); 132 Cong. Rec. 17608 (1986) (Rep. Williams).

Id. No Senator questioned this statement, although disputes over other matters were aired. The Senate adopted S. 415 without a recorded vote. *Id.* at 21393.

Proceedings in the House reflect the same commitment to making expert costs available to prevailing parents. Following the House hearings, a substitute version of H.R. 1523 was reported out of committee that authorized courts to "award reasonable attorneys' fees, expenses and costs" to prevailing parents. H.R. Rep. No. 99-296, at 1, 5 (1985) (*House Report*). The House Report explained that "the phrase 'expenses and costs' includes expenses of expert witnesses; the reasonable costs of any study, report, test, or project which is found to be necessary for the preparation of the parents' or guardian's due process hearing, state administrative review or civil action; as well as traditional costs and expenses incurred in the course of litigating a case (e.g., depositions and interrogatories)." *Id.* at 6. There was no objection to this provision, although, like the Senate bill, the House Bill did contain controversial provisions, including one authorizing the recovery of attorneys' fees and costs for administrative proceedings, even in the absence of litigation. *See id.* at 15–17 (supplemental views).

By the time the bill reached the floor, there was bipartisan agreement on a new substitute bill. 131 Cong. Rec. 31369 (1985) (remarks of Rep. Williams). The new bill did not change the cost-shifting provision. But to accommodate concerns about the bill's cost, it did add a provision directing the GAO to study and report to Congress on the legislation's fiscal impact, accompanied by a "sunset" provision. *Id.* at 31370. With the compromise in place, the House passed H.R. 1523 without a recorded vote. *Id.* at 31377. At no point during the House's deliberations on H.R. 1523 was any objection raised to allowing prevailing parents to recoup expert costs.

After the House vote, conferees met to iron out differences between the two bills. The conferees largely accepted S. 415 insofar as it defined parents' rights to recover attorneys' fees and costs, and they accepted H.R. 1523 insofar as it directed the GAO to study the fiscal impact of the legislation and report back to Congress, but without a sunset provision. *See* H.R. Conf. Rep. No. 99-687, at 1–3 (1986) (*Conference Report*). The Joint Statement identified the various issues the Conferees had resolved. Reiterating what the House and Senate had already been told about the provision, the Conferees explained that "the term 'attorneys' fees as part of the costs' include[s] 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 parent or guardian's case in the action or proceeding, as well as traditional costs incurred in the course of litigating a case." *Id.* at 5.[26] The Conference Report and the accompanying Joint Statement were printed together (amounting to seven pages of text) and circulated to all members of Congress in advance of the vote on the final bill; they were also reprinted in the Congressional Record. 132 Cong. Rec. 16701 (1986).[27]

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[26] The Conferees did make one notable change to the wording of what became Section 1415(i)(3)(B). It substituted the phrase "attorneys' fees *as part of* the costs" for "attorney's fees *in addition to* the costs." The Joint Statement explains that "[t]his change incorporates the Supreme Court *Marek v. Chesny* [, 473 U.S. 1 (1985)] decision." *Conference Report*, at 5. *Marek* held that where the underlying statute defines "costs" to include attorneys' fees, attorneys' fees are included in offers of settlement under Rule 68. Although the Conferees' modification of the language had implications for Rule 68 settlement offers, it had no bearing on the meaning of "costs." *Id.*; *see also Marek,* 473 U.S. at 11–12.

[27] Congress does this for a reason. The Joint Statement sets forth the understanding of the Members of Congress who drafted the *final* bill, which reflects compromises on issues dividing the two houses. The Joint (continued...)

Both the Senate and House accepted the Conference Report. 132 Cong. Rec. 16823–25 (1986); *id.* at 17607–12. At no point was any objection raised to the Conferees' statement that expert costs would be subject to reimbursement under the Act. The Act was signed into law by President Reagan on August 5, 1986.

2. Despite this clear intent, petitioner claims that "no one suggested that the language Congress enacted — 'attorneys' fees as part of the costs' — encompassed expert fees." Pet. Br. at 24 n.10. That assertion is incorrect: the Joint Statement, signed by the House and Senate Conferees, said just that.

Equally unavailing is petitioner's claim that the legislative history proves "that Congress purposefully declined to include expert costs in attorneys' fees." *Id.* Petitioner points out that the Senate bill initially authorized the award of "witness fees," but the final bill omitted that term. That is true, but does not tell the whole story. As shown above, the "witness fee" language was

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Statement informs Members of Congress of the final bill's contents and how it differs from the bills approved in the House and Senate. After the Conferees issue the Report, it then goes *back* to both chambers, where it is distributed to Members before they vote on whether to accept the Conference Report. Only if both chambers approve the Conference Report is the legislation submitted to the President. The Joint Statement is thus a document of considerable authority. *See* Hon. Robert A. Katzmann, *Courts and Congress* 63–64 (1997) (quoting Judge James L. Buckley as remarking that, as a Senator, "my understanding of most of the legislation I voted on was based entirely on my reading of its language and, where necessary, on explanations contained in the accompanying report"); *see also City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 440 (2002) (citing Conference Report to construe statute); *INS v. St. Cyr*, 533 U.S. 289, 317 (2001) (same); *Rostker v. Goldberg*, 453 U.S. 57, 74 (1981) ("The [Conference] Report, therefore, is considerably more significant than a typical report of a single House, and its findings are in effect findings of the entire Congress.").

part of a controversial bill that was scrapped, in part, because it capped fees for legal services lawyers. It was replaced by the Hatch-Weicker substitute. As Senator Weicker explained when he introduced Hatch-Weicker, the substitute's language was to be construed to cover "attorney's fees, necessary expert witness fees, and other reasonable expenses" necessary for the parents' case. 131 Cong. Rec. at 21389–90(1985).[28]

Nor does the omission of the word "expenses" from the final legislation demonstrate an intent to exclude expert costs, as petitioner contends. The House receded to the Senate's bill in Conference, but did so based on the Joint Statement's explanation that expenses and expert costs are covered by Section 1415(i)(3)(B). *See Conference Report*, at 5. And fundamentally, recovery of "expenses" *is* part of the Act; the GAO was tasked to report on "expenses" recovered by prevailing parents to Congress. Contrary to petitioner's claim, these minor textual changes do not demonstrate that Congress "purposefully declined to include expert costs" in the Act.

Finally, petitioner and the United States contend that the focus of the legislative effort was to restore to parents the right to recover attorneys' fees, not expert costs. Pet. Br. at 24 n.10; U.S. Br. at 19 n.7. That assertion is partially true. It is correct that "attorneys' fees" were the sole item at issue in *Smith*. But to suggest that Congress in the HCPA single-mindedly focused on attorneys' fees is to dramatically understate what Congress sought to achieve in the HCPA, which reflects Congress' full-

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[28] Senator Weicker's reference to 130 similar statutes shows that he was unaware of the variations among these statutes that this Court later relied on in *Casey*. That is not surprising. As noted above, nothing in the record of Congress' deliberations on the HCPA suggests that Senator Weicker or his colleagues had any expectation that the variations in drafting cost-shifting provisions had the significance later given to them in *Casey*.

bore disapproval of *Smith*.[29]

Petitioner and the United States fixate on what the HCPA purportedly did *not* do. But what is striking about their discussion of the history of the HCPA is how little they say about what Congress *did* do in the Act. In the course of shaping the HCPA, Congress resolved many contentious issues. But there was not one objection to authorizing prevailing parents to recover expert costs. Nor was there any reason, given the then-prevailing understanding about the meaning of the word "costs," to conclude that Congress had anything else in mind. All of the indicia of congressional intent — the full text of the HCPA, its purpose and the purpose of IDEA, and the resolve of the leaders of both parties to support the Hatch-Weicker substitute — support the conclusion that Congress authorized the recovery of expert costs.

III. *Crawford Fitting* And *Casey* Do Not Call For A Different Reading Of The Act.

Every case holding that IDEA does not permit awards of expert costs has relied on *Casey* to conclude that "costs" has a legal, term-of-art meaning that excludes expert fees. This reliance is misplaced. Neither *Crawford Fitting* nor *Casey* sheds light on what Congress meant in 1986 when it enacted the HCPA.

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[29] Congress accomplished many goals in the HCPA: Section 2, codified at 20 U.S.C. 1415(i)(3)(B), provided the authorization for the award of "attorneys' fees" found lacking in *Smith*; Section 3, codified at 1415(*l*), overturned *Smith*'s basic holding by providing that claims under the Civil Rights and Rehabilitation Acts may be maintained with IDEA claims; Section 4 directed the GAO Report; and Section 5 made Section 1415(i)(3)(B) retroactive to all cases brought or pending after July 4, 1984 (the day before *Smith* was decided).

To understand why these decisions do not inform the interpretation of IDEA, it is useful to review their specific holdings. In *Crawford Fitting*, the Court held that the expenses of hiring an expert could not be assessed against a losing party as part of "costs" in federal court proceedings governed by 28 U.S.C. 1821 and 1920. "[A]bsent explicit statutory or contractual authorization for the taxation of the expenses of a litigant's witnesses as costs, federal courts are bound by the limitations set out in 28 U.S.C. § 1821 and § 1920," which do not authorize the shifting of expert costs. 482 U.S. at 445. Building on *Crawford Fitting*, *Casey* held that Section 1988's authorization for awards of "attorneys' fees" did not extend to expert fees. 499 U.S. at 96–97. The Court supported its conclusion by first pointing to 28 U.S.C. 1821(b) and 1920(c) — which fix compensation for witnesses (not just experts) in federal court proceedings — and held that there was no indication that Congress repealed these provisions by implication when it enacted Section 1988. *Id*. at 87–88. *Casey* also observed that Congress, in thirty-four other cost-shifting statutes, explicitly provided authorization to reimburse expert witnesses. In the absence of evidence to the contrary, it was fair to conclude that Congress had not intended Section 1988's authorization to award attorneys' fees as encompassing expert fees. *Id.* at 88–94.[30]

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[30] The Civil Rights Act of 1991 expressly authorized awards of expert fees in Section 1988. P.L. 102-166, 105 Stat. 1071, 1099 (1991), codified at 42 U.S.C. 1988(c). Congress did not revisit IDEA in that enactment. At that time, there was no need to: No court had ruled, or even suggested, that IDEA did not provide authorization for expert costs. Nor did Congress revisit the issue when IDEA was reauthorized in 1997 or 2004. Both petitioner and the United States point to proposed legislation in 2004 that would have amended IDEA and many other statutes to provide explicit authorization for expert fees awards. Pet. Br. at 22 n.8; U.S. Br. at 22–23 n.8. But as this Court emphasized earlier this Term, "[f]ailed legislative proposals are a 'particularly dangerous

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In *Casey*, the Court distinguished IDEA from Section 1988 by pointing to the Joint Statement's explanation that expert costs would be reimbursable. The Court remarked: "The specification [in the Joint Statement] 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." 499 U.S. at 91 n.5 (emphasis in original). Courts have disputed the meaning of this footnote. *Compare, e.g.*, *Murphy*, Pet. App. at 10a–11a, *with Goldring*, 416 F.3d at 75. But one thing is clear: *Casey* avoided pre-judging the issue in this case. And for good reason. There are many factors that differentiate this case from *Casey*, beyond the most obvious one — that IDEA is a very different statute than Section 1988, and the language of IDEA has to be examined in the context of *that* statute. *Leocal*, 543 U.S. at 8–10.

1. First and foremost, the text of Section 1415(i)(3)(B), coupled with Congress' direction to the GAO to study and report back on the costs of expenses and consultants in IDEA cases, leave no doubt that Section 1415(i)(3)(B) authorizes courts to reimburse expert costs to prevailing parents. Statutory language must be construed in light of the historical context facing the Congress that enacted it; not through the lens of hindsight, post-enactment developments, or the language of other, unrelated statutes. *MCI Telecomms.*, 512 U.S. at 228. Nothing in the HCPA's history suggests that Congress anticipated the legal, term-of-art meaning that *Crawford Fitting* and *Casey* ascribed to the word "costs," and there is much to refute it. At every turn,

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ground on which to rest an interpretation of a prior statute.'" *Lockhart v. United States*, 126 S. Ct. 699, 702 (2005) (quoting *United States v. Craft*, 535 U.S. 274, 287 (2002) and *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990)).

Congress expressed its understanding that courts would construe the cost-shifting language in the Act to authorize awards of expert costs, not to preclude such awards. In so doing, Congress made it clear that "costs" should be read in its ordinary sense, not as a term of art. To the extent that *Crawford* and *Casey* demand clarity on Congress' part, that test is amply met here.

2. The text and purposes of IDEA and Section 1988 are quite different, which also suggests that *Casey* has no bearing here. There are key textual differences between the two provisions that reflect their different aims. Section 1415(i)(3)(B) speaks of "the costs to the *parents*." Section 1988 authorizes costs to "the prevailing *party*." This difference reflects Congress' intent in IDEA to authorize the reimbursement of costs parents incur mainly in challenging adverse school board determinations *in state administrative proceedings*,[31] whereas Section 1988 was aimed at permitting prevailing civil rights plaintiffs to recover their litigation costs *in federal court*. Section 1988 does not ordinarily authorize awards of costs incurred in state administrative proceedings. *See, e.g.*, *N.C. Dep't of Transp. v. Crest St. Cmty. Council, Inc.*, 479 U.S. 6 (1986); *Webb v. Dyer County Bd. of Educ.*, 471 U.S. 234 (1985). Because the aims of Section 1415(i)(3)(B) are so different, petitioner's effort uncritically to engraft *Casey*'s understanding about the meaning of "attorneys' fees" in Section 1988 onto the authorization for "the costs to the parents" in Section 1415(i)(3)(B) is unavailing. Rough similarities in statutory language cannot be invoked as a means of subverting stark differences in congressional intent.

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[31] Every circuit recognizes that parents may bring an action under IDEA *solely* to recover fees and costs incurred in state administrative proceedings. *See, e.g.*, *Eggers v. Bullitt County Sch. Dist.*, 854 F.2d 892, 895–898 (6th Cir.1988); *Brown v. Griggsville Cmty. Unit Sch. Dist. No. Four*, 12 F.3d 681, 683–85 (7th Cir. 1993); *Moore v. District of Columbia*, 907 F.2d 165, 169–172 (D.C. Cir. 1990) (en banc).

Moreover, *Casey* rested in part on the proposition that permitting expert fees to be awarded in litigation under Section 1988 as part of attorneys' fees would work an implied repeal of 28 U.S.C. 1821(b) and 1920. *Casey*, 499 U.S. at 87–88. But those provisions, by their express terms, apply only to proceedings in *federal* court. As noted, IDEA proceedings are different from the civil rights cases covered by Section 1988, because the record in IDEA cases is compiled during state due process hearings where Sections 1821(b) and 1920 have no applicability. Thus, *Casey*'s implied repeal theory has no bearing on IDEA.[32]

3. *Casey* also based its ruling on a determination that, at the time Congress enacted Section 1988, cost-shifting provisions authorizing the award of "attorney's fees as part of the costs" had

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[32] The majority opinions in *Goldring* and *Neosho* suggest that courts in IDEA cases could award costs and witness fees for state due process hearings under Sections 1821(b) and 1920. *See Goldring*, 416 F.3d at 77 n.4; *Neosho R-V Sch. Dist.*, 315 F.3d at 1031–32. Both opinions disregard the text of those provisions, which apply only to proceedings in federal court. 28 U.S.C. 1821(a)(2) (defining "court of the United States" for the purpose of witness fees to include only federal and not state courts); 28 U.S.C. 1920 (permitting only a Judge or clerk of a federal court to tax costs); 28 U.S.C. 451 (defining court of the United States); *see also Neosho R-V Sch. Dist.*, 315 F.3d at 1034 (Pratt, J., dissenting) (criticizing majority opinion on this ground). *Goldring* and *Neosho* also overlook another consequence of their holdings: Congress provided that IDEA cases could be brought in state as well as federal court, 20 U.S.C. 1415(i)(A)(2), and it is by no means clear that Sections 1821 and 1920 authorize an award of costs in *state* courts. Under petitioner's argument and the holdings in *Goldring* and *Neosho*, the authorization for "costs" in IDEA has no independent meaning. That interpretation leaves parents in state court IDEA cases potentially worse off than their federal counterparts, who are at least entitled to the costs authorized under Sections 1821 and 1920, while state court plaintiffs may be left only whatever costs, if any, are authorized under state law.

"a clearly accepted meaning in legislative and judicial practice" that *excluded* awards of expert costs. 499 U.S. at 88–94. Here, the "legislative and judicial practice" cuts in the opposite direction. All of the relevant legislative material confirm that Congress understood the term costs to *include* expert costs, including the House Report, Senator Weicker's floor statement, the Joint Statement, the GAO reporting requirement, and the GAO's Report. Even the Department of Education held that view. The same is true of the "judicial practice" following the HCPA's passage. Courts uniformly understood the HCPA to confer authority to award the costs of experts. *See supra* at II.A.

4. More generally, the Congress that enacted the HCPA had every reason to think that courts would respect its intentions as made plain in the legislative history. The HCPA was enacted in response to *Smith v. Robinson*, which relied heavily on legislative history to conclude that Congress intended IDEA to provide a comprehensive remedial scheme. 468 U.S. at 1010–11. Chief Justice Burger's opinion for the Court in *Tatro* (issued on the same day as *Smith*) relied on IDEA's legislative history in construing the scope of the Act's exclusion of "medical services." *Tatro*, 468 U.S. at 893; *see also Rowley*, 458 U.S. at 192–98 (reviewing legislative history to determine what is an "appropriate" education). Thus, for the Congress that enacted the HCPA, the notion that a reviewing court would shut its eyes to the Joint Statement and other uncontroverted expressions of intent in the legislative history to resolve any possible doubt about the statute's meaning would have been alien.

5. Finally, the interpretative task in *Casey* was different from the one here because Section 1988 is a stand-alone cost-shifting provision that applies to many civil rights statutes. Thus, in construing Section 1988, *Casey* could not follow the Court's general practice of looking to related textual provisions to shed

light on Section 1988's meaning, but instead found it necessary to look at other statutes, enacted by other Congresses. That is not true here. As noted above, when Section 1415(i)(3)(B) is examined in the context of related provisions in both the HCPA and IDEA, Congress' intent is clear.

IV. Spending Clause Considerations Do Not Affect The Interpretation Of Section 1415(i)(3)(B).

Petitioner and the United States argue that Section 1415(i)(3)(B) should be construed to exclude expert costs under rules of interpretation applicable to Spending Clause legislation. Pet. Br. at 19–20; U.S. Br. at 13. Section 1415(i)(3)(B) has been the law for twenty years, but they cite no case involving expert costs in which a Spending Clause argument was made, let alone accepted. Nor did petitioner make a Spending Clause argument in the lower courts.[33] There is good reason why this argument was not raised before — it is wrong and it is beside the point.

It is wrong because the HCPA was enacted under Section 5 of the Fourteenth Amendment.[34] It is wholly inaccurate to say, as

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[33] Petitioner has therefore forfeited this argument. *See, e.g.*, *TRW, Inc. v. Andrews*, 534 U.S. 19, 34 (2001) (declining to reach question "not raised or briefed below").

[34] The HCPA made the Act's cost-shifting provision retroactive to cases pending at the time this Court decided *Smith*. In litigation over the retroactivity provision's constitutionality, the courts uniformly rejected Spending Clause claims because the HCPA provided ample notice to states and because it was enacted pursuant to Congress' authority under Section 5 of the Fourteenth Amendment, *see, e.g.*, *Fontenot v. La. Bd. of Elementary & Secondary Educ.*, 835 F.2d 117 (5th Cir. 1988), or pursuant to Congress' power under Section 5 *and* the Spending Clause. *See, e.g.*, *Mitten v. Muscogee County Sch. Dist.*, 877 F.2d 932 (11th Cir. 1989); (continued...)

does petitioner, that IDEA is *exclusively* a Spending Clause statute. IDEA was enacted under Section 5 as well. *See* 20 U.S.C. 1400(c)(6) (Congress enacted IDEA "to assure equal protection of the law"). This Court has never held that Spending Clause principles cabin the interpretation of IDEA, and such a ruling would be at odds with many of the Court's prior IDEA cases. *See, e.g.*, *Burlington*, 471 U.S. at 369; *Smith*, 468 U.S. at 1010–11; *Rowley*, 458 U.S. at 180, 192–200.

More fundamentally, the argument is beside the point. The Spending Clause requires Congress to give states fair notice of their fiscal obligations when they accept federal funds. *See, e.g.*, *Gebser v. Lago Vista Indep. Sch. Dist*., 524 U.S. 274 (1998). The HCPA did just that. In the years following the HCPA's enactment, courts overwhelmingly interpreted Section 1415(i)(3)(B) as imposing an obligation on school boards to pay parents their costs, including the costs of experts, when they prevailed. No school district objected to the award of expert costs on Spending Clause grounds. Nor did petitioner Arlington Central. The question here is not the adequacy of notice. The question is whether now, twenty years after passage of the HCPA, there is reason to question the judgment of the vast majority of courts, the GAO, and even the United States, all of whom concluded that Section 1415(i)(3)(B) authorizes courts to award the costs of experts to prevailing parents. There is none.

(...continued)
Counsel v. Dow, 849 F.2d 731 (2d Cir. 1988).

CONCLUSION

For the reasons stated above, the judgment below should be affirmed.

Respectfully submitted,

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