NO. 05-983

IN THE
Supreme Court of the United States

JACOB WINKELMAN, A MINOR, BY AND THROUGH HIS PARENTS AND LEGAL GUARDIANS, JEFF AND SANDEE WINKELMAN, ET AL., PETITIONERS

v.

PARMA CITY SCHOOL DISTRICT

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

To what extent, if any, may a non-lawyer parent of a minor child with a disability proceed *pro se* in a federal court action brought pursuant to the Individuals with Disabilities in Education Act, 20 U.S.C. 1400 *et seq*.

PARTIES TO THE PROCEEDING

Petitioners are Jacob Winkelman, a minor, by and through his parents and legal guardians, Jeff and Sandee Winkelman; Jeff Winkelman; and Sandee Winkelman. Respondent is Parma City School District.

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The order of the court of appeals (Pet. App. 1a-2a) is unreported. The district court's unreported memorandum of opinion (Pet. App. 3a-23a) is available at 2005 WL 1315728.

JURISDICTION

The district court entered judgment for respondent on June 2, 2005. Pet. App. 3a-23a. The court of appeals' order was entered on November 4, 2005. *Id.* at 1a-2a. The petition for a writ of certiorari was filed on February 2, 2006. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Section 35 of the Judiciary Act of 1789, 28 U.S.C. 1654, provides that "[i]n all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein."

2. The relevant portions of the Individuals with Disabilities in Education Act (IDEA), 20 U.S.C. 1400 *et seq*., are reproduced as an appendix to this brief.

STATEMENT

Petitioners Jeff and Sandee Winkelman, neither of whom is a lawyer, are the parents of petitioner Jacob Winkelman, a now-nine-year old boy afflicted with autism spectrum disorder. Petitioners brought this action under IDEA to challenge the appropriateness of the special-education program offered by respondent for Jacob and to vindicate various procedural violations of IDEA committed by respondent and the Ohio administrative hearing officer who presided over petitioners' administrative-level proceedings.

The district court entered judgment for respondent after finding that neither respondent nor the hearing officer violated IDEA. The court of appeals ordered the dismissal of petitioners' appeal because they were proceeding *pro se*. Petitioners seek reversal of that dismissal order.

I. STATUTORY FRAMEWORK

IDEA provides federal grants to States for assistance in the education of children with disabilities.[1] The Act

[1] IDEA traces back to the Education of the Handicapped Act (EHA), Pub. L. No. 91-230, 84 Stat. 175 (1970), which was Congress' first effort to address the needs of children with disabilities and their families. Because EHA did not stem the tide of overt discrimination in education against these children, parents and civil rights groups began turning to the federal courts, where they won substantial relief in two path-breaking decisions: *Mills v. Board of Education of the District of Columbia*, 348 F. Supp. 866 (D.D.C. 1972) and *Pennsylvania Ass'n for Retarded Children v. Pennsylvania* (*PARC*), 334 F. Supp. 1257 (E.D. Pa. 1971), and 343 F. Supp. 279 (E.D. Pa 1972). The courts in these cases concluded (*PARC* through a consent decree) that systematic discrimination against children with disabilities in the provision of public education violated the equal protection and due process guarantees of the Fourteenth Amendment. *Mills*, 348 F. Supp. at 875; *PARC*, 343 F. Supp. at 279. The courts ordered an end to discrimination and entered broad injunctive relief. In the wake of these decisions, Congress substantially overhauled the EHA with the passage of the Education for All Handicapped Children Act of 1975 (EAHCA), Pub. L. No. 94-142, 89 Stat. 773. For a detailed history of the statute's early evolution, including the impact these cases had on the EAHCA, *see Hendrik Hudson Central School District Board of Education v. Rowley*, 458 U.S. 176, 179-80 (1982).

In 1990, Congress changed the title of the statute to the Individuals with Disabilities Education Act. See Education of the Handicapped Act Amendments of 1990, Pub L. No. 101-476, § 901(a)(1), (3), 104 Stat. 1103, 1141-42. Congress reauthorized and revised IDEA in 1997, see Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105-17, 111 Stat. 88, and did so again in 2004, renaming it the Individuals with Disabilities in Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647.

explicitly seeks to protect the rights of parents as well as children. See 20 U.S.C. 1400(d)(1)(B) (IDEA seeks "to ensure that the rights of children with disabilities *and parents of such children* are protected." (emphasis added)). Among its numerous provisions, IDEA contains 212 express references to "parent" or "parents" and 17 references to "family" or "families."

Under IDEA, a State participating in the grant program must ensure that each child with a disability receives a "free appropriate public education" (FAPE), which includes special-education and related services necessary to meet the child's particular needs. 20 U.S.C. 1400(d)(1)(A), 1412(a)(1)(A). The Act guarantees "children with disabilities *and the families of such children* access to a [FAPE]." 20 U.S.C. 1400(c)(3) (emphasis added).

To ensure that each disabled child receives a FAPE, IDEA requires local school systems to develop an individualized education program (IEP) for each child with a disability in accordance with statutory requirements. See 20 U.S.C. 1412(a)(4), 1414(d). "Parents and guardians play a significant role in the IEP process." *Schaffer v. Weast*, 126 S. Ct. 528, 532 (2005). For example, local school systems must obtain informed consent from parents before evaluating the child and must notify parents of the procedures they propose to use. 20 U.S.C. 1414(a)(1)(D)(i)(I), (b)(1). "[I]nformation provided by the *parent*" must be examined during this evaluation. 20 U.S.C. 1414(b)(2)(A), (c)(1)(A)(i) (emphasis added). The determination whether the child has a disability and how the child's educational needs will be satisfied "shall be made" by an "IEP Team" consisting "of qualified professionals and the *parent* of the child." 20 U.S.C. 1414(b)(4)(A).

For ease of reference, we refer to the statute as IDEA and cite to the statute as amended in 2004, unless otherwise indicated.

As members of the IEP Team, parents are expressly given numerous and repeated opportunities to shape their child's IEP. For example, "other individuals who have knowledge or special expertise regarding the child" may be added to the IEP Team "at the discretion of the *parent*." 20 U.S.C. 1414(d)(1)(B)(vi). Parents also have the right to require attendance of all IEP Team members at each IEP meeting. 20 U.S.C. 1414(d)(1)(C)(i). In developing and reviewing the child's IEP, the Team must consider "the concerns of the *parents* for enhancing the education of their child." 20 U.S.C. 1414(d)(3)(A)(ii) (emphasis added); *see also* 20 U.S.C. 1414(d)(4)(A)(ii)(III). After the IEP is created, the local school system may modify the IEP only after first holding a Team meeting unless "the *parent*" agrees otherwise. 20 U.S.C. 1414(d)(3)(D) (emphasis added). Finally, parents have a right to annual reevaluations of their child, before which local school systems must obtain the parent's consent. 20 U.S.C. 1414(a)(2), (c)(3).

IDEA also mandates that States and localities accord to "children with disabilities *and their parents*" a set of procedural safeguards to ensure the provision of a FAPE. 20 U.S.C. 1415(a) (emphasis added). "Congress placed every bit as much emphasis upon compliance with procedures giving *parents* and guardians a large measure of participation at every stage of the administrative process, * * * as it did upon the measurement of the resulting IEP against a substantive standard." *Rowley*, 458 U.S. at 205-06. For this reason, Congress required educational agencies to give "to the parents" "a full explanation of the procedural safeguards" available to them under the Act. 20 U.S.C. 1415(d)(2).

Among other things, those procedural safeguards include a guarantee that "parents of a child with a disability" be given "[a]n opportunity * * * to examine all records relating to [their] child." 20 U.S.C. 1415(b)(1) (emphasis added). "[P]arents of the child" must also be given "[w]ritten prior notice" in advance of any change (or refusal to change) in

their child's educational services. 20 U.S.C. 1415(b)(3). If parents are dissatisfied "with respect to any matter relating to the identification, evaluation, or educational placement of the[ir] child, or the provision of a [FAPE] to such child," they may file an administrative complaint. 20 U.S.C. 1415(b)(6)(A). Parents are likewise entitled to "an impartial due process hearing" on their complaint before either the local or state educational agency. 20 U.S.C. 1415(f)(1)(A). If the local agency conducts the due process hearing, "any party aggrieved by the findings and decision rendered in such a hearing may appeal such findings and decision to the State educational agency." 20 U.S.C. 1415(g)(1). After exhausting administrative remedies, "[a]ny party aggrieved by the findings and decision" of the due process hearing or state-level review has "the right to bring a civil action * * * in any State court of competent jurisdiction or in a district court of the United States, without regard to the amount in controversy." 20 U.S.C. 1415(i)(2)(A).

II. FACTUAL AND PROCEDURAL BACKGROUND

Beginning in July 2001, Jacob attended preschool at the Achievement Center for Children (ACC) because he did not respond well to respondent's preschool program. Jacob's parents and respondent agreed that ACC was an appropriate placement for Jacob's preschool education for the 2001-02 and 2002-03 school years. Pet. App. 4a.

On June 2, 2003, Jacob's parents and respondent's officials met to discuss Jacob's IEP for the 2003-04 school year – Jacob's kindergarten year. Respondent proposed an IEP that would educate Jacob in a special education classroom at one of respondent's elementary schools. This proposal was unacceptable to Jacob's parents. Specifically, Jacob's parents were concerned that the proposed IEP did not contain a specific plan to implement occupational therapy, did not contain a sufficient amount of speech therapy or one-

on-one instruction, and did not include music therapy. *Id.* at 5a.

On June 2, 2003, Jacob's parents filed a request for a due process hearing with respondent's superintendent, alleging that the 2003-04 IEP proposed by respondent failed to provide Jacob with a FAPE. Meanwhile, Jacob's parents enrolled him at the Monarch School (Monarch), a school that specializes in educating autistic children, where "Jacob performed well" during the 2003-04 school year. But because Monarch's $56,000 annual tuition was prohibitively expensive,[2] Jacob's parents did not enroll him at Monarch for the 2004-05 school-year and instead educated him at home with supplementation from a one- to two-hour per week outreach program at Monarch. *Ibid.*

On February 25, 2004, the Impartial Hearing Officer (IHO) selected to preside over the petitioners' due process hearing issued a decision finding that respondent provided Jacob with a FAPE. Jacob's parents appealed to the State Level Review Office (SLRO), which on June 2, 2004, issued a decision affirming the IHO's decision. *Id.* at 6a. Petitioners were represented by counsel before both the IHO and SLRO.

Dissatisfied with the results of the administrative proceedings, on July 15, 2004, petitioners filed an action in

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[2] Jacob's sister, Jenna, also suffers from autism. Due to Jacob's mother's disability and the time required to care for Jenna and Jacob, the Winkelmans' household income is less than $40,000 per year. They have no savings, face a monthly mortgage payment of $1,300, and incur significant medical expenses for Jacob and Jenna. Because petitioners are unable to afford counsel, *see* BIO App. 34b; Adam Liptak**,** *Nonlawyer Father Wins His Suit over Education, and the Bar Is Upset*, N.Y. Times, May 6, 2006, at A8 (noting that one lawyer asked Jacob's mother for a biweekly fee of $2,600 or a payment every two weeks of twice the amount the family paid every month for their mortgage to represent Jacob in the court of appeals proceedings below), we represent petitioners on a *pro bono* basis.

the United States District Court for the Northern District of Ohio pursuant to 20 U.S.C. 1415(i)(2). The complaint listed all three petitioners as plaintiffs: Jacob's parents and Jacob, "by and through" his parents. JA 11. The complaint challenged the IHO's and SLRO's findings that respondent had provided Jacob with a FAPE and alleged that respondent and the IHO had violated petitioners' procedural rights under IDEA. In total, petitioners alleged three procedural violations and three substantive violations of IDEA. JA 17-19; Pet. App. 6a-22a. Specifically, petitioners alleged that their procedural rights were violated (1) when respondent predetermined to place Jacob in its own program "without meaningful input by Jacob's parents" prior to developing his 2003-04 IEP;[3] (2) when the IHO impermissibly allowed her research assistant to "co-preside" over the proceedings;[4] and (3) when the administrative proceedings lasted longer than

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[3] A school district violates IDEA when it predetermines a child's placement and fails to give parents a "meaningful" opportunity to participate in the formulation of their child's IEP. See, *e.g., Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840, 864-65 (CA6 2004) (holding that school district predetermined child's placement and violated parents' right to participate in IEP formulation process where school district refused to discuss parents' suggested alternative placement "even in the face of impressive results"), cert. denied, 126 S. Ct. 422 (2005); see also *W.G. v. Board of Tr. of Target Range Sch. Dist. No. 23*, 960 F.2d 1479, 1484-85 (CA9 1992) (holding that school district violated IDEA when it independently developed a proposed IEP that would place the student in a preexisting, predetermined program and refused to consider other alternatives).

[4] IDEA gives "state authorities * * * limited discretion to determine who conducts [due process] hearings." *Schaffer*, 126 S. Ct. at 532 (citing 20 U.S.C. 1415(f)(1)). Ohio grants parents the right to participate in the selection of the hearing officer and to know the hearing officer's qualifications. See Ohio Admin. Code § 3301-51-08(D)(2) ("The office for exceptional children will send * * * a statement of the qualifications of each hearing officer * * * to both the parent and the district who will have the opportunity to agree upon a hearing officer."); *see also generally id.* § 3301-51-08(E), (F).

the forty-five days allowed by IDEA's implementing regulations.[5] JA 17-18; see also Pet. App. 7a-8a, 10a-11a; Pet. Mot. S.J. at 5-8. Petitioners alleged that IDEA's substantive right to a FAPE was denied because the 2003-04 IEP (1) did not contain specific goals and objectives for occupational therapy;[6] (2) reduced Jacob's speech therapy from ninety minutes to sixty minutes and did not provide for one-on-one academic instruction;[7] and (3) did not include music therapy.[8] See JA 18-19; Pet. App. 11a, 16a-17a, 21a;

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[5] IDEA's implementing regulations specify that "[t]he public agency shall ensure that not later than 45 days after the receipt of a request for a [due process] hearing – (1) A final decision is reached in the hearing." 34 C.F.R. 300.511(a); accord, Ohio Admin. Code § 3301-51-08(G)(3)(b)).

[6] Among other things, an IEP must include "a statement of annual goals, including short-term objectives [and] a statement of the specific educational services to be provided the child." 34 C.F.R. 222.50. "[O]ccupational therapy" is a "related service[]" that school districts must provide to qualifying children and discuss in a qualifying child's IEP. 20 U.S.C. 1401(26)(A) (requiring school districts to provide "'related' * * * supportive services (including * * * occupational therapy * * *)" if the requested services are necessary "to assist a child with a disability to benefit from special education").

[7] "Speech-language pathology services" are also "related services" that school districts must provide to qualifying children and discuss in a qualifying child's IEP. 20 U.S.C. 1401(26)(A) (requiring school districts to provide "'related' * * * supportive services (including speech-language pathology services)" if the requested services are necessary "to assist a child with a disability to benefit from special education"); see also *supra* note 6. The dispute between the parties over speech therapy and one-on-one instruction concerned whether the sixty minutes of speech therapy offered by respondent and the group instruction used in respondent's special education classroom were each "reasonably calculated to enable the child to receive educational benefits." *Rowley*, 458 U.S. at 207; see also Pet. App. 16a-21a.

[8] Although not listed among IDEA's examples of "related services," music therapy is, nonetheless, a "related service[]" that a school district must provide if necessary "to assist a child with a disability to benefit

Pet. Mot. S.J. at 8-15. On June 2, 2005, the district court granted judgment on the pleadings for respondent, essentially affirming the decisions of the IHO and SLRO. See Pet. App. 23a. Petitioners timely appealed.

Shortly before petitioners appealed, the Sixth Circuit decided *Cavanaugh v. Cardinal Local School District*, 409 F.3d 753 (CA6 2005). In that case, the Sixth Circuit held that non-lawyer parents of a disabled child may not proceed *pro se* in a federal court action brought pursuant to IDEA. *Id.* at 757-58. The Sixth Circuit explained that "pro se means to appear on one's own behalf * * * not * * * on another person's behalf in the other's cause of action." *Id.* at 755. The Sixth Circuit reasoned that "the right of [a] disabled child to a FAPE belongs to the child alone, and is not a right shared jointly with his parents" because, as it explained in *Barnett v. Memphis City Schools*, 113 Fed. Appx. 124 (CA6 2004), "the intended beneficiary of the IDEA is not the parents of the individual with a disability, but the disabled individual." 409 F.3d at 757. The court recognized that "IDEA does grant parents of disabled students a narrow set of procedural rights" but stated that those "procedural rights exist only to ensure that the child's substantive right to a FAPE is protected." *Ibid.* It therefore concluded that "any right on which the [parents] could proceed on their own behalf would be derivative of their [child's] right to receive a FAPE, and wholly dependent on the [parents] proceeding, through counsel, with their appeal on [their child's] behalf." *Ibid.*

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from special education." 20 U.S.C. 1401(26)(A); see also *supra* notes 6 & 7. The dispute between the parties over music therapy concerned whether Jacob needed music therapy to "receive educational benefits." Pet. App. 21a-22a.

After petitioners' appeal was docketed,[9] respondent filed on July 14, 2005, a motion invoking *Cavanaugh* and seeking dismissal of the appeal because petitioners were proceeding *pro se*. BIO App. 18b-32b. On November 4, 2005, the court of appeals ordered petitioners' entire appeal dismissed unless petitioners retained counsel within 30 days. Pet. App. 1a-2a. Relying on *Cavanaugh* and its order in petitioners' preliminary injunction appeal, the Sixth Circuit stated that "Jeff and Sandee Winkelman are not permitted to represent their child in this court nor can they pursue their own IDEA claims *pro se*." Pet. App. 1a (citing *Cavanaugh*, 409 F.3d at 756-57).

On December 2, 2005, Justice Stevens stayed the Sixth Circuit's November 4, 2005, order, "pending the timely filing and disposition by this Court of a petition for a writ of certiorari." Justice Stevens' order provided that, if certiorari is denied, the "stay will terminate automatically fifteen days after the date of the order denying certiorari," or if certiorari is granted, the stay will terminate "upon the sending down of the judgment of this Court."

This Court granted certiorari on October 27, 2006. 127 S. Ct. 467.

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[9] Petitioners had filed a previous interlocutory appeal challenging the district court's denial of a preliminary injunction regarding Jacob's "stay put" placement at Monarch. See *Winkelman v. Parma City Sch. Dist.*, 166 Fed. Appx. 807, 808 (CA6 2006). Relying on *Cavanaugh*, the Sixth Circuit on September 20, 2005, ordered dismissal of that appeal unless petitioners retained counsel within 30 days. BIO App. 2b-4b (citing *Cavanaugh*, 409 F.3d at 756-57). In response to the Sixth Circuit's order, we volunteered to represent petitioners *pro bono*. *Id.* at 5b-7b. On January 25, 2006, the Sixth Circuit affirmed the denial of the preliminary injunction on the merits. See *Winkelman*, 166 Fed. Appx. at 808-11. Petitioners did not seek further review of that decision, which is not implicated here.

SUMMARY OF ARGUMENT

The question in this case is to what extent non-lawyer parents of a disabled child, like Jacob's parents, may litigate an IDEA dispute in federal court *pro se*. The answer is "without limitation."

In § 35 of the Judiciary Act of 1789, 28 U.S.C. 1654, Congress provided that "[i]n all courts of the United States *the parties* may plead and conduct their own cases personally or by counsel." Congress created a private right of action for judicial review of IDEA disputes when it provided that "[a]ny party aggrieved by the findings and decision" of an administrative-level hearing officer may bring suit in federal court. 20 U.S.C. 1415(i)(2)(A).

On a plain reading of this provision – as confirmed by IDEA's text, structure, and legislative history, Congress intended to make parents of a disabled child real parties in interest to IDEA actions, such that they are entitled under the general federal rule embodied in 28 U.S.C. 1654 to bring an IDEA action *pro se*. This is the case regardless whether the claims the parent asserts allege a denial of the statutory substantive right to a free appropriate education (FAPE) or a violation of one of IDEA's procedural safeguards.

In IDEA cases, federal courts review the outcomes of and procedures employed during administrative due process hearings, which Congress specifically required to be exhausted as a precondition to suit. 20 U.S.C. 1415(*l*). Congress repeatedly recognized that parents would be the party to initiate the administrative process through its various provisions acknowledging that parents would typically file the initial due process complaint. *E.g.,* 20 U.S.C. 1415(b)(6)(B).

Congress further required, as a condition precedent to suit, that in states with two-tier systems, like Ohio, "any party aggrieved" by the findings of or procedures employed during the initial due process hearing exhaust the second level of review. 20 U.S.C. 1415(g)(1). Because Congress employed the same "any party aggrieved" language in both IDEA's right-to-sue provision and IDEA's provision governing second-tier administrative review, the two provisions must be accorded the same meaning – namely, that parents may continue to press their own right of action. *Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995).

IDEA's provisions prohibiting challenges to the qualifications of educational agency personnel and conferring jurisdiction to award attorneys' fees confirm that parents are real parties in interest with their own right of action in federal court. These provisions refer, respectively, to "the right of action that a parent * * * may maintain," *e.g.,* 20 U.S.C. 1401(10)(E), and to "a prevailing party who is the parent," *e.g.,* 20 U.S.C. 1415(i)(3)(A).

In providing parents with their own right of action, Congress did not intend to limit it to only procedural claims. In fact, Congress conferred on parents their own right to ensure that the statutory substantive right to a FAPE was provided to their child. This is manifest primarily in IDEA's repeated expressions of congressional intent to provide an appropriate education to disabled children "at no cost to parents." *E.g.,* 20 U.S.C. 1401 (29). It is confirmed by IDEA's numerous provisions granting parents extensive rights of involvement in shaping the individualized educational plan designed to provide their disabled child the services that the child requires and IDEA's numerous provisions granting parents the right to advocate for the child throughout the administrative process. See, *e.g., Cedar Rapids Comm. Sch. Dist. v. Garret F.*, 526 U.S. 66, 73 (1999) (looking to IDEA's "overall statutory scheme" to interpret its provisions).

Even if the substantive statutory right to a FAPE belonged only to the disabled child, IDEA cases are appropriate cases in which to allow parental lay representation. Unlike other contexts in which the common law presumption against lay representation has been enforced, IDEA cases affect parents and children whose interests are perfectly aligned. In IDEA cases, parents have a concrete stake in the issue because of their financial responsibility for the child and the financial effect on them of a denial of benefits.

Moreover, parents of disabled children are permitted to and often do represent their children in the administrative process that must be exhausted before seeking judicial review. Once administrative remedies have been exhausted, the cases involve administrative record review and little new fact-finding. And because parents are often unable to find counsel, a ban on parental representation would both jeopardize the child's statutory right to judicial review of adverse decisions and result in forfeiture of the very benefits that are intended to aid children during their childhood and, therefore, must be timely provided.

ARGUMENT

The court of appeals erred when it held that "Jeff and Sandee Winkelman are not permitted to represent their child in this court nor can they pursue their own IDEA claims *pro se*." Pet. App. 1a.

I. PARENTS MAY LITIGATE IDEA CASES *PRO SE* UNDER 28 U.S.C. 1654 BECAUSE THEY ARE REAL PARTIES IN INTEREST IN SUCH CASES

This Court has recognized repeatedly that parents of a disabled child are among those who may file a civil action under IDEA, see *Honig v. Doe*, 484 U.S. 305, 312 (1988) ("At the conclusion of [a due process] hearing, both the

parents and the local educational agency may seek further administrative review and, where that proves unsatisfactory, may file a civil action in any state or federal court."); *School Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 361 (1985) (noting "the right of the parents * * * to challenge in administrative and court proceedings a proposed IEP with which they disagree"), but it has not yet recognized that parents may do so *pro se*.

In § 35 of the Judiciary Act of 1789, 28 U.S.C. 1654, Congress provided that "[i]n all courts of the United States *the parties* may plead and conduct their own cases personally or by counsel." Congress created a private right of action for judicial review of IDEA disputes when it provided that "[a]ny party aggrieved by the findings and decision" of an administrative-level hearing officer may bring suit in federal court. 20 U.S.C. 1415(i)(2)(A). Because parents of a disabled child are "part[ies] aggrieved" under 20 U.S.C. 1415(i)(2)(A) when they bring a civil action either to seek relief for a substantive violation of the statutory right to a FAPE or to enforce IDEA's procedural safeguards, they are entitled under the general federal rule embodied in 28 U.S.C. 1654 to proceed *pro se* in a federal court action under IDEA.

Statutory language is the starting point in any case of statutory construction, *Leocal v. Ashcroft*, 543 U.S. 1, 8 (2004), and should be given its most natural reading, *Rousey v. Jacoway*, 544 U.S. 320, 330 (2005). This Court has stressed repeatedly that, in performing a textual analysis, the "[i]nterpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis." *Dolan v. United States*, 126 S. Ct. 1252, 1257 (2006); *see also Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 60 (2004) ("Statutory construction is a 'holistic endeavor.'" (citations omitted)); *Leocal*, 543 U.S. at

9 ("[T]he Court construes language in its context and in light of the terms surrounding it.").[10]

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[10] The Spending Clause is inapplicable to this case but, even if it was applicable, this Court's analysis and the result it reaches should be the same. A parent's right to sue *pro se* for an IDEA violation derives from 28 U.S.C. 1654, which is not Spending Clause legislation. The question how an IDEA case may be litigated in federal court does not implicate the Spending Clause's concerns about whether a state official "engaged in the process of deciding whether the State should accept IDEA funds [has] * * * clear notice regarding the [State's] liability," any "'federally imposed conditions'" on the receipt of IDEA funds, or other "obligations that go with those funds." *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 126 S. Ct. 2455, 2459 (2006) (quoting *Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)). A State's liability and fiscal obligations are independent of the question of federal court procedure at issue here. To this end, the issue in this case differs markedly from the questions in *Schaffer* and *Murphy*, which involved how States administer and conduct the administrative-level proceedings that IDEA obligates them to provide (*Schaffer*) or whether States may be liable to compensate prevailing parents for expert fees (*Murphy*). Moreover, because civil litigants have been able to sue *pro se* since Congress enacted 28 U.S.C. 1654 as § 35 of the Judiciary Act of 1789, States have long had notice that they may have to oppose *pro se* litigants.

Neither respondent's speculative concern about *pro se* parents filing "'poorly drafted, inarticulate, or vexatious claims,'" BIO at 16 (quoting *Collinsgru v. Palmyra Bd. of Educ.*, 161 F.3d 225, 231 (CA3 1998)), nor its concern about its "and its taxpayers' * * * right to an efficient and timely resolution to * * * legal proceedings," *id.* at 30, implicates the Spending Clause. IDEA's implementing regulations make clear that IDEA funds "may not be used to pay attorneys' fees or costs of a party related to an action or proceeding under section 615 [20 U.S.C. 1415] of the Act." 34 C.F.R. 300.517(b)(1). Indeed, upon § 300.517(b)(1)'s original promulgation, the Department of Education explained that "the limited Federal resources under this Act should be used to provide special education and related services and not be used to promote litigation of disputes." 64 Fed. Reg. 12406, 12615 (1999). Whatever the efficiency and duration of IDEA actions – and the costs of defending such actions – they do not relate to the bargain struck by States when they agree to receive IDEA funds, because receipt of those funds is totally unrelated to the in-court litigation obligations of a State or local school district.

In any event, even if the Spending Clause was applicable to this case, it would not affect the result. Nothing in *Murphy* – nor any of the Court's

Contrary to the Sixth Circuit's conclusion "that the right * * * to a FAPE belongs to the child alone" and that "any [procedural] right on which the [parents] could proceed on their own behalf would be derivative of their [child's] right to receive a FAPE," *Cavanaugh*, 409 F.3d at 757, "[o]n a plain reading" of IDEA's text – and confirmed by its structure, purposes, and legislative history – parents have both their own procedural rights under IDEA and their own right to ensure that their child is receiving IDEA's statutorily-guaranteed FAPE. *Maroni*, 346 F.3d at 251. Consequently, parents are real parties in interest in IDEA actions, not merely guardians of their children's rights, and *ipso facto* have a right under 28 U.S.C. 1654 to proceed *pro se* on such IDEA claims.[11]

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prior Spending Clause precedents – indicates that the Spending Clause is an independent interpretive lens through which to read a statute. Rather, the Spending Clause simply amplifies why a statute should be interpreted according to its plain meaning. And "[o]n a plain reading" of IDEA, as discussed throughout this brief, the court of appeals' judgment should be reversed. *Maroni v. Pemi-Baker Reg'l Sch.*, 346 F.3d 247, 251 (CA1 2003).

[11] Thus, this Court need not necessarily decide, as respondent has suggested, whether parents can "proceed *pro se* on behalf of their children." BIO 13. That issue, which is addressed, *infra*, in Part II of this brief, would be implicated only if the Court finds either that parents do not have their own right to ensure that their child is receiving IDEA's statutorily-guaranteed FAPE, see *Cavanaugh*, 409 F.3d at 757 (holding that IDEA's "guarantee of a FAPE is [not] a right that [a child] shares jointly with his parents"); *Collinsgru*, 161 F.3d at 232-37 (same), or that parents' procedural rights under IDEA are derivative of their child's substantive right to a FAPE, see *Cavanaugh*, 409 F.3d at 757 ("[A]ny right on which the [parents] could proceed on their own behalf would be derivative of their [child]'s right to receive a [free appropriate public education], and wholly dependent upon the [parents] proceeding, through counsel, with their appeal on [their child's] behalf.").

A. CONGRESS VIEWED PARENTS AS "PARTIES AGGRIEVED" BY ADVERSE ADMINISTRATIVE DECISIONS AND, THEREFORE, REAL PARTIES IN INTEREST TO IDEA SUITS

Congress used the phrase "[*a*]*ny party aggrieved* by the findings and decision * * * with respect to [an administrative] complaint" to define those entitled to bring a civil action under IDEA. 20 U.S.C. 1415(i)(2)(A) (emphasis added). This Court has explained that "[h]istory associates the word 'aggrieved' with a congressional intent to cast the standing net broadly." *FEC v. Akins*, 524 U.S. 11, 19 (1998); see also *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 208-09 (1972) (holding that the term "aggrieved person" in § 810(a) of the Fair Housing Act demonstrated congressional intent to confer standing to the fullest extent permitted by Article III). A person is "aggrieved" if he or she has "legal rights that are adversely affected" or has "been harmed by an infringement of legal rights." *Black's Law Dictionary* 73 (8th ed. 2004).

1. Parents are real parties in interest to the administrative-level proceedings that must be exhausted as a condition precedent to suit

In IDEA cases, federal courts review the outcomes of and procedures employed during administrative due process hearings. Congress required as a condition precedent to bringing suit in court that such administrative remedies be exhausted,[12] see 20 U.S.C. 1415(*l*) ("[T]he procedures under

[12] There are, of course, exceptions to the requirement that administrative remedies be exhausted. See *Honig*, 484 U.S. at 327 ("[J]udicial review is normally not available under § 1415(e)(2) [the former judicial review provision] until all administrative proceedings are completed, but as we have previously noted, parents may bypass the administrative process where exhaustion would be futile or inadequate.").

subsections (f) and (g) shall be exhausted."), and it is indisputable that parents have the right to exhaust those administrative remedies (and to do so *pro se*), see 20 U.S.C. 1415(h)(2)).[13] Indeed, Congress specifically acknowledged in both IDEA's text and its legislative history that *parents* – not their minor children – would be the parties that file administrative complaints.

For example, IDEA's statute of limitations for administrative complaints is limited to events occurring "not more than 2 years before the date the *parent* or public agency knew or should have known about the alleged action that forms the basis of the complaint." 20 U.S.C. 1415(b)(6)(B) (emphasis added). Section 1415(b)(8) "require[s] the State educational agency to develop a model form to assist *parents* in filing a complaint and due process complaint notice." (Emphasis added). Section 1415(c)(2)(B) requires school districts, upon receiving a "*parent's* due process complaint notice," to respond to it within ten days. (Emphasis added).

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[13] While a parent has "the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities" at due process hearings, 20 U.S.C. 1415(h)(1), parents are *discouraged* from having counsel accompany them to IEP meetings. See 34 C.F.R. Part 300, App. A ("The presence of the agency's attorney could contribute to a potentially adversarial atmosphere at the meeting. The same is true with regard to the presence of an attorney accompanying the parents at an IEP meeting."). The Sixth Circuit's reading of the statute would result in a sequence in which parents would be permitted but discouraged from employing counsel at an IEP meeting, permitted to employ counsel at the administrative level, but required to employ counsel in court. That sequence would be odd in any administrative law regime but is particularly bizarre under IDEA, where courts largely conduct record review and, unlike Title VII or Prison Litigation Reform Act (PLRA) cases, do not adjudicate *de novo*. See *infra* pp. 40-41; cf. *Maroni*, 346 F.3d at 256-57 ("It would be odd for Congress to exclude parents from the definition of 'parties aggrieved' as to substantive claims, and thus force them to find attorney representation at the federal court level, after giving parents such a strong role at every other stage of the process.").

Likewise, § 1415(d)(2) requires that, "upon * * * the filing of a complaint," educational agencies provide "a full explanation of the procedural safeguards, written in the native language of the *parents*." (Emphasis added). Once the complaint is filed, "the *parents* or the local education agency involved shall have an opportunity for an impartial due process hearing." 20 U.S.C. 1415(f)(1) (emphasis added)); see also 20 U.S.C. 1415(e)(2)(A)(ii) (ensuring that IDEA's mediation process "is not used to deny or delay a *parent's right* to a due process hearing" (emphasis added)), (k)(3)(A) ("The *parent* of a child with a disability who disagrees with any decision regarding placement, or the manifestation determination under this subsection, or a local educational agency that believes that maintaining the current placement of the child is substantially likely to result in injury to the child or to others, may request a hearing." (emphasis added)).

IDEA's legislative history is entirely consistent with the understanding that parents will be the parties to exhaust IDEA's administrative remedies before filing suit. The Senate Committee on Labor and Human Relations, in reporting on proposed attorneys' fees amendments to the statute, explained that "[u]nder the EHA *parents* must generally exhaust administrative remedies to attempt to resolve certain disagreements before filing a civil court action." S. Rep. No. 99-112, 99th Cong., 1st Sess. 15 (1985) (emphasis added). Similarly, the House Committee on Education and Labor explained that "Congress, by establishing a comprehensive scheme of procedural protections under EHA * * * expected that in appropriate situations these procedures would be used before a *parent* or guardian filed a law suit [sic]." H.R. Rep. No. 99-296, 99th Cong., 1st Sess. 4 (1985) (emphasis added); *see also id.* at 7 ("Typically, a *parent* is required to exhaust administrative remedies where complaints involve the identification, evaluation, education placement, or the provision of a [FAPE] to their handicapped child." (emphasis added)).

Having made parents the "party" in interest in administrative hearings under the Act, it follows that Congress also considered parents to be a "party aggrieved by the findings and decision" resulting from those very same administrative hearings. Indeed, it would be absurd if the parents who are explicitly expected to exhaust administrative remedies as a condition precedent to initiating a civil action could not be parties for purposes of that civil action. See *Nixon v. Missouri Mun. League*, 541 U.S. 125, 144 (2004) (observing that the Court's task is to interpret statutes "in light of the purposes Congress sought to serve while avoiding 'absurd results'"). "Because the statute enables parents to request due process hearings, they are parties to such hearings and thus are logically within the group of 'parties aggrieved' given the right to sue." *Maroni*, 346 F.3d at 251; see also *Collinsgru*, 161 F.3d at 236-39 (Roth, J., dissenting).[14]

2. Parents are "parties aggrieved" under § 1415(g)(1) when they administratively appeal the results of a due process hearing in two-tier systems

That parents are real parties in interest in IDEA cases is "buttressed" by the provisions of IDEA that allow appeals to

[14] Indeed, courts "almost uniformly permitted parents to sue pro se under the predecessor statute to IDEA, the Education for All Handicapped Children Act (EHA)." *Maroni*, 346 F.3d at 250 (citing, *inter alia*, *Gregory K. v. Longview Sch. Dist.*, 811 F.2d 1307 (CA9 1987); *Rettig v. Kent City Sch. Dist.*, 788 F.2d 328 (CA6 1986); *Kruelle v. New Castle Co. Sch. Dist.*, 642 F.2d 687, 690 & n.4 (CA3 1981) (allowing parents to proceed *pro se*, without discussion, in case challenging provision of FAPE to their disabled son under the EHA; noting without discussion that "20 U.S.C. § 1415(e)(2) provides that any party aggrieved by an agency decision shall have the right to bring a civil action * * * in a district court")).

the state educational agency in two-tier systems like that employed in Ohio.[15] *Maroni*, 346 F.3d at 251. Congress mirrored the "any party aggrieved" language in IDEA's right-to-sue provision (§ 1415(i)(2)(A)), when it provided that "any party aggrieved by the findings and decision rendered" in a due process hearing conducted by a local education agency "may appeal such findings and decision to the State educational agency." 20 U.S.C. 1415(g)(1). Parents – as the principal parties initiating due process hearings under the Act – are unquestionably "part[ies] aggrieved" for purposes of filing an administrative appeal, as numerous courts have recognized. See *Maroni*, 346 F.3d at 251-52 (citing *Frazier v. Fairhaven Sch. Comm.,* 276 F.3d 52, 59 (CA1 2002)); *Cudjoe v. Indep. Sch. Dist. No. 12,* 297 F.3d 1058, 1064 (CA10 2002); *Board of Educ. v. Kelly E. ex rel. Nancy E.,* 207 F.3d 931, 935 (CA7 2000).

3. Congress' use of the same "parties aggrieved" language in granting both the right to administrative appeal under § 1415(g)(1) and the right to sue under § 1415(i)(2)(A) requires that the term be given consistent meaning

Under the "normal rule of statutory construction," *Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995) ("[I]dentical words used in different parts of the same act are intended to have the same meaning." (quoting *Department of*

[15] States have "one-tier" or "two-tier" systems for due process hearings. In one-tier systems, the state department of education conducts the due process hearing and the losing party can appeal directly to state or federal court. 20 U.S.C. 1415(i)(2)(A). In two-tier systems, the due process hearing is conducted by the school district. The losing party must appeal to the state department of education, which appoints a review officer or review panel. 20 U.S.C. 1415(g)(1), (i)(2)(A). After the review officer or panel issues a decision, the losing party may appeal to state or federal court. 20 U.S.C. 1415(i)(2)(A). Ohio employs a two-tier system.

Revenue v. ACF Indus., Inc., 510 U.S. 332, 342 (1994))), Congress' use of the same broad reference to "any party aggrieved" in the provisions governing both administrative appeals (§ 1415(g)(1)) and civil actions challenging the outcome of administrative appeals (§ 1415(i)(2)(A)) requires that the two provisions "be accorded a consistent meaning," *National Credit Union Admin. v. First Nat. Bank & Trust Co.*, 522 U.S. 479, 501 (1998) (applying the "established canon of construction that similar language within the same statutory section must be accorded a consistent meaning"); see also *NASA v. Federal Labor Relations Auth.*, 527 U.S. 229, 235 (1999) (observing that phrase "should ordinarily retain the same meaning wherever used in the same statute"); *Mertens v. Hewitt*, 508 U.S. 248, 260 (1993) ("[L]anguage used in one portion of a statute * * * should be deemed to have the same meaning as the same language used elsewhere in the statute."); *Sorenson v. Secretary of Treas.*, 457 U.S. 851, 860 (1986) ("[I]dentical words used in different parts of the same act are intended to have the same meaning."); 2A Norman J. Singer, *Sutherland Statutes & Statutory Construction* § 47.16 (rev. 6th ed. 2000) ("Where the meaning of a word is unclear in one part of a statute but clear in another part, the clear meaning can be imparted to the unclear usage on the assumption that it means the same thing throughout the statute."). If parents are "parties aggrieved" by due process hearings when seeking to appeal to a state administrative agency, then as a matter of statutory construction – in addition to the logical reasons discussed above – they must also be "parties aggrieved" by due process hearings when seeking judicial review.

The Sixth Circuit, in concluding that parents cannot be "parties aggrieved" with a right to sue under § 1415(i)(2)(A), see *Cavanaugh*, 409 F.3d at 757 ("We have considered, and reject, the reasoning of the First Circuit in *Maroni*."), has simply ignored Congress' use of the same "parties aggrieved" language in both § 1415(g)(1) and § 1415(i)(2)(A) and the fact that Congress fully intended

parents to be parties to the administrative proceedings that must be exhausted before filing suit. It has not – and cannot – explain away the persuasive force of the parallelism between these two provisions.

4. Congress had no need to single-out parents from the collective group of "parties aggrieved" in § 1415(i)(2)(A) to make them real parties in interest

In concluding that parents cannot be "parties aggrieved" with a right to sue under § 1415(i)(2)(A), the Sixth Circuit relied, *inter alia*, on the Third Circuit's decision in *Collinsgru* – a divided decision – which reasoned that, because IDEA contains a provision allowing parties to proceed in the administrative level without an attorney, see 20 U.S.C. 1415(h), but contains no comparable provision pertaining to court actions, Congress did not intended the term "party aggrieved" to include parents. *Cavanaugh*, 409 F.3d at 757. Congress did explicitly say that parents could bring due process hearings without a lawyer, and so, according to the Third and Sixth Circuits, the rule of *expressio unius est exclusio alterius* means that Congress did not intend parents to be able to sue *pro se*. *Cavanaugh*, 409 F.3d at 756; *Collinsgru*, 161 F.3d at 232.

But the *expressio unius* canon, which is of limited force to begin with, see *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003), is inapplicable here. Congress' omission of parents from § 1415(i)(2)(A) reveals nothing about whether Congress intended to authorize parents to proceed *pro se* in federal court. Congress had no need to address the issue in that provision because – unlike the situation with respect to IDEA *State*-run administrative proceedings – another *federal*

statute (28 U.S.C. 1654) already provided parties the right to pursue their own claims *pro se* in federal lawsuits.[16]

Moreover, in crafting the right-to-sue provision, Congress needed to include several categories of plaintiffs – school districts, parents, and children – and, therefore, used a collective term. For example, IDEA does not refer to "child aggrieved" as it easily could if only the child could sue. Nor does § 1415(i)(2)(A) refer to school districts, even though they may – and do – seek review under it. See, *e.g., Manchester Sch. Dist. v. Crisman*, 306 F.3d 1, 4 & n.3 (CA1 2002) (reviewing a federal civil suit by a school district under 20 U.S.C. 1415(i)(2)(A)). Accordingly, the only plausible explanation for IDEA's use of the term "party aggrieved" instead of "parents" is that Congress sought to confer the right to judicial review of administrative-level proceedings upon all parties involved: school districts, parents, and children.

[16] For similar reasons, the Third and Eleventh Circuit's observation that while "parents have the right to present evidence and examine witnesses in due process hearings * * * there is no indication that Congress intended to carry this requirement over to federal court proceedings," *Devine v. Indian River County Sch. Bd.*, 121 F.3d 576, 582 (CA11 1997) (citing 20 U.S.C. 1415(d)(2) (1997) (current version at 20 U.S.C. 1415(h)(2))), cert. denied, 522 U.S. 1110 (1998); see also *Collinsgru*, 161 F.3d at 235-36, is of no moment. In discussing how a court should adjudicate IDEA cases, Congress provided that "the court * * * shall hear additional evidence at the request of a party," 20 U.S.C. 1415(i)(2)(C), which simply begs the antecedent question whether parents are "a party."

5. IDEA's provisions prohibiting challenges to the qualifications of educational agency personnel and conferring jurisdiction to award attorneys' fees confirm that parents are real parties in interest

In addition to IDEA's grant to parents of a cause of action under § 1415(i)(2)(A)'s right-to-sue provision, both IDEA's provisions prohibiting challenges to the qualifications of educational agency personnel and provisions conferring jurisdiction to award attorneys' fees confirm that parents are real parties in interest.

In §§ 1401(10)(E) and 1412(a)(14)(E), Congress prohibited a "right of action" "for the failure of a particular * * * educational agency employee to be highly qualified."[17] In doing so, however, Congress confirmed that parents are real parties in interest with a "right of action," by explaining that its prohibition on challenges to the qualifications of personnel applies "[n]otwithstanding any other individual right of action that a *parent* or student may maintain under this subchapter." 20 U.S.C. 1401(10)(E), 1412(a)(14)(E) (emphasis added).

The attorneys' fee provisions of IDEA also confirm that Congress viewed parents as real parties in interest who may pursue in court claims that their child was denied a FAPE or that their own or their child's procedural rights were violated. IDEA allows "the district courts of the United States" "[i]n any action or proceeding brought under this section," to "award reasonable attorneys' fees * * * *to a prevailing party*

[17] At minimum, a "highly qualified" teacher must have an undergraduate degree and be certified or licensed by the State. Additional requirements vary depending on the level and curricula they teach. 20 U.S.C. 1401(10)(B)-(D).

who is the parent of a child with a disability."[18] 20 U.S.C. 1415(i)(3)(A), (B)(i)(I) (emphasis added);[19] see also *Lucht v. Molalla River Sch. Dist.*, 225 F.3d 1023, 1026 (CA9 2000) (holding in action to recover attorneys' fees that "[w]hen a *parent* obtains affirmative relief in a proceeding brought

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[18] In *Collinsgru,* the Third Circuit rejected the plaintiffs' argument that IDEA's attorneys' fees provisions showed that "an IDEA suit is the parents' own case for 28 U.S.C. 1654 pro se representation purposes," because, in its view, "it is just as logical to read this language simply as a reference to the procedural cases in which parents clearly have standing as parties." 161 F.3d at 234. The more logical reading of § 1415(i)(3), however, is that it applies to appeals of decisions rendered in administrative hearings on substantive as well as procedural issues: Section 1415(i)(3)(B) makes clear that the attorneys' fees provisions apply "[i]n any action or proceeding brought under this section," *i.e.* § 1415. 20 U.S.C. 1415(i)(3)(B)(i). The "action[s] or proceeding[s]" provided for in § 1415 include due process hearings, 20 U.S.C. § 1415(f)(1)(A) (parents have the right to a due process hearing regarding complaints they file under subsection (b)(6)), as well as court-appeals from decisions rendered in those hearings, 20 U.S.C. 1415(i)(2)(A) (any "party aggrieved" by a decision made under subsection (f) may bring a civil action with respect to the complaint presented "pursuant to this section"). Thus, the attorneys' fees provisions' reference to parents as "parties" to all actions under § 1415 necessarily includes actions brought in court.

[19] The pre-2004 version of § 1415(i)(3)(B) authorized the award of attorneys' fees "to the parents of a child with a disability who is the prevailing party." 20 U.S.C. 1415(i)(3)(B) (2000). That provision, however, does not affect other provisions recognizing that parents may be a prevailing party, because the fact is that either parents or children, or both, may be prevailing parties under IDEA. See *Maroni*, 346 F.3d at 252 (noting that the pre-2004 version of 20 U.S.C. 1415(i)(3)(B) "suggests parents are aggrieved parties who bear the costs and benefits of a successful suit" and that the pre-2004 version of 20 U.S.C. 1415(i)(3)'s "dual usage undercuts any argument that the attorneys' fees provision requires the term 'party aggrieved' to exclude parents"). In any event, in 2004, Congress amended § 1415(i)(3)(B) to provide for attorneys' fees "to the prevailing party who is the parent of a child with a disability." 20 U.S.C. 1415(i)(3)(B)(i)(I).

under IDEA, the *parent* is the 'prevailing party.'" (emphasis added)).

IDEA also prohibits a court from awarding attorneys' fees in "any action or proceeding under this section for services performed subsequent to the time of a written offer of settlement to a *parent*" if, in addition to other conditions, "the relief finally obtained *by the parents* is not more favorable *to the parents* than the offer of settlement." 20 U.S.C. 1415(i)(3)(D)(i), (D)(i)(III) (emphasis added). That prohibition, however, is tempered by language reiterating that parents may be prevailing parties under IDEA, insofar as Congress allowed a district court to award attorneys fees to "a *parent who is the prevailing party* and who was substantially justified in rejecting the settlement offer," even if the parent fails to obtain relief greater than the rejected settlement. 20 U.S.C. 1415(i)(3)(E) (emphasis added). Similarly, if "the parties" reach a settlement during one of IDEA's voluntary mediation or resolution sessions, their settlement "shall * * * [be] signed by both the *parent* and a representative agency * * * [and is] enforceable * * * in a district court of the United States." 20 U.S.C. 1415(e)(2)(F), (f)(1)(B)(iii) (emphasis added).[20] If the child were the only real party in interest, it would be strange for Congress to focus so specifically on the relief obtained "by the parents."

The 2004 amendments to IDEA's attorneys' fee provisions reaffirm this reading.[21] In addition to clarifying

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[20] While Congress presumably assumed that parents would oversee litigation involving the rights of their children and so might be the target of settlement offers in that context, the repeated focus on the rights of the parents, here and throughout the statute, indicates that the parents enjoy more than merely derivative rights.

[21] The 2004 amendments govern the question presented. Those amendments took effect on July 1, 2005, see Pub. L. No. 108-446, § 302(a)(1), 118 Stat. 2803, before petitioners filed this appeal with the Sixth Circuit. JA 7, 9. Thus, the statute as amended in 2004 was the version in effect at the time of the proceedings in the court of appeals.

parents' prevailing party status in § 1415(i)(3)(B)(i)(I), see *supra* note 19, the 2004 amendments provide that parents and/or their attorneys – notably, not a child or a child's attorney – may be liable for attorneys' fees when they (1) pursue a "cause of action that is frivolous, unreasonable, or without foundation," (2) "continue[] to litigate after the litigation clearly became frivolous, unreasonable, or without foundation," or (3) pursue a "cause of action * * * for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation." 20 U.S.C. 1415(i)(3)(i)(B).[22]

Contrast *Schaffer*, 126 S. Ct. at 532 (applying pre-2004 version of IDEA because that version "was in effect during the proceedings below"). There was no reason not to give that provision immediate effect in pending cases. Under *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994), a statute operates retroactively only if "it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Respondent* surely cannot claim any of its interests are implicated. The opposing party would hardly seem to have a vested interest in precluding the other party from proceeding *pro se*. See *Fernandez-Vargas v. Gonzales*, 126 S. Ct. 2422, 2432 n.10 (2006) (defining "vested rights" as "a term that describes something more substantial than inchoate expectations and unrealized opportunities"). Nor is applying this rule to pending cases a retroactive application at all because the relevant event for judging retroactivity is a party's ongoing self-representation prospectively. See *id.* at 2433 (rejecting retroactivity challenge to "application of new law to continuous[] * * * action"); *Landgraf*, 511 U.S. at 290-293 (Scalia, J., concurring); cf. *Martin* v. *Hadix*, 527 U.S. 343, 360-361 (1999) (applying attorneys' fees limitations of PLRA in pending cases to legal services provided after effective date of the Act). Thus, applying the 2004 amendments is consistent with *Landgraf*. In any event, the 2004 amendments did not change the law with respect to *pro se* representation because, for the reasons explained above, parents enjoyed the right to proceed *pro se* in federal court under the version of IDEA prior to 2004.

[22] As amended in 2004, the statute authorizes an award of attorneys' fees

> (I) to a *prevailing party who is the parent* of a child with a disability;

The Court should, therefore, reject the Sixth Circuit's contrary reading, which would require the Court to simultaneously "rewrite the [IDEA] statute," *Honig*, 484 U.S. at 323 (declining the California Superintendent of Public Instruction's invitation to read a dangerousness exception into the disciplinary section of IDEA where no exception was included by Congress and the statute is clear on its face), and deprive parents of their right to litigate their own cases *pro se* under 28 U.S.C. 1654.

> (II) to a prevailing party who is a State educational agency or local educational agency against the *attorney of a parent* who files a complaint or subsequent cause of action that is frivolous, unreasonable, or without foundation, or against the *attorney of a parent* who continued to litigate after the litigation clearly became frivolous, unreasonable, or without foundation; or
>
> (III) to a prevailing State educational agency or local educational agency against *the attorney of a parent*, or against the parent, if the parent's complaint or subsequent cause of action was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation.

20 U.S.C. 1415(i)(3)(B)(i) (emphasis added). In addition, with limited exceptions, the current version of IDEA mandates that a court reduce the amount of attorneys' fees if:

> (i) the parent, or the *parent's attorney*, during the course of the action or proceeding, unreasonably protracted the final resolution of the controversy; [or]
>
> * * * * *
>
> (iv) the *attorney representing the parent* did not provide to the local educational agency the appropriate information in the notice of the [administrative] complaint.

20 U.S.C. 1415(i)(3)(F) (emphasis added).

B. PARENTS ARE REAL PARTIES IN INTEREST REGARDLESS WHETHER THEY BRING CLAIMS ALLEGING VIOLATIONS OF IDEA'S SUBSTANTIVE RIGHT TO A FAPE OR VIOLATIONS OF IDEA'S PROCEDURAL SAFEGUARDS

Parents have both procedural rights under IDEA and their own right to ensure that their child is receiving IDEA's statutorily-guaranteed FAPE. When any of those rights is violated, the parents themselves are "parties aggrieved" and real parties in interest to any suit to vindicate those rights. Accordingly, when parents bring a claim challenging the denial of IDEA's substantive statutory right to a FAPE, they are not bringing that claim "on behalf of their child," as some courts have erroneously held in denying parents the opportunity to litigate those claims *pro se*. See *Mosely v. Bd. of Educ.*, 434 F.3d 527, 532, 535 (CA7 2006) (holding that parents may proceed *pro se* on their own procedural claims under IDEA but must retain counsel if they wish to pursue IDEA claims on behalf of their child); *Collinsgru*, 161 F.3d at 227, 232-36 (same); *Wenger v. Canastota Cent. Sch. Dist.*, 146 F.3d 123, 124-26 (CA2 1998) (per curiam) (same), cert. denied, 526 U.S. 1025 (1999); *Devine*, 121 F.3d at 581-82 & n.17 (same). Nor are parents' claims alleging violations of IDEA's procedural safeguards merely derivative of the rights guaranteed for their children, as the Sixth Circuit erroneously held in *Cavanaugh*, 409 F.3d at 757, because that conclusion likewise rests on the faulty premise that parents do not enjoy their own right to ensure that their child is receiving IDEA's statutorily-guaranteed FAPE.

1. Parents have their own right to ensure that their child is receiving IDEA's statutorily-guaranteed FAPE

Although parents of a child with a disability enjoy several procedural rights under IDEA,[23] see *Schaffer*, 126 S. Ct. at 532 (noting several examples), parents also have a substantive right under IDEA to a *free* appropriate public education for their child.[24] For example, in enacting IDEA, Congress found that, "[s]ince the enactment and implementation of the Education for All Handicapped Children Act of 1975, [IDEA] has been successful in ensuring children with disabilities and *the families of such children access to a free appropriate public education*." 20 U.S.C. 1400(c)(3) (emphasis added). Congress similarly recognized that denial of a FAPE adversely affects not just the child with a disability but also his or her family. See 20 U.S.C. 1400(c)(2)(D) (acknowledging that before EHA, "the educational needs of millions of children with disabilities were not being fully met because * * * a lack of adequate resources within the public school system forced *families* to find services outside the public school system." (emphasis added)).

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[23] Where parents allege procedural violations at a due process hearing, the hearing officer may conclude that procedural inadequacies constituted a denial of the substantive guarantee of a free appropriate public education if he determines that the parents' opportunity to participate in the decision-making process was significantly impeded. 20 U.S.C. 1415(f)(3)(E)(ii).

[24] Indeed, implicitly recognizing that *lawyer*-parents litigating over the substantive right to a FAPE are effectively litigating for themselves, the circuits have universally held that § 1415(i)(3)(B) attorneys' fees are unavailable to them under *Kay v. Ehrler,* 499 U.S. 432 (1991). See *Ford v. Long Beach Unified Sch. Dist.*, 461 F.3d 1087, 1090-91 (CA9 2006); *S.N. ex rel. J.N. v. Pittsford Cent. Sch. Dist.,* 448 F.3d 601, 603-04 (CA2 2006); *Woodside v. School Dist. of Philadelphia Bd. of Educ.*, 248 F.3d

Other provisions of the Act likewise emphasize that parents should not be required to bear the cost of educating their child with a disability. For example, the Act defines "free appropriate public education" to mean "special education and related services" that, among other things, are provided "at public expense" and "without charge," 20 U.S.C. 1401(9), and "special education" to mean "specially designed instruction, *at no cost to parents*, to meet the unique needs of a child with a disability," 20 U.S.C. 1401(29) (emphasis added); see also 20 U.S.C. 1412(a)(10)(B)(i) (requiring, under certain circumstances, that children with disabilities placed in private schools by public agencies be "provided special education and related services, in accordance with an [IEP], *at no cost to their parents*") (emphasis added).

To protect the right to a FAPE, Congress expressly authorized courts, under certain circumstances, to order local educational agencies "to reimburse the *parents*" for private school tuition.[25] 20 U.S.C. 1412(a)(10)(C)(ii) (emphasis added); see *also Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15 (1993) ("[P]ublic educational authorities who want to avoid reimbursing parents for the private placement of a disabled child can do one of two things: give the child a free appropriate public education in a public setting, or place the child in an appropriate school in an appropriate private setting of the State's choice."). Such reimbursement was one of the forms of relief that petitioners sought in their federal court complaint. JA 19; Pet. App. 6a. The statute's

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129, 130-31 (CA3 2001); *Doe v. Board of Educ. of Baltimore County,* 165 F.3d 260, 263, 264 (CA4 1998), cert. denied*,* 526 U.S. 1159 (1999).

[25] This right to reimbursement is not implied. Rather, it is an express codification of the Court's decision in *Burlington*, 471 U.S. at 370, recognizing that then-§ 1415(e)(2) (current version at 20 U.S.C. 1415(i)(2)(C)(iii)) authorized courts to award reimbursement as a form of "relief as the court determines is appropriate."

authorization of reimbursement *to parents* confirms that Congress viewed parents as real parties in interest when they challenge the denial of a free appropriate public education. Indeed, as Judge Wilkinson recognized for the Fourth Circuit, a disabled child would typically not have standing to seek reimbursement of private school expenses under IDEA because the child does not suffer any out-of-pocket loss as a result of attending private school. See *Emery v. Roanoke City Sch. Bd.*, 432 F.3d 294, 299-300 (CA4 2005) (Wilkinson, J.) ("In the usual case, the parents of the disabled child will be the appropriate ones to seek reimbursement because they will have incurred the expense and suffered the subsequent monetary injury.").

Thus, by guaranteeing a FAPE and providing for reimbursement when a FAPE is denied, Congress sought to equalize the disparity between the families of non-disabled children who may rely on public education to avoid the costs of private school education for their children and "the families" of disabled children who, before IDEA, "were often forced to find services outside the public school system, often at great distance from their residence and at their own expense." 20 U.S.C. 1400(c)(2)(E) (2000). Whether compensatory or prospective, the financial relief provided by the guarantee of a FAPE inures to parents, is independent, and not merely derivative of the child's right to an appropriate public education.

The interpretation of parents as "parties aggrieved" and, therefore, real parties in interest who may litigate substantive claims *pro se* is reinforced by the structure of IDEA, which relies upon the central role played by parents in assuring that their disabled child receives a FAPE. See, *e.g., Cedar Rapids Comm. Sch. Dist. v. Garret F.*, 526 U.S. 66, 73 (1999) (looking to IDEA's "overall statutory scheme" to interpret its provisions).

For example, IDEA provides for extensive parental involvement, *Schaffer*, 126 S. Ct. at 532 ("Parents and

guardians play a significant role in the IEP process."), in the "centerpiece" of the statute: the IEP, *Maroni*, 346 F.3d at 256; see also 20 U.S.C. 1401(9)(D) (listing "conformity with the [IEP]" as one of four components of a FAPE). Indeed, as the Court acknowledged in *Schaffer*, among other participatory guarantees (discussed *supra* at pp. 3-4), parents

> must be informed about and consent to evaluations of their child under the Act. § 1414(c)(3). Parents are included as members of "IEP teams." § 1414(d)(1)(B). They have the right to examine any records relating to their child, and to obtain an "independent educational evaluation of the[ir] child." § 1415(b)(1). [And t]hey must be given written prior notice of any changes in an IEP, § 1415(b)(3).

Schaffer, 126 S. Ct. at 532.

IDEA also contemplates that parents will act as advocates both throughout the IEP process and in due process hearings. Indeed, IDEA's implementing regulations discourage parents and school districts from bringing attorneys to IEP meetings. See 34 C.F.R. Part 300, App. A ("The presence of the agency's attorney could contribute to a potentially adversarial atmosphere at the meeting. The same is true with regard to the presence of an attorney accompanying the parents at an IEP meeting."). Similarly, at due process hearings, parents have the option of proceeding *pro se* or being accompanied by non-attorney "individuals with special knowledge or training with respect to the problems of children with disabilities." 20 U.S.C. § 1415(h)(1). Although IDEA grants parents the right to be accompanied by counsel at due process hearings, the presence of counsel is not required. *Ibid.*

These provisions for parental involvement are so central to IDEA's statutory scheme that when a child's parents are

not known or cannot be located, IDEA requires "assignment of an individual to act as a surrogate for the parents." 20 U.S.C. 1415(b)(2). Accordingly, as the First Circuit concluded, "it would be odd for Congress to exclude parents from the definition of 'parties aggrieved' as to substantive claims, and thus force them to find attorney representation at the federal court level, after giving parents such a strong role at every other stage of the process." *Maroni*, 346 F.3d at 256-57.

2. Neither IDEA's right-to-administrative-appeal provision (§ 1415(g)(1)) nor right-to-sue provision (§ 1415(i)(2)(A)) precludes "parties aggrieved" from suing for a substantive violation

By requiring that the exhaustion of IDEA administrative remedies begin with the filing of a due process complaint, Congress necessarily contemplated that the complaint would frame the universe of claims eligible for any further administrative review under § 1415(g) or judicial review under § 1415(i)(2)(A). Indeed, IDEA specifically provides that "[a]ny party aggrieved * * * shall have the right to bring a civil action with respect to the *complaint* presented pursuant to this section." 20 U.S.C. 1415(i)(2)(A) (emphasis added).

The complaint provision imposes no limit on the bundle of claims that a party may bring. To the contrary, it expressly provides that a party may complain about "*any matter* relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate education to such child." 20 U.S.C. 1415(b)(6)(A) (emphasis added). Thus, the claims to be presented in a complaint are the full panoply of claims that Congress intended to recognize as appropriate for administrative challenge, including both the substantive

claim that the right to a FAPE has been denied and the procedural claim that a school district or State educational agency has failed to comply with IDEA's procedural safeguards. And, as discussed *supra*, at Part I, Congress specifically acknowledged that parents may bring – and are real parties in interest to – such complaints.

Nor does the provision governing the right of parents to seek administrative-level appellate review (§ 1415(g)) or the provision governing the right of parents to seek judicial review (§ 1415(i)(2)(A)) narrow the bundle of claims to be reviewed or draw a distinction between substantive and procedural rights.[26] Section 1415(g)(2) prescribes State-level review "of the findings and decision appealed" from the due process hearing. Section 1415(i)(2)(A) prescribes judicial review "with respect to the complaint." It therefore follows that, if parents may pursue claims alleging the substantive denial of a FAPE at the administrative level, they should also be able to pursue the same substantive claims in court when they are aggrieved by the outcome of the administrative-level proceedings at which they initially presented that claim. See *Maroni*, 346 F.3d at 255.

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[26] In drawing such a distinction, the Third Circuit in *Collinsgru* relied, *inter alia*, on a presumption against allowing parents to seek review regarding substantive claims based the rationale that implied rights of action are disfavored, and that allowing parents to proceed *pro se* on substantive claims is analogous to creating an implied right of action. 161 F.3d at 233-34. But Congress has already created an express right of action to seek review of administrative determinations under 20 U.S.C. § 1415(i)(2)(A). The issue is one of ordinary statutory interpretation: whether the term "parties aggrieved" in § 1415(i)(2)(A) applies to parents as well as children. No right of action is being implied and, hence, no presumption need be made concerning Congress's likely intent. Cf. *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 70-71 (1992) (treating the issue as one of ordinary statutory interpretation where Congress has expressly created a remedy but the scope of the remedy is disputed).

II. EVEN IF ONLY THE CHILD POSSESSES THE SUBSTANTIVE STATUTORY RIGHT TO A FAPE, PARENTS SHOULD BE ABLE TO BRING THAT CLAIM *PRO SE*

The Sixth Circuit in prohibiting – and other courts in limiting – the opportunity of non-lawyer parents to bring an IDEA case *pro se* have mistakenly done so by relying on the common law principle that non-attorneys cannot represent the interests of another in court. Although it is certainly true that there exists such a general principle, see, *e.g., Herrera-Venegas v. Sanchez-Rivera*, 681 F.2d 41, 42 (CA1 1982) (collecting cases); *Guajardo v. Luna*, 432 F.2d 1324, 1325 (CA5 1970), it is not without exception – the most notable of which present situations materially indistinguishable from IDEA cases.

Lay representation has been permitted frequently in cases where the real party in interest lacks the ability to represent him or herself and otherwise might go without adequate representation, such as cases involving children from families insufficiently wealthy to afford a lawyer. For example, in *State v. Ritchie*, 757 P.2d 1247 (Idaho Ct. App. 1988), a fifteen-year-old facing two misdemeanor charges requested that the court allow his non-lawyer father to represent him as lay counsel. After recognizing the default rule that criminal defendants have no right to lay counsel, the court nonetheless permitted the defendant's non-lawyer father to represent him because

> [w]hen a minor lacks th[e] capability [to represent his or her interests in court to the same extent as an adult], the right of self-representation has little genuine meaning unless it is deemed to embrace the assistance of a parent or guardian. We see no cogent reason for imposing a blanket prohibition

> against such assistance. In fact, we surmise that many judges have allowed it.

Id. at 1250.

The reasoning of the *Ritchie* court is particularly appropriate in cases, like IDEA cases, where the policies against allowing lay representation are inapplicable or significantly outweighed by competing policies favoring lay representation. A prime example is the virtually indistinguishable context of non-lawyer parents seeking judicial review of their children's adverse Supplemental Security Income (SSI) disability decisions. The courts confronting that context have consistently held that non-lawyer parents may bring their children's claims *pro se*. See *Machadio v. Apfel*, 276 F.3d 103, 107 (CA2 2002); *Harris v. Apfel*, 209 F.3d 413, 416 (CA5 2000); *Maldonado v. Apfel*, 55 Supp. 2d 296, 308 (S.D.N.Y. 1999).[27]

Those circuits that have prohibited parents from proceeding *pro se* on what the courts construed as the children's IDEA claims almost exclusively rely on cases in which a non-lawyer parent attempted to litigate *pro se* some variety of a tort claim belonging to their child, see *Cavanaugh*, 409 F.3d at 754; *Collinsgru*, 161 F.3d at 231-32; *Wenger*, 146 F.3d at 125; *Devine*, 121 F.3d at 581.[28]

Those tort cases, in turn, rested on concerns that the choice whether to proceed *pro se* or with counsel "is not a true choice" for children if the choice is made by their

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[27] *Rosario v. Apfel*, No. 96 Civ. 1227, 1998 WL 685173, *2 (S.D.N.Y. Sept. 30, 1998), reached a contrary conclusion but was expressly rejected by the Second Circuit in *Machadio*. 276 F.3d at 107.

[28] In holding that "a non-lawyer [parent] has no authority to appear as [his son's] legal representative" in an IDEA suit, *Navin v. Park Ridge Sch. Dist.* 64, 270 F.3d 1147, 1149 (CA7 2001), simply cited *Collinsgru*, 161 F.3d at 231, *Wenger*, 146 F.3d at 124-26, and *Devine*, 121 F.3d at 581-82.

parents, *Johns v. County of San Diego*, 114 F.3d 874, 877 (CA9 1997) (quoting *Osei-Afriye v. Medical College of Penn.*, 937 F.2d 876, 882-83 (CA3 1991) (in turn quoting *Cheung v. Youth Orchestra Found. of Buffalo, Inc.*, 906 F.2d 59, 61 (CA2 1990))), that children's rights will not be "fully protected" without trained legal assistance, *Osei-Afriye*, 937 F.2d at 883 (quoting *Cheung*, 906 F.2d at 61), and that permitting "guardians to bring *pro se* litigation * * * invites abuse," *Cheung* at 61.

As the SSI cases explain, none of those concerns are present, when:

(1) the cases do not affect multiple parties with different or conflicting interests but rather parents and children whose interests are identical (*Machadio*, 276 F.3d at 106);

(2) parents have a stake in the issue because of their financial responsibility for the child and the financial effect on them of a denial of benefits (*ibid.*; *Harris*, 209 F.3d at 416-17);

(3) parents are permitted to and often do represent their children in the administrative process that must be exhausted before seeking judicial review (*Machadio*, 276 F.3d at 107);

(4) the cases involve administrative record review and little new fact-finding (*Harris*, 209 F.3d at 416);

(5) parents are often unable to find counsel (*ibid.* (citing *Maldonado*, 55 F. Supp. 2d at 305));

(6) a ban on parental representation would jeopardize the child's statutory right to judicial review of adverse decisions (*id.* at 417); and

(7) the benefits sought are intended to aid children during their childhood and, therefore, must be timely provided (*id.* at 416 (citing *Maldonado*, 55 F. Supp. 2d at 305)).

IDEA cases satisfy each of these criteria.

The tort cases relied on to preclude parents from "representing" their children under IDEA involved rights of the child at the very least separate and distinct from that of the parent, *Johns*, 114 F.3d at 877 (non-lawyer father could not litigate *pro se* minor son's claim that police unlawfully stopped, towed, and stored son's car); *Osei-Afriye*, 937 F.2d at 883 (non-lawyer father could not litigate *pro se* tort claims relating to the treatment of minor daughters for malaria); *Cheung*, 906 F.2d at 61 (non-lawyer father could not litigate *pro se* case challenging municipal youth orchestra's decision where to seat his minor daughter in first violin section), and sometimes in conflict with the parent's interests, see *Meeker v. Kercher*, 782 F.2d 153, 154 (CA10 1986) (non-lawyer father could not litigate *pro se* minor daughters' claim alleging that child abuse investigation resulting in the transfer of custody of daughters to state violated family rights guaranteed by the Fourteenth Amendment). Unlike those cases, parents suing under IDEA have congruent and not conflicting interests in their child's receipt of the statutory guarantee of a FAPE. In addition to the desire to see their children grow up to live productive and independent adult lives, parents of disabled children have a significant financial responsibility for the child that may be significantly reduced if the IDEA suit is successful. Indeed, Congress "recogni[zed] that to educate a special needs child, it was going to cost effectively double what it costs to normally educate a child in this country." 150 Cong. Rec. S5331 (daily ed. May 12, 2004) (statement of Sen. Kennedy).

Parents are statutorily permitted and often do represent their children and themselves at IDEA administrative-level hearings where they may subpoena evidence, submit evidence, and make statements about law and facts. 20 U.S.C. 1415(h)(2). Although 20 U.S.C. 1415(i)(2)(C) allows a federal judge to hear additional evidence at the request of a party, parties are not ordinarily permitted to supplement the record or to have witnesses testify in IDEA review proceedings unless they can show prejudice or that the

evidence was unavailable at the time of the administrative hearing. See, *e.g.*, *West Platte R-II Sch. Dist. v. Wilson*, 439 F.3d 782, 785 (CA8 2006); *Springer v. Fairfax County Sch. Bd.*, 134 F.3d 659 (CA4 1998); *Town of Burlington v. Dep't of Educ.*, 736 F.2d 773 (CA1 1984), aff'd, 471 U.S. 359 (1985). Moreover, *Rowley* held that courts must give "due weight" to the findings of the state administrative proceeding and should not "substitute their own notions of sound educational policy for those of the school authorities they review." 458 U.S. at 206. IDEA cases are, therefore, unlike original tort actions or other types of administrative actions, such as Title VII or PLRA actions, in which courts conduct *de novo* review.

Relatedly, the tort cases' concern about abuse of the judicial process is largely inapplicable to IDEA cases. As amended in 2004, IDEA expressly allows States and local school districts to recover attorneys' fees from a parent "if the parent's complaint or subsequent cause of action was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation." 20 U.S.C. 1415(i)(3)(B)(i)(III). This provision may serve as a check on meritless *pro se* lawsuits. If this provision proves to be an inadequate deterrent to frivolous IDEA lawsuits, Congress can further amend the statute to address the problem.

Parents of disabled children are overwhelmingly unable to locate counsel to litigate IDEA disputes. As the American Bar Association has acknowledged, "[i]n many communities there appear to be few, if any, lawyers experienced or willing to handle" IDEA cases. Am. Bar Ass'n, Comm'n on Nonlawyer Practice, *Nonlawyer Activity in Law Related Situations: A Report with Recommendations* 81 (1995); see also *Collinsgru*, 161 F.3d at 236 ("[M]ost attorneys will be reluctant to take on [IDEA] cases * * * characterized as they are by voluminous administrative records, long administrative hearings, and specialized legal issues, without

a significant retainer."). The surveys conducted by *amici* bear this out. See Br. of Autism Soc'y of Am. *et al.* in Support of Petitioners 9-10; Br. of Council of Parent Attorneys & Advocates *et al.* in Support of Petitioners 9-10 n.4.

Where a child is the real party in interest, a tort case can easily be dismissed without prejudice to being re-filed when the child reaches the age of eighteen or stayed until that time. *Johns*, 114 F.3d at 878; *Osei-Afriye*, 937 F.2d at 883; *Cheung*, 906 F.2d at 62. This is not a realistic possibility under IDEA because, although a parent may transfer rights under IDEA to the child at the child's majority, see 20 U.S.C. 1415(m)(1), those rights lose substantially all of their value if not pursued promptly, since it is not money but a change in educational placement that is being pursued. See *Collinsgru*, 161 F.3d at 237 (Roth, J., dissenting). In the process, Congress' primary goal of preparing children with disabilities for "further education, employment, and independent living" will be thwarted. 20 U.S.C. 1400(d)(1)(A); see also 20 U.S.C. 1450(1) (acknowledging the "ongoing obligation" of the federal government to enable children with disabilities "to lead productive and independent adult lives"), 1470(1) (ensuring "parents receive training and information designed to assist the children * * * in preparing to lead productive independent adult lives"), 1471(b)(1)(B), 1472(a)(1)(B). IDEA is intended to provide a means for intervention that addresses the child's disabilities as quickly as possible because the longer appropriate services are delayed, the more difficult it becomes to counter the disabilities. See *Burlington*, 736 F.2d at 798 ("[S]pecial need children [may not be] treated as though they were non-perishable commodities able to be warehoused until the termination of *in rem* proceedings."). Accordingly, the tort cases' desire to give children "a true choice" between proceeding with or without counsel is unrealistic.

Moreover, the rationale for allowing parents to represent their children is even *stronger* in IDEA cases than in SSI cases in one important respect. This is because judicial review of an SSI decision is available only to a losing claimant – not the agency. See 42 U.S.C. 405(g). There is no danger, therefore, that a successful minor SSI claimant will lose the benefits she won at the administrative level because her parents are unable to hire an attorney. If the court of appeals' decision is upheld in this case, however, that is precisely what could happen to any child who succeeds on an IDEA claim at the administrative level. If the child's parents cannot afford or locate an attorney, the losing school district need only file suit and move for default or summary judgment to overturn the administrative decision, which would yield an absurd result that Congress could not have intended. See *Nixon*, 541 U.S. at 144 (court's task is to interpret statutes "in light of the purposes Congress sought to serve while avoiding "absurd results").

III. CONGRESS' REFUSAL IN 2004 TO ENACT A PROVISION ALLOWING PARENTAL *PRO SE* REPRESENTATION IS IRRELEVANT

In support of the court of appeals' decision, respondent relied heavily in its BIO on congressional inaction – namely, the fact that Congress did not adopt a proposed amendment that would have expressly authorized parents to proceed *pro se* on behalf of their children in IDEA lawsuits. BIO 5-6, 14-15. In May 2004, the Senate passed a bill that would have amended 20 U.S.C. 1415(i) to provide that "a parent of a child with a disability may represent the child in any action under [IDEA] in Federal or State court, without the assistance of an attorney." 150 Cong. Rec. S5430 (daily ed. May 13, 2004). The Conference Committee – without explanation – omitted this provision from the final version of

the IDEA amendments that Congress enacted in 2004. See H.R. Conf. Rep. No. 779, 108th Cong., 2d Sess. 220 (2004).

This failed amendment "lacks persuasive significance." *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994). As this Court has emphasized repeatedly, "[f]ailed legislative proposals are 'a particularly dangerous ground on which to rest an interpretation of a prior statute.'" *Ibid.* (quoting *Pension Benefit Guaranty Corp. v. LTV Corp.,* 496 U.S. 633, 650 (1990)); accord, *Lockhart v. United States*, 126 S. Ct. 699, 702 (2005) (quoting *United States v. Craft*, 535 U.S. 274, 287 (2002)); see also, *e.g., Mead Corp. v. Tilley*, 490 U.S. 714, 723 (1989) ("'[M]ute intermediate legislative maneuvers' are not reliable indicators of congressional intent." (quoting *Trailmobile Co. v. Whirls*, 331 U.S. 40, 61 (1947)); *Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 501 (1988) ("[U]nenacted approvals, beliefs, and desires are not laws."); *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 686 (1987) ("Congress' silence is just that – silence"). "Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change." *Central Bank of Denver*, 511 U.S. at 187 (quoting *LTV Corp*., 496 U.S. at 650).

But even if the failed Senate amendment were relevant to whether parents may proceed *pro se* on behalf of their children, it does not undermine the conclusion that parents may represent *themselves* in federal court on their own substantive statutory claim to a FAPE and their own procedural claims. Accordingly, there was no need, as respondent mistakenly asserts, for Congress to enact a further statutory provision that "could have expressly allowed non-lawyer parents to proceed *pro se*." BIO 13. Indeed, one plausible inference is that Congress ultimately concluded that the Senate amendment was unnecessary because other

provisions of IDEA confirm that parents are real parties in interest entitled to pursue both types of claims in court, and 28 U.S.C. 1654 already provides that such parties may proceed *pro se*.[29]

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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[29] This explanation is largely consistent with the understanding of the Senate committee that proposed the amendment. As the Committee on Health, Education, Labor, and Pensions explained, in its view, "current statutory language and * * * the rich legislative history emphasizing the importance of parental involvement," already established "that parents have a right to represent their child in court, without a lawyer for purposes of IDEA law, regardless of whether their claims involve procedural or substantive issues." S. Rep. No. 108-185, 108th Cong., 1st Sess. 41-42 (2003). Accordingly, the Committee proposed the amendment simply to "clarify" and "make clear" "that a parent of a child with a disability may represent the child in any action * * * in State or Federal Court, without the assistance of an attorney." *Id.* at 42.

APPENDIX

The Individuals with Disabilities in Education Act, 20 U.S.C. 1400 *et seq.*, provides in pertinent part:

§ 1400. Congressional statements and declarations

* * * * *

(c) Findings

Congress finds the following:

* * * * *

(2) Before the date of enactment of the Education for All Handicapped Children Act of 1975 (Public Law 94-142), the educational needs of millions of children with disabilities were not being fully met because—

* * * * *

(D) a lack of adequate resources within the public school system forced families to find services outside the public school system.

(3) Since the enactment and implementation of the Education for All Handicapped Children Act of 1975, this chapter has been successful in ensuring children with disabilities and the families of such children access to a free appropriate public education and in improving educational results for children with disabilities.

* * * * *

(d) Purposes

The purposes of this chapter are—

(1)(A) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living;

(B) to ensure that the rights of children with disabilities and parents of such children are protected; and

* * * * *

(3) to ensure that educators and parents have the necessary tools to improve educational results for children with disabilities by supporting system improvement activities; coordinated research and personnel preparation; coordinated technical assistance, dissemination, and support; and technology development and media services; and

* * * * *

§ 1401. Definitions

* * * * *

(9) Free appropriate public education

The term "free appropriate public education" means special education and related services that—

(A) have been provided at public expense, under public supervision and direction, and without charge;

(B) meet the standards of the State educational agency;

(C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and

(D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

* * * * *

(10) Highly qualified

* * * * *

(E) Rule of construction

Notwithstanding any other individual right of action that a parent or student may maintain under this subchapter, nothing in this section or subchapter shall be construed to create a right of action on behalf of an individual student or class of students for the failure of a particular State educational agency or local educational agency employee to be highly qualified.

* * * * *

(26) Related services

(A) In general

The term "related services" means transportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, school nurse services designed to enable a child with a disability to receive a free appropriate public education as described in the individualized education program of the child, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early

identification and assessment of disabling conditions in children.

* * * * *

(29) Special education

The term "special education" means specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including—

(A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and

(B) instruction in physical education.

* * * * *

§ 1412. State eligibility

(a) In general

A State is eligible for assistance under this subchapter for a fiscal year if the State submits a plan that provides assurances to the Secretary that the State has in effect policies and procedures to ensure that the State meets each of the following conditions:

(1) Free appropriate public education

(A) In general

A free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school.

* * * * *

(4) Individualized education program

An individualized education program, or an individualized family service plan that meets the requirements of section 1436(d) of this title, is developed, reviewed, and revised for each child with a disability in accordance with section 1414(d) of this title.

* * * * *

(10) Children in private schools

* * * * *

(B) Children placed in, or referred to, private schools by public agencies

(i) In general

Children with disabilities in private schools and facilities are provided special education and related services, in accordance with an individualized education program, at no cost to their parents, if such children are placed in, or referred to, such schools or facilities by the State or appropriate local educational agency as the means of carrying out the requirements of this subchapter or any other applicable law requiring the provision of special education and related services to all children with disabilities within such State.

* * * * *

(C) Payment for education of children enrolled in private schools without consent of or referral by the public agency

* * * * *

(ii) Reimbursement for private school placement

If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary school or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.

* * * * *

(14) Personnel qualifications

* * * * *

(E) Rule of construction

Notwithstanding any other individual right of action that a parent or student may maintain under this subchapter, nothing in this paragraph shall be construed to create a right of action on behalf of an individual student for the failure of a particular State educational agency or local educational agency staff person to be highly qualified, or to prevent a parent from filing a complaint about staff qualifications with the State educational agency as provided for under this subchapter.

* * * * *

§ 1414. Evaluations, eligibility determinations, individualized education programs, and educational placements

(a) Evaluations, parental consent, and reevaluations

(1) Initial evaluations

* * * * *

(D) Parental consent

(i) In general

(I) Consent for initial evaluation

The agency proposing to conduct an initial evaluation to determine if the child qualifies as a child with a disability as defined in section 1401 of this title shall obtain informed consent from the parent of such child before conducting the evaluation. Parental consent for evaluation shall not be construed as consent for placement for receipt of special education and related services.

* * * * *

(2) Reevaluations

(A) In general

A local educational agency shall ensure that a reevaluation of each child with a disability is conducted in accordance with subsections (b) and (c) of this section—

(i) if the local educational agency determines that the educational or related services needs,

including improved academic achievement and functional performance, of the child warrant a reevaluation; or

(ii) if the child's parents or teacher requests a reevaluation.

(B) Limitation

A reevaluation conducted under subparagraph (A) shall occur—

(i) not more frequently than once a year, unless the parent and the local educational agency agree otherwise; and

(ii) at least once every 3 years, unless the parent and the local educational agency agree that a reevaluation is unnecessary.

* * * * *

(b) Evaluation procedures

(1) Notice

The local educational agency shall provide notice to the parents of a child with a disability, in accordance with subsections (b)(3), (b)(4), and (c) of section 1415 of this title, that describes any evaluation procedures such agency proposes to conduct.

(2) Conduct of evaluation

In conducting the evaluation, the local educational agency shall—

(A) use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information

provided by the parent, that may assist in determining—

(i) whether the child is a child with a disability; and

(ii) the content of the child's individualized education program, including information related to enabling the child to be involved in and progress in the general education curriculum, or, for preschool children, to participate in appropriate activities;

* * * * *

(4) Determination of eligibility and educational need

Upon completion of the administration of assessments and other evaluation measures—

(A) the determination of whether the child is a child with a disability as defined in section 1401(3) of this title and the educational needs of the child shall be made by a team of qualified professionals and the parent of the child in accordance with paragraph (5); and

(B) a copy of the evaluation report and the documentation of determination of eligibility shall be given to the parent.

(c) Additional requirements for evaluation and reevaluations

(1) Review of existing evaluation data

As part of an initial evaluation (if appropriate) and as part of any reevaluation under this section, the IEP Team and other qualified professionals, as appropriate, shall—

(A) review existing evaluation data on the child, including—

(i) evaluations and information provided by the parents of the child;

* * * * *

(3) Parental consent

Each local educational agency shall obtain informed parental consent, in accordance with subsection (a)(1)(D) of this section, prior to conducting any reevaluation of a child with a disability, except that such informed parental consent need not be obtained if the local educational agency can demonstrate that it had taken reasonable measures to obtain such consent and the child's parent has failed to respond.

* * * * *

(d) Individualized education programs

(1) Definitions

In this chapter:

* * * * *

(B) Individualized education program team

The term "individualized education program team" or "IEP Team" means a group of individuals composed of—

(i) the parents of a child with a disability;

(ii) not less than 1 regular education teacher of such child (if the child is, or may be, participating in the regular education environment);

(iii) not less than 1 special education teacher, or where appropriate, not less than 1 special education provider of such child;

(iv) a representative of the local educational agency who—

(I) is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities;

(II) is knowledgeable about the general education curriculum; and

(III) is knowledgeable about the availability of resources of the local educational agency;

(v) an individual who can interpret the instructional implications of evaluation results, who may be a member of the team described in clauses (ii) through (vi);

(vi) at the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and

(vii) whenever appropriate, the child with a disability.

(C) IEP Team attendance

(i) Attendance not necessary

A member of the IEP Team shall not be required to attend an IEP meeting, in whole or in part, if the parent of a child with a disability and the local educational agency agree that the attendance of such member is not necessary because the member's area of the curriculum or related services is not being modified or discussed in the meeting.

(ii) Excusal

A member of the IEP Team may be excused from attending an IEP meeting, in whole or in part, when the meeting involves a modification to or discussion of the member's area of the curriculum or related services, if—

(I) the parent and the local educational agency consent to the excusal; and

(II) the member submits, in writing to the parent and the IEP Team, input into the development of the IEP prior to the meeting.

(iii) Written agreement and consent required

A parent's agreement under clause (i) and consent under clause (ii) shall be in writing.

* * * * *

(3) Development of IEP

(A) In general

In developing each child's IEP, the IEP Team, subject to subparagraph (C), shall consider—

(i) the strengths of the child;

(ii) the concerns of the parents for enhancing the education of their child;

(iii) the results of the initial evaluation or most recent evaluation of the child; and

(iv) the academic, developmental, and functional needs of the child.

* * * * *

(D) Agreement

In making changes to a child's IEP after the annual IEP meeting for a school year, the parent of a child with a disability and the local educational agency may agree not to convene an IEP meeting for the purposes of making such changes, and instead may develop a written document to amend or modify the child's current IEP.

* * * * *

(4) Review and revision of IEP

(A) In general

The local educational agency shall ensure that, subject to subparagraph (B), the IEP Team—

* * * * *

(ii) revises the IEP as appropriate to address—

* * * * *

(III) information about the child provided to, or by, the parents, as described in subsection (c)(1)(B) of this section;

* * * * *

§ 1415. Procedural safeguards

(a) Establishment of procedures

Any State educational agency, State agency, or local educational agency that receives assistance under this subchapter shall establish and maintain procedures in accordance with this section to ensure that children with disabilities and their parents are guaranteed procedural

safeguards with respect to the provision of a free appropriate public education by such agencies.

(b) Types of procedures

The procedures required by this section shall include the following:

(1) An opportunity for the parents of a child with a disability to examine all records relating to such child and to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child.

(2)(A) Procedures to protect the rights of the child whenever the parents of the child are not known, the agency cannot, after reasonable efforts, locate the parents, or the child is a ward of the State, including the assignment of an individual to act as a surrogate for the parents, which surrogate shall not be an employee of the State educational agency, the local educational agency, or any other agency that is involved in the education or care of the child. In the case of—

(i) a child who is a ward of the State, such surrogate may alternatively be appointed by the judge overseeing the child's care provided that the surrogate meets the requirements of this paragraph; and

(ii) an unaccompanied homeless youth as defined in section 11434a(6) of Title 42, the local educational agency shall appoint a surrogate in accordance with this paragraph.

(B) The State shall make reasonable efforts to ensure the assignment of a surrogate not more than 30 days after there is a determination by the agency that the child needs a surrogate.

(3) Written prior notice to the parents of the child, in accordance with subsection (c)(1) of this section, whenever the local educational agency—

(A) proposes to initiate or change; or

(B) refuses to initiate or change, the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to the child.

* * * * *

(6) An opportunity for any party to present a complaint—

(A) with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child; and

(B) which sets forth an alleged violation that occurred not more than 2 years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the complaint, or, if the State has an explicit time limitation for presenting such a complaint under this subchapter, in such time as the State law allows, except that the exceptions to the timeline described in subsection (f)(3)(D) of this section shall apply to the timeline described in this subparagraph.

* * * * *

(8) Procedures that require the State educational agency to develop a model form to assist parents in filing a complaint and due process complaint notice in accordance with paragraphs (6) and (7), respectively.

* * * * *

(c) Notification requirements

* * * * *

(2) Due process complaint notice

* * * * *

(B) Response to complaint

(i) Local educational agency response

(I) In general

If the local educational agency has not sent a prior written notice to the parent regarding the subject matter contained in the parent's due process complaint notice, such local educational agency shall, within 10 days of receiving the complaint, send to the parent a response that shall include—

(aa) an explanation of why the agency proposed or refused to take the action raised in the complaint;

(bb) a description of other options that the IEP Team considered and the reasons why those options were rejected;

(cc) a description of each evaluation procedure, assessment, record, or report the agency used as the basis for the proposed or refused action; and

(dd) a description of the factors that are relevant to the agency's proposal or refusal.

(II) Sufficiency

A response filed by a local educational agency pursuant to subclause (I) shall not be

construed to preclude such local educational agency from asserting that the parent's due process complaint notice was insufficient where appropriate.

(ii) Other party response

Except as provided in clause (i), the non-complaining party shall, within 10 days of receiving the complaint, send to the complaint a response that specifically addresses the issues raised in the complaint.

* * * * *

(d) Procedural safeguards notice

(1) In general

(A) Copy to parents

A copy of the procedural safeguards available to the parents of a child with a disability shall be given to the parents only 1 time a year, except that a copy also shall be given to the parents—

(i) upon initial referral or parental request for evaluation;

(ii) upon the first occurrence of the filing of a complaint under subsection (b)(6) of this section; and

(iii) upon request by a parent.

(B) Internet website

A local educational agency may place a current copy of the procedural safeguards notice on its Internet website if such website exists.

(2) Contents

The procedural safeguards notice shall include a full explanation of the procedural safeguards, written in the native language of the parents (unless it clearly is not feasible to do so) and written in an easily understandable manner, available under this section and under regulations promulgated by the Secretary relating to—

(A) independent educational evaluation;

(B) prior written notice;

(C) parental consent;

(D) access to educational records;

(E) the opportunity to present and resolve complaints, including—

(i) the time period in which to make a complaint;

(ii) the opportunity for the agency to resolve the complaint; and

(iii) the availability of mediation;

(F) the child's placement during pendency of due process proceedings;

(G) procedures for students who are subject to placement in an interim alternative educational setting;

(H) requirements for unilateral placement by parents of children in private schools at public expense;

(I) due process hearings, including requirements for disclosure of evaluation results and recommendations;

(J) State-level appeals (if applicable in that State);

(K) civil actions, including the time period in which to file such actions; and

(L) attorneys' fees.

(e) Mediation

* * * * *

(2) Requirements

Such procedures shall meet the following requirements:

(A) The procedures shall ensure that the mediation process—

* * * * *

(ii) is not used to deny or delay a parent's right to a due process hearing under subsection (f) of this section, or to deny any other rights afforded under this subchapter; and

* * * * *

(F) Written agreement

In the case that a resolution is reached to resolve the complaint through the mediation process, the parties shall execute a legally binding agreement that sets forth such resolution and that—

(i) states that all discussions that occurred during the mediation process shall be confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding;

(ii) is signed by both the parent and a representative of the agency who has the authority to bind such agency; and

(iii) is enforceable in any State court of competent jurisdiction or in a district court of the United States.

* * * * *

(f) Impartial due process hearing

(1) In general

(A) Hearing

Whenever a complaint has been received under subsection (b)(6) or (k) of this section, the parents or the local educational agency involved in such complaint shall have an opportunity for an impartial due process hearing, which shall be conducted by the State educational agency or by the local educational agency, as determined by State law or by the State educational agency.

(B) Resolution session

* * * * *

(iii) Written settlement agreement

In the case that a resolution is reached to resolve the complaint at a meeting described in clause (i), the parties shall execute a legally binding agreement that is—

(I) signed by both the parent and a representative of the agency who has the authority to bind such agency; and

(II) enforceable in any State court of competent jurisdiction or in a district court of the United States.

* * * * *

(3) Limitations on hearing

* * * * *

(E) Decision of hearing officer

(i) In general

Subject to clause (ii), a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education.

(ii) Procedural issues

In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies—

(I) impeded the child's right to a free appropriate public education;

(II) significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parents' child; or

(III) caused a deprivation of educational benefits.

* * * * *

(g) Appeal

(1) In general

If the hearing required by subsection (f) of this section is conducted by a local educational agency, any party aggrieved by the findings and decision rendered in such a hearing may appeal such findings and decision to the State educational agency.

* * * * *

(h) Safeguards

Any party to a hearing conducted pursuant to subsection (f) or (k) of this section, or an appeal conducted pursuant to subsection (g) of this section, shall be accorded—

(1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities;

(2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses;

(3) the right to a written, or, at the option of the parents, electronic verbatim record of such hearing; and

* * * * *

(i) Administrative procedures

* * * * *

(2) Right to bring civil action

(A) In general

Any party aggrieved by the findings and decision made under subsection (f) or (k) of this section who does not have the right to an appeal under subsection (g) of this section, and any party aggrieved by the findings and decision made under this subsection, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States, without regard to the amount in controversy.

* * * * *

(C) Additional requirements

In any action brought under this paragraph, the court—

(i) shall receive the records of the administrative proceedings;

(ii) shall hear additional evidence at the request of a party; and

(iii) basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

(3) Jurisdiction of district courts; attorneys' fees

(A) In general

The district courts of the United States shall have jurisdiction of actions brought under this section without regard to the amount in controversy.

(B) Award of attorneys' fees

(i) In general

In any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys' fees as part of the costs—

(I) to a prevailing party who is the parent of a child with a disability;

(II) to a prevailing party who is a State educational agency or local educational agency against the attorney of a parent who files a complaint or subsequent cause of action that is frivolous, unreasonable, or without foundation, or against the attorney of a parent who continued to

litigate after the litigation clearly became frivolous, unreasonable, or without foundation; or

(III) to a prevailing State educational agency or local educational agency against the attorney of a parent, or against the parent, if the parent's complaint or subsequent cause of action was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation.

* * * * *

(D) Prohibition of attorneys' fees and related costs for certain services

(i) In general

Attorneys' fees may not be awarded and related costs may not be reimbursed in any action or proceeding under this section for services performed subsequent to the time of a written offer of settlement to a parent if—

(I) the offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or, in the case of an administrative proceeding, at any time more than 10 days before the proceeding begins;

* * * * *

(III) the court or administrative hearing officer finds that the relief finally obtained by the parents is not more favorable to the parents than the offer of settlement.

* * * * *

(E) Exception to prohibition on attorneys' fees and related costs

Notwithstanding subparagraph (D), an award of attorneys' fees and related costs may be made to a parent who is the prevailing party and who was substantially justified in rejecting the settlement offer.

(F) Reduction in amount of attorneys' fees

Except as provided in subparagraph (G), whenever the court finds that—

(i) the parent, or the parent's attorney, during the course of the action or proceeding, unreasonably protracted the final resolution of the controversy;

(ii) the amount of the attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, reputation, and experience;

(iii) the time spent and legal services furnished were excessive considering the nature of the action or proceeding; or

(iv) the attorney representing the parent did not provide to the local educational agency the appropriate information in the notice of the complaint described in subsection (b)(7)(A) of this section, the court shall reduce, accordingly, the amount of the attorneys' fees awarded under this section.

* * * * *

(k) Placement in alternative educational setting

(3) Appeal

(A) In general

> The parent of a child with a disability who disagrees with any decision regarding placement, or the manifestation determination under this subsection, or a local educational agency that believes that maintaining the current placement of the child is substantially likely to result in injury to the child or to others, may request a hearing.
>
> * * * * *

(*l*) Rule of construction

Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990 [42 U.S.C.A. § 12101 et seq.], title V of the Rehabilitation Act of 1973 [29 U.S.C.A. § 791 et seq.], or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (f) and (g) of this section shall be exhausted to the same extent as would be required had the action been brought under this subchapter.

(m) Transfer of parental rights at age of majority

> (1) In general
>
> A State that receives amounts from a grant under this subchapter may provide that, when a child with a disability reaches the age of majority under State law (except for a child with a disability who has been determined to be incompetent under State law)—
>
> * * * * *
>
> **(B)** all other rights accorded to parents under this subchapter transfer to the child;