

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. :

8 - - - - -X

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:

15 RAYMOND G. KUNTZ, ESQ., Bedford Village, New York; on  
16 behalf of the Petitioner.

17 DAVID B. SALMONS, ESQ., Assistant to the Solicitor  
18 General, Department of Justice, Washington, D.C.;  
19 on behalf of the United States, as amicus curiae,  
20 supporting the Petitioner.

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

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2 (10:03 a.m.)

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

6 Mr. Kuntz.

7 ORAL ARGUMENT OF RAYMOND G. KUNTZ

8 ON BEHALF OF THE PETITIONER

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

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

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

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

24 It's our belief that the lack of compensation  
25 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 detraction 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

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ON BEHALF OF THE PETITIONER

MR. KUNTZ: Thank you, Your Honor.

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

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

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