

RECENT DECISION: SUPREME COURT DECLINES TO AWARD EXPERT WITNESS FEES TO
PREVAILING PARTIES IN IDEA LITIGATION.
Arlington Central School District Board of Education v. Murphy, 125 S. Ct. 2455 (2006).
by Lori M. Leonardo

I. INTRODUCTION

In 1998, Joseph Murphy attended the Kildonan school, a boarding school where students spent time horseback riding, skiing, and receiving intensive help learning with dyslexia.¹ Under the Individuals with Disabilities Education Act (IDEA),² Joseph's parents received tuition reimbursement from the school district where he would have attended public high school.³ Designed to "to ensure that all children with disabilities have available to them a free appropriate public education,"⁴ the IDEA began as the Education for all Handicapped Children Act (EAHCA) in 1975.⁵

With this idealistic beginning, present-day IDEA litigation is often a battle of experts brought in by both parents and schools.⁶ In addition, IDEA litigation is

¹ Although the court never discloses Joseph's disability, he presumptively suffered from dyslexia. According to the website of the Kildonan School, Horseback riding, skiing, and a strong art program . . . play an important role in the extra-curricular program The school continues its mission to meet the needs of the dyslexic population by strengthening language skills, by providing stimulating subject matter courses, and by building confidence and self-esteem.

About Us – History, <http://www.kildonan.org/aboutus/history.asp> (last visited Nov. 21, 2006).

² See 20 U.S.C. § 1400, et. seq. (2006).

³ See discussion *infra* Part II.A (discussing the litigation on the merits and the liability of the Arlington School District Board of Education for \$20,750, the amount of Joseph Murphy's tuition to the Kildonan School for the 1998-1999 school year).

⁴ 20 U.S.C. § 1400(d)(1)(A) (2006). The Supreme Court held that a "free and appropriate education" under the IDEA "consists of educational instruction specifically designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child 'to benefit' from the instruction." *Bd. of Educ. v. Rowley*, 458 U.S. 176, 188-89 (1982).

⁵ Congress enacted the EAHCA after findings that:

[T]he educational needs of millions of children with disabilities were not being fully met because (A) the children did not receive appropriate educational services; (B) the children were excluded entirely from the public school system and from being educated with their peers; (C) undiagnosed disabilities prevented the children from having a successful educational experience; or (D) a lack of adequate resources within the public school system forced families to find services outside the public school system.

20 U.S.C. § 1400(c)(2) (2006).

⁶ See, e.g., *Oberti v. Bd. of Educ.*, 995 F.2d 1204, 1210-12 (3d Cir. 1993) (detailing the testimony of experts brought into the district court by both the parents and the school).

expensive for schools,⁷ which were promised “full funding” at a level of forty-percent of the national average of per-pupil spending on special education but received only about eighteen-percent.⁸ Not only do schools pay IDEA litigation costs, but schools also pay the costs of educating disabled students, which may, as in Joseph Murphy’s case, involve placement of students in private schools.⁹

For all of these reasons, schools and parents watched closely when the Supreme Court, in its most recent term, granted certiorari on a case brought by Joseph Murphy’s parents that would decide whether expert fees may be awarded to prevailing parties in IDEA litigation. In *Arlington Central School District Board of Education v. Murphy*, 126 S. Ct. 2455 (2006), the Supreme Court denied recovery of expert fees to prevailing parties in IDEA litigation.

Murphy addresses a paradigmatic issue in education law: achieving balance where the interests of the parent, the interests of the child, and the interests of the school intersect. The *Murphy* decision achieves a sustainable balance, protecting the rights of the school, while fostering a non-adversarial and collaborative environment to protect the rights of the parent and disabled child.

Section II of this paper will discuss the *Murphy* opinion as it proceeded through the courts. Section III of this paper will discuss the public reaction to the *Murphy*

⁷ See Brief of Amici Curiae National School Boards Association et al. in Support of Petitioner at 37, *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 126 S. Ct. 2455 (2006) [hereinafter Brief in Support of Petitioner] (citing JAY G. CHAMBERS ET AL., CENTER FOR SPEC. EDUC. FINANCE, SPEC. EDUC. EXPENDITURE PROJ., WHAT ARE WE SPENDING ON PROCEDURAL SAFEGUARDS IN SPECIAL EDUCATION, 1999-2000 at 8 (2003)) (estimating that school boards spent \$146.5 million on special education mediation, due process proceedings, and IDEA litigation during the 1999-2000 school year).

⁸ Michelle R. Davis, *Senate Approves Bill to Reauthorize IDEA*, EDUC. WK., May 19, 2004, at 28.

⁹ See, e.g., *Drew P. v. Clarke Cty. Sch. Dist.*, 877 F.2d 927 (11th Cir. 1989) (obligating the school district to pay tuition to place a severely autistic and mentally retarded child in a private facility in Tokyo, Japan), cited in MARTIN R. GARDNER & ANNE PROFFITT DUPRE, CHILDREN & THE LAW: CASES AND MATERIALS 782-83 (2d ed. 2006).

decision, the strengths and weaknesses of the Supreme Court’s opinion as the Court attempted to balance the interests of the parent/child and the school, and the future direction of IDEA litigation given the collaborative emphasis of the *Murphy* decision.

II. BACKGROUND

A. LITIGATION ON THE MERITS

In 1997, Joseph Murphy attended Arlington High School¹⁰ in LaGrangeville, New York.¹¹ Because the school identified Joseph as a “child with a disability” under the IDEA,¹² the school prepared an individualized education plan (IEP)¹³ for Joseph for the following school year, 1998-99.¹⁴ The IEP continued to place Joseph at Arlington High School; however, the Murphys disagreed and requested a due process hearing under the IDEA.¹⁵

For the 1998-99 school year, the Murphys unilaterally withdrew Joseph from Arlington High School, placing him at Kildonan, a private school, and continued to pursue the administrative remedies afforded to them by the IDEA against the Arlington School District Board of Education (School District).¹⁶ On July 7, 1999, an impartial

¹⁰ *Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.*, 86 F. Supp. 2d 354, 355 (S.D.N.Y. 2000), *aff’d*, 297 F.3d 195 (2d Cir. 2002).

¹¹ See Arlington High School Home Page, <http://arlingtonschools.org/ArlingtonHigh/AHW.html> (last visited Nov. 19, 2006). Arlington High School employs twenty-four special education teachers for the 2006-07 school year. Arlington High School Faculty List, <http://arlingtonschools.org/ArlingtonHigh/AHSFacultyList2006-2007.pdf> (last visited Nov. 19, 2006).

¹² See 20 U.S.C. § 1401(3)(A) (2006) (

The term “child with a disability” means a child—(i) with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance . . . orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and (ii) who, by reason thereof, needs special education and related services.)

¹³ See 20 U.S.C. § 1414(d) (2006) (setting forth the framework for individualized education plans), *cited in* GARDNER & DUPRE, *supra* note 9, at 766.

¹⁴ *Murphy*, 86 F. Supp. 2d at 355.

¹⁵ *Id.* See also 20 U.S.C. § 1415 (2006) (guaranteeing procedural safeguards to disabled children and their parents of the disabled child’s “free and appropriate education”).

¹⁶ *Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.*, 86 F. Supp. 2d 354, 355 (S.D.N.Y. 2000), *aff’d*, 297 F.3d 195 (2d Cir. 2002).

hearing officer (IHO) considered Kildonan the appropriate placement for Joseph; the School District appealed the IHO's decision before the state review officer (SRO).¹⁷ During the 1999-2000 school year, the SRO finally reached a decision, affirming Joseph's placement at Kildonan and ordering the School District to reimburse the Murphys in the amount of \$20,750, Joseph's Kildonan tuition for the 1998-99 school year.¹⁸

The SRO's decision established Kildonan as Joseph's "current educational placement."¹⁹ The School District would remain financially responsible for Joseph's tuition until an agreement between his parents and the School District or an administrative or court decision changed Joseph's placement.²⁰

B. THE DISTRICT COURT'S DECISION

After prevailing on the merits, the Murphys instituted a separate action, applying for an order directing the School District to pay, among other things, the fees incurred for the services of Marilyn Arons, an educational consultant.²¹ Arons charged the Murphys a total of \$29,350 over a time period beginning November 1997, when she

¹⁷ *Id.* The Murphys filed an action in the Northern District of New York, seeking a temporary restraining order requiring the School District to pay Joseph's tuition until the SRO returned its decision. *Id.* at 356. The case was then transferred to the Southern District of New York. *Id.*

¹⁸ *Id.* at 356. For the 2005-06 school year, tuition at Kildonan cost \$43,250. Admissions—Kildonan—Tuition & Financial Aid, http://www.kildonan.org/admissions/kildona_tuitionfinancialai.asp (last visited Nov. 26, 2006).

¹⁹ *Id.* at 360 (citing 20 U.S.C. § 1415(j) (2006) ("[D]uring the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child")).

²⁰ *Id.* at 366.

²¹ *Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.*, No. 99 Civ. 9294 (CSH), 2003 WL 21694398, at *1 (S.D.N.Y. July 22, 2003). See also Parent Information Center of New Jersey, <http://www.picofnj.org/history.html> (last visited Nov. 19, 2006) (containing the homepage of the educational consulting business founded by Marilyn Arons).

first met with the Murphy's to review Joseph's records in preparation for the IEP meeting discussing his placement for the 1998-99 school year, and ending in July 2002.²²

The district court spent little time questioning whether Arons could recover her consulting fees from the school district; instead, the bulk of the court's opinion involved the amount of fees recoverable by Arons. On the question of whether Arons could recover her consulting fees, the district court first looked to fee-shifting provision of the IDEA, which states, "In any action or proceeding brought under this subsection, the court, in its discretion, may award *reasonable attorneys' fees as part of the costs* to the parents or guardian of a child or youth with a disability who is the prevailing party."²³

This language would eventually become the focus of the Supreme Court opinion. The district court also found significant the provision of the IDEA allowing the representation of parties to an impartial due process by "counsel and by *individuals with special knowledge or training with respect to the problems of children with disabilities*."²⁴

Without explicitly stating, the court seemed to combine these passages to conclude that prevailing parents could recover the cost of representation by an educational consultant like Arons as well as an attorney.

Although the district court allowed Arons to recover fees for her consulting work from the School District, the court limited the amount. First, the court limited the types of services for which Arons could recover fees. Because Arons was not a lawyer, the district court disallowed recovery of any legal services; however, the court held that Arons could recover "for work done as an expert consultant or witness," including

²² *Id.* at *2-3. Arons charged \$200 an hour for a total of 146.75 hours of service. *Id.* at *3.

²³ *Id.* at *4 (quoting 20 U.S.C. § 1415(e)(4)(B) (1998)) (emphasis added) (current version at 20 U.S.C. § 1415(i)(3)(B) (2006)).

²⁴ *Id.* (quoting 20 U.S.C. § 1415(d)(1) (1998)) (emphasis added) (current version at 20 U.S.C. § 1415(h)(1) (2006)).

“giving testimony, preparing technical reports, consulting with parents, attending hearings, or advising parents about education decisions.”²⁵ Accordingly, the district court discounted Arons fees to the value of the non-legal services she provided to the Murphy’s.

The district court also limited the time period over which Arons could recover consulting fees. The court held that Arons could recover fees incurred from September 3, 1998, the date the Murphy’s requested an impartial hearing, to March 1, 2000, the date of the court’s ruling in the Murphy’s favor on the merits.²⁶ The fee-type and time period limitations, taken together, reduced Arons possible recovery from \$20,750 to \$8,650.²⁷

C. THE SCHOOL DISTRICT’S APPEAL TO THE SECOND CIRCUIT

The School District appealed the district court’s decision holding the School District liable for \$8,650 of educational consulting fees to the Second Circuit Court of Appeals. On appeal, the School District challenged the district court’s interpretation of the IDEA’s fee-shifting provision, the issue on which the Supreme Court would eventually grant certiorari.²⁸ Because the School District challenged the district court’s interpretation of the statute qua statute, arguing that it did not allow expert witnesses like Arons to recover fees, the Second Circuit reviewed the district court’s interpretation

²⁵ *Id.* at *4-5 (quoting *Arons v. N.J. State Bd. of Educ.*, 842 F.2d 58, 62-63 (3d Cir. 1998)). The Northern District of New York ratified the Third Circuit’s interpretation of the types of services recoverable by educational consultants in *Connors v. Mills*, 34 F. Supp. 2d 795 (N.D.N.Y. 1998). *Id.* at *5.

²⁶ *Id.* at *9. The court noted that “[t]he ‘trigger point’ for attorney’s fees under the IDEA is generally a request for an impartial hearing.” *Id.* (quoting *Shanahan v. Bd. of Educ.*, 953 F. Supp. 440, 444 (N.D.N.Y. 1997)). The ending point is when the plaintiffs become “‘prevailing parties’ under the IDEA fee-shifting provision.” *Id.*

²⁷ *Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.*, No. 99 Civ. 9294 (CSH), 2003 WL 21694398, at *10 (S.D.N.Y. July 22, 2003) (representing a total of 43 ¼ hours at the reasonable rate of \$200 per hour).

²⁸ *Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.*, 402 F.3d 332, 333 (2d Cir. 2005).

of the IDEA fee-shifting statute *de novo*.²⁹ The Second Circuit affirmed the district court's decision to award expert fees to Arons at the expense of the School District in the amount of \$8,650.³⁰

In finding that "Congress intended to and did authorize the reimbursement of expert fees in IDEA actions," the Second Circuit first turned to Supreme Court precedent and the legislative history of the IDEA.³¹ Generally, federal statutes limit reimbursement for expert witness fees to \$40 per day per witness absent explicit statutory authority to the contrary.³² However, the Second Circuit focused on language from a Conference Committee Report on the IDEA, stating that "[t]he conferees intend that the term 'attorneys' fees as part of the costs' include reasonable expenses and fees of expert witnesses and the reasonable costs of any test or evaluation which is found to be necessary for the preparation of the . . . case."³³ In a footnote in *West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83, 91 n.5 (1991), *abrogated by statute*, 42 U.S.C. § 1988(c), Justice Scalia wrote that the statement in the IDEA Conference Committee Report was "an apparent effort to depart from ordinary meaning and define a term of art."³⁴ The Second Circuit used the *Casey* footnote and the Conference

²⁹ *Id.* at 335-36 (citing *J.C. ex rel. C v. Regional Sch. Dist. 10*, 278 F.3d 119, 123 (2d Cir. 2002)). See also 20 U.S.C. § 1415(i)(3)(B) (2006) ("In any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys' fees as part of the costs--(l) to a prevailing party who is the parent of a child with a disability . . .").

³⁰ *Id.* at 333 (reviewing the amount of expert fees awarded for abuse of discretion).

³¹ *Id.* at 336.

³² *Id.* (quoting *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 439 (1987)). See also 28 U.S.C. § 1821(b) (2006) (limiting expert witness fees to \$40 per day per witness).

³³ *Id.* at 336-37 (quoting *W.V. Univ. Hosp. v. Casey*, 499 U.S. 83, 91 n.5 (1991) (quoting H.R. CONF. REP. NO. 99-687, at 5 (1986)), *abrogated by statute*, 42 U.S.C. § 1988(c)).

³⁴ *Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.*, 402 F.3d 332, 337 (2d Cir. 2005). The court later derives significance from the fact that Justice Scalia, "a noted skeptic of the use of legislative history," authored the *Casey* footnote. *Id.*

Committee Report to conclude that Congress intended the fee-shifting provision in the IDEA to shift the fees of expert witnesses like Arons.³⁵

The Second Circuit also considered determinative Congressional action after *Casey*. After the *Casey* court held that expert witnesses could not recover fees under the fee-shifting provision of the statute at issue at issue in *Casey*, Congress amended the statute to make expert fees compensable.³⁶ Because Congress did not similarly amend the IDEA, the Second Circuit inferred that Congress considered the Conference Committee Report sufficient to indicate intent to award expert witness fees under the fee-shifting provision.³⁷

The Second Circuit then looked to the statutorily defined purposes of the IDEA:

“[To] ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living” and “to ensure that the rights of children with disabilities and parents of such children are protected.”³⁸

The Second Circuit observed that IDEA cases often turn on expert testimony, and, as noted by the district court, the IDEA confers on parents, as a procedural safeguard, the right to advice from experts.³⁹ The Second Circuit held that it would be inconsistent to

³⁵ *Id.* The *Casey* court held that, under the fee-shifting provision of a civil rights statute, a prevailing party could not recover expert fees because no explicit statutory authority allowed expert fee-shifting. *Id.* (quoting *W.V. Univ. Hosp., Inc. v. Casey*, 499 U.S. 83 (1991))(providing no pinpoint cite). The fee-shifting provisions at issue in this case and *Casey* contain the same wording. Compare 42 U.S.C. § 1988 (civil rights statute) with 20 U.S.C. § 1415(e)(4)(B) (1998) (IDEA) (current version at 20 U.S.C. § 1415(i)(3)(B) (2006)).

³⁶ *Id.* See also *W.V. Univ. Hosp. v. Casey*, 499 U.S. 83, *abrogated by statute*, 42 U.S.C. § 1988(c).

³⁷ *Id.* However, this argument could go both ways. Congress’s refusal to amend the IDEA to include an award of expert witness fees could signify Congress’s intent not to award expert witness fees under the IDEA.

³⁸ *Id.* at 338 (quoting 20 U.S.C. §§ 1400(d)(1)(A)-(B) (2006)).

³⁹ *Id.* (quoting 20 U.S.C. § 1450(h)(1) (2006)). See *supra* note 24 and accompanying text (setting forth the IDEA provision affording parents the right to consult with experts).

afford the right to retain an expert but refuse the expert's fees.⁴⁰ Further, the court held that, while prevailing parties in IDEA proceedings may recover tuition to private school, the IDEA affords no other monetary damages, impairing the ability of parents would could not afford expert witnesses to pursue IDEA claims.⁴¹ Thus, refusing recovery of expert witness fees would, according to the Second Circuit, "frustrate the purposes of the IDEA."⁴²

D. CERTIORARI GRANTED BY THE SUPREME COURT

1. *Majority Opinion.* Although the Second Circuit awarded expert fees under the fee-shifting provision of the IDEA, others, such as the D.C., Seventh, and Eighth Circuits, refused to award expert fees under the same provision.⁴³ Recognizing this split in the circuits, the Supreme Court granted certiorari on the issue of whether, in 20 U.S.C. § 1415(i)(3)(B), the current IDEA fee-shifting provision, "Congress authorized the compensation of expert fees to prevailing parents in IDEA actions."⁴⁴ Specifically, the Murphy's argued that the court should interpret the word "costs" in the statute to include expert fees.⁴⁵ The Court ultimately disagreed with the Murphy's interpretation.

The Supreme Court's decision turned on the clear notice requirement of Spending Clause analysis: "when Congress attaches conditions to a State's acceptance

⁴⁰ *Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.*, 402 F.3d 332, 338 (2d Cir. 2005).

⁴¹ *Id.* (contrasting other civil rights statutes, which may allow compensatory damages, monetary relief, or punitive damages).

⁴² *Id.*

⁴³ See *Goldring v. D.C.*, 416 F.3d 70 (D.C. Cir. 2005); *T.D. v. LaGrange Sch. Dist. No. 102*, 349 F.3d 469 (7th Cir. 2003); *Nehosho R-V Sch. Dist. v. Clark*, 315 F.3d 1022 (8th Cir. 2003). The preceding cases were cited in *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 126 S. Ct. 2455, 2458 (2006). See also *supra* note 29 (setting forth the current version of the IDEA fee-shifting provision).

⁴⁴ *Murphy*, 126 S. Ct. at 2458.

⁴⁵ *Id.* at 2459.

of federal funds, the conditions must be set out ‘unambiguously.’”⁴⁶ The Court explained that since “Congress enacted the IDEA pursuant to the Spending Clause . . . we must ask whether the IDEA furnishes clear notice regarding the liability at issue in the case.”⁴⁷

To answer the question of whether the IDEA unambiguously obligated school districts to award expert fees to prevailing parents, the court first looked at the text of the statute. Employing the rule of statutory interpretation that words should be construed in accordance with their plain meaning, the court first explained that the word “cost” is a term of art that generally excludes expert fees.⁴⁸ The use of the term “costs” rather than “expenses” signaled Congressional intent to avoid imposing broad liability on school districts.⁴⁹ Instead, because the IDEA fee-shifting provision did not otherwise clearly authorize an award of expert fees, the Supreme Court found the federal statutory limitations on expert witness fees applicable.⁵⁰

In interpreting the text of the statute to deny expert witness fees to prevailing parties, the Court also looked to the provisions of the IDEA surrounding the fee-shifting

⁴⁶ *Id.* (quoting *Bd. of Educ. v. Rowley*, 458 U.S. 176, 204 n.26 (1982); *Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)).

⁴⁷ *Id.* at 2458-59 (“We must ask whether . . . a state official would clearly understand that one of the obligations of the Act is the obligation to compensate prevailing parents for expert fees.”). See also U.S. Const. art. I, § 8, cl. 1 (the Spending Clause).

⁴⁸ *Murphy*, 126 S. Ct. at 2459. See also BLACK’S LAW DICTIONARY 372 (8th ed. 2004) (defining costs as “the expenses of litigation, prosecution, or other legal transaction, esp. those allowed in favor of one party against the other”).

⁴⁹ *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 126 S. Ct. 2455, 2459-60 (2006).

⁵⁰ *Id.* at 2460 (discussing the list of recoverable costs set forth in 28 U.S.C. § 1920, limited by 28 U.S.C. § 1821). The Second Circuit Court of Appeals discussed and reject the applicability of the federal statutory limitations on expert witness fees. See *supra* note 32 and accompanying text (discussing the federal statutory limitations on expert witness fees of \$40 per day per witness).

provision. The Court noted that the surrounding provisions ensuring reasonable awards and procedural safeguards referred only to attorneys' fees, not expert witness fees.⁵¹

The Court next addressed a provision of the IDEA's predecessor which required the General Accounting Office (GAO) to collect data on the "specific amount of attorneys' fees, costs, and expenses awarded to the prevailing party" and "the number of hours spent by personnel, including attorneys and consultants, involved in the action or proceeding, and expenses incurred by the parents and the State educational agency and local agency."⁵² Rejecting the Murphy's argument that the study would be needless if Congress did not intend to allow educational consultants to recover expert witness fees, the Court instead acknowledged other reasons to obtain the kind of information commissioned from the GAO, including use in proposing future amendments.⁵³

The Court found its "strongest support" in two previous decisions, also discussed by the Second Circuit; in *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437 (1987) and *West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83 (1991), the Supreme Court limited the term "costs" to the federal statutory limitations on expert witness fees.⁵⁴ Since the fee-shifting language in the IDEA mirrors the fee-shifting language in the statute at issue in *Casey*, the Court explained that to decide in favor of the Murphy's,

⁵¹ *Murphy*, 126 S. Ct. at 2460. Notably, the statutory section containing the fee-shifting provision is entitled "Award of attorneys fees." 20 U.S.C. § 1415(i)(3)(B) (2006).

⁵² *Murphy*, 126 S. Ct. at 2460 (quoting Handicapped Children's Protection Act of 1986, § 4(b)(3), 100 Stat. 797, 797-98 (no longer in force)).

⁵³ *Id.* at 2460-61. In a footnote, the Court acknowledged that the direction to study costs *and* expenses could mean that Congress intended to award expert witness fees as expenses separate from the traditional list of costs. *Id.* at 2460 n.1. However, the Court emphasized the Murphy's argument: that the term "costs" included "expert fees." *Id.* If "costs" included "expert fees," the Court explained, then the separate reference to "expenses" did not support the Murphy's argument. *Id.* Although the Court began the footnote with the general presumption that "statutory language is not superfluous," the Court concluded that "instances of surplusage are not unknown." *Id.*

⁵⁴ *Id.* at 2461. The Court previously applied the federal statutory limitations on expert witness fees to the IDEA fee-shifting provision. See *supra* note 50 and accompanying text.

[W]e would have to interpret the virtually identical language in [the IDEA fee-shifting provision] as having exactly the opposite meaning. Indeed, we would have to go further and hold that the relevant language in the IDEA *unambiguously means* exactly the opposite of what the nearly identical language in [the statute at issue in *Casey*].⁵⁵

The Court refused to allow its interpretation of the meaning of “cost” in the IDEA fee-shifting statute to call into question the meaning of “cost” in all federal statutes using that term.

The Court similarly rejected the Second Circuit’s interpretation of the infamous *Casey* footnote, concluding that Congress’s “apparent effort to depart from the ordinary meaning [of ‘costs’] and define a term of art” in the Conference Committee Report was simply unsuccessful.⁵⁶

The *Murphy*’s presented arguments not based on the text of the IDEA, but the Court summarily dismissed those arguments. The Court considered the argument that awarding expert fees furthered the IDEA’s goal of protecting parental and child interests “too general.”⁵⁷ Similarly, the Court considered the legislative intent to include expert fees in an award of costs, manifested in the Conference Committee Report, “not sufficient.”⁵⁸ Viewing the fee-shifting language of the IDEA as unambiguous, the

⁵⁵ *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 126 S. Ct. 2455, 2462 (2006). See also *supra* note 35 (discussing the holding in *Casey* and noting the similarity of the fee-shifting provisions in *Casey* and the IDEA).

⁵⁶ *Murphy*, 126 S. Ct. at 2462-63 (quoting *W.V. Univ. Hosp. v. Casey*, 499 U.S. 83, 91 n.5 (1991), *abrogated by statute*, 42 U.S.C. § 1988(c)). See also *supra* notes 33-34 and accompanying text (discussing the Second Circuit’s interpretation of the *Casey* footnote).

⁵⁷ *Murphy*, 126 S. Ct. at 2463 (“The IDEA obviously does not seek to promote these goals at the expense of all other considerations, including fiscal considerations.”).

⁵⁸ *Id.* at 2463 (“When everything other than the legislative history *overwhelming* [sic] suggests that expert fees may not be recovered, the legislative history is simply not enough.”) (emphasis added). The dissent, however, emphasized that “Members of both Houses of Congress voted to adopt both the statutory text before us and the Conference Committee Report that made clear that the statute’s words include the expert costs here in question.” *Id.* at 2468 (Breyer, J., dissenting).

Supreme Court concluded that the IDEA fee-shifting provision does not authorize an award of expert witness fees.

2. *Concurrence.* In concurrence with majority's result denying the recovery of expert witness fees under the IDEA fee-shifting provision, Justice Ginsburg rejected the need to employ the "clear notice" requirement.⁵⁹ Instead, she considered the provisions of the IDEA focusing on attorneys' fees and prior precedent interpreting the term "costs" as excluding expert witness fees sufficient to support the majority's conclusion.⁶⁰

3. *Dissent.* Affirming the Second Circuit's conclusion that the IDEA fee-shifting provision awards expert witness fees to prevailing parties, Justice Breyer emphasized the purposes of the IDEA: to protect disabled children and their parents.⁶¹ Since expert witnesses are a necessary expense of IDEA litigation, Breyer alleged that the majority's result would foreclose the use of expert witnesses to parties who otherwise could not afford them, contravening the purposes of the IDEA.⁶²

Justice Breyer similarly rejected the majority's classification of the IDEA fee-shifting provision as unambiguous. Because he considered the IDEA fee-shifting provision ambiguous, Breyer looked beyond the text of the statute, finding the clarity necessary to satisfy Spending Clause analysis in the legislative purpose of the IDEA.⁶³

⁵⁹ *Id.* at 2464 (Ginsburg, J., concurring) ("[N]o 'clear notice' prop is needed in this case given the twin pillars on which the Court's judgment securely rests.").

⁶⁰ *Id.* (Ginsburg, J., concurring) (citing 20 U.S.C. §§ 1415(i)(3)(B)-(G) (2006) (attorneys' fees provisions)).

⁶¹ *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 126 S. Ct. 2455, 2468 (2006) (Breyer J., dissenting). Justice Breyer highlights the purpose of the IDEA as guaranteeing "a 'free' and 'appropriate' public education for 'all' children with disabilities." *Id.* (Breyer J., dissenting) (quoting 20 U.S.C. § 1400(d)(1)(A) (2006)). He goes on to emphasize the parental participation encouraged by the IDEA. *Id.* (Breyer J., dissenting) (citing 20 U.S.C. § 1400(c)(5)(B) (2006)).

⁶² *Id.* at 2468-70 (Breyer, J., dissenting) ("The practical significance of the Act's participatory rights and procedural protections may be seriously diminished if parents are unable to obtain reimbursement for the costs of their experts.").

⁶³ *Id.* at 2470-71 (Breyer, J., dissenting). Breyer focused on a parent/child centered approach to the purpose of the IDEA, confirmed by the Conference Committee Report manifesting an intent to award

Justice Breyer similarly rejected the application of the federal cost-limiting statutes applied by the majority; those statutes, he concluded, applied in federal court only, while IDEA proceedings normally began with state due process hearings.⁶⁴ Finally, Justice Breyer considered not dispositive the majority's argument that "costs" is a term of art, stating that "Congress is free to redefine terms of art."⁶⁵ Justice Breyer, less focused on textual analysis than on the purpose of the IDEA, would hold expert fees recoverable under the IDEA fee-shifting provision.

III. ANALYSIS

Ultimately, the answer to the fee-shifting question turned on the issue of statutory ambiguity. The majority declared the IDEA fee-shifting statute unambiguous, leaving little room for statutory interpretation; instead, the majority accepted "costs" as a term of art defined by precedent as excluding expert witness fees.⁶⁶ The dissent declared the statute ambiguous and looked to legislative history, finding an interpretation of "costs" contrary to "costs" as a term of art that allowed the inclusion of expert witness fees.⁶⁷ More broadly, the Supreme Court majority crafted a traditionalist, textualist opinion, while the dissent and lower courts focused on the purpose of the statute.

A. PUBLIC REACTION TO THE *Murphy* DECISION

When the *Murphy* decision came down, the reaction of the public and the education and legal professions mirrored the disagreement of the courts. The reactors divided into two camps: those that favored the school and opposed awarding expert

expert witness fees separately from costs under the IDEA fee-shifting provision. *Id.* See also H.R. CONF. REP. NO. 99-687, at 5 (1986).

⁶⁴ *Id.* at 2471-72 (Breyer, J., dissenting). See also *supra* note 50 and accompanying text (discussing the majority's application of the federal cost-limiting statutes to the IDEA fee-shifting provision).

⁶⁵ *Id.* at 2472-73 (Breyer, J., dissenting).

⁶⁶ See discussion *supra* Part II.D.1 (explaining the majority holding in *Murphy*).

⁶⁷ See discussion *supra* Parts II.C, II.D.3 (explaining the holdings of the Second Circuit and Supreme Court dissent in *Murphy*).

witness fees to prevailing parties, and those that favored the parents and supported awarding expert witness fees to prevailing parties. Arons, the expert witness at issue in *Murphy*, wrote in reaction to the verdict, “For now, Goliath has slain David, the innocent savaged by brute force”; others said the decision “renders the IDEA meaningless for those who have no resources” and “substantially limit[s] the degree to which parents can represent their interests effectively.”⁶⁸ However, an NSBA-employed lawyer evaluated the decision as “a victory for the collaborative approach over the litigation approach.”⁶⁹ Read broadly, public controversy over the *Murphy* decision exposes the decision’s weaknesses.

B. THE WEAKNESS OF THE MAJORITY’S OPINION LIES IN FAILING TO RE-CHARACTERIZE THE IDEA’S PURPOSE AS COLLABORATIVE RATHER THAN PARENT-CENTERED

The Supreme Court majority dismissed the purpose argument in the dissent and the lower courts, saying only that the goals of ensuring a free and appropriate education to children with disabilities and safeguarding the rights of parents against the school “are too general to provide much support.”⁷⁰ The Court appears to consider the statutory language so free from ambiguity that it can easily dismiss any opposing, non-textual arguments. In fact, the Supreme Court holds that the statute “overwhelming[ly] suggests that expert fees may not be recovered.”⁷¹ This bold language, coupled with

⁶⁸ Mark Walsh, *Justices Rule Against Parents in IDEA Case*, EDUC. WK., July 12, 2006, at 31.

⁶⁹ *Id.*

⁷⁰ *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 126 S. Ct. 2455, 2463 (2006). See also 20 U.S.C. § 1400(d)(1)(A) (2006) (setting forth the statutorily defined purposes of the IDEA); *supra* note 57 and accompanying text (discussing the majority’s dismissal of the parent-centered purpose argument set forth by the Second Circuit and supported by the Supreme Court dissent).

⁷¹ *Murphy*, 126 S. Ct. at 2463 (2006). See also *supra* note 58 and accompanying text (explaining the majority’s characterization of the IDEA fee-shifting statute as unambiguous despite the legislative intent in the Conference Committee Report).

the weak generality of purpose argument, makes the Supreme Court's position seem tenuous.

To bolster the opinion, the Court should have re-characterized the purpose of the IDEA. Instead of allowing the parent-centered purpose set forth by the Second Circuit and the dissent to remain unchallenged,⁷² the Court should have redefined the IDEA's purpose as fostering a collaborative framework to meet the educational needs of the disabled child.

At the same time, the Court could have rejected the parent-centered purpose as too adversarial. Expert witnesses hired by parents are not independent; by their very nature, expert witnesses are advocates. In a brief to the Supreme Court on the *Murphy* decision, the National School Boards Association (NSBA) warned, "The toll that an adversarial and litigious conception of IDEA exacts on school resources confronts NSBA members with more difficult choices among services to all children, including children with disabilities."⁷³ The IDEA contains provisions to protect the rights of parents without fostering an adversarial environment.

First, the IDEA mandates hiring "highly qualified teachers" to provide special education services; these teachers should be professional enough to serve students independently.⁷⁴ Although the IDEA provides procedural safeguards that allow parents to challenge decisions about their disabled child's education, the safeguards seem to

⁷² See *supra* note 61 and accompanying text (setting forth the dissent's characterization of the IDEA's purpose).

⁷³ Brief in Support of Petitioner, *supra* note 7, at 12.

⁷⁴ See 20 U.S.C. § 1401(10) (2006) (defining "highly qualified teacher").

have the broader purpose of allowing the parent contribute equally with the school to the development of the child's IEP.⁷⁵

Lastly, maintaining an adversarial relationship only harms the education of the disabled child, which is contrary to the central purpose of the IDEA no matter how one characterizes that purpose. Unlike traditional litigation, the parties to IDEA litigation have a continuing relationship. Especially if the school "wins," the disabled child still must attend the school and the parent must continue to work with the school to develop an IEP beneficial to the disabled child. To strengthen the opinion, the Court should have taken the opportunity afforded by the facts in *Murphy* to explicitly re-characterize the purpose of the IDEA as collaborative rather than parent-centered.

C. THE IMPACT OF THE *Murphy* DECISION ON THE FUTURE OF EDUCATION LAW

1. *The Trend Towards a Collaborative Approach.* Going forward, the Supreme Court's articulation of a collaborative purpose in *Murphy* would continue in a trend toward bolstering the interests of the school and reading a collaborative rather than adversarial, parent-centered purpose into the IDEA. In another recent decision, *Schaffer v. Weast*, 125 S. Ct. 528, 537 (2005), the Supreme Court's holding placed the burden of proof in an administrative hearing challenging an IEP on the party seeking to challenge the IEP, most often the parents. The *Schaffer* court explained that "[t]he core of the [IDEA] . . . is the cooperative process that it establishes between parents and

⁷⁵ Because the public school is a government institution, parents lack bargaining power and do not stand on equal footing. The procedural safeguards afforded to parents by the IDEA seek to afford the parents equality, *not* set up a framework where the parents and the school battle for control. See 20 U.S.C. § 1415 (setting forth the procedural safeguards afforded by the IDEA). See also *Schaffer v. Weast*, 126 U.S. 528, 532 (2006) ("Parents and guardians play a significant role in the IEP process. They must be informed about and consent to evaluations of their child under the Act. Parents are included as members of the 'IEP teams.'") (citations omitted).

schools.” Subsequently holding the IDEA’s as fostering collaboration between parents and schools would be in line with the Supreme Court’s previous decision in *Schaffer*.

Further, Congress manifested an intent to define the IDEA’s purpose as collaborative when amending the IDEA in 2004. One of the changes to the procedural safeguards afforded by the IDEA requires a mandatory resolution session between parents and the school within 15 days of the school district’s receipt of a due process complaint; otherwise, the parties must submit the issue to mediation.⁷⁶ This amendment evidences Congressional intent to encourage dispute resolution between parents and schools. Another amendment modified the fee-shifting provision to award attorneys fees to the school when a parent brings a complaint that is “frivolous, unreasonable, and without foundation.”⁷⁷ This amendment shows Congressional intent Congress to protect the school’s interests in the face of IDEA litigation abuses by parents.⁷⁸

The 2004 amendments, taken together, show that Congress supports the trend towards emphasizing the collaborative purpose of the IDEA, potentially diminishing advocacy for disabled students who receive special education services.⁷⁹

⁷⁶ Dianna B. Glick, *Statutory Spotlight: Individuals with Disabilities Education Act 2004*, 9 U.C. DAVIS J. JUV. L. & POL’Y 439, 442 (2005). The 2004 amendments to the IDEA also set forth more stringent requirements for teacher qualifications. *Id.* at 442.

⁷⁷ 20 U.S.C. §§ 1415(i)(3)(B)(i)(II)-(III) (2006) (cited in *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 126 S. Ct. 2455, 2561 n.2 (2006)).

⁷⁸ See discussion *infra* Part III.C.2 (discussing the problem of IDEA litigation abuses).

⁷⁹ Glick, *supra* note 76, at 439. Perhaps the Court did not consider writing an opinion that would foster a collaborative approach between parents and schools in IDEA-related interactions. By granting certiorari on the *Murphy* case, the Court could merely have meant to signal Congress to amend the IDEA if Congress wanted the term “costs” interpreted contrary to the generally accepted term of art that excluded expert witness fees. The Second Circuit argued that Congress could have included an amendment in 2004 authorizing prevailing parties to recover expert witness fees, but Congress declined to amend the statute because Congress already understood the statute as authorizing the recovery of expert witness fees. *Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.*, 402 F.3d 332, 337n.6 (2d Cir. 2005). However, the same argument could favor the denial of expert witness fees if Congress instead understood and intended “costs” as excluding expert witness fees. See also *supra* notes 36-37 (discussing the Second

2. *Prevention of IDEA Litigation Abuses.* Despite failing to explicitly articulate the IDEA's purpose as collaborative, the Supreme Court's decision in *Murphy* implicitly achieves the same effect. Since IDEA cases often turn on expert witness testimony, the holding in *Murphy* denying the recovery of expert witness fees diminishes the incentive for parents to hire expert witnesses to advocate expensive private school placements for children.⁸⁰

In this case, the Murphys unilaterally withdrew Joseph from public high school and placed him in private school.⁸¹ Only after the Murphys withdrew Joseph from public school did the court determine, on the merits, that the public high school did not have the resources to provide Joseph a free and appropriate education.⁸² By denying the recovery of expert witness fees, the *Murphy* decision encourages parents to work more closely with the school to achieve a mutually satisfactory placement for the child.

Circuit's attribution of significance to Congressional action after *Casey*). The split in the Circuits existed at the time Congress passed the 2004 Amendments, and Congress failed to resolve the issue by amendment. By clearly ruling that "costs" excluded expert witness fees, the Court may have been prompting Congress to overrule it by statute.

⁸⁰ See *supra* note 9 (discussing the outer limits of private school placement under the IDEA). However, perhaps the solution to IDEA litigation reform lies with the courts rather than the interpretation of the fee-shifting provision. The IDEA awards fees to "prevailing parties." 20 U.S.C. § 1415(i)(3)(B) (2006). Courts should give more deference to the daily interaction educators have with disabled students when determining whether the student's IEP is adequate. See *Oberti v. Bd. of Educ.*, 995 F.2d 1204, 1219 (1993) (discounting the weight of the school's evidence because "the school has an advantage when a dispute arises under the Act: the school has better access to the relevant information, greater control over potentially more persuasive witnesses (those who have been directly involved with the child's education), and greater overall educational expertise than the parents"). This increased deference to the school more efficiently solves the problem of IDEA abuses by not allowing parties with frivolous claims to prevail in the first place.

⁸¹ *Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.*, 86 F. Supp. 2d 354, 355 (S.D.N.Y. 2000), *aff'd*, 297 F.3d 195 (2d Cir. 2002). See also GARDNER & DUPRE, *supra* note 9, at 782-84 n.1 (discussing the cost to school districts of private school tuition for disabled children).

⁸² *Murphy*, 86 F. Supp. 2d at 360. Public schools usually can provide adequate supplementary services to students with dyslexia so as not to require the student's removal from public school in order to obtain a free and appropriate education. Interview with Linda Leonardo, Speech Pathologist, Cobb County School District, in Kennesaw, GA (Nov. 20, 2006).

IV. CONCLUSION

The Supreme Court's decision in *Murphy* denying the recovery of expert witness fees to prevailing parties under the IDEA fee-shifting provision effectively balances the interests of the school, parent, and disabled child. The Supreme Court majority could have broken away from its largely textualist analysis and explicitly re-defined the IDEA's purpose as "collaborative," bolstering the weaknesses in the *Murphy* opinion itself and giving a clearer direction to future courts' efforts interpreting the IDEA. However, the implicit holding of the *Murphy* opinion as well as the larger trend shown by Congress and other Supreme Court decisions towards attributing a collaborative purpose to the IDEA accomplish similar objectives and fosters incentives for parents and school districts to cooperate in the best interests of the disabled child.