

Official

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P R O C E E D I N G S

[10:03 a.m.]

CHIEF JUSTICE ROBERTS: We'll hear argument this morning in 05-983, Winkelman versus Parma City School District.

Mr. Andre.

ORAL ARGUMENT OF JEAN-CLAUDE ANDRE

ON BEHALF OF THE PETITIONERS

MR. ANDRE: Mr. Chief Justice, and may it please the Court:

This case asks the Court to decide to what extent nonlawyer parents of a child with a disability may litigate an IDEA case pro se in Federal court. Under two distinct theories, the answer to that question should be without limitation. But I would like to focus today on Petitioner's primary and first theory, which is that parents are real parties in interest in IDEA suits regardless of the claims being asserted.

Under 28 U.S.C. 1654, a party has a right, as a matter of Federal statutory law, to litigate their own case. Accordingly, when a parent sues under IDEA, it is our position they are suing in their own right and are suing on their own case. This is particularly so because the right-to-sue provision that Congress enacted in IDEA uses the broad phrase "any party aggrieved" when

1 it allows judicial review of an adverse administrative
2 hearing officer's decision. The parties agree that it
3 is the underlying administrative complaint, or the due
4 process complaint, that frames both the claims that can
5 be brought eventually in court, and also, identifies who
6 the parties are that can appear in court.

7 Those complaint provisions in IDEA -- and
8 there are eight of them in all, we cite them in footnote
9 seven of our reply brief; all eight of those provisions
10 refer unambiguously to the parents' complaint. Congress
11 did not describe this due process complaint that starts
12 the whole dispute resolution process as the child's
13 complaint, the child's complaint by and through the
14 parents, or the parents' complaint on behalf of the child.

15 Accordingly, when a parent files that due
16 process complaint, they are the real party in interest,
17 and again, the provisions make no distinctions about the
18 kinds of claims that can be brought. It shouldn't
19 matter that when they get to Federal court that -- or
20 there shouldn't be any limitation on who is the real
21 party in interest in Federal court, or what claims may
22 be asserted.

23 JUSTICE KENNEDY: If we say that the parents
24 are the real party in interest and are entitled to sue
25 in their own right, is that the end of the case, or do

1 we reach the second -- a second question as to whether
2 or not they can represent the children?

3 MR. ANDRE: I don't think you would need to
4 reach a second question, Justice Kennedy. It's our
5 position that the remedies in an IDEA case are
6 coextensive and that the rights are inseparable. And
7 so, this case was pleaded in such a way as to have both
8 the parents and the child be before the court. But if
9 this Court were to agree with us on our first and
10 primary theory, we don't believe it would be necessary
11 to have the child listed as a plaintiff to a future
12 suit, and we imagine that on remand the child might be
13 dismissed from the suit. It's our position that he's
14 not an indispensable party.

15 JUSTICE SCALIA: What can the parents get
16 out of this case other than reimbursement for tuition
17 they've paid to private schools and procedural rights
18 that are given them by the Act? What can they get out
19 of this case other than those two things that do not
20 depend upon their status as representatives of the child?

21 MR. ANDRE: Well, clearly the relief
22 primarily sought by my clients -- in fact, if you look
23 just at the relief section of the complaint that my
24 clients filed, and this is in joint appendix page 19,
25 the only relief they actually seek is reimbursement.

1 There's a number of ways --

2 JUSTICE SCALIA: What other possible relief
3 could they seek other than giving them a procedural
4 right accorded by the Act? What other possible relief
5 could they seek that they would not be seeking as
6 guardians of the child?

7 MR. ANDRE: Of course, it's our position
8 that parents are never acting as guardians, at least in
9 the legal sense, or lay representatives of a child in a
10 court action. And so, therefore, a parent should be
11 able to assert any one of the -- a claim asserting
12 violations of any one of the many rights conferred in the
13 Act.

14 JUSTICE SCALIA: It depends upon their being
15 a party aggrieved. That is defined in Black's Law
16 Dictionary as a party entitled to a remedy.

17 MR. ANDRE: Correct.

18 JUSTICE SCALIA: Now if the only remedies
19 the parents are entitled to in their own right are
20 reimbursement, which is at issue here, and procedural
21 guarantees, why would not their ability to sue or to
22 appear pro se be limited to those two categories? You'd
23 win this case, but I'm talking about how broad is the
24 rule that you're urging us to adopt?

25 MR. ANDRE: Well, in -- and this could be a

1 very easy case if the Court wants to look just at the
2 specific procedural violations that my clients assert
3 and also the reimbursement claim that they assert. But
4 it's of course our position also that the full bundle of
5 rights can be asserted by parents. And I think maybe the
6 best way to answer your question, Justice Scalia, is
7 that -- to direct you back to the definition of a "free
8 appropriate public education" itself, and that's in
9 1401(9) and (29) in the statute. That definition
10 provides that a free appropriate public education is one
11 that's provided at no cost to parents. So if a school
12 district provides a "free and inappropriate public
13 education," then it's the parents' obligation -- or not
14 obligation -- they have the choice of whether to
15 supplement the inappropriate public education with
16 additional services, or to replace the public education
17 with one that provides an appropriate bundle of
18 services.

19 So I guess my point is that even in a case
20 where the parents don't necessarily seeks reimbursement,
21 they still are intended beneficiaries of the right to a
22 free appropriate --

23 JUSTICE SCALIA: The child is. The child is
24 entitled to an appropriate public education and the
25 parents are entitled to have it provided free. That's

1 really the only interest they have on the table, it
2 seems to me, separate and apart from their status as
3 representatives or guardians of the child.

4 MR. ANDRE: We also believe that the parents
5 have an interest in the education being appropriate
6 for -- in addition to the reason I just explained, that
7 they may have to supplement an inappropriate education,
8 but parents are also the co-architects of the
9 individualized educational program that is eventually --
10 that eventually defines the bundle of services that are
11 provided to the child. And they're integral to the --

12 CHIEF JUSTICE ROBERTS: Well, you say
13 they're the co-architects. I mean, are you saying
14 anything more than they are given a procedural right
15 to participate in the hearing?

16 MR. ANDRE: I think they're given -- I
17 haven't counted them -- but I think they're given 10, 12
18 of the 15 procedural rights outlined in the statute.
19 And this Court explained in Rowley, Congress placed
20 every bit as much emphasis on parental involvement in
21 the shaping of the individualized educational program
22 as it did upon --

23 CHIEF JUSTICE ROBERTS: Isn't there a bit
24 of -- there's a leap from saying they have these various
25 procedural rights and they're are a party aggrieved by

1 the decision rendered after the hearing; that's a
2 different question, isn't it?

3 MR. ANDRE: Well, typically a parent would
4 file a due process complaint, challenging the bundle of
5 services offered by the school district, and alleging a
6 procedural violation. And so I think it would be a rare
7 case where a parent would, by the time they get to
8 Federal court, try to be a party aggrieved to something
9 that they didn't exhaust below -- I mean that would render
10 the exhaustion requirement.

11 JUSTICE GINSBURG: They are an aggrieved
12 party for purposes of the administrative process. The
13 question is whether that -- when that is done, whether
14 they also constitute an aggrieved party. And one of
15 the -- one of the points made by the other side is that
16 there is an express provision for proceeding without
17 counsel at the administrative level, and there's no
18 provision for proceeding without counsel in court.

19 So doesn't that suggest that the right to
20 proceed pro se is limited to the administrative process?

21 MR. ANDRE: No, not at all,
22 Justice Ginsburg. Congress sensibly recognized that
23 because due process proceedings are run on a State-by-
24 State basis, certain unauthorized practice of law
25 statutes or other laws require -- or prohibiting counsel

1 in administrative proceedings might come into play. So
2 Congress had to make it express in section 1415(h)(1)
3 that any party may appear in the administrative
4 proceedings with or without counsel.

5 In contrast, in Federal court, there's
6 already 28 U.S.C. 1654, which has been on the books
7 since 1789 as part of the Judiciary Act. That provision
8 allows any party to litigate their own case. So it
9 actually makes a lot of sense that Congress would have
10 included the express right to proceed pro se --

11 CHIEF JUSTICE ROBERTS: Which just begs the
12 question, doesn't it? I mean, you're assuming that the
13 parents are a party to the case in Federal court.

14 MR. ANDRE: Well, again, it is our position
15 that they are because they're parties aggrieved by the
16 administrative proceedings, so long as they have
17 exhausted their claims. And that this is confirmed in
18 other provisions, for example, the attorneys' fees
19 provision of the statute refers repeatedly to parents as
20 a possible prevailing party.

21 CHIEF JUSTICE ROBERTS: I thought it was the
22 unanimous view of the circuits that parents, as a
23 general matter, do not have the right to represent their
24 children in Federal court, that the provision of the
25 judicial code that you cited does not confer on parents,

1 generally, the right to represent children.

2 MR. ANDRE: That's absolutely correct, Mr.
3 Chief Justice. But our primary theory in this case is not
4 that parents are seeking to represent their children as
5 lay advocates in court. Our primary theory is that a
6 parent suing under the statute is suing in their own
7 right. In fact, that's why my clients pleaded this case
8 with -- as -- with themselves on the caption, and
9 asserted claims that are their own, because they
10 believed that those claims are their own, and they
11 believe that they should be able to litigate those
12 claims under section 1654.

13 JUSTICE SCALIA: You know, it's not an
14 insignificant matter at issue here. Counsel, who are
15 referred to as officers of the court, protect the court
16 from frivolous suits, from suits that really have no
17 basis. When we give that authority to appear in court
18 and initiate a suit to the public at large, we make a
19 lot more work for Federal district judges. Why should
20 we interpret this statute to achieve that unusual
21 result?

22 MR. ANDRE: Well, I'm not sure that the
23 policy considerations would be relevant to the statutory
24 construction question of whose rights are being asserted
25 in a case like this. But certainly under our second

1 theory, the public policy considerations would be
2 appropriate.

3 It is our position that those public policy
4 concerns about pro se litigants burdening the courts,
5 burdening opposing counsel are dramatically outweighed
6 by the fact that -- by the reality that two-thirds of
7 the disabled children in the United States come from
8 families that cannot afford counsel --

9 CHIEF JUSTICE ROBERTS: Well -- but the statute
10 already allows the shifting of fees to a prevailing party.
11 So presumably attorneys can be found to take the
12 meritorious cases. And what we are probably dealing
13 with are cases that can't attract attorneys, even though
14 the attorneys know that if they win, they will get their
15 fees.

16 MR. ANDRE: I have two responses, Mr. Chief
17 Justice. First, in other regimes, where you have a
18 fee-shifting statute, the cases are usually still brought
19 by pro se litigants. Here because you are dealing with a
20 minor child, really, it is an all-or-nothing proposition.
21 Either bring the case and you have the potential to
22 recover attorneys' fees, or the case doesn't get brought
23 at all. And this is borne out by the statistics cited
24 in our petition and the amicus briefs from the Council
25 of Parent Attorneys and Advocates, and the Autism

1 Society of America.

2 JUSTICE KENNEDY: Was there an argument at
3 any point in this case that the claim was frivolous?

4 MR. ANDRE: No, there was not. And then
5 that brings me to, I guess, my last point, which is,
6 as a practical matter, there is a very limited private
7 special ed bar and they cherry-pick only the best cases.
8 But that doesn't mean that all the cases that are left
9 are frivolous or meritless. There's a whole universe of
10 cases out there, some of which may be quite strong, some
11 of which may be on the borderline, and some which may be
12 meritless.

13 But Congress cannot have intended to create
14 this important and robust substantive statutory
15 guarantee to a free and appropriate public education,
16 and guarantee all these procedural safeguards, including
17 judicial review to enforce it, and then expect it -- that
18 that right would never be fulfilled because --

19 CHIEF JUSTICE ROBERTS: Well, if they had
20 that overriding intent, it would have been easy enough
21 for them to make clear that this was an exception to the
22 normal rule, that parents don't have the right to
23 represent children in court. They did that with respect
24 to the administrative proceeding, as Justice Ginsburg
25 pointed out. They perhaps conspicuously did not do it

1 with respect to the proceeding in court.

2 MR. ANDRE: Well, actually, if I could
3 clarify one thing. If you look closely at section
4 1415(h)(1), it does not provide that a parent can
5 represent their child in the administrative proceeding.
6 It just says that any party may litigate that
7 administrative proceeding, with or without counsel.

8 CHIEF JUSTICE ROBERTS: I know, but 14 -- is
9 it 1415(f)? Specifically says that parents have the
10 right to participate in the due process hearing. I'm
11 looking at 1415(f)(1)(A). In other words, parents have
12 the right to participate in the due process hearing.

13 MR. ANDRE: But that's also -- it's our position
14 that they have the right to participate in the due process
15 hearing as parties, in fact as the kind of plaintiff-
16 side parties. And that is confirmed by the eight provisions
17 that we cite in footnote seven of our reply brief that
18 talk about the parents' complaint.

19 CHIEF JUSTICE ROBERTS: Well, it doesn't say
20 they have the right to participate as parties. They have
21 -- they say they have the right to -- for an impartial due
22 process hearing. I would suppose if you're trying to
23 figure out who is the party to that case, you would
24 still think of it in terms of the child and not the
25 parents.

1 MR. ANDRE: Well, we thought that -- we
2 believe that Congress thought of it as the parents
3 because of all the statutory references to the parents'
4 complaint. Of course, we don't take the absurd position
5 that the child could not also be a party to those
6 proceedings.

7 But in any event, my point was simply that --
8 the expressio unius argument that some courts relied on
9 to suggest that Congress consciously decided not to
10 allow parental lay representation, I mean, that argument
11 simply doesn't have a strong foundation, because the
12 provision on which that argument is based, which is
13 1415(h)(1), is -- it's ambiguous at best. And, in fact,
14 could suggest just the opposite.

15 I'd like to address a point that Respondents
16 have relied on --

17 JUSTICE ALITO: Before you do that, how much
18 of a practical benefit is -- would it be -- if --
19 children with disabilities and their parents, if you are
20 successful here, in light of the complexity of the IDEA
21 and the fact this is an area where some parents are going
22 to have difficulty maintaining any kind of emotional
23 detachment from the litigation?

24 If parents can represent their -- can -- a
25 -- nonlawyer parents can appear in court, isn't there a

1 risk that in some instances where a lawyer could be
2 found if the parent made an effort to do that, they're
3 going to be lured into trying to provide the
4 representation themselves?

5 MR. ANDRE: Well, first of all, parents
6 already have to get to know the statute and the
7 applicable regulations when they bring these cases at
8 the administrative level. By the time they get to
9 court, they are intimately familiar with the facts and
10 intimately familiar with the relevant law. The only
11 thing that's different about a court action and the
12 administrative proceeding is that now you have the Federal
13 Rules of Civil Procedure.

14 JUSTICE SCALIA: These disadvantaged parents
15 that you are referring to who -- comprise the majority of
16 parents, they're really up on section, you know, (h)(1)
17 and all that stuff? I find that hard to believe. I
18 mean, the people you're assertedly benefiting here are
19 the people least likely to have familiarized themselves
20 with the statute and the procedures.

21 MR. ANDRE: I'm not sure we agree, with all
22 due respect, Justice Scalia. But even if that's true,
23 the nature of IDEA court action, I think, addresses some
24 of the concern. These are not pure record review
25 proceedings, like in merit systems protection board

1 cases, or immigration cases. But they are quasi-review
2 proceedings. And so what we're advocating here is
3 really access to the courts. Let the parents, whether
4 they are brilliant writers or whether they're not so good
5 at writing, let them at least have access to the courts,
6 so that way then, the capable district judge can look at
7 the case and decide whether the school district has
8 complied with the statutory mandates.

9 JUSTICE SCALIA: And do it right after
10 reading pro se prisoner petitions, right? You'd have a
11 nice evening's work.

12 MR. ANDRE: We think that the pro se parents
13 are quite different from pro se prisoners. I'd like to
14 save the rest of my time for rebuttal.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 Mr. Andre.

17 Mr. Salmons.

18 ORAL ARGUMENT OF DAVID B. SALMONS

19 ON BEHALF OF THE UNITED STATES,

20 AS AMICUS CURIAE, SUPPORTING PETITIONERS

21 MR. SALMONS: Thank you, Mr. Chief Justice,
22 and may it please the Court:

23 Congress made parents of children with
24 disabilities parties in their own right in
25 administrative and judicial proceedings under the IDEA,

1 and granted parents their own rights under the Act. One
2 of the rights granted expressly to parents is the right
3 to seek reimbursement for private educational expenses
4 when the parents believe the school has failed to
5 provide an appropriate education.

6 That is the claim that's at issue in this
7 case, and the parents are clearly the appropriate party
8 for that claim because they're the ones that have
9 incurred the financial harm. When they are reimbursed
10 --

11 CHIEF JUSTICE ROBERTS: That argument proves
12 a little too much. If you have a child who is the
13 victim of a tort, for example, and suffers a serious
14 injury, it is the parents who are going to have to bear
15 the costs of accommodating that injury. And yet in any
16 tort action, it's still the child who is the party and
17 not the parent.

18 MR. SALMONS: Well, I think that's right,
19 Your Honor, but the difference here is that the statute
20 in section 1412(a)(10)(C)(ii), and this is on page 6a of
21 Petitioner's brief, expressly provides a right to
22 parents to seek reimbursement for the -- for their --
23 the educational expenses that they incur.

24 And while the parents have to show that
25 there was a denial of a free appropriate public

1 education, we think it's clear that the statute makes
2 the claim the parent's claim. And there are cases, for
3 example, out of the Fourth Circuit, in Emery, that
4 would suggest that it is not even clear that the child
5 would have standing to assert a claim for reimbursement
6 when they're not out of pocket any expenses.

7 So we think in a case like this, this is an
8 easy case. We think clearly here the parents are the
9 parties.

10 JUSTICE GINSBURG: But then you would be
11 establishing a right for the least needy. I mean, if
12 they're seeking reimbursement, they're able to pay the
13 private school tuition. It's the people who can't --
14 who have no alternative, they have to take what the
15 school district gives them because they don't have the
16 wherewithal to enroll their child in a private school.
17 And your argument, concentrating on the reimbursement
18 right, would leave out those people, would it not?

19 MR. SALMONS: Well, that's not the sum total
20 of our argument, Your Honor. I was just pointing out
21 that actually there's a relatively narrow way to decide
22 this case if the Court so chose, by focusing on the
23 reimbursement claim in this case.

24 Our position is that parents share in the
25 substantive right to a free appropriate public education

1 under the Act. And there are two things we would point
2 to in regard to the definition of a free appropriate
3 public education that we think makes this clear. And
4 this is in section 1401 of the Act on pages 2a and 4a of
5 Petitioner's brief.

6 The first is the definition says that the
7 term "free appropriate public education" means special
8 education services provided, quote, "without charge and
9 at no cost to parents." We think clearly the free
10 aspect, again, is first and foremost a right of the
11 parents, because they're the ones that bear the cost.
12 With regard to --

13 JUSTICE SCALIA: I'm not following you.
14 Where is this provision? 1401 what?

15 JUSTICE KENNEDY: I think you quoted from
16 4a.

17 MR. SALMONS: There's -- That's correct.
18 The definition begins on page 2a which says "free
19 appropriate public education" on section 1401 and it
20 says, "the term free appropriate public education means
21 special education related services that" -- and under
22 subparagraph A -- "have been provided at public expense
23 under public supervision and direction and without
24 charge," and then in subparagraph 29, which is on page 4a
25 the term "special education" is defined -- which is again

1 the term from the definition of "free appropriate public
2 education" -- is defined to mean "specially designed
3 instructions at no cost to parents."

4 And so again the right to a free appropriate
5 public education is defined expressly in part as terms
6 of the parents interest. We also think that with regard
7 to any question about what is the appropriate -- what is the
8 appropriate education for the child, if you look back again
9 on 2a, subparagraph D of the definition of "free appropriate
10 public education," it says that it has to be special education
11 services that are provided in conformity with the individual
12 education program required under the Act.

13 And now the individual education program or
14 IEP process is the process by which parents are given
15 the right to participate as full members of the IEP team
16 and to have a say in helping to define what is an
17 appropriate education for their child. And as this Court
18 pointed out in Rowley, this is the essential feature of
19 this Act. The way it works is that Congress did not
20 specify or flesh out a substantive standard for what is
21 appropriate for a child, instead it ensured -- it
22 mandated, excuse me -- that an appropriate education is
23 an education that involves parental involvement.

24 And when there is a dispute with regard to
25 whether the IEP team has adopted the right educational

1 program for the child, we think that the Act makes
2 parents, who again, who are full members of that team,
3 when their views are rejected as far as what is
4 appropriate, they are given the procedural safeguard of
5 initiating a due process hearing. Again the Act refers
6 repeatedly to --

7 CHIEF JUSTICE ROBERTS: So their, their
8 rights -- so their right to proceed in Federal court
9 should be limited to the rights that you've identified
10 under the statute as opposed to the right to proceed on
11 behalf of the child?

12 MR. SALMONS: That's correct.

13 CHIEF JUSTICE ROBERTS: In other words, you
14 think -- you think their -- their, their rights -- the
15 rights they can assert are only ones they can identify
16 as their own as opposed to the child's?

17 MR. SALMONS: Well it, that is essentially
18 our position although I would add that our position is
19 that all of the rights of the statute are rights that
20 are shared by the parent. At least with regard to the
21 substantive --

22 JUSTICE SCALIA: Well, then you haven't said
23 anything. I thought you were saying that they can sue
24 for the money and they can sue for denied procedures.
25 But if all the procedures are given and they're still not

1 satisfied with the public education that is given, they
2 would not be able to sue claiming that it was inadequate
3 under the terms of the Act.

4 You think they can sue then, too, as well.

5 MR. SALMONS: Yes, Your Honor. We do --

6 JUSTICE SCALIA: Well, you haven't said
7 anything then.

8 MR. SALMONS: Well --

9 JUSTICE SCALIA: You really haven't limited
10 the scope of the parent's right to sue at all.

11 MR. SALMONS: Well -- well -- just because I
12 haven't limited the rights of the parent's right doesn't
13 mean that I haven't been trying to make a point about
14 how to interpret the statute. The statute we think does
15 not limit the parents' rights to sue on behalf of their
16 child and on behalf of their own rights under the
17 statute.

18 We think the way to think about this --
19 again, keep in mind that the right to initiate a due
20 process hearing and the right to seek review of that in
21 court, those are rights that are contained in section
22 1415, which is the procedural protections, the procedural
23 guarantees of the Act. And we think that those are rights
24 that belong to the parents.

25 JUSTICE SCALIA: That's fine. You've given the

1 procedure but where does the Act guarantee the parents
2 the proper outcome? The proper -- assignment?

3 MR. SALMONS: Well, we think the way --

4 JUSTICE SCALIA: It does give the parents
5 the right procedures explicitly and the right to
6 reimbursement for -- for private tuition.

7 MR. SALMONS: The -- that -- that's correct.
8 The way we look at the question, Your Honor, is to say
9 it gives the parents those rights, it gives the parents
10 the right to be full members of the IEP team that
11 determines the appropriate education for that child.
12 While the school district has the final say as far as
13 the contents of the IEP, the parents as members of that
14 team have the right to initiate litigation through
15 administrative procedures and then ultimately in court,
16 if their view of what is appropriate for their child is
17 rejected by the -- by the -- by the IEP team. And
18 while, and no doubt --

19 JUSTICE SCALIA: And that right, where --
20 where is that right contained? You have given us
21 citations for the other ones. Where is that right
22 contained?

23 MR. SALMONS: The right to initiate --

24 JUSTICE SCALIA: The right to initiate a
25 suit solely on the basis -- not that I was denied

1 procedures, not that I, I paid money for private
2 schooling, but I do not believe the outcome, the
3 education given to my child in the public school was
4 enough.

5 MR. SALMONS: Your Honor, what I would refer
6 you to are the many provisions of the Act, and you can
7 turn to pages 16a and 17a for example of Petitioner's
8 brief that has these, in part, where the Act repeatedly
9 refers to the parents' due process complaint, the
10 parents' due process complaint, known as the parents'
11 right to a due process hearing. The 2004 amendments
12 expressly refer -- define "prevailing party" to be parents.

13 It referred to the parents' cause of action
14 --

15 JUSTICE SCALIA: They have the right -- they
16 have the right to the hearing. But do they have the
17 right --

18 MR. SALMONS: Well, if they have a right --

19 JUSTICE SCALIA: Do they have a right in and
20 of themselves -- not as guardians -- do they have the
21 right to a particular outcome in the hearing? That's,
22 that's the point I'm inquiring to.

23 MR. SALMONS: Our way of looking at the
24 statute, Your Honor, says that if they are the ones that
25 initiate the hearing, they file the complaint, they are

1 parties to that hearing, then when, when their claims
2 are denied, they are parties aggrieved within the
3 meaning of the statute. It's the same term, "parties
4 aggrieved," that refers to the right to an appeal in the
5 administrative process that refers to the ability to
6 initiate a civil cause of action.

7 CHIEF JUSTICE ROBERTS: It is not -- it is
8 not just party aggrieved. It's party aggrieved by the
9 findings and decision, as opposed to party aggrieved by
10 a denial of the procedural right, and those strike me as
11 two different things.

12 MR. SALMONS: Well, I -- it does say, it does
13 reference back, in fact it references back to the
14 complaint that's filed to initiate the due process
15 hearing. And the parties are the ones that -- excuse
16 me, the parents are the ones that are referred to as the
17 ones filing those complaints. It is referred to
18 repeatedly as the parents' complaint and the parents are
19 -- are referred to as prevailing parties in the civil
20 action. Again in the attorneys fee provisions that were
21 added in 2004, expressly refer to quote, "the parents'
22 complaint or subsequent cause of action." This is on
23 page 24a of Petitioner's brief.

24 And it refers to parents as a prevailing
25 party. There are other provisions that do so as well

1 and while we're on the topic of the 2004 amendments -- I
2 see my time is up.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 Mr. Salmons.

5 Mr. Bergeron.

6 ORAL ARGUMENT OF PIERRE H. BERGERON,
7 ON BEHALF OF RESPONDENT

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

10 The common law rule banning parental pro se
11 representation is as longstanding as it is pervasive.
12 Appreciating the fact that the IDEA does not abrogate
13 the common law rule, Petitioners instead seek to
14 circumvent that through this substantive rights theory.
15 If their due process complaint never raised any issue of
16 parental substantive rights, nor even did their cert
17 petition, which at page 11 said children have substantive
18 rights but parents have procedural rights.

19 Now, however, they tell this Court that the
20 right -- the parents' substantive right is so ingrained
21 in the fabric of the statute that the courts should
22 recognize it.

23 JUSTICE STEVENS: How do you classify right
24 to reimbursement?

25 MR. BERGERON: Your Honor, I would classify

1 that as not a right, it's a remedy. It is a remedy
2 premised on the denial of the FAPE to the child. And as
3 a result, it is simply a derivative claim for the
4 parents to recover those funds.

5 JUSTICE STEVENS: The right to recover
6 money, it's just a remedy, it's not a right?

7 MR. BERGERON: That -- and that's how 1412
8 is structured, the provisions about reimbursement. It
9 depends on the predicate finding that the child was
10 denied a FAPE and therefore one of the remedies, among
11 other remedies, compensatory education and so forth, is
12 reimbursement.

13 JUSTICE GINSBURG: What about the provision
14 that says "at no cost to the parent"?

15 MR. BERGERON: Your Honor, certainly that
16 has been one of the emphases by Petitioners, but the
17 response to that is that the "free" aspect of the free
18 appropriate public education does not give parents a
19 substantive right to the education itself. We are not
20 talking -- we are debating in this case, the merits of
21 this case, we are debating the "A" aspect, the
22 appropriateness. We are not saying, we have not
23 expelled the student and therefore they have a claim
24 based on that. It is simply --

25 JUSTICE STEVENS: Can I just go back to my

1 other question to be sure I got your point? The
2 reimbursement is paid to whom?

3 MR. BERGERON: Your Honor --

4 JUSTICE STEVENS: The child or the parents?

5 MR. BERGERON: Our position is it would be
6 paid to the child. The child would be the party that
7 could bring that claim. And I just would like to
8 clarify. If you look at page 153 of the joint --

9 JUSTICE STEVENS: You reimburse a child
10 for money that his parents spent?

11 MR. BERGERON: And Your Honor, that is how the
12 courts -- the lower courts and the Third Circuit, where
13 the Collinsgru rule prevails, that's how they apply it.

14 JUSTICE STEVENS: What would -- what would
15 happen if the child were deceased or incompetent?

16 MR. BERGERON: Well, that is, that is
17 exactly the scenario in the Seventh Circuit case that
18 they cited from 2007. And they said it's, the child's
19 estate is the one that brings the claim. Now in that
20 case, the child had actually expended the funds. But
21 that case upheld the rule that we were -- that we are
22 advocating here.

23 JUSTICE SOUTER: In an instance in which the
24 money is paid to the -- the reimbursement is paid to the
25 child, how does the child get the money to the parents?

1 MR. BERGERON: Your Honor, we assume that --

2 JUSTICE STEVENS: Maybe, maybe these
3 children don't. Do they set up trust funds for these
4 reimbursements?

5 MR. BERGERON: Your Honor, I think it is no
6 different than a basic attorney fee award. There's not,
7 there's not a claim that -- that, you know, if someone
8 else, if the uncle pays the attorneys' fees that doesn't
9 negate the award of fees on behalf of the child.

10 JUSTICE SOUTER: No, I'm not talking about
11 negating the award. I'm -- if that theory is sound, that
12 the child is the proper recipient of the reimbursement,
13 I presume that ultimately the reimbursement is supposed
14 to go to the person who paid the money?

15 MR. BERGERON: That's right.

16 JUSTICE SOUTER: Which would be the parent.
17 My question is how does the child in that case get the
18 money to the parent?

19 MR. BERGERON: Well, because the claim would
20 have to be brought on behalf of the child, because they
21 would not have the capacity to bring the claim itself,
22 the award would go straight to the, to the guardian, who
23 may be the parent that is proceeding on their behalf.

24 JUSTICE KENNEDY: But the guardian can't the
25 funds that belong to the child.

1 MR. BERGERON: Well, but Your Honor, we
2 believe that that's the pragmatic result that Congress
3 intended here.

4 JUSTICE SOUTER: All right. But if the, if
5 the guardian is in a position to convey the money to
6 himself in the different capacity as the parent, then
7 why isn't the guardian equally in a, in a position to be
8 substituted for the child in -- in litigating the
9 action?

10 MR. BERGERON: Well, Your Honor --

11 JUSTICE SOUTER: You can't have it -- you
12 can't have it both ways.

13 MR. BERGERON: Well, the guardian can
14 certainly bring the claim on behalf of the child. But
15 it's different than bringing the claim in their own
16 right. And I would point that at page 153 of the joint
17 appendix, it specifies at the -- at the administrative
18 hearing level, there was no claim for reimbursement to
19 the parents. In fact, what they were seeking was
20 reimbursement to Monarch, to the school. In other
21 words, as far as the administrative record disclosed,
22 they had not actually paid the funds.

23 JUSTICE BREYER: What is this to do -- I
24 mean, I'm -- I'm puzzled about why we're talking about
25 this complicated thing. I mean why -- the statute as I

1 read it has a section and it's called procedural,
2 procedural rights.

3 MR. BERGERON: Yes.

4 JUSTICE BREYER: And it says that the
5 procedural rights, right at the beginning, are for both
6 the children and the parents. And it sets up some
7 procedures in the agency which is for the children and
8 the parents and the school board, and everybody is supposed
9 to be there. And then another part of the same section
10 says any person aggrieved by the first has a court
11 hearing.

12 Why isn't that the end of it? It's clearly
13 aimed, as the statute is aimed, at both students and
14 parents. And then we give them all procedural rights,
15 and what in the statute says that the procedures that
16 they're following before the school board happen to be
17 for both parents and students. But without saying a
18 word, a different procedure, a Federal court procedure
19 in the same section, without saying anything, would be
20 just for the students and not for the parents?

21 I mean, I find that hard to read the statute
22 that way.

23 MR. BERGERON: Well, Your Honor, if you're
24 talking about the distinction between the procedural and
25 the substance in the Act, Congress made clear --

1 JUSTICE BREYER: No, I'm not. I'm talking
2 about the whole Act. Throughout the whole Act, they
3 talk about parents and students.

4 MR. BERGERON: Right.

5 JUSTICE BREYER: And who writes the check?
6 The student?

7 MR. BERGERON: Generally, no, Your Honor.

8 JUSTICE BREYER: No. Of course. The parent
9 writes the check. And who has the interest? I have an
10 interest in educating my children as you do in yours.
11 And this statute talks about that throughout.

12 MR. BERGERON: Just --

13 JUSTICE BREYER: So I'm looking at the
14 particular words in the procedural section, and the
15 particular words explicitly say that every subsection is
16 both for parent, through child; and then we get to the
17 court one and it talks about person aggrieved.

18 And you, I guess, have to convince me --
19 which as I'm putting it, sounds like an uphill battle --

20 (Laughter.)

21 JUSTICE BREYER: But you have --

22 MR. BERGERON: I'll do my best.

23 JUSTICE BREYER: You have to convince me
24 that that word "person aggrieved," appearing at the
25 at the end of this section is meant to apply to only

1 some of the people whom every other section talks about,
2 namely just children, not parents.

3 Now why should I read that it way?

4 MR. BERGERON: Well, let me try to explain,
5 Justice Breyer. The reason is as Petitioners
6 effectively concede in their reply brief, party
7 aggrieved does depend on the party entitled to the
8 remedy. And if we look at the amendment in
9 1415(f)(3)(E), which was just added in 2004, it
10 clarifies that all relief that the hearing officer
11 should award is based on substantive violation to the
12 child.

13 And it's important that if we look to the
14 entirety of subchapter 2, there are more than two dozen
15 references to the right, to the obligation, to the
16 provision of a FAPE to the child. That is what we are
17 talking about. The dispute resolution provisions hinge
18 on vindicating the child's right. And I think the
19 question earlier to Mr. Salmons was --

20 JUSTICE SCALIA: What's that section you
21 just alluded to? You're blasting by it. Where is it, in
22 the --

23 MR. BERGERON: I'm sorry, which section?

24 JUSTICE SCALIA: F --

25 MR. BERGERON: Oh, 1415(f)(3)(E) is located

1 on 21a of the blue brief, Your Honor. And
2 what that section --

3 CHIEF JUSTICE ROBERTS: 21a or --

4 MR. BERGERON: 21a of the blue brief, Your
5 Honor.

6 CHIEF JUSTICE ROBERTS: And which is the
7 statutory section again?

8 MR. BERGERON: It's 1415(f)(3)(E).

9 JUSTICE SCALIA: I thought you said 14 --
10 1415 --

11 CHIEF JUSTICE ROBERTS: (f)(3)(E). Are you
12 sure it's not 18a?

13 JUSTICE SCALIA: (f)(3)(E) is on 18a.

14 MR. BERGERON: (f)(3)(E) is on 21a of my
15 version of the blue brief, Your Honor. That's the
16 provision that's called -- it's titled decision of a
17 hearing officer, and it provides that a hearing officer
18 should grant relief on substantive grounds.

19 JUSTICE SCALIA: It's in 18a of mine, too.
20 Maybe you have a different brief there.

21 MR. BERGERON: It's not my brief, Your
22 Honor, I apologize. In any event, it limits the hearing
23 officer's ability to reward relief based on the
24 substantive -- whether the substantive right to the FAPE
25 has been awarded or not. And then we return to

1 Justice Breyer's point about the party aggrieved, the
2 party aggrieved by the finding or the decision. Because
3 the decision is limited to substantive grounds, that is
4 what we are really talking about here. And I think one
5 of the confusing aspects about what the nature of the
6 substantive right is, and I think we've heard some
7 different versions of that this morning, is what is the
8 scope.

9 Petitioners in their reply brief seem to try
10 to retreat a little bit and make the right more
11 palatable. But if they -- in doing so, the question is,
12 what is the right different than the child's right? And
13 we simply do not have the answer for that, and for the
14 school districts applying this Act on a daily basis, and
15 for courts interpreting it, it simply poses numerous
16 problems trying to apply to a parent a statute that was
17 designed to benefit children.

18 JUSTICE BREYER: Your argument, I guess, is
19 this argument. Now you're conceding the parent does
20 have a right to go to court, but he can only complain
21 about something that hurts him. Right?

22 MR. BERGERON: I would not --

23 JUSTICE BREYER: He can't complain in court
24 or -- well, it sounds as if you were saying that.
25 You're saying that the hearing officer has to decide

1 against the parent and if he doesn't decide against the
2 parent, obviously the parent can't go into court because
3 he doesn't have anything to complain about, the parent.
4 Isn't that your point?

5 MR. BERGERON: Well, he can't decide against
6 the parent because the only issue at stake is the right
7 of the child.

8 JUSTICE BREYER: Oh, well -- wait. I'm
9 sorry. Then you go ahead. I thought I heard you say
10 that the problem is that the parent didn't have a right
11 taken away by the hearing officer, and that's why the
12 parent can't go to court.

13 MR. BERGERON: Well, he won't have a right
14 taken away from him because it's not -- it's not his
15 claims at stake in the due process hearing.

16 JUSTICE BREYER: Oh, I would agree, we can
17 be on the same grounds there.

18 MR. BERGERON: Right.

19 JUSTICE BREYER: I agree that if the parent
20 isn't hurt, if the parent wasn't deprived of anything,
21 the parents can go to court but doesn't have anything to
22 complain about, you know, whereas another section of the
23 statute says that reimbursement is something supposed to
24 be reimbursement for the parent, so it would seem as if
25 the parent has something to complain about. Isn't that

1 so? It says the -- I think so -- it says a parent is to
2 be reimbursed. I thought that was one of the things
3 that --

4 MR. BERGERON: That's correct, Your Honor.
5 That's what it says.

6 JUSTICE BREYER: So, now it looks as if the
7 parent has something to complain about. The parent
8 hasn't got the money that he was supposed to get. Now
9 we have something to complain about, so therefore, we're
10 aggrieved, and then the last section says an aggrieved
11 person can go to court.

12 MR. BERGERON: Right. We simply feel that
13 because the reimbursement, as I said before, hinges on
14 the deprivation of the right to the child and not the
15 deprivation of the substantive right to the parent, it
16 is the child's claim to bring. I appreciate --

17 JUSTICE SOUTER: Mr. Bergeron, I have a
18 basic conceptual problem, both with that response and
19 with your larger argument. Leaving aside how we should
20 classify the reimbursement right or classify
21 reimbursement, you make a broad distinction between the
22 substantive right of the child to the free appropriate
23 public education and on the other hand, the procedural
24 rights of the parents in going through the process that
25 ultimately comes to a conclusion for the child's

1 benefit.

2 The conceptual problem I have is that I
3 don't understand why it makes sense to say that the
4 parents have procedural rights unless that procedural --
5 or unless those procedural rights of the parents are in
6 aid of some substantive entitlement of the parents. We
7 give procedural protection to people in order to
8 vindicate some substantive interest that they can claim,
9 and you're, in effect, splitting those two apart.
10 You're saying one person has a substantive right, the
11 other people have procedural rights. And I don't see
12 conceptually how you can make that split. And if you
13 don't make that split, then it only makes sense to say
14 that the right to the free public -- the free appropriate
15 public education is, as the statute in one place seems to
16 say, a right of the family group, the parents and the
17 child together, rather than the right of the child alone.

18 So conceptually, how do you defend the
19 distinction that you make between substantive rights on
20 one person and procedural rights in another?

21 MR. BERGERON: And here's how I would
22 explain it, Justice Souter.

23 The right, the substantive right is the
24 right to the FAPE to the child. And because the child
25 does not have capacity, Congress implemented a pragmatic

1 system to allow the parents to protect those rights.
2 It's derivative for the parent to protect the child's
3 right --

4 JUSTICE SOUTER: Then why don't we say that
5 they are the procedural rights of the child and the
6 parents are simply stepping into the child's shoes to
7 vindicate them?

8 MR. BERGERON: That is exactly what 1415(m)
9 says, Your Honor. That allows the transfer of rights.
10 And 1415(m) is at 11a and 12a of the red brief, and I
11 hope I've got the cite right this time. 1415(m) allows
12 for States to require, and Ohio does, to require the
13 transfer of all rights under subchapter 2 that a parent
14 would otherwise have, straight to the child. So
15 basically --

16 JUSTICE GINSBURG: But that's when the child
17 reaches majority.

18 MR. BERGERON: That's right.

19 JUSTICE GINSBURG: The child is no longer a
20 child, the child is an adult.

21 MR. BERGERON: And that's my -- that's part
22 of what I was trying to say.

23 JUSTICE SOUTER: I'm sorry. You go ahead.

24 MR. BERGERON: Oh. Well, what I'm trying to
25 say is because the child lacks capacity, they can't do

1 all these things on their own until they reach majority.
2 But once they do and the rights transfer, it illustrates
3 that it's not really the parents' right, it is the
4 child's right that they are protecting.

5 JUSTICE SCALIA: What if -- what stands in
6 the way of that analysis is the text, which says "all
7 other rights accorded to parents under this subchapter
8 transfer to the child."

9 Not only doesn't that help you, it seems to
10 me it hurts you. It acknowledges that there are rights
11 accorded to parents.

12 MR. BERGERON: Right. And those would be
13 the procedural safeguards that are delineated in the
14 Act.

15 JUSTICE SCALIA: But then you were denying
16 them, as I understood the argument.

17 MR. BERGERON: Well, let me clarify then. I
18 wasn't denying the existence of the procedural
19 safeguards. To the contrary, what I'm saying is that
20 they are not redressible independent of themselves in
21 Federal court unless -- and this is what 1415(f)(3)(E)
22 clarifies, is that you have to have a substantive
23 violation. Because if you think of a situation in which
24 the child is provided a FAPE, no one disputes that, but
25 the parent says well, you didn't invite me to a meeting,

1 what's your remedy there? There is no remedy. And
2 that's what Congress was trying to clarify.

3 JUSTICE SOUTER: Isn't that the problem? On
4 the analysis that you're coming up with, the parents end
5 up without even the procedural rights, because you're
6 saying the only person who can basically invoke a
7 violation of procedural right is the person who has been
8 denied the substantive right. The parent hasn't been
9 denied the substantive right. Therefore, the parent
10 cannot invoke even the procedural right which ostensibly
11 on your own analysis, the parent has been given. That
12 can't be correct.

13 MR. BERGERON: Well, Your Honor, if you look at
14 -- I'll direct you to the DiBuo case and the Lesesne case,
15 I'm probably mispronouncing both of them --

16 JUSTICE SOUTER: No, but before you direct
17 me to cases --

18 MR. BERGERON: Okay.

19 JUSTICE SOUTER: What's wrong with the
20 analytical point that I just made?

21 MR. BERGERON: Well, Your Honor, the --
22 that's what Congress was trying to clarify in 2004.
23 They did not want technical procedural violations to
24 eclipse the substantive right, and so what they
25 provided was the substantive right is the only one that

1 is important.

2 JUSTICE SOUTER: Yes, but instead of saying
3 they're not eclipsed, you're saying that they are totally
4 blocked out. Because your analysis, I thought was, in
5 response to my earlier objection, that the procedural
6 right, in fact, can only ultimately be invoked for the
7 vindication of the substantive right. And because the
8 substantive right is the child's, not the parent's, it
9 would follow that the parents cannot even invoke their
10 procedural rights, and we know that that can't be
11 correct.

12 MR. BERGERON: Right, and I'm not saying
13 that the parent -- the parent's procedural rights are
14 gone. I mean, remember --

15 JUSTICE SOUTER: But if the parent's
16 procedural rights are not gone, then the parents must be
17 able to invoke those procedural rights based on what
18 they claim to be a denial of some substantive
19 entitlement. You're saying that's the entitlement of
20 the child, but if the parents are going to have any
21 procedural right worth having, they've got to invoke it
22 for the purpose of vindicating that substantive right;
23 isn't that correct?

24 MR. BERGERON: Yes.

25 JUSTICE SOUTER: Okay. Then why do not the

1 parents, when they are claiming that they are aggrieved,
2 have as much right to make a claim that goes to the
3 substantive denial as to the procedural denial, simply
4 because the two are inseparable?

5 MR. BERGERON: Your Honor, because that --
6 again, that was what Congress was trying to clarify in
7 2004. And if you look at the DiBuo case and the Lesesne
8 case cited on page 27 of the SG's brief, both those
9 cases make clear that notwithstanding procedural
10 violations, there must actually be a causation, there
11 must actually be substantive harm before any relief can
12 flow from that.

13 CHIEF JUSTICE ROBERTS: Does a parent have a
14 right to bring a 1983 action if their procedural rights
15 under this statute are interfered with by the State
16 actors?

17 MR. BERGERON: Your Honor, if the parent
18 would otherwise have a 1983 claim under 1415(1), if it
19 relates to an IDEA claim, there would have to be
20 exhaustion first.

21 CHIEF JUSTICE ROBERTS: I think I understand
22 your argument based on 3(E), but when I look at page 21a
23 of my blue brief there's another provision on attorneys'
24 fees and it's phrased in a very curious way. It says
25 that fees are allowed to a prevailing party who is the

1 parent of a child with a disability. It seems to me
2 that's the most difficult express language for you to
3 deal with. It doesn't say attorneys' fees happen to be
4 allowed to parents, it's to a prevailing party who is a
5 parent. And I understand your argument to be that a
6 parent can never be a prevailing party.

7 MR. BERGERON: That's right. And let me try
8 to explain why. If you look at 1411(e)(3)(E), which is
9 5a of the red brief, and I'm sorry to keep jumping
10 briefs on you, that provides that litigation brought to
11 secure the right of the child to a FAPE is brought on
12 behalf of the child. So Congress added both that
13 section and the section you were just referring to at
14 the same time, and the only way to read them
15 harmoniously is that any action that is being brought on
16 behalf of the child to secure the FAPE, it's not the
17 parent's own action that they are bringing, they are
18 bringing it on their own -- on behalf of the child.

19 JUSTICE SCALIA: What was the section you
20 cited?

21 MR. BERGERON: 1411(e)(3)(E), on 5a of the
22 red brief.

23 JUSTICE SCALIA: (e)(3)(E).

24 MR. BERGERON: Yes.

25 JUSTICE SCALIA: Legal fees. The

1 disbursements under subparagraph (d) shall not support
2 legal fees, court costs, or other costs associated with
3 the cause of action brought on behalf of a child with a
4 disability to ensure a free and appropriate public
5 education for such child.

6 What do you think that proves?

7 MR. BERGERON: What I'm saying is Congress
8 recognized that when legal action is being brought to
9 secure a FAPE, just like it's the child's right to the
10 FAPE under subchapter 2, it is being brought on behalf
11 of the child. And that's where Petitioners run into
12 problem with the common rule law, because the common law
13 rule that they don't dispute is that parents cannot
14 bring claims on behalf of the child pro se. So they
15 have to find a way to abrogate, and they initially
16 argued in the opening brief for an exception to the
17 common law rule, which from my reading of the reply
18 brief they have abandoned. So the core issue in dispute
19 as far as the Petitioners go is what is the nature of
20 the substantive right.

21 And I'd like to make the --

22 JUSTICE GINSBURG: It says -- the section
23 you pointed to says disbursements under subparagraph
24 (d), but your brief doesn't include subparagraph (d).

25 MR. BERGERON: It's the high cost, one of

1 the high-cost funds for States, Justice Ginsburg.

2 I'd like to make --

3 JUSTICE GINSBURG: Well then, if this
4 provision is limited to subparagraph (d), how can you
5 argue that it covers the waterfront?

6 MR. BERGERON: Well, Your Honor, I think
7 it's indicative of what Congress appreciated the claim
8 would look like on any level, and it's not simply saying
9 that those funds aren't provided under subparagraph (d).
10 That is the nature of the claim. Regardless of under
11 what section we are looking at, that is the nature of
12 the claim that would be brought in order to secure a
13 FAPE for the child, and in every circumstance, it is
14 brought on behalf of the child.

15 Your Honor, I'd like to make one point, if I
16 can, about the spending clause, in response to
17 Petitioner's argument in the reply brief.

18 Petitioners effectively say that the
19 spending clause doesn't apply because this is not an
20 issue of liability. I'd like to direct your attention
21 again to Rowley, where at footnotes 11 and 26 the Court
22 recognized the difference between the educational
23 benefit which is the FAPE, and maximizing the
24 educational outcome.

25 CHIEF JUSTICE ROBERTS: Are attorneys' fees

1 allowed to a parent who is bringing one of these cases
2 on behalf of a child pro se?

3 MR. BERGERON: No.

4 CHIEF JUSTICE ROBERTS: It's a convoluted
5 question. Okay. So there's no issue under the spending
6 clause that a nonattorney parent would be able to claim
7 some sort of attorneys' fees?

8 MR. BERGERON: That's what -- I think there
9 have been four circuits who addressed that in the
10 context of attorney parents, and they've all said that
11 they cannot get fees.

12 CHIEF JUSTICE ROBERTS: So how is the
13 spending clause issue very significant in terms of the
14 exposure of the school boards?

15 MR. BERGERON: Well, Arlington did not limit
16 it to simply liability issues. It said repeatedly
17 obligations and conditions. And that's exactly what
18 Rowley was looking at in footnotes 11 and 26. We don't
19 necessarily have -- have to have a line item that there's
20 going to be X dollars in damage. It was simply the
21 difference between an educational benefit and maximizing
22 that benefit that triggered spending cost concerns in
23 Rowley. Just like in South Dakota v. Dole the issue of
24 whether someone was 21 in order to consume alcohol was
25 not necessarily a liability but it was a very important

1 obligation or condition imposed upon the States.

2 And their second point regarding the
3 spending clause is that not every single detail needs to
4 be fleshed out in clear notice.

5 JUSTICE BREYER: So I take it your argument
6 is, your red brief argument is that Congress said,
7 States, if you get some judgments against you and they
8 award attorneys' fees, you pay for it, we won't? Is
9 that what it says?

10 MR. BERGERON: No.

11 JUSTICE BREYER: You don't pay for it, you
12 can't pay for it out of the grant?

13 MR. BERGERON: Right.

14 JUSTICE BREYER: Okay. So we're not paying
15 for this, you pay for it. Is that right?

16 MR. BERGERON: I'm sorry?

17 JUSTICE BREYER: States --

18 MR. BERGERON: Right.

19 JUSTICE BREYER: -- if some people bring
20 claims against you under this because you didn't have a
21 good plan for the child and your attorneys' fees are
22 awarded against you, don't pay for it out of this grant.
23 Isn't that what you're saying it says?

24 MR. BERGERON: Well, Your Honor, it's a
25 little bit different because part of the -- part of the

1 real issue here is not necessarily an award of
2 attorneys' fees to the other party, but it's the
3 incurrence of attorneys' fees defending --

4 JUSTICE BREYER: I thought what your
5 argument was -- and if it's not, forget it, it's just
6 that I don't understand it. That here the Government
7 says pay for this out of your own pocket, and then it
8 defines what you're supposed to pay out of our own
9 pocket is, as a parent representing a child, not his own
10 action.

11 And then later on they say, they define it
12 differently. They talk about prevailing party; the
13 parents of a prevailing party. But you say that
14 second phrase must mean the first phrase. Because it
15 wouldn't make sense for the Government to say pay for
16 that out of the grant but not this out of the grant.
17 Is that your argument?

18 MR. BERGERON: And -- I think that's right.

19 JUSTICE BREYER: Okay. It is an argument.

20 MR. BERGERON: And -- and just to clarify,
21 Congress hasn't provided any funds for this. I mean
22 they, they recognized in 2004 they were only funding 19
23 percent of the obligations of the statute, and we have
24 to pick up the balance of the tab.

25 And their other argument on the spending

1 clause is that it's, you don't have to flesh out
2 everything in the statute but here we're talking about
3 two core issues. One is abrogating the common law rule
4 and the other is the creation of substantive rights to an
5 entirely new class of beneficiaries.

6 If there's ever anything that demanded clear
7 notice, this is it. It is much more serious and severe
8 than the expert fees at issue in Arlington, and school
9 districts and States simply have to have notice, what is
10 the parameter of the right that you are being requested
11 to recognize? And based on the briefing, and based on
12 what we have heard in argument, it is simply not clear
13 to the school districts, not only what the nature of the
14 right is, but how to apply it.

15 CHIEF JUSTICE ROBERTS: Well, that's where I
16 have a little bit of trouble. It's not -- the
17 underlying right is still the same. It's the right of
18 the child to a free and appropriate public education.
19 And that can be vindicated in court actions by attorneys
20 who get their fees paid if they prevail, and all we're
21 talking about is a situation where the parents can
22 assert that same right when an attorney won't.

23 And I'm just wondering how significant
24 additional exposure we're talking about? And what turns
25 on that is whether to take the spending clause argument

1 seriously or not.

2 MR. BERGERON: Well -- and I think the
3 answer to that is it's still not clear to me from --
4 from listening to the argument today, I mean, Petitioner
5 acknowledged the child falls out of the equation.

6 This is a statute that needs to benefit the
7 child, and they're taking the child completely out. And
8 so what is the nature of this parental right? The SG
9 says well, it's all, it's all intertwined. But if we
10 look at what Petitioner says in the --

11 JUSTICE GINSBURG: So if we were talking about
12 what is the toll on the State, it seems to me that if the
13 State would have to pay for a lawyer, if it lost, and the
14 parent who brings the case is not entitled to reimbursement,
15 how is the State's pocketbook affected?

16 MR. BERGERON: Justice Ginsburg, in
17 litigating this case while the Winkelmans were pro se,
18 we expended far greater than the \$8,000 at issue in
19 Arlington, on our legal fees defending --

20 CHIEF JUSTICE ROBERTS: Right. But you
21 would have had to do that if they had gotten a lawyer to
22 take the case. What, what your spending clause argument
23 is, the State agreed to undertake this liability, that
24 they would have to provide a free and appropriate
25 education, that if they litigated, they would have pay

1 the other side's attorneys' fees. But if they knew that
2 in the case where an attorney wouldn't take it, the
3 parents could prosecute it, and that might result in
4 overturning their decision and that might result in
5 greater expense, well, in that case they would not have
6 bought into this deal at all. That seems a little
7 implausible.

8 MR. BERGERON: Well, Mr. Chief Justice,
9 remember at the time that the Congress reauthorized in
10 2004, every circuit that had addressed it besides the
11 First had agreed that parents could not bring it pro se.
12 So the States reasonably would not have believed,
13 especially in the circuits where it was decided, that
14 they would have to -- have to come up with these funds.

15 CHIEF JUSTICE ROBERTS: I'm not disputing
16 that it results in additional exposure. I'm just
17 disputing that it affects the voluntariness of their
18 agreement to undertake the program.

19 MR. BERGERON: Well, if you, in the dissent
20 in Arlington, they made -- Justice Breyer made a
21 basically materiality argument and the majority did not
22 seem moved by it. So I think, this is something that is
23 very significant, not simply on the dollars involved,
24 but how we apply this substantive right to parents that
25 Petitioners seek to have recognized.

1 JUSTICE KENNEDY: Could the court appoint
2 the parent guardian ad litem and just let the parent
3 proceed as guardian ad litem?

4 MR. BERGERON: That wouldn't solve the issue
5 of -- under the common law, the guardian ad litem would
6 not have the ability to proceed pro se on the common law
7 piece, the same as the parent. The rule is the same. So
8 they would still have --

9 JUSTICE KENNEDY: The guardian ad litem
10 cannot proceed pro se?

11 MR. BERGERON: That's right. Unless they're
12 -- unless they have -- unless they are an attorney.
13 Which in many cases the appointment might be to someone
14 who is an attorney.

15 JUSTICE SOUTER: Mr. Bergeron, one of
16 the points you made on the spending clause argument, I
17 thought, was that if there are lawyers representing the
18 parents, the lawyers are going to screen out the more
19 frivolous cases. If they are not, more frivolous cases
20 are going to be brought. And there's -- there's an
21 intuitive appeal to that argument.

22 Do we have any -- any figures on the
23 comparative numbers of frivolous cases in lawyer
24 representation and pro se representation under the Act?

25 MR. BERGERON: Justice Souter, we don't

1 because most of the circuits were saying this is --
2 we're not going to allow pro se --

3 JUSTICE SOUTER: We don't have any First
4 Circuit numbers --

5 MR. BERGERON: No.

6 JUSTICE SOUTER: -- versus other numbers?

7 MR. BERGERON: No, we checked and couldn't
8 find anything, Your Honor.

9 JUSTICE SOUTER: Okay. Thank you.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 Mr. Bergeron.

12 Mr. Andre, you have three minutes remaining.

13 REBUTTAL ARGUMENT OF JEAN-CLAUDE ANDRE,

14 ON BEHALF OF PETITIONERS

15 MR. ANDRE: Thank you, Mr. Chief Justice.

16 I would like to turn briefly to Respondent's
17 assertion that Petitioners have somehow waived their claim
18 to reimbursement by not exhausting it below. We addressed
19 this in our reply brief, but if the Court wishes to look
20 at pages 78 and 88 of the joint appendix, particularly
21 page 78, there it is clear that the Petitioners were
22 seeking reimbursement in their own right.

23 On the page 153, that Respondent refers to,
24 I assume that at that point in time we were now on appeal
25 to the second tier of the Ohio administrative

1 proceeding, and perhaps at that point in time, Monarch
2 School was actually paying for Jake's education on a
3 grant-like basis, because that was something that
4 happened in this case. And that perhaps at that point
5 in time Petitioners referenced reimbursement to Monarch
6 because Monarch had been actually expending the funds.
7 But by and large my clients expended the funds to
8 educate Jake at Monarch School, and they certainly did
9 exhaust that claim to reimbursement.

10 JUSTICE GINSBURG: Are you claiming that
11 hiring an attorney would be a cost, if the phrase "at no
12 cost to the parent," if they have to hire an attorney,
13 that's a cost?

14 MR. ANDRE: Certainly. And I mean, I think
15 that's why Congress included the attorneys' fee
16 provision in 2004 that recognized that parents can be
17 prevailing parties. And if they prevail on establishing
18 that a free appropriate public education has not been
19 provided, then they can recover attorneys' fees as part
20 of their, their right to try to vindicate Congress's
21 purposes at no cost to them.

22 CHIEF JUSTICE ROBERTS: So why didn't
23 Congress just add the provision making this very clear
24 that the Senate had passed, why did the House boot it
25 out of the conference bill?

1 MR. ANDRE: We don't know. The legislative
2 record is entirely silent. But one plausible inference
3 could be, could be reached based on looking at the
4 addition of attorney's fees provision and the timing of
5 the Maroni decision in the First Circuit. Maroni came
6 down after the parental lay representation provision was
7 proposed by the Senate.

8 Maroni was the first court of appeals case
9 to recognize that parents may litigate these cases pro
10 se. The way Maroni did it however was by adopting our
11 primary argument here today, which is that parents
12 possess the right to -- to sue in their own name, as pro
13 se litigants, not as lay representatives of their
14 children, and seek to enforce the full bundle of rights.

15 Congress very well could have looked at
16 Maroni and said aha, that's what we intended all along;
17 Maroni got it right, and then they just put -- Congress
18 just put its thumb on the scale a little bit by enacting
19 the attorneys fee provision which made it clear that
20 parents can be, or are the prevailing party if the
21 plaintiffs prevail in an IDEA action.

22 Finally, I would like to address two -- two
23 points about the spending clause. Of course we believe
24 the spending clause is totally inapplicable, but I want
25 to respond to Respondent's suggestion that we're advocating

1 creation of a new substantive right here.

2 CHIEF JUSTICE ROBERTS: Why do you think
3 it's totally inapplicable?

4 MR. ANDRE: We think that this Court's
5 spending clause jurisprudence is concerned with
6 providing clear notice to States with respect to
7 liability and certain fiscal obligations. And what
8 Respondent is complaining about here --

9 CHIEF JUSTICE ROBERTS: Please --

10 MR. ANDRE: Oh, what Respondent is
11 complaining about here is essentially a disparate
12 impact. And this Court has never recognize a disparate
13 impact claim under the spending clause.

14 CHIEF JUSTICE ROBERTS: So you think it is
15 not violated, not that it doesn't apply for some reason?
16 There is no doubt this is spending clause legislation,
17 right?

18 MR. ANDRE: Well, absolutely spending clause
19 legislation. But we believe that the clear notice
20 concerns of the spending clause are not even implicated.
21 But that if the clear notice concerns were implicated,
22 the statute is sufficiently clear.

23 CHIEF JUSTICE ROBERTS: Thank you, counsel.
24 The case is submitted.

25 [Whereupon, the case in the above-entitled

1 matter was submitted at 11:04 a.m.]

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