No. 05-18

IN THE
Supreme Court of the United States

ARLINGTON CENTRAL SCHOOL DISTRICT
BOARD OF EDUCATION,

Petitioner,

v.

PEARL MURPHY and THEODORE MURPHY,

Respondents.

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

REPLY BRIEF

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ARGUMENT

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

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

Respondents acknowledge that statutory language is the starting point in any case of statutory construction (Res. Br. at 17).[1] The IDEA grants district courts of the United States discretionary authority to "award reasonable attorneys' fees as part of the costs to the parents of a child with a disability who is the prevailing party." *See* 20 U.S.C. § 1415(i)(3)(B).[2]

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1. Conversely, Amicus Council of Parent Attorneys and Advocates ("COPAA") incorrectly suggest that "the Court must first inquire whether . . . an award [of expert fees] is necessary" (Amicus Br. at 4). *Cf. Leocal v. Ashcroft*, 543 U.S. 1, 8 (2004).

2. The IDEA was originally entitled the "Education of the Handicapped Act" (the "EHA") and was originally enacted as Title VI of the Elementary, Secondary, and Other Education Amendments of 1969. *See* Pub. L. No. 91-230, 84 Stat. 175. In 1975, certain amendments were enacted in the "Education for All Handicapped Children Act" (the "EAHCA"). *See* Pub. L. No. 94-142, 89 Stat. 773. Its name was changed to IDEA in 1990 by Pub. L. No. 101-476, 104 Stat. 1142. Congress entirely revised the IDEA in 1997. *See* Pub. L. No. 105-17, 111 Stat. 88. The IDEA was recently amended by the Individuals with Disabilities Education Improvement Act of 2004 ("IDEIA"), Pub. L. No. 108-446, 118 Stat. 2647 (Dec. 3, 2004), which took effect on July 1, 2005. Because all events related to this case occurred prior to the IDEIA's effective date, all statutory citations refer to the IDEA, as codified prior to the enactment of the IDEIA. *See Lillbask v. State of Conn. Dep't of Educ.*, 397 F.3d 77, 80 n.1 (2d Cir. 2005).

Respondents concede that expert fees are not part of attorneys' fees – "That is not the Murphy's argument" (Res. Br. at 26).[3] Respondents argue instead that expert fees are inherently recoverable as costs.

This Court has previously rejected the suggestion that expert fees might be part of the costs allowable in a fee-shifting statute. *See Casey*, 499 U.S. at 87 n.3. There is "no authority to support the counter-intuitive assertion that the term 'costs' has a different and broader meaning in fee-shifting statutes than it has in the cost statutes that apply to ordinary litigation."[4] *See id*. Indeed,

> The specification [in House Conference Report No. 99-687 that the 'term 'attorneys' fees as part of the costs' include reasonable expenses and fees of expert witnesses and the reasonable costs of any test or evaluation which is found to be necessary for the preparation of the . . . case'] would have been quite unnecessary if the ordinary meaning of the term included those elements.

See id. at 91 n.5. The Second Circuit likewise acknowledged in its opinion below that "'costs' . . . generally does not

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3. Respondents acknowledge that this Court's decision in *West Virginia Univ. Hosp., Inc. v. Casey*, 499 U.S. 83 (1991) "rejected the argument that expert fees are part of 'attorneys' fees' to parties in Section 1988 district court litigation" (Res. Br. at 26).

4. Even Respondents' Amici, National Disability Rights Network and the Center for Law and Education ("NDRN-CLE"), concede that "absent congressional action, the range of costs ordinarily recoverable to a party prevailing in federal court are limited to those enumerated at 28 U.S.C. §§ 1920 and 1821(b)" (Amici Br. at 15).

include expert fees in civil rights fee-shifting statutes" (Pet. App. A at 8a).[5]

Contrary to the respondents' assertion, the application of Sections 1821 and 1920 of Title 28 of the United States Code to IDEA claims will not deprive parents of the opportunity to recover taxable costs for due process proceedings (*cf*. Res. Br. 16, 46). While only courts, not administrative hearing officers, are authorized to award fees, the award can be the result of either an administrative decision or court case. *See Lucht v. Molalla River Sch. Dist.*, 224 F.3d 1023, 1028 (9th Cir. 2000); *Megan C. v. Indep. Sch. Dist. No. 625*, 57 F. Supp. 2d 776, 783 (D. Minn. 1999). The respondents also concede that "every circuit recognizes that parents may bring an action under IDEA solely to recover fees and costs incurred in state administrative proceedings" (Res. Br. at 45 n.31).

Alternatively, respondents argue that recovery of experts' fees is part of the Act, as the GAO was tasked to report on "expenses" recovered by prevailing parents to Congress. *See* Handicapped Children's Protection Act of 1986 ("HCPA") § 4(b)(3), Pub. L. No. 99-372, 100 Stat. 796 (1986). Respondents attach great weight to the fact that the

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5. There would be a similar result if the respondents had made their claim in state court. While a party to whom costs are awarded is entitled to recover "reasonable and necessary expenses as are taxable according to the course and practice of the court, by express provision of law or by order of the court," N.Y. C.P.L.R. § 8301(a)(12) (McKinney 1981), it is well established that only statutory witness fees may be taxed, *see County of Sullivan v. Emden*, 59 A.D.2d 957, 958, 400 N.Y.S.2d 376, 378 (3d Dep't 1977). "Expert witness fees are not recoverable under the discretionary provision of CPLR 8301(a)(12) absent extraordinary circumstances." *Board of Educ. of Northport-East Northport Union Free Sch. Dist. v. Ambach*, 90 A.D.2d 227, 242, 458 N.Y.S.2d 680, 690 (3d Dep't 1982).

GAO read "expenses" *en passant* as including "expert witness fees."[6]

As a preliminary matter, the Second Circuit did not cite the GAO report as probative, or even relevant, to its analysis of the IDEA's attorneys' fees provision (Pet. App. A at 8a). The Second Circuit likely decided against grounding its opinion on the word "expenses" in Congress' charge to the GAO because this Court has previously dismissed speculation that the disbursements by attorneys are "costs" within the meaning of the statute. *See Casey*, 499 U.S. at 87 n.3; *see also United States Football League v. National Football League*, 887 F.2d 408, 416 (2d Cir. 1989) ("attorney's fees awards include those reasonable out-of-pocket expenses incurred by attorneys and ordinarily charged to their clients.").

The directive to the GAO lacks any mention of recovery of experts' fees under the HCPA, which under Section 4(b)(3)(A) references the "specific amount of attorneys' fees, costs, and expenses awarded" and under Section 4(b)(3)(B) references the "hours spent by personnel, including attorneys and consultants, involved in the action or proceeding, and expenses incurred by parents and the State educational agency

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6. The GAO Report states, in relevant part:

> Expert 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.

Government Accounting Office, *Special Education: The Attorney Fees Provision of Public Law 99-372* (HRD-90-22BR) at 13 (Nov. 1989). The GAO exists to serve Congress and its committees, so it is no surprise that the GAO Report mirrors language contained in the House Conference Committee Report. *Compare id. with* H.R. Rep. No. 99-296 (99th Cong. 1st Sess.) at 5 (Oct. 2, 1985), *reprinted in* 1986 U.S.C.C.A.N. 1798, 1808.

and local educational agency." Here, the word "expenses" likely meant "disbursements (billed directly to the client)." *See Casey*, 499 U.S. at 87 n.3 (*citing Northcross v. Board of Educ. of Memphis Schs.*, 611 F.2d 624, 639 (6th Cir. 1979) ("reasonable out-of-pocket expenses incurred by the attorney" included in Section 1988 "attorney's fee" award), *cert. denied*, 447 U.S. 911 (1980)).[7] Since Congress directed the GAO to study expenses of both the parents and school districts, it is more likely that these are requests for data on which to base future legislation. This construction is strengthened by the lack of response by the GAO, despite repeated meetings with Congress.[8]

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7. For similar reasons, respondents' reliance on Congress' directive to the GAO to obtain data on "the number of hours spent by personnel, including attorneys and *consultants*, involved in the action or proceeding," HCPA, Pub. L. No. 99-372, § 4(b)(3), 100 Stat. 796, 797-798 (1996), is equally unavailing, as the GAO's Report included no information on expert *fees* in response to the separate charge to study consultant *hours*, *see* GAO, *Special Education: The Attorneys Fees Provision of Public Law 99-372* (HRD-90-22BR) (Nov. 1989).

Respondents' Amici, NDRN-CLE, in turn, suggest that if the charge to the GAO does not provide explicit statutory authority for the recovery of expert fees, it at least creates the necessary statutory ambiguity to trigger a review of the IDEA's legislative history (Amici Br. at 17 n.20). Lacking any direction to review "expert fees" there is no ambiguity, but the purpose for the direction is resolved by reviewing the report the GAO prepared for Congress after three separate meetings with Congress. *See id.* at 2, 15. Congress instructed the GAO "to obtain available information on the total amount of attorney fees paid by state or local educational agencies to parents of handicapped children under the act during fiscal years 1987 and 1988." *See id.* at 2. And that is what the GAO did.

8. In its 85 page report, the GAO references "expert witness fees" only once – no data on "expert witness fees" is reported or

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Respondents and Amicus COPAA misinterpret a Federal Register notice published after the 1997 IDEA Amendments (Res. Br. at 33; Amicus Br. at 3). This notice did not recognize that expert fees are recoverable as costs under Section 1415(i)(3)(B), or even address that issue. *See* 64 Fed. Reg. 12,406, 12,615 (Mar. 12, 1999); *see also* 34 C.F.R. § 300.513(b). Instead, the notice clarified the prohibition against using Part B funds for the litigation expenses of either parents or school districts. *See id.*

1. The IDEA provides no notice to either school districts or parents of the availability of expert fees.

The concept of notice is fundamental to the IDEA. *See* 20 U.S.C. § 1415(b)(3) (school districts required to give parents written notice of their rights at key intervals in the IEP development process); 20 U.S.C. § 1415(d)(1) (same); 20 U.S.C. § 1415(c) (defining the content of prior written notice before school district action); 20 U.S.C. § 1415(d)(2)

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analyzed anywhere in the report. *See* GAO, *Special Education: The Attorneys Fees Provision of Public Law 99-372* (HRD-90-22BR) (Nov. 1989). The GAO had discussions with the offices of Senators Kennedy and Harkin and Congressmen Hawkins and Owens prior to the study to set its parameters. *Id.* at 1. The GAO provided an interim briefing to the staffs of the House Education and Labor Committee and Senate Labor and Human Resources committee in March 1988. *Id.* at 2, 15. The GAO also provided a final briefing to the staffs from the same committees on September 22, 1989, prior to the report's publication in November 1989. GAO, *Special Education: The Attorneys Fees Provision of Public Law 99-372* (HRD-90-22BR) at 2, 15 (Nov. 1989). Data on expert fees is likewise omitted from the GAO's study in September 2003 of dispute resolution under the IDEA. *See* GAO, *Special Education – Numbers of Formal Disputes Are Generally Low and States Are Using Mediation and Other Strategies to Resolve Conflicts* (GAO-03-897) at 7 (Sept. 2003).

(notice of the parents' rights must be written in an "easily understandable manner"); *Weast v. Schaffer*, 377 F.3d 449, 454 (4th Cir. 2004), *aff'd*, 546 U.S. __, 126 S. Ct. 528 (2005) ("By the time the IEP is finally developed, parents have been provided with substantial information about their child's educational situation and prospects."). Yet, of all the notice that the IDEA requires school districts to give parents, they are not required to give parents notice of the recovery of expert fees. *Cf*. 20 U.S.C. § 1415(d)(2) (defining the content of the written procedural safeguard notice provided parents); 34 C.F.R. § 300.504(b) (same); *see also* Rebecca H. Cort, *Revised New York State Procedural Safeguards Notice: Rights for Parents of Children with Disabilities, Ages 3-21* (NYSED July 2005).

If the IDEA does not require school districts to notify parents of the availability of expert fees, *see id.*, as it does of the availability of attorneys' fees, *see* 20 U.S.C. § 1415(d)(2)(M); 34 C.F.R. § 300.504(b)(13), then it is incorrect to assume that either parents or school districts are on notice from the statute of the recovery of expert fees to prevailing parents in actions or proceedings brought under the Act. Having required school districts to notify parents of their important rights under the law, the absence of notice of a right to experts' fees is a telling omission, indicating that those fees, whatever they might be, are not shifted to the school districts if the parents prevail.

This absence of notice of the recovery of expert fees, *cf*. 20 U.S.C. § 1415(d)(2), also belies the alleged importance respondents and Amici NDRN-CLE attribute to congressional intent to include experts' fees in the careful balance Congress struck in making "enforceable the rights of . . . children while at the same time endeavoring to relieve the financial burden imposed on the agencies responsible to guarantee those rights," *Smith v. Robinson*, 468 U.S. 992, 1021 (1984).

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

The conflicting legislative history presented by the parties on the scope of the IDEA's attorneys' fees provision demonstrates why it is a basic principle of statutory interpretation that a court should not consider the legislative history of a statute unless the plain language of the statute is ambiguous. *See, e.g.*, *Burlington Northern R.R., Co. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 461 (1987). While the Second Circuit may consider a conference committee report to be more reliable than other forms of legislative history (Joint App. A at 11a), "a sentence in a conference report cannot rewrite unambiguous statutory text with a Supreme Court tested and approved meaning." *Goldring v. District of Columbia*, 416 F.3d 70, 75 (D.C. Cir. 2005); *see also Department of State v. Washington Post Co.*, 456 U.S. 595, 600 (1982) ("Passing references and isolated phrases are not controlling when analyzing a legislative history."). "The best evidence of that purpose is the statutory text adopted by both Houses of Congress and submitted to the President." *Casey*, 499 U.S. at 98. "Where that contains a phrase that is unambiguous – that has a clearly accepted meaning in both legislative and judicial practice – we do not permit it to be expanded or contracted by the statements of individual legislators or committees during the course of the enactment process." *Id*. "Congress could have made explicit in the statutory language of the IDEA that attorneys' fees include expert fees," *Goldring v. District of Columbia*, No. 02 Civ. 1761, slip op. at 6 (D.D.C. July 21, 2004), *aff'd*, 416 F.3d 70 (D.C. Cir. 2005), "yet, the fee shifting statute at issue here provides no explicit authorization of expert witness fees," *Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1022, 1032 (8th Cir. 2003).

Alternatively, respondents urge this Court to consult "signals" (Res. Br. at 18) from the HCPA's "drafting history" (Res. Br. at 34) to illuminate Congress' "understanding" (Res. Br. at 47) that the term "costs" in the IDEA includes expert costs. In 1986 Congress inserted a provision in the Act to expressly allow an award of reasonable attorneys' fees as part of the costs to the parents of a child with a disability who is the prevailing party. This provision was added in 1986 in response to this Court's decision in *Smith v. Robinson*, 468 U.S. 992 (1984). In that case this Court held that plaintiffs who prevail in an EHA action were not entitled to an award of attorneys' fees under any other federal statute, based on the fact that the EHA contained no express provision for an award of attorneys' fees. *See Smith*, 468 U.S. at 1015. In enacting the HCPA, Congress specifically added the attorneys' fees provisions (then contained in Section 1415(e)(4)), lifting Section 1988's language allowing attorneys' fees to be shifted to a prevailing party, and provided that this and other HCPA provisions affecting the award of attorneys' fees were to be given retroactive effect.

Although Congress entirely revised the IDEA in 1997, *see* Pub. L. No. 105-17, 111 Stat. 88, and reclassified the attorneys' fees provision under a different subsection of Section 1415 (from Section 1415(e)(4)(B) to Section 1415(i)(3)(B)), it reenacted substantially the same language regarding the award of attorneys' fees, *see Jason D.W. v. Houston Indep. Sch. Dist.*, 158 F.3d 205 (5th Cir. 1998). Congress stated that it intended the 1997 amendments to the IDEA's attorneys' fees provision, like former Section 1415(e)(4), to be interpreted in accordance with principles set forth in this Court's opinion in *Hensley v. Eckerhart*, 461 U.S. 424 (1983) on the relationship between the extent of success and the amount of the fee awarded in federal civil rights cases, *see* H.R. Rep. No. 105-95, at 106, *reprinted in* 1997 U.S.C.C.A.N. 104; H.R. Conf. Rep. No. 687, at 5, *reprinted in* 1986 U.S.C. Appx. §§ 1798, 1808. This Court's

opinion in *Hensley* did not endorse the recovery of a prevailing party's expert fees, but instead was focused on whether a partially prevailing plaintiff may recover an attorney's fee for legal services on unsuccessful claims. *See Hensley*, 461 U.S. at 426.

In 2004 Congress considered, but did not adopt, a bill (the Fairness and Individual Rights Necessary to Ensure a Stronger Society: Civil Rights Act of 2004) that would have amended IDEA and numerous other civil rights statutes to explicitly authorize an award of expert fees. *See* S. 2088, 108th Cong. 2d Sess. (2004); H.R. 3809, 108th Cong. 2d Sess. (2004). The bill explained that its purpose was, *inter alia*, "to allow recovery of expert fees by prevailing parties under civil rights fee-shifting statutes" and that this purpose was "made necessary by the decision of the Supreme Court in [*Casey*]." *See* S. 2088 at §§ 521, 522(1). Specifically, it would have provided that "Section 615(i)(3)(B) of the Individuals with Disabilities Education Act (20 U.S.C. § 1415(i)(3)(B)) is amended by inserting '(including expert fees)' after 'attorneys' fees.' " S. 2088 at § 523(e). If, as the Second Circuit posited below, Congress already allowed for the recovery of expert fees under IDEA's fee-shifting provision, then Congress would have had no need to include IDEA among the civil rights statutes to be amended by the bill. That bill expired at the end of the 108th Congress.

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

In interpreting nearly identical statutory language, not "roughly similar" language (*cf.* Res. Br. at 45), in a previous version of Section 1988, this Court held that a provision allowing attorneys' fees does not include the authorization to recover fully expert witness fees, *see Casey*, 499 U.S. at 84-88. While respondents argue that this Court's holding in *Casey* "has no bearing here" because "the text and the purpose

of IDEA and Section 1988 are quite different" (Res. Br. at 45), neither the precedent of this Court, nor that of the Second Circuit, supports such a distinction.

Respondents argue that "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" (Res. Br. at 17). This is so, the respondents claim, because there are key textual differences between the IDEA and Section 1988, asserting that the phrase "costs to the parents" evidences a far different intent than the former text of Section 1988 which authorized "costs to the prevailing party" (Res. Br. at 45).

Respondents selective quotation of IDEA's attorneys' fees provision attempts to create a distinction with that version of Section 1988 construed by *Casey* which does not exist. Both statutes reward prevailing parties with "attorneys' fees as part of the costs." Costs in both statutes do not include recovery of expert fees beyond that which is authorized by Sections 1920(3) and 1821(b) of Title 28 of the United States Code. Since "the legislative history of the IDEA indicates that its fee-shifting provisions were intended to mirror those of 42 U.S.C. § 1988," *A.R. v. New York City Dep't of Educ.*, 407 F.3d 65, 73 n.9 (2d Cir. 2005), even the Second Circuit "continues to interpret the IDEA's fee-shifting provision in consonance with Section 1988 and other federal civil fee-shifting statutes," *id.* at 73 n.9.

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

The IDEA is a Spending Clause statute. *See Board of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 204 n.26 (1982); *see also Cedar Rapids Comty. Sch. Dist. v. Garrett F.*, 526 U.S. 66, 83-85 (1999) (Thomas,

J., joined by Kennedy, J., dissenting).[9] Contrary to Amici NDRN-CLE's claim that "there is no sound basis for subjecting Spending Clause legislation to different interpretive rules than legislation enacted under other sources of congressional power" (Amici Br. at 27), the Court has repeatedly emphasized that, when Congress places conditions on the receipt of federal funds under the Spending Clause, "it must do so unambiguously," *see, e.g.*, *Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1, 17 (1981); *see also Rowley*, 458 U.S. at 190 n.11. This is because a law that "condition[s] an offer of federal funding on a promise by the recipient . . . amounts essentially to a contract between the Government and the recipient of funds." *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998).

While the respondents claim that the District's Spending Clause argument was not raised below and has been forfeited (Res. Br. at 48), both the Second Circuit and the district court acknowledged that the District had argued, *inter alia*, that expert fees are not available under the Act (Pet. App. A at 3a; Pet. App. B at 36a); the District's and the United States' reference to the Spending Clause is an amplification of why

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9. Respondents and Amici NDRN-CLE's argument that the "IDEA is not just Spending Clause legislation" (Res. Br. at 16; Amici Br. at 27 n.24), is irrelevant since all statutes must be interpreted according to their plain meaning, not just those derived from Congress' Spending Power. While Amici NDRN-CLE suggest that the Court may imply the recovery of expert fees under the IDEA as it might imply a right of action (*cf.* Amici Br. at 29 n.25), private rights of action may not be implied against a public recipient of federal funds, *see Gonzaga Univ. v. Doe*, 536 U.S. 273, 287 (2002) (holding "that [Family Education Rights and Privacy Act]'s nondisclosure provisions fail to confer enforceable rights"); *Association of Cmty. Org. for Reform Now v. New York City Dep't of Educ.*, 269 F. Supp. 2d 338, 347 (S.D.N.Y. 2003) (holding that "the [No Child Left Behind Act] does not reflect the clear and unambiguous intent of Congress to create individually enforceable rights").

the statute should be interpreted according to its plain meaning, not an independent rationale. *Cf. TRW v. Andrews*, 534 U.S. 19, 34 (2001) (rejecting petitioner's attempt to raise an additional legal argument for review).

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

Respondents' analysis of available district court opinions on whether or not expert fees are available under the IDEA as costs (Res. Br. at 31 n.20) belie their previous position that the issue "is not sufficiently mature to warrant this Court's attention at this time" (Res. Br. in Opposition at 1). Previously, the District has cited a number of district court cases which have held that expert fees are not recoverable under the IDEA's attorneys' fees provision (Pet. for a Writ of Cert. at 14). Clearly, those district courts in the Seventh, Eighth and D.C. Circuits which had held that expert fees are recoverable under the IDEA have been corrected by the majority opinions of the circuit courts in *Goldring v. District of Columbia*, 416 F.3d 70 (D.C. Cir. 2005); *Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1022 (8th Cir. 2003) and *T.D. v. LaGrange Sch. Dist. No. 102*, 349 F.3d 469 (7th Cir. 2003).

Nonetheless, it is disingenuous for respondents to imply that conflicting authority from the district courts establishes the requisite statutory ambiguity to justify a foray into legislative history *and* to also argue that expert fees are "indisputably 'part of costs' parents incur in actions or proceedings under IDEA" (*Compare* Res. Br. at 17 *with* Res. Br. at 33-34). The statutory provision at issue is either ambiguous or it is not; it cannot be both at the same time. In interpreting the true meaning of the provision, the conflicting district court authority is as of much value to the Court as

the conflicting legislative history – both pale in comparison to the "best evidence" of the purpose of statutory text, which is the "text adopted by both Houses of Congress and submitted to the President." *See Casey*, 499 U.S. at 98. Congress in 1986, 1997 and/or 2004 could have easily shifted attorneys' fees and expert witness fees, but it chose instead to enact more restrictive language. Litigants under the Act are bound by that restriction.

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

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

The HCPA's amendment of the EHA to provide for the recovery of attorneys' fees to prevailing parents has succeeded in holding school districts accountable for their educational decisions and actions. See GAO, *Special Education: The Attorney Fees provision of Public Law 99-372* (HRD-90-22BR) at 3 (Nov. 1989).[10]

Although the respondents and their amici argue that parents of disabled students lack the resources to secure competent counsel or experts to sustain their burden in due process hearings (Res. Br. at 7 n.3, 14, 22; Amici NDRN-CLE Br. at 4), Congress made no such finding in either its 1997 or its 2004 reauthorization of the Act, *see* 20 U.S.C.

10. The GAO's November 1989 Report identifies a significant difference between the number of administrative hearings scheduled and the number decided, which it attributes to settlement. The parent success rate (43%) is based on the hearings actually decided. For unexplained reasons, in determining success in civil actions (it recites 43% as well for this category) the Report uses "complaints" rather than "decisions" as the divisor. Using the later, as it did for administrative hearings, the success rate is 69%.

§ 1400(c); IDEIA § 601(c). Parents' access to an independent educational evaluation at public expense, *see* 20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502(b)(1), levels any advantage in information and expertise that a school district might otherwise have, *see Schaffer v. Weast*, 546 U.S. __, 126 S. Ct. 528, 536 (2005). Here, the parents presented three independent evaluations at public expense in support of their successful claim for public reimbursement of the student's tuition to private school. *See Application of the Bd. of Educ. of the Arlington Cent. Sch. Dist.*, Appeal No. 99-65 (SRO Dec. 14, 1999).[11]

The kinds of questions that arise in special education cases tend not to depend on expert witnesses (*cf.* Res. Br. at 2, 15, 21-22; Amici NDRN-CLE Br. at 3, 15, 20; Amicus COPAA Br. at 14), as "adequate compliance with the procedures prescribed [in the Act] would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP," *Rowley*, 458 U.S. at 206.[12]

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11. Evaluations of the student were done by Mr. Gerald Brooks, a speech/language pathologist, on September 2, 1997 (he also later prepared a "summary statement" for the District's Committee on Special Education on May 13, 1998) and by Dr. Nancy Mashayekhi, a neuropsychologist, her first report completed on August 19, 1997 and her second one completed in September 1997. The District paid for the evaluations from Mr. Brooks and Dr. Mashayekhi. Mr. Brooks' description of the student as "severely functionally language disordered" is in contrast to achievement testing conducted by the District shortly before the 1998/99 school year. The District's testing evidenced that the student possessed an average level of functioning in reading, written language and mathematics (R. 430-431, 450, 520; Exs. SD-65, SD-85, SD-90, SD-92, SD-94, SD-95, SD-106).

12. Likewise, experts are not required to educate impartial hearing officers as suggested by Amici NDRN-CLE (Amici Br. at 9). Unless previously certified, impartial hearing officers in New York State must be admitted to the practice of law in the State of

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2. A holding that the IDEA authorizes the award of expert fees would violate Congress' intent to reduce litigation-related costs.

A key objective of the 2004 Amendments to the IDEA is to reduce the litigation costs for schools under the Act. *See Schaffer*, 126 S. Ct. at 535. More recent data than that supplied by Amici NDRN-CLE (*cf*. Amici Br. at 7-8) suggests that litigation in special education in New York State is on the rise:

> Beginning with the 2002/03 school year, the New York State Education Department began tracking the number of independent review hearings requested, and the number of hearing held. Between that year and the 2004/05 school year, the number of requests increased each year from 4,542 to 5,422, an increase of 20 percent.

See New York State Educ. Dep't, Office of Vocational and Educ. Serv. for Individuals with Disabilities, *IDEA Part B State Performance Plan 2005-2010* at 105 (Dec. 2005).

"Over the past 10 years the most common category in special education litigation is attorneys' fees," rather than cases about core issues under the IDEA, such as what constitutes a free, appropriate public education or a least

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(Cont'd)

New York, must be in good standing, and must have a minimum of two year practice and/or experience in the areas of education, special education, disability rights or civil rights. *See* N.Y. Comp. Codes R. & Regs. tit. 8(A-2), § 200.2(x)(1) (2005). Even if a hearing officer lacks expertise on some discrete educational topic, he or she may order an independent educational evaluation at public expense. *See* 34 C.F.R. § 300.502(d); N.Y. Comp. Codes R. & Regs. tit. 8(A-2), § 200.5(j)(3)(viii) (2005).

restrictive educational environment. *See* Mark Walsh, *Court to Weigh Expert Fees in IDEA Cases*, Education Week (Jan. 18, 2006) (*quoting* Perry A. Zirkel, a professor of education law at Lehigh University in Bethlehem, Pennsylvania and a state hearing officer for special education disputes).

As Amici National School Boards Association, American Association of School Administrators, New York State School Boards Association and New York State Council of School Superintendents point out, besides increasing litigation on the merits of parental challenges, authorizing the award of expert fees will burden courts with even more litigation involving fee disputes (Amici Br. at 19). If this Court affirms the Second Circuit's decision, the job of parsing out the fees related to expert witnesses, educational consultants and law advocates will require inordinate amounts of time and expense for both parties, adding to the costs of litigation.

CONCLUSION

The judgment of the Second Circuit should be reversed. Expert witness fees are not recoverable under the IDEA, which provides only for shifting of "reasonable attorneys' fees as part of the costs" associated with a proceeding under the Act. The IDEA contains no explicit statutory authority for the recovery of expert fees and provides no notice to either school districts or parents of the availability of such fees. The Second Circuit erred in relying on one sentence of a conference committee report to hold that expert fees are available under the IDEA. Contrary to the Second Circuit's reasoning, this Court's analysis in *Casey* does not authorize a departure from the language of the statute. The majority of the circuits have found the meaning of the statute to be plain and clear and there is no reason to depart from that meaning. Public policy does not require the recovery of expert fees in IDEA proceedings. The procedural protections in the IDEA level the playing field between parents and school districts and provide for an independent evaluation at public expense, among other safeguards, to allow the parents access to expert opinion at the point where it best serves the interests of the student, the development of the IEP.

Respectfully submitted,

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