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 SIXTHCIRCUIT

REPLY BRIEF FOR THE PETITIONERS

JEAN-CLAUDE ANDRÉ
Counsel of Record
IVEY, SMITH & RAMIREZ
2602 Cardiff Ave.
Los Angeles, CA 90034
(310) 558-0932

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES

Page

STATUTES AND RULE

TABLE OF AUTHORITIES

MISCELLANEOUS

REPLY BRIEF FOR THE PETITIONERS

Through the Individuals with Disabilities in Education Act (IDEA), 20 U.S.C. 1400 *et seq.*,[1] Congress conferred to disabled children *and their parents* the substantive statutory right to a free appropriate education (FAPE) and various procedural rights and remedies designed to ensure that educational agencies provide a FAPE. Petitioners' complaint asserts claims for violations of both substantive and procedural rights that Congress expressly granted to and, therefore, made enforceable by parents in their own right.

Among other things, petitioners' complaint asserts both a substantive claim for reimbursement of the private school tuition that Jacob's parents paid after respondent failed to provide Jacob with a FAPE (JA 19) and a claim that respondent violated the parents' procedural rights when respondent predetermined Jacob's educational placement "without [their] meaningful input" (JA 17).[2] As real parties in interest to and having exhausted such claims before the State educational agency, Jacob's parents are "part[ies] aggrieved" under IDEA's express right-to-sue provision, § 1415(i)(2)(A), and may bring those claims *pro se* under 28 U.S.C. 1654.

Perhaps cognizant that they are on their weakest footing when they argue that Jacob's parents may not seek to vindicate their claims as their own, respondent attempts to obfuscate the statutory construction inquiry whether parents suing under IDEA are suing in their own right by fo-

---

[1] All statutory references are to IDEA's codifications in Title 20 of the United States Code unless otherwise noted.

[2] See § 1412(a)(10)(C)(ii) (providing that "a court or a hearing officer may require the agency to reimburse *the parents*" for private school tuition (emphasis added)); § 1415(f)(3)(E)(ii)(II) (providing that a complaining parent will be entitled to relief if, *inter alia*, "procedural inadequacies * * * significantly impeded the *parents' opportunity* to participate in the decisionmaking process regarding the provision of a [FAPE] to the parents' child" (emphasis added)).

cusing first (and its *amici* by focusing primarily) on the alternative (and possibly unnecessary) inquiry whether non-lawyer parents without rights of their own may bring IDEA cases as lay advocates on behalf of their children. Respondent's attempt to lure the Court away from the primary (and necessary) inquiry cannot obscure the fact that respondent's arguments as to both inquiries lack merit.

I. PARENTS OF DISABLED CHILDREN HAVE JUDICIALLY ENFORCEABLE RIGHTS OF THEIR OWN UNDER IDEA

IDEA confers on parents of disabled children both procedural rights and the substantive right to ensure that local school districts provide their children with a FAPE. Pet. Br. 30-35; US Br. 14-18. Contrary to the holding of the court of appeals below and the arguments offered by respondent and its *amici*, these rights are not merely derivative of or collateral to the disabled child's right to a FAPE, as the overwhelming evidence gathered by petitioners, the United States, and other *amici* demonstrates. See Pet. Br. 30-36; see also *id.* at 3 (noting 212 express references in the statute to "parent" or "parent" and 17 references to "family" or "families"); US Br. 14-22; Senator Edward M. Kennedy *et al.* (Cong.) Br. 9-27; Council of Parent Attorneys & Advocates *et al.* (COPAA) Br. 14-21.; Ohio Coalition for the Educ. of Children with Disabilities *et al.* (Ohio Coalition) Br. 4-22.

A. Parents of Disabled Children Have a Substantive Right Under IDEA to a Free Appropriate Public Education for Their Child

The Court need not "rewrite the statute to mandate that a FAPE be made available to 'children with disabilities *and their parents*,'" as respondent mistakenly argues (at 21 (emphasis in original)), because Congress already so provided. Consistent with Congress' goal[3] to "ensure that the

[3] Respondent and its *amici*'s claim that the *sole* purpose of the statute was to "provide disabled children with a [FAPE]," cannot be squared

rights of children with disabilities *and parents of such children* are protected" (§ 1400(d)(1)(B) (emphasis added)), IDEA guarantees "children with disabilities *and the families of such children* access to a free appropriate education [(FAPE)]" (§ 1400(c)(3) (emphasis added)).[4]

That Congress gave parents their own substantive right to ensure that educational agencies provide a FAPE to their children is most clearly manifested in Congress' definition of FAPE itself. Congress defined FAPE as "special education and related services" (§ 1401(9)) that are, among other things, "appropriate" and provided "*at no cost to parents*," § 1401(29) (emphasis added); see also § 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 individualized education program [IEP], *at no cost to their parents*." (emphasis added)). Congress noticeably did not define FAPE as "special education and related services *at no cost to the disabled child*," as it easily could have if it intended disabled children to be the only real parties in

---

with Congress' declaration of *four* purposes, including the purposes "to ensure that the rights of children with disabilities and *parents of such children* are protected" and "to ensure that educators and *parents* have the necessary tools to improve educational results for children with disabilities." Compare § 1400(d)(1)(B) & (3) with Resp. Br. 21 (discussing § 1400(d)(1)(A)) and National School Board Assn. *et al.* (NSBA) Br. 3 (discussing § 1400(d)(1)(A)).

[4] Respondent criticizes (at 35) petitioners' reliance on § 1400(c)(3)'s "hortatory" use of the word "families" because it appears in IDEA's preamble, yet respondent and its *amici* rely on other statements in IDEA's preamble. Resp. Br. 7 & 21 (invoking § 1400(d)(1)(A), 20 (invoking § 1400(c)(1)); NSBA Br. 3, 14 (invoking § 1400(d)(1)(A)). In any event, petitioners rely on the preamble as simply one piece of confirming evidence that IDEA confers rights on parents themselves that are not merely derivative of the rights guaranteed for their children.

interest to the substantive statutory right to a FAPE.[5] Perhaps this is why respondent and its *amici* never attempt to address Congress' definition; neither § 1401(9) nor § 1401(29) are discussed – much less, cited – in any of the three bottomside briefs.

Instead, respondent and its *amici* chide petitioners for "not elaborat[ing] on how a parent's substantive right to a FAPE could be applied" and suggest that "[p]etitioner's reading would confound school districts and the judiciary alike, as they would struggle to determine how to apply to parents a statute designed to enhance the educational opportunities of children." Resp. Br. 32; see also NSBA Br. 17. This criticism is a straw-man. Nothing in IDEA suggests – and petitioners do not contend – that the identity of the party alleging the denial of a FAPE requires reviewing hearing officers or courts to apply differing standards. All a hearing officer or court reviewing a claim that the substantive statutory right to a FAPE was denied need determine is whether the educational agency complied with the statute's – not a particular individual's – requirements. Cf. *Board of Educ. v. Rowley*, 458 U.S. 176, 206 (1982) ("[N]othing in the Act * * * suggest[s] that * * * [Congress]

---

[5] Of course, a parent's interest in the substantive statutory right to a FAPE is not purely pecuniary. As members of the child's IEP Team and contributing architects to the design of the child's IEP, parents also have a vested interest in the *appropriateness* of the special education and related services provided to their child. See Pet. Br. 3-4; Cong. Br. 22-27.

Perhaps to suggest that this is not the case with Jacob's parents, respondent and its *amici* assert that Jacob's parents "elected to keep Jacob out of school entirely in the 2004-05 and the current school year in favor of pursuing claims for tuition reimbursement." CGCS Br. 24 n.13 (emphasis added); see also Resp. Br. 6; NSBA Br. 22. Not only is this assertion irrelevant to the question presented, it is untrue. In 2004-05, Jacob was enrolled at the Monarch School, see Pet. Mot. Inj. Pending Appeal Ex. C, No. 04-4159 (filed Jan. 3, 2005) (Dec. 13, 2004, Ltr. From Debra Mandell, Director, Monarch Sch.) ("Jacob is enrolled at Monarch school."), where is presently enrolled today.

intended that reviewing courts should have a free hand to impose substantive standards of review which cannot be derived from the Act itself.").

In any event, a parent's own right to enforce the substantive statutory right to a FAPE could not be clearer than in this case, in which Jacob's parents placed him at a private school and incurred out-of-pocket tuition expenses themselves. Consistent with its guarantee that disabled children receive appropriate "special education and related services" "at no cost to parents," §§ 1401(9) & (29), Congress gave parents an express right to ask "a court or a hearing officer [to] require the agency to reimburse *the parents*" for private school tuition. § 1412(a)(10)(C)(ii) (emphasis added).[6]

Respondent counters (at 31) that the child, nonetheless, "remains the real party in interest to any such [reimbursement] action as any reimbursement is premised on his injury." But that rejoinder ignores that, in most cases (and in this 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." *Emery v. Roanoke City Sch. Bd.*, 432 F.3d 294, 299 (CA4 2005); cf. *School Comm. of Burlington v.*

---

[6] Jacob's parents have consistently sought reimbursement throughout this dispute. Respondent repeatedly references (at 20, 24, 38 & n.13) petitioners' due process complaint (Resp. Br. App. 1a-2a) to suggest that the only claim properly before this Court is *Jacob's* claim to a FAPE. Not so. Under Ohio law, Jacob's parents were required to provide in their due process complaint only "a description of the nature of the problem." Ohio Admin. Code § 3301-51-08(C)(1)(a). It is the due process hearing officer's duty upon receiving such a complaint to "seek additional information and clarify the issues." *Id.* § 3301-51-08(C)(1)(b). The hearing officer in this case did so and clarified that "the relief requested in association with this administrative hearing involves * * * reimbursement for tuition" (JA 88). She subsequently determined that "the petitioners" – Jacob's parents (JA 21) – "are not entitled to reimbursement" (JA 78).

Department of Educ., 471 U.S. 359, 373-74 (1985) (explaining that parents who change their child's placement pending IDEA disputes "do so at their own financial risk"). Indeed, as both courts of appeals to have considered the issue agree, only individuals who actually incur expenses for special education and related services have standing to pursue a reimbursement claim under § 1412(a)(10)(C)(ii). See *Malone v. Nielson*, --- F.3d ---, 2007 WL 136127, *3 (CA7 Jan. 22, 2007); *Emery*, 432 F.3d at 299. A holding by this Court that Jacob's parents may not bring that claim in their own right would effectively write § 1412(a)(10)(C)(ii) out of the statute because neither Jacob nor anyone else would have standing to assert it.

B. Parents of Disabled Children Have Actionable Procedural Rights Under IDEA

In addition to making parents of disabled children real parties in interest to IDEA's substantive statutory right to a FAPE, Congress gave parents various procedural rights and remedies to help them vindicate the substantive right. See *Schaffer v. Weast*, 126 S. Ct. 528, 532 (2005) (noting several examples). Respondent argues (at 37) that "Congress did not permit" these procedural rights "to be independently enforceable in court." Because "IDEA civil actions are * * * limited to adjudicating matters 'with respect to the [due process] complaint'" (at 23) and "[p]arents are never the real party in interest" to that complaint (at 37 n.12; see also *id.* at 31), respondent argues, parents cannot be "part[ies] aggrieved" by a due process hearing officer's rejection of parents' procedural claims. The statute's text does not support respondent's argument.

While it is certainly true that the "due process complaint * * * frame[s] the universe of claims eligible for any further administrative review under § 1415(g) or judicial review under § 1415(i)(2)(A)," Pet. Br. 35, respondent is mistaken that parents are not real parties in interest to due process complaints and that parents' procedural claims are

not actionable at the administrative level. IDEA's text unambiguously indicates that Congress considered an administrative complaint filed by parents under IDEA to be the parents' *own* complaint and not simply a complaint that they bring on behalf of their child. Among other similar provisions confirming that the right to due process belongs to parents (Pet. Br. 18-19; Cong. Br. 10-11), IDEA mandates that, before a due process hearing takes place, educational agencies convene a meeting "where the *parents* of the child discuss *their complaint*." § 1415(f)(1)(B)(i) (emphasis added). Had Congress intended a parent's due process complaint to be brought only "on behalf of the child," as respondent and its *amici* argue (Resp. Br. 25, 37 n.12; CGCS Br. 6; NSBA Br. 5-7, 14), Congress could have easily referred to the due process complaint as "the child's," "the child's brought by his or her parents," or "the parent's on behalf of the child." But Congress decidedly did not refer to the due process complaint in these terms in any of IDEA's many pertinent provisions.[7]

---

[7] See § 1415(b)(6)(B) (providing a statute of limitations for due process complaints of "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."); § 1415(b)(8) ("require[ing] the State educational agency to develop a model form to assist *parents* in filing a complaint and due process complaint notice."); § 1415(c)(2)(B) (requiring school districts, upon receiving a "*parent's* due process complaint notice," to respond to it within ten days); § 1415(d)(2) (requiring 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*."); § 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"); § 1415(f)(1) (requiring that once the complaint is filed, "the *parents* or the local education agency involved shall have an opportunity for an impartial due process hearing"); § 1415(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

Nor did Congress limit the scope of a due process complaint (and, by extension, the bundle of claims that start at due process and may end up in court)[8] to only children's claims. Section 1415(b)(6) allows parents to bring their due process complaints "with respect to *any matter* relating to the identification, evaluation, or educational placement of the child, or the provision of a [FAPE] to such child." (Emphasis added). In support of their erroneous theory that due process complaints are brought by parents on behalf of their children, respondent and its *amici* focus exclusively on § 1415(b)(6)'s references to "the child" and "such child" and blow right past Congress' use of the broad phrase "any matter." Resp. Br. 23; NSBA Br. 8-9. This is not surprising, given that Congress' inclusion of the words "any matter" indicates its intent to make the universe of claims actionable at due process (and in court) broader than it would otherwise be had "any matter" not appeared in § 1415(b)(6). See, *e.g., In re Chapman*, 166 U.S. 661, 667 (1897) (rejecting suggestion that Congress' reference to "'any' matter" is "fatally defective, because too broad and unlimited"); cf. *Leh v. General Petroleum Corp.*, 382 U.S. 52, 59 (1965) ("[E]ffect must be given to the broad terms of the statute itself – 'based in whole or in part on any matter complained of.'").

Moreover, because "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 [special education] against a substantive standard," *Rowley*, 458 U.S. at 205-06, the only

---

substantially likely to result in injury to the child or to others, may request a hearing."). (Emphases added).

[8] As explained in petitioners' opening brief and by their *amici*, nothing in IDEA's administrative appeal or judicial review provisions narrows the bundle of actionable claims (Pet. Br. 35-36; Cong. Br. 11-14, 18; COPAA Br. 16-17), and respondent does not contend otherwise.

reasonable construction of § 1415(b)(6)'s use of the phrase "any matter" is that it includes both the substantive claim that a FAPE has been denied *and* parents' procedural claims – that is, the full panoply of claims. See Pet. Br. 35-36; Cong. Br. 17-18.

Respondent posits that "Congress could have clarified that *parents* could seek certain relief under [§ 1415(b)(6)] for harm to themselves, but it declined to do so." Resp. Br. 31 (emphasis in original). Respondent, however, ignores § 1415(f)(3)(E)(ii), which expressly provides that certain "procedural inadequacies" that "significantly impede[] the *parents'* opportunity to participate in the decisionmaking process regarding the provision of a [FAPE]" are themselves actionable denials of a FAPE themselves.[9] (Emphasis added). This case presents just such a procedural inadequacy, insofar as Jacob's parents alleged in their complaint that respondent predetermined Jacob's placement "and tailor[ed] the IEP to suite [sic] that placement * * * without [their] meaningful input."[10] JA 17. Respondent and its

---

[9] Section 1415(f)(3)(E)(ii) provides that "[i]n matters alleging a procedural violation, a hearing officer may find that a child did not receive a [FAPE] only if the procedural inadequacies – (I) impeded the child's right to a [FAPE]; (II) significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a [FAPE] to the parents' child; or (III) caused a deprivation of educational benefits."

The NSBA misconstrues the statute when it argues (at 8) that § 1415(f)(3)(E)(ii)'s reference to "the parents' opportunity to participate in the decisionmaking process" is not a separate cause of action but instead "evidence that can be submitted in support of an argument that the child did not receive a FAPE." This attempt to cast parents' procedural claims as derivative of their children's substantive claim is not faithful to the text as it would render clause (II) superfluous to clauses (I) and (III). The text is clear that "significant[]" infringement of "the parents' opportunity to participate in the decisionmaking process" is itself a denial of a FAPE.

[10] Like their substantive claim for reimbursement, the parents' procedural claim that respondent predetermined Jacob's placement without

amici's overly narrow reading of the scope of administrative review would render such a procedural inadequacy entirely unredressable, and contravene Congress' express recognition in § 1415(f)(3)(E) that hearing officers and courts are empowered to remedy certain violations of parents' procedural rights.

* * * * *

Lest there be any doubt that parents have their own judicially enforceable rights, Congress clarified as much in 2004, when it specifically identified, through the attorneys' fees provisions of IDEA, that "parents" may qualify as the "prevailing party" to an IDEA dispute regardless whether the dispute is resolved at the administrative level or in court and regardless whether the claims on which the parents prevail are substantive or procedural. See § 1415(i)(3)(B)(i)(I) & (E); see also Pet. Br. 25-28; US Br. 18-22; Cong. Br. 16.

Respondent does not attempt to meaningfully address IDEA's attorneys' fees provisions. Instead, it simply asserts conclusorily (at 29) that "the congressional choice to permit attorneys' fees cannot be twisted into a basis for guaranteeing parents the right to proceed *without counsel*." (Empha-

---

their meaningful input was plainly before the hearing officer and not, as respondent mistakenly asserts (at 38 n.13), raised for the first time in district court. See, *e.g.,* JA 23-24 ("[T]he school district must provide notice of a change of placement. * * * The parents in this case believe this is an unauthorized change of placement of which they do not approve."). Nor is respondent correct (at 38 n.13) that petitioners' other procedural claims are untimely because they were not presented in their due process complaint. Those claims, which challenge the procedures employed during the due process hearing itself, could not possibly have been raised until the next level of review, where petitioners did raise them. See, *e.g.,* JA 121 ("[T]he issues as raised by the parents' brief are that procedurally, IHO Freda acted improperly when she employed an assistant who attended the due process hearings and when she allowed for excessive time delays that cause harm to the parents.").

sis in original). This attempt to brush aside the attorneys' fees provisions cannot be squared with the Court's commitment to look to IDEA's "overall statutory scheme" when interpreting the statute, *Cedar Rapids Comm. Sch. Dist. v. Garrett F.*, 526 U.S. 66, 73 (1999) – particularly, when, as here, the attorneys' fees provisions so clearly confirm the meaning of other provisions in dispute.

II. ALLOWING PARENTS TO REPRESENT THEIR CHILDREN IN COURT IS CONSISTENT WITH CONGRESSIONAL INTENT

As demonstrated in petitioners' opening brief (at 37-43), even if parents do not possess their own judicially enforceable rights under IDEA, parents should be able to assert their children's rights *pro se*. In the absence of parents' ability to assert their own rights under the statute, permitting parental lay representation is the only result "consistent with Congress' intent in enacting" IDEA. *Astoria Fed. Sav. & Loan Assn. v. Solimino*, 501 U.S. 104, 110 (1991) (quoting *University of Tennessee v. Elliott*, 478 U.S. 788, 796 (1986)).

Respondent (at 13) and its *amici* (CGCS Br. 29) urge this Court to apply a higher "clear statement" standard to the inquiry whether to abrogate the common law presumption against lay representation. But the Court has reserved the "[r]ules of plain statement and strict construction" for only "the protection of weighty and constant values * * * [i]n traditionally sensitive areas," such as Eleventh Amendment sovereign immunity or the extraterritorial application of domestic statutes. *Astoria*, 501 U.S. at 108-09. Less sensitive areas presenting less weighty values – even if "long favored" – require only that the Court determine whether abrogation of the relevant common law principle is "consistent with Congress' intent in enacting the statute." *Id.* at 107, 109-10 (holding that administrative preclusion, although "long favored," does not "represent independent values of such magnitude and constancy as to justify the protection of a clear-statement rule").

In light of the dearth of available counsel to litigate IDEA disputes in court,[11] see Pet. Br. 41-42; Autism Soc'y of Am. (ASA) *et al.* Br. 9-10; COPAA Br. 9-10, application of the common law presumption against lay representation in IDEA cases will have the unacceptable consequence of destroying IDEA's express right of judicial review and making administrative review final for countless disabled children and their families – a consequence that Congress clearly did not intend.[12] See *Rowley*, 458 U.S. at 205 ("Congress expressly rejected provisions that would have so severely restricted the role of reviewing courts."); see also COPAA Br. 21. Along the way, Congress' goal of preparing disabled chil-

[11] The NSBA asserts (at 27-28) that the 41 attorneys located in 9 states by petitioners' *amici* (ASA Br. 8-10) "is actually a reasonable number of attorneys to take on" the 301 IDEA civil suits filed each year. This is wishful thinking, as both this case and the large number of other cases in which the question presented has arisen demonstrate. See US Cert. Br. 8 n.5 (collecting cases in which question presented has arisen). Indeed, the Court need only take note who represents petitioners here (and represented petitioners in their related Sixth Circuit appeal) – a California-based attorney – and who represents petitioners in their presently pending due process proceedings – an Ohio-based *criminal defense* attorney, http://www.michaeljgoldberg.net/. Neither the Ohio Legal Rights Service (OLRS – the designated Protection & Advocacy organization for the State of Ohio), the Equal Justice Foundation (EJF), nor the Ohio Legal Assistance Foundation – each of which attempt to provide some *pro bono* representation to disabled children and their families, see EJF Br. 1-2 – have ever represented – much less, had sufficient resources to offer to represent – petitioners, see ASA Br. 7 (noting that OLRS received 595 requests for assistance in 2006 and provided assistance in less than three percent of those cases because it employs only four attorneys and lay two advocates who handle IDEA cases and none of whom work on IDEA cases full-time).

[12] Respondent's *amici* (CGCS Br. 18) suggest that "most [of] the claims that are likely to be cut off by a bar on *pro se* actions by parents under the IDEA [will be] frivolous actions." But they do not explain how a court may determine whether an action is frivolous if it is barred from its inception or how a court may protect a disabled child's rights if the action is promptly dismissed or never brought in the first place because the child's parents cannot afford or locate an attorney.

dren for "further education, employment, and independent living" will be thwarted, § 1400(d)(1)(A), because the longer appropriate services are delayed, the more difficult it becomes to counter the disabilities. See *Collinsgru v. Palmyra Bd. of Educ.*, 161 F.3d 225, 240 (CA3 1998) (Roth, J., dissenting) ("[M]any of the benefits of an appropriate education will be lost if they are not timely pursued.").

Respondent (at 17-19) and its *amici* (CGCS Br. 7-9; NSBA Br. 6-7) assert that IDEA and the Federal Rules of Civil Procedure adequately protect disabled children against these ills, but this is not so.[13] Respondent relies first (at 17) on the attorneys' fees provisions of IDEA, which it claims, "ensure a threshold level of protection." But, as the First Circuit has aptly observed, the prospect of attorneys' fees are "a partial incentive at best, as they are awarded only to prevailing parties." *Maroni v. Pemi-Baker Reg'l Sch. Dist.*, 346 F.3d 247, 258 (CA1 2003). Further, as *amici* have demonstrated, the lower courts' application of *Buckhannon Board & Home Care, Inc. v. West Virginia Department of Health & Human Services*, 532 U.S. 598 (2001), which precludes an award of attorneys fees following a pre-merits adjudication settlement, to IDEA cases "provides little incentive for attorneys to assist with these cases." ASA Br. 11. Additionally, Congress' enactment of a provision that allows school districts to recover fees from a parent's attorney in certain situations provides a strong *disincentive* for attorneys to represent families pursuing IDEA claims. ASA Br. 12 (discussing § 1415(i)(3)(B)(i)(II) & (III)).

---

[13] Respondent's reliance (at 17) on § 1471, which permits grants to "parent organizations" to "provide guidance to parents involved in disputes under IDEA," actually supports petitioners' position that Jacob's parents should be able to litigate this case *pro se*. It would have been strange for Congress to provide such guidance expressly to parents if they were then precluded from utilizing it at the final level of review.

Federal Rule of Civil Procedure 17(c), on which respondent (at 18-19) and its *amici* (CGCS Br. 19; NSBA Br. 6-7) rely heavily, has not appropriately protected disabled children either. Although respondent and its *amici* are quick to point out that the Rule *allows* a "court [to] appoint a guardian ad litem for an infant * * * not otherwise represented in an action or [to] make such other order as it deems proper for the protection of the infant," they can cite only Second Circuit cases actually invoking the Rule's protections. See Resp. Br. 18 (citing *Wenger v. Canastota Cent. Sch. Dist.*, 146 F.3d 123, 125 (CA2 1998) (per curiam), cert. denied, 526 U.S. 1025 (1999); *Cheung v. Youth Orchestra Found. of Buffalo, Inc.*, 906 F.2d 59, 59 (CA2 1990)).

If courts actually applied Rule 17(c) in the manner that respondent and its *amici* suggest, this case would not be before this Court.[14] Although the court of appeals held that Jacob was the only real party in interest to this case, Pet. App. 2a ("[T]his appeal is dismissed unless * * * an appearance of counsel is entered in this appeal to represent Jacob."); *Cavanaugh v. Cardinal Local Sch. Dist.*, 409 F.3d 753, 757 (CA6 2005) ("[A]ny 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."), the court never suggested that it would consider appointing counsel to represent Jacob's interests.[15] This has been the approach in the over-

[14] Nor would the question presented have recurred with such remarkable frequency (see US Cert. Br. 8 n.5) if courts regularly appointed guardians ad litem or *pro bono* counsel instead of ordering dismissal of *pro se* IDEA suits.

[15] Should the Court agree with respondent and its *amici* that Jacob's parents may not maintain this suit in their own right or as Jacob's lay representatives, the Court should at minimum vacate the court of appeals' dismissal order in this case and direct it to appoint counsel.

whelming majority of cases in which non-lawyer parents file IDEA suits *pro se.*

III. RESPONDENT'S OTHER SOURCES OF LAW DO NOT REQUIRE IDEA CASES TO BE BROUGHT BY AN ATTORNEY

A. Congress' Refusal in 2004 to Enact a Parental Lay Representation Provision Does Not Require IDEA Cases To Be Brought By an Attorney

Respondent (at 16-17) and its *amici* (CGCS Br. 6-9) place considerable weight on Congress' 2004 proposal of and refusal to enact a provision that would have expressly allowed non-lawyer parents to represent their children in IDEA disputes in court. But as petitioners, the United States, and the Congressional *amici* have all already explained (Pet. Br. 43-45; U.S. Br. 23-24; Cong. Br. 27-28), such "Congressional inaction lacks persuasive significance." *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994) (citation omitted).

Notwithstanding the frequency with which the Court has repeated that admonition (see Pet. Br. 44 (collecting cases)), respondent and its *amici* argue that this case is different because the failed amendment spoke to the "precise issue" before the Court. In doing so, they rely on *Rapanos v. United States*, 126 S. Ct. 2208, 2231 (2006), and *Bob Jones University v. United States*, 461 U.S. 574, 600-01 (1983). Neither case, however, will bear the interpretive weight that respondent and its *amici* attempt to place on them.

The portion of *Rapanos* on which respondent and its *amici* rely represented the view of only four Members of the Court and is not controlling under *Marks v. United States*, 430 U.S. 188, 193 (1977). Moreover, the *Rapanos* plurality's observation that the Court "has sometimes relied on congressional acquiescence when there is evidence that Congress considered and rejected the 'precise issue' presented before the Court," 126 S. Ct. at 2231, was made in the context of *refusing* to place significance on Congress' asserted

acquiescence. To this end, the *Rapanos* plurality stressed "in no uncertain terms, our oft-expressed skepticism towards reading the tea leaves of congressional inaction." *Ibid.*

Respondent and its *amici* fare no better under *Bob Jones*, the prior case to which the *Rapanos* plurality referred. In that case, the Court relied on congressional inaction, but only because it did "not have an ordinary claim of legislative acquiescence" before it. 461 U.S. at 600. "Only one month after the IRS announced" the policy at issue in that case, Congress held "hearings on th[e] precise issue." *Ibid.* By the time the issue reached this Court, "[e]xhaustive hearings ha[d] been held on the issue at various times," and "no fewer than 13 bills [were] introduced to overturn" the policy, but none was enacted. *Ibid.*

Congress' consideration in 2004 of the proposed parental representation provision does not at all resemble the congressional acquiescence at issue in *Bob Jones*. Without any hearings on the issue, the parental representation provision was proposed just once by the Senate as part of IDEA's 2004 reauthorization bill, see 150 Cong. Rec. S5430 (daily ed. May 13, 2004), and dropped by the Conference Committee without explanation, see H.R. Conf. Rep. No. 779, 108th Cong., 2d Sess. 220 (2004). Contrary to respondent's assertion (at 16), this sparse legislative history does nothing to undermine the fact that "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 (emphasis added). Indeed, that IDEA "already incorporated the offered change" was the precise view of the Senate Health, Education, Labor, and Pensions Committee that originally proposed the amendment as a *clarification* of an existing right – not the creation of a new right – to parental lay representation. S. Rep. No. 108-185, 108th Cong., 1st Sess. 41-42 (2003) (declaring that the amendment was designed to

"clarify" and "make clear" "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," even though, in its view, the "current statutory language and * * * the rich legislative history emphasizing the importance of parental involvement" already established the right).

An equally plausible explanation for Congress' inaction is that parental lay representation was not necessary at all because (as discussed *supra* at 2-11) parents were already real parties in interest to and could, therefore, sue *pro se* in federal court to enforce the IDEA's panoply of substantive and procedural claims in their own right. Both the timing of the First Circuit's decision in *Maroni*, 346 F.3d at 251, the first case to embrace this reasoning, and Congress' clarification in the attorneys' fees provisions of IDEA that "parents" are "part[ies]" to IDEA court actions are consistent with this explanation. As respondent's *amici* explain (CGCS Br. 8 n.5), *Maroni* was decided shortly after the parental representation provision was added to the Senate's bill. Perhaps believing that *Maroni* appropriately captured Congress' view of the statute's operation and that subsequent courts would follow suit, Congress simply decided to bolster *Maroni* by amending the attorneys' fees provisions, rather than taking the additional and unnecessary step of clarifying that parents may represent their children as lay advocates.

Of course, the Court's inability to know why Congress rejected the proposed parental representation provision is precisely why the Court has steadfastly refused to rely on congressional inaction, except in the extraordinary case like *Bob Jones*.

B. The Spending Clause, Even If Applicable to This Case, Does Not Require IDEA Cases To Be Brought By an Attorney

Notwithstanding the Court's refusal in *Barnes v. Gorman*, 536 U.S. 181, 188 n.2 (2002), to apply the Spending

Clause's "contract-law principles * * * to all issues that [suits under Spending Clause legislation] raise," respondent and its *amici* argue (Resp. Br. 40-49; CGCS Br. 25-29) that the Spending Clause controls the analysis of this case.

Under either approach that petitioners offer to the question presented in this case, however, the Spending Clause is inapplicable. An individual's right to bring their own suit *pro se* is conferred by 28 U.S.C. 1654, which is not Spending Clause legislation. See Pet. Br. 15 n.10; US Br. 11 n.4. Likewise, any exception to the common law presumption against lay representation would be a common law rule itself and not controlled by IDEA or any other Spending Clause legislation.

Nothing in the Court's recent decision in *Arlington Central School District v. Murphy*, 126 S. Ct. 2455 (2006), compels this case to be analyzed through the Spending Clause, which – even if applicable – would be satisfied. In *Murphy*, the Court held that the statutory language of the attorneys' fee provision of IDEA, § 1415(i)(3)(B), did not provide sufficiently clear notice to state officials "engaged in the process of deciding whether the State should accept IDEA funds and the obligations that go with those funds," that states could be liable not only for attorneys' fees, but expert witness fees as well. 126 S. Ct. at 2459. Thus, the key question in *Murphy*, as framed by the Court itself, was "whether the IDEA furnishes clear notice regarding the liability at issue." *Ibid.* (emphasis added).

The question in this case, whether resolved by determining that parents of disabled children are real parties in interest to IDEA suits or by determining that parents of disabled children may represent their children's interests as lay advocates in court, does not affect liability at all. The liability of educational agencies for violations of the statute is the same regardless who brings the suit. To be sure, respondent and other educational agencies may face fewer IDEA suits if both inquiries are resolved against petitioners.

But if that were the test for application of the Spending Clause, the Spending Clause would apply to every issue involving a Spending Clause statute – not just liability issues – and decades of this Court's Spending Clause jurisprudence would have to be overruled (which respondent does not ask the Court to do).[16] See, *e.g., Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 183 (2005) (holding that the Spending Clause does not require Congress "specifically" to "identify" and "proscribe *each* condition in [Spending Clause] legislation"); *Barnes*, 536 U.S. at 188 n.2 (refusing to apply the Spending Clause's "contract-law principles * * * to all issues that [suits under Spending Clause legislation] raise"); *Bell v. New Jersey*, 461 U.S. 773, 790 n.17 (1983) (holding that the Spending Clause does not necessarily require "the remedies against a noncomplying State" to be set forth unambiguously).

Perhaps this is why respondent (at 44-45) and its *amici* (CGCS 10, 16-17, 19-21) go to such great lengths to manufacture evidence that *pro se* parents are likely to increase school districts' litigation costs. That evidence, however, is entirely speculative[17] and stands in stark contrast to the con-

---

[16] See *Murphy*, 126 S. Ct. at 2471 (Breyer, J., dissenting) ("[T]o view each statutory detail of a highly complex federal/state program * * * simply through the lens of linguistic clarity, rather than to assess its meanings in terms of basic legislative purpose, is to risk a set of judicial interpretations that can prevent the program, overall, from achieving its basic objectives or that might well reduce a program in its details to incoherence.").

[17] This is particularly so when one considers that the evidence is divined overwhelmingly from cases filed by *pro se* prisoners, whose propensity to file suit, level of education, and familiarity with the law are different from other *pro se* litigants. See, *e.g., Report of the Working Committees to the Second Circuit Task Force on Gender, Racial and Ethnic Fairness in the Courts*, 1997 Ann. Surv. Am. L. 117, 302 (reporting that "the vast majority of the civil *pro se* docket" is composed of prisoner cases).

crete increase in liability that educational agencies would have faced had *Murphy* been decided the other way.

In any event, for the reasons explained throughout petitioner's opening brief, this reply brief, and the various top-side *amici* briefs, the statute is sufficiently clear that parents may sue *pro se* under IDEA to satisfy whatever lens through which the Court views the question presented.

CONCLUSION

For the foregoing reasons and those stated in petitioners' opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

JEAN-CLAUDE ANDRÉ
Counsel of Record
IVEY, SMITH & RAMIREZ
2602 Cardiff Ave.
Los Angeles, CA 90034
(310) 558-0932

FEBRUARY 2007