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By Ashlie D’Errico Surur *

I. INTRODUCTION

The Individuals with Disabilities Education Act (“IDEA”) focuses on providing a fair and appropriate public education (also known as a “FAPE”) to all individuals with disabilities.¹ With its enactment of the special education legislation, Congress anticipated that disputes would arise between school districts and parents with respect to a child’s right to a FAPE.² Congress also believed school districts would have a “natural advantage” over the parents of a disabled child.³ Thus, to ensure meaningful parental participation and accurate resolutions of disputes, Congress created procedural safeguards.⁴ The goal was to create an even playing field where

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³ Id.
⁴ Id. See generally 20 U.S.C. § 1415 et seq., for a list of the procedural safeguards in the IDEA.
parents could meaningfully participate in the development of their child’s education and could also challenge inappropriate decisions rendered by school districts.\(^5\)

Then, on June 26, 2006, the Supreme Court handed down a major decision regarding the procedural safeguards mandated by the IDEA. In *Arlington Central School District Board of Education v. Murphy*,\(^6\) the Court held that prevailing parents could not recover expert fees as part of their litigation costs.\(^7\) The decision was rendered in light of a jurisdictional split on whether the term “costs” as laid down in 20 U.S.C. § 1415(i)(3)(B) included expert fees.\(^8\) The *Arlington* decision came in the wake of another significant special education law case. In *Schaffer v. Weast*,\(^9\) the Supreme Court held that the burden of proof\(^10\) in an administrative hearing challenging an individualized education program (“IEP”) is placed upon the party seeking relief.\(^11\) Viewed in light of one another, these decisions create entirely new problems for the parents of children with disabilities. These decisions not only impact the nature of the IDEA’s procedural safeguards, but also have the potential to diminish a parent’s ability to effectively challenge a school district’s decisions. In the wake of *Schaffer*, more than ever, experts are necessary in IDEA litigation.\(^12\) Yet, as a result of *Arlington*, the cost of obtaining an expert just might be too much for some parents to bear.

This case note provides an analysis of the Court’s decision in *Arlington* and its impact on the future of special education law and those individuals involved in it. Part II of this article is devoted to the historical background of special education law and the Spending Clause of the United States Constitution. Part III sets forth the substantive and procedural facts of *Arlington*. Then in Part IV, this article presents a critical analysis of the majority, concurring, and dissenting opinions in *Arlington*. Part V deals with the potential legal

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6. 126 S. Ct. at 2455.
7. Id. at 2463.
8. Id. at 2458.
10. In this context the burden of proof refers to the burden of persuasion.
12. See Arlington, 126 S. Ct. at 2469 (Breyer, J., dissenting).
and social consequences of the decision. Finally, Part VI concludes this article.

II. HISTORICAL BACKGROUND

A. The History of Special Education Law in the United States

Disability is a natural part of the human experience and in no way diminishes the right of individuals to participate in or contribute to society. Improving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities.\textsuperscript{13}

This quote is from the Congressional Findings section of the Individuals with Disabilities Education Improvement Act of 2004 ("IDEA 2004"). It provides a modern view of disability, a view that did not come into effect until the latter part of the Twentieth century. Until 1975, more than one million children were excluded from school because of a disability.\textsuperscript{14} It was not until November 29, 1975, when Congress enacted the Education for All Handicapped Children Act (Public Law 94-142) ("EAHCA"), that children with disabilities were finally given full access to the public school system.\textsuperscript{15} Sadly, exclusion from public schools is only part of the deep and shocking history of special education in the United States. For the majority of the Nineteenth and Twentieth Centuries, individuals with disabilities were treated as subhuman.

1. Early Cases, Eugenics, Forced Sterilization, and Euthanasia in the United States

\textsuperscript{13} 20 U.S.C. § 1400(c)(1). This quote is taken from the Congressional Findings sections of the IDEA 2004.
\textsuperscript{14} Id. § 1400(c)(1)(D), n.10.
\textsuperscript{15} Id.
Several late Nineteenth and early Twentieth Century cases are indicative of society’s substandard treatment of individuals with disabilities. In 1893, the Supreme Court of Massachusetts held that a school had properly excluded a child from attending the school because he “was too weak-minded to derive profit from instruction.” The court went on to hold that, “whether certain acts of disorder so seriously interfere with the school that one who persists in them, either voluntarily or by reason of imbecility, should not be permitted to continue in the school, is a question which the statute makes [the School Committee’s] duty to answer.” Thus, according to the Watson court, the cause of the disruption was immaterial. Rather, it was solely within the school’s discretion to decide whether or not to exclude the child from public school. However, the most revealing evidence of the court’s and society’s feelings towards the disabled lies in the Watson court’s explanation of why it has chosen to label this child “weak-minded.” This child is given the label “weak-minded” because he is “troublesome to other children, making unusual noises, pinching others, etc.,” and because he is “unable to take ordinary, decent, physical care of himself.” Surprisingly, these explanations have nothing to do with mental capacity, but rather include only the physical attributes and outward impressions of the child.

Later, in 1919, the Wisconsin Supreme Court upheld a school’s exclusion of a thirteen-year-old cripple child named Merritt. Merritt had been crippled since birth. His paralysis affected his entire physical and nervous system so that he did not have normal control of his voice, hands, feet, and body. He had a high, rasping tone of voice, and would make uncontrolled facial contortions. On these facts the court made the following statement:

17. Id. at 845.
18. Id.
19. Id.
20. Id. at 864 (emphasis added).
22. Id. at 153.
23. Id.
24. Id.
It is claimed, on the part of the school board, that his physical condition and aliment produces a depressing and nauseating effect upon the teachers and school children; that by reason of his physical condition he takes up an undue portion of the teachers time and attention, distracts the attention of other pupils and interferes generally with the discipline and progress of the school.\textsuperscript{25}

In the record there was no evidence that Merritt suffered from mental retardation or that he was unable to learn.\textsuperscript{26} The school’s sole reason for exclusion was that his physical appearance made everyone depressed and nauseous.\textsuperscript{27}

In 1914, just prior to the \textit{Beattie} decision, the theory of Eugenics was being taught at major universities in the United States including: Harvard, Columbia, Cornell, Brown, Wisconsin, Northwestern, Clark, and several others.\textsuperscript{28} In 1869, English Psychologist Francis Galton published his major work on Eugenics entitled, “Hereditary Genius” which led to the belief that the incompetent and ailing were a threat to society.\textsuperscript{29} As a result, eugenical sterilization laws were passed in the United States in the 1920s and 1930s.\textsuperscript{30}

Eugenical sterilization was aimed specifically at those individuals in mental or penal institutions who, from family pedigree analysis, were considered likely to give birth to socially defective children. Sterilization could be ordered at any time after a patient had been examined by a eugenics committee, usually composed of a lawyer or family member representing the individual, a judge, and a doctor or

\textsuperscript{25} Id. at 154.
\textsuperscript{26} Id.
\textsuperscript{27} Id.
\textsuperscript{29} Id.
\textsuperscript{30} Id.
other eugenic 'expert.' In the end, more than 30 states had enacted such compulsory sterilization laws by 1940. And between 1907 (when the first such law was put into effect in Indiana) and 1941, more than 60,000 eugenical sterilizations were performed in the United States.\textsuperscript{31}

Even the Supreme Court of the United States believed in and enforced the eugenical sterilization movement.\textsuperscript{32} In 1927, Carrie Buck ("Carrie"), a twenty-one-year-old woman with epilepsy, who refused to be forcibly sterilized, came before the United States Supreme Court.\textsuperscript{33} Carrie has been committed to the Virginia State Colony for Epileptics and Feeble Minded ("the facility"), where her mother was also an inmate.\textsuperscript{34} The facility sought enforcement through the court system because Carrie refused sterilization.\textsuperscript{35} The Court upheld the facility's forced sterilization policy.\textsuperscript{36} In his majority opinion, Justice Oliver Wendell Holmes made the following statement:

\begin{quote}
We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover
\end{quote}

\begin{footnotes}
\item[31] Id. at 28.
\item[33] See id. at 205.
\item[34] Id.
\item[35] Id.
\item[36] Id. at 208.
\end{footnotes}
cutting the Fallopian tubes . . . . *Three generations of imbeciles are enough.*

With this, Justice Holmes ordered twenty-one-year-old Carrie sterilized against her will. Sadly, the widespread social and legal maltreatment of individuals with disabilities did not end with *Buck*.

In 1942, the theory of Euthanasia swept the United States and threatened the disabled community. A United States psychiatrist named Foster Kennedy published an editorial in the American Journal of Psychiatry promoting the killing of "retarded" children and the "utterly unfit." Kennedy reasoned that euthanasia would put these individuals out of their misery. Thus began the Euthanasia movement in the United States. Shockingly, the only thing capable of stopping this sweeping movement was the United States' entrance into World War II.

2. The Civil Rights Movement and the Reformation of Special Education

a). *Brown v. Board of Education*\(^{43}\) Inspires a Movement

Even though the Euthanasia movement had been interrupted by the war, this old world view of disability continued well into the Mid-Twentieth Century. The historical discrimination and animosity towards individuals with disabilities continued uncontested until the

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37. *Id.* at 207 (emphasis added).
38. *Id.*
40. *Id.*
41. *Id.*
42. Richard Peterson, Professor at Pepperdine University School of Law, Special Education Law Lecture (August 23, 2006) (lecture slides of Professor Richard Peterson and author).
44. Richard Peterson, Professor at Pepperdine University School of Law, Special Education Law Lecture (August 23, 2006) (lecture slides of Professor Richard Peterson and author).
Supreme Court's 1954 decision in *Brown v. Board of Education*[^45]. In *Brown*, the Court held that segregation of white and colored students was inherently unconstitutional and that "separate educational facilities are inherently unequal."[^46] Inspired, civil rights advocates became convinced that the *Brown* decision was a clear indication that the exclusion and discrimination of children with disabilities was also unconstitutional[^47]. Consider for a moment the following paraphrases from the *Brown* decision:

> To separate them from others of similar age and qualifications solely because of their [disability] generates a feeling of inferiority as to their status in the community that may affect their hearts and minds unlikely ever to be undone.[^48]

Segregation of [disabled and typical] children in public schools has a detrimental effect upon the [disabled] children. The impact is greater when it has the sanction of law; for the policy of separating the [disabled and typical children] is usually interpreted as denoting inferiority of the [disabled] group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore has a tendency to [retard] the educational and mental development of [disabled] children and to deprive them of some of the benefits they would receive in a [typical and disabled] integrated school system.[^49]

These paraphrases from *Brown* illustrate just how inspirational the decision became to special education advocates and parents of

[^45]: Tyce Palmaffy, *The Evolution of the Federal Role*, in *RETHINKING SPECIAL EDUCATION FOR A NEW CENTURY* 1, 3 (Chester E. Finn, Jr., Andrew J. Rotherham & Chester R. Hokanson, Jr. eds., 2001).

[^46]: *Brown*, 347 U.S. at 495.

[^47]: Palmaffy, supra note 45, at 3.

[^48]: *Brown*, 347 U.S. at 494.

[^49]: Id. Disability language has been substituted for the segregation language to illustrate how the holding and reasoning in *Brown* is applied to Special Education Law. Typical children are defined as children without disabilities.
children with disabilities. In the wake of the Brown decision, parents of children with disabilities brought suit against school districts arguing that the districts’ exclusion and segregation policies unconstitutionally discriminated against their children because of their disabilities. Concurrently, civil rights advocates argued that, “schools were underestimating the benefits of placing disabled children in the regular classroom.” They advocated for inclusion, arguing the need for society to help create self-sufficient disabled children. Advocates reasoned that in order to learn self-sufficiency, disabled children needed to live amongst and interact with their typical peers.

States, on the other hand, were not so inspired and continued to exclude children with disabilities from public schools. For example, as late as 1969, North Carolina schools were allowed to label students “uneducable” and could criminally punish any parent who challenged the school’s determination. On a milder level, yet equally discriminatory, most other schools continued to place disabled children in facilities separate from any of their typical peers. School districts continued to believe that it was cheaper to educate disabled children in separate facilities than to educate them in a regular classroom.

b). Early Federal Legislation: Congress’ First Step in Special Education Reform

Congress finally took action in 1965 when it enacted the Elementary and Secondary Education Act (“ESEA”). The ESEA

50. PETER WRIGHT & PAMELA WRIGHT, SPECIAL EDUCATION LAW 13 (2d ed. 2007).
51. Palmaffy, supra note 45, at 4.
52. Id.
53. Id.
54. Palmaffy, supra note 45, at 4.
55. Id.
56. These facilities could range anywhere from separate classrooms to separate schools. Palmaffy, supra note 45, at 4.
57. Id.
58. Id.
59. Wright, supra note 50, at 13.
specifically dealt with underprivileged children’s lack of educational
opportunity and sought to provide them with the resources that would
ensure they received equal access to an appropriate education.60 But,
Congress did not address the education of children with disabilities
until it amended the ESEA in 1966.61 With the amendment, the
ESEA established a “grant program to assist states in the ‘initiation,
expansion, and improvement of programs and projects . . . for the
education of handicapped children.’”62 For the first time in the
United States, federal funding was established to educate disabled
children.63 Later, in 1970, the ESEA was replaced by the Education
of the Handicapped Act ("EHA")64 which consolidated several grants
for children with disabilities.65 Like the ESEA, the EHA established
a grant program whose purpose was to encourage States to develop
educational programs and resources for individuals with
disabilities.66 Unfortunately, the EHA did not mandate how funds
were to be used by states.67 As a result, the ESEA and the EHA both
failed to significantly improve the education received by children
with disabilities.68

c). PARC69 & Mills70: Special Education Advocates Score Their
First Victories in the Courts

60. Id.

61. Id. (quoting Back to School on Civil Rights, published by the National
(Retrieved on October 11, 2006)).

62. Id. (emphasis added).

63. Palmaffy, supra note 45, at 5.


65. Palmaffy, supra note 45, at 5.

66. Wright, supra note 50, at 13 (quoting Back to School on Civil Rights,
published by the National Counsel on Disability (2000). URL:
www.ncd.gov/newsroom/publications/2000/backtoschool_1.htm
(Retrieved on October 11, 2006)).

67. Id.

68. Id.

69. See generally Pa. Ass’n for Retarded Children v. Pennsylvania, 334 F.
Supp. 1257 (E.D. Pa. 1972) (per curiam) [hereinafter PARC] (holding that since the
Commonwealth of Pennsylvania had undertaken the task of providing a free public
Unable to make any legitimate headway in the legislature concerning the education of individuals with disabilities, special education advocates turned to the courts. During the 1970s, two major cases defined the rights of individuals with disabilities, set the framework for future special education litigation, and became the major catalyst for change in the education and treatment of the disabled.

In *PARC*, the parents of mentally retarded children filed a class action lawsuit against the Commonwealth of Pennsylvania arguing that certain state statutes unconstitutionally barred the mentally retarded from public schools. The United States District Court for the Eastern District of Pennsylvania upheld a consent agreement between the parties and in doing so established the principle that when a state agrees to provide free public education to all its children, it must also provide disabled children with equal access to that same free public education. Specifically, the court made the following findings:

[T]hat all mentally retarded persons are capable of benefiting from a program of education and training; that the greatest number of retarded persons, given such education and training, are capable of achieving education to all of its children, it must also provide access to that same free public education to its children with disabilities).

71. *Palmaffy*, supra note 45, at 4. Litigation was also sparked by the fear that in the aftermath of the Brown decision, school districts would begin labeling black children as mentally retarded in order to keep them out of schools. *Palmaffy*, supra note 45, at 4.
74. Parents argued that the statutes barring mentally retarded children from public schools violated their equal protection and due process rights guaranteed to them under the Fourteenth Amendment. They argued the statutes were unconstitutional because they “arbitrarily exclud[ed] children from school without any kind of hearing or legitimate reason for doing so.” *Palmaffy*, supra note 45, at 4.
76. Id. at 1259.
self-sufficiency, and the remaining few, with such education and training, are capable of achieving some degree of self-care; that the earlier such education and training begins, the more thoroughly and the more efficiently a mentally retarded person will benefit from it; and, whether begun early or not, that a mentally retarded person can benefit at any point in his life and development from a program of education and training.

The Commonwealth of Pennsylvania has undertaken to provide a free public education to all of its children between the ages of six and twenty-one years, and, even more specifically, has undertaken to provide education and training for all of its exceptional children.

Having undertaken to provide a free public education to all of its children, including its exceptional children, the Commonwealth of Pennsylvania may not deny any mentally retarded child access to a free public program of education and training.

It is the Commonwealth’s obligation to place each mentally retarded child in a free, public program of education and training appropriate to the child’s capacity, within the context of a presumption that, among the alternative programs of education and training required by statute to be available, placement in a regular public school class is preferable to placement in a special public school class and placement in a special public school class is preferable to placement in any other type of program of education and training.77

77. Id. at 1259-60. The order laid down by the court that “placement in a regular public school class is preferable to placement in a special public school class and placement in a special public school class is preferable to placement in any other type of program of education and training” is now referred to as the theory of least restrictive environment (“LRE”). PARC, 334 F. Supp. at 1260.
The decision in PARC established two extremely influential ideas that would greatly impact the future role of the federal government in special education. First, the consent agreement approved by the court outlined Pennsylvania’s duty to provide equal access to public education to children with disabilities. Second, it laid down certain rules and procedures that were intended to protect the rights of students with disabilities. Further, “[i]n the subsequent settlement, it was agreed that educational placement decisions must include a process of parental participation and a means to resolve disputes.”

The other 1972 case, Mills v. Board of Education of District of Columbia, involved: (1) the District of Columbia’s failure to provide equal access to public education to children with disabilities. The plaintiffs in PARC included the following underprivileged children:

PETER MILLS is twelve years old, black, and a committed dependent ward of the District of Columbia resident at Junior Village. He was excluded from the Brent Elementary School on March 23, 1971, at which time he was in the fourth grade. Peter allegedly was a ‘behavior problem’ and was recommended and approved for exclusion by the principal. Defendants have not provided him with a full hearing or with a timely and adequate review of his status. Furthermore, Defendants have failed to provide for his reenrollment in the District of Columbia Public Schools or enrollment in private school. On information and belief, numerous other dependent children of school attendance age at Junior Village are denied a publicly-supported education. Peter remains excluded from any publicly-supported education.

DUANE BLACKSHEARE is thirteen years old, black, resident at Saint Elizabeth’s Hospital, Washington, D.C., and a dependent committed child. He was excluded from the Giddings Elementary School in October, 1967, at which time he was in the third grade. Duane allegedly was a “behavior problem.” Defendants have not provided him with a full hearing or with a timely and adequate review of his status. Despite repeated efforts by his mother, Duane remained largely excluded from all publicly-supported education until February, 1971. Education experts at the Child Study Center examined Duane and found him to be capable of returning to regular class if supportive services were...
provided. Following several articles in the Washington Post and Washington Star, Duane was placed in a regular seventh grade classroom on a two-hour a day basis without any catch-up assistance and without an evaluation or diagnostic interview of any kind. Duane has remained on a waiting list for a tuition grant and is now excluded from all publicly-supported education.

GEORGE LIDDELL, JR., is eight years old, black, resident with his mother, Daisy Liddell. . . . George has never attended public school because of the denial of his application to the Maury Elementary School on the ground that he required a special class. George allegedly was retarded. Defendants have not provided him with a full hearing or with a timely and adequate review of his status. George remains excluded from all publicly-supported education, despite a medical opinion that he is capable of profiting from schooling, and despite his mother's efforts to secure a tuition grant from Defendants.

STEVEN GASTON is eight years old, black, resident with his mother, Ina Gaston . . . and unable to afford private instruction. He has been excluded from the Taylor Elementary School since September, 1969, at which time he was in the first grade. Steven allegedly was slightly brain-damaged and hyperactive, and was excluded because he wandered around the classroom. Defendants have not provided him with a full hearing or with a timely and adequate review of his status. Steven was accepted in the Contemporary School, a private school, provided that tuition was paid in full in advance. Despite the efforts of his parents, Steven has remained on a waiting list for the requisite tuition grant from Defendant school system and excluded from all publicly-supported education.

MICHAEL WILLIAMS is sixteen years old, black, resident at Saint Elizabeth's Hospital, Washington, D.C., and unable to afford private instruction. Michael is epileptic and allegedly slightly retarded. He has been excluded from the Sharpe Health School since October, 1969, at which time he was temporarily hospitalized. Thereafter Michael was excluded from school because of health problems and school absences. Defendants have not provided him with a full hearing or with a timely and adequate review of his status. Despite his mother's efforts, and his attending physician's medical opinion that he could attend school, Michael has
provide its "exceptional children" with appropriate public education and training, and (2) the District of Columbia's practice of suspending the excluding, expelling, reassigning, and transferring

remained on a waiting list for a tuition grant and excluded from all publicly-supported education. JANICE KING is thirteen years old, black, resident with her father, Andrew King, . . . and unable to afford private instruction. She has been denied access to public schools since reaching compulsory school attendance age, as a result of the rejection of her application, based on the lack of an appropriate educational program. Janice is brain-damaged and retarded, with right hemiplegia, resulting from a childhood illness. Defendants have not provided her with a full hearing or with a timely and adequate review of her status. Despite repeated efforts by her parents, Janice has been excluded from all publicly-supported education.

JEROME JAMES is twelve years old, black, resident with his mother, Mary James, . . . [in] Washington, D.C., . . . Jerome is a retarded child and has been totally excluded from public school. Defendants have not given him a full hearing or a timely and adequate review of his status. Despite his mother's efforts to secure either public school placement or a tuition grant, Jerome has remained on a waiting list for a tuition grant and excluded from all publicly supported education. Mills, 348 F. Supp. 866 at 869-70.

The court is quick to point out that, although all of the plaintiffs are African American, their race is not determinative of the class of children they represent. Id. at 870. The plaintiffs represent all school age children with disabilities. Id. Though the court quickly glosses over this, the fact remains that the plaintiffs were all black children and were all being excluded from the public school system because of their alleged disabilities. While some of these plaintiffs clearly have disabilities, this exclusion of black children from the public school system by labeling them disabled was exactly what many civil rights activists feared. It is also important to note that all of the plaintiffs were poor and without the requisite financial means to obtain private instruction, id.; thus, the only way these children could obtain any education was through the State's public school system.

81. The term "exceptional children" is defined by the court as including the mentally retarded, emotionally disturbed, physically handicapped, hyperactive and all other children with behavioral problems. Mills, 348 F. Supp. 866 at 868. It is also important to note that Mills involves a broader class of children than PARC, which dealt solely with the mentally retarded.

children with disabilities from its regular public schools. Unlike the defendant in PARC, the Board of Education of the District of Columbia ("the Board") acknowledged its failure to provide disabled children with access to a free public education. The Board argued that it knew of this affirmative obligation, but lacked the requisite resources to carry it out. The Board’s financial defense proved futile. In response the court held, "[The Board’s] failure to fulfill this clear duty to include and retain these children in the public school system, or otherwise provide them with publicly-supported education, and their failure to afford them due process hearings and periodical review, cannot be excused by the claim that there are insufficient funds."87

Thus, PARC and Mills left the special education community with three principles that would guide the future development of the law. First, schools cannot exclude students from access to a public education solely on the basis of a disability. Second, parents are entitled to challenge the school’s decisions with respect to their children’s education and parents must be given the means for such a challenge (i.e. impartial hearings and access to the courts). Finally, the alleged high cost of educating children with disabilities is not a defense for failure to provide disabled children with access to a free and public education.

In the aftermath of PARC and Mills, similar decisions were rendered in the courts across the county. By 1974, litigation in twenty-seven states had produced similar results and many states even enacted laws that mandated that individuals with disabilities be given equal access to the public school system.

d). The 1972 Congressional Investigation

83. Id.
84. Id. at 871.
85. Id.
86. Id. at 876.
87. Id.
88. Palmaffy, supra note 45, at 4-5.
89. Id.
90. Id.
91. Id. at 5.
92. Id.
93. Id.
But, this movement to provide an appropriate education to all individuals with disabilities did not end with the states. After PARC and Mills, Congress launched an investigation aimed at uncovering the true educational status of children with disabilities in the United States.94 The investigations revealed that nearly five million disabled children were not receiving an appropriate education.95

Yet, the most recent statistic provided by the Bureau of Education for the Handicapped estimated that of the more than 8 million children . . . with handicapping conditions requiring special education and related services, only 3.9 million such children are receiving an appropriate education. 1.75 million handicapped children are receiving no educational services at all, and 2.5 million handicapped children are receiving an inappropriate education.96

The investigations moved Congress, and members responded by writing:

The long range implications of these statistics are that public agencies and taxpayers will spend billions of dollars over the lifetimes of these individuals to maintain such persons as dependents and in a minimally acceptable lifestyle. With proper education services, many would be able to become productive citizens, contributing to society instead of being forced to remain burdens. Other, through such services, would increase their independence, thus reducing their dependence on society.

There is no pride in being forced to receive economic assistance. Not only does this have negative effects upon the handicapped person, but it has far-reaching effects for such person’s family.

94. Wright, supra note 50, at 14.
96. Id. at 1432.
Providing educational services will ensure against persons needlessly being forced into institutional settings. One need only look at public residential institutions to find thousands of persons whose families are no longer able to care for them and who themselves have received no educational services. Billions of dollars are expended each year to maintain persons in these subhuman conditions . . . .

Parents of handicapped children all too frequently are not able to advocate the rights of their children because they have been erroneously led to believe that their children will not be able to lead meaningful lives. It should not . . . be necessary for parents throughout the country to continue utilizing the courts to assure themselves a remedy . . . .

c). The Road to the IDEA

Following the 1972 Congressional Investigation and its results, Congress enacted Public Law 94-142, also known as The Education for All Handicapped Children Act of 1975 (“EAHCA”).98 The EAHCA provided funding, and clearer, more specific mandates than any of the earlier special education legislation.99 The law sought to ensure access to a free public education and due process of law for all children with disabilities.100 But, Congress was not blind to the need for an appropriate checks and balances system.101 Thus, in order to hold State and local educational agencies “accountable for providing educational services for all handicapped children,”102 the EAHCA included elaborate “procedural safeguards” designed to protect the

98. Wright, supra note 50, at 14. The EAHCA is later renamed the Individuals with Disabilities Act (“IDEA”) in 1990. Palmaffy, supra note 45, at 5.
99. Palmaffy, supra note 45, at 5.
100. Wright, supra note 50, at 14.
101. Id.
rights of both children and their parents. As the EAHCA was amended these procedural safeguards underwent elaborate changes as well.

3. The Modern Era of Special Education Law

Since 1975, the special education law originally entitled the EAHCA has been amended and renamed by Congress several times. In 1990, the Act took on its current name: The Individuals with Disabilities Education Act ("IDEA"). Most recently, on December 3, 2004, the IDEA underwent a reauthorization. The amended statute is named the Individuals with Disabilities Education Improvement Act of 2004 and is most commonly known as IDEA 2004 ("IDEA 2004"). IDEA 2004 has two primary purposes: (1) to provide every child with an education designed to meet his or her unique needs and prepare him or her for further education, employment, and independent living, and (2) to protect the rights of children with disabilities and their parents through procedural safeguards.

These procedural safeguards are enumerated in 20 U.S.C. § 1415 et seq. of IDEA 2004 and contain a provision for attorney's fees. The provision of IDEA 2004 governing the award of attorney's fees, 20 U.S.C. § 1415(i)(3)(B) ("§ 1415(i)(3)(B)"), provides that "[i]n any action or proceeding brought under this section, the court in its discretion may award reasonable attorneys' fees as part of the costs." Under IDEA 2004, prevailing parents can recover from

103. Wright, supra note 50, at 14.
104. Id. at 15.
105. Palmaffy, supra note 45, at 5.
106. Formerly the EAHCA.
107. Wright, supra note 50, at 15.
108. Id. The statute encompasses 20 U.S.C. § 1400 et seq. and the federal regulations accompanying the statute are published in 34 C.F.R. § 300 et seq.
110. Id.
112. For a discussion on the definition of the term "prevailing party" see generally Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res., 532 U.S. 598 (2001). In Buckhannon, the Supreme Court "held that the term
their attorney’s fees from school districts.113 This provision allowing parents to recover attorney’s fees was not a new addition to IDEA 2004.114 Rather, the provision awarding attorney’s fees to prevailing parties was explicitly added to the text of the IDEA by Congress following the Supreme Court’s decision in Smith v. Robinson.115 In Smith, the Court held that under the then current text of the IDEA, prevailing parents were not entitled to attorney’s fees.116 In response, Congress amended the IDEA to expressly include the phrase, “the court, in its discretion may award reasonable attorney’s fees as part of the costs to prevailing parents,”117 and to overrule the Supreme Court’s decision in Smith.118 Thus, the attorney’s fees provision in

\[\text{‘prevailing party,’ as it is used in various attorney’s fees statutes, requires a ‘material alteration of the legal relationship of the parties.’} \]


Then, in Shapiro v. Paradise Valley, the Ninth Circuit considered the question of whether Buckhannon applies to the IDEA’s attorney’s fees provision. Shapiro v. Paradise Valley, 374 F.3d 857, 865 (9th Cir. 2004). The court explained how it had applied Buckhannon to a number of other attorney’s fees statutes. See, e.g., Kasza v. Whitman, 325 F.3d 1178, 1180 (9th Cir. 2003) (applying Buckhannon to the fee-shifting provision of the Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6972(e)); Perez-Arellano v. Smith, 279 F.3d 791, 793-94 (9th Cir. 2002) (applying Buckhannon to the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A)); Bennett, 259 F.3d 1097, 1100-01 (9th Cir. 2001) (applying Buckhannon to the Civil Rights Attorney’s Fees Awards Act of 1976, 42 U.S.C. § 1988). Id. The court also pointed out that other circuits had already determined that Buckhannon applies to the attorney’s fees provisions of the IDEA. Id. Ultimately the court held that Buckhannon’s definition of “prevailing party” applies to the IDEA’s attorney’s fees provision, 20 U.S.C. § 1415(i)(3)(B). Id.

113. § 1415(i)(3)(B).
114. See id.
116. Id. at 1007-08.
117. 20 U.S.C. § 1415(i)(3)(B); see 132 Cong. Rec. 16823 (1986) (remarks of Sen. Weiker). Congress submitted a Conference Report concerning the above-mentioned amendment of the IDEA which provided that the IDEA include an explicit attorney’s fees provision. Id. On the floor, sponsors of the new legislation made it clear that this legislation’s purpose was to overrule the Supreme Court’s decision in Smith. Id.
118. 132 Cong. Rec. 16823 (1986) (remarks of Sen. Weiker). Senator Weiker expressly remarked, “In adopting this legislation, we are rejecting the reasoning of the Supreme Court in Smith versus Robinson.” Id. Further, according to
IDEA 2004 explicitly provides that a prevailing party may recover attorney's fees.

There are, however, several new additions to the attorney's fees provision in IDEA 2004. Specifically, school districts may now recover attorney's fees from parents or from the parent's attorney in limited situations. These limited situations include the filing, by a parent or attorney, of a complaint for a frivolous, unreasonable, or improper purpose, or to harass, cause unnecessary delay, or needlessly increase the cost of litigation. In these specific circumstances, the court may award school districts reasonable attorney's fees. These new provisions to § 1415(i)(3)(B) in IDEA 2004 were injected to counter the growing concern that certain parents were unnecessarily increasing special education litigation.

According to attorney Peter Wright:

Some parents, driven by anger and frustration, request due process hearings although they have not prepared their case. They may be focused on perceived wrongs by the school, not on obtaining a program that will meet their child's needs. Unfortunately, many hearing officers and judges view parents of children with disabilities as emotional "loose canons." These parents not only lose their cases, but they create ill will for other parents who use due process procedures to resolve disputes.

Representative Biaggi, "[t]his legislation clearly supports the intent of Congress back in 1975 and corrects what I believe was a gross misrepresentation of the law. Attorney's fees should be provided to those individuals who are being denied access to the educational system." Id. at 17609 (remarks of Rep. Biaggi).

119. See § 1415(i)(3)(B).
120. Id.
121. Id.
122. Id.
123. See Wright, supra note 50, at 117, n. 149.
124. Peter Wright is a special education attorney and has represented children with disabilities since 1975. Wright, supra note 50. He represented Shannon Carter before the United States Supreme Court in Florence County Sch. Dist. v. Shannon Carter, 510 U.S. 7 (1993), where he won a landmark victory that has benefited all children with disabilities. Wright, supra note 50.
125. Wright, supra note 50, at 117, n. 149.
B. The Spending Clause and Federal Funding

In Arlington, the Court categorized IDEA 2004’s fee-shifting attorney’s fees provision as Spending Clause legislation.\textsuperscript{126} Recently, federal grants, like those given to States under the IDEA, have increased rapidly.\textsuperscript{127} From 1965 to 1995 the total federal grants-in-aid and shared revenue increased from approximately eleven billion dollars to around 228 billion dollars in funding.\textsuperscript{128} In 1994, twenty-three percent of state and local government budgets were funded by federal grants.\textsuperscript{129}

In general, Congress’ power to spend is granted in the Spending Clause in Article I, Section 8, Clause 1 of the United States Constitution and provides as follows: “[t]he Congress shall have the Power To lay and collect Taxes, Duties, Imposts and Excises, to pay all the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.”\textsuperscript{130}

Thus, Congress is granted the power to tax and spend as long as the “common Defence and general Welfare” are being served.\textsuperscript{131} As Justice Roberts states in United States v. Butler, “The true construction undoubtedly is that the only thing granted is the power to tax for the purpose of providing funds for payment of the nation’s debts and making provision for the general welfare . . . .”\textsuperscript{132}

1. Butler and the Scope of Congress’ Power to Spend

Until 1937 the question of whether Congress’ spending power was limited to the powers enumerated in the Constitution or whether

\textsuperscript{126} Arlington, 126 S. Ct. at 2458. An in depth discussion of the Court’s analysis of Arlington can be found below in Part IV of this article, entitled Analysis & Critique of Opinion.


\textsuperscript{128} Id. (citing Statistical Abstract 1995, at 302).

\textsuperscript{129} Id. (citing Statistical Abstract 1995, at 302).

\textsuperscript{130} U.S. CONST. art. I, § 8, cl. 1.

\textsuperscript{131} Id.

\textsuperscript{132} United States v. Butler, 297 U.S. 1, 64, 66 (1936).
Congress could spend for whatever purpose it deemed appropriate remained unanswered.\(^3\) Finally, in *Butler*, the Court held that the power to spend and the power to tax were expressly granted; the power to spend and tax are enumerated powers themselves, independent of the other enumerated powers.\(^4\) Thus, the Court held that Congress could spend and tax in furtherance of the general welfare without furthering any other enumerated power.\(^5\) In other words, Congress could spend for whatever purpose it wished as long as the spending was in furtherance of the general welfare.

In his majority opinion, Justice Roberts explains the two divergent interpretations of the phrase "to provide for the general welfare."\(^6\) First, in Madison’s view, the United States is a government of enumerated and limited powers; thus, "the power to tax and spend for the general welfare must be confined to the enumerated legislative fields committed to the Congress."\(^7\) However, according to Roberts, this interpretation ultimately leads to the conclusion that Congress could spend for the general welfare as it wished, since, in reality, Congress could almost always categorize their spending within those powers enumerated in the Constitution.\(^8\) On the other hand, in Hamilton’s view, the spending clause:

confers a power separate and distinct from those later enumerated [and] is not restricted in meaning by the grant of them, and Congress consequently has a substantive power to tax and to appropriate, limited only by the requirement that it shall be exercised to provide for the general welfare of the United States.\(^9\)

In other words, the Hamiltonian view took a broad approach and defined Congress’ power to tax and spend as an individual enumerated power separate from the other enumerated powers.\(^10\)

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133. See id. at 65.
134. Id. at 66.
135. Id.
136. Id. at 65.
137. Id.
138. Id.
139. Id. at 65-66.
140. Id.
However, while the *Butler* Court opted for a broad interpretation of the spending clause, it also recognized that this interpretation was not without limitation.\(^{141}\)

*Butler* involved a major New Deal measure known as the Agriculture Adjustment Act of 1933 ("1933 Act").\(^{142}\) The 1933 Act was enacted to raise farm prices and reduce the production of certain crops.\(^{143}\) To reduce production, the 1933 Act required that farmers produce less of the particular crop and it placed a tax upon the processing of those crops.\(^{144}\) In order to carry out this scheme, the Secretary of Agriculture ("Secretary") was authorized to contract with individual farmers to reduce their acreage in exchange for benefit payments.\(^{145}\) These benefit payments were paid from a tax that was placed on the processing of the commodity.\(^{146}\) This tax was referred to as a "processing tax."\(^{147}\) Subsequently, the Secretary entered into several agreements for the reduction of cotton production and a processing tax was placed upon the processors of cotton.\(^{148}\) One of these processors was Hoosac Mills and Butler was their receiver.\(^{149}\) As a result, Butler brought suit to recover the tax arguing that the Act was an unconstitutional program to control agricultural production.\(^{150}\)

Because the Court held that the power to spend and tax for the general welfare was a separate and distinct power granted to Congress, there was no problem with the Act on that ground.\(^{151}\) However, the Court did find the Act unconstitutional on different

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141. *Id.*
142. Amar et al., *supra* note 127 at 196.
143. *Id.*
144. *Id.*
145. *Id.* Benefit payments were computed on the basis of the reduction amount agreed to by the farmer.
146. *Id.*
147. *See id.*
148. *Id.* The agreements were to reduce the total acreage of cotton being produced. While cotton is the commodity dealt with in *Butler*, agreements were entered into for certain other crops as well. *Id.*
149. *Id.*
150. *Id.*
151. *Id.*
grounds. The Court stated that since it had taken the broad Hamiltonian view of the phrase, "to provide for the general welfare," limitations were necessary. As a result, the Court held that Congress's power to provide for the general welfare lies within its power to spend and tax. In other words, Congress' power to provide for the general welfare was not a power independent of its power to spend and tax. Thus, Congress could only spend or tax for the general welfare and could not regulate for the general welfare. Hence, legislative regulations must encompass an enumerated power outside of the spending and taxing power. It was on this ground that the Act, in its regulatory nature, was struck down as unconstitutional. Thus, Butler recognized the broad power granted to Congress to spend for the general welfare.

2. The Clear Notice Requirement

While Congress could not directly regulate State action through the use of its spending power, it could indirectly regulate the States by placing conditions on States' receipt of federal funding. For example, in South Dakota v. Dole, the Court upheld a federal statute that withheld federal highway funds from any state whose drinking age was under twenty-one. The Dole court reaffirmed the notion that Congress, under its spending power, could attach conditions to States' receipt of federal funding. However, the Court also pointed out that the spending power granted to Congress is not without limitation. The Court carefully laid out the four general restrictions that case law had placed upon Congress' broad power to

152. Id. at 68.
153. Id. at 65.
154. Id. at 68-70.
155. Id.
156. Id.
157. Id. at 71.
158. Id.
160. Id. at 205-206, 218.
161. Id. at 207.
162. Id.
spend for the general welfare. First, Congress must spend for the benefit of the general welfare. Second, if Congress intends to place a condition on States’ receipt of federal funding, it “must do so unambiguously . . . , enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation.” Third, the conditions placed on the receipt of federal funds must be related “to the federal interest in particular national projects or programs.” Finally, other constitutional limitations could potentially bar the conditional grant of federal funds. In Arlington, the Court grapples with the second limitation mentioned above and answers the question of whether the IDEA gives clear notice of its conditions to the States accepting its funds.

C. Statutory Interpretation and Costs as a Term of Art: The Supreme Court’s Interpretation of Other Fee Shifting Provisions

Prior to Arlington, the Supreme Court had the opportunity to interpret fee-shifting provisions in other legislation. Specifically, the Court relies on its decisions in Crawford Fitting and Casey to determine the correct interpretation of the IDEA’s attorney’s fees provision.

163. Id.
164. Butler, 297 U.S. at 65. However, as noted in Dole, substantial deference is given to Congress when considering whether a particular expenditure furthers the general welfare. Dole, 483 U.S. at 207.
166. Dole, 483 U.S. at 207-08 (quoting Massachusetts v. United States, 435 U.S. 444, 461 (1968) (plurality opinion)) (internal quotes omitted).
167. Id.
168. See infra Part IV.
169. The IDEA’s attorney’s fee provision, 20 U.S.C. § 1415(i)(3)(B), is a fee-shifting provision in that that attorney’s fees incurred by prevailing parents are shifting to noncompliant school districts. In certain situations, fees incurred by school districts are shifted to parents. See 20 U.S.C. § 1415(i)(3)(B).
In *Crawford Fitting*, the Court rejected the argument that Federal Rule of Civil Procedure 54(d) ("Rule 54(d)") authorizes the award of costs not listed in 28 U.S.C. § 1821. Rule 54(d) provides for an award of "costs" to a prevailing party. \(^{172}\) "The Court held, however, that Rule 54(d) does not give a district judge 'discretion to tax whatever costs may seem appropriate'; rather, the term "costs" in Rule 54(d) is defined by the list set out in [28 U.S.C.A.] § 1920." (§ 1920).\(^{174}\) Thus, since Rule 54(d) lacks explicit language referring to expert fees, it is defined by those categories of expenses enumerated in § 1920.\(^{175}\) The Court interpreted the statute narrowly, pointing out that § 1920(3) is strictly limited by 28 U.S.C.A. § 1821 ("§ 1821").\(^{176}\)

\(^{172}\) *Crawford Fitting*, 482 U.S. at 439.

\(^{173}\) *Arlington*, 126 S. Ct. at 2461.

\(^{174}\) *Id.* at 2462 (quoting *Crawford Fitting*, 482 U.S. 437 at 441). § 1920 provides as follows:

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;
5. Docket fees under section 1923 of this title [28 USCS § 1923];
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 USCS § 1828].

A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree. 28 U.S.C.A. § 1920.

\(^{175}\) *Murphy*, 126 S. Ct. at 2462.

\(^{176}\) 28 U.S.C. § 1821 provides as follows:

(a) (1) Except as otherwise provided by law, a witness in attendance at any court of the United States, or before a United States Magistrate [United States Magistrate Judge], or before any person authorized to take his deposition pursuant to any rule or order of a
court of the United States, shall be paid the fees and allowances provided by this section.

(2) As used in this section, the term “court of the United States” includes, in addition to the courts listed in section 451 of this title [28 USCS § 451], any court created by Act of Congress in a territory which is invested with any jurisdiction of a district court of the United States.

(b) A witness shall be paid an attendance fee of $40 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 at the beginning and end of such attendance or at any time during such attendance.

(c) (1) A witness who travels by common carrier shall be paid for the actual expenses of travel on the basis of the means of transportation reasonably utilized and the distance necessarily traveled to and from such witness’s residence by the shortest practical route in going to and returning from the place of attendance. Such a witness shall utilize a common carrier at the most economical rate reasonably available. A receipt or other evidence of actual cost shall be furnished.

(2) A travel allowance equal to the mileage allowance which the Administrator of General Services has prescribed, pursuant to section 5704 of title 5, for official travel of employees of the Federal Government shall be paid to each witness who travels by privately owned vehicle. Computation of mileage under this paragraph shall be made on the basis of a uniformed table of distances adopted by the Administrator of General Services.

(3) Toll charges for toll roads, bridges, tunnels, and ferries, taxicab fares between places of lodging and carrier terminals, and parking fees (upon presentation of a valid parking receipt), shall be paid in full to a witness incurring such expenses.

(4) All normal travel expenses within and outside the judicial district shall be taxable as costs pursuant to section 1920 of this title [28 U.S.C. § 1920].

(d) (1) A subsistence allowance shall be paid to a witness when an overnight stay is required at the place of attendance because such place is so far removed from the residence of such witness as to prohibit return thereto from day to day.
In the Court's view, a broader interpretation would, in effect, cause Rule 54(d) to repeal §§ 1920 and 1821, even though Rule 54(d) fails to explicitly refer to witness fees.177 Thus, Crawford Fitting stands for the proposition that "no statute will be construed as authorizing the taxation of witness fees as costs unless the statute refers explicitly to witness fees."178

(2) A subsistence allowance for a witness shall be paid in an amount not to exceed the maximum per diem allowance prescribed by the Administrator of General Services, pursuant to section 5702(a) of title 5, for official travel in the area of attendance by employees of the Federal Government.

(3) A subsistence allowance for a witness attending in an area designated by the Administrator of General Services as a high-cost area shall be paid in an amount not to exceed the maximum actual subsistence allowance prescribed by the Administrator, pursuant to section 5702(c)(B) of title 5, for official travel in such area by employees of the Federal Government.

(4) When a witness is detained pursuant to section 3144 of title 18 for want of security for his appearance, he shall be entitled for each day of detention when not in attendance at court, in addition to his subsistence, to the daily attendance fee provided by subsection (b) of this section.

(e) An alien who has been paroled into the United States for prosecution, pursuant to section 212(d)(5) of the Immigration and Nationality Act (8 U.S.C. 1182(d)(5)), or an alien who either has admitted belonging to a class of aliens who are deportable or has been determined pursuant to section 240 of such Act (8 U.S.C. 1252(b) [1229a]) to be deportable, shall be ineligible to receive the fees or allowances provided by this section.

(f) Any witness who is incarcerated at the time that his or her testimony is given (except for a witness to whom the provisions of section 3144 of title 18 apply) may not receive fees or allowances under this section, regardless of whether such a witness is incarcerated at the time he or she makes a claim for fees or allowances under this section. 28 U.S.C.A. § 1821.

177. Arlington, 126 S. Ct. at 2462.
178. Id. (quoting Crawford Fitting, 482 U.S. at 445) (internal quotations omitted).
In *Casey*, the Supreme Court again interpreted a fee-shifting provision, 42 U.S.C. § 1988(b) (“§ 1988”). The provision “permit[ed] prevailing parties in certain civil rights actions to be awarded reasonable attorney’s fee as part of costs.”179 The Court held that absent explicit statutory language, expert fees incurred in civil rights litigation may not be shifted to the losing party as part of the statute’s award of reasonable attorney’s fees.180 Because the statute was unambiguous on its face, the rules of statutory interpretation require that the Court look at the statute’s plain meaning and not to statements made by legislatures or committees during the enactment process.'81 Thus, the Court concluded that the plain meaning of § 1988 did not shift the cost of expert fees to the losing party, but that experts were still able to recover fees pursuant to § 1920 and § 1821.182 Together, *Crawford Fitting* and *Casey* represent the case precedent crucial to the Court’s final decision in *Arlington*.

### III. FACTS

#### A. Substantive Case History

1. The 1998-1999 School Year

Pearl and Theodore Murphy (the “Murphys”) are the parents of Joseph, a child with a disability as defined under the IDEA.183 In 1994, Joseph was identified as a student requiring special education.184 Joseph completed his 1997-1998 school year in the Arlington School District (“Arlington”); therefore, Arlington High School became Joseph’s educational placement for the approaching 1998-1999 school year.185 The individualized education program (“IEP”) prepared for Joseph by Arlington for the 1998-1999 school

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179. *Id.* (quoting *Casey*, 499 U.S. 83 at 102) (internal quotations omitted).
181. *Id.* at 97-102.
182. *Id.* at 102.
184. *Id.*
185. *Id.*
year again placed him at Arlington High School. The Murphys, however, refused to approve the Arlington IEP. Pursuant to their rights under the IDEA, the Murphys proceeded to request a due process hearing. According to the IDEA’s stay-put provision, Joseph should have remained at Arlington High School during the pendency of the Murphys’ due process hearing request; but, the Murphys continued to feel that Arlington High School was an inappropriate placement for Joseph and were increasingly unwilling to allow their son to remain in such a setting. In response to their concerns, the Murphys unilaterally withdrew Joseph from Arlington High School, and enrolled him at Kildonan, a private school. The Murphys paid for Joseph’s attendance at Kildonan for the 1998-1999 school year.

During the 1998-1999 school year, the Murphys continued to pursue administrative remedies. New York law provides for a two-tier system of administrative review in special education litigation. An impartial hearing officer (“IHO”) presided over the Murphys’ first hearing. On July 7, 1999, the IHO reached his decision, holding that: (1) Arlington’s proposed IEP for the 1998-1999 school year was inadequate to meet Joseph’s special needs, (2) Kildonan was an appropriate placement, and (3) the Murphys were entitled to reimbursement for Joseph’s tuition and the costs of a private speech pathologist. Arlington appealed the IHO’s decision.

The second tier of the administrative proceedings in New York involves a state review officer (“SRO”). While Arlington’s appeal was pending before the SRO, the Murphys decided to file a complaint with the District Court for the Northern District of New York.
York.\textsuperscript{197} The Murphys sought a temporary restraining order requiring Arlington to fund Joseph’s tuition at Kildonan during the pendency of the appeal.\textsuperscript{198} Before a decision was rendered, the case was transferred to the District Court for the Southern District of New York (“District Court”).\textsuperscript{199} However, the District Court was ultimately unable to determine on the record before it whether it possessed subject matter jurisdiction over the Murphys’ action.\textsuperscript{200} But, before the District Court had settled the jurisdiction issue, the SRO affirmed the decision of the IHO.\textsuperscript{201} The SRO held that Kildonan was the appropriate placement for Joseph and ordered Arlington to reimburse the Murphys for the tuition they had paid for the 1998-1999 school year.\textsuperscript{202} Arlington appealed the SRO’s decision in state court. However, even though an appeal was pending in state court, Arlington nevertheless paid the Murphys for Joseph’s 1998 Kildonan tuition.\textsuperscript{203} Thus, the District Court, still deciding whether it possessed subject matter jurisdiction over the Murphy’s complaint, dismissed the Murphys’ case as moot.\textsuperscript{204}

2. The 1999-2000 School Year

While this conflict wound its way through the state administrative system and the courts, the 1999-2000 school year loomed ahead.\textsuperscript{205} Arlington again proposed an IEP placing Joseph at Arlington High School, and the Murphys again rejected it.\textsuperscript{206} Once again the Murphys unilaterally enrolled Joseph at Kildonan for the 1999-2000 school year.\textsuperscript{207} Then the Murphy’s invoked their right to an administrative review, challenging Arlington’s 1999 IEP and

\begin{itemize}
  \item \textsuperscript{197} Id.  \\
  \item \textsuperscript{198} Id.  \\
  \item \textsuperscript{199} Id.  \\
  \item \textsuperscript{200} Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 297 F.3d. 195, 199 (2d. Cir. 2002).  \\
  \item \textsuperscript{201} Id.  \\
  \item \textsuperscript{202} Id.  \\
  \item \textsuperscript{203} Id.  \\
  \item \textsuperscript{204} Id.  \\
  \item \textsuperscript{205} Id.  \\
  \item \textsuperscript{206} Id.  \\
  \item \textsuperscript{207} Id.  \\
\end{itemize}
requesting reimbursement for Joseph’s Kildonan tuition for the 1999-2000 school year. Thus, the Murphy’s again set in motion the same process that they had just completed with respect to the 1998-1999 school year.

Again, during the pendency of their administrative remedies, the Murphy’s filed a motion before the District Court seeking a court order to compelling Arlington to pay Joseph’s Kildonan tuition for the 1999-2000 school year. The District Court held that the SRO’s decision constituted an “agreement” by the state that Joseph’s current educational placement was Kildonan. Pursuant to the IDEA’s stay-put provisions, the District Court ordered Arlington to pay Joseph’s Kildonan tuition from the date the of the SRO’s decision regarding tuition reimbursement for the prior 1998 school year until Joseph’s educational placement changes or a court orders otherwise. Arlington appealed the District Court’s decision and the Second Circuit affirmed the lower court, requiring Arlington to pay for Joseph’s Kildonan tuition for the above-mentioned school years.

B. Seeking Fees and the Jurisdictional Split

As prevailing parents on substantive grounds, the Murphys returned to the courts in 2002 seeking reimbursement for the expert consulting fees they had incurred during their IDEA litigation. During the substantive IDEA proceedings, the Murphys were assisted by Marilyn Arons (“Arons”), an educational consultant.

1. The District Court’s Decision Regarding Fees

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208. Id.
209. Id.
210. Id.
211. Id.
212. Id.
213. Id.
215. Id.
216. The Murphys’ suit for fees was initiated in the District Court for the Southern District of New York. Thus, any further reference to the District Court refers to the District Court for the Southern District of New York.
Under the IDEA's fee-shifting provision, 20 U.S.C. 1415 (i)(3)(B), the District Court subsequently allowed the Murphys to recover part of their requested fees.\textsuperscript{217} The Murphys initially sought to recover $29,350 in fees for Arons' services and the District Court ultimately reduced their award to $8,650.\textsuperscript{218} First, the District Court held that the Murphys could only recover fees incurred from Arons between the Murphys' initial hearing request and the court's ruling in their favor.\textsuperscript{219} According to the District Court, only this time frame constituted an action or proceeding as defined in the IDEA.\textsuperscript{220} Finally, the District Court held that the Murphys could not recover fees for work Arons performed that was similar to that of an attorney.\textsuperscript{221} Since Arons was a not a lawyer, she could only be compensated for her time spent as an expert consultant.\textsuperscript{222} However, the District Court classified all her time as expert consultant time so the Murphys were entitled to recover the full $8,650.\textsuperscript{223}

2. The Decision of the Court of Appeals for the Second Circuit

Arlington subsequently appealed the District Court's decision and the Court of Appeals for the Second Circuit ("Second Circuit") affirmed.\textsuperscript{224} The Second Circuit acknowledged contradictory rulings from other circuits, but decided that a broad, strict contextual reading of the IDEA's attorney's fees provision was appropriate.\textsuperscript{225} Ultimately, the Second Circuit held that, "[C]ongress intended to and did authorize the reimbursement of expert fees in IDEA actions."\textsuperscript{226} In making its decision, the Second Circuit recognized the Supreme

\textsuperscript{217} Id.
\textsuperscript{218} Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 402 F.3d. 332, 334 (2d Cir. 2005).
\textsuperscript{219} Arlington, 126 S. Ct. 2455 at 2458.
\textsuperscript{220} Id.
\textsuperscript{221} Id.
\textsuperscript{222} Id.
\textsuperscript{223} Id.
\textsuperscript{224} Id.
\textsuperscript{225} See id.
\textsuperscript{226} Id. (quoting Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 402 F.3d 332, 336 (2d. Cir. 2005)) (internal quotations omitted).
Court's decision in *Crawford Fitting* and *Casey*, but relied heavily on the 1986 House Conference Committee Report relating to § 1415(i)(3)(B) of the IDEA ("the Report") and to dicta in a footnote in *Casey* referring to the Report. The Second Circuit believed that, based on these two authorities, it was required to interpret the IDEA's attorney's fees provision as authorizing the award of expert fees. In 2006, the Supreme Court granted certiorari to resolve the issue of whether Congress authorized an award of expert fees under the IDEA's attorney's fees provision. Arguments were heard on April 19, 2006, and in a 6-3 decision the Court reversed the lower courts' decisions and held that because the IDEA did not explicitly allow prevailing parents to recover expert fees, an award of expert fees was not available pursuant to the IDEA's attorney's fees provision.

IV. ANALYSIS AND CRITIQUE OF OPINION

Justice Alito delivered the opinion of the Court and was joined by Justices Roberts, Scalia, Kennedy, and Thomas. Justice Ginsburg filed a separate opinion, concurring in the judgment and Justice Breyer, joined by Justices Stevens and Souter, filed a passionate dissent.

A. Justice Alito's Majority Opinion

Justice Alito begins his majority opinion with a quick review of the underlying facts of the case and in-depth outline of its procedural history. He quickly characterizes the case as a Spending Clause case, and thus, the primary issue is whether the IDEA has provided

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228. *Id.*
229. *Id.*
230. *Id.* at 2455
231. *Id.* at 2457.
232. *Id.*
233. *Id.* at 2457-58.
234. It is important to note that this case is controlled by the IDEA prior to its most current reauthorization, known as IDEA 2004. While the IDEA 2004 has
states with the requisite notice. According to Justice Alito, "[the] resolution of the question presented in this case is guided by the fact that Congress enacted the IDEA pursuant to the Spending Clause." Because the IDEA was enacted pursuant to the Spending Clause, Congress must unambiguously set out the conditions attached to States receipts of federal funds. In Justice Alito's view, "We must view the IDEA from the perspective of a state official who is engaged in the process of deciding whether the State should accept IDEA funds and the obligations that go with those funds." In essence, the real issue in this case is "whether the IDEA furnishes clear notice regarding the [award of expert fees]." Justice Alito proceeds to answer this question on three separate grounds. First, he turns to the plain meaning of the statute. Second, he considers Supreme Court precedent and its role in the interpretation of the statutory language involved in this case. Finally, Justice Alito considers and quickly dismisses the Murphys' arguments that the IDEA's purpose and legislative intent should control the outcome of the case.

undergone many changes, the provision in controversy here, § 1415(i)(3)(B), has not undergone any significant changes that would affect the outcome of this case.

235. Id. at 2458-59.
236. Id. at 2458.
237. Id. at 2459.
238. Id.
239. Id.
1. The Plain Meaning of § 1415(i)(3)(B)

Justice Alito begins his discussion of whether the IDEA provides clear notice with the plain text of the statute. The pertinent language of § 1415(i)(3)(B) provides that “[i]n any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys’ fees as part of the costs to the parents of a child with a disability who is the prevailing party.” According to Justice Alito, the plain language of the provision does not even hint at the possibility that States may be required to reimburse parents who prevail in proceedings under the IDEA.

The Murphys, on the other hand, argue that the Court should interpret the term “costs” as it is used in the statute with respect to its ordinary meaning. In other words, the Murphys contend that the term “costs” is not used as a term of art in the IDEA. Justice Alito quickly points out the flaws in the Murphys’ argument. First, “costs” is a term of art that generally does not include an award of expert fees. In his view, if Congress had wanted to make States liable for a whole host of expenses then Congress could have easily substituted the word expenses for costs. However, Congress chose to use the term “costs” rather than expenses, suggesting that the IDEA’s attorney’s fees provision is not an open-ended one that holds States liable for all expenses incurred in the course of litigation.

240. Id.
241. Id. (internal quotes omitted) (emphasis added).
242. Id.
243. Id. (citing Brief for Respondents 17).
244. See id.
245. Id.
246. Id.
247. Id.
248. Id. at 2460. While Justice Alito distinguishes between the use of a term of art such as “costs” and general language such as expenses, he fails to address the argument that “costs” as it is used in the IDEA is not intended as a term of art. Rather, “costs” should be interpreted with its ordinary meaning. In this case, such an interpretation may provide the ambiguity needed to force the Court to consider the legislative history and the goals of the IDEA, which were so heavily relied on by the Murphys and the proponents of the interpretation of the IDEA allowing an award of expert fees as part of the costs incurred during IDEA proceedings.
Further, the grammatical construction of the provision indicates that reasonable attorney's fees are within the costs that a court, in its discretion, may award to prevailing parents.\textsuperscript{249} In the Court's view, § 1415(i)(3)(B) merely adds attorney's fees to the list of recoverable costs otherwise enumerated in § 1920.\textsuperscript{250} According to the Court, the statute does not provide that parents may recover costs.\textsuperscript{251} Thus, under its current construction, § 1415(i)(3)(b) does not explicitly authorize an award of expert fees up and beyond those enumerated in § 1920 and limited by § 1821, and it fails to provide the requisite clear notice to States.\textsuperscript{252}

To strengthen the argument that the IDEA fails to provide clear notice regarding expert fees, Justice Alito considers other provisions of the IDEA.\textsuperscript{253} Specifically, §§ 1415(i)(3)(C)-(G) of the IDEA were designed to ensure that awards of attorneys' fees are in fact reasonable.\textsuperscript{254} In the Court's view, the fact that these provisions fail to mention expert fees is a clear indication that the IDEA does not authorize such an award.\textsuperscript{255} Additionally, the Court points to the provision of the IDEA, § 1415(d)(2), that requires school districts to provide parents with "a full explanation of the procedural safeguards" available to them under the IDEA.\textsuperscript{256} Like every other provision mentioned by the Court, § 1415(d)(2) also fails to mention expert fees, yet expressly references attorney's fees.\textsuperscript{257} Justice Alito takes the position that if the IDEA actually authorized an award of expert fees to prevailing parents then expert fees should be mentioned in at least those provisions comparable to §

\textsuperscript{249. Id.}
\textsuperscript{250. Id. Section 1920 is the general statute governing the taxation of costs in federal court and is strictly limited by § 1821. See Crawford Fitting Co. v. J.T. Gibbons, Inc. Champion Int'l Co., 482 U.S. 437 (1987), supra note 158 and accompanying text.}
\textsuperscript{251. Arlington, 126 S. Ct. at 2460.}
\textsuperscript{252. Id.}
\textsuperscript{253. Id.}
\textsuperscript{254. Id.}
\textsuperscript{255. Id.}
\textsuperscript{256. Id. (internal quotes omitted).}
\textsuperscript{257. Id.}
Yet, there is no mention of expert fees in any pertinent provision of the IDEA.\textsuperscript{259} Next, the Murphys relied on a provision of the Handicapped Children's Protection Act of 1986 to support their interpretation of § 1415(i)(3)(B). The specific provision relied on by the Murphys required the General Accounting Office ("GAO") to conduct a study concerning special education.\textsuperscript{260} The study required that the GAO collect data concerning:

\begin{itemize}
\item[(A)] the specific amount of attorneys' fees, costs, and expenses awarded to the prevailing party in IDEA cases . . . , and
\item[(B)] the number of hours spent by personnel, including attorneys and consultants, involved in the action or proceeding, and expenses incurred by the parents and the State educational agency and local educational agency.\textsuperscript{261}
\end{itemize}

Turning first to paragraph (A) of the study, Justice Alito points out that it never mentions consultant, experts, or such fees, and paragraph (A) is not asking the GAO to study the amount of awards given to prevailing parties with respect to consultant hiring expenses.\textsuperscript{262} If the study had mentioned either of these then the Murphys might have found some support for their proposition.\textsuperscript{263} Paragraph (B) fails as well.\textsuperscript{264} The Court explains, "[j]ust because Congress directed the GAO to compile statistics on the hours spent by consultants in IDEA cases, it does not follow that Congress meant for States to compensate prevailing parties for the fees billed by these consultants."\textsuperscript{265} Justice Alito goes on to list some of the reasons why Congress would ask for such data, but still not intend to make expert

\begin{itemize}
\item[258.] See id.
\item[259.] Id. In fact, expert fees are not mentioned in any provision of the IDEA.
\item[260.] Id.
\item[261.] Id. (quoting § 4(b)(3), 100 Stat. 797, 797-98) (internal quotes omitted).
\item[262.] Id.
\item[263.] Id.
\item[264.] Id. at 2461.
\item[265.] Id.
\end{itemize}
fees recoverable by prevailing parties. Most importantly, Justice Alito explains that data regarding the costs of litigation would be useful to Congress in constructing future amendments to the IDEA in general, or to its attorney’s fees provision. Justice Alito notes that the study also called for data to be compiled regarding the costs incurred by state and local educational agencies, even though at the time of the study the IDEA did not authorize an award to either.

Hence, the plain text of the IDEA fails to provide States with the requisite clear notice that is required if Congress wishes to make States’ receipt of federal funds conditional. Thus, Justice Alito concludes that the terms of the IDEA do not support the Murphys’ contention that the IDEA provides an award of expert fees to prevailing parents.

2. The Role of Precedent in Statutory Interpretation

Justice Alito finds his strongest support for the Court’s interpretation of § 1415(i)(3)(B) in the Court’s own case precedent. When viewing the present case in light of the Court’s decisions in Crawford Fitting and Casey, Justice Alito believes it is clear that the IDEA fails to give IDEA funded States unambiguous notice regarding their potential liability for expert fees. Justice Alito quickly applies the reasoning laid down by the Court in Crawford Fitting to the term “costs” in § 1415(i)(3)(B). Like the term “costs” in Rule 54(d), the term “costs” in § 1415(i)(3)(B) is

266. Id.
267. Id.
268. Id. Just as Justice Alito predicted, Congress has used the study as a catalyst for the amendment of the IDEA. In 2004, Congress amended the IDEA to include provisions that award costs to state or local educational agencies in certain situations. The goal of the amendment was to reduce the amount of frivolous, improper, and unreasonably costly litigation that would sometimes take place, especially in regards to special education litigation.
269. Id.
270. Id.
271. Id.
272. Id.
273. Id. at 2462.
defined by § 1920.274. Justice Alito strictly applies the principle recognized in *Crawford Fitting* that no statute will be interpreted as allowing the taxation of witness fees unless the statute explicitly states otherwise.275 Thus, under *Crawford Fitting*, because the IDEA does not explicitly refer to the award of expert fees, one cannot imply that the IDEA actually authorizes such an award.276

Justice Alito finds the Court’s decision in *Casey* even more compelling.277 He notes that § 1988, the statute interpreted in *Casey*, contained language practically identical to the language used in § 1415(i)(3)(B). Compare § 1415(i)(3)(B) which “authoriz[es] the award of attorneys’ fees as part of the costs to prevailing parents” with § 1988 which “permit[s] prevailing parties in certain civil rights actions to be awarded a reasonable attorney’s fee as part of the costs.”278 Justice Alito emphatically notes that in order to follow the Murphys’ proposed interpretation the Court would have to hold that “the IDEA unambiguously means exactly the opposite of what the nearly identical language in . . . § 1988 was held to mean in *Casey*.”279 The Court is unwilling, to say the least, to depart from its decision in *Casey* and that decision’s applicability to the case at hand.280

Finally, Justice Alito comments on the Second Circuit’s weighty reliance on a footnote in *Casey*.281 The footnote in question contained the Report which stated, “The conferees intend[ed] that the term “attorneys’ fees as part of the costs” includes reasonable

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274. Id.
275. Id.
276. See id.
277. Id.
278. Id. (internal quotes omitted) (emphasis added).
279. Id.
280. Importantly, Congress amended § 1988 following the Court’s decision in *Casey* to allow for the recovery of certain expert fees. A similar course of action was taken by Congress with respect to other fee-shifting statutes but not with respect to the IDEA. Thus, either Congress did not want to authorize an award of expert fees under the IDEA and that is why they chose not to add the requisite language in an amendment to the IDEA, or Congress already thought an award of expert fees was clearly inferred from the IDEA’s text, purpose, or legislative history.
281. Id.
expenses and *fees of expert witnesses . . .*282 In the footnote, the Court stated that this statement by Congress represented an intention to define a term of art.283 Justice Alito argues that, when read in context, the footnote stands for the proposition that the term “attorneys’ fees,” by itself, is not commonly understood to include expert fees.284 He further explains that the footnote did not say that the Report represented the correct interpretation of § 1415(i)(3)(B) and that the Report, alone, does not provide States with the clear notice required by the Spending Clause.285 Thus, Justice Alito concludes that the Court’s reasoning in both *Crawford Fitting* and *Casey* clearly support his notion that the IDEA fails to authorize an award of attorney’s fees.286

3. The IDEA’s Purpose and Legislative Intent Do Not Provide Clear Notice

To conclude his analysis, Justice Alito confronts two of the Murphys’ arguments that are unrelated to the text of the IDEA.287 First, the Murphys argue that an award of expert fees as part of the recoverable costs to prevailing parents would further the two of the IDEA’s most important goals.288 According to the Murphys, their interpretation would further ensure that “all children with disabilities

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282. *Id.* (internal quotes omitted) (emphasis added).
283. *Id.*
284. *Id.* at 2463.
285. *Id.* at 2462-63. Justice Alito glosses over the Report and its potential impact on the interpretation of the provision in controversy. If anything, it demonstrates Congress’ intent to include expert fees as part of the costs recoverable by prevailing parents. The strongest argument to exclude this potentially crippling piece of information may be to conclude the IDEA, on its face, is unambiguous. Then, the Court does not have to go any further. Justice Alito remains committed to his Spending Clause argument and summarily concludes that the Report would not provide States with the clear notice required by the Spending Clause. By doing so, he makes concludes that clear notice is not given to States in Conference Committee Reports. Something more is needed, and from the Court’s opinion in this case it seems that clear notice can only be found if explicit language is placed in the text of the statute.
286. *Id.* at 2463.
287. *Id.*
288. *Id.*
have available to them a free appropriate public education," and would “safeguard the rights of parent to challenge school decisions that adversely affect their child.” According to Justice Alito, the Murphys’ argument fails because it is too general and because the IDEA’s goals are not intended to be promoted “at the expense of all other considerations, including fiscal consideration.”

Second, the Murphys rely on the legislative history of § 1415(i)(3)(B) to support their argument that Congress intended to compensate prevailing parents for expert fees incurred during litigation. The Murphys again point to the Report mentioned above, but Justice Alito is not swayed by this wolf dressed in sheep’s clothing. In his opinion, the legislative intent is not enough to convince the Court to follow the Murphys’ interpretation, especially given the overwhelming weight of authority to the contrary. Both the unambiguous text of the IDEA and the Court’s reasoning in Crawford Fitting and Casey support Justice Alito’s interpretation of the IDEA: that the IDEA does not authorize an award of expert fees to prevailing parents. But, he also returns again to the clear notice requirement of the Spending Clause, explaining that the key to clear notice is not what Congress intended but “what the States are clearly told regarding the conditions that go along with the acceptance of those funds.” Legislative history alone is not clear notice. Thus, Justice Alito and the Court Majority reverse the Second Circuit’s judgment and hold that the IDEA does not authorize an award of expert fees to prevailing parents.

290. Id. (quoting Brief for Respondents 20) (internal quotations omitted).
291. Id. While lack of financial means is not a defense for a school district’s failure to provide children with disabilities access to a free public education, fiscal considerations can be and often are taken into account in certain IDEA disputes.
292. Id.
293. Id.
294. Id.
295. Id.
296. Id.
B. Justice Ginsburg's Concurring Opinion:
C. Placing the Ball in Congress' Court

1. Critiquing the Majority

Justice Ginsburg concurs with the Court's holding, but finds Justice Alito's Spending Clause analysis "unwarranted." In her opinion, Justice Alito unnecessarily takes Pennhurst's clear notice out of its context and applies it to a rather low key case. Unlike in Pennhurst, the case at hand deals only with the remedies available to parents who prevail against noncompliant school districts. Further, Justice Ginsburg is concerned with the Majority's constant reference and reliance on the Spending Clause. She quickly points out that the IDEA was not only enacted pursuant to the Spending Clause, but also pursuant to the Fourteenth Amendment.

Ultimately, Justice Ginsburg finds that Justice Alito did not need the "clear notice prop" because the Court's decision securely rests on "twin pillars" which clearly support the Court's interpretation that the IDEA does not authorize an award of expert fees to prevailing parents. First, the IDEA's provisions governing and controlling attorneys' fees awards make no mention at all of expert or professional services or fees. Second, the Courts development of analogous prior decisions both support and confirm the Court's holding.

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297. Id. at 2464 (Ginsburg, J., concurring).
298. Pennhurst dealt with the educational programs the IDEA directs school districts to provide. Id. at 2464 (Ginsburg, J., concurring).
299. Id. (Ginsburg, J., concurring).
300. Id. (Ginsburg, J., concurring).
301. Id. (Ginsburg, J., concurring). See also Smith v. Robinson, 468 U.S. 992, 1009 (1984) (holding that the EHA was "set up by Congress to aid the States in complying with their constitutional obligations to provide public education for handicapped children").
303. Id. (Ginsburg, J., concurring).
304. Id. (Ginsburg, J., concurring).
2. Critiquing the Dissent

Justice Ginsburg agrees with Justice Breyer’s contention that including expert costs in § 1415(i)(3)(B) is a good idea given the IDEA’s goal of providing “a free appropriate public education” to all children with disabilities.\(^{305}\) However, as Justice Ginsburg points out, “Congress did not compose § 1415(i)(3)(B)’s text, as it did the texts of other statutes too numerous and varied to ignore, to alter the common import of the terms ‘attorneys’ fees’ and ‘costs’ in the context of expense-allocated legislation.”\(^{306}\) For an example, Justice Ginsburg turns to the statute in controversy in \textit{Casey} and explains that in 1991 Congress amended § 1988 to include “expert fees as part of attorney’s fees.”\(^{307}\) According to Justice Ginsburg, the Court is “not at liberty to rewrite ‘the statutory text adopted by both Houses of Congress and submitted to the President,’ to add several words Congress wisely might have included.”\(^{308}\) Thus, Justice Ginsburg concluded that “the ball . . . is properly left in Congress’ court to provide, if it so elects,” for the authorization of an award of expert fees under the IDEA.\(^{309}\) With that, Justice Ginsburg disagrees only with the Court’s Spending Clause rationale and ultimately concurs in its judgment.\(^{310}\)

\textit{C. The Dissent and Its Critique of the Majority}\(^{311}\)

\(^{305}\) \textit{Id.} at 2465 (Ginsburg, J., concurring) (quoting 20 U.S.C. § 1400(d)(1)(A)).
\(^{306}\) \textit{Id.} (Ginsburg, J., concurring).
\(^{307}\) \textit{Id.} (Ginsburg, J., concurring).
\(^{308}\) \textit{Id.} (Ginsburg, J., concurring) (quoting \textit{Casey}, 499 U.S. at 98).
\(^{309}\) \textit{Id.} (Ginsburg, J., concurring).
\(^{310}\) \textit{Id.} (Ginsburg, J., concurring).
\(^{311}\) Justice Souter joins in Justice Breyer’s dissent but also filed a small, separate dissent of his own. In it, Justice Breyer points out that he agrees with Justice Breyer’s distinction between this case and \textit{Barnes v. Gorman}. \textit{Id.} at 2466 (Souter, J., dissenting). He also emphasizes his reliance on the study conducted by the GAO pursuant to the Handicapped Children’s Protection Act of 1986. \textit{Id.} (Souter, J., dissenting). Because of the existence if the GAO study, Justice Souter finds Justice Breyer’s reliance in the report relating to § 1415(i)(3)(B) unreasonable. \textit{Id.} (Souter, J., dissenting).
According to Justice Breyer, the word “costs” includes the costs of experts and authorizes payment of such costs. Relying on the report accompanying § 1415(i)(3)(B) and the fact that not one Senator or Representative opposed the statement in the report which specified that “the term attorneys’ fees as part of the costs’ include[s] reasonable expenses of expert witnesses . . .,” Justice Breyer contends that Congress intended the IDEA to mean exactly what the Murphys’ proposed: the IDEA authorizes an award of expert fees to prevailing parents.

1. Congress Intended the IDEA to Include the Award of Expert Fees

Justice Breyer bases his interpretation of the IDEA attorney’s fees provision on two principles. First, such an interpretation is what Congress intended. Second, his interpretation “furthers the IDEA’s statutorily defined purposes.”

a). Justice Breyer’s Interpretation is What Congress Intended

To support his conclusion that Congress intended that the IDEA authorize an award of expert fees, Justice Breyer gave an in-depth overview of the Congressional history of the IDEA. Congress first added a fee-shifting provision to the IDEA when it enacted the Handicapped Children’s Protection Act of 1986. The provision was added to explicitly overrule the Court’s decision in Smith, supra. Debates and hearings ensued. As a result, some Senators introduced a new bill that placed a cap on the amount of recoverable attorneys’ fees but explicitly allowed the recovery of expert fees. Some objected to the cap, but no one objected to the expert fees.

312. Arlington, 126 S. Ct. at 2466 (Breyer, J., dissenting).
313. Id. (Breyer, J., dissenting) (quoting H.R. Rep. No. 99-687, at 5 (1986)).
314. Id. (Breyer, J., dissenting).
315. Id. (Breyer, J., dissenting).
316. Id. (Breyer, J., dissenting).
317. Id. (Breyer, J., dissenting).
318. Id. (Breyer, J., dissenting).
319. Id. (Breyer, J., dissenting).
320. Id. at 2467 (Breyer, J., dissenting).
provision. Another bill was proposed that used the language that a court could award "a reasonable attorney's fee in addition to the costs to a parent." On the floor, Senator Weiker, a proponent of the bill, explained that the drafters of the bill intended to include "necessary expert witness fees and other reasonable expenses" in the award of reasonable costs to prevailing parents. No one objected to Senator Weiker's statement. The House reflected similar intentions and again, no objections were raised. After the bill passed both houses, members of Congress met to negotiate and produced the report accompanying § 1415(i)(3)(B). Both houses orally agreed to the report without objection. It is at this point that Justice Breyer points out that while no one objected to the Report, one could still conclude that silence is significant given the fact that majority of members who spoke that day had already signed the report. From its history, Justice Breyer attempts to show that Congress adopted both the proposed text of the IDEA and the accompanying report. Thus, the report, in a sense, explains Congress' intended meaning of the textual language of the Act. Since the Report's text clearly allows for an award of expert fees, Justice Breyer contended that Congress intended for the IDEA to authorize such an award.

b). The Purpose of the IDEA Supports an Award of Expert Fees

321. Id. (Breyer, J., dissenting).
323. 131 CONG. REC. 21390.
325. Id. (Breyer, J., dissenting).
326. Id. (Breyer, J., dissenting).
327. Id. (Breyer, J., dissenting).
328. Id. (Breyer, J., dissenting).
329. Id. (Breyer, J., dissenting). Justice Breyer is making this comment in response to Justice Ginsburg's contention that the silence of the sponsors of the legislation as to expert fees in some way indicated that they did not intend the amendment to authorize such an award under the IDEA.
330. Id. (Breyer, J., dissenting).
331. Id. (Breyer, J., dissenting).
332. Id. (Breyer, J., dissenting).
Justice Breyer’s key concern with the Court’s decision is that the IDEA’s goals of ensuring parental participation and quality procedural protections will be increasingly diminished if parents are unable to recover expert fees and costs. Justice Breyer points out the increasing need of experts in IDEA litigation and the fact that “the vast majority of parents whose children require the benefits and protections provided in the IDEA lack the knowledge about the educational resources available to their child and the sophistication to mount an effective case against a district-proposed IEP.”

Further, Justice Breyer notes the high cost of experts and the likely problem that many parents will just not be able to afford an expert without the potential for reimbursement. Unlike their school district counterparts, parents do not staff experts that can later be used during IDEA litigation. In effect, Justice Breyer is saying that an individual’s right to a free appropriate public education will mean nothing to that individual if he or she has to pay hundreds of dollars to receive it.

To support his argument, Justice Breyer points out that the Court has previously avoided interpretations that would cause a ghastly result. Specifically, Justice Breyer turns to the Court’s holding in Florence County School District Four v. Carter. In Carter, the Court held that “prevailing parents are not barred from reimbursement for switching their child to a private school that does not meet the IDEA’s definition of a free and appropriate education.” The Court overlooked a small detail with respect to the IDEA in order to ensure that its overarching purpose was maintained. Justice Breyer strongly believes that the Court’s interpretation of the word “costs” will defeat the primary purpose of the IDEA. And, in the words of Justice Breyer, the Court’s decision “will leave many parents . . .

333. Id. at 2469 (Breyer, J., dissenting).
334. Id. (Breyer, J., dissenting).
335. Id. (Breyer, J., dissenting).
336. Id. (Breyer, J., dissenting).
337. Id. (Breyer, J., dissenting).
338. Id. (Breyer, J., dissenting).
339. Id. at 2470 (Breyer, J., dissenting) (quoting Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 13 (1993)).
341. Arlington, 126 S. Ct. at 2470 (Breyer, J., dissenting).
without an expert with the firepower to match the opposition, a far

cry from the level playing field that Congress envisioned."\textsuperscript{342}

2. Justice Breyer’s Critique of the Majority

To conclude his dissenting opinion, Justice Breyer gives an in-
depth critique of the majority decision with respect to all three of its
arguments. Justice Breyer first attacks the Court’s Spending Clause
analysis. While he agrees with the majority that the IDEA, on its
face, does not \textit{clearly} indicate that States must pay for expert fees,
Justice Breyer does not believe that the majority has taken the correct
approach.\textsuperscript{343} According to Justice Breyer, the Court has gone too far
with its strict and narrowly interpreted clear notice requirement.\textsuperscript{344}
He points out that \textit{Pennhurst} does not require that every detail of
Spending Clause legislation be spelled out with striking clarity.\textsuperscript{345}
Justice Breyer argues that this case involves but a detail of an
extensive piece of legislation, and requiring overtly detailed clarity
here, when such clarity was never required in several other IDEA
cases decided by the Court\textsuperscript{346}, is overreaching.\textsuperscript{347} In fact, Justice
Breyer points out that in many cases where the Court examined
financial burdens imposed by the IDEA, it never even referenced the
Spending Clause or the clear notice requirement.\textsuperscript{348} In all, Justice
Breyer is most concerned with the Court’s strict requirement of
textual clarity because of its potential to circumvent the objectives of
complex federal programs.\textsuperscript{349}

\textsuperscript{342} \textit{Id.} (Breyer, J., dissenting) (quoting \textit{Schaffer}, 126 S. Ct. at 536).
\textsuperscript{343} \textit{Id.} (Breyer, J., dissenting).
\textsuperscript{344} \textit{Id.} (Breyer, J., dissenting).
\textsuperscript{345} \textit{Id.} (Breyer, J., dissenting).
\textsuperscript{346} \textit{See} Sch. Comm. of Burlington v. Dep’t of Educ. of Mass., 471 U.S. 359,
369 (1985) (providing for parental reimbursement for private school fees); \textit{see also}
school to provide child with continuous nursing services).
\textsuperscript{347} \textit{Id.} (Breyer, J., dissenting).
\textsuperscript{348} \textit{See Burlington}, 471 U.S. at 369 (providing for parental reimbursement
for private school fees); \textit{see also Cedar Rapids}, 526 U.S. at 76-79 (requiring school
to provide child with continuous nursing services).
\textsuperscript{349} \textit{Arlington}, 126 S. Ct. at 2471 (Breyer, J., dissenting).
Next, Justice Breyer attacks the Court's reliance on statutory interpretation. He sees the Court's interpretation of § 1415(i)(3)(B) as plausible, but not the only plausible construction.\textsuperscript{350} Justice Breyer argues that one could reasonably read the statute as containing the general authority to award costs, coupled with an express inclusion of attorneys' fees as one of the potential cost awards.\textsuperscript{351} Under this construction, the statute would not exclude an award of expert fees. Even though Justice Breyer's construction is grammatically more challenging than the Court's, he contends it is legislatively more likely.\textsuperscript{352} Specifically, under the Court's interpretation, the attorney's fees provision of the IDEA is subject to § 1920; yet, § 1920 only applies in federal court.\textsuperscript{353} This produces a somewhat odd result in that all IDEA actions are initiated in state due process hearings.\textsuperscript{354} Then, parents who choose to appeal may do so in either state or federal court.\textsuperscript{355} Section 1920 would not apply to these due process hearings or the appeals brought in state courts.\textsuperscript{356} Under the Court's interpretation, the scope of the term "costs" would vary from state to state and from proceeding to proceeding.\textsuperscript{357} Thus, Justice Breyer disagrees with the Court's determination that § 1415(i)(3)(B) is unambiguous; rather, he concludes that because there are two plausible interpretations of the provision, the Court should have looked to legislative intent and the overriding purpose of the IDEA in interpreting the attorney's fees provision in question.

Finally, Justice Breyer critiques the Court's decision to categorize the term "costs" as it is used in the IDEA as a term of art whose scope traditionally excludes expert fees.\textsuperscript{358} Justice Breyer disagrees with this categorization and rests his argument on the study conducted by the GAO.\textsuperscript{359} Justice Breyer first points out that the language of the provision directing the GAO to conduct this study

\begin{thebibliography}{9}
\bibitem{350} Id. at 2472 (Breyer, J., dissenting).
\bibitem{351} Id. (Breyer, J., dissenting).
\bibitem{352} Id. (Breyer, J., dissenting).
\bibitem{353} Id. (Breyer, J., dissenting).
\bibitem{354} Id. (Breyer, J., dissenting).
\bibitem{355} Id. (Breyer, J., dissenting).
\bibitem{356} Id. (Breyer, J., dissenting).
\bibitem{357} Id. (Breyer, J., dissenting).
\bibitem{358} Id. at 2473 (Breyer, J., dissenting).
\bibitem{359} Id. (Breyer, J., dissenting).
\end{thebibliography}
used both the word “costs” and “expenses.” Justice Breyer raises the question: if Congress wanted to limit the award of costs to only those enumerated in § 1920, why did Congress use the word “expenses” as part of the amount awarded to the prevailing party? He goes on to point out that, when used as a term of art, the term “costs” and § 1920 do not cover any expenses. So, the question remains, why include expenses in the provision if “costs” is a term of art intended to exclude an award of expert fees?

Justice Breyer criticizes the Court’s speculation as to why the GAO study required data to be collected with respect to expert costs and fees. He concludes his dissent by pleading to the Court that the study is at least some indication that Congress did not intend the word “costs” to be a term of art, as it was in Crawford Fitting and Casey. According to Justice Breyer, if this is the case then precedent would not prevent the Court from turning to the legislative history of § 1415(i)(3)(B) for help in interpreting the provision.

And thus, as previously stated by Justice Breyer, “[the legislative] history could not be more clear about the matter: Congress intended the statutory phrase ‘attorneys’ fees as part of the costs’ to include the costs of experts.”

Ultimately, Justice Breyer is most disappointed with the Court’s failure to truly consider the IDEA’s legislative history. According to Justice Breyer, the most important judicial goal is to interpret with respect to a statute’s purpose. In his opinion, the Court’s failure in this regard has led to an interpretation that undercuts the purposes of the IDEA, and one that Congress neither expected nor wanted.

360. Id. (Breyer, J., dissenting).
361. Id. (Breyer, J., dissenting).
362. Id. (Breyer, J., dissenting).
363. Id. (Breyer, J., dissenting).
364. Id. (Breyer, J., dissenting).
365. Id. (Breyer, J., dissenting).
366. Id. (Breyer, J., dissenting).
367. Id. (Breyer, J., dissenting).
368. Id. (Breyer, J., dissenting).
369. Id. (Breyer, J., dissenting).
370. Id. at 2475 (Breyer, J., dissenting).
Finally, he fears that the Court's course of action in this case has "divorce[d] law from life."371

V. IMPACT

A. The Practical Implications of Requiring Clear Notice

The most obvious impact of the Court's decision is expressed in Justice Ginsburg's concurring opinion. Like in Smith, the Court has once again placed the ball in Congress' court to reevaluate the statutory language of the IDEA. Specifically with regard to expert fees, Congress will have to decide whether it really intended the IDEA to authorize an award of expert fees to prevailing parents. Congress' decision to amend the IDEA to include an award of expert fees would, in effect, affirm the Dissent's interpretation of § 1415(i)(3)(B). On the other hand, Congress' failure to amend the provision in question would affirm the Court's interpretation that the IDEA does not authorize an award of expert fees. In reality, it is solely within Congress' discretion to decide whether the Court's ruling in Arlington will be overruled.

Another implication of the Court's reliance on the Spending Clause is the potential effect of the Court's strict interpretation of the clear notice requirement on other IDEA provisions and other Spending Clause legislation, in general. The IDEA is a complex and expansive piece of federal legislation. As a result, many of the provisions in the IDEA are unclear or ambiguous. To help clarify provisions in the IDEA a Code of Federal Regulations is published to accompany the most recent IDEA amendment,372 but even these Regulations can fall short of total clarity. As Justice Breyer's dissenting opinion points out, the Court's overt attention to provisions in the IDEA that are no more than details could cause unanticipated problems. How detailed is Congress going to have to be? And, if the Court continues to construe Pennhurst's clear notice requirement strictly, just how many times is Congress going to have to amend its Spending Clause legislation? It seems that Arlington gave the Court the perfect opportunity to find clear notice in the

371. Id. (Breyer, J., dissenting).
372. 34 C.F.R. § 300.500 et seq.
IDEA’s legislative history, yet the Court chose to extend its reasoning in *Pennhurst*. The Court’s extension of the *Pennhurst* clear notice requirement has the potential to create enormous inflexibility in the Court’s interpretation of spending clause legislation and could potentially force Congress into amending large and expansive legislation similar to the IDEA.

**B. The Rise of the Independent Education Evaluation as a Litigation Tool**

Unfortunately without the opportunity to recover expert fees parents are at a natural disadvantage to school districts that generally staff their own experts. In spite of the Court’s holding, parents of children with disabilities may still gain access to experts via another IDEA procedural safeguard known as the Independent Education Evaluation (“IEE”).[^373] Specifically, under 20 U.S.C. § 1415(b)(1) ("§ 1415(b)(1)"), the IDEA guarantees parents the opportunity to obtain an independent evaluation of their child at public expense.[^374] The Code of Federal Regulations clarifies § 1415(b)(1) and provides: “a parent has to right to an [IEE] at public expense if the parent disagrees with an evaluation obtained by the public agency.”[^375] A parent may request an IEE any time he or she disagrees with an evaluation.[^376] When the parent does request an IEE, the school district has only two options: (1) to agree to provide the IEE or (2) to file a due process complaint against the parents, explaining why the school district’s evaluation is adequate.[^377] Importantly, a school district cannot just refuse a parent’s IEE request.[^378] According to the Court in *Schaffer*, “[the] IDEA . . . ensures parents’ access to an expert who can evaluate all the materials that the school must make available, and who can give an independent opinion. They are not left to challenge the government without a realistic opportunity to access the necessary evidence, or *without an expert with the*

[^374]: *Id.*
[^376]: *Id.*
[^377]: *Id.*
firepower to match the opposition.” While parents are given the opportunity to access experts outside the influence of a school district, the experts obtained through an IEE are, by definition, independent. In reality, independent experts are very different than those retained by a party in preparation of litigation.

First, it is unlikely that the independent evaluator will act as one would expect a retained expert to act. It is unlikely that the independent evaluator will help parents understand evidence or prepare to challenge the school district’s experts. Also, there is no guarantee that this independent evaluator will testify at the due process hearing, and no guarantee that he will do so at public expense. If provided, the IEE guarantees nothing more than an independent evaluation and the accompanying report.

Second, there is no absolute guarantee that parents will receive an IEE at public expense. School districts have the option of denying the parents request for an IEE if they believe their evaluations are adequate. School districts can opt to take the parents to hearings, where the school district will have to show the adequacy of its evaluation and the parents will have to show why an IEE is necessary. Unfortunately, “the vast majority of parents whose children require the benefits and protections provided in the IDEA lack knowledge about the educational resources available to their child and the sophistication to mount an effective case against a [district refusal to provide an IEE].” Thus, the parents who need an expert the most will likely be unable to obtain one, and in effect, the level playing field imagined by Congress is now increasingly uneven.

Even though the IEE provision allows for parents to obtain an expert in most situations, it still fails to empower parents the same way a hired expert would. Unfortunately, as a result of the Court’s decision in Arlington, those parents who cannot afford to retain their

379. Id. at 6-61 (emphasis added).
380. See 34 C.F.R. § 300.502(b)(1).
381. See id.
382. Id.
383. Id.
384. Id.
385. Schaffer, 377 F.3d at 458 (Luttig, J., dissenting)).
own expert may never be able to match the firepower of a school district's staffed and experienced expert. Further, parents relying on the IEE process to furnish their expert will have to prepare earlier for litigation.

Requiring parents to better prepare themselves before initiating litigation has its pros and cons. On the one hand, parents will be forced to slow down and utilize negotiation and settlement techniques. Conversely, parents may also need to seek attorneys earlier in the litigation process, thus, increasing the total amount of attorneys' fees incurred during the resolution process. This also has the potential to leave parents with the responsibility of paying their own attorney's fees. As mentioned above, § 1415(i)(3)(B) only awards attorneys fees to prevailing parents. Thus, parents who are able to resolve their issues before proceedings are formally initiated will most likely never recover attorneys' fees. In effect, while the IEE provides an alternative for parents unable to afford an expert, there is no compensation for the loss of parental fire power sustained as a result of the Court's decision.

VI. CONCLUSION

Special Education Law has undergone an enormous transformation since the days of institutions and forced sterilizations. There have always been bumps along the road and the Court's decision in Arlington is no exception. Despite legislative history to the contrary, the Court in Arlington held that § 1415(i)(3)(B), the IDEA's attorney's fees provision does not authorize an award of expert fees to prevailing parents.386 As a result, both the parents of children with disabilities and Congress will have to take a step back and consider the impact of the Court's decision. For parents, it means better preparation and better utilization of other IDEA procedural safeguard provisions. The real pressure, however, has been placed on Congress. With its decision, the Court has effectively placed the ball in Congress' court. It is now up to Congress to decide whether the IDEA should authorize an award of attorney's fees to prevailing parents. Until then, parents are left with potentially less

effective means to ensure that children with disabilities receive a free and appropriate public education.