

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 ARLINGTON CENTRAL SCHOOL :

4 DISTRICT BOARD OF EDUCATION, :

5 Petitioner :

6 v. : No. 05-18

7 PEARL MURPHY, ET VIR. :

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9 Washington, D.C.

10 Wednesday, April 19, 2006

11 The above-entitled matter came on for oral

12 argument before the Supreme Court of the United States

13 at 10:03 a.m.

14 APPEARANCES:

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16 behalf of the Petitioner.

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20 supporting the Petitioner.

21 DAVID C. VLADECK, ESQ., Washington, D.C.; on behalf of

22 the Respondents.

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P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first in Arlington Central School District Board of Education v. Murphy.

Mr. Kuntz.

ORAL ARGUMENT OF RAYMOND G. KUNTZ

ON BEHALF OF THE PETITIONER

MR. KUNTZ: Thank you, Mr. Chief Justice, and may it please the Court:

The statute awarding attorneys' fees as part of the costs to the prevailing parents provides a clear rule, imposes a certain obligation. It should not be expanded to include fees for expert witnesses.

This is a case of statutory construction. Under longstanding rules, statutes are construed by first looking at the words of the statute. Is the meaning plain? If so, the inquiry stops there.

This statute is unambiguous. Expert fees are not a part of attorneys' fees. Expert fees are not costs. The statute contains no reference to expert fees. They are not shifted to the school district when the parents prevail.

It's our belief that the lack of compensation for experts is an intentional exclusion and omission

1 from the statute. Congress knows how to add expert
2 fees in a cost-shifting statute, and that omission is
3 telling here.

4 In that context, I think it's important to
5 draw the Court's attention to the origin of the
6 statute. It was in response to this Court's decision
7 in Smith against Robinson. At the time that Smith
8 against Robinson was heard, the EHA was often grafted
9 onto other causes of action as a pleading device to --
10 in an attempt to ensure that attorneys' fees flowed to
11 the prevailing party at the conclusion of the case. So
12 cases were brought not only under the -- the Education
13 for All Handicapped Children Act, but also under 504 of
14 the Rehabilitation Act of 1973 and under 1983 as well
15 of -- on the theory that these were equal protection
16 claims brought under the Fourteenth Amendment. In
17 Smith against Robinson, this Court made it clear that
18 the avenue that had to be followed by the parents was
19 exclusively that of -- of the remedy provided under the
20 Education for All Handicapped Children Act.

21 In response to that decision of the Court, as
22 my opponent points out in his brief -- I think it was
23 19 days later -- bills were introduced into Congress to
24 remedy what Congress at that point saw was a -- a lack
25 of coverage for fees for attorneys for the prevailing

1 parties in cases under the -- under the act. So it's
2 no -- no great surprise that what Congress did in that
3 instance was to take the language that appears in
4 section 1988 and, in effect, lift it and put it into
5 the -- into the act, into what we now call the IDEA.

6 And it's very clear that in doing so, it
7 limited the right of recovery to attorneys' fees, and
8 that right does not include the expert fees advocated
9 by the Respondents here this morning.

10 JUSTICE STEVENS: Do you think the right
11 includes any costs other than statutory costs, any
12 expenses?

13 MR. KUNTZ: No, it does not, Your Honor.

14 JUSTICE STEVENS: How do you explain the
15 reference to expenses on page 4 of the red brief which
16 quotes from the -- a section of the statute authorizing
17 a report to be made, a report authorized under? They
18 shall include data about the specific amount of
19 attorneys' fees, costs, and expenses. Why do you
20 suppose they put the word expenses in?

21 MR. KUNTZ: Well, it said attorneys' fees,
22 costs, and expenses.

23 JUSTICE STEVENS: Right.

24 MR. KUNTZ: And it's a direction to --

25 JUSTICE STEVENS: So the expenses must be

1 something other than attorneys' fees or costs.

2 MR. KUNTZ: Well, they could be expenses of
3 the attorney. But if they were to be -- be set aside
4 separately, that's no indication that -- that Congress
5 intended that expenses of other individuals be shifted
6 to the cost -- shifted, rather, to the school district.
7 It's a direction to the GAO to acquire data --

8 JUSTICE STEVENS: Right.

9 MR. KUNTZ: -- for future reference by -- by
10 Congress.

11 JUSTICE SOUTER: Well, what about -- may I
12 just take the question one step further? I think it's
13 in a subsequent clause in that same section requiring
14 the GAO report that it refers to the -- the -- I forget
15 whether -- the expenses of consultants. Why was the
16 word consultant in there? Because as -- as I
17 understand it, a consultant would not be covered by the
18 costs -- the general costs statute.

19 MR. KUNTZ: Your Honor, I believe that's
20 correct. That's in -- in subdivision (B).

21 JUSTICE GINSBURG: Is it? Is it? I thought
22 the -- there was a reference to hours of consultants,
23 but not expenses.

24 MR. KUNTZ: There are two subdivisions:
25 subdivision (A) and subdivision (B). Subdivision (A)

1 says attorneys' fees, costs, and expenses -- expenses,
2 and in subdivision (B), it refers to consultants. But
3 there isn't any --

4 JUSTICE KENNEDY: I -- I would have thought
5 that your answer would be that the Congress was
6 interested in finding out the cost of this act, and
7 it's very clear that school districts hire consultants
8 to assist them in -- in these cases, and it wanted to
9 know the amount they were paying to the consultants.
10 And that's also why it used the word personnel, which
11 -- which is a word usually reserved for a government
12 agency.

13 MR. KUNTZ: I -- I believe Your Honor is
14 correct in that it -- it's a direction by the GAO to
15 acquire data. And I believe we argued that point in
16 our brief, just as Your Honor has expressed it. We
17 think that that direction to the GAO, however, does not
18 relate back particularly and -- and certainly doesn't
19 inform this Court or inform the statute that expert's
20 fees are to be included and shifted over to the -- to
21 the school district.

22 JUSTICE BREYER: But does it make it possible
23 to read -- I mean, I agree with you it doesn't say to
24 do that, but I guess you could read it to do that,
25 couldn't you? I mean, you said the word cost wasn't

1 ambiguous.

2 MR. KUNTZ: Under this statute.

3 JUSTICE BREYER: Maybe you might be right,
4 maybe absolutely, but might you also be wrong? How is
5 it not ambiguous? It might cover -- it might cover the
6 fees of consultants. It might be that the argument you
7 made is right, but it also mightn't.

8 MR. KUNTZ: Your Honor, I think this Court
9 has looked at that issue in -- in two separate cases,
10 and one of those cases is Crawford Fitting and the
11 other is --

12 JUSTICE BREYER: Which involved this statute?

13 MR. KUNTZ: Well, it didn't involve this --

14 JUSTICE BREYER: All right. Well, I mean, we
15 have a statute and they're using the word costs in the
16 statute, and whatever they used in some other statute
17 they might have meant something different in this
18 statute. And my question is simply how do we know they
19 didn't by just reading the word five times,
20 particularly since, in fact, if you look at another
21 part of the statute, they do seem to use the word cost
22 to include number of hours spent by personnel,
23 including consultants, and the expenses incurred. I
24 mean, can you say -- is there a dictionary that says
25 the word costs couldn't include that?

1 MR. KUNTZ: Your Honor, it -- it could, but I
2 --

3 JUSTICE BREYER: Well, once you say it could,
4 then possibly it's reasonable to ask what the Congress
5 Members were actually thinking, and as soon as we look
6 at what they were actually thinking, that's perfectly
7 clear. Isn't it? Because both the conference report
8 and the Senate report say absolutely clearly that they
9 intended this kind of expense to be used, which is why
10 the GAO went out and did all the studies to include it.

11 MR. KUNTZ: But we come back to the
12 historical derivation of how this statute came into --
13 into being, and it did come in in response to Smith
14 against Robinson.

15 JUSTICE SCALIA: I thought the GAO study
16 included not just the -- the hours worked and the --
17 the costs, however you choose to define it, on the part
18 of the parent challenging the school board action, but
19 it also included those hours and those costs expended
20 by the school.

21 MR. KUNTZ: Yes, Your Honor, it does.

22 JUSTICE SCALIA: In which case it could not
23 possibly have been directed to what items are
24 compensable.

25 MR. KUNTZ: We think that's a separate

1 section.

2 JUSTICE SCALIA: On its face, it covers at
3 least half of the items that are not compensable.

4 MR. KUNTZ: That's true, Your Honor.

5 JUSTICE BREYER: It's true, but --

6 JUSTICE STEVENS: Isn't it true that the
7 provision I referred to refers to the specific amount
8 of attorneys' fees, costs, and expenses awarded to the
9 prevailing party? So it's definitely referring to
10 expenses incurred by the -- by the plaintiff. Isn't
11 that true?

12 MR. KUNTZ: Your Honor, I -- that's correct.

13 JUSTICE STEVENS: Yes.

14 MR. KUNTZ: But I think there are expenses
15 that -- that the attorney bears in -- in the routine of
16 a -- of a -- of handling the client. Those are
17 expenses --

18 JUSTICE STEVENS: So you're saying the word
19 expenses should refer only to expenses incurred by
20 counsel, which of course would be normally
21 reimbursable.

22 MR. KUNTZ: Yes, Your Honor.

23 JUSTICE KENNEDY: Well, but I'm not -- I'm
24 not sure that you don't have a further answer to
25 Justice Stevens because there's (3) (A) and (3) (B).

1 (3) (A) talks about costs and expenses awarded to the
2 prevailing party. (3) (B) says, for the same sample the
3 number of hours spent.

4 MR. KUNTZ: They're talking about -- the same
5 sample refers to a -- a designated number of States, a
6 representative number of States. So the sample refers
7 to the States surveyed, not to those --

8 JUSTICE BREYER: That's certainly possible.
9 I just wonder why don't we look and see what they
10 intended, since they told us. In the conference
11 report, they say the conferees intend the phrase,
12 attorneys' fees as part of costs, to include reasonable
13 expenses and fees of expert witnesses and the
14 reasonable cost of any test or evaluation which is
15 found to be necessary for the preparation of a parent
16 or guardian's case in the action or proceeding. So why
17 are we metaphysically trying to guess what Congress
18 intended when they told us what they intended?

19 MR. KUNTZ: Your Honor, I don't think it's so
20 much a question of metaphysics or philosophy -- maybe
21 perhaps of philosophy.

22 JUSTICE BREYER: My question is why don't we
23 just look and see what they intended since they wrote
24 it down on a piece of paper and all we have to do is
25 read it?

1 JUSTICE SCALIA: Did Congress say that, Mr.
2 Kuntz?

3 MR. KUNTZ: No, Congress didn't say that.

4 JUSTICE BREYER: I thought it did. I thought
5 that the conferees in Congress wrote in the conference
6 report precisely what they intended.

7 MR. KUNTZ: Your Honor, if I might respond to
8 that.

9 JUSTICE BREYER: Oh, I'd like you to respond
10 to it.

11 (Laughter.)

12 MR. KUNTZ: It's -- it's a longstanding rule
13 of statutory construction that Congress' intent is best
14 found in the language that Congress actually puts into
15 the statute. And as we pointed out in the brief, there
16 were previous versions of this act which included
17 experts' fees which did not make its way to the final
18 version approved by both the -- the Senate and the
19 House.

20 JUSTICE STEVENS: There's no doubt that the
21 best evidence is the text of the statute, but at least
22 the people who drafted this, even if they were not the
23 conferees themselves but were just staff members, they
24 apparently thought the language was subject to that
25 reading.

1 MR. KUNTZ: Your Honor --

2 JUSTICE STEVENS: Which would mean it would
3 be ambiguous, wouldn't it?

4 MR. KUNTZ: The rule that we look first to
5 the -- yes, Your Honor. Yes.

6 JUSTICE STEVENS: The rule that you refer to
7 that you cannot look at legislative history -- of
8 course, we always start with the plain language.
9 That's clear. But the rule that you cannot look at
10 legislative history didn't really get any emphasis till
11 after 1987, and this statute was enacted in 1986.

12 MR. KUNTZ: But that -- in -- in the
13 retrospective view that the Court looked at in -- in
14 the -- the Casey decision, it went back and it traced
15 the origin of a number of -- of statutes and looked
16 essentially to similar language, and it found that
17 experts' fees were not a part of attorneys' fees, and
18 it found that experts' fees were not a part of -- of
19 costs.

20 JUSTICE GINSBURG: But it also found that
21 there were dozens of statutes, I think -- didn't
22 Justice Scalia list in his opinion for -- it went on
23 for a couple of pages, including footnotes? I think it
24 was over 30 that did mention experts. It mentioned
25 attorneys' fees and expert fees.

1 MR. KUNTZ: Yes, Your Honor, and to us that
2 proves that Congress knows how to distinguish between
3 experts' fees and attorneys' fees when it wants to.

4 JUSTICE SCALIA: Was this language, by the
5 way -- I'm not clear. It always cited to the House --
6 the House conferees. Was -- was this language in the
7 -- in the Senate conference report?

8 MR. KUNTZ: No, Your Honor, I don't believe
9 it was.

10 JUSTICE SCALIA: So we don't really know --

11 MR. KUNTZ: It emanates -- it emanates solely
12 from the House conference report.

13 JUSTICE SCALIA: Well, that's only half of
14 the Congress, isn't it? Even if --

15 JUSTICE STEVENS: I thought it was a joint
16 explanatory statement.

17 JUSTICE SCALIA: -- even if everybody in the
18 House agreed with that, which we don't really know.

19 What about the President? When he signed it,
20 did -- did he indicate any interpretation?

21 MR. KUNTZ: His -- Your Honor, the -- the
22 President's hesitancy was about the retroactive effect of
23 the statute, and he noted that in his signing
24 memorandum, but he didn't note any other differences.

25 JUSTICE SCALIA: So we have a committee of

1 one house that said -- that said that, that thought it
2 meant that or would have liked it to mean that.

3 MR. KUNTZ: Yes, Your Honor. And it isn't
4 all that unusual that the congressional history of a
5 particular statute might point one way and the actual
6 plain meaning point another way.

7 JUSTICE STEVENS: How do you explain the
8 title, Joint Explanatory Statement of the Committee of
9 the Conference? Doesn't that speak for both the House
10 and the Senate?

11 MR. KUNTZ: It -- yes, Your Honor, it does.

12 JUSTICE BREYER: So it's not correct it's
13 just for one house. It's -- what I have is the Joint
14 Explanatory Committee, and it says the managers, on the
15 part of the House and the Senate.

16 MR. KUNTZ: It -- it does say that, Your
17 Honor.

18 JUSTICE BREYER: All right.

19 And is there some rule -- I don't know what
20 this rule is you can't refer to legislative history.
21 Does it say that in the Constitution of the United
22 States?

23 MR. KUNTZ: No, Your Honor, it doesn't.

24 JUSTICE BREYER: No. And so --

25 CHIEF JUSTICE ROBERTS: Counsel, sometimes

1 these joint statements are actually voted on by the
2 Congress as a whole. Was this one -- was this one
3 voted on?

4 MR. KUNTZ: There was no evidence of that,
5 Your Honor, in our review.

6 JUSTICE BREYER: Which ones are voted on?
7 I've not heard of that. I mean, they might be, but it
8 used to be that the -- they circulate the report to all
9 the Members and the Members read it, and if a Member
10 disagrees with it, they note their dissent. Maybe it's
11 changed. But I guess --

12 JUSTICE STEVENS: Can you cite an example of
13 a conference report that was voted on by the Congress?

14 MR. KUNTZ: I -- I cannot, Your Honor, and
15 that's why I -- I responded as I did, which is that I
16 know of no evidence.

17 JUSTICE KENNEDY: I think we have said that
18 conference reports are more valuable than the reports
19 of a single house. I think we have said that.

20 JUSTICE SCALIA: They are voted on when the
21 -- when the conferees make changes, which they
22 sometimes do. Then -- then, of course, they have to be
23 voted on. So it's frequent. It's frequent that
24 they're voted on, but this one apparently -- there were
25 no changes made and it wasn't voted on.

1 MR. KUNTZ: Thank you, Your Honor. If I --
2 if there are no further questions, I'd like --

3 JUSTICE SCALIA: Justice Breyer knows that.
4 He -- he's worked there.

5 MR. KUNTZ: Oh, I'm sorry.

6 JUSTICE BREYER: I didn't have an opportunity
7 to work for a Senator who, in fact, to my experience
8 asked me to report on a vote on such a thing. I just
9 wasn't aware of it.

10 CHIEF JUSTICE ROBERTS: Thank you, counsel.

11 MR. KUNTZ: Thank you. I'd like to reserve
12 my time for rebuttal.

13 CHIEF JUSTICE ROBERTS: Certainly.

14 MR. KUNTZ: Thank you.

15 CHIEF JUSTICE ROBERTS: Mr. Salmons.

16 ORAL ARGUMENT OF DAVID B. SALMONS

17 ON BEHALF OF THE UNITED STATES,

18 AS AMICUS CURIAE, SUPPORTING THE PETITIONER

19 CHIEF JUSTICE ROBERTS: You have examples of
20 conference reports being voted on, don't you?

21 MR. SALMONS: I do not, Your Honor. I -- I
22 do not dispute the representations that have been made
23 about that practice.

24 But let me begin by saying, thank you, Mr.
25 Chief Justice, and may it please the Court:

1 This Court should give the attorneys' fee
2 provision of IDEA the same construction it gave the
3 nearly identical language of section 1988 in Casey and
4 hold that an award of attorneys' fees as part of the
5 cost does not include expert fees.

6 Respondent's sole argument is that expert
7 fees are included in the statutory term costs, but as
8 this Court made clear in both Casey and Crawford
9 Fitting, the term costs in a fee-shifting statute has a
10 well-settled meaning and is a reference and is limited
11 to those -- that modest category of costs that may be
12 awarded under 28 U.S.C. 1920 and 1821.

13 Now --

14 JUSTICE SOUTER: What -- what do you say
15 about expenses? Isn't -- isn't it a fairly common
16 practice for a -- a trial lawyer to -- to hire his
17 experts and pay them and then bill the client for --
18 for whatever he's paid for the experts? I mean, if
19 that is the -- this has been a long time since I've
20 practiced law. So maybe that isn't the way it's done
21 anymore. But it -- it certainly has been done that
22 way, and -- and if that is still the practice, wouldn't
23 it make sense for Congress to have assumed that expenses
24 would include those kinds of expenses?

25 MR. SALMONS: No. No, I don't think so, Your

1 Honor. Now, first of all, just to be clear, the -- the
2 fee provision that's at issue here is identical to the
3 fee provision that was at issue in Casey, and it makes
4 no reference to expenses. It says attorneys' fees as
5 part of the costs.

6 Now, in this separate section instructing the
7 GAO to do a report --

8 JUSTICE SOUTER: It's the GAO reference.
9 You're right.

10 MR. SALMONS: -- it says to look at the --
11 the awards in cases, the awards of attorneys' fees,
12 costs, and expenses. We don't think the term expenses
13 in -- in that provision can fairly be read to somehow
14 dramatically expand the meaning of the phrase,
15 attorneys' fees as part of the costs. We think it's
16 much more naturally to read that as just a reference,
17 as this Court noted in Casey, to the common practice of
18 including out-of-pocket expenses of attorneys for
19 things like copying costs and -- and necessary travel
20 expenses and things like that as -- as also being
21 compensable. And so we don't think that that -- that
22 term expenses does anything dramatically to the meaning
23 of the statutory provision at issue here.

24 And as far as subsection (B) of that
25 provision related to the GAO, we think it's clear that

1 it's no longer referring to the actual awards in cases,
2 and is instructing the GAO to do a broader study about
3 the time that's spent by attorneys and consultants and
4 others on both sides in these cases because Congress
5 was very concerned about the amount of litigation and
6 the expense of that litigation and the diversion of
7 funds away from the core educational services of the
8 schools. As this Court noted in Schaffer, that's one
9 of the primary concerns Congress has had, especially in
10 the more recent amendments to the act.

11 And we think, in fact, that the -- the fact
12 that Congress instructed the GAO to study that is, if
13 anything, more consistent with the idea that Congress
14 decided not to legislate on the question of expert
15 fees, but to leave it for another day after they've had
16 the benefit of that study at a minimum.

17 Now --

18 JUSTICE GINSBURG: Mr. Salmons, there's one
19 difference, a marked difference, between this statute
20 and the others, and that is, in -- in many of these
21 cases, it is the consultant that is the primary,
22 perhaps exclusive, aide to the parent. There's not a
23 case where they have these determinations, a lawyer is
24 in the front line. Even in this very case, wasn't it
25 true that it was the consultant who was the aide to the

1 parent and there was no lawyer on the scene?

2 MR. SALMONS: That -- that is correct.

3 During the administrative proceeding and in the -- and
4 in the district court, there was no attorney here.

5 But -- but I think there's one important
6 thing to keep in mind about that is that that's --
7 Congress expected that that would be the result. This
8 is not a statute where Congress didn't think about the
9 role of experts. Among other things, section --

10 JUSTICE SOUTER: What do you -- what do you
11 say about the legislative history, which has been so
12 prominent in the discussion this morning? The
13 conference report.

14 MR. SALMONS: Sure. Well, I think the
15 conference report clearly represents the view of the
16 author of the conference report with regard to the
17 meaning of the language.

18 JUSTICE SOUTER: Well, don't you suppose it
19 represents the view of the House and Senate conferees?

20 MR. SALMONS: Well, I mean, I think -- I
21 think what that points to is the perils of -- of using
22 committee reports and statements --

23 JUSTICE SOUTER: No. I -- I realize that,
24 but I mean, an --

25 MR. SALMONS: -- from the legislative history

1 when the text is clear.

2 JUSTICE SOUTER: -- an argument, a perfectly
3 fair argument, can be made, whether -- whether you find
4 it dispositive or not, that everything that goes into a
5 committee report of one house cannot simply be taken as
6 a literal reflection of the thinking -- the -- the
7 actual thinking of -- of everybody on that committee,
8 let alone a whole house.

9 But when we're talking about a conference
10 report that has been hammered out between two sets of
11 conferees, I think it is reasonable to suppose that the
12 conferees know exactly what is in that report and would
13 take exception to it if it didn't represent their
14 views. Isn't -- isn't that a -- a fair reason for
15 saying that whatever you may think of reports in
16 general, the conference report probably has a -- a
17 superior authority?

18 MR. SALMONS: I don't think so, Your Honor,
19 and let me try to explain why.

20 First of all, this Court made clear in Casey,
21 dealing with the exact same language, it took -- you
22 know, that's at issue here --

23 CHIEF JUSTICE ROBERTS: The text or --

24 JUSTICE STEVENS: Language in the statute but
25 not in the conference report.

1 JUSTICE SOUTER: Yes.

2 JUSTICE STEVENS: Was there a conference
3 report in --

4 MR. SALMONS: No. That's right. And I'm
5 referring to the statutory language here, that this
6 Court considered this exact --

7 JUSTICE STEVENS: And would you agree, if the
8 statute is ambiguous, you can look at the conference
9 report?

10 MR. SALMONS: Well, but my point, Your Honor,
11 is that what this Court said --

12 JUSTICE STEVENS: Would you answer my
13 question?

14 MR. SALMONS: Yes. If the Court thinks the
15 statute is ambiguous, it's fair to look at the
16 conference report.

17 JUSTICE STEVENS: And why is it not ambiguous
18 if the author of the conference report read it that
19 way?

20 MR. SALMONS: For, among other reasons, Your
21 Honor -- this is what I was trying to -- trying to
22 state because this Court in Casey, dealing with this
23 exact same language, said the following. It said where
24 the statute contains a phrase that is unambiguous,
25 attorneys' fees as part of the cost, that has a clearly

1 accepted meaning in both legislative and judicial
2 practices -- again, this Court in Casey tracked through
3 the -- the usage, the history of the usage of this
4 language and the way courts had responded to this over
5 time -- that when that's the case, we do not permit it
6 to be expanded or contracted by the statements of
7 individual legislators or committees during the course
8 of the enactment process. We think that holding in
9 Casey is equally applicable here --

10 JUSTICE BREYER: Well, one thing here --

11 MR. SALMONS: -- and it be would wrong to
12 look to that.

13 Now, if the Court did, I think the thing that
14 the Court should take away from it, if you're going to
15 look at what Congress intended here -- and this is
16 undisputably true. Everyone agrees on this. The
17 primary purpose of this legislation was to respond to
18 this Court's decision in Smith v. Robinson. And prior
19 to this Court's decision in Smith, section 1988 had
20 provided the means by which courts had awarded
21 attorneys' fees in cases under IDEA's predecessor.

22 JUSTICE KENNEDY: Does the gravamen --

23 MR. SALMONS: Smith foreclosed those fees --

24 JUSTICE KENNEDY: -- does the gravamen --
25 well, I'll let you finish your answer.

1 MR. SALMONS: Sure.

2 JUSTICE KENNEDY: Does the gravamen of the
3 argument -- is it that this phrase is unambiguous?

4 MR. SALMONS: That -- that is certainly our
5 first argument, absolutely, Your Honor. The point I'm
6 making now is that if you look at the context in which
7 this language was used, Smith foreclosed the award of
8 section 1988 fees. Congress responded shortly
9 thereafter by -- by adding the precise language of
10 section 1988 to the language in IDEA's predecessor.
11 Now, however anomalous it would normally be to give the
12 same language in two different fee provisions different
13 meanings -- and it would be quite anomalous -- to do so
14 here with section --

15 JUSTICE STEVENS: But isn't it true that at
16 the time they did that, it was well settled in cases of
17 this kind that the Court would look at the conference
18 report to ascertain the meaning of the statute? At
19 that time, in 1986.

20 MR. SALMONS: Well, I think --

21 JUSTICE STEVENS: Was there any case that
22 said you can't look at the conference report at that
23 time?

24 MR. SALMONS: There are plenty of cases, Your
25 Honor, that -- that point out --

1 JUSTICE STEVENS: -- later.

2 MR. SALMONS: -- that the -- that -- that
3 point out, even -- even I think beforehand, that the
4 language is the primary basis to look.

5 JUSTICE STEVENS: Is the best evidence, but
6 not the sole evidence.

7 MR. SALMONS: And that even when it's
8 unambiguous, that's the end of the matter.

9 JUSTICE SCALIA: Counsel, even in -- in those
10 benighted days, I don't think -- I don't think we ever
11 would use the conference report when the statute was
12 not ambiguous. I thought it was always a rule that --
13 that --

14 MR. SALMONS: We certainly agree with that,
15 and I would just add that I'm not aware of any decision
16 of this Court that would suggest that the type of
17 statutory construction tools the Court would use would
18 depend on what was in place at the time that the
19 statute was enacted.

20 JUSTICE BREYER: No. Of course --

21 MR. SALMONS: I mean, this Court applies the
22 rules that it thinks are appropriate at the time it
23 issues its decision.

24 Now --

25 JUSTICE BREYER: You can't use red if the

1 statute says green. Green doesn't include red. I
2 understand that. And that's why, in fact, I wondered
3 if the presence in this bill of the GAO section
4 suggests in the bill itself the possibility that the
5 word cost means something special. And if that's so,
6 then I would think it is ambiguous enough to refer to
7 the legislative history. It's not like using the word
8 red and arguing it includes green.

9 MR. SALMONS: Two responses to that, Your
10 Honor. The first is that we don't think it's ambiguous
11 at all, and we think when -- even if you look at the
12 GAO provision, you don't get the kind of ambiguity that
13 would allow you to otherwise deviate from the -- the
14 clear meaning of this language when it's -- when it's
15 been consistent with statutory usage over time. As
16 this Court noted in Casey, more than 34 statutes use --
17 expressly state attorneys' fees in addition to expert
18 -- expert fees in addition to attorneys' fees, and
19 there would be no point to those.

20 But -- but moreover, I think the important
21 thing to keep in mind is that it's not just this fee
22 provision. If you want a further indication of
23 Congress' intent, let me refer you to some other
24 provisions of the statute itself, again, the language
25 of the statute. Among other things, section 1415(d)(2)

1 expressly details the content of the notice that has to
2 be given to the parents about the procedural safeguards
3 in the act, and it's very specific. It lists 13
4 different things that States have to explain in full to
5 the parents. The -- the 12th and the 13th items on
6 that list are the parents' ability to bring a civil
7 action and their right to bring, quote, attorneys'
8 fees, no mention whatsoever of expert fees.

9 Thank you, Your Honors.

10 CHIEF JUSTICE ROBERTS: Thank you, Mr.
11 Salmons.

12 Mr. Vladeck.

13 ORAL ARGUMENT OF DAVID C. VLADECK

14 ON BEHALF OF THE RESPONDENTS

15 MR. VLADECK: Mr. Chief Justice, and may it
16 please the Court:

17 The Murphys' principal submission in this
18 case is that the text of IDEA authorizes courts to
19 award prevailing parents the costs of the experts who
20 assist them in IDEA hearings which are typically held
21 before State administrative tribunals and in Federal
22 court.

23 CHIEF JUSTICE ROBERTS: Mr. Vladeck, let me
24 just give you a purely hypothetical situation. Let's
25 suppose that the conferees can't agree whether expert

1 fees should be included. Some think they should; some
2 think they shouldn't. And somebody suggests a
3 compromise. The compromise is we won't put it in the
4 statute, but we'll put it in the report and we'll let
5 the courts figure it out.

6 What should happen in that situation?

7 MR. VLADECK: Thank you so much, Your Honor.

8 I think -- I think that if the statutory text was
9 clear, which -- and I believe this text is clear in the
10 other direction -- I think we would lose that case.
11 But that is not this case, Your Honor, and let me
12 explain why.

13 CHIEF JUSTICE ROBERTS: Well if that's not
14 this case, what in the world prevented the conferees
15 from putting something as important in this context as
16 expert fees, as I understand it, probably more
17 important than attorneys' fees -- what prevented them
18 from putting that in the statute if that clearly was
19 their intent?

20 MR. VLADECK: Without being flippant, Your
21 Honor, I think that the conferees thought they had put
22 it in the statute. Remember, this statute was passed
23 back in 1986 when, at least with respect to the 99th
24 Congress that enacted this provision, the word cost did
25 not have the term-of-art meaning that was later

1 ascribed to it in this Court's opinion in Casey.

2 JUSTICE ALITO: As you --

3 CHIEF JUSTICE ROBERTS: I was going to say it
4 certainly had the meaning in Federal -- the Federal
5 court context set forth in section 1920 of the Judicial
6 Code.

7 MR. VLADECK: I understand that, Your Honor,
8 but Congress thought it was adding -- that the use of the
9 word cost and its breadth was a way of -- of including
10 the cost. And -- and this is important, Your Honor.
11 The language --

12 JUSTICE SCALIA: Before you get past Casey,
13 Casey didn't invent this as a definition. Casey said
14 it has always meant this in innumerable Federal
15 statutes. Casey was relying on a longstanding practice
16 which existed long before Casey was -- was pronounced.

17 MR. VLADECK: Your Honor, at the time Casey
18 was -- at the time this case was -- excuse me -- at the
19 time this statute was enacted by Congress, for example,
20 costs were routinely read to include expert fees in
21 title VII cases, for example. So I don't disagree with
22 Your Honor's point.

23 I am simply saying that the lens through
24 which this statute must be judged is the understanding
25 of the 99th Congress, and every indication in the

1 legislative history here is that Congress used the word
2 cost for its breadth, not as a term of art.

3 JUSTICE GINSBURG: Mr. Vladeck, why -- if
4 that was what Congress had in mind, then how do you
5 explain the multiple statutes that are listed in Casey
6 that say, in the text of the statute, witness fees?

7 MR. VLADECK: My only explanation, Your
8 Honor, is that the -- the Members of Congress who wrote
9 this provision were unaware of the difference this
10 Court would later ascribe to those statutes in Casey.

11 JUSTICE SCALIA: Not later ascribe. I mean,
12 Casey was relying on --

13 JUSTICE KENNEDY: Casey -- Casey is very
14 clear in saying the judicial background against which
15 Congress enacted 1988, talking about 1988, mirror the
16 statutory background, and it says the judicial
17 background was that expert fees were quite different
18 than attorneys' fees. They were not a subset of
19 attorneys' fees.

20 MR. VLADECK: Even -- even conceding all of
21 that, which I -- I think is -- let me take a step back.
22 Even if you reject that submission, the next provision
23 of the statute on which we rely is section 4 of the
24 Handicapped Children's Protection Act, which was
25 enacted at the same time as section 1415(i)(3)(B), and

1 if you look at that provision, it is clear that
2 Congress intended the word cost to have a broader
3 meaning.

4 Section 4(b) (A) directs the General
5 Accounting Office to study --

6 CHIEF JUSTICE ROBERTS: Where is that set
7 forth?

8 MR. VLADECK: I'm sorry? That's page --
9 excuse me. Page 4 of the red brief, Your Honor.

10 CHIEF JUSTICE ROBERTS: Thank you.

11 MR. VLADECK: That directs the General
12 Accounting Office, first, to study the amount of
13 attorneys' fees, costs, and expenses awarded to the
14 prevailing party. In this statute, only the parents
15 could be the awarding -- the prevailing party because,
16 unlike 1988, this statute is a one-way street and
17 provides only for awards to parents.

18 And secondly, it says that for -- for the --

19 JUSTICE GINSBURG: Well, what -- Mr. Vladeck,
20 may I stop you there? Because the parents are always
21 the plaintiff. It's not the child. The parents are
22 representing the child.

23 MR. VLADECK: That's correct, Your Honor.

24 JUSTICE GINSBURG: So prevailing party is
25 identical to parents. The parents are the ones who

1 prevail.

2 MR. VLADECK: That's exactly my point, Your
3 Honor. And -- and --

4 JUSTICE KENNEDY: But -- but the word
5 consultants appears in subsection (B) of the statute.

6 MR. VLADECK: Right, Your Honor.

7 JUSTICE KENNEDY: And that specifically
8 refers to the State educational agency and local
9 educational agency.

10 MR. VLADECK: Your Honor --

11 JUSTICE KENNEDY: And it uses personnel,
12 which sounds to me a very odd way to talk about private
13 experts hired by an attorney. You don't talk about
14 them as personnel.

15 MR. VLADECK: Well, Your Honor, this
16 provision, up until the last part which says, and
17 expenses incurred by the parents, the -- the last
18 clause of this provision was added in the conference.
19 And the conference report makes that clear at page 7.
20 The conference report makes it clear that the House --
21 the Senate recedes to the House bill. The GAO study
22 provision was only in the House bill, with an amendment
23 expanding the data collection requirements of the GAO
24 study to include information recording the amount of
25 funds expended by local educational agencies and State

1 education agencies on civil actions and administrative
2 proceedings. That clause was added, Your Honor, in
3 conference. Prior to the conference, the provision was
4 very much the same as it is today. So --

5 JUSTICE SCALIA: Mr. Vladeck, my -- my
6 problem with the argument you're now making is -- is a
7 little more basic. Assuming, which I think is a -- is
8 a major assumption, that expenses refers to expert
9 fees, I don't see how it helps your case that in
10 another part of the statute, the statute says, fees,
11 costs, and expenses, whereas in the operative part that
12 we're talking about here, it only refers to fees as
13 part of costs. How does it help your case that --

14 MR. VLADECK: Your Honor --

15 JUSTICE SCALIA: -- that elsewhere they go
16 out of their way to add and -- and expenses? It seems
17 to me that hurts your case.

18 MR. VLADECK: Your Honor, I don't believe
19 that this is an inoperative part of the statute. I
20 believe that -- that -- this direction to GAO makes no
21 sense if all Congress sought to authorize was
22 attorneys' fees and the costs that are historically
23 available under section 1920 and section 1821. This
24 provision makes no sense.

25 JUSTICE SOUTER: Isn't -- isn't it really the

1 point not that it makes no sense, but that it raises a
2 question? It creates the question, which -- which we
3 have in mind when we say the statute is ambiguous, and
4 it is in answering that question, that you then turn to
5 the legislative history, which has a pretty unequivocal
6 statement in your favor. Isn't -- isn't that the --
7 the way to analyze it?

8 MR. VLADECK: I -- it certainly can be read
9 that way. I read it as more of an affirmative
10 statement by Congress --

11 CHIEF JUSTICE ROBERTS: Well, but if you
12 conclude that the statute is ambiguous, what do you do
13 with the Spending Clause problem? We've said that when
14 you're imposing conditions in Spending Clause
15 legislation, you have to do that unambiguously. It's
16 what the Court said in -- in Pennhurst.

17 MR. VLADECK: That's correct.

18 CHIEF JUSTICE ROBERTS: If it's ambiguous, if
19 the availability of expert fees, which is the big-
20 ticket item in these things, not the attorneys' fees,
21 States are not unambiguously on notice that they're
22 accepting that liability when they take the funds.

23 MR. VLADECK: With all respect, let me
24 quarrel with one of the premises in your question,
25 which is that the -- the expenses for experts are,

1 quote, a big-ticket item. If you look at page 28,
2 footnote 17 of our brief, we've tried to compile all of
3 the reported cases on the amount of expert fees that
4 are awarded. They tend to be exceedingly modest, Your
5 Honor. They run from a few hundred dollars to a few
6 thousand dollars.

7 JUSTICE KENNEDY: Well, that's before the
8 Magna Carta you're asking for in this case which would
9 establish a whole -- a whole --

10 MR. VLADECK: Your Honor --

11 JUSTICE KENNEDY: -- new profession of
12 experts.

13 MR. VLADECK: Your Honor, that is not the
14 case. The -- the rule that we seek to preserve has
15 been the way courts have interpreted this provision
16 since 1988. That's --

17 CHIEF JUSTICE ROBERTS: Well, even if it is
18 not the big-ticket item --

19 MR. VLADECK: So -- so these are modest.

20 CHIEF JUSTICE ROBERTS: -- it still has to be
21 -- it still has to be unambiguously set forth in
22 Spending Clause legislation.

23 MR. VLADECK: Right. And -- and if the Court
24 finds that the legislative history adds the clarity
25 that the statute otherwise needed -- is needed, I do

1 not see why that would not comply with the Spending
2 Clause, particularly since, Your Honor, this statute
3 has been on the book for 20 years. There are dozens of
4 opinions finding that expert fees are compensable. No
5 Spending Clause argument has ever been raised in this
6 kind of issue even though the statute has been on the
7 books for 20 years.

8 JUSTICE ALITO: Under your reading of 1415,
9 may a court award to parents any costs that they incur
10 in connection with the litigation, or -- or would you
11 just add expert fees to the attorneys' fees?

12 MR. VLADECK: Your Honor, there is a body of
13 law on that issue that already exists because courts
14 have interpreted this provision since 1986. By and
15 large, the costs that have been awarded under the
16 statute are costs that are normally associated with
17 litigation, copying costs, computer-assisted research
18 when there's a lawyer involved.

19 JUSTICE GINSBURG: What about testing? Isn't
20 testing --

21 MR. VLADECK: The cost of testing and
22 evaluation, which is -- which is a crucial component of
23 the statute -- those costs have been awarded.

24 JUSTICE ALITO: But if costs is not a term --
25 is not a legal term of art, if it really -- if it means

1 just the expenses that parents incur, why wouldn't it
2 include things like travel expenses or lost wages to
3 attend the court proceeding?

4 MR. VLADECK: The -- the way the courts have
5 addressed that issue, Your Honor, is they -- they have
6 looked to the -- the initial phrase of the statute, in
7 an action or a proceeding, and have found those costs
8 not sufficiently closely enough related to the action
9 or proceeding to justify an award.

10 And also courts have applied the rule 54
11 reasonableness standard in ordering costs under this
12 provision, and therefore, expert costs have been
13 reduced and other costs have been reduced to meet the
14 general requirements of rule 54.

15 I would like -- I would like to --

16 JUSTICE BREYER: Would you read the phrase
17 from the conference report as a limitation? That is,
18 that -- we're trying to figure out what the Congress
19 meant by the phrase costs. It says it means includes
20 reasonable expense and fees of expert witnesses and
21 reasonable costs of any test or evaluation that's
22 necessary. So then is that -- have the courts read
23 that as a -- as a limitation?

24 MR. VLADECK: Yes, Your Honor, but they've
25 also imposed limitations that are generally -- that

1 generally constrain the awards of costs in cases. They
2 have not done what -- what I understood Justice Alito
3 -- his question to -- to get to, was to use this as --
4 as a broad, open door.

5 I'd like to talk about the legislative
6 history, and particularly I'd like to respond to
7 Justice Scalia's comment about the conference report in
8 this case.

9 This statute was changed dramatically in
10 conference. It does not reflect either the House bill
11 or the Senate bill. If one reads the conference report
12 in the Joint Explanatory Statement of the Committee of
13 the Conference, which is three pages long, one will see
14 that there were dramatic and substantial changes made
15 because there were substantial disagreements between
16 the House and the Senate, not on the question of
17 reimbursement of expert costs. That -- that provision
18 -- that understanding was shared on a bipartisan basis
19 in both houses. But the --

20 CHIEF JUSTICE ROBERTS: Why were the earlier
21 versions that included that expressly then not -- why
22 didn't they make it through to the final version?

23 MR. VLADECK: The -- the version that -- that
24 was referred to earlier, Your Honor, came out of the
25 Senate bill. The Senate bill contained a number of

1 very controversial features. It was pared down, and
2 the word cost was substituted, as the drafter of the
3 language made clear on the floor of the Senate before
4 the Senate voted on its version of the bill, and
5 Senator Weicker's explanation of what the word cost
6 means could not be clearer, and he -- he --

7 CHIEF JUSTICE ROBERTS: Now, we've slid back
8 from the joint statement to the statement of one Member
9 on the floor now.

10 MR. VLADECK: Well, I'm happy for you to rely
11 on the joint statement, Your Honor.

12 My only point is, is that the understanding
13 in the House report is expert fees were included in the
14 House bill, which referred to costs and expenses.
15 Senator Weicker explains precisely the question you
16 asked, which is what happened to the Senate bill. And
17 Senator Weicker's explanation, which was made before
18 the Senate, immediately before the Senate voted on the
19 bill, makes clear that expert costs are included.

20 Then, of course, you have the bill going to
21 conference. There were many changes in the bill,
22 including the language of section 1415. Prior to the
23 conference, it did not say attorneys' fees as part of
24 costs. It said attorneys' fees in addition to costs.
25 That language was changed in conference to accommodate

1 this Court's decision in *Marek v. Chesny*, which had to
2 do with the applicability of rule 68.

3 JUSTICE ALITO: Well, speaking of that -- of
4 that language, that attorneys' fees may be awarded as
5 part of costs, does that suggest -- it doesn't say
6 directly that costs may be awarded. Does that suggest
7 that the attorneys' fees are simply to be regarded as
8 another element of costs that -- that may be awarded
9 under the costs statute?

10 MR. VLADECK: I don't believe that Congress,
11 when it used the word costs, was adverting to section
12 1920. If that is your question, I do not believe that
13 that is --

14 JUSTICE SCALIA: Well, then where is the
15 authorization? I think that's what Justice Alito's
16 question goes to. You have to come up with some
17 statutory authorization to pay expert fees. Now,
18 attorneys' fees as part of costs does not authorize any
19 costs. It just says whatever costs are otherwise
20 authorized, attorneys' fees will be part of that.

21 MR. VLADECK: Well, Your Honor, it says --
22 it's part of the cost to the parents. And unlike
23 section 1980, this language is not, contrary to the
24 previous submissions to the Court, identical to the
25 language in 1988. It says that a court may award

1 attorneys' fees as part of the costs to parents, and
2 the --

3 JUSTICE SCALIA: What is the authorization to
4 pay costs, to pay those costs that include expert fees?

5 All -- all this section says is they may award
6 attorneys' fees as part of costs, and costs are
7 presumably elsewhere authorized.

8 MR. VLADECK: Your Honor --

9 JUSTICE SCALIA: But where is the
10 authorization to pay?

11 MR. VLADECK: Under -- under that reading, no
12 statute would authorize the -- the payment of costs.

13 JUSTICE SOUTER: Under that reading, wouldn't
14 -- wouldn't you have a problem in a State court?
15 Because doesn't this same provision govern in a State
16 court, so that if the State did not have a separate
17 cost statute, it would -- it would authorize nothing.
18 Isn't -- isn't that the problem you'd run into.

19 MR. VLADECK: That is correct.

20 Let me make one last --

21 JUSTICE SCALIA: Do you know any State that
22 doesn't have a cost statute?

23 MR. VLADECK: I have not -- I've not looked
24 at them to see whether they correspond to 1920, Your
25 Honor.

1 JUSTICE GINSBURG: Mr. Vladeck, you have --
2 you referred to the section on GAO reporting --

3 MR. VLADECK: Yes, Your Honor.

4 JUSTICE GINSBURG: -- as an assist to help
5 you include consultant fees in -- in costs. But how do
6 you explain the -- the provision in this very statute
7 that says attorneys' fees can be reduced? Congress
8 explicitly provided that you could reduce attorneys'
9 fees -- this is in 1415(i)(3)(F) -- and not one word
10 about reducing the costs of testing fees or consulting
11 fees.

12 MR. VLADECK: Well, Your Honor, all costs are
13 subject to the general requirement in rule 54 of
14 reasonableness, and --

15 JUSTICE GINSBURG: Then why -- then it would
16 be unnecessary to have done that for attorneys' fees.

17 MR. VLADECK: Here's the reason, Your Honor.
18 At least, here's the reason that -- as I understand
19 it. Much of the litigation in IDEA cases takes out --
20 takes place outside the confines of Federal court.
21 Most of the litigation takes place in State due process
22 hearings. And what I believe Congress was interested
23 in making sure were the general rules, like rule 11,
24 the general rules that punish parties for engaging in
25 vexatious or frivolous litigation would have some

1 analog in these proceedings.

2 And therefore, what the court -- what -- what
3 Congress did was to authorize a Federal court, in
4 reviewing an application for attorneys' fees incurred
5 before a State-administered tribunal, because that's
6 where the action takes place in these cases, to -- to
7 be able to reduce an attorneys' fee award if there was
8 misconduct by the parent or -- or the lawyer,
9 misconduct in the sense of trying to protract
10 litigation or multiply proceedings.

11 And interestingly, Your Honor, the -- the
12 conference report addresses this issue and does explain
13 -- and now I'm quoting from page 6 of the -- of the
14 conference report, the joint explanation -- that the
15 court shall accordingly reduce the amount of attorneys'
16 fees and related expenses otherwise allowable if they
17 determine that this misconduct had taken place. So I
18 think that at least in the conference report, Congress
19 is signaling that if there were other costs that were
20 incurred unreasonably as a result of lawyers
21 protracting or delaying the proceeding, they too would be
22 subject to the same reduction.

23 JUSTICE SCALIA: And that's effective too, as
24 though it were written into the statute, because one
25 committee of Congress said so. That's effective.

1 MR. VLADECK: Well, Your Honor, this is not
2 one committee of Congress. This was -- this -- the
3 conference report was circulated to all Members of
4 Congress before they voted on the final bill.

5 JUSTICE SCALIA: And -- and they read it.

6 MR. VLADECK: Well, Your Honor, this is the
7 final bill they voted on, and if they turned the page
8 --

9 JUSTICE SCALIA: That's the only thing we
10 know for sure that they voted on.

11 MR. VLADECK: That is correct, Your Honor,
12 though the vote technically, of course, is a vote to
13 approve the conference report. That is the final vote
14 Congress took on this legislation. The vote was a vote
15 to approve the conference report, which contains four
16 pages -- three pages of text and three pages of
17 explanation.

18 JUSTICE KENNEDY: Did the -- did the final
19 bill say we adopt the findings of the conference
20 report?

21 MR. VLADECK: It did not, Your Honor.

22 JUSTICE KENNEDY: And other bills have said
23 that.

24 MR. VLADECK: I --

25 JUSTICE KENNEDY: Like in -- as in Nofstiker.

1 MR. VLADECK: As far as I know, Your Honor,
2 the procedure followed here was the standard procedure
3 when the conference report takes bills and essentially
4 amalgamates them or redrafts them --

5 JUSTICE SCALIA: But was this legislation
6 vetoed by the President?

7 MR. VLADECK: It was not, Your Honor.

8 JUSTICE SCALIA: Now, when the President
9 signed it, did -- did he also approve the conference
10 report? Did he have the conference report in front of
11 him?

12 MR. VLADECK: I do not know that.

13 JUSTICE SCALIA: He had the statute in front
14 of him, didn't he?

15 MR. VLADECK: I -- he -- my assumption, Your
16 Honor, is he had this.

17 JUSTICE SCALIA: You -- you think he read the
18 conference report too.

19 MR. VLADECK: I don't believe that.

20 (Laughter.)

21 MR. VLADECK: I'm not arguing that he did.
22 My assumption, though, is if he had the statute before
23 him, he probably had this. The President --

24 JUSTICE BREYER: Was there any opposition?
25 Was there any -- is there any history of anyone in this

1 Senate or the House either before or after suggesting
2 that they didn't want to allow recovery for the expert
3 fees?

4 MR. VLADECK: Not at all, Your Honor. And
5 one of the points that I would like to make -- and I
6 would like to return to the language of 1415 -- is this
7 statute is all -- the IDEA is a statute all about
8 protecting parents and children with disabilities. One
9 provision of IDEA we have not mentioned, but I think is
10 an important one, is the general guarantee that --

11 CHIEF JUSTICE ROBERTS: Counsel, if I could
12 interrupt you. As I understood it, this gets back to
13 where you started. Your position is that if this same
14 scenario had taken place in 1988 as opposed to 1986,
15 that your position would not be the same. In other
16 words, you said -- your suggestion was that it was the
17 legal context at the time in '86 that governed what
18 Congress thought the effectiveness of its statements in
19 committee reports would be. Maybe I'm ascribing one of
20 the Justice's views to you.

21 MR. VLADECK: If -- if you're -- and -- and
22 forgive my -- my lack of knowledge of the exact history
23 of this, but if 1988 is a date upon which the Court
24 begins to be reluctant to look at legislative history,
25 I would concede that my case would be different post-

1 1988. It is quite clear that the Congress that enacted
2 this bill assumed, and rightly so, that this Court and
3 reviewing courts would rely on legislative history.
4 Indeed, when this Court issued its opinion in Casey,
5 footnote 5 of Casey says that this case may be
6 different because of the conference report.

7 JUSTICE SCALIA: What -- what date in -- I
8 mean, so we have two different modes of interpreting
9 statutes: one, pre-1988 in which we use legislative
10 history, and one post-1988 in which we don't use
11 legislative history?

12 MR. VLADECK: Your Honor --

13 JUSTICE SCALIA: I mean, that -- that's what
14 you're suggesting, isn't it?

15 MR. VLADECK: What I am suggesting is that
16 the Court's role, as I understand it, is to be the
17 faithful agent of Congress, and if the -- if the
18 expectation of Members of Congress is that language in
19 committee reports will -- will garner respect from the
20 Court, it is hard to then change the rules on Congress.
21 The operative question here is what --

22 JUSTICE SCALIA: The reason one does not use
23 legislative history, if one does not use it, as I don't
24 -- as I don't, is not because Congress doesn't expect
25 it to be used, but because Congress does not have the

1 power to delegate to one of its committees the content
2 of -- of its statutes. The Constitution provides that
3 legislation will be passed by two houses and signed by
4 the President, and the problem with legislative
5 history, for those of us who have a problem with it, is
6 this amounts to a delegation by Congress.

7 It's not a matter of what Congress expected.
8 I don't care what Congress expected. It can't do it.
9 It can't leave it to a -- to a committee to -- to fill
10 in the blanks in a statute. That's the problem, and
11 that has nothing to do with expectations.

12 MR. VLADECK: Your Honor, my only point is
13 that the Congress that enacted this statute, the 99th
14 Congress, thought -- and this -- this view is expressed
15 repeatedly in the legislative history, and I believe it
16 -- it is reflected in the statutory language as well --
17 that the word costs here would be given a broad meaning
18 to ensure that parents were made whole when they have
19 to fight against school boards to secure that which
20 IDEA guarantees their child, which is a free and
21 appropriate public education.

22 This Court has repeatedly in Township of
23 Burlington, in Tatrow, in Florence County said that
24 provisions of IDEA should not be interpreted in ways
25 that detract from this fundamental guarantee. There

1 would be no more clear detracting from that guarantee
2 than requiring parents to bear the expense, which for
3 many of these parents is enormous, even though Chief
4 Justice, it may amount to only a few hundred or a few
5 thousand dollars, to retain an expert, to do battle
6 with school boards who have experts on staff.

7 Earlier this term, this Court decided
8 Schaffer v. Weast. Post Schaffer, parents cannot hope
9 to meet their burden of production, let alone their
10 burden of proof in IDEA hearings without expert
11 assistance. To force parents to bear those expenses,
12 even when they prevail, will detract from IDEA's core
13 guarantee that the -- that the education provided to
14 the child is both appropriate and free. Those
15 provisions are in the statute to avoid having parents
16 being compelled to make the Hobson's choice: a free
17 education that's inappropriate or an appropriate
18 education that is not free.

19 This Court repeatedly instructs lower courts
20 to interpret statutes consistent with the statutory
21 context. I would urge that in looking at section 1415,
22 you take a look at -- at -- there are now eight
23 sections of the statute that reinforce this guarantee.

24 It is hard to imagine a statutory guarantee more
25 deeply embedded in an act than the guarantee of a free

1 and appropriate public education than is embedded in
2 the IDEA. Permitting parents to recover their expert
3 costs --

4 JUSTICE GINSBURG: But it's not -- if the
5 parents make a reasonable effort, but they lose, it's
6 not going to be free. I mean, the -- the statute gives
7 them --

8 MR. VLADECK: But -- but --

9 JUSTICE GINSBURG: -- a right to oppose the
10 school board's choice, and if what you say about making
11 it easier on parents of limited resources, they're told
12 it's going to be a gamble if you lose, you don't get
13 your fees.

14 MR. VLADECK: That's correct, Your Honor, but
15 they lose only when the school board is providing, in
16 fact, an education that is appropriate. But where the
17 parent prevails because the school board was not
18 providing a free and appropriate education, the act's
19 guarantee would be seriously eroded unless parents can
20 recover the costs of their expert -- of their experts.

21 If there are no further questions, thank you
22 very much.

23 CHIEF JUSTICE ROBERTS: Thank you, counsel.

24 Mr. Kuntz, you have 4 minutes remaining.

25 REBUTTAL ARGUMENT OF RAYMOND G. KUNTZ

1 ON BEHALF OF THE PETITIONER

2 MR. KUNTZ: Thank you, Your Honor.

3 Shifting the costs to the school district of
4 experts' fees will also shift scarce public resources
5 away from the point where it's most effective, at the
6 stage when the parent meets with the IEP team to
7 resolve the differences.

8 When Congress has revisited this statute, as
9 it has since 1986, time and time and again, it's --
10 it's spoken to the -- to the goal of reducing
11 litigation and -- and reducing the costs associated
12 with litigation. If -- if as the Respondents claim,
13 it's central to the fulfillment of this statute that --
14 that Congress be seen to have shifted the costs of
15 these so-called experts to the -- to the school
16 district when -- when they prevail, I -- I call to the
17 Court's attention that the reality is that the school
18 district has no staff of experts as Respondents
19 intimate. It has no staff of consultants.

20 What it has are the people who actually
21 provide the services to the child, and when they come
22 to testify at the hearing, typically they're -- they're
23 scared or nervous because it's the first time that
24 they've been at such a hearing. They're not
25 professional experts. They're not testimonial experts.

1 Those are the kinds of experts that the Respondents
2 are talking about and asking this Court to see in the
3 statute.

4 One needs to ask the question if Congress
5 really intended expert fees to be a part of this
6 statute, what stayed Congress' hand from writing those
7 words into the statute? It's very clear that Congress
8 knew how to do that when it became appropriate, in its
9 judgment, for it to do that. To sort of see it here
10 lurking in the shadows in -- in sort of the backwaters
11 of -- of the act and to intimate from there that the
12 plain language of the statute has meaning that needs to
13 be expanded and enlightened by the congressional report
14 doesn't make a lot of -- of sense. If -- if it's that
15 important, it should have been there. The -- its
16 absence is very, very telling. And --

17 JUSTICE KENNEDY: Don't the school boards
18 have some consultants and experts in this area other
19 than the teachers?

20 MR. KUNTZ: Typically they do not, Your
21 Honor. The typical IEP team meeting has the school
22 psychologist perhaps, has the -- the teachers of the --
23 of the child. Those -- some of those are required
24 members. It has the parent of a handicapped child. It
25 might have the -- the service providers like the speech

1 pathologist. And when -- when it comes to a trial,
2 comes to a due process hearing, those are the folks who
3 come and testify as to what they know about the child,
4 the test results they have. There are no typical
5 consultants or testimonial experts that appear for the
6 school district.

7 So the -- the central part of this statute,
8 its -- its revolution, where it brings parents of
9 children who are disabled into contact with the -- with
10 the school, has had a wonderful effect in fulfilling
11 the promise of this statute. Energizing the litigation
12 aspect of this by transferring those costs to the
13 school district will -- will take away and will detract
14 from the -- the true meaning of the statute, which was
15 to build a partnership between the parents and the
16 school district, not to let it dribble off into
17 litigation.

18 Thank you.

19 CHIEF JUSTICE ROBERTS: Thank you, Mr. Kuntz.

20 The case is submitted.

21 (Whereupon, at 11:00 a.m., the case in the
22 above-entitled matter was submitted.)

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25