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

BRIEF IN OPPOSITION

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September 1, 2005

BRIEF IN OPPOSITION

Respondents Pearl and Theodore Murphy oppose the petition for a writ of certiorari, which presents two questions, neither of which warrants review. As to the first question, respondents agree that there is an emerging circuit split on whether expert fees are available under the Individuals with Disabilities Education Act's provision authorizing an award of "costs." But this split is not sufficiently mature to warrant this Court's attention at this time. Petitioner also seeks review of the Second Circuit's affirmance of the partial expert fee awarded by the district court in this case. Petitioner claims that the lower courts have approved an "expert" fee for what it contends are "legal" services. But the Second Circuit did not hold that plaintiffs can obtain "legal" fees for the services of non-lawyer experts. Indeed, it held just the opposite. Petitioners' claim is only that the Second Circuit erred in drawing the line between legal and expert services. This claim, which is highly fact-bound, does not merit review. The petition should be denied.

1. Petitioner asks this Court to review the Second Circuit's decision that a prevailing party may recover expert fees under the fee-shifting provision of the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1415(i)(3)(B). That provision states that "[i]n any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorney's fees as part of the costs to the parents of a child with a disability who is a prevailing party." *Id.* After a thorough analysis of the text of IDEA's fee-shifting provision, this Court's precedent, IDEA's legislative history, and the statute's remedial purpose, the Second Circuit concluded that "Congress intended to and did authorize the reimbursement of expert fees in IDEA actions." *Murphy v. Arlington Central Sch. Dist. Bd. of Educ.*, 402 F.3d 332, 336 (2d Cir. 2005).

In reaching its conclusion, the Second Circuit first examined this Court's rulings in *Crawford Fitting Co. v. J.T.*

Gibbons, Inc., 482 U.S. 437 (1987), and *West Virginia Univ. Hospital v. Casey*, 499 U.S. 83 (1991). Taken together, the decisions establish that, although the term "costs" is not self-defining, unless Congress specifies otherwise, a statutory authorization for costs does not authorize the payment of expert witness fees. *Murphy,* 402 F.3d at 336. The Second Circuit noted that, in contrast to the statutes construed in those cases, Congress, in IDEA's legislative history, left no doubt that it intended expert fees to be included within the term "costs" under IDEA. *Id.* The court also pointed out that *Casey* looked to IDEA's legislative history to differentiate IDEA from 42 U.S.C. § 1988, where there was no indication that Congress intended the word "costs" to include expert witness fees. *Casey*, 499 U.S. at 92 n.5. The Second Circuit 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 that school boards have offered to secure a free appropriate public education." *Murphy*, 402 F.3d at 338. The availability of expert fees would thus be in keeping with IDEA's remedial purpose. *Id.*

In ruling that IDEA authorizes the award of expert fees as part of costs, the Second Circuit joined the Third Circuit and the majority of district courts that have considered the issue. *See Arons v. New Jersey State Bd. of Educ.*, 842 F.2d 58 (3d Cir. 1988); *see, e.g.*, *Pazik v. Gateway Regional Sch. Dist.*, 130 F. Supp. 2d 217, 220 (D. Mass. 2001); *Brillon v. Klein Ind. Sch. Dist.*, 274 F. Supp. 2d 864, 870-72 (S.D. Tex. 2003), *rev'd in part on other grounds*, 100 Fed. Appx. 309 (5th Cir. 2004); *Verginia McC. v. Corrigan-Camden Indep. Sch. Dist.*, 909 F. Supp. 1023, 1033 (E.D. Tex 1995); and *Gross v. Perrysburg Exempted Village Sch. Dist.*, 306 F. Supp. 2d 726, 738-39 (N.D. Ohio 2004).

To be sure, three other circuits – the Seventh, Eighth, and, now, D.C. Circuits – have reached the contrary conclusion. *Neosho R-V. Sch. Dist. v. Clark ex rel. Clark*, 315 F.3d 1022, 1031 (8th Cir. 2003); *T.D. v. LaGrange Sch. Dist. No.*

102, 349 F.3d 469, 482 (7th Cir. 2003); *Goldring v. District of Columbia*, 416 F.3d 70 (D.C. Cir. 2005). But only the D.C. Circuit's opinion sets forth any detailed analysis to support its conclusion, and that decision was reached over a vigorous dissent by Judge Rogers, who argued that the court should follow the Second Circuit's approach in *Murphy*.[1] Thus, although a split has emerged among the circuits, fewer than half of the circuits have yet considered the question, and only two circuits have written opinions that address the question in any depth. There is no need for the Court to resolve this question at this time. The Court should deny the petition on the first question presented.

2. Petitioner also seeks review of the Second Circuit's affirmance of the partial expert fee awarded by the district court in this case. Petitioner claims that the lower courts have approved an "expert" fee for what it contends are "legal" services. This claim, which is highly fact-bound, does not merit review.

In IDEA due process proceedings, parents and students with disabilities 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." 20 U.S.C. § 1415(h)(1). Plaintiffs' expert, Ms. Marilyn Arons, is an educational consultant who advises families like the Murphys on their children's disabilities and the educational strategies that might help their children make progress in school. Ms. Arons also assists families in navigating IDEA's complex procedures. The district court ruled that the Murphys were entitled to recover only $8,650 of the $29,350 in expert fees requested for Ms. Arons' services, and the Second Circuit affirmed that ruling. In so doing, the Sec-

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[1] A petition for rehearing en banc in *Goldring* was filed with the D.C. Circuit on August 25, 2005, and thus there is a possibility that the D.C. Circuit will reconsider the panel's split ruling in that case.

ond Circuit adopted the Third Circuit's approach in *Arons v. New Jersey State Bd. of Educ*., 842 F.2d 58, 62 (1988) (involving the same expert) namely, that experts who assist families may not be awarded costs for "legal" work, but may recover costs for expert consultations. *Murphy*, 402 F.3d at 338-39. Petitioner asks this Court to review the district court's finding, affirmed by the Second Circuit, that Ms. Arons should be awarded expert fees for the non-legal, expert consulting services she performed on the Murphys' behalf. No other court has addressed this issue, and the line drawn by the Second and Third Circuits is eminently reasonable. This question does not warrant review by this Court.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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