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

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF FOR THE NATIONAL DISABILITY RIGHTS NETWORK AND THE CENTER FOR LAW AND EDUCATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

This case is of particular interest to *amici*, who advocate on behalf of children with disabilities to ensure that they receive the free appropriate public education they are guaranteed under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq*.

Amicus National Disability Rights Network (NDRN), formerly the National Association of Protection and Advocacy Systems, is the membership association of protection and advocacy (P&A) agencies that are located in all 50 states, the District of Columbia, Puerto Rico, and the territories. P&As are authorized under various federal statutes to provide legal representation and related advocacy services on behalf of persons with all types of disabilities in a variety of settings. In fiscal year 2004, P&As served over 76,000 persons with disabilities through individual case representation and systemic advocacy.

The P&A system comprises the nation's largest provider of legally based advocacy services for persons with disabilities. P&A lawyers often represent or assist parents of children with disabilities in the impartial due process hearings authorized under the IDEA and know first-hand of the need for parents to retain experts if they are to have a chance of prevailing.

Amicus The Center for Law and Education (CLE) is a national advocacy organization that works with parents, advocates, and educators to improve the quality of education for all students, and in particular, students from

[1] Letters from the parties consenting to the filing of *amicus* briefs have been filed with the Clerk of this Court pursuant to Supreme Court Rule 37.3(a). No counsel for a party authored this brief in whole or in part, and no person or entity, other than the *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

low-income families and communities. Throughout its history, CLE has been a recognized leader in advancing the rights of students with disabilities – from federal policy through state and local implementation. As one of the few national organizations that is firmly rooted in both disability rights and school reform, CLE has focused increasingly on bringing the two together – in order to help ensure, for example, that specialized instruction and support services provided through individualized education programs, assessment practices, placement decisions, etc., are aimed at overcoming the barriers for students with disabilities to meeting high standards, rather than being vehicles for lower expectations.

CLE has participated in other important cases involving the recovery by prevailing parents of costs and fees under IDEA. In 1990, CLE represented members of the United States Senate and House of Representatives as *amicus* in *Moore v. District of Columbia*, 907 F.2d 165 (D.C. Cir. 1990), in which the U.S. Court of Appeals for the District of Columbia Circuit *en banc* recognized a cause of action under IDEA on behalf of prevailing parents to attorney's fees incurred in administrative due process hearings.

SUMMARY OF ARGUMENT

The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*, was enacted to guarantee children with disabilities the right to a "free appropriate public education." 20 U.S.C. § 1400(d)(1)(A). At issue in the instant dispute is whether parents of children with disabilities must effectively waive the right to a "free" public education when the school district refuses to provide an "appropriate" one, thereby forcing the parents to invoke their statutory right to an impartial due process

hearing to remedy the deficiency. Because effective parental participation as contemplated by IDEA should not come at a cost, Congress in IDEA's text and structure has authorized parents who prevail in vindicating their children's IDEA rights to be reimbursed for their costs of obtaining an expert to resist and remedy the school district's violation of the law.

A. IDEA accomplishes its substantive statutory mandate of providing to each child with a disability a free special education that offers educational benefit through extensive procedural protections, which ensure constant parental involvement. Although parents and school districts reach agreement in the overwhelming majority of IDEA cases through collaborative efforts, genuine disagreements as to what constitutes an "appropriate" public education do arise. Congress granted parents in such circumstances a statutory right to have these disputes resolved in a due process hearing before an impartial hearing officer. The ability of parents to retain experts is critical to these hearings fulfilling their assigned function of determining the appropriate education for the child, and reimbursement of prevailing parents for the costs of experts is necessary to enable parents to retain them.

Notwithstanding the parent-school district cooperative goals of IDEA, due process hearings are unquestionably adversarial. The school district and parents each have their own perspective as to what constitutes the appropriate education of the child. As this Court has recognized, when IDEA cases turn adversarial, the school district is armed with greater resources, more information, and employees that it can rely on to testify as experts. Yet the parents generally bear the burden of showing that the school district's proposal is inappropriate.

Empirical evidence and case law, as well as *amici*'s experiences working with thousands of parents of children with disabilities, demonstrate that the most important resource for parents in ensuring that their children receive a free appropriate public education is access to experts with whom parents can consult. Expert testimony and consultation are effectively required to sustain the parents' burden on many critical issues in due process hearings. Without the benefit of expert resources to present factual evidence and context and to assist the parents in challenging the school district's experts, parents of children with disabilities simply have little chance of prevailing in a due process hearing even if they are correct.

B. Congress has addressed this issue by authorizing parents of children with disabilities who prevail in a due process proceeding to recover the expert fees expended in securing a free appropriate public education for their children. *See* 20 U.S.C. § 1415(i)(3)(B). In enacting that provision in the Handicapped Children's Protection Act of 1986, Congress explicitly contemplated that IDEA's cost-shifting provision would award prevailing party parents costs incurred "by personnel, including attorneys and *consultants*, involved in the action or proceeding." Pub. L. No. 99-371 § 4(b)(3), 100 Stat. 796, 797-798 (emphasis supplied). Because of this congressional action, costs awarded under IDEA thus are not limited to those deemed permissible in *West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83 (1991).

This result is further reinforced by IDEA's broad grant of remedial authority to district courts and the structure of the statute. IDEA guarantees a "free" education for children with disabilities, and expects parental involvement to ensure that this education is "appropriate."

Parents are afforded the right to participate at every stage of the IDEA process, and to be accompanied by their own expert at a due process hearing. This opportunity to participate would be meaningless, however, if the parents were required to pay thousands of dollars from their own pockets in order for their child to receive the "free" public education guaranteed by the statute. As this Court has recognized, IDEA's mandate of providing "free appropriate public education" would be eviscerated if parents were required to choose between a "free" education and an "appropriate" one. *Town of Burlington v. Department of Educ.*, 471 U.S. 359, 371 (1985).

C. Finally, there is no reason for this Court to depart from its well-established Spending Clause jurisprudence and construe IDEA narrowly. As this Court has held in the context of IDEA, all that the Spending Clause requires is that entities receiving federal funds have notice that conditions are attached to the acceptance of such funds. *See Irving Independent Sch. Dist. v. Tatro*, 468 U.S. 883, 890 n.6, 891 & n.8 (1984); *Smith v. Robinson*, 468 U.S. 992, 1002 n.6 (1984). IDEA has unquestionably satisfied that requirement, and this Court's decisions in *Town of Burlington* and *Florence County School District v. Carter*, 510 U.S. 7 (1993), confirm that a narrow construction of IDEA's remedies is unwarranted.

ARGUMENT

IDEA AUTHORIZES COURTS TO AWARD PARENTS OF CHILDREN WITH DISABILITIES EXPERT FEES AS PART OF COSTS WHEN THEY ARE PREVAILING PARTIES IN IDEA ADMINISTRATIVE OR JUDICIAL PROCEEDINGS

The core of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq*., is the

substantive requirement that every State that accepts federal IDEA funds must provide each child with a disability a free appropriate public education tailored to accommodate their disabilities and to achieve educational benefit. *See Board of Educ. v. Rowley*, 458 U.S. 176, 209 (1982). This substantive standard necessarily requires reliance on a wide range of experts to take into account the diverse array of disabilities and the almost unique circumstances of each child.[2]

If parents disagree with the school district; are able to afford to retain their own experts in order to contest what they perceive as the school district's proposal for an inadequate and inappropriate educational program; and prevail in convincing an impartial hearing officer (or court) that the school district's proposal does not comply with the requirements of the statute, the parents should be able to recover the reasonable costs expended on such experts from the school district.

A. Experts Are Critical To Parents' Ability To Ensure That Their Children Receive A Free Appropriate Public Education

Parents know their children in different and more profound ways than anybody else. Parents have had years living with, observing, understanding, and responding to their children. In view of this reality, Congress thus guaranteed parents of a child with a disability a formal role in the development of the child's individual education program. The efficacy of IDEA relies on parents to advocate on behalf of their children and to demand compliance with the law. *See Rowley*, 458 U.S. at 205-206;

[2] Experts in due process hearings can include special education administrators, researchers, psychologists, doctors, nurses, audiologists or speech language pathologists, occupational or physical therapists, behavioral experts, and other specialists with particular knowledge of disabilities and educational practices.

National Council on Disabilities, *Back to School on Civil Rights – Advancing the Federal Commitment to Leave No Child Behind*, at 6-7, 50, 70 (2000).

If the parents and the school district cannot reach a consensus, Congress gave the parents a right to demand a due process hearing before an impartial hearing officer and, if still aggrieved, review by federal or state courts. *See* 20 U.S.C. § 1415. These due process safeguards are intended to give parents the "necessary tools to improve educational results for children with disabilities." *Id.* § 1400(d)(3). Congress also enacted provisions to deter and sanction frivolous claims and to encourage reasonable settlements. *See id*. §§ 1415(i)(3)(D) & (F), 1415(i)(3)(B)(i)(II) & (III).

These procedures are rarely invoked by parents. Rather, most disputes under IDEA are resolved through collaborations between parents and school officials. In any given year, the overwhelming majority of school districts (94%) do not hold any due process hearings.[3] Of the more than 6 million children with disabilities entitled to IDEA's protection, approximately 3000 due process hearings are held each year.[4] Parents prevail in approximately 43% of such hearings.[5] Less than 10% of

[3] E. Schiller, K. Burnaska, G. Cohen, Z. Douglas, C. Joseph, P. Johnston, A. Parsad & C. Price, *Study of State and Local Implementation and Impact of the Individuals with Disabilities in Education Act: Final Report on Selected Findings* 45 (2003).

[4] In 2000, although there were 11,068 requests for hearings, only 3,020 hearings were actually held nationwide, a 15% decline over the previous five years. General Accounting Office, *Special Education: Numbers of Formal Disputes Are Generally Low and States Are Using Mediation and Other Strategies to Resolve Conflicts* (GAO-03-897), at 12-13 (2003).

[5] J. Chambers, J. Harr & A. Dhanani, Special Education Expenditure Project, *What Are We Spending on Procedural Safeguards*

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due process hearing results are appealed to court (by either parents or school districts) – about 300 cases annually.[6]

1. Due process hearings are structured to make it necessary for parents to retain their own experts

Due process hearings are, by design, adversarial. Hearings are to be conducted according to "appropriate, standard legal practice." 20 U.S.C. §1415(f)(3)(A)(iii); *see also Handicapped Children's Protection Act of 1985: Hearings on S. 415 Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Human Resources*, 99th Cong. (1985) (Statement of Sen. Simon) ("[Due process] hearings – where witnesses are called and sometimes technical and medical evidence is offered – are quasi-judicial."). The object of these quasi-judicial due process procedures is to develop a complete and accurate factual record and to obtain a prompt decision by an impartial expert decisionmaker.

When a due process hearing is held at the request of the parent, the parent will (absent state law to the contrary) normally bear the burden of proof of showing that the school district's proposal does not comply with IDEA. *See Schaffer v. Weast*, 126 S. Ct. 528, 536 (2005). Parents have the right (indeed, the obligation if they wish to meet their burden of proof) to present evidence and to examine and cross-examine witnesses. 20 U.S.C.

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in Special Education, 1999-2000?, at 20 (May 2003); General Accounting Office, *Special Education: The Attorney Fees Provision of Public Law 99-372* (HRD-90-22BR), at 3 (1989).

[6] Only 301 court cases under IDEA were filed nationwide in the 1998-99 school year, while 3,315 and 3,126 due process hearings were held in 1998 and 1999, respectively. Chambers, Harr & Dhanani, *supra*, at 7-8.

§ 1415(h). Parents are afforded a right to be represented by counsel, if they can locate and afford one. *Id*. § 1415(h)(1).[7] Additionally, parents have a right "to be accompanied and advised * * * by individuals with special knowledge or training with respect to the problems of children with disabilities." *Ibid.*

The law requires an impartial hearing examiner with appropriate qualifications and expertise in the law. 20 U.S.C. § 1415(f)(3)(A)(ii)-(iv). Hearing officers may be expert in administrative law and educational law, but are not required to possess expertise in the unique disability issues involved in any particular case. *Ibid*.; G. Schultz & J. McKinney, *Special Education Due Process: Hearing Officer Background and Case Variable Effects on Decisions Outcomes*, 2000 B.Y.U. Ed. & L. J. 17, 21-22 (2000) (most hearing officers have no background on disability issues).

2. Experience shows that experts are critical to parents' chances of demonstrating in a due process hearing that the school district erred

IDEA's extensive procedural protections for parents to ensure their involvement in the development of an individualized education program (IEP) are driven by the proposition that these processes will provide a crucible

[7] Even with the addition of a statutory provision in 1986 permitting a court to award attorney's fees to a prevailing parents, parents still are disproportionately unrepresented in due process proceedings compared to school districts. For example, in New York parents are represented by lawyers in 31% of proceedings while school districts are so represented in 100% of proceedings; in Illinois, parents have lawyers in 35% of proceedings and school districts have lawyers in 91% of proceedings. 150 Cong. Rec. S5351 (daily ed. May 12, 2004) (Statement of Sen. Kennedy).

from which a child's appropriate education will emerge. Yet parents' assertion of their child's procedural rights is not sufficient to assure an appropriate education. The consensus of the empirical studies and the case law, which *amici* can confirm based on their own experience working with thousands of parents, is that those procedural protections are virtually meaningless if parents do not introduce expert evidence or do not have experts assisting them in presenting their case.

When the question at issue in a hearing is the "appropriate" education for a particular child, the burden on parents includes presenting knowledge about the child's disability;[8] the child's present level of achievement, including his abilities and assessments, evaluations, and function in school settings;[9] the child's specific educational needs (*e.g.*, placement and services);[10] and the capacity of the proposed educational program to address the child's disability, enable the child to achieve the proposed educational goals, and provide educational benefit.[11] In this type of inquiry, parents who do not have access to experts cannot effectively present facts in support of their

[8] *Shore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194 (3d Cir. 2004) (expert testimony as to needs of emotionally disturbed child and appropriate placement).

[9] *Nein v. Greater Clark County Sch. Corp.*, 95 F. Supp. 2d 961 (S.D. Ind. 2000) (parent's expert testified as to student's progress and requisite expertise for teachers of dyslexic students).

[10] *Evans v. Board of Educ.*, 930 F. Supp. 83 (S.D.N.Y. 1996) (parent's experts on dyslexia presented uncontroverted evidence that recommended method of instruction was necessary, not merely optional).

[11] *Board of Educ. v. Michael M.*, 95 F. Supp. 2d 600, 610 (S.D. W. Va. 2000) (experts needed on issue of reasonable goals).

position, thus defeating the very purpose of the hearing. Such parents are, indeed, left "without an expert with the firepower to match the opposition," *Schaffer*, 126 S. Ct. at 536, and have little hope of carrying the burden required to prevail, no matter how meritorious their position.[12] The need for experts was heightened by a 2004 amendment to IDEA, which imposed a new requirement that special education must be "based on peer-reviewed research to the extent practicable." 20 U.S.C. § 1414(d)(1)(A)(i)(IV). Under this criterion, parents also must present evidence regarding the educational options available that are appropriate for that child, the research regarding the generally acceptable methodologies being used to educate similar students, and whether the proposed program is generally accepted by the educational community or recognized by educational experts as reasonable.[13]

By contrast, a parent's special knowledge about his or her child is rarely credited in such proceedings, no matter how relevant. Parents may have well-informed knowledge and beliefs as to their child's needs, not to mention a

[12] *In the Matter of Student v. Poudre Sch. Dist. R-1*, Due Process Hearing L2003:120 (Colo. Feb. 11, 2004), http://www.cde.state.co.us/spedlaw/download/DP2003-120.pdf (when a parent "produced no testimony other than her own" regarding child's emotional distress due to placement, and need for classroom aide the parent "did not sustain a defense to the onslaught of educational and psychological experts from the district").

[13] *Michael M*, 95 F. Supp. at 610 (experts should opine whether methodology is recognized by educational experts and generally accepted in the educational community for similar children); *S.H. v. State-Operated Sch. Dist.*, 336 F.3d 260, 267 (3d Cir. 2003) ("In this particular matter [appropriate placement], the credibility and persuasiveness of the testimony is of paramount concern" and parent's expert was persuasive because she was "impeccably credentialed" in deaf education – "no one connected with the hearing knew more about deaf education than she").

wealth of personal experience with their own child, but parental testimony is all too often discredited as merely "anecdotal" or not objective evidence.[14] Hearing officers and courts may comment on the knowledge of parents about their children, but they do not treat them as qualified experts, even when their knowledge of their child's disability plainly exceeds that of the school personnel. Indeed, in many cases, parents' testimony is not even treated as evidence.[15]

A study of due process hearing outcomes found that the single best predictor of whether a parent will prevail in a due process hearing is the number of witnesses the parents call. *See* P. Kuriloff, *Is Justice Served by Due Process?: Affecting the Outcome of Special Education Hearings in Pennsylvania*, 48 Law & Contemp. Probs. 89, 100-101, 109 (Winter 1985 No. 1). Such parents "won more often" because they could use their witnesses to "present[ ] their cases more effectively, and cross-examine[ ] the school's witnesses more thoroughly." P. Kuriloff & S. Goldberg, *Is Mediation a Fair Way to Resolve Special*

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[14] *See, e.g.*, *Parents of [Redacted] v. Montgomery County Pub. Sch.,* OAH No. MSDE-MONT-OT-04-50271 at 25-26, (Md. OAH Dec. 21, 2004), http://www.msde.md.gov/NR/rdonlyres/AE1F478C-AB7F-407F-85C8-CEC950B8C836/4993/04HMONT50271.pdf (granting school district's motion to dismiss before putting on school evidence: "Parents' evidence of the Child's development and progress * * * during that period was primarily anecdotal and was supplied largely by the mother. * * * There was evidence * * * that she has some background as an educator, although she was not qualified as an expert in special education or other fields germane to the Child's learning disabilities.").

[15] *See, e.g.*, *Poudre*, *supra* (parent testimony as to emotional response of child to placement discredited because it "lacks the support of an expert"); *[Redacted] v. Baltimore City Pub. Sch.,* OAH NO: MSDE-CITY-OT-200200192 (June 26, 2002), http://www.msde.md.us/SpecialEducation/hearing_decisions2002/02-H-CITY-192.pdf (testimony of guardian and student characterized as "not factual evidence;" school district granted summary judgment without presenting evidence).

Education Disputes? First Empirical Findings, 2 Harv. Negotiation L. Rev. 35, 40 (Spring, 1997). Indeed, the number of witnesses called by the parents correlated with successful outcomes even more than whether the parents were represented by counsel. *See* Kuriloff, *supra*, at 100.

Normally, however, school districts can, and do, "call on many more experts in developing their arguments than can the average parent." Kuriloff & Goldberg, *supra*, at 62. Twice as many witnesses in due process hearings testify for the school district, on average 4.5 witnesses for the school, and only 2 for the child.[16] Furthermore, in one study, the parents' witnesses typically consist of the child's mother and one other witness.[17] The cause for this disparity is due to the fact that school districts largely employ the experts throughout the special education procedural process. "School districts have a 'natural advantage' in information and expertise * * * ." *Schaffer*, 126 S. Ct. at 536; *Oberti v. Board of Educ.*, 995 F.2d 1204, 1219 (3d Cir. 1993). School experts are already on staff – teachers, psychologist, the special education director, speech language pathologists, physical therapists, etc. – and available to testify at the due process hearings. In most cases, virtually all school system witnesses are treated as experts by hearing officers.[18]

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[16] Cherie N. Simpson, *Parent Perceptions of the Special Education Due Process Hearings in Michigan*, 1980-1981, pp. 127-130, 212 (1984) (Ph.D. dissertation, Michigan State University) (on file with Michigan State University Microfilms).

[17] *Ibid.*

[18] *Michael M.*, 95 F. Supp. 2d, at 611 (S.D. W. Va. 2000) (classroom teachers described as experts); *Clay T. v. Walton County Sch. Dist.*, 952 F. Supp. 817, 823 (M.D. Ga. 1997) (same); *Poudre, supra*, at 16 (teachers are educational experts).

Reflecting this reality, courts have consistently acknowledged that expert testimony is necessary in order for a parent to have a chance of showing that the school district is not complying with the law. Thus, the Fourth Circuit held in the *Schaffer* case, that "parents will have to offer expert testimony" in order to "mount a serious, substantive challenge to an IEP." *Schaffer v. Weast*, 377 F.3d 449, 456 (4th Cir. 2004); *see also Oberti*, 995 F.2d at 1216 (3d Cir. 1993) ("The court will have to rely heavily * * * on the testimony of educational experts."); *Pazik v. Gateway Reg'l Sch. Dist.*, 130 F. Supp 2d 217, 22 (D. Mass. 2001) ("[E]xpert testimony is often critical to a case.").

An illustrative case involved 9-year old Rachel Holland, who was classified as moderately retarded.[19] The school proposed that she spend most of her day in a segregated special education classroom. Her parents requested a full-time placement in a regular classroom, based on success she had shown over several years in a private school classroom while the due process case was pending. In weighing the testimony of the expert witnesses for both sides, the court found the parents' witnesses to be more credible because they had more background in evaluating similar children in regular classrooms, and they had a greater opportunity to observe Rachel in a normal academic setting. The court concluded that Rachel would experience significant academic and nonacademic benefits from the mainstream placement. The hearing officer, federal district judge, and federal circuit court all ruled for the parents over the course of the five-year legal ordeal. Without expert assistance, the parents undoubtedly would not have been able to obtain

[19] *Sacramento City Unified Sch. Dist. v. Holland*, 786 F. Supp. 874 (E.D. Cal. 1992), *aff'd*, 14 F.3d 1398 (9th Cir.), *cert. denied*, 512 U.S. 1207 (1994).

what all the impartial decisionmakers agreed was the appropriate placement for their child.

B. IDEA's Structure And Text Convey Broad Authority To District Courts To Provide Any Appropriate Relief To A Prevailing Party, Including Awarding Parents The Costs Of Obtaining An Expert

The empirical evidence and case law demonstrate a clear need by parents to retain their own experts. But the structure and purpose of IDEA evince as well a clear mandate on the part of Congress to permit district courts to award litigation expenses, including expert and consultant fees, to prevailing party parents. 20 U.S.C. § 1415(i)(3)(B). IDEA thus ensures that a lack of parental resources will not prevent the vigorous enforcement of the law against an errant school district.

1. *Casey* does not control the proper interpretation of the term "costs" in IDEA

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). *See West Virginia Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 86 (1991); *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 439 (1987). But this Court has also recognized that the use of the term "costs" is not inflexible across all public laws, and that Congress can authorize, and in fact has on numerous occasions, the award of expert fees to the prevailing party in a federal action. *See Casey*, 499 U.S. at 89. The language allowing for the recovery of such fees can take a variety of forms, so

that there are no "magic words" that Congress must universally employ. *See id.* at 88-92 (noting that expert fees can be authorized by provisions that define, provide context, or separately authorize the expert fees).

As respondents demonstrate more fully, both the text and structure of IDEA reflect Congress's intent that the specific litigation expenses that can be recovered by prevailing party parents include expert fees. Congress enacted the Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372, 100 Stat. 796 (1986), which initially added what is now Section 1415(i)(3)(B) to IDEA, in response to this Court's decision in *Smith v. Robinson*, 468 U.S. 992 (1984), which held that prevailing party parents could not recover attorney's fees in special education cases.

In so doing, Congress was cognizant of the financial responsibilities IDEA already imposed upon state and local governments. Accordingly, in expanding the remedies available to prevailing parents by authorizing awards of costs incurred during the due process and judicial proceedings, Congress mandated in Section 4 of the Handicapped Children Protection Act that the then-General Accounting Office (GAO) study the "impact" of Section 1415(i)(3)(B) over a three-and-a-half-year period following the Act's effective date. Pub. L. No. 99-372 § 4, 100 Stat. at 797. In this report, the GAO was required to examine "the specific amount of attorney's fees, costs, *and expenses* awarded to the prevailing party" under Section 1415(i)(3)(B) and "the number of hours spent by personnel, including attorneys *and consultants*, involved in the action or proceeding" where such fees were awarded. *Id*. § 4(b)(3) (emphases supplied). This statutory language demonstrates that, in enacting Section 1415(i)(3)(B), Congress understood that expert (*i.e.*, consultant) fees would be paid by school districts to prevailing party parents and thus required

examination. Had Congress intended to award to prevailing party parents *only* attorney's fees and those costs set forth in 28 U.S.C. §§ 1920 and 1821(b), there simply would have been no need for Congress to order, by statute, the GAO to study "expenses" and "the number of hours spent by * * * consultants" in cases where such costs were awarded to parents under Section 1415(i)(3)(B) *in addition* to "attorney's fees [and] costs." Pub. L. No. 99-372, § 4(b)(3), 100 Stat. at 797-798.

In arguing for a more narrow interpretation of IDEA, petitioner and its *amici* would have the Court disregard that language of Section 4 of the Handicapped Children's Protection Act and, in turn, the very canon of statutory construction that caused the Court to reach the result it did in *Casey*: that no term in a statute can be found to "add nothing." 499 U.S. at 91. Accordingly, the narrow construction of recoverable "costs" set forth in *Casey* and *Crawford* plainly cannot apply to IDEA.[20]

2. Excluding expert fees from the term "costs" in IDEA would be contrary to IDEA's structure and purpose

Moreover, Section 1415(i)(3)(B) "must be read in context" of the rest of the Act. *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) ("[W]e follow 'the cardinal rule that statutory language must be read in context [since] a phrase gathers

[20] In any event, to the extent the statutory language is only ambiguous rather than dispositive for respondents (which, at minimum, it must be if the language in Section 4 of the Handicapped Children's Protection Act is to have any meaning), this Court should look to the legislative history of the Act to discern congressional intent. As respondents demonstrate, this legislative history unquestionably confirms the common-sense understanding – that Congress intended expert fees to be recoverable as a part of costs. Indeed, this Court acknowledged in *Casey* that Congress intended an expansive reading of "costs" to apply to IDEA actions. *See* 499 U.S. at 91 n.5.

meaning from the words around it.'") (quoting *General Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 596 (2004)). Any interpretation of Section 1415(i)(3)(B) as not including an award of expert fees would create significant inconsistencies within IDEA's structure and purpose.

Unlike the provision in *Casey*, Section 1415(i)(3)(B) is not a stand-alone fee-shifting provision addressing a number of different statutes. Thus, it must be construed in accordance with IDEA's overall mission of ensuring a "free appropriate public education" to children with disabilities. 20 U.S.C. § 1400(d)(1)(A). Indeed, IDEA and its predecessor statute (the Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (1975)) were enacted to remedy a specific public problem – that "the educational needs of millions of children with disabilities were not being fully met" in public schools, either because they were "[being] excluded entirely from the public school system" or "not receiv[ing] appropriate educational services." 20 U.S.C. § 1400(c)(2)(A), (B), (C).

IDEA was enacted to provide these children with a remedy from their previous exclusion and mistreatment. The statute defines the "special education" the school district is required to provide as a "specially designed instruction, at *no cost* to parents, to meet the unique needs of a child with a disability." 20 U.S.C. § 1401(29) (emphasis supplied). To ensure that an education is appropriate for that child's unique needs, parents are expected to participate at every stage of the procedures required to design the child's special education. *See Town of Burlington v. Department of Educ.*, 471 U.S. 359, 368-369 (1985). IDEA thus expands "the role * * * of parents and ensur[es] that families of such children have meaningful opportunities to *participate* in the education of their children at school." 20 U.S.C. § 1400(c)(5)(B)

(emphasis supplied). This opportunity to participate would be meaningless, however, if the parents were required to pay thousands of dollars from their own pockets in order for their child to receive the "free" public education guaranteed by the statute.

This is a cost parents of children with disabilities are least able to bear, yet unable to forego. Parents of children with disabilities are often the least equipped to address independently the needs of their children. These parents are 50 percent more likely to have only a high school education or less when compared to the parents of students in the general population, and their college graduation rate is two-thirds that of other parents. *See* M. Wagner *et al.*, *Special Education Elementary Longitudinal Study (SEELS): The Children We Serve: The Demographic Characteristics of Elementary and Middle School Students with Disabilities and Their Households* 23-24 (2002).

Parents of children with disabilities also come from economic circumstances which would likely limit their ability to pay for experts in the absence of the opportunity of recovering costs if they are successful. Almost one quarter of children with disabilities are living in poverty, compared with 16 percent in the general population. *See* Wagner, *supra*, at 28. And parents of children with disabilities are a staggering 67 percent more likely to be unemployed. *See* M. Wagner *et al.*, *The Individual and Household Characteristics of Youth With Disabilities: A Report from the National Longitudinal Transition Study-2* (*NLTS-2)* at 3-4 (2003). Overall, 65 percent of children with disabilities live in households with incomes less than $50,000, compared to only 45 percent of nondisabled children. *Id.* at 3-5. It is simply unrealistic to expect that these parents could afford the "appropriate" education for their children with disabilities on their own.

Parents with adequate financial resources may be able to hire the necessary experts to help develop and, if necessary, to present their factual case in a due process or judicial proceeding. But if families do not have the resources to retain such experts, a school district could, in light of the burden of proof, rest its case without presenting any evidence or witnesses in support of the IEP, and prevail. To deny such families effective access to expert witnesses diminishes the rights of those children, rather than protecting them.

> The need for expert advocacy to protect the rights of the child is undeniable and undisputed. The fundamental purposes of the IDEA are attainable only when disabled children can rely on the support of expert witness testimony in due process proceedings. * * * The IDEA does not limit its benefits to only those who can afford to recoup them. Quite the contrary, the IDEA seeks to ensure that all disabled children, whether rich or poor, receive a free appropriate public education designed to meet their unique needs.

Neosho R-V Sch. Dist. v. Clark, 315 F.3d 1022, 1039 (8th Cir. 2003) (Pratt, J., dissenting).

3. IDEA's other remedial provisions, including Congress's mandate that courts "grant such relief as the court determines is appropriate," confirm the authorization to award expert fees

Parents ultimately can enforce their entitlement to a free appropriate public education in a civil action, and, along with costs that can be awarded pursuant to Section 1415(i)(3)(B), a court of competent jurisdiction also "shall grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(i)(2)(C)(iii). When construing IDEA, this

Court consistently has interpreted the broad remedial language of the statute in favor of parents whose children wrongfully have been denied a free appropriate public education. Courts must ensure that the education is *both* "free" *and* "appropriate." "The Act was intended to give handicapped children both an appropriate education and a free one; it should not be interpreted to defeat one or the other of those objectives." *School Comm. of the Town of Burlington v. Department of Educ. of Mass.*, 471 U.S. 359, 371 (1985).

IDEA's purpose would be defeated if prevailing party parents could not recover the cost of expert fees expended for due process and judicial hearings. IDEA's objective that parents of children with disabilities participate in designing their child's *free* appropriate public education, and seek redress if the school district will not provide it, would be significantly impaired if they were required *to pay* when the school district failed to meet its obligation.

This Court has rejected interpreting IDEA's remedial provisions in a manner that "would defeat this statutory purpose." *Florence County Sch. Dist. v. Carter*, 510 U.S. 7, 14 (1993). In *Town of Burlington*, this Court took note of the fact that the administrative and judicial process regarding the placement of a child can take years, during which time, under the school district's view, parents were faced with the Hobson choice of leaving their child in a school district's proposed placement "to the detriment of their child if it turns out to be inappropriate or pay for what they consider to be the appropriate placement." 471 U.S. at 370. The Court concluded that "[i]f that were the case, 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 would be less than complete." *Ibid.* Thus, Congress "undoubtedly" could not have intended that

result. *Ibid*. The "appropriate" relief under Section 1415(i)(2)(B) must include "retroactive reimbursement to parents" whose children were *in*appropriately placed. *Ibid*.

Likewise, in *Carter*, parents of a child with a disability challenged a school district's IEP and placed their child in a private school. The school district's IEP ultimately proved inappropriate under IDEA, but the school district still refused to reimburse the parents on the grounds that the private school did not meet some of IDEA's technical requirements, such as employing only certified teachers, even though the private school unquestionably "provided an education otherwise proper under IDEA." *Carter*, 510 U.S. at 12-13. The Court rejected the school district's argument because those technical requirements "do not make sense in the context of a parental placement." *Id.* at 13. The Court held: "IDEA was intended to ensure that children with disabilities receive an education that is both appropriate and free. To read the provisions of [IDEA] to bar reimbursement in the circumstances of this case would defeat this statutory purpose." *Id.* at 13-14 (internal citation omitted).

Respondents here ask for no more or no less of this Court. An interpretation of IDEA which required parents to bear these costs in helping (or, as is sometimes the case, in compelling) the school district craft an *appropriate* education for their children would defeat the mandate that such an education be *free* as well. *See id.* at 14; *Town of Burlington*, 471 U.S. at 371. IDEA, when viewed as a whole, must be interpreted to permit prevailing party parents, who were wronged by the inappropriate placement of their children, to recover fees that were expended in securing the appropriate education IDEA guarantees. *See Hibbs*, 542 U.S. at 101.

4. The "independent educational evaluation of the child" authorized by IDEA does not obviate the need for parents to obtain reimbursement for expert fees

Petitioner suggests that prevailing parents do not need reimbursement for their own experts because IDEA effectively provides a free one to the parents in the form of an "independent educational evaluation." *See* Pet. Br. 6, 31-32. This argument rests upon a flawed understanding of the independent educational evaluation, which as a practical matter is extremely difficult for parents to obtain, and this Court's dictum in *Schaffer*. The so-called "right" to an independent educational evaluation is, at best, extremely limited, and was not intended to meet parents' needs for expert assistance in a due process hearing.

a. Section 1415 of IDEA grants parents of children with disabilities the "opportunity * * * to obtain an independent educational evaluation." 20 U.S.C. § 1415(b)(1). The term "educational evaluation" is a term of limitation under IDEA. The scope of an evaluation under IDEA generally is limited to gathering information and testing data regarding whether a child is or continues to be disabled and their educational needs. 34 C.F.R. § 300.532. An evaluation may not determine matters such as eligibility, educational goals, placement or services, since those decisions are the province of an eligibility committee or the IEP team. *See id.* §§ 300.343-344, 300.533-534. For the same reason, an educational evaluation does not review the school district's proposed IEP, placement, or services, since those matters are to be determined by others after the evaluation. Most courts have also limited parents to a *single* evaluation, regardless of the nature of the dispute between the parents and the school district.

See Warren G. v. Cumberland County Sch. Dist., 190 F.3d 80, 87 n.4 (3d Cir. 1999); *Hudson v. Wilson*, 828 F.2d 1059, 1065-1066 (4th Cir. 1987).[21]

b. The Department of Education's implementing regulations place further limits on the independent educational evaluation. The regulations provide that such an evaluation shall be "at public expense" only "if the parent disagrees with an evaluation obtained by [the school]." 34 C.F.R. § 300.502(b)(1). If parents agree with the evaluation, but disagree with the subsequent proposed IEP or the proposed placement or services, they may not obtain an independent educational evaluation at public expense.

Furthermore, a school district need not reimburse parents for an independent educational evaluation if the earlier evaluation conducted by the district was "appropriate." 34 C.F.R. § 300.502(b)(2)(i). Many courts have placed the burden on the parents to show at a due process hearing that the school district's evaluation is inappropriate. *See Ford v. Long Beach Unified Sch. Dist.*, 291 F.3d 1086, 1089-1090 (9th Cir. 2002); *Holmes v. Mill Creek Twp. Sch. Dist.*, 205 F.3d 583, 590-592 (3d Cir. 2000); *John M. v. Board of Educ.*, 2002 U.S. Dist. LEXIS 10931, at *29-31 (N.D. Ill. 2002); *Judith S. v. Board of Educ.*, 1998 U.S. Dist. LEXIS 11072, at *17 (N.D. Ill. July 14, 1998); *Maine Sch. Admin. Dist. #17*, 39 IDELR 281 (Me. Aug. 15, 2003).[22] Of course, without paying for a

[21] One court has held that parents are entitled to obtain only one evaluation for each evaluation conducted by the public agency. *See Board of Educ. of Murphysboro v. Illinois State Bd. of Educ.*, 41 F.3d 1162, 1169 (7th Cir. 1994).

[22] At least one court has suggested that the parents must "identify particular omissions in the school district's case study evaluation and then show how these omissions prevented the district from developing an adequate program of specialized instruction" for the child in order to obtain reimbursement. *Judith S.,* 1998 U.S. Dist. LEXIS 11072, at *17.

(Continued on following page)

private evaluation and an expert of their own, parents are unlikely to be able to meet this burden.

Courts have also denied reimbursement if the location of the evaluation and the qualifications of the examiner do not meet the criteria set by the public agency for their own evaluations.[23]

c. Neither the statute nor the regulations require that the evaluator consult with the parents, or provide the results directly to the parents. To the contrary, a common practice is for the expert used in an independent educational evaluation to provide the results of his evaluation first to the school district, even without the parents' consent, *see* Letter to Katzerman, 28 IDELR 310 (OSEP Sept. 9, 1997), which in turn provides the evaluation to the parents.

Some hearing officers have held parents to an even tougher standard, denying reimbursement for an evaluation when the school district's evaluation has met certain procedural requirements (use of unbiased test by trained examiner under proper test procedures), regardless of whether the result is "correct." *See* S. Etscheidt, *Ascertaining the Adequacy, Scope, and Utility of District Evaluations*, 69 Exceptional Children 227, 240 (2003).

[23] *See Johnson v. Metro Davidson County Sch. Sys.*, 108 F. Supp. 2d 906, 920 (M.D. Tenn. 2000); *Judith S.*, 1998 U.S. Dist. LEXIS, at *17-18; *Das v. McHenry Sch. Dist. #15*, 1994 U.S. Dist. LEXIS 315, at *10-11 (N.D. Ill. Jan. 13, 1994). The Department of Education's Office of Special Education Programs has interpreted IDEA to allow a public agency to require parents seeking an independent educational evaluation to use evaluators on an agency-provided list unless the parents can show that an alternative evaluator meets agency criteria or can "demonstrate that unique circumstances justify the selection of an evaluator that does not meet agency criteria." Letter to Parker, 41 IDELR 155 (OSEP February 20, 2004); *see also* Letter to Young, 39 IDELR 98 (OSEP March 20, 2003); 64 Fed. Reg. 12,406, 12,607 (1999) (to be codified at 34 C.F.R. 300.502) ("Since public agencies must provide parents with information about where IEEs may be obtained, provided the options are consistent with §§ 300.530-536, public agencies have some discretion in the cost if it is at public expense.").

d. Petitioner reads *Schaffer* as prescribing a broader role for an independent educational evaluation. But it ignores that in *Schaffer*, the issue before this Court was whether the parents or the school district had the burden of proof in a due process hearing challenging an IEP. The Court noted that the parents' "most plausible argument" was that, because the school district possessed *all* the information, the school district, rather than the parents, should be required to affirmatively prove its case. 126 S. Ct. at 536. The Court rejected this argument because Congress has required school districts "to share information with" parents. *Ibid.* The independent educational evaluation thus was understood as one mechanism that provided parents with sufficient information so as to not alter the ordinary default rule regarding the burden of proof.

But, as discussed above, the independent educational evaluation does not provide parents an expert opinion in a due process proceeding. Instead, it merely guarantees an "independent" evaluation prior to the IEP. If parents wish to use an expert for anything beyond the initial evaluation, they must pay for it out of pocket without reimbursement. The independent educational evaluation provision has not been interpreted to require school districts to reimburse experts that provide services to parents such as consultation on goals, placement, or services; assistance with preparation for a due process proceeding; or testimony.

Thus, an independent educational evaluation does not, and cannot, come close to leveling the playing field. Indeed, as the empirical evidence demonstrates, that occurs only through the use of experts who are authorized by the statute to accompany and advise parents in due process hearings. 20 U.S.C. § 1415(h)(1).

C. Petitioner's Limiting Construction Of The Statute Based On The Spending Clause Is Unwarranted

In support of its miserly reading of IDEA, petitioner attempts to find (Pet. Br. 13-14, 19-20) in this Court's precedents a general principle that statutes enacted pursuant to Congress's power under the Spending Clause, U.S. Const., Art. I, § 8, Cl. 1, should be read narrowly, citing primarily *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981), and the dissenting opinion in *Cedar Rapids Community School District v. Garrett F.*, 526 U.S. 66 (1999). That proposition finds no support in this Court's cases in general, and particularly not when addressing a federal court's authority to provide remedies for proven violations.

There is no sound basis for subjecting Spending Clause legislation to different interpretive rules than legislation enacted under other sources of congressional power. It is commonplace for a federal law not to govern the conduct of a party unless and until that party voluntarily undertakes the particular activity that is subject to the law, whether that be choosing to run a business large enough to be subject to the Fair Labor Standards Act, Title VII, etc.; choosing to discharge pollution into waters protected by the Clean Water Act; or choosing to market driver's license information subject to the Driver's Privacy Protection Act of 1994; or, as in this case, accepting federal funds under a federal program.[24]

[24] Moreover, IDEA is not just Spending Clause legislation. As this Court explained, IDEA was "set up by Congress to aid the States in complying with their *constitutional obligations* to provide public education for handicapped children." *Smith*, 468 U.S. at 1009 (emphasis supplied). The United States has consistently urged that "IDEA was enacted not only pursuant to Congress's authority under the Spending Clause, but also pursuant to Section 5 of the Fourteenth Amendment."

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All *Pennhurst* requires is that entities that receive federal funds have notice that Congress or a federal agency has attached conditions to the acceptance of the funds. The Court held that that requirement was not met in *Pennhurst* because the relevant statutory language was merely "precatory." 451 U.S. at 18. It is undisputed that IDEA meets that requirement because the statute is clear that recipients of federal IDEA funds will be obliged to undertake significant obligations. *See Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883, 890 n.6, 891 & n.8 (1984); *Smith*, 468 U.S. at 1002 n.6.

Once that requirement of notice has been satisfied, the exact scope of the statute's obligations presents a straightforward matter of statutory interpretation, relying on all the normal tools of construction including text, structure, and legislative history. *See Honig v. Doe*, 484 U.S. 305, 324-325 & n.8 (1988); *Tatro*, 468 U.S. at 891-893; *see also Jackson v. Birmingham Bd. of Educ.*, 125 S. Ct. 1497, 1509-1510 (2005); *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 642-643, 650 (1999); *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 286 n.15 (1987); *Bennett v. Kentucky Dep't of Educ.*, 470 U.S. 656, 665-666 (1985).

Nor do this Court's decisions establish a requirement that recipients of federal funds be given unambiguous notice in the statute as to remedies available for

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Brief for United States as *Amicus Curiae* at 15, *Cedar Rapids Cmty Sch. Dist. v. Garret F.*, No. 96-1793 (S. Ct. Aug. 1998); *see also* Brief for the United States as Intervenor at 21 n.10, *M.A. v. New Jersey Dep't of Educ.*, No. 02-1799 (3d Cir. July 3, 2002) (IDEA "can be sustained as a valid exercise of Congress's power under Section 5 of the Fourteenth Amendment"). Like the statute at issue in *Rumsfeld v. Forum for Academic and Institutional Rights Inc.*, 126 S. Ct. 1297 (2006), IDEA uses the Spending Clause to encourage school districts to do that which Congress could compel them to do pursuant to its authority under Section 5 of the Fourteenth Amendment.

noncompliance. To the contrary, this Court rejected that argument more than twenty years ago, holding that once Congress makes clear its intention to impose conditions on the receipt of federal funds, Congress need not go further and warn in advance of "the remedies available against a noncomplying State." *Bell v. New Jersey*, 461 U.S. 773, 790 n.17 (1983).[25] This holding is consistent with the approach adopted by this Court in both *Carter* and *Town of Burlington*, in which IDEA's remedial provision was read to provide district courts broad authority to provide any appropriate relief that furthers the purposes of the statute.

Certainly these holdings apply with greater force to the question of what constitutes "costs" under IDEA. As this Court has explained, awarding costs incurred during litigation to a prevailing party is unlikely to impose any

[25] Indeed, such a requirement could not be reconciled with the very nature of an implied right of action, which by definition is not made express in the text of a statute. Yet the Court has long accepted that a private right of action may be implied against a public recipient of federal funds. *See, e.g., Jackson*, 125 S. Ct. at 1504; *Franklin v. Gwinett County Pub. Schs.*, 503 U.S. 60, 65-66 (1992); *Cannon v. University of Chicago*, 441 U.S. 677, 704-706 (1979); *cf. Board of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226 (1990) (adjudicating claim under Equal Access Act, which imposes obligations on school districts that receive federal funds, that has no express cause of action). Congress has ratified this Court's decisions implying such rights of action from Spending Clause statutes. *See Alexander v. Sandoval*, 532 U.S. 275, 280 (2001); *Franklin*, 503 U.S. at 72; *id*. at 78 (Scalia, J., concurring in judgment).

It is true that this Court has sometimes tailored the circumstances under which damages are available in an implied private right of action to preclude such an award when the recipient of federal funds had no actual knowledge that discriminatory conduct was occurring in its programs. *See Davis*, 526 U.S. at 639-640. But it has not required the recipient to have actual knowledge of the remedies available to a prevailing plaintiff. For example, when the Court in *Franklin* held that damages were available for violations of Title IX (contrary to the law of the circuit in which the defendant resided, *see* 503 U.S. at 64), it applied that holding to the case before it.

"hardship for a [defendant]" because they are "limited" to "partially compensating a successful litigant for the expense of his suit." *Hutto v. Finney*, 437 U.S. 678, 697 n.27 (1978). The award in this case, less than $9,000, confirms that permitting prevailing party parents to recover the costs of experts used at the due process and judicial hearings will impose no unexpected burden on school districts.

CONCLUSION

For the reasons set forth above and in respondents' brief, the judgment of the Second Circuit should be affirmed.

Respectfully submitted,

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