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Is a Free Appropriate Public Education Really Free? How the Denial of Expert Witness Fees Will Adversely Impact Children with Autism

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I. PROLOGUE

Until its recent decisions of *Schaffer v. Weast*[1] in November of 2005 and *Arlington Central School District Board of Education v. Murphy*[2] in June of 2006, respectively, the United States Supreme Court had not heard a special education case since 1999.[3] Now, the Court's renewed focus on special education legal disputes will likely increase the attention paid to this burgeoning area of the law. However, along with this heightened attention come greater limitations on the rights of parents who have children with disabilities. In its *Arlington* decision, the Supreme Court ended the protracted debate among the circuit courts over the meaning of "costs" under 20 U.S.C. § 1415(i)(3)(B) of the Individuals with Disabilities Education Act (IDEA). The Supreme Court held that the IDEA does not entitle prevailing parents in an action against a school district to recover expert witness fees as part of the "costs" associated with the litigation.[4] In addressing *Arlington*, this Comment adopts a contrary position to that of the Supreme Court and argues that the majority wrongly decided the case. Not only does the decision contradict the overarching purposes of the IDEA, but now parents bringing an action on behalf of their child with a disability will have to bear the financial burden of compensating experts. In addition, *Arlington* will effectively deter many low-income parents from pursuing litigation when they cannot fund an expert. This ruling is especially problematic for parents of children with an Autism Spectrum Disorder who, to successfully litigate an IDEA case, require experts to assess

1. 546 U.S. 49 (2005).
2. 126 S. Ct. 2455 (2006).
3. *See* Cedar Rapids Cmty. Sch. Dist. v. Garret F., 526 U.S. 66 (1999).
4. *See Arlington*, 126 S. Ct. at 2457.

whether the school district is providing an appropriate educational program for their child.

II. INTRODUCTION

For Brian and Juliana Jaynes of Newport News, Virginia, receiving the neurologist's confirmation that their son, Stefan, was severely autistic was just the beginning.[5]

Before his second birthday, Stefan knew his colors and his address. He could identify different flowers, and he maintained a vocabulary of 250 words or more.[6] However, after his second birthday he began to significantly regress, losing the ability to recognize words he previously knew.[7] When the pediatric neurologist diagnosed Stefan with autism, he stressed to Brian and Juliana the importance of early behavioral intervention, emphasizing that there is "a window of opportunity and that window of opportunity is greatest between the age of discovery and as early as possible."[8]

Stefan's frantic parents took action immediately, obtaining a referral for special education services from Newport News Public Schools.[9] Rather than placing Stefan in a program specifically tailored for autistic children, the school district enrolled him in a special education preschool for children with various disabilities.[10] Stefan was the only student with autism in his class.[11] Newport developed an Individualized Education Program (IEP) for Stefan but failed to implement it.[12] After the Jayneses repeatedly contacted the school requesting that the IEP be carried out, Newport held another meeting and, without explanation or justification, revised the IEP, which reduced the speech and language services Stefan would receive to one day a week.[13] However, Newport

5. Laurie Tarkan, *Autism Therapy Is Called Effective, but Rare*, N.Y. TIMES, Oct. 22, 2002, at F1. For an explanation of autism, or Autism Spectrum Disorder, see discussion *infra* Part III.A.

6. Brief of Appellees at 4, Jaynes v. Newport News Sch. Bd., 13 F. App'x 166 (4th Cir. 2001) (Nos. 00-2312(L), 00-2575).

7. *Id.* at 5.

8. *Id.*

9. *Jaynes*, 13 F. App'x at 169.

10. *Id.*; Tarkan, *supra* note 5.

11. Brief of Appellees, *supra* note 6, at 11.

12. *Jaynes*, 13 F. App'x at 169.

13. *Id.*; Brief of Appellees, *supra* note 6, at 14.

still neglected to supply Stefan with the minimal services provided in the revised IEP.[14]

Following months of delays in carrying out the IEP, Stefan's condition substantially worsened.[15] The neurologist informed the Jayneses that Stefan was rapidly regressing and that if he did not receive appropriate behavioral intervention, he might have to be institutionalized.[16] Stefan's parents heeded the neurologist's advice by immediately removing him from the public school's program and placing him in a private Lovaas Applied Behavioral Analysis (ABA)[17] program, which included forty hours a week of intensive behavioral therapy.[18]

After the Jayneses incurred over $100,000 in educational expenses over the course of three emotionally testing years, they saw the return of their son.[19] Stefan has dramatically improved in his language and social skills and spends more time engaging in social interactions and less time in his own silent, isolated world.[20] And, according to his father, the behavioral therapy awakened his son's personality, which was "truly a miracle."[21]

The Jaynes' relentless struggle with the Newport News School District to secure appropriate behavioral therapy for their autistic son is not unique. Rather, the controversy over whether children with an Autism

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14. Brief of Appellees, *supra* note 6, at 9.
15. *Id.* at 13.
16. *Id.* at 13–14; Tarkan, *supra* note 5.
17. For a discussion on Applied Behavioral Analysis as an early intervention strategy for children with autism, see *infra* note 69.
18. *Jaynes*, 13 F. App'x at 169; Brief of Appellees, *supra* note 6, at 14; Tarkan, *supra* note 5.
19. Upon learning that they were entitled to a special education due process hearing, Brian and Juliana Jaynes filed a request for this hearing, alleging that Newport News School District committed several substantive and procedural violations of the Individuals with Disabilities Education Act (IDEA). The Jayneses also sought to challenge the school's IEP for Stefan and obtain reimbursement from the school district for the intensive educational services Stefan received at home. The local hearing officer (LHO) found that Newport repeatedly failed to follow the procedures set forth in the IDEA and ordered Newport to indemnify the Jayneses of $117,979.78 for the educational expenses they incurred. Newport then appealed the decision to the state review officer (SRO). The SRO upheld the decision of the LHO, but reduced the award to $56,090.84 based on his determination that the statute of limitations prevented the parents from recovering reimbursement for expended costs prior to the date the parents requested a due process hearing. Brief of Appellees, *supra* note 6, at 18. Thereafter, the Jayneses appealed the decision to the U.S. District Court, seeking reinstatement of the original award amount. The court determined that Newport violated the IDEA by failing to inform Stefan's parents of their right to a due process hearing and concluded that they were entitled to recovery of $102,929.45 of the amount accrued. Newport then appealed the district court's judgment to the Fourth Circuit Court of Appeals. The court of appeals affirmed the judgment of the district court. *Jaynes*, 13 F. App'x at 170.
20. Tarkan, *supra* note 5.
21. *Id.*

Spectrum Disorder (ASD)[22] are receiving an appropriately tailored education has become a hot legal topic in schools and in the courtroom.[23] The increased legal activity has resulted from disagreements between parents[24] of children with ASD and the school district regarding the methodology employed on the given student, the adequacy of the school's support services, decisions regarding whether the student's placement is in the least restrictive environment (LRE), and the length of services provided by the school district.[25]

The noticeable increase in litigation by parents of children with ASD may largely be attributable to the disorder's legal recognition as one of the developmental disabilities under the Individuals with Disabilities Education Act (IDEA). In 1975, Congress passed the Education for All Handicapped Children Act (EAHCA),[26] which was renamed the IDEA in 1991.[27] The IDEA was then reauthorized in 1997[28] and again in

22. The terms *autism*, *Autism Disorder*, and *Autism Spectrum Disorder* are often used interchangeably throughout the medical community. Therefore, references made to any of these terms in this Comment should be understood to encompass individuals diagnosed with any manifestation of an Autism Spectrum Disorder.

23. Perry A. Zirkel, *The Autism Case Law: Administrative and Judicial Rulings*, 17 FOCUS ON AUTISM & OTHER DEVELOPMENTAL DISABILITIES 84, 84 (2002).

24. The term *parent* shall mean a natural, adoptive, or foster parent of a child (unless state law prohibits the foster parent from serving as a parent), a guardian (but not the state if the child is a ward of the state), a person acting in the place of a natural or adoptive parent (including a grandparent, stepparent, or other relative) with whom the child lives, a person legally responsible for the child's welfare, or a person assigned to be a surrogate parent under the IDEA. 20 U.S.C. § 1401(23) (Supp. V 2005).

25. L. Juane Heflin & Richard Simpson, *Interventions for Children and Youth with Autism: Prudent Choices in a World of Exaggerated Claims and Empty Promises. Part II: Legal/Policy Analysis and Recommendations for Selecting Interventions and Treatments*, 13 FOCUS ON AUTISM & OTHER DEVELOPMENTAL DISABILITIES 212, 212–14 (1998).

26. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 1975 U.S.C.C.A.N. (89 Stat.) 773 (current version at 20 U.S.C. §§ 1400–1487 (Supp. IV 2004)). Before the passage of the Act, two prominent cases formed the foundation for what would become the EAHCA. *See* Mills v. Bd. of Educ., 348 F. Supp. 866, 874 (D.D.C. 1972) (holding that the Board of Education has an affirmative duty to provide specialized instruction adapted to the child's needs that will enable him to benefit in the educational setting); Pa. Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279, 302 (E.D. Pa. 1972) (finding that the exclusion of mentally retarded students from Pennsylvania public schools offended due process and the right to a free appropriate public education, and, therefore, entering a consent judgment providing extensive rights to children with disabilities to address these inadequacies).

27. *See* Individuals with Disabilities Education Act Amendments of 1991, Pub. L. No. 102-119, 105 Stat. 587.

28. *See* Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105-17, 111 Stat. 37 (codified at 20 U.S.C. § 1400 (2000)).

2004.[29] Through its enactment, the federal government placed on school districts and educators the affirmative duty to "ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs."[30] To ensure that the school district adheres to the IDEA's overarching purposes, the Act provides certain procedural safeguards to the parents of eligible students with disabilities.[31] Some of these safeguards include a parent's right to an impartial due process hearing, the right to bring a civil action against the school district or educator if the parent is dissatisfied with the decision rendered in the administrative hearing, and the right to be accompanied and advised by legal counsel and by experts having special knowledge or training regarding children with disabilities.[32] Moreover, the IDEA provides that a court may award reasonable attorneys' fees to a prevailing party who is the parent of the child with a disability as part of the costs associated with the litigation process.[33] By including these provisions, Congress

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29. *See* Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647.

30. Individuals with Disabilities Education Act, 20 U.S.C. § 1400(d)(1)(A) (Supp. IV 2004).

31. The IDEA serves four stated purposes:

> (1) (A) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living;
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> (B) to ensure that the rights of children with disabilities and parents of such children are protected; and
>
> (C) to assist States, localities, educational service agencies, and Federal agencies to provide for the education of all children with disabilities;
>
> (2) to assist States in the implementation of a statewide, comprehensive, coordinated, multidisciplinary, interagency system of early intervention services for infants and toddlers with disabilities and their families;
>
> (3) to ensure that educators and parents have the necessary tools to improve educational results for children with disabilities by supporting system improvement activities; coordinated research and personnel preparation; coordinated technical assistance, dissemination, and support; and technology development and media services; and
>
> (4) to assess, and ensure the effectiveness of, efforts to educate children with disabilities.

Id. § 1400(d)(1)–(4).

32. *Id.* § 1415(b)(6), (i)(2)(A), (h)(1).

33. *Id.* § 1415(i)(3)(B)(i)(I). This Comment discusses the ability of prevailing parents to recover expert fees under § 1415(i)(3)(B)(i)(I). However, the IDEA does not foreclose the possibility—albeit rare—of a school district recovering costs against the attorney of the parent, or the parent, if the complaint or subsequent cause of action was "frivolous, unreasonable, or without foundation" or was presented for an "improper purpose." At its discretion, a court may also award costs to the school district if the attorney of the parent continued to litigate the case after it "clearly became frivolous, unreasonable, or without foundation." *Id.* § 1415(i)(3)(B)(i)(II)–(III).

sought to ensure that the school district would not have a unique advantage over the parents in information and expertise.[34]

IDEA-related cases involving students with ASD have caused an ever-increasing challenge for school districts, parents, education lawyers, and advocates to afford the student a free appropriate public education (FAPE).[35] Although a substantial amount of research on educational interventions for children with ASD exists,[36] researchers have yet to identify a specific behavioral approach that will yield positive results for all children with the disorder, which is largely due to the fact that ASD manifests differently in each affected child.[37] Thus, while research has indicated that certain interventions produce positive outcomes, determining which methodology the school district ought to employ, based on the child's unique set of characteristics, is a difficult task.[38]

Accessibility to expert evaluation for parents of children with ASD, therefore, is crucial to bringing successful claims against a school district for its lack of adherence to the IDEA's requirements in providing the child an appropriate, individually tailored education.[39] However, while parents may still utilize the expertise and recommendations of such individuals, the recent Supreme Court decision of *Arlington Central School District Board of Education v. Murphy* now prevents the recovery of nonattorney expert fees to prevailing parents in an IDEA-related suit as part of the "costs" recoverable under 20 U.S.C. § 1415(i)(B)(3) of the IDEA.[40] As a result of this decision, parents will now have to bear the financial costs of experts if they seek to mount a successful action against a well-equipped school district—a burden that low-income parents will not be able to shoulder.[41]

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34. Schaffer v. Weast, 546 U.S. 49, 60–61 (2005).

35. Mitchell L. Yell et al., *Developing Legally Correct and Educationally Appropriate Programs for Students with Autism Spectrum Disorders*, 18 FOCUS ON AUTISM & OTHER DEVELOPMENTAL DISABILITIES 182, 182 (2003). For further explanation of what constitutes a "free appropriate public education," see discussion *infra* Part III.C.

36. Rose Iovannone et al., *Effective Educational Practices for Students with Autism Spectrum Disorders*, 18 FOCUS ON AUTISM & OTHER DEVELOPMENTAL DISABILITIES 150, 151 (2003).

37. *Id.* at 150–51.

38. Heflin & Simpson, *supra* note 25, at 216.

39. Myrna R. Mandlawitz, *The Impact of the Legal System on Educational Programming for Young Children with Autism Spectrum Disorder*, 32 J. AUTISM & DEVELOPMENTAL DISORDERS 495, 497 (2002).

40. 126 S. Ct. 2455, 2461 (2006).

41. Julie Rawe, *Who Pays for Special Ed?*, TIME, Sept. 25, 2006, at 62, 63.

This Comment addresses how the *Arlington* decision, in disallowing the recovery of expert witness fees, will adversely impact parents of children with ASD who seek to invoke due process against the school district.[42] Part III examines the controversy between parents and school districts in providing the most appropriate behavioral interventions and therapies to the child with ASD and the reasons behind the increase in IDEA-related litigation, particularly with respect to students diagnosed with ASD. Part III also explores the meaning of a FAPE, the procedural safeguards afforded to parents of children eligible under the Act, and the congressional intent behind the IDEA's "costs" provision with respect to whether Congress intended expert witness fees to be recoverable as costs. Part IV includes a discussion of the majority and dissenting opinions in *Arlington* and an analysis of the Supreme Court's use of specific statutory approaches to interpret the "costs" provision. Part IV also details why the Supreme Court made an incorrect ruling based on the legislative history of the Act and prior case law and describes how this decision, coupled with the Supreme Court's ruling in *Schaffer v. Weast*, which placed the burden of proof on the party seeking relief in an IDEA suit, will discourage parents from challenging the school district.[43] Part V explains how these decisions will impact children with ASD and emphasizes what must now take place from the parent's perspective, post-*Arlington*, to secure an appropriately tailored education for students with ASD. This Comment concludes that to uphold the IDEA's purpose of providing the student a *free* appropriate public education, Congress must revise the IDEA's "costs" provision to clearly express its intent to include expert witness fees as a recoverable cost by the prevailing party.

III. AUTISM SPECTRUM DISORDER AND ITS UNIQUENESS WITHIN THE CONTEXT OF THE IDEA

A. Background of Autism Spectrum Disorder

As one of the listed disorders under the umbrella of Autism Spectrum Disorders, autism is a complex developmental disability impairing communication and social interaction.[44] Typically diagnosed before the

42. *Due process* is a term of art in special education. Before a parent of a child with a disability or the school district can file a civil action in federal or state court, the parties must first exhaust all administrative remedies provided under the IDEA. *See* 20 U.S.C. § 1415(a)–(i), (l) (Supp. IV 2004).

43. 546 U.S 49, 62 (2005).

44. Autism Society of America, What Is Autism?, http://www.autism-society.org/site/PageServer?pagename=about_whatis_home (last visited Feb. 26, 2008). Autism is one of the five disorders falling under Pervasive Developmental Disorders (PDD)—a

age of three, autism is the result of a lifelong neurological disorder that affects the proper functioning of the brain.[45] Individuals with autism exhibit a unique combination of pervasive behavioral deficiencies and excesses, which negatively affect the most important aspects of life, including the ability to meaningfully engage in social interactions as well as communicate one's thoughts or feelings with others.[46] The disability is also associated with the presence of repetitive or stereotypic behavior, restricted interests, lack of pretend play in younger children, lack of joint attention, and abnormal sensory behaviors.[47] Because ASD encompasses a myriad of specific behavioral symptoms that can range from mild to severe, children with the same diagnosis may manifest these characteristics differently.[48] For instance, one child may flap his or her arms to show excitement in a given situation, another may respond to the same stimulus by smiling softly, and a third child may sit in the corner rocking back and forth apparently emotionless.[49]

Once noted as a rare disorder, autism is undeniably more widely diagnosed today than it was in the past ten or fifteen years.[50] ASD occurs in all ethnic, racial, and socioeconomic groups, and boys are four

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category of neurological disorders exhibiting varying degrees of impairment in many areas of an individual's social, cognitive, and linguistic development. The five disorders provided under the umbrella of PDD include Autistic Disorder, Asperger's Disorder, Childhood Disintegrative Disorder (CDD), Rett's Disorder, and PDD-Not Otherwise Specified (PDD-NOS). *Id.*

45. LAURA SCHREIBMAN, THE SCIENCE AND FICTION OF AUTISM 2 (2005); Autism Society of America, *supra* note 44.

46. Autism Society of America, Characteristics of Autism, http://www.autism-society.org/site/PageServer?pagename=about_whatis_characteristics (last visited Feb. 26, 2008).

47. *See generally* ROBERT L. KOEGEL & LYNN KERN KOEGEL, PIVOTAL RESPONSE TREATMENTS FOR AUTISM 41 (2006) (discussing symptoms attributable to children with Autism Spectrum Disorder).

48. Autism Society of America, *supra* note 46. Autism Spectrum Disorders range from a mild form, such as Asperger Syndrome, to a severe form, such as Autistic Disorder. If a child possesses symptoms of either of these disorders but does not sufficiently meet the disorder's diagnostic criteria, medical professionals will typically diagnose him or her as having a Pervasive Developmental Disorder-Not Otherwise Specified (PDD-NOS). Rett Syndrome and Child Disintegrative Disorder are also included as spectrum disorders, but they are extremely rare. *See also* National Institute of Mental Health, Autism Spectrum Disorders (Pervasive Development Disorders), http://www.nimh.nih.gov/health/publications/autism/complete-publication.shtml (last visited Feb. 26, 2008).

49. Wrightslaw, Autism, ASD, PDD, Asperger Syndrome, http://www.wrightslaw.com/info/autism.index.htm (last visited Feb. 26, 2008).

50. BRYNA SIEGEL, HELPING CHILDREN WITH AUTISM LEARN 14 (2003).

to five times more likely to have ASD than girls.[51] In 2004, the Centers for Disease Control and Prevention (CDC) indicated that the prevalence rate for autism was one in 166 children.[52] However, data released in early 2007 found that one in 150 eight-year-olds in multiple regions of the United States have ASD, which translates into roughly 1.5 million Americans affected with ASD.[53] According to the United States Department of Education, autism is growing at a rate of ten to seventeen percent every year, and the number of individuals affected will reach nearly four million in the United States alone within the next decade.[54]

While it appears that ASD may be on the rise, part of this exponential increase may be attributable to greater awareness within the community and better diagnosis by medical professionals. Due to differences in criteria used to diagnose individuals, strategies to obtain relevant data, and population demographic characteristics, there remains variability in reported prevalence rates.[55] One reason for the increase is that the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV-TR) published by the American Psychiatric Association, which is the official standard used to diagnose children with ASD, has been continually revised to include more diagnostic criteria.[56] It also now includes a reclassification of children previously identified under another disability category.[57] Thus, children previously diagnosed with mental retardation, for instance, now fall within the spectrum under the new criteria if they also display autistic characteristics.[58]

Another explanation for the dramatic increase in children diagnosed with ASD is Congress's inclusion of autism as a recognized disability category under the IDEA in 1990.[59] During the 1991–1992 school year, the nationwide educational system served a total of 5415 students with

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51. *Id.* at 22, 25; Autism Society of America, *supra* note 44.

52. Centers for Disease Control and Prevention, Autism Information Center, http://www.cdc.gov/ncbddd/autism/faq_prevalence.htm (last visited Feb. 26, 2008).

53. *Id.*; Autism Society of America, *supra* note 44. Note, however, that the current prevalence rate of autism, which was based on a study conducted by CDC's Autism Developmental Disabilities Monitoring (ADDM) Network, is not a representative sample of the entire United States population and should not be generalized to every community within the United States. This data is only accurate with respect to the specific regions involved in the study. Therefore, prevalence rates may differ in populations outside of the study. Centers for Disease Control and Prevention, *supra* note 52.

54. Autism Society of America, *supra* note 44.

55. Iovannone et al., *supra* note 36, at 151.

56. SIEGEL, *supra* note 50, at 14. *See generally* AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: DSM-IV-TR (4th ed. text rev. 2000).

57. SIEGEL, *supra* note 50, at 14–15.

58. *Id.* At the time of the first major shift to DSM-III-R (the revised third edition), roughly a third more children became diagnosable with ASD. *Id.* at 14.

59. Zirkel, *supra* note 23, at 84.

ASD under the IDEA.[60] The number of eligible students with ASD significantly increased by the 1999–2000 school year in which 65,424 students with ASD received special education services—a 1108% increase.[61] To put this in perspective, all other eligible students with disabilities served under the IDEA represented only a 26.3% increase during the same time period.[62] Today, the IDEA provides special education services to more than 200,000 children with ASD in the United States.[63]

B. Early Intervention Strategies

Presently, research has failed to identify any effective means to prevent the disorder, develop a specific treatment yielding positive results for all of those affected, or discover a cure.[64] Consequently, all aspects of the disorder—ranging from etiology to diagnosis and the procurement of effective intervention strategies—feature differing viewpoints on the type of appropriate services for young children with ASD. This lack of consensus has stirred up controversy among the scientific, medical, and educational communities, as well as families with children with ASD.[65] Scientists seek to assess the efficacy of a given therapy by its methodology and replicability, while parents search for case studies or videotaped presentations of children who have obtained positive, concrete outcomes in communicative and social functioning using a specific program.[66] Seeing such testimonials provides parents of young children with ASD the solace they need to select a treatment option that will be most advantageous for their respective

60. F. Edward Yasbak, *Autism in the United States: A Perspective*, 8 J. AM. PHYSICIANS & SURGEONS 103, 103 (2003); Yell et al., *supra* note 35, at 182.

61. Yell et al., *supra* note 35, at 182.

62. *Id.*

63. *See* Centers for Disease Control and Prevention, *supra* note 52. Based on 2005 statistics, 193,637 children ages six to twenty-one and 30,305 children ages three to five received special education and related services through the public school system under the disability category of "autism." *Id.*

64. U.S. DEP'T OF HEALTH & HUMAN SERVICES, REPORT TO CONGRESS ON AUTISM 2004: CHILDREN'S HEALTH ACT OF 2000, at 2 (2003), *available at* http://www.nimh.nih.gov/research-funding/scientific-meetings/recurring-meetings/iacc/reports/autismreport2004.pdf.

65. Edward Feinberg & John Vacca, *The Drama and Trauma of Creating Policies on Autism: Critical Issues to Consider in the New Millennium*, 15 FOCUS ON AUTISM & OTHER DEVELOPMENTAL DISABILITIES 130, 130 (2000).

66. *Id.* at 131.

child.[67]

However, irrespective of this lack of consensus on the "most successful methodology," extensive research has indicated that early diagnosis and intervention produce dramatically better outcomes for individuals with ASD. The earlier the child receives a diagnosis, the greater the opportunity for the child to gain the maximum benefit from one of the existing therapies.[68] While there are many therapies available for children with ASD, Applied Behavior Analysis (ABA),[69] Discrete Trial Training (DTT),[70] and the Treatment and Education of Autistic and

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67. *Id.*

68. Autism Society of America, Diagnosis and Consultation, http://www.autism-society.org/site/PageServer?pagename=about_whatis_diagnosis (last visited Feb. 26, 2008).

69. Applied Behavior Analysis (ABA) is an intervention approach developed in 1987 by Dr. O. Ivar Lovaas that is based on shaping the child's behavior through reinforcement mechanisms. ABA focuses on the breakdown of skills into smaller distinct tasks taught by trained instructors in a highly structured manner. The instructors conduct individual analyses of the child's functioning abilities to identify skills necessary for improved performance and develop a curriculum based on the child's strengths and weaknesses. The intervention is then structured to produce appropriate behaviors through positive reinforcement and prompting. For instance, if the child expresses interest in a toy, the instructor will prompt the child to ask for the toy using an appropriate form of communication. As the intervention progresses, the instructor expands the reinforcement and gradually introduces structured time to allow for the integration of more difficult skills into the child's developmental scheme. The instructor will also work with the child to reduce inappropriate behavior by teaching alternate methods to communicate his or her needs in a more socially acceptable fashion. *See* Daniel H. Ingram, *Cognitive-Behavioral Interventions with Autism Spectrum Disorder*, *in* COGNITIVE-BEHAVIORAL INTERVENTIONS IN EDUCATIONAL SETTINGS 255, 258 (Rosemary B. Mennuti et al. eds., 2006); L. Juane Heflin & Richard L. Simpson, *Interventions for Children and Youth with Autism: Prudent Choices in a World of Exaggerated Claims and Empty Promises. Part I: Intervention and Treatment Option Review*, 13 FOCUS ON AUTISM & OTHER DEVELOPMENTAL DISABILITIES 194, 200 (1998); Autism Society of America, Learning Approaches, http://www.autism-society.org/site/ PageServer?pagename=about_ treatment_learning (last visited Feb. 26, 2008); The Lovaas Institute, The Lovaas Approach, http://www.lovaas.com/approach-method.php (last visited Feb. 26, 2008).

70. Discrete Trial Training (DTT) is a method used for the implementation of ABA for students with ASD. DTT sets forth a basic one-on-one approach whereby the instructor cues the student to perform, provides positive reinforcement for the desired behavior, and continually evaluates the student's performance. For example, the instructor may ask the child to match two shapes of the same color. If the child does not produce the desired goal, the instructor will facilitate the achievement of that goal by physically providing assistance. The instructor continues this process until the student can independently perform the task on his or her own. The ABA/DTT approach has proven to produce positive gains in the child's IQ, language comprehension and expression, and social interaction skills. However, while ABA is one of the most effective treatment methods available, it is also one of the most controversial. Questions remain as to whether the ABA method ought to be used exclusively on the affected child (to the exclusion of other educational methods), whether the heavy focus on the child's behavioral tendencies may ignore the underlying neurological characteristics of autism, and whether the extensive use of ABA and DTT therapy (up to forty hours per week for the given child) is suitable for the child's needs. *See* Heflin & Simpson, *supra* note 69,

Related Communication-Handicapped Children (TEACCH) program[71] are some of the most extensively utilized treatments in both home-based and school-based settings.[72]

C. IDEA's Promises to Children with ASD: FAPE, IEP, and LRE

As its first stated purpose, the IDEA proclaims that all children are entitled to a "free appropriate public education that emphasizes special education and related services designed to meet their unique needs . . . ."[73] Essentially, a FAPE is a publicly funded and individually tailored educational program aimed to meet the needs of a child with a disability.[74] The IDEA specifies that such an education and related services[75] be provided to a child with a disability at public expense,

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at 201; Autism Society of America, *supra* note 69.

71. The Treatment and Education of Autistic and Related Communication-Handicapped Children (TEACCH) program focuses on the child's needs, skills, and interests rather than on the child's behavior. The approach seeks to assist the child in adaptive functioning by modifying the surrounding environment to accommodate for his or her specific characteristics. Essentially, TEACCH develops an individualized curriculum that emphasizes visual, rather than verbal, learning and uses structure and predictability to encourage the child to engage in spontaneous communication. Many studies have validated the TEACCH model by illustrating its effectiveness in identifying the child's emerging skills and adapting those skills to a modified environment. However, concerns regarding the program revolve around whether TEACCH places sufficient emphasis on the child's social and communicative development and whether it employs an exclusionary approach, which isolates the child with ASD from other typically developing children. Despite its potential drawbacks, however, the TEACCH method is largely used in a classroom setting and is a valuable method of instruction for teaching important skills. *See* Heflin & Simpson, *supra* note 69, at 201; Autism Society of America, Learning Approaches, *supra* note 69; Division TEACCH, What is TEACCH?, http://www.teacch.com/whatis.html (last visited Feb. 26, 2008).

72. Division TEACCH, What is TEACCH?, *supra* note 71; The Lovaas Institute, Consultation Based Services, http://www.lovaas.com/services_consultation.php (last visited Feb. 26, 2008).

73. 20 U.S.C. § 1400(d)(1)(A) (Supp. IV 2004).

74. Mitchell L. Yell & Eric Drasgow, *Litigating a Free Appropriate Public Education: The Lovaas Hearings and Cases*, 33 J. SPECIAL EDUC. 205, 205 (1999).

75. "Related services" entail student transportation as well as any developmental, corrective, or other supportive services necessary to identify disabling conditions in children and to allow a child to benefit from special education. Examples of such services include speech-language pathology, interpreting services, psychological services, physical and occupational therapy, social work services, school nurse services, recreation, counseling services, and certain medical services. 20 U.S.C. § 1401(26) (Supp. IV 2004). The 2006 IDEA Regulations regarding the Special Education and Related Services provision state that "related services" include appropriate monitoring and maintenance of medical devices necessary for the maintenance of the child's health and safety, including breathing, nutrition, or the operation of other bodily functions.

under public supervision, and without charge.[76] To ensure a state affords each child a FAPE, the IDEA conditions the state's receipt of funding on its adherence to certain guidelines.[77] Thus, the state receives assistance, based on the state eligibility provisions of the IDEA, if it agrees to identify children with disabilities, properly evaluate them, and implement an educational program suited to their respective needs.[78]

The "heart of IDEA," and a vital component of a child's FAPE, is the Individualized Education Program (IEP).[79] The IEP is a written document produced through a collaborative process between the school district and the child's parents that is designed to afford the student an appropriate educational program.[80] While the IDEA does not enumerate specific services to be administered to eligible students based on their respective disabilities, the statute does require the school district to take certain affirmative steps when identifying students who may have a disability and are, therefore, in need of special education.[81] First, the school district must carry out a thorough assessment of the child's individual needs to determine his or her eligibility under the IDEA.[82] This includes verification that the student fits within one of the enumerated disabilities defined in the Act and the determination that he or she requires special education and related services due to that disability.[83] The school must then use the data obtained during the child's assessment as a basis for the implementation of the special education services and as a measurement of the student's progress.[84]

Assistance to States for the Education of Children with Disabilities, 34 C.F.R § 300.34(b)(2)(ii) (2007). However, such "related services" do not include a surgically-implanted medical device, the optimization of the device's functioning, or maintenance or replacement of the device. Services do cover the routine checking of an external component of the surgically-implanted device. *Id.* § 300.34(b).

76. 20 U.S.C. § 1401(9)(A); *see also id.* § 1401(3) (defining what constitutes a child with a disability).

77. *Id.* § 1412(a) (Supp. IV 2004).

78. *See generally id.* § 1412 (listing eligibility requirements with which a state must comply during each fiscal year to receive federal grants under the IDEA).

79. Yell et al., *supra* note 35, at 184.

80. 20 U.S.C. § 1412(a)(4); 20 U.S.C. § 1414(d)(1)(A)(i) (Supp. IV 2004); Autism Society of America, Individualized Education Plan (IEP), http://www.autism-society.org/site/ PageServer?pagename=about_education_IEP (last visited Feb. 27, 2008). Following the reauthorization of the IDEA in 1997, parents must now be included in the IEP process when making decisions on the educational placement of the child. As equal participants in the IEP process, parents have the right to suggest goals for the child and provide any information that may be helpful in tailoring the IEP around the child's needs. Upon completion of the written document, the IDEA requires unanimous approval of the student's IEP from all involved parties in the IEP meeting. Autism Society of America, *supra*.

81. 20 U.S.C. § 1412(a)(4); Yell et al., *supra* note 35, at 184.

82. 20 U.S.C. § 1414(a)(1).

83. *Id.* § 1414(a)(1)(C)(i); Yell et al., *supra* note 35, at 184.

84. 20 U.S.C. § 1414(b)(4)(A), (c)(1).

The second critical step the school district must take after confirming the student's eligibility under the IDEA is to create an IEP team.[85] The IEP team consists of the parents of the child, local educational agency (LEA) officials, at least one regular education teacher of the child (if the child spends or may spend any time in regular education), the child's special education teacher, and other supportive personnel.[86] Together, the team develops an IEP that describes the student's present level of educational performance and states his or her measurable goals—based on the child's unique needs resulting from the disability—for one year.[87] The LEA must review the current IEP on an annual basis and must supply periodic reports on the progress the child is making with respect to meeting his or her annual goals.[88] If the child does not achieve the goals set forth in the IEP, the LEA must then review the IEP and, where appropriate, make revisions to address the child's lack of expected progress toward those goals.[89]

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85. *Id.* § 1414(b)(4); Yell et al., *supra* note 35, at 184.

86. Specifically, in the 2004 reauthorization of the IDEA, the Act requires the IEP team to be composed of the parents of the child, at least one regular education teacher (if the child is or may be participating in a regular classroom environment), at least one special education teacher of the student, a representative of the school district (or LEA official) who is qualified to oversee and supervise the child's educational plan and is knowledgeable about the educational curriculum and the school district's availability of resources, an individual who can interpret the data collected during the student's assessment and provide instructional options, any individuals with knowledge or special expertise regarding the child and his or her disability (at the discretion of the parent or agency), and the child (when necessary or appropriate). 20 U.S.C. § 1414(d)(1)(B); Candace Cortiella, IDEA 2004 Close Up: The Individualized Education Program (IEP) (March 24, 2005), http://www.schwablearning.org/articles.aspx?r=978.

87. The statement of the child's present level of performance included in the IEP was revised in IDEA 2004 to illustrate the child's educational achievements and functional performance and, thus, emphasize the importance of all parts of his or her development, rather than just academic performance. 20 U.S.C. § 1414(d)(1)(A). Also note, with respect to the child's IEP, the duration of the IEP is not based on the academic school year; rather it expires twelve months from the date on the initial IEP. *See id.* §1414(d)(4)(A).

88. The periodic reports must be supplied as often as the general education teachers supply report cards. It is extremely important that the school district adhere to this requirement because parents need to be informed as to whether their child is benefiting from the educational program and whether his or her desired outcomes are achievable within the duration of the IEP. *Id.* § 1414(d)(1)(A)(i)(III).

89. *Id.* § 1414(d)(4)(A); *see* Bd. of Educ. v. Rowley, 458 U.S. 176, 181 (1982) (identifying the IEP as an integral part of providing an eligible student with a FAPE). Both the school district and the parents may modify or amend the IEP after the annual IEP meeting without having to reconvene the entire team. While the IEP does not need to be completely rewritten, parents may nevertheless request a revised IEP reflecting the

Finally, the IEP team must place the child in an appropriate educational setting. When making a placement decision, the team must look to many factors including the child's adaptive behavior, social and cultural background, physical condition, and performance on aptitude and achievement tests.[90] The team must also place the child in an environment that is conducive to meeting his or her IEP goals. To achieve such goals, the IDEA requires that the school district educate the child in the least restrictive environment (LRE) as part of its guarantee of a FAPE.[91] The LRE mandate requires mainstreaming, or educating the disabled student in a general education classroom with other nondisabled students to the "maximum extent appropriate."[92] When the child's learning in the general education setting does not produce satisfactory results, the IDEA permits his or her removal to other special classes or to separate schooling.[93] Thus, although the IDEA favors integration, it acknowledges that the child's needs may necessitate placement in a more restrictive environment when the general education classroom is not appropriate, even with the support of supplementary aids and other services.[94]

With respect to children with ASD, a core concern among school districts and parents is determining the restrictiveness of the educational setting. Since the IDEA does not establish a framework for selecting the least restrictive environment for the student,[95] the IEP team is left to

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changes or modifications made. 20 U.S.C. § 1414(d)(3)(F). In addition, if any changes are made to the child's IEP resulting from an agreement with a member of the IEP and the parent outside the IEP Team meeting process, such changes or modifications must be disclosed to the IEP Team. 34 C.F.R. § 300.324(a)(4)(ii) (2007).

90. Yell et al., *supra* note 35, at 184.

91. 20 U.S.C. § 1412(a)(5). The general education classroom would typically be the least restrictive educational setting for the child and a completely segregated school, institution, or hospital the most restrictive. *Id.*

92. *Id.* § 1412(a)(5)(A).

93. *Id.*

94. *Id.*

95. However case law has established a "presumptive inclusion," which is a presumption in favor of mainstreaming, that provides a standard the courts have used to determine the least restrictive environment for the student:

> Adhering to the language of the EHA, we discern a two part test for determining compliance with the mainstreaming requirement. First, we ask whether education in the regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given child. If it cannot and the school intends to provide special education or to remove the child from regular education, we ask, second, whether the school has mainstreamed the child to the maximum extent appropriate. . . . [O]ur analysis is an individualized, fact-specific inquiry that requires us to examine carefully the nature and severity of the child's handicapping condition, his needs and abilities, and the schools' response to the child's needs.

Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1048 (5th Cir. 1989) (citations omitted); *see also* Roncker v. Walter, 700 F.2d 1058, 1063 (6th Cir. 1983) ("In a case where the segregated facility is considered superior, the court should determine whether

decide, based on the child's individualized goals and objectives, which "placement or combination of placement options" will produce positive outcomes before the expiration of his or her annual IEP.[96] Due to varying interpretations of the LRE provision, placement challenges continue to surface, with some members of the IEP process favoring restrictive home-based or institutional instruction for the given child, and others believing the child can only benefit by full inclusion in the general education classroom.[97] Still others stress that while segregation may be necessary for the child in an academic sense, the school must still mainstream the child in the general education setting for nonacademic activities, so that he or she can interact with nondisabled students "to the maximum extent possible."[98]

D. Procedural Safeguards to Secure a Substantive Right

While all students in special education are entitled to a FAPE, Congress has never provided a substantive definition of the term either in the IDEA or in any subsequent federal legislation.[99] Some critics believe Congress's omission was both intentional and strategic; recognizing that every FAPE would vary according to the child's distinctive needs and goals, Congress sought to ensure that parents would be meaningfully involved in the creation and execution of their child's IEP.[100] However, despite this omission, Congress did set forth specific procedural safeguards for parents to protect their child's guarantee of a FAPE. Consequently, parents have invoked these procedural due process rights when in disagreement with the school district regarding what constitutes a FAPE for their particular child.[101]

Arising from such a disagreement over whether a child's IEP provided

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the services which make that placement superior could be feasibly provided in a non-segregated setting. If they can, the placement in the segregated school would be inappropriate under the Act.").

96. Heflin & Simpson, *supra* note 25, at 214.

97. *Id.*

98. Sarah E. Farley, Comment, *Least Restrictive Environments: Assessing Classroom Placement of Students with Disabilities Under the IDEA*, 77 WASH. L. REV. 809, 834 (2002).

99. Yell & Drasgow, *supra* note 74, at 206.

100. *Id.*

101. For a thorough account of recent cases brought under specific provisions of the IDEA, see Karen Norlander, *The Emerging Caselaw Involving Students with Disabilities*, *in* SCHOOL LAW SERIES (SIXTH ANNUAL) 81 (PLI Litig. & Admin. Practice, Course Handbook Series No. 160, 2006).

an adequate FAPE was the first special education case heard by the United States Supreme Court in the landmark decision of *Board of Education v. Rowley*.[102] In *Rowley*, the Court established the meaning of a FAPE under the IDEA and developed a standard for assessing whether the school district fulfilled the mandate for this substantive right.[103] The Court explained that while public education is available to all students with disabilities under the Act, a FAPE requires more than mere access to special education services. However, the Court also noted that "Congress did not impose upon the States any greater substantive educational standard than would be necessary to make such access meaningful."[104] In other words, the Court interpreted an "appropriate" education to include not a "guarantee [of] any particular level of education," but rather one that is individually designed to grant some educational benefit to the child.[105] Thus, the Court ruled that students with disabilities do not have an enforceable right to an education permitting them to achieve their maximum potential. Rather, the IDEA entitles them to an education that is "reasonably calculated" to produce an educational benefit.[106]

Significant to the decision, the *Rowley* Court emphasized that because courts lack the expertise necessary for evaluating the soundness of educational approaches, decisions regarding a school district's choice of methodology are "for resolution by the States."[107] Therefore, as long as the educational practices adhere to the requirements set forth in the IDEA, the courts will not challenge the school's judgment. A hearing officer may, however, assess whether the methodology employed at the time of the hearing or trial is producing an educational benefit for the child and hold that support must continue.[108] Moreover, the hearing officer may even support one-on-one instruction, an in-home setting versus a school setting, or a certain level of intensity for the child, but he or she cannot indicate that the ABA approach, for example, is better than

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102. 458 U.S. 176, 206–07 (1982).

103. The standard for assessing whether the school district has complied with the provisions of the IDEA in providing a FAPE to a student with a disability involves a two-part test. To determine whether a child's IEP provides "some educational benefit," the Court asked:

> First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.

Id. at 200, 206–07.

104. *Id.* at 192.

105. *Id.* at 192, 201.

106. *Id.* at 204.

107. *Id.* at 208.

108. Mandlawitz, *supra* note 39, at 496.

the TEACCH program or other methodologies.[109] Rather, this discretion is left entirely to the school district.

The school's decisionmaking authority regarding the choice and application of a preferred methodology, however, does not remain unchecked. The *Rowley* Court specifically addressed and disposed of this concern, stating that "parents and guardians will not lack ardor" in actively seeking the benefits entitled to their children under the Act because the IDEA affords parents numerous procedural safeguards to secure those rights.[110] Furthermore, the Court read the IDEA as a mechanism for maximizing parental support, concluding that

> [i]t seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process, . . . as it did upon the measurement of the resulting IEP against a substantive standard.[111]

Section 1415 of the IDEA enumerates these types of procedures that the state educational agency (SEA), state agency, or local educational agency (LEA) must establish and maintain to continue to obtain federal assistance.[112] As previously mentioned, the IDEA guarantees parents of a child with a disability the opportunity to participate in the entire IEP process, including identification, evaluation, educational placement, or any issue involving the provisions of a FAPE.[113] Moreover, if the parents are dissatisfied with the school's evaluation, they may request an independent educational evaluation (IEE) of their child at public expense by a qualified examiner.[114] If the district grants the request, it must not unreasonably delay an IEE and it must consider the results of the IEE when assessing the child's eligibility for services or when developing the child's IEP if the IEE meets the agency criteria.[115]

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109. *Id.*
110. *Rowley*, 458 U.S. at 209.
111. *Id.* at 205–06.
112. 20 U.S.C. § 1415(a) (Supp. IV 2004).
113. *Id.* § 1415(b)(1).
114. *Id.*
115. 34 C.F.R. § 300.502(b) (2007). If the school district denies the request for an IEE, it shall invoke a due process hearing to demonstrate that its evaluation of the child was in fact appropriate for his or her educational needs. Even if the presiding judge or hearing officer finds the evaluation to be sufficient, however, parents may still obtain an IEE at their own expense. 34 C.F.R § 300.502(c)(1); Technical Assistance ALLIANCE for Parent Centers, *Evaluation: What Does It Mean For Your Child?* (2007), http://www.taalliance.org/publications/ALL11.pdf. Also, the IDEA entitles the parent to

The IDEA requires that the school district provide prior written notice to the child's parents if the school either seeks to initiate or change, or refuses to initiate or change, the child's IEP.[116] Not only must the school district include an explanation of why it proposes or refuses to take the specified action—including a description of the evaluation, record, assessment, procedure, or report it uses to base its decision—but it must also provide a statement notifying the parents of the procedural safeguards they may utilize under § 1415.[117] In addition, § 1415(b)(6) provides parents the opportunity to present complaints against the school district alleging a violation that occurred relating to the child's identification, evaluation, placement, or the provisions of a FAPE.[118] Following the filing of the complaint by the parents, the district is required to convene a resolution session within fifteen days to attempt to resolve the dispute.[119] If the parents and the district are unable to reach an agreement, both parties may also seek resolution through formal mediation. If the parents opt for the mediation process, the state must supply a list of qualified mediators knowledgeable about the law and regulations relating to special education and related services.[120] The state must also cover the costs associated with the mediation.[121] If, on the other hand, the parents request a due process hearing, either the state or local educational agency—as determined by the state or the state educational agency—must initiate the proceeding.[122] For these hearings, parents have "the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities."[123] Hence, the IDEA entitles parents to the legal support of attorneys and experts in the field of special education law.

If any party is dissatisfied with the result of the due process hearing, they may appeal the decision to the state educational agency, if the state has a two-tier system, or they can bring a civil action in any state court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy.[124] With respect to the civil action, the court will analyze the findings from the administrative

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only one IEE at public expense for every time the LEA conducts an evaluation of the child with which the parent disagrees. 34 C.F.R § 300.502(b)(1).

116. 20 U.S.C. § 1415(b)(3).
117. *Id.* § 1415(c)(1)(B)–(C).
118. *Id.* § 1415(b)(6)(A)–(B).
119. *Id.* § 1415(e), (f)(1)(B).
120. *Id.* § 1415(e)(2)(C).
121. *Id.* § 1415(e)(2)(D).
122. *Id.* § 1415(f)(1)(A).
123. *Id.* § 1415(h)(1).
124. *Id.* § 1415(g)(1), (i)(2)(A).

hearing and will hear any additional evidence at a party's request.[125] After making its ruling based on a preponderance of the evidence standard, the court "may award reasonable attorneys' fees as part of the costs" to the party prevailing in the suit who is the parent of the child with a disability.[126]

While § 1415(i)(3)(B) states that a party may recover attorneys' fees resulting from a favorable decision in an IDEA-related suit, it is unclear, based on the plain language of the text, what the phrase "as part of the costs" exactly entails. The IDEA specifically affords parents the opportunity to be accompanied by counsel and expert witnesses knowledgeable about the child's disability during a due process hearing or during the appeals process. However, because Congress did not provide a substantive definition of the "costs" recoverable by the prevailing party, § 1415(i)(3)(B) does not indicate whether expert fees fit within this framework. Despite the ambiguous nature of the IDEA's costs provision, there is some indication in the legislative history of the IDEA that Congress intended for the term "costs" to encompass expert witness fees as well. Of particular note is the Conference Committee Report No. 99-687, approved by Congress while drafting the statute, which announces:

> The conferees intend that the term "attorneys' fees as part of the costs" include reasonable expenses and fees of expert witnesses and the reasonable costs of any test or evaluation which is found to be necessary for the preparation of the parent or guardian's case in the action or proceeding, as well as traditional costs incurred in the course of litigating a case.[127]

Irrespective of what appears to be Congress's desire to include expert fees as part of the costs, this language was never integrated into § 1415(i)(3)(B). For this reason, a circuit split developed; some courts concluded that the provision ought to be read in a textualist manner, demonstrating that the plain language did not include reimbursement for expert witness fees.[128] Other rulings, however, favored a more liberal

125. *Id.* § 1415(i)(2)(C)(i)–(ii).
126. *Id.* § 1415(i)(2)(C)(iii), (i)(3)(B).
127. H.R. REP. NO. 99-687, at 5 (1986) (Conf. Rep.), *reprinted in* 1986 U.S.C.C.A.N. 1807, 1808.
128. *See*, *e.g.*, Goldring v. District of Columbia, 416 F.3d 70, 73 (D.C. Cir. 2005); Mo. Dep't of Elementary & Secondary Educ. v. Springfield R-12 Sch. Dist., 358 F.3d 992, 1002 (8th Cir. 2004); T.D. v. LaGrange Sch. Dist. No. 102, 349 F.3d 469, 481–82 (7th Cir. 2003); Neosho R-V Sch. Dist. v. Clark, 315 F.3d 1022, 1031 (8th Cir. 2003); Arons v. N.J. State Bd. of Educ., 842 F.2d 58, 62 (3d Cir. 1988); Eirschele v. Craven County Bd. of Educ., 7 F. Supp. 2d 655, 659–60 (E.D.N.C. 1998); Cynthia K. v. Bd. of

approach to statutory interpretation, supporting the notion that the language set forth in the Conference Committee Report ought to be read in conjunction with § 1415(i)(3)(B) so as to afford prevailing parents the ability to recover such fees.[129] The United States Supreme Court has now laid to rest the debate in the legal community over whether prevailing parents could recover expert fees in its recent decision of *Arlington Central School District Board of Education v. Murphy*.

IV. SETTING THE PRECEDENT: *ARLINGTON CENTRAL SCHOOL DISTRICT BOARD OF EDUCATION V. MURPHY*

In June 2006, the United States Supreme Court addressed the issue of whether the IDEA entitles prevailing parents to the recovery of nonattorney expert fees in an IDEA-related suit as part of the "costs" recoverable under § 1415(i)(B)(3).[130] This decision involves Joseph Murphy, who, at the time of the original action, was an eighth grade student at Arlington High School.[131] At the beginning of the 1997–1998 school year, a speech and language specialist determined Joseph had a learning disability in which he was "severely functionally language disordered."[132] Following this assessment, a neurologist examined Joseph and concluded he had a "near total incapacity to process language, written or oral."[133] Despite the recommendation of Arlington Central School District's speech and language evaluator that Joseph be placed in a residential school for language impaired students because he was "'high risk' . . . both academically and emotionally," Arlington Central proposed an IEP in which Joseph would attend Arlington High School and be placed in classes with other students with disabilities.[134] Joseph's parents then sought the opinion of Marilyn Arons, an expert in the field of special education, to determine their son's educational options.[135] After evaluating Joseph, reviewing the district's assessments, and attending

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Educ., No. 95 C 7172, 1996 WL 164381 (N.D. Ill. Apr. 1, 1996).

129. *See, e.g.*, Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 402 F.3d 332, 337–39 (2d Cir. 2005); BD v. DeBuono, 177 F. Supp. 2d 201, 207–08 (S.D.N.Y. 2001); Mr. J. v. Bd. of Educ., 98 F. Supp. 2d 226, 242–43 (D. Conn. 2000); Bailey v. District of Columbia, 839 F. Supp. 888, 892 (D.D.C. 1993); Field v. Haddonfield Bd. of Educ., 769 F. Supp. 1313, 1323 (D.N.J. 1991); Doe v. Watertown Sch. Comm., 701 F. Supp. 264, 266 (D. Mass. 1988); Hirsch v. McKenzie, No. 85-3199, 1988 WL 78859 (D.D.C. July 21, 1988).

130. Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 126 S. Ct. 2455, 2457 (2006).

131. Brief of Respondents at 8, *Arlington*, 126 S. Ct. 2455 (No. 05-18).

132. *Id.*

133. *Id.*

134. *Id.* at 8–9.

135. *Id.* at 9.

IEP meetings, Arons "urge[d] Arlington Central to provide Joe with more intensive speech/language training."[136] Arlington Central, however, failed to grant the request.[137] Joseph's parents refused to approve the school district's IEP and, thereafter, requested a due process hearing.[138] They also removed Joseph from the school, enrolled him in the Kildonan School, a private school for learning disabled students,[139] and paid for his tuition costs.[140]

Despite not having exhausted their administrative remedies, the Murphys filed an action under the IDEA in district court on behalf of their son, Joseph, seeking reimbursement from Arlington Central for the tuition costs of the private school.[141] The United States District Court for the Southern District of New York ruled in favor of the parents, directing Arlington Central to reimburse the parents for the tuition costs from the 1999–2000 school year to date and to continue funding Joseph's tuition as long as the Kildonan School was his current appropriate placement.[142] Arlington Central appealed, and the Second Circuit

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136. *Id.*
137. *Id.*
138. Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 86 F. Supp. 2d 354, 355 (S.D.N.Y. 2000).
139. *Id.*; Brief of Respondents, *supra* note 131, at 9.
140. *Arlington*, 86 F. Supp. 2d at 355.
141. The impartial hearing officer (IHO) presided over the initial administrative hearing, holding that Arlington Central's proposed IEP for the 1998–1999 school year was not sufficient to meet Joseph's educational needs and that the Kildonan School was an appropriate placement. The IHO also ordered Arlington Central to reimburse the Murphys for both tuition fees and the costs of a private speech pathologist. Arlington Central then timely appealed the decision to the state review officer (SRO). While the appeal was pending, the Murphys filed an action in district court seeking a temporary restraining order that would require the school district to pay the tuition for Kildonan during the pendency of the appeal. *Id.* Before the SRO rendered a decision regarding Joseph's appropriate placement during the 1998–1999 year—which, at this point, was completed—the District held an IEP meeting to determine his placement for the 1999–2000 school year and proposed that Joseph return back to Arlington High School. The Murphys rejected the IEP and continued to cover his tuition costs at Kildonan. In December 1999, the SRO reached a decision, upholding the IHO's award of tuition reimbursement but reversing the award of reimbursement for the costs of the speech pathologist. The Murphys then requested a due process hearing to obtain reimbursement for tuition costs for the 1999–2000 school year, and in the still-pending district court action, invoked the "stay put" provision to require Arlington Central to pay for the current 1999–2000 school year tuition. The Murphys contended that Kildonan was Joseph's then-current placement and should remain so during the pendency of the proceedings. *Id.* at 356. The District argued, on the other hand, that Joseph's current educational placement was Arlington High School. *Id.* at 357.
142. *Id.* at 368.

affirmed the decision.[143] The Murphys then filed a motion in the district court to recover $29,350 for the services provided by their educational consultant, Marilyn Arons.[144] The district court granted reimbursement for Aron's services but substantially reduced the amount to $8650—compensating only for services rendered from the commencement of the initial due process hearing up to the district court's ruling in the Murphys' favor.[145] These compensable services included facilitating the Murphys' understanding of the school board's experts, reviewing the technical materials to be used in the hearing, and preparing questions for the cross examination of the school board's experts.[146] The Second Circuit affirmed the decision, holding that the legislative history of the IDEA, coupled with the dicta of House Conference Report No. 99-687, required the court "to construe the IDEA as providing for the reimbursement of costs such as those incurred here by Arons in conducting the expert evaluation."[147] Arlington Central once again appealed and the United States Supreme Court granted certiorari.[148]

A. The Majority Opinion

Justice Samuel Alito, writing for the majority of the Court,[149] began the opinion stating that the fact that Congress enacted the IDEA pursuant to the Spending Clause provides sufficient guidance for the resolution of the expert fees issue.[150] The Court found that because Congress allocates federal money to state and local educational agencies for special education services, and because it conditions that funding upon a state's compliance in meeting the Act's requirements,[151] these conditions "must

143. Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 297 F.3d 195 (2d Cir. 2002).

144. Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., No. 99 Civ. 9294(CSH), 2003 WL 21694398 (S.D.N.Y. July 22, 2003).

145. *Id.* at *9–10. The court determined that Arons supplied 43 1/4 of the total 146.75 hours of consulting services between the dates of September 23, 1998 through September 4, 1999. Therefore, 43 1/4 x $200 (Arons's hourly rate) totaled $8650 in fees. *Id.* at *9–10.

146. Brief of Respondents, *supra* note 131, at 12.

147. Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 402 F.3d 332, 336–37 (2d Cir. 2005).

148. Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 126 S. Ct. 2455, 2455 (2006).

149. Members of the majority opinion included Justices Alito, Roberts, Scalia, Kennedy, and Thomas. Justice Ginsburg filed a concurring opinion, Justice Souter filed a dissenting opinion, and Justice Breyer also filed a dissenting opinion in which Justices Stevens and Souter joined. *Id.*

150. *Id.* at 2458.

151. For a comprehensive listing of the substantive and procedural requirements a state must meet in order to receive federal funds under the IDEA, see 20 U.S.C. § 1412(a) (Supp. IV 2004).

be set out 'unambiguously.'"[152] In other words, the IDEA must supply clear notice of the obligation to compensate prevailing parents for expert fees, which will enable recipients of federal money to accept or reject these conditions "voluntarily and knowingly."[153] The Court then looked at the plain language of § 1415(i)(3)(B) and determined that this provision "does not even hint that acceptance of IDEA funds makes a State responsible for reimbursing prevailing parents for services rendered by experts."[154] Striking down respondents' contention that the term *costs* should be read so as to authorize the recovery of all costs associated with the IDEA-related proceedings—including expert costs—the Court instead concluded that "costs" is a term of art that typically does not encompass expert fees.[155] Congress's use of the word *costs* rather than *expenses*, the Court added, is a further indication that § 1415(i)(3)(B) is not an open-ended provision that would hold all participating states liable for every type of expense incurred as a result of the litigation. Rather, Congress was simply expanding the definition of costs to include attorneys' fees.[156] Therefore, absent a clear reference to expert fees within this provision, the Court expressed that it would only look to the list of otherwise recoverable costs.[157] These costs are set out in 28 U.S.C. § 1920, which is the "general statute governing the taxation of costs in federal court," and 28 U.S.C. § 1821, which provides a forty dollar per day witness fee for court attendance.[158] When reading these statutes and § 1415(i)(3)(B) of the IDEA together, the Court concluded that the text "does not authorize an award of any additional expert fees, and it certainly fails to provide the clear notice that is required under the Spending Clause."[159]

Next, the Court addressed respondents' argument that a General Accounting Office (GAO) study provides a strong indication that Congress intended recoverable costs under §1415(i)(3)(B) to include expert fees.[160] In this study, the GAO directed the Comptroller General

152. *Arlington*, 126 S. Ct. at 2459 (citation omitted).
153. *Id.* (citation omitted).
154. *Id.*
155. *Id.*
156. *Id.* at 2460.
157. *Id.*
158. *Id.*
159. *Id.*
160. *Id.* at 2460–61; *see* Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372, § 4, 100 Stat. 796, 797–98.

to collect data on the amount of attorneys' fees, costs, and expenses awarded to the prevailing party in IDEA cases during a particular time frame, the number of hours spent by personnel—including attorneys and experts—involved in the action or proceeding, and the expenses borne by the parties to the action or proceeding.[161] After analyzing the study's directive, the Court stated that respondents' argument would have had more persuasive force if the GAO had directed the Comptroller General to compile data on the awards to prevailing parents for expert fees.[162] But because the study discussed experts only in the context of assessing the number of hours they spent in IDEA cases, while making no specific mention of expert fees, the Court concluded "it does not follow that Congress meant for States to compensate prevailing parties for the fees billed by these consultants."[163] Thus, the Supreme Court rejected respondents' contention.

Following its review of the text of the IDEA, the Court directed its attention to two notable Supreme Court cases dealing with statutes containing costs provisions arguably similar to § 1415(i)(3)(B) of the IDEA.[164] First, the Court focused on the reasoning and decision of *Crawford Fitting Co. v. J.T. Gibbons, Inc.*[165] In *Crawford*, the petitioner argued that Federal Rule of Civil Procedure (FRCP) 54(d),[166] which generally provides for the award of "costs" to the prevailing party, gives the court discretionary authority to exceed the thirty dollar per day witness fee limit[167] found in 28 U.S.C. § 1821(b).[168] Petitioners supported this assertion by emphasizing that while 28 U.S.C. § 1920[169] includes a

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161. *Arlington*, 126 S. Ct. at 2460; *see* H.R. REP. NO. 99-687, at 5 (1986), *reprinted in* 1986 U.S.C.C.A.N. 1807, 1808.

162. *Arlington*, 126 S. Ct. at 2460.

163. *Id.* at 2460–61.

164. *Id.* at 2461 (citing W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83 (1991); Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437 (1987)).

165. 482 U.S. 437 (1987).

166. FED. R. CIV. P. 54(d).

167. 28 U.S.C. § 1821(b) was amended after the issuance of this decision to increase the attendance fee for witnesses from thirty dollars to forty dollars per day. *See* Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 314, 104 Stat. 5115.

168. *Crawford*, 482 U.S. at 439; *see also* 28 U.S.C. § 1821 (2000) (providing in relevant part: "A witness shall be paid an attendance fee of $30 per day for each day's attendance. A witness shall also be paid the attendance fee for the time necessarily occupied in going to and returning from the place of attendance . . . .").

169. Section 1920 states:

> A judge or clerk of any court of the United States may tax as costs the following:
>
> (1) Fees of the clerk and marshal;
> (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
> (3) Fees and disbursements for printing and witnesses;
> (4) Fees for exemplification and copies of papers necessarily obtained for use in the case;

list of costs that are taxable by the court, FRCP 54(d) supplies a "separate source of power [to the court] to tax as costs expenses not enumerated in § 1920."[170] The Court disagreed, however, holding that because the recovery of expert fees is strictly limited by § 1821 and § 1920, it would not infer that Congress intended to override these statutes by a broader interpretation of FRCP 54(d).[171] In the present case, the Court applied its analysis in *Crawford* and concluded that the term *costs* in both § 1415(i)(3)(B) of the IDEA and FRCP 54(d) are defined by the list of expenses enumerated in 28 U.S.C. § 1920. Thus, in recognizing the principle set forth in *Crawford*, the Court here refused to permit the general reference to *costs* in § 1415(i)(3)(B) to essentially nullify the specific definition of costs provided in 28 U.S.C. § 1920 absent explicit statutory authority.[172]

Second, the Court relied on its decision in *West Virginia University Hospitals, Inc. v. Casey* as confirmation that the IDEA does not authorize the award of expert fees to a prevailing party.[173] In *Casey*, petitioners sought the recovery of expert fees pursuant to 42 U.S.C. § 1988.[174] In writing for the majority, Justice Antonin Scalia held that § 1988 conveys no authority to shift expert fees to the losing party; experts are only eligible for the fees provided in § 1920 and § 1821.[175] Following the examination of the language of § 1988, Justice Alito, in the instant case, interpreted this fee-shifting statute as having similar wording to that of 20 U.S.C. §1415(i)(3)(B).[176] Therefore, consistent with its decision in *Casey*, the Court in *Arlington* ruled:

> To decide in favor of respondents here, we would have to interpret the virtually identical language in 20 U.S.C. § 1415 as having exactly the opposite meaning. Indeed, we would have to go further and hold that the relevant language in the IDEA *unambiguously means* exactly the opposite of what the nearly identical

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> (5) Docket fees under section 1923 of this title;
> (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

28 U.S.C. § 1920 (2000).

170. *Crawford*, 482 U.S. at 441.
171. *Id.* at 445.
172. Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 126 S. Ct. 2455, 2462 (2006).
173. *Id.* (citing W. Va. Univ. Hosp., Inc. v. Casey, 499 U.S. 83, 102 (1991)).
174. *Casey*, 499 U.S. at 85–86.
175. *Id.* at 102.
176. *Arlington*, 126 S. Ct. at 2462.

language in 42 U.S.C. § 1988 was held to mean in *Casey*.[177]

The Court also responded to a particular footnote in *Casey*, which substantially influenced the decision of the court of appeals to award expert fees under § 1415(i)(3)(B).[178] In the footnote, the *Casey* Court commented on petitioners' reference to House Committee Report No. 99-687,[179] finding that the statement in the Report was "an apparent effort to *depart* from ordinary meaning and to define a term of art."[180] While this comment appeared to support respondents' claim in *Arlington* that the *Casey* Court viewed the Report as demonstrating a favorable interpretation of § 1415(i)(3)(b) and as attaching a different meaning to "costs" within the context of the IDEA, the Court disagreed. Rather, without going into much detail, the Court stressed that the "thrust of the footnote was simply that the term 'attorney's fees' . . . is generally not understood" to cover expert fees as well.[181] Therefore, according to the Court, both *Crawford*[182] and *Casey*[183] reinforced the conclusion that § 1415(i)(3)(B) neither provides clear notice nor unambiguously authorizes a court to award expert fees to prevailing parents.[184]

Finally, the Court addressed respondents' remaining contentions about the fundamental purpose of the IDEA and the legislative history of the Act. Respondents claimed that disallowing the recovery of expert fees would contradict the overarching goals of the IDEA in providing eligible students a FAPE and in safeguarding the ability of parents to contest a school district's decision that negatively impacts their child.[185] Finding these goals to be "too general" to provide sufficient backing for respondents' assertion, the Court quickly disposed of their interpretation, concluding that the IDEA "does not seek to promote these goals at the expense of all other considerations, including fiscal considerations."[186] Finally, respondents emphasized that a proper reading of the Conference Committee Report clearly reveals the intent of Congress to afford compensation of expert fees to the prevailing party.[187] The Court once again, however, struck down respondents' argument, declaring that

177. *Id.*
178. *Id.* (citing *Casey*, 499 U.S. at 92 n.5); *see* Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 402 F.3d 332, 336–37 (2d Cir. 2005).
179. For the exact quoted language from the House Committee Report, see discussion *infra* Part III.D.
180. *Casey*, 499 U.S. at 92 n.5.
181. *Arlington*, 126 S. Ct. at 2463.
182. Crawford Fitting Co. v. J.T. Gibbons, Inc, 482 U.S. 437, 445 (1987).
183. *Casey*, 499 U.S. at 102.
184. *Arlington*, 126 S. Ct. at 2463.
185. *Id.*
186. *Id.*
187. *Id.*

legislative history is not sufficient to supersede the overwhelming legal authority that denies the recovery of expert fees.[188] In Spending Clause litigation, a correct reading of a statute is not based on what Congress intends, but rather "what the States are clearly told" with respect to the conditions they must meet to receive federal assistance.[189] Thus, for the foregoing reasons, the Supreme Court reversed the judgment of the Second Circuit, denying the recovery of expert fees under § 1415(i)(3)(B) of the IDEA.[190]

B. The Dissent

In disagreeing with the majority decision of the Supreme Court, Justice Stephen Breyer issued a powerful dissent in which he argued that congressional intent is abundantly clear in authorizing "attorneys' fees as part of the costs" to include expert fees.[191] Justice Breyer began his discussion providing two notable reasons why the statutory phrase must be read in this manner. First, he explained, the inclusion of an award for expert fees is exactly what Congress *said* it intended by the use of that

188. *Id.*
189. *Id.*
190. *Id.* at 2463–64. Justice Ginsburg concurred with the majority decision but, nevertheless, disagreed with the Court's interpretation of the clear notice requirement in Spending Clause litigation. Ginsburg stated that the Court's reference to the clear notice requirement in *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 17 (1981), should not be taken out of context. She explained: "The Court there confronted a plea to impose an 'unexpected condition for compliance—a new [programmatic] obligation for participating States.' The controversy here is lower key: It concerns not the educational programs IDEA directs school districts to provide, but 'the remedies available against a noncomplying [district].'" *Arlington*, 126 S.Ct. at 2464 (Ginsburg, J., concurring) (citations omitted). Ginsburg also recognized that the IDEA was enacted not only pursuant to the Spending Clause, but to Section 5 of the Fourteenth Amendment as well. For this reason she stated, the Court does not need to rely on the clear notice requirement in reaching its conclusion. Rather, the "twin pillars" provide ample support for the Court's final judgment. *Id.* Ginsburg also noted that while it would "make good sense" when considering the overarching goals of the IDEA to include the costs of consultants under § 1415(i)(3)(B), Congress still did not provide specific reference to expert fees in the IDEA as it did in other statutes. *Id.* at 2465; *see* W. Va. Univ. Hosp., Inc. v. Casey, 499 U.S. 83, 89 n.4 (1991) (supplying a list of thirty-four statutes in ten different titles of the United States Code that explicitly shift both attorneys' fees and expert fees). Therefore, Ginsburg stressed that because the judiciary is unable to rewrite the text of the statute, "[t]he ball . . . is properly left in Congress' court to provide, if it so elects, for consultant fees and testing expenses beyond those IDEA and its implementing regulations already authorize." *Arlington*, 126 S. Ct. at 2465 (Ginsburg, J., concurring).
191. *Arlington*, 126 S. Ct. at 2466 (Breyer, J., dissenting).

phrase and, second, this interpretation is in line with the basic legislative purposes of the IDEA.[192]

Regarding his first point, Justice Breyer thoroughly discussed the legislative history of the IDEA's cost-shifting provision, explaining that upon Congress's enactment of the Handicapped Children's Protection Act (HCPA)[193] in 1986, it was already mindful of the need to award attorneys' fees to prevailing parties.[194] In 1985, Senator Lowell Weicker introduced the pertinent bill in the Senate providing for the recovery of attorneys' fees.[195] Thereafter, several senators introduced a new bill that would cap attorneys' fees but, at the same time, empower courts to award reasonable attorneys' fees, reasonable witness fees, and other reasonable expenses resulting from the litigation in addition to the costs of a prevailing parent.[196] Although some senators objected to the cap, no one objected to the latter portion of the bill.[197] Another group of senators then proposed an alternative bill, which would "authorize[] courts to award 'a reasonable attorney's fee in addition to the costs to a parent' who prevailed."[198] Senator Weicker explained that this bill would

> enable courts to compensate parents for *whatever reasonable costs they had to incur to fully secure what was guaranteed to them by the [EAHCA]*. As in other fee shifting statutes, it is *our intent* that such awards will include, at the discretion of the court, reasonable attorney's fees, *necessary expert witness fees, and other reasonable expenses which [are] necessary for parents to vindicate their claim to a free appropriate public education for their handicapped child.*[199]

The Senate then passed the bill without any opposition to Senator Weicker's statement.[200]

Just as the Senate expressed clear intent to award expert fees to prevailing parties in IDEA cases, Justice Breyer noted that the House version of the bill reflected the same viewpoint.[201] The Committee on Education and Labor created a substitute bill that would permit courts to

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192. *Id.*

193. *See generally* Allan G. Osbourne, Jr., Commentary, *Update on Attorney's Fees Under the IDEA*, 193 EDUC. L. REP. 1, 1 (2004). Congress enacted the HCPA to authorize courts to award reasonable attorneys' fees to prevailing parties in an IDEA lawsuit. *Id.* The HPCA amended the original version of the IDEA in response to the Supreme Court decision of *Smith v. Robinson*, 468 U.S. 992 (1984), which held that prevailing parties are not entitled to the recovery of attorneys' fees under the Act. *Id.*

194. *Arlington*, 126 S. Ct. at 2466 (Breyer, J., dissenting).

195. *Id.*; 131 CONG. REC. 1361, 1979–80 (1985).

196. *Arlington*, 126 S. Ct. at 2466–67; S. REP. No. 99-112, at 7 (1985).

197. *Arlington*, 126 S. Ct. at 2467; S. REP. No. 99-112, *supra* note 196, at 17–18.

198. *Arlington*, 126 S. Ct. at 2467 (quoting S. REP. No. 99-112, *supra* note 196, at 15–16).

199. *Id.* (quoting 131 CONG. REC. 21387, 21390 (1985)) (emphasis added).

200. *Id.*; 131 CONG. REC. 21387, 21393 (1985).

201. *Arlington*, 126 S. Ct. at 2467.

"'award reasonable attorneys' fees, expenses and costs' to prevailing parents," explicitly stating that "'[t]he phrase 'expenses and costs' includes *expenses of expert witnesses*.'"[202] No member of the House objected to this statement. When the bill reached the House floor, members of the House introduced another bill that, in still authorizing the same award of expert fees, would add a provision directing the Comptroller General, on behalf of the GAO, to study and report on the fiscal impact of the cost-shifting provision.[203] Subsequently, the House passed the bill.[204] Members of both the House and Senate then convened to discuss and decide on the two bills.[205] During this meeting, they created a Conference Committee Report that included the text of the new bill, which was a combination of the House bill's GAO provision and the cost-shifting provisions of both the House and Senate's respective bills.[206] Included in the Report was the statement that the "'*conferees intend that the term 'attorneys' fees as part of the costs' include . . . fees of expert witnesses.*'"[207] The House and Senate then, without opposition to this statement, adopted the newly crafted bill.[208] Thus, according to Justice Breyer, in approving the Report and in adopting the bill, Congress made its intent perfectly clear that the costs provision unquestionably would encompass expert fees.[209]

Justice Breyer then highlighted the IDEA's fundamental purpose of guaranteeing each child a FAPE to support his contention that Congress intended to grant prevailing parents the opportunity to recover expert fees. Justice Breyer explained that because the IDEA's ultimate goal is to afford every eligible child specially designed instruction under the Act at no cost to parents, forcing parents to shoulder the burden of additional costs in an IDEA case would run completely contrary to the Act's practical significance.[210] Furthermore, the IDEA encourages meaningful parent participation in every stage of the child's education and enumerates specific procedural protections to "assure[] parents that they may question a school district's decisions about what is 'appropriate' for

202. *Id.* (quoting H.R. REP. No. 99-296, at 5 (1985)).
203. *Id.*
204. *Id.*
205. *Id.*
206. *Id.* at 2467–68.
207. *Id.* at 2468 (quoting H.R. REP. NO. 99-687, at 5 (1986), *reprinted in* 1986 U.S.C.C.A.N. 1807, 1808).
208. *Id.*
209. *Id.*
210. *Id.*

their child."[211] Thus, Justice Breyer emphasized, disallowing reimbursement for expert fees will diminish the parents' faith in the IDEA as a means to successfully challenge the school district with an equal basis of knowledge and expertise.

Justice Breyer also noted that experts are both necessary and expensive.[212] Because the school district often retains many of its experts that are already on the staff, the "costs of experts may not make much of a dent in a school district's budget."[213] However, Justice Breyer stressed, the denial of an award of costs may substantially affect a parent's ability to utilize the services of experts in an action against a school district—and low-income parents may be forced to surrender their right altogether.[214] Moreover, according to Justice Breyer, the Court's concern that allowing the recovery of expert fees will essentially open the floodgates to parents receiving awards of "indeterminate magnitude, untethered to compensable harm" is unfounded.[215]

Justice Breyer also did not find convincing the majority's argument that the IDEA was enacted pursuant to the Spending Clause and that any conditions Congress attached to federal funding must be set out "unambiguously." While conceding that the IDEA's costs provision "does not clearly tell the States that they must pay expert fees to prevailing parents," Justice Breyer nevertheless disagreed with the inflexible approach taken by the Court in requiring the Act to provide "clear notice" to the states.[216] He noted that the Court has yet to decide a case involving a Spending Clause statute where it has required that every spending detail be "spelled out with unusual clarity."[217] Rather, the text of the statute must simply enable a state to "assess its meanings in terms of basic legislative purpose."[218] Justice Breyer expressed, however, that irrespective of whether Congress set out such conditions "unambiguously" in the present case, the Court has held in a prior IDEA-related case that this requirement "does *not* necessarily apply to legislation setting forth '*the remedies available against a noncomplying State*.'"[219] Therefore, the majority's mandate for linguistic clarity in the IDEA's costs provision to warrant the award of expert fees is misplaced; such a reading of the Act "risk[s] a set of judicial interpretations that can

211. *Id.* at 2468–69.
212. *Id.* at 2469.
213. *Id.*
214. *Id.*
215. *Id.* at 2471 (quoting Barnes v. Gorman, 536 U.S. 181, 190–91 (2001) (Souter, J., concurring)).
216. *Id.* at 2470.
217. *Id.* at 2470–71.
218. *Id.* at 2471.
219. *Id.* at 2471 (citation omitted).

prevent the program, overall, from achieving its basic objectives or that might well reduce a program in its details to incoherence."[220]

Justice Breyer then addressed how the Court read the IDEA's costs provision as implicitly referencing 28 U.S.C. § 1920, which enumerates the types of costs taxable by a federal court. Although this may be a possible reading of § 1415(i)(3)(B), Justice Breyer explained, it is not the only one.[221] Instead, one can read the provision as being twofold: granting a "general authority to award costs" *and* granting the specific authority to award attorneys' fees in addition to those costs.[222] Reading the statute in this manner, according to Justice Breyer, may be "linguistically the less natural," but it is still "legislatively the more likely."[223] Furthermore, the majority's reading of the provision as necessarily including the costs listed in § 1920 is inconsistent for an additional reason. Because § 1920 is a federal cost-shifting statute, it only applies in federal courts. Therefore, Justice Breyer argued, it seems contrary to Congress's vision of the IDEA that a federal statute would define the meaning of "costs" for all IDEA cases when much of IDEA-related legal activity occurs in administrative and state court proceedings.[224]

Finally, Justice Breyer discussed the Court's "most persuasive argument," which focused on the word *costs* as being a term of art.[225] Justice Breyer acknowledged that the Court has traditionally excluded expert fees from the scope of the word *costs* and has interpreted the term in a similar manner in other cost-shifting statutes.[226] However, he noted that the Court recognized in the *Casey* decision that Congress is free to redefine terms of art, even through a statutory provision such as Conference Committee Report No. 99-687.[227] But the present case is different, Justice Breyer reasoned, because Congress did not intend *costs* to be used as a term of art as it was in the *Casey* decision.[228] Rather, Congress intended the word *costs* to include additional expenses. This is evident, Justice Breyer concluded, based on Congress's acceptance of the GAO's briefing report which stated that "[p]arents can receive reimbursement

220. *Id.* at 2471.
221. *Id.* at 2472.
222. *Id.*
223. *Id.*
224. *Id.*
225. *Id.*
226. *Id.* at 2472–73.
227. *Id.* at 2473.
228. *Id.*

from state or local education agencies for . . . attorney fees *and related expenses* if they are the prevailing party" and "*[e]xpert witness fees . . . are [an] example[] of reimbursable expenses.*"[229] Thus, following his analysis of the legislative history of the IDEA, the basic purpose of the Act, and the proper reading of the statutory language of the costs provision, Justice Breyer found that the majority's decision to deny the recovery of expert fees to prevailing parents in an IDEA case is incorrect, for it "divorces law from life."[230]

C. Understanding the Arlington *Court's Choice of Statutory Interpretation*

Both the majority and dissenting opinions in *Arlington* illustrate the multitude of issues and considerations underlying the application of the costs provision of the IDEA. Although the decision stands for the exclusion of expert fees as recoverable costs under 20 U.S.C. §1415(i)(3)(B), it also represents something much more significant: *Arlington* now marks the Supreme Court's departure from securing a free appropriate public education for a child with a disability. Before discussing how the majority has departed from its prior rulings involving eligible children under the IDEA as well as the resulting policy implications of this decision, it is first necessary to understand why the majority adopted a strict reading of § 1415(i)(3)(B) and refused to look beyond the explicit terms of the provision to guide its decisionmaking. Thus, an examination of the competing methodologies the Supreme Court Justices use when interpreting statutory law is important to develop that understanding.[231]

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229. *Id.* at 2474 (quoting U.S. GEN. ACCOUNTING OFFICE, SPECIAL EDUCATION: THE ATTORNEY FEE PROVISION OF PUBLIC LAW 99-372, at 13 (1989)).

230. *Id.* at 2475.

231. This Comment does not attempt to provide a comprehensive account of the various doctrines of statutory interpretation utilized by the Supreme Court, because offering a general overview of the Court's approaches would hardly do justice to such an expansive and intricate subject. Rather, a discussion will follow explaining two dominant, yet competing, approaches to statutory interpretation that appear to be controlling in the majority and dissenting opinions in *Arlington*. However, note that much scholarly attention centers on the Supreme Court's canons of statutory interpretation, the benefits and drawbacks of the different approaches, and how these methods substantially affect the outcomes of statutory holdings. For an excellent discussion of prominent models of statutory interpretation employed by the Supreme Court, see Note, *Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court*, 95 HARV. L. REV. 892 (1982). *See also* John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 419–420 (2005) (discussing the shift in Supreme Court doctrines of statutory interpretation in the past two decades from one of "classical intentionalism" to one of "textualism" which has made a profound effect on academic writing and judicial behavior).

1. Methods of Statutory Interpretation

The concept of statutory construction, or a federal court's interpretation of statutory language to ascertain Congress's true intention of the law, symbolizes a balancing of powers of the three branches of government. While it is Congress's duty to enact federal law and policy, the Supreme Court has reserved to itself and the other federal courts, since the decision of *Marbury v. Madison*,[232] the power to say what the law means.[233] Therefore, the task of statutory interpretation is a shared responsibility among legislators, other elected officials, bureaucrats, and judges, which reinforces the constitutional scheme of separation of powers.[234] However, the line between making the law and determining what the law means becomes muddled when congressional intent is not clear on the face of the statute. As a result, the Supreme Court has historically resorted to doctrines of statutory interpretation to decipher legislative language in the context of specific factual issues when the federal statute at issue is facially ambiguous and unclear.[235]

Although many canons of statutory interpretation exist, the Supreme Court has predominantly employed two distinct, competing approaches when deciding issues implicating a vague or ambiguous statute.[236] These interpretative methodologies include what legal scholars and critics refer to as classical intentionalism,[237] or purposivism,[238] and textualism.[239]

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232. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule.").

233. Robin Kundis Craig, *The Stevens/Scalia Principle and Why It Matters: Statutory Conversations and a Cultural Critical Critique of the Strict Plain Meaning Approach*, 79 TUL. L. REV. 955, 959 (2005).

234. *Id.*

235. *Id.* at 958 (describing that Supreme Court has followed the English rule in statutory interpretation, considering both the current plain meaning and prior legal context).

236. For an outline of certain canons of statutory construction "that presuppose Congress's knowledge of and responsiveness to Court decisions," see Michael E. Solimine & James L. Walker, *The Next Word: Congressional Response to Supreme Court Statutory Decisions*, 65 TEMP. L. REV. 425, 428 (1992).

237. For clarity, this Comment will refer to the view that the court must consider the legislative history and the statute's goals and purposes in conjunction with the explicit wording of the statute for further evidence of Congress's intent as "classical intentionalism." *See* Manning, *supra* note 231.

238. *See* Craig, *supra* note 233, at 960–61 (referring to the purposivist approach as having the ultimate goal of effectuating congressional intent that preserves the balance of power between the legislative and judicial branches).

Classical intentionalism, a philosophy most often associated with its committed follower on the Supreme Court, Justice John Paul Stevens, posits "the idea that legislation is a purposive act" in which Congress formulates relatively coherent policy objectives but often expresses those policies inaccurately in statutory text.[240] Thus, according to classical intentionalists, it is the province of the judiciary to effectuate legislative intent by uncovering Congress's unexpressed background intentions, purposes, or goals relating to the statutory language at issue. Put differently, classical intentionalists emphasize the "fallibility of legislative expression."[241] Due to the "[l]imits on human foresight, imprecision in the tools of linguistic expression, and constraints on legislative resources," Congress inevitably drafts generally worded text that fails to explain the variety of situations that may invoke the given statute.[242] Therefore, if a statute's literal interpretation produces a result that appears to be in contravention with the law's background purpose, classical intentionalists assume that Congress "spoke clearly but inaccurately" in selecting the words to express its aims.[243] Consequently, proponents of this theory advocate making use of the statute's legislative history, committee hearings, conference reports, and prior case law as a means to provide contextual clarity to an otherwise ambiguous statutory term or phrase.

Textualism, in contrast, represents a theory of statutory interpretation that is diametrically opposed to classical intentionalism. As a "surrogate for actual legislative intent,"[244] textualism emphasizes a literalist reading of statutory terms in which judges must "give precedence to semantic context . . . [and] enforce the conventional meaning of a clear text," even if it does not appear to align properly with the statute's overarching purpose.[245] When discerning the meaning of unclear text, many textualist judges, including Justice Scalia of the Supreme Court, refuse to treat legislative history or references to explanations found in legislative debates and reports as authoritative evidence of congressional intent. Rather, proponents of this philosophy will only resort to "dictionary definitions, the statutory context, or . . . canons of construction" to supplement

239. *See generally* John F. Manning, *Competing Presumptions About Statutory Coherence*, 74 FORDHAM L. REV. 2009 (2006); Manning, *supra* note 231.
240. Manning, *supra* note 239, at 2009.
241. *Id.* at 2009–10.
242. *Id.* at 2010.
243. *Id.*
244. Note, *supra* note 231, at 894.
245. John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 3–4 (2001).

their interpretation.[246] To support their position, textualists explain that due to the inherent complexity of the legislative process, interpreters cannot easily determine whether Congress proscribed a meaning to the written text apart from that which it expressly included in the statute.[247] For this reason, judges must not assume the role of the legislator by attributing greater meaning to the literal words of a statute, for doing so would amount to rewriting the law duly enacted by Congress.[248] Instead, judges must strictly adhere to the statute's "chosen words" and assume that "what Congress enacts is precisely what Congress intends."[249]

Before the addition of Justice Scalia to the Supreme Court in 1986, the Court traditionally used statutory tools of construction that focused on "overall statutory structure, statutory goals and purposes, and legislative history" to properly give effect to congressional intent.[250] However, over the past two decades, the Supreme Court has witnessed a noticeable change in posture in which its seemingly dominant method of statutory interpretation has centered less on the contextualization of a statute's language and more on the literal meaning of its express terms.[251] This recent shift toward textualism in the Supreme Court has, in turn, particularly influenced decisions involving expert fees.

2. Deciphering the Meaning of the Expert Fees Provision

As a precursor to the expert fees issue in *Arlington*, the Supreme Court's decision of *West Virginia University Hospitals, Inc. v. Casey* supplies perhaps the clearest illustration of the conflict between the textualist and classical intentionalist readings of a statute.[252] In addition, it is interesting to note that when juxtaposing the *Casey* and *Arlington*

246. Ernest Gellhorn, *Justice Breyer on Statutory Review and Interpretation*, 8 ADMIN. L.J. AM. U. 755, 758 (1995).
247. Manning, *supra* note 231, at 420.
248. Note, *supra* note 231, at 895.
249. *Id.*
250. Craig, *supra* note 233, at 961, 980.
251. *See, e.g.*, T. Alexander Aleinikoff & Theodore M. Shaw, *The Costs of Incoherence: A Comment on Plain Meaning*, West Virginia University Hospitals, Inc. v. Casey, *and Due Process of Statutory Interpretation*, 45 VAND. L. REV. 687, 689 (1992); William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 624–25 (1990); Nicholas S. Zeppos, *Justice Scalia's Textualism: The "New" New Legal Process*, 12 CARDOZO L. REV. 1597, 1598–99 (1991).
252. 499 U.S. 83, 101–02 (1991).

decisions, the majority and dissenting opinions demonstrate remarkable similarities in their overall treatment of the respective cases. However, while Justice Alito's majority opinion in *Arlington* gains textualist support from Justice Scalia's reasoning in *Casey*, both dissenting opinions nevertheless offer powerful justification for reading unclear statutory text in a light favorable to congressional intent. And, when mindful of Congress's paramount objective in enacting the IDEA and the clarity of its explanations specifically addressing the recovery of expert fees, Justice Breyer's dissent in *Arlington* provides even stronger rationale for why the Supreme Court erred in its decision by ignoring persuasive evidence of Congress's actual purpose.

As previously mentioned,[253] *Casey* involved the question of whether plaintiffs in certain types of civil rights actions are entitled to recover expert fees as part of the "attorney's fees" awardable under 42 U.S.C. § 1988.[254] Justice Scalia's majority opinion examined the language of the provision and concluded that attorneys' fees and expert fees are distinct items of expense. Because the statute made no express mention of expert fees, the Court could not enlarge the statute to include within its scope that which Congress omitted, since doing so would "transcend[] the judicial function."[255] Scalia supported this argument by referencing thirty-four statutes that explicitly accounted for both attorneys' fees and expert fees as separate types of recovery.[256] Although recognizing that the denial of expert fees made the policy of § 1988 inconsistent with other statutes that preceded § 1988 and explicitly shifted such fees, Scalia remained steadfast to his textualist position, stating that when Congress provides for a particular meaning of a term, "it is not [the Court's] function to eliminate clearly expressed inconsistency of policy and to treat alike subjects that different Congresses have chosen to treat differently."[257] As a result, the Court held that due to the absence of express statutory authority, § 1988 does not permit the shifting of expert fees.[258]

Just as Justice Scalia approached the expert fees issue from a purely textualist standpoint, Justice Alito's majority opinion in *Arlington* also advanced this form of reasoning to ultimately reach the same conclusion.[259] Justice Alito alluded to the decisions of *Casey* and *Crawford* to reinforce his argument that because the IDEA does not explicitly authorize

253. *See* discussion *supra* Part IV.A.
254. *Casey*, 499 U.S. at 84.
255. *Id.* at 101 (citation omitted).
256. *Id.* at 88–90.
257. *Id.* at 100–01.
258. *Id.* at 102.
259. *See* discussion *supra* Part IV.A.

prevailing parents to recover expert fees, the Court could not give effect to a meaning beyond that specifically provided in the provision's literal language. While completely glossing over the policy reasons for the IDEA's enactment, Justice Alito focused largely on the text of the statute, concluding that in Spending Clause legislation, Congress must clearly identify the conditions attached to those states receiving federal money. However, as Justice Ruth Bader Ginsburg noted in a concurring opinion, Congress did not enact the IDEA pursuant only to Spending Clause authority.[260] Rather, it was also enacted pursuant to Section 5 of the Fourteenth Amendment as a means to aid the states in complying with their constitutional obligations of providing children with a FAPE.[261] Therefore, by framing the expert fees issue as purely invoking the Spending Clause, Justice Alito stripped the IDEA entirely of its contextual meaning, refusing to take into account other provisions establishing the right to expert assistance in IDEA proceedings as well as the Act's legislative history in which members of Congress clearly communicated their intent for expert fees to be recoverable costs under § 1415(i)(3)(B). Not surprisingly, Alito's particular reliance on the literal text of § 1988 as having "virtually identical language" as that of § 1415(i)(3)(B) to strengthen his final decision is analogous to Scalia's dependence on other fee-shifting statutes that either expressly permitted or denied expert fees to conclude the same.[262] Therefore, although the resulting effect of Scalia's reasoning in *Casey* was completely contradictory to the aim of affording protections for civil rights litigants under § 1988, and while Alito's decision in *Arlington* completely avoided the significance of the IDEA in securing added protections to parents of children with disabilities, both chose to sacrifice consistency in policy for the sake of judicial deference to Congress's duly enacted legislation—even though such a decision may not have been Congress's vision in the least.

Although a thoughtful consideration of the plain text of a federal statute and its pattern of usage is a necessary starting point when resolving a dispute, both Justice Stevens and Justice Breyer would not end the analysis there. In his dissent in *Casey*, Justice Stevens criticized the Court for "put[ting] on its thick grammarian's spectacles and ignor[ing] the available evidence of congressional purpose and the

260. *See supra* note 190.
261. Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 126 S. Ct. 2455, 2464 (2006) (Ginsburg, J., concurring).
262. *Id.* at 2462.

teaching of prior cases."[263] He explained that it makes little sense to permit attorneys' fees to a prevailing plaintiff in a civil rights action, but simultaneously deny fee recovery for experts whose services were essential and provided a substitute for the time spent by an attorney.[264] Moreover, he warned that to permit the reimbursement for other categories of expenses and yet deny the same for expert fees "is both arbitrary and contrary to the broad remedial purpose that inspired the fee-shifting provision of § 1988."[265] Justice Stevens emphasized that the intention behind the congressional enactment of § 1988 was to overturn *Alyeska Pipeline Service Co. v. Wilderness Society*, which had disallowed the earlier practice of shifting attorneys' fees and expert fees in certain federal cases.[266] To support his argument, Justice Stevens referred to House and Senate Committee hearings and reports that all underscored Congress's intention to shift costs under § 1988, including expert witness fees.[267] Thus, Justice Stevens inferred that Congress sought to return the courts to their pre-*Alyeska* practice of shifting fees in civil rights cases so that those acting as private attorneys general could be made "whole again," which would, in turn, encourage public interest litigation.[268] And, shortly after the decision this inference proved true: Congress amended § 1988, which effectively abrogated *Casey*.[269]

Like Justice Stevens, Justice Breyer adopted a classical intentionalist reading of § 1415(i)(3)(B) in *Arlington* and refused to view the plain meaning of the costs provision from a literalist standpoint. Breyer instead rooted his analysis in the Act's underlying purposes and drafting history to give proper context to § 1415(i)(3)(B).[270] Breyer found that the majority's decision to overlook Congress's objective to afford prevailing parents the ability to recover expert fees essentially stripped the Act of its practical significance.[271] By disallowing such reimbursement, parents would no longer have the same participatory rights and procedural protections, which is a "far cry from the level playing field that Congress envisioned."[272] Similar to Stevens's approach in *Casey*

263. *Casey*, 499 U.S. at 113 (Stevens, J., dissenting).
264. *Id.* at 107.
265. *Id.* at 107–08.
266. *Id.* (citing Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 269 (1975)).
267. *Casey*, 499 U.S. at 108–11.
268. *Id.* at 109, 111.
269. Civil Rights Act of 1991, Pub. L. No. 102-166, § 113, 105 Stat. 1071, 1079 (codified at 42 U.S.C. § 1988(c) (2000)).
270. *See* discussion *supra* Part IV.B.
271. Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 126 S. Ct. 2455, 2469 (2006) (Breyer, J., dissenting).
272. *Id.* at 2470.

regarding the expert fees issue, Breyer explained that the majority's literal reading of the word *costs* in *Arlington* distorted the actual meaning of the term and rendered the remaining statutory provisions inconsistent. He emphasized that such a mechanical application of the term for purposes of "linguistic clarity" cannot assist the courts in reaching sound results.[273] By abandoning all consideration of congressional floor debates, hearing testimony, and committee reports, the Court did a disservice to not just those protected under the statute, but to those who created and enacted that statute as well. Breyer also implied that this approach inhibited the courts from carrying out an important and necessary function: the interpretation of statutory law where Congress's work product suffered from an omission or inadvertent error.

While some textualists might argue that the omission of the phrase "expert witness fees" could hardly be a mistake, given the fact that Congress addressed the expert fees issue in committee reports and hearings prior to the IDEA's enactment and expressly included the phrase "expert fees" in prior fee-shifting statutes, Justices Breyer and Stevens would disagree with this assessment. Rather, as Justice Stevens admonished in *Casey*, "The fact that Congress has consistently provided for the inclusion of expert witness fees in fee-shifting statutes . . . is a weak reed on which to rest the conclusion that the omission of such a provision represents a deliberate decision to forbid such awards."[274] The Court must instead, according to both Justices, allow for the possibility of a different interpretation of the costs provision that is faithful to true congressional intent. Thus, in criticizing the Court's rigid approach to the expert fees issue, Justice Breyer illustrated how this inflexibility did little justice to the IDEA's fundamental goals of securing procedural and substantive protections for parents and their children. Now, just as the civil rights litigants had to await congressional amendment of § 1988, parents must also rely on the revision of § 1415(i)(3)(B) to undo the harm imposed by the majority's decision.

D. Why the Arlington *Court Made the Wrong Decision*

When retracing the Supreme Court's rather liberal approach to statutory interpretation in some of its recent decisions involving the

273. *See id.* at 2471; *see also* Gellhorn, *supra* note 246, at 764.
274. W. Va. Univ. Hosp., Inc. v. Casey, 499 U.S. 83, 115–16 (1991) (Stevens, J., dissenting).

IDEA, the strictly textualist method the Court applied in *Arlington* seems both arbitrary and improper. This is especially evident in light of Congress's goal of entrusting the Supreme Court with the responsibility of interpreting the provisions of the IDEA when disputes arise between parents and school districts and its vision that the core purposes of the Act would guide that interpretation. One of those purposes is to provide children with disabilities an appropriate education at no cost to their parents.

Until recently, the Supreme Court has been faithful to its mission of carrying out Congress's instruction and has aligned its reasoning and decisions in IDEA cases with the aim of maintaining the Act's substantive and procedural protections.[275] In doing so, the Court, despite its recent shift toward textualism, has placed considerable weight on the Act's legislative history to properly interpret the meaning Congress attached to specific terms in the statute. For instance, in *Rowley*, the Court strongly relied upon the Senate and House Reports to determine the meaning of an "appropriate" education because Congress never provided a substantive definition of the term in the IDEA.[276] The Senate Report discussed statistics compiled by the Bureau of Education for the Handicapped, showing that only 3.9 of eight million children with disabilities were receiving an "appropriate education" in 1975.[277] This report also included a table illustrating the number of children "served" and the number of those "unserved" in 1975, and a similar discussion and table appeared in the House Report as well.[278] The *Rowley* Court thoroughly discussed these reports in its decision to demonstrate that Congress sought to provide children under the Act with an "appropriate" education conferring some educational benefit, rather than one that would maximize each student's potential. The Court emphasized the importance of looking to the Act's legislative history when attempting to define a statutory term, such as "appropriate" education, and explained that "[l]ike many statutory definitions, this one tends toward the cryptic rather than the comprehensive, but that is scarcely a reason for abandoning the quest for legislative intent."[279] The Court then concluded that "the Senate and House Reports unmistakably disclose Congress'[s] perception of the type of education required by the Act . . . ."[280]

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275. *See supra* Part III.C–D.
276. Bd. of Educ. v. Rowley, 458 U.S. 176, 195–97 (1982).
277. *Id.* at 195 (quoting S. REP. NO. 94-168, at 8 (1975)).
278. *Id.* (citing S. REP. NO. 94-168, at 8 (1975); H.R. Rep. No. 94-332, at 11–12 (1975)).
279. *Id.* at 188.
280. *Id.* at 197.

This comprehensive reading and application of Congress's statements in the Supreme Court's ultimate decision in *Rowley*, however, was hardly the technique employed by the majority in *Arlington*. With the exception of the dissent, the *Arlington* Court barely even mentioned the drafting history of the IDEA's costs provision, including the bills introduced by the Senate and the House discussing the recovery of costs, to gain insight into the congressional intent behind its wording of the provision.[281] The only time the Court did discuss an aspect of the legislative history of this provision was in its reference to the GAO Report.[282] While it seems that Congress's instruction to the GAO to study the "attorneys' fees, costs, and expenses" awarded to prevailing parties in IDEA cases, including the hours spent by attorneys and consultants, provides a clear indication that Congress expected § 1415(i)(3)(B) of the IDEA to be read so as to include expert costs, the majority found this interpretation to be "incorrect." The Court simply concluded that having knowledge of the costs incurred by parties in an IDEA suit might be useful in considering future procedural or fee-shifting amendments. Additionally, because the GAO study involved obtaining data on expenses that could not be taxed as costs, the majority found that it does not necessarily follow that Congress intended the recovery of expert fees.

Even if Congress was unclear in its purpose behind the implementation of the GAO Report, it is still markedly apparent that Congress intended expert fees to be included as recoverable costs because it explicitly said so in Conference Committee Report No. 99-687.[283] However, the Court in *Arlington* overlooked the importance of this Report and refused to grant any leeway in interpreting the meaning of "costs," despite its forthright acceptance in *Rowley* of using legislative history as a means to clarify an otherwise ambiguous term. Whereas the *Rowley* Court stressed that a statutory term that "tends toward the cryptic" does not provide an excuse for "abandoning the quest for legislative intent," the Court here concluded the opposite in stating that the legislative history was not enough to render a decision favorable to the Murphys. Thus, the Court, in favoring a more literal reading of the statute, departed from the position it assumed in *Rowley*

281. For a discussion on Justice Breyer's *Arlington* dissent, see discussion *supra* Part IV.B.
282. *See* discussion *supra* Part IV.A.
283. *See* discussion *supra* Part III.D.

by failing to consult the relevant legislative history to inform its analysis on the proper meaning of an important term.

Not only did the Supreme Court demonstrate a change in posture with respect to the weight given to the IDEA's legislative history, but it also fell short in its once consistent commitment to ensuring that every eligible child receives a FAPE. For example, in *Cedar Rapids Community School District v. Garret F.*, the Court sought to uphold Congress's vision of providing disabled children meaningful access to education in its broad interpretation of the "related services" provision of the IDEA.[284] Rather than construing services provided by a qualified school nurse as excludable "medical services" under the Act, the Court found, in keeping with the purpose of the IDEA, that "related services" did encompass the type of care at issue in the case, despite the fact that the provision did not provide a clear definition of the phrase.[285] Likewise, in *School Committee of Burlington v. Department of Education*, the Supreme Court found that the IDEA confers broad discretion to grant appropriate relief.[286] Noting that the term *appropriate* was not specified in the Act, the Court nevertheless authorized the reimbursement of tuition fees to parents who unilaterally placed their child in a private school after the school district's IEP had inappropriately placed the child in a public school.[287] In justifying its decision, the Court opined that "[a]bsent other reference, the only possible interpretation is that the relief is to be 'appropriate' in light of the purpose of the Act."[288] As a successor to *Burlington*, *Florence County School District Four v. Carter* also signified the Supreme Court's commitment to the IDEA's promise of a FAPE when it held that parents are entitled to reimbursement of tuition costs resulting from their child's placement in a private school regardless of whether the school is approved by the state or complies

284. 526 U.S. 66, 73 (1999); *see also* Irving Indep. Sch. Dist. v. Tatro, 468 U.S. 883, 891 (1984) (holding that a service that permits a child with a disability to remain at school during the day is necessary to provide the child with the meaningful access to education that Congress intended).

285. *Garret F.*, 526 U.S. at 74 n.6. Here, the student was paralyzed from the neck down and required the use of a ventilator and other health services to attend school. *Id.* at 69. The student's mother requested that the school district maintain financial responsibility for the healthcare services he required during the school day; however, the district disagreed. *Id.* at 70. In finding for the student, the Supreme Court held that the IDEA's definition of "related services" includes ventilator services that can be administered by a school nurse. Therefore, the Court concluded that the district had a financial responsibility under the IDEA to provide all the services in dispute to the student during the school day. *Id.* at 77–79.

286. 471 U.S. 359, 369 (1985).

287. *Id.* at 369.

288. *Id.*

with all the terms set forth in the IDEA.[289] The Court found that while this holding may result in a significant financial burden on a school district that produces an inappropriate IEP for the given child, to read the relevant provision as barring reimbursement in this case "would defeat [the] statutory purpose."[290]

Together, these past decisions illustrate how the Supreme Court has turned to the underlying purposes of the IDEA to give meaning to a relevant term or phrase that is otherwise ambiguous standing alone. However, the *Arlington* Court took the opposite approach by circumventing the legislative purpose of the IDEA when it defined the meaning of "costs." This avoidance is especially evident from the Court's rejection of the Murphys' argument that their interpretation of the IDEA furthers the Act's overarching goals of providing a FAPE to all children with disabilities and safeguarding parents' rights to challenge a school district's decision. The Court simply determined these goals to be "too general" to provide a deeper understanding of the term *costs*. Although the Supreme Court's increasingly textualist approach to statutory interpretation provides an explanation of why it decided *Arlington* in this manner, such a conclusion still does not make sense in light of the Court's past decisions which used a far more liberal approach to clarify the meaning of a vague term. Moreover, the *Arlington* decision now impedes, rather than advances, the goals of the IDEA by imposing a significant obstacle for low-income parents, especially those having children with ASD, who seek to challenge the school district. This reality is especially poignant when taking into account the Court's recent decision of *Schaffer v. Weast*.[291]

E. Schaffer v. Weast *in Context*

At first glance, *Schaffer v. Weast* represents the Supreme Court's concise holding that parents who challenge the appropriateness of their child's IEP in an IDEA hearing must bear the burden of proof, unless state law specifies otherwise.[292] This holding, in isolation, does not

289. Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 14 (1993).
290. *Id.* at 13–14.
291. 546 U.S. 49 (2005).
292. *Id.* at 62. To clarify, the burden of proof in an administrative hearing is placed on the party seeking relief. Although the burden of proof was on the child's parents in *Schaffer* because they brought the claim against the school district, Justice Sandra Day O'Connor noted that the "rule applies with equal effect" to school districts seeking to

seem to contravene the underlying purposes of the IDEA because parents still retain all the procedural protections afforded by the Act. However, when viewing *Schaffer* in conjunction with the decision in *Arlington*, some of these parental safeguards seem to quickly dissipate.

Justice Sandra Day O'Connor, in writing for the majority, attempted to dispel the notion that the school district bears a "unique informational advantage" by reiterating that the IDEA guarantees parents the right to review all of the school's records relating to their child.[293] The problem, though, is not necessarily access to the school district's information; rather, the problem stems from the parents' inability to synthesize that information without a special education expert.[294] Expert assistance is critical to parents in IDEA cases because typically neither the parents nor their respective attorneys are "equipped to advocate the specifics" of what constitutes an appropriate IEP that is designed to provide the child with a FAPE.[295] It is also largely undisputed that expert testimony is of critical importance to the school district as well; but the difference is that for the latter party, experts are readily available for consultation. School districts employ internal experts who develop special education programs for disabled students and have the advantage of working directly with the child.[296] When a dispute arises regarding the child's IEP, the school district depends on these experts, which may include special education teachers, psychologists, guidance counselors, and other specialists, to testify on behalf of the school district's position.[297] Parents, on the other hand, do not have this luxury.

In *Schaffer*, Justice O'Connor addressed this imbalance of expertise by noting that parents are not left without "an expert with the firepower to match the opposition"[298] because the IDEA provides parents the right to an independent educational evaluation (IEE) of their child at public

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challenge an IEP. *Id.* Also, Justice O'Connor explained that in this case, the pertinent question was with regard to which party bore the burden of *persuasion*. Because the parent's evidence and the school district's evidence were in equipoise (evenly balanced), the Court did not have to direct its attention to who properly bore the burden of *production. Id.* at 56. For a detailed commentary on *Schaffer v. Weast*, see Allan G. Osbourne, Jr. & Charles J. Russo, *The Burden of Proof in Special Education Hearings:* Schaffer v. Weast, 200 ED. L. REP. 1 (2005).

293. *Schaffer*, 546 U.S. at 61; 20 U.S.C. § 1415(b)(1) (Supp. IV 2004).

294. Brief of Respondents at 23, Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 126 S. Ct. 2455 (2006) (No. 05-18).

295. Neosho R-V Sch. Dist. v. Clark, 315 F.3d 1022, 1036 (8th Cir. 2003) (Pratt, J., dissenting) (discussing the need for expert witness testimony on behalf of the child's parents in an IDEA suit and how denying the recovery of expert fees will foreclose the opportunity of many low-income families to successfully litigate their claim).

296. *Id.*

297. *Id.*; Brief of Respondents, *supra* note 294, at 23.

298. *Schaffer*, 546 U.S. at 61.

expense.[299] However, obtaining an IEE does not extinguish the need for retaining an expert. An IEE may include an evaluation of the child's academic and cognitive skills as well as any other skill related to the child's educational needs.[300] But the evaluation likely stops there. The IDEA does not require evaluators to review the evidence the school district will use in the due process hearing, develop questions for the cross examination of the district's experts, or even testify on behalf of the parents at the hearing.[301] Moreover, even if the evaluator were to advise the parents or testify on their behalf, there is no requirement that the parents receive these services at public expense.[302]

Now, not only do parents bringing an action under the IDEA have to supply sufficient evidence showing the inadequacy of their child's IEP to meet their burden of proof, they also have to bear the expense of hiring an expert even if they receive a favorable judgment. For low-income parents, the cost of retaining an expert is a considerable expense, and since parents who win against the school district generally do not receive compensatory damages, there is no surplus of money resulting from the judgment to offset the fees of the expert.[303] Furthermore, because expert testimony is, more often than not, a necessary element in IDEA due process hearings, parents who lack the resources to fund an expert are "left with nothing but their attorney to protect their rights" and the expert's testimony on behalf of the school district "goes unchallenged."[304] Therefore, *Schaffer*'s placement of the burden of proof on parents who attempt to challenge the school district coupled with *Arlington*'s denial of the recovery of expert fees produces a serious dilemma for low-income parents: they must either relinquish their right to challenge the school district or place themselves in financial risk by having to shoulder the costs of an expert.

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299. *Id.*

300. Wayne Steedman, *Independent Educational Evaluations: What? Why? How? Who Pays?*, http://www.wrightslaw.com/info/test.iee.steedman.htm (last visited Feb. 29, 2008).

301. Brief of Respondents, *supra* note 294, at 24.

302. *Id.*

303. For a discussion on why compensatory damages are not awarded to prevailing parties in IDEA lawsuits, see Angela Hamilton, Comment, *Damage Control: Promoting the Goals of the Individuals With Disabilities Education Act by Foreclosing Compensatory Damage Awards*, 2001 UTAH L. REV. 659.

304. Neosho R-V Sch. Dist. v. Clark, 315 F.3d 1022, 1036 (8th Cir. 2003) (Pratt, J., dissenting).

V. THE AFTERMATH OF *ARLINGTON*

A. The Impact on Children with ASD

While the *Schaffer* and *Arlington* decisions will undoubtedly affect low-income parents who have children with any type of disability, this Comment argues that low-income parents of children with ASD may face even greater setbacks.[305] As previously mentioned, there is no cure for autism and there is no single agreed upon intervention program that has been proven to yield positive results for all children with the disability. Despite these uncertainties, however, one thing is known: time is of the essence. Following the child's diagnosis, experts advise parents to begin intensive treatment "as soon as possible, while the child's mind is malleable and the developmental intervention may have the best chance of achieving optimal results."[306] Thus, the immediacy of the situation causes parents of a child with ASD to look to the school district for support, entrusting its staff with the responsibility of developing and implementing an IEP that is designed to benefit their child and provide him or her with a FAPE. But if the school district fails to evaluate all areas of the child's disability and, subsequently, produces an inappropriate IEP, the result will leave indelible marks.[307] The child may significantly regress as a result of improper treatment, and it may take twice as long to recoup the skills that he or she already possessed—not to mention the child may already be at a lower educational level than other children of the same age.[308]

Because of the complexity of the disorder, in which every child displays a unique combination of communicative and behavioral characteristics, it is unlikely that parents challenging a school district's educational decision will be able to successfully advocate for their child without the help of an expert.[309] In many respects, this is due to the fact that the parents are unable to regularly observe their child throughout the day in a school setting and, thus, may not be able to differentiate which, if any, intervention strategies are promoting positive outcomes for their child and which ones are not. Moreover, because a common attribute of

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305. *See* discussion *supra* Part II.

306. AutismPro, Autism FAQs, http://www.autismpro.com/aboutautismfaq.php (last visited Feb. 29, 2008).

307. *See, e.g.*, Porter v. Bd. of Trs., 307 F.3d 1064, 1068 (9th Cir. 2002) (finding that the school district's failure to provide an autistic boy a FAPE resulted in significant, irreparable deficiencies to his educational, social, and physical well-being).

308. Systematic Treatment of Autism and Related Disorders, STAR Information Series: Extended School Year Information, http://www.starautism.louisville.edu/images/pdf/ESY.pdf (last visited Feb. 29, 2008).

309. *See* Mandlawitz, *supra* note 39, at 497.

the disorder is the child's inability to fully communicate his or her emotions and needs, the parents may be without the help of their child's input when trying to point out the deficiencies in the school district's program. For these reasons, parents of children with ASD require the assistance of experts that are knowledgeable about the disorder, are able to assess the specific needs of their child, and can determine whether the school has developed an appropriate, individually tailored program that will permit the child to benefit from his or her educational experience.

Unfortunately, the *Arlington* decision now prevents parents of children with ASD from recovering nonattorney expert fees if they prevail in litigation against the school district. While some parents will not be dissuaded from pursuing an IDEA lawsuit by the inability to recover expert fees, many parents of children with ASD will not have such an opportunity because they will not have the financial backing to fund an expert. According to the Special Education Elementary Longitudinal Study (SEELS) conducted by the United States Department of Education in 2002, approximately fifty-one percent of families with children with ASD have a yearly income of less than $50,000, and 16.3% of those families have an annual household income of less than $20,000.[310] These statistics clearly indicate that a substantial number of families with children with ASD do not have an income that will allow for additional expenditures such as expert fees. As Justice Breyer admonished, while the costs of experts "may not make much of a dent in a school district's budget," the same cannot be said for low-income parents who will likely be unable to cover such costs, even if the fee is nominal.[311] Thus, although parents have uniformly prevailed in their IDEA claims when the school district's program was deemed to be insufficient to meet the child's need for intensive services, now *Arlington* and *Schaffer* together may foreclose the opportunity of low-income parents of children with ASD to pursue litigation altogether, even if their argument is meritorious.

310. MARY WAGNER ET AL., U.S. DEP'T OF EDUC., THE CHILDREN WE SERVE: THE DEMOGRAPHIC CHARACTERISTICS OF ELEMENTARY AND MIDDLE SCHOOL STUDENTS WITH DISABILITIES AND THEIR HOUSEHOLDS 37 (2002), *available at* http://www.seels.net/designdocs/SEELS_Children_We_Serve_Report.pdf.

311. Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 126 S. Ct. 2455, 2469 (2006) (Breyer, J., dissenting).

*B. What Needs To Be Done Post-*Arlington

1. Revision of 20 U.S.C. § 1415(i)(3)(B)

In her concurring opinion in *Arlington*, Justice Ginsburg explained that the judiciary cannot rewrite the text of 20 U.S.C. § 1415(i)(3)(B).[312] Rather, she emphasized that "[t]he ball . . . is properly left in Congress' court to provide, if it so elects, for consultant fees and testing expenses beyond those IDEA and its implementing regulations already authorize."[313] Therefore, in keeping with the overarching purpose of the IDEA to secure every child with a disability an appropriate education at no cost to parents, Congress should amend 20 U.S.C. § 1415(i)(3)(B) to permit courts, at their discretion, to award expert fees to a prevailing parent in an IDEA-related lawsuit. Although it appears from the legislative history of the Act that Congress intended to include expert fees as part of the recoverable "costs" under the provision, § 1415(i)(3)(B) should still be revised to explicitly include the phrase "expert fees" as part of those costs. Congress should also specify the other types of recoverable costs under this section so as to prevent any future confusion for parties litigating over this provision regarding what the term encompasses. Not only will this simple revision allow for clearer interpretation, it will also substantially aid many low-income parents in their quest to obtain a FAPE for their child.

2. Family Involvement

Children with ASD present special challenges for their parents and for the school district. Parents dream for their child to have a healthy, normal lifestyle. When learning that a developmental disorder might prevent their son or daughter from achieving that high quality of life they envisioned, they seek out the best therapy available. This places a heavy burden on school professionals who are charged with the responsibility of selecting a treatment or intervention option that will produce positive outcomes for the child and will satisfy the concerns of the parents. However, even with the IDEA mandate requiring parental involvement in the IEP process, many school districts have lost hearings involving children with ASD because they did not allow *meaningful* parent participation.[314] Because the child's parents play an essential role in the planning and implementation of support services, school districts must include parents in all aspects of their child's education. This

312. *See supra* note 190.
313. *Arlington*, 126 S. Ct. at 2464 (Ginsburg, J., concurring).
314. Iovannone et al., *supra* note 36, at 161.

includes ensuring that there are no delays in responding to the parents' requests to evaluate their child, conducting the evaluation, developing an appropriate IEP, and implementing the IEP.[315] If the school district actively works to keep the lines of communication open between the parents and the other members of the child's IEP team, this will yield a stronger relationship among the parties that is built on trust and confidence. Moreover, it is likely that less dissatisfaction will result on behalf of the parents because they will be aware of the services afforded to their child, the progress he or she is—or is not—making, and how they can effectively address any of their concerns. This, in turn, will minimize the number of lawsuits brought against the school district by unhappy parents who seek to contest the appropriateness of their child's IEP, and there will be less of a concern regarding the inability to recover expert fees.

3. Highly Qualified and Well-Trained School Personnel

To ensure that the child with ASD is receiving an appropriate individualized education, the school district must employ professionals with expertise in the area of autism to conduct comprehensive evaluations and carry out effective intervention programs. In doing so, the school district must establish that its special education teachers who teach core academic subjects[316] meet the "highly qualified" teacher standards set forth in the 2004 Reauthorization of the IDEA.[317] These standards require the teacher to have obtained full state certification as a special education teacher or have passed the state special education licensing examination and hold a license to teach in the given state as a special education teacher.[318] The teacher must also hold at least a bachelor's degree, and he or she must not have had a special education certification or licensure requirement waived on an emergency, provisional, or temporary basis.[319]

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315. Yell et al., *supra* note 35, at 187.

316. Core subjects include English, reading or language arts, mathematics, science, foreign languages, civics and government, economics, arts, history, and geography.

317. 34 C.F.R. § 300.18(a)–(h) (2007). Also note that Congress intended to align the IDEA with the No Child Left Behind Act by instituting new changes in the 2004 Reauthorization. Some of these changes include the adoption of the "highly qualified" teacher standards from the No Child Left Behind Act with some slight modifications.

318. *Id.* § 300.18(b)(1)(i).

319. *Id.* § 300.18(b)(1)(ii)–(iii). For charter schools, "highly qualified" means that the teacher meets the certification or licensing requirements provided for in the state's public charter school law. *Id.* § 300.18(b)(1)(i).

However, if the teacher is only providing consultative or collaborative support to a "highly qualified" teacher, he or she does not need full state certification. Rather the special educator must have at least obtained a bachelor's degree[320] and must be receiving "high-quality professional development that is sustained, intensive, and classroom-focused,"[321] participating in an intensive supervision program,[322] carrying out the functions of the teacher for a specified period of time that does not exceed three years,[323] and showing satisfactory progress toward obtaining state certification.[324] If a school district complies with these requirements, fewer substantive and procedural violations will occur and the district's personnel will be well equipped to create and facilitate appropriate educational programs for children with ASD.

VI. CONCLUSION

The Supreme Court's decision of *Arlington Central School District v. Murphy* stands in the way of many parents who seek to challenge the school district's IEP for their disabled child. Foreclosing the award of expert fees to prevailing parents in an IDEA suit may categorically remove low-income parents from the due process scheme because they cannot fund an expert. This is especially troubling for parents of children with ASD who require an expert to assess the behavioral and communicative complexities their child possesses and to determine whether the school district has developed an appropriate IEP to meet their child's individualized needs. Therefore, it is imperative that Congress revise 20 U.S.C. § 1415(i)(3)(B) to specify the inclusion of expert fees as part of the recoverable costs. In doing so, Congress will not only preserve the IDEA's fundamental goal of protecting the right of disabled children to a FAPE, but it will also ensure that parents are better equipped with "the firepower to meet the opposition" when advocating for their child.[325]

320. *Id.* § 300.18(b)(3).
321. *Id.* § 300.18(b)(2)(i)(A).
322. *Id.* § 300.18(b)(2)(i)(B).
323. *Id.* § 300.18(b)(2)(i)(C).
324. *Id.* § 300.18(b)(2)(i)(D).
325. Schaffer v. Weast, 546 U.S. 49, 61 (2005).