No. 05-983

In the Supreme Court of the United States

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

v.

PARMA CITY SCHOOL DISTRICT

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

PAUL D. CLEMENT
Solicitor General
Counsel of Record

WAN J. KIM
Assistant Attorney General

GREGORY G. GARRE
Deputy Solicitor General

DAVID B. SALMONS
Assistant to the Solicitor General

DAVID K. FLYNN
GREGORY B. FRIEL
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

KENT D. TALBERT
General Counsel
Department of Education
Washington, D.C. 20202

QUESTION PRESENTED

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases–Continued: Page

Cases–Continued: Page

Constitution, statutes and rule:

Statutes and rule–Continued: Page

Statutes and rule–Continued: Page

Statutes and rule–Continued: Page

Miscellaneous:

In the Supreme Court of the United States

No. 05-983

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

v.

PARMA CITY SCHOOL DISTRICT

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This case presents the question whether and to what extent a non-lawyer parent of a minor child with a disability may proceed *pro se* in a federal court action brought pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 *et seq.* The Department of Education administers IDEA and has authority to promulgate regulations necessary to ensure compliance with the Act. See 20 U.S.C. 1406. The United States has participated as an amicus in numerous cases involving the construction of IDEA. See, *e.g.*, *Arlington Cent. Sch. Dist.* v. *Murphy*, 126 S. Ct. 2455 (2006); *Schaffer* v. *Weast*, 126 S. Ct. 528 (2005); *Cedar Rapids Cmty. Sch. Dist.* v. *Garret F.*, 526 U.S. 66 (1999);

Board of Educ. v. *Rowley*, 458 U.S. 176 (1982). At the Court's invitation, the United States filed a brief at the petition stage of this case.

STATEMENT

1. The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 *et seq.*, provides federal grants to States for assistance in the education of children with disabilities.[1] The Act explicitly seeks to protect the rights of parents as well as children. See 20 U.S.C. 1400(d)(1)(B) (IDEA seeks "to ensure that the rights of children with disabilities and parents of such children are protected."). Under IDEA, a State participating in the grant program must ensure that each child with a disability receives a "free appropriate public education," which includes special education and related services necessary to meet the child's particular needs. 20 U.S.C. 1400(d)(1)(A), 1412(a)(1)(A). The Act guarantees "children with disabilities *and the families of such children* access to a free appropriate public education." 20 U.S.C. 1400(c)(3) (emphasis added).

IDEA requires local school systems to develop an individualized education program (IEP) for each child with a disability. See 20 U.S.C. 1412(a)(4), 1414(d). "Parents and guardians play a significant role in the IEP process." *Schaffer* v. *Weast*, 126 S. Ct. 528, 532 (2005). For example, parents are members of the "IEP team" that develops an IEP for their child. 20 U.S.C. 1414(d)(1)(B). In addition, in developing the IEP, the team must consider, among other factors, "the concerns

[1] Congress reauthorized and amended IDEA in 2004. See Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647 (to be codified at 20 U.S.C. 1400 *et seq.*). Unless otherwise indicated, citations are to the statute as amended in 2004.

of the parents for enhancing the education of their child." 20 U.S.C. 1414(d)(3)(A)(ii).

Parents may file an administrative complaint "with respect to any matter relating to the identification, evaluation, or educational placement of the[ir] child, or the provision of a free appropriate public education to such child." 20 U.S.C. 1415(b)(6)(A). Parents are likewise entitled to "an impartial due process hearing" on their complaint before either the local or state educational agency. 20 U.S.C. 1415(f)(1)(A). In addition, the statute gives parents a right to such a hearing when they disagree with certain decisions by the local education agency pertaining to the child's violation of a code of student conduct. 20 U.S.C. 1415(k)(3)(A); 20 U.S.C. 1415(f)(1)(A). If the local agency conducts the due process hearing, "any party aggrieved by the findings and decision rendered in such a hearing may appeal such findings and decision to the State educational agency." 20 U.S.C. 1415(g)(1). After exhausting administrative remedies, "[a]ny party aggrieved by the findings and decision" made in the administrative proceedings has "the right to bring a civil action * * * in any State court of competent jurisdiction or in a district court of the United States, without regard to the amount in controversy." 20 U.S.C. 1415(i)(2)(A).

2. Petitioners are Jeff and Sandee Winkelman and their son, Jacob, who has autism spectrum disorder. Pet. 1-2. The respondent school district proposed an IEP for the 2003-2004 school year that would have placed Jacob at a public elementary school. Pet. App. 4a-5a. Jacob's parents believed the proposed IEP was inadequate and requested a due process hearing in which they alleged that respondent had failed to provide a free appropriate public education for their son. *Ibid.*

An administrative hearing officer issued an order designating the learning center where Jacob had attended preschool as his "stay put" placement under 20 U.S.C. 1415(j) during the pendency of the administrative proceedings. Pet. App. 4a-5a. Instead of sending Jacob to the learning center for the 2003-2004 school year, petitioners enrolled him at their own expense at the Monarch School, a private school that specializes in educating children with autism. *Id.* at 5a.

In February 2004, the administrative hearing officer issued a decision finding that respondent had provided Jacob with a free appropriate public education as required by IDEA. J.A. 21-113; Pet. App. 6a. Petitioners appealed that decision to a state-level review officer, who affirmed the hearing officer's decision. J.A. 114-158; Pet. App. 6a.

3. On July 15, 2004, petitioners filed an action in federal court pursuant to 20 U.S.C. 1415(i)(2), challenging the administrative decision rejecting their IDEA claims. Pet. App. 6a; J.A. 11-20. The complaint listed three plaintiffs: Jacob's parents and Jacob "by and through" his parents. J.A. 11-12. Petitioners alleged that respondent violated both IDEA's procedural requirements and its substantive guarantee by failing to provide Jacob a free appropriate public education. J.A.17; see Pet. App. 10a-22a. Petitioners sought, *inter alia*, reimbursement for the cost of educating Jacob at the Monarch School. J.A. 19; Pet. App. 6a. Petitioners later sought a preliminary injunction designating the Monarch School as Jacob's stay-put placement, but the district court denied the request. See *Winkelman* v. *Parma City Sch. Dist.*, 166 Fed. Appx. 807, 808-809 (6th Cir. 2006). On June 2, 2005, the district court rejected all of petitioners' IDEA

claims and granted judgment in favor of respondent. Pet. App. 3a-23a.

4. Petitioners filed two *pro se* appeals. The first appeal challenged the district court's denial of a preliminary injunction regarding Jacob's stay-put placement at the learning center he had attended. See No. 04-4159 (6th Cir.). On September 20, 2005, the Sixth Circuit ordered dismissal of that appeal unless petitioners retained counsel within 30 days. Resp. Br. in Opp. App. 2b-4b (Resp. App.). The court relied on its decision in *Cavanaugh* v. *Cardinal Local Sch. Dist.*, 409 F.3d 753 (6th Cir. 2005), which held that IDEA does not grant parents the right to represent their child *pro se* in federal court and that "parents cannot pursue their own substantive IDEA claim *pro se*." Resp. App. 3b (citing *Cavanaugh*, 409 F.3d at 756-757). In response to the Sixth Circuit's order, petitioners retained counsel. *Id.* at 5b-7b. On January 25, 2006, the Sixth Circuit affirmed the denial of the preliminary injunction. See *Winkelman*, 166 Fed. Appx. at 808-811.

Petitioners also filed a *pro se* appeal from the district court's merits decision. See No. 05-3886 (6th Cir.). On November 4, 2005, the court of appeals ordered dismissal of that appeal unless petitioners retained counsel within 30 days. Pet. App. 1a-2a. Relying on its order in petitioners' preliminary injunction appeal, the Sixth Circuit stated that "Jeff and Sandee Winkelman are not permitted to represent their child in this court nor can they pursue their own IDEA claim *pro se*." *Id.* at 2a. Petitioners are challenging that order in this Court.

The Sixth Circuit's holding appears to prohibit parents from proceeding *pro se* not only on substantive claims under IDEA, but also on procedural claims. Although recognizing that parents have procedural rights

under IDEA, the court in *Cavanaugh* stated that those "procedural rights exist only to ensure that the child's substantive right to a [free appropriate public education] is protected." 409 F.3d at 757. The court therefore concluded that "any right on which the [parents] could proceed on their own behalf would be derivative of their son's right to receive a [free appropriate public education], and wholly dependent upon the [parents'] proceeding, through counsel, with their appeal on [their son's] behalf." *Ibid*. The Sixth Circuit applied its reasoning in *Cavanaugh* to preclude petitioners from appearing *pro se* on both their substantive and procedural IDEA claims in this case. Pet. App. 2a; Resp. App. 4b (requiring dismissal of entire appeal).

5. On December 2, 2005, Justice Stevens issued a stay of the Sixth Circuit's order of November 4, 2005, pending the timely filing and disposition by this Court of a petition for a writ of certiorari.

SUMMARY OF ARGUMENT

Under a correct reading of IDEA, the parents of a child with a disability may proceed *pro se* when they bring a civil action in federal court either to enforce procedural rights under the statute or to seek relief for a substantive violation of the right to a free appropriate public education.

A. This case turns on whether parents may be "part[ies] aggrieved" under 20 U.S.C. 1415(i)(2)(A). IDEA provides that "[a]ny party aggrieved by the findings and decision" made in a due process hearing or administrative appeal under the statute may bring a civil action in state or federal court. *Ibid.* If parents are "part[ies] aggrieved" for purposes of Section 1415(i)(2)(A), then they have a right to proceed *pro se* if

they wish under 28 U.S.C. 1654, which provides that "[i]n all courts of the United States *the parties* may plead and conduct their own cases personally or by counsel." 28 U.S.C. 1654 (emphasis added).

B. IDEA's text and structure demonstrate that parents are "part[ies] aggrieved" under Section 1415(i)(2)(A) when they bring a civil action to enforce either procedural or substantive rights under the statute. It is undisputed that parents are "part[ies] aggrieved" under 20 U.S.C. 1415(g)(1), which authorizes *administrative* appeals from adverse decisions rendered in due process hearings. It follows logically that Congress had parents in mind when it authorized a civil action by "[a]ny party aggrieved by the findings and decision" made in those administrative hearings. 20 U.S.C. 1415(i)(2)(A). Under well-established principles of statutory construction, the Court should interpret the phrase "[a]ny party aggrieved" to have the same meaning in Section 1415(i)(2)(A) as it does under Section 1415(g)(1).

Moreover, parents themselves enjoy several rights under IDEA that are not merely derivative of the rights guaranteed for their children. When any of those rights is violated, the parents themselves are aggrieved parties. In addition to enjoying numerous procedural safeguards under IDEA, parents share with their child the substantive right under the statute to a free appropriate public education. For example, Congress found that IDEA "has been successful in ensuring children with disabilities and *the families of such children access to a free appropriate public education*." 20 U.S.C. 1400(c)(3) (emphasis added). Other statutory provisions emphasize that parents should not be required to bear the cost of educating their child with a disability. 20 U.S.C. 1401(9)

and (29), 1412(a)(10)(B)(i). Indeed, Congress authorized reimbursement of parents under certain circumstances for private school tuition when a local educational agency violates its statutory obligation to provide a free appropriate public education. See 20 U.S.C. 1412(a)(10)(C)(ii).

The attorneys' fees provisions of IDEA further confirm that Congress viewed parents as real parties in interest who may pursue their own procedural and substantive claims in court. See 20 U.S.C. 1415(i)(3)(D) and (E). Those provisions specifically identify the "parents" as the "prevailing party." The 2004 amendments to IDEA reaffirmed that parents are real parties in interest when they bring civil actions under IDEA. See 20 U.S.C. 1415(i)(3)(B) and (F).

C. The parents' right to proceed *pro se* in IDEA actions should not depend on whether their claims are deemed procedural, as opposed to substantive, in nature. One court of appeals has held that parents may litigate their own procedural IDEA claims *pro se*, but are barred from proceeding without an attorney when bringing claims challenging the denial of the substantive right to a free appropriate public education. See *Collinsgru* v. *Palmyra Bd. of Educ.*, 161 F.3d 225, 227, 230-236 (3d Cir. 1998). That approach not only conflicts with congressional intent but also is unworkable in practice because procedural and substantive rights under IDEA are inextricably intertwined. In order to obtain relief in the administrative hearing and in federal court, a party who alleges a procedural violation of IDEA typically must demonstrate that the procedural flaw resulted in the denial of the substantive right to a free appropriate public education. See 20 U.S.C. 1415(f)(3)(E)(ii); *Kingsmore* v. *District of Columbia*, 466 F.3d 118 (D.C.

Cir. 2006). Thus, even if the party's claim is deemed "procedural," a court typically will have to resolve the question of whether a substantive violation has occurred.

D. Although permitting parents to proceed *pro se* could increase the amount of meritless IDEA litigation, it is for Congress, not the courts, to decide whether that risk outweighs the harm that would occur if parties with meritorious claims are denied their day in court because they cannot find or afford an attorney. In any event, such policy concerns cannot justify adopting an interpretation of IDEA that is contrary to the plain language and structure of the statute.

ARGUMENT

PARENTS MAY PROCEED *PRO SE* IN FEDERAL COURT WHEN THEY BRING A CIVIL ACTION UNDER IDEA

The Sixth Circuit's holding barring parents from appearing *pro se* in civil actions under IDEA is inconsistent with the plain language, structure, and purposes of the statute. Parents are "part[ies] aggrieved" under 20 U.S.C. 1415(i)(2)(A) when they bring a civil action either to enforce procedural rights under IDEA or to seek relief for a substantive violation of the statutory right to a free appropriate public education. Consequently, parents are parties in their own right in IDEA actions, not merely guardians of their children's rights, and therefore have a right under 28 U.S.C. 1654 to proceed *pro se* if they wish on their IDEA claims.

A. 28 U.S.C. 1654 Entitles Parents To Proceed Pro Se In Federal Court On IDEA Claims If They Qualify As "Part[ies] Aggrieved" Under 20 U.S.C. 1415(i)(2)(A)

IDEA provides that "[a]ny party aggrieved by the findings and decision" made in a due process hearing or

administrative appeal under the statute may bring a civil action in state or federal court. 20 U.S.C. 1415(i)(2)(A). This Court has recognized that parents are among those who may file a civil action under IDEA. See *Honig* v. *Doe*, 484 U.S. 305, 312 (1988) ("At the conclusion of [a due process] hearing, both the parents and the local educational agency may seek further administrative review and, where that proves unsatisfactory, may file a civil action in any state or federal court."); *School Comm. of Burlington* v. *Department of Educ.*, 471 U.S. 359, 361 (1985) (noting "the right of the parents * * * to challenge in administrative and court proceedings a proposed IEP with which they disagree").[2] Congress expressly provided that parents may file administrative complaints "with respect to any matter relating to * * * the provision of a free appropriate public education" to their children, and it specifically required that "*the parent* of a child with a disability" shall "provide notice" to the educational agency in the complaint concerning, *inter alia*, "a description of the nature of the problem of the child" under the school's proposed placement and "a proposed resolution of the problem to the extent known and available to *the parents* at the time." 20 U.S.C. 1415(b)(6) and (7) (2000) (emphases added).

This Court has not addressed whether parents are "part[ies] aggrieved" under 20 U.S.C. 1415(i)(2)(A) entitled to sue on their *own* behalf or, instead, whether they may sue only on behalf of their children.[3] That issue is

---

[2] When this Court decided *Doe* and *Burlington*, the statute was known as the Education of the Handicapped Act. Congress changed the name of the statute to IDEA in 1990. See Pub. L. No. 101-476, §§ 1, 901(a)(1), 104 Stat. 1103, 1141.

[3] The parents' right to file an IDEA action could stem, for example, from Rule 17(c) of the Federal Rules of Civil Procedure, which permits

key to the resolution of the question in this case, because Congress has provided that "[i]n all courts of the United States *the parties* may plead and conduct their own cases personally or by counsel." 28 U.S.C. 1654 (emphasis added). Thus, if parents are "part[ies] aggrieved" for purposes of Section 1415(i)(2)(A), then they are entitled under 28 U.S.C. 1654 to proceed *pro se* in a federal court action under IDEA.[4]

B. Parents Are "Part[ies] Aggrieved" Under Section 1415(i)(2)(A) When They Pursue Either Procedural Or Substantive Claims Under IDEA

In providing a right to bring a civil action under IDEA, Congress used the broad phrase "[a]ny party

---

a parent or other guardian to "sue or defend on behalf" of a minor child. If a child is a "party aggrieved" under IDEA, a parent could rely on Rule 17(c) to file an IDEA suit in federal court on the child's behalf. But when a parent sues as "next friend" of his or her minor child, "[i]t is the infant, and not the next friend, who is the real and proper party." *Morgan* v. *Potter*, 157 U.S. 195, 198 (1895); cf. *Whitmore* v. *Arkansas*, 495 U.S. 149, 163 (1990). Thus, when parents sue solely as representatives of their children under Rule 17(c), the parents are not "parties" who are "conduct[ing] their own cases" for purposes of 28 U.S.C. 1654, and they may not represent other individuals, including their children, in court. See, *e.g.*, *Collinsgru* v. *Palmyra Bd. of Educ.*, 161 F.3d 225, 232 (3d Cir. 1998); *Myers* v. *Loudoun County Pub. Schs.*, 418 F.3d 395, 401 (4th Cir. 2005); *Cheung* v. *Youth Orchestra Found. of Buffalo, Inc.*, 906 F.2d 59, 61 (2d Cir. 1990); *Meeker* v. *Kercher*, 782 F.2d 153, 154 (10th Cir. 1986) (per curiam). As discussed, the parents in this case sought to litigate under IDEA in their own right. See pp. 4-5, *supra*.

[4] The fact that IDEA is Spending Clause legislation, while relevant in other contexts, see, *e.g.*, *Arlington Cent. School Dist. Bd. of Educ.* v. *Murphy*, 126 S. Ct. 2455, 2459 (2006), does not affect the analysis here. It is 20 U.S.C. 1654, rather than any provision of IDEA, that provides parties, including parents, the right to proceed *pro se* in federal court, and 20 U.S.C. 1654 is not Spending Clause legislation.

aggrieved by the findings and decision" of the hearing officer to define those who are entitled to bring a civil action under Section 1415(i)(2)(A). There is no dispute that parents typically are "part[ies]" to the administrative due process hearing. Indeed, the Act expressly identifies parents as parties who are entitled to file administrative complaints. See, *e.g.*, 20 U.S.C. 1415(b)(8), 1415(*o*). Nor can there be any doubt that parents who lose during the administrative process are "aggrieved" within the meaning of Section 1415(i)(2)(A). As this Court has explained, "[h]istory associates the word 'aggrieved' with a congressional intent to cast the standing net broadly." *FEC* v. *Akins*, 524 U.S. 11, 19 (1998). A person is "aggrieved" if he or she has "legal rights that are adversely affected" or has "been harmed by an infringement of legal rights." *Black's Law Dictionary* 73 (8th ed. 2004). Parents are "aggrieved" when they bring suit seeking relief either for a violation of their own procedural rights under IDEA or for a violation of the substantive right to a free appropriate public education.

1. It is uncontested that parents have the right to bring both procedural and substantive claims under IDEA at the administrative hearing stage (and to appear *pro se* to prosecute those claims, see 20 U.S.C. 1415(h)(2)). See Br. in Opp. 2, 4, 11, 17. Indeed, Congress specifically contemplated that parents typically would be the parties who file administrative complaints. See, *e.g.*, 20 U.S.C. 1415(b)(6), 1415(b)(8), 1415(*o*). The statutory language, moreover, indicates that an administrative complaint filed by parents under IDEA is considered the parents' own complaint and not simply a claim that they are bringing on behalf of their child. IDEA mandates that before the due process hearing takes place, the local education agency must convene a meet-

ing "where the *parents* of the child discuss *their complaint*, and the facts that form the basis of the complaint, and the local educational agency is provided the opportunity to resolve the complaint." 20 U.S.C. 1415(f)(1)(B)(i) (emphasis added). This language confirms that parents are parties in interest in their own right during the administrative proceedings.

Having expressly made parents the "party" in interest in administrative hearings under the Act, it follows that Congress also had parents in mind in providing a right to initiate a civil action to "[a]ny party aggrieved by the findings and decision" made in the administrative proceedings. As the First Circuit has explained, "[b]ecause the statute enables parents to request due process hearings, they are parties to such hearings and thus are logically within the group of 'parties aggrieved' given the right to sue." *Maroni* v. *Pemi-Baker Reg'l Sch. Dist.*, 346 F.3d 247, 251 (2003); see *Collinsgru*, 161 F.3d at 237-239 (Roth, J., dissenting). Indeed, in granting "any party aggrieved" by the administrative decision the right to file a civil action, Congress made express reference to the administrative complaint. See 20 U.S.C. 1415(i)(2)(A) ("Any party aggrieved * * * shall have the right to bring a civil action with respect to the complaint presented pursuant to this section.").

Moreover, Congress used precisely the same language in providing that "any party aggrieved by the findings and decision" rendered in a hearing conducted by a local educational agency "may appeal such findings and decision to the State educational agency." 20 U.S.C. 1415(g)(1). Parents—as the principal parties initiating due process hearings under the Act—are unquestionably "part[ies] aggrieved" for purposes of filing an administrative appeal. Congress's use of the same broad refer-

ence to "any party aggrieved" in the provision governing administrative appeals is persuasive evidence that Congress intended to permit parents to file their own civil actions challenging the outcome of administrative proceedings as well. See *NASA* v. *Federal Labor Relations Auth.*, 527 U.S. 229, 235 (1999) (observing that a phrase "should ordinarily retain the same meaning wherever used in the same statute"). Nor is there any practical reason why Congress would permit parents to litigate administrative proceedings on their own behalf under IDEA but not federal court actions.

2. IDEA confers rights on parents themselves that are not merely derivative of the rights guaranteed for their children. Contrary to the holding of the court of appeals below, parents have procedural rights under IDEA and jointly share with their child the substantive statutory right to a free appropriate public education. When any of those rights is violated, the parents themselves are aggrieved parties under the Act.

a. Parents enjoy several procedural rights under IDEA. See *Schaffer* v. *Weast*, 126 S. Ct. 528, 532 (2005) (noting several examples). IDEA requires state and local educational agencies receiving federal funds under the statute "to ensure that children with disabilities *and their parents* are guaranteed procedural safeguards with respect to the provision of a free appropriate public education." 20 U.S.C. 1415(a) (emphasis added); accord 20 U.S.C. 1412(a)(6). Those procedural safeguards include, among other rights, the right to be members of the team that develops their child's IEP, 20 U.S.C. 1414(d)(1)(B); to be included in "any group that makes decisions on the educational placement of their child," 20 U.S.C. 1414(e); to examine any records relating to their child; to obtain an "independent educational evaluation

of the child"; and to participate in meetings that address the evaluation and educational placement of their child, 20 U.S.C. 1415(b)(1). In addition, parents have the right to receive notice whenever the local school system initiates or changes or refuses to initiate or change the child's identification, evaluation, or educational placement, or the provision of a free appropriate public education to the child. 20 U.S.C. 1415(b)(3). Parents are also entitled to notice whenever the local school system decides to take disciplinary action against a child with a disability. 20 U.S.C. 1415(k)(1)(H).

IDEA, moreover, makes clear that the procedural rights guaranteed parents are necessarily intertwined with the substantive right to a free appropriate public education. It directs that administrative hearing officers make decisions "on substantive grounds based on a determination of whether the child received a free appropriate public education." 20 U.S.C. 1415(f)(3)(E)(i). But it expressly provides that, "[i]n matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education" if the procedural inadequacies "significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to the parents' child." 20 U.S.C. 1415(f)(3)(E)(ii). Congress thus recognized that the procedural protections—most of which are expressly guaranteed *to the parents*—are themselves inextricably tied to the substantive guarantee of a free appropriate public education. As this Court observed in *Board of Education* v. *Rowley*, 458 U.S. 176, 205-206 (1982):

> It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and

> guardians a large measure of participation at every stage of the administrative process, see, *e.g.*, Section 1415(a)-(d), as it did upon the measurement of the resulting IEP against a substantive standard. We think that the congressional emphasis upon full participation of concerned parties throughout the development of the IEP, as well as the requirements that state and local plans be submitted to the Secretary for approval, demonstrates the legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP.

b. Parents of a child with a disability also have a substantive right under IDEA to a *free* appropriate public education for their child. The language of IDEA confirms that Congress viewed the right to a free appropriate public education as one held jointly by parents and their child. For example, in enacting IDEA, Congress found that, "[s]ince the enactment and implementation of the Education for All Handicapped Children Act of 1975, [IDEA] has been successful in ensuring children with disabilities and *the families of such children access to a free appropriate public education*." 20 U.S.C. 1400(c)(3) (emphasis added). Congress similarly recognized (and common sense makes clear) that denial of a free appropriate public education adversely affects not just the child with a disability but also his or her family. See 20 U.S.C. 1400(c)(2)(E) (2000) (before IDEA, "*families* were often forced to find services outside the public school system, often at great distance from their resi-

dence and at their own expense") (emphasis added).[5] Parents typically bear the cost of educating their child if the "free" guarantee is not honored. Thus, while a child suffers a harm by the denial of an appropriate education, the parents are likewise harmed where, as here, the child ultimately receives an appropriate education, but only at significant financial cost to the parents.

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

Moreover, Congress authorized courts, under certain circumstances, to order local educational agencies "to reimburse the parents" for private school tuition. 20 U.S.C. 1412(a)(10)(C)(ii); see *Florence County Sch. Dist.*

---

[5] As amended in 2004, the provision now states that

> Before the date of enactment of the Education for All Handicapped Children Act of 1975 * * * , the educational needs of millions of children with disabilities were not being fully met because * * * a lack of adequate resources within the public school system forced *families* to find services outside the public school system.

20 U.S.C. 1400(c)(2)(D) (emphasis added).

Four v. *Carter*, 510 U.S. 7 (1993) (discussing courts' authority under IDEA to order reimbursement to parents); *Burlington*, 471 U.S. at 369 (same). Petitioners sought such reimbursement in their federal court complaint. See pp. 4-5, *supra*. The statute's authorization of reimbursement *to parents* confirms that Congress viewed parents as real parties in interest when they challenge the denial of a free appropriate public education. Indeed, the child himself would typically lack the capacity to contract on his own behalf for private educational services, see, *e.g.*, Ohio Rev. Code Ann. § 3109.01 (LexisNexis 2003) (defining "age of majority" for contracting purposes to be eighteen years), and would lack standing to seek reimbursement of private school expenses under IDEA because the child does not suffer any out-of-pocket loss as a result of attending private school, see *Emery* v. *Roanoke City Sch. Bd.*, 432 F.3d 294, 299-300 (4th Cir. 2005) ("In the usual case, the parents of the disabled child will be the appropriate ones to seek reimbursement because they will have incurred the expense and suffered the subsequent monetary injury.").

c. The attorneys' fees provisions of IDEA also confirm that Congress viewed parents as real parties in interest who may pursue their own substantive and procedural claims in court. IDEA prohibits a court from awarding attorneys' fees in "any action or proceeding under this section for services performed subsequent to the time of a written offer of settlement to a parent" if, in addition to other conditions, "the relief finally obtained *by the parents* is not more favorable *to the parents* than the offer of settlement." 20 U.S.C. 1415(i)(3)(D)(i) and (D)(i)(III) (emphasis added). If the child were the only real party in interest, it would be

strange for Congress to focus so specifically on the relief obtained "by the parents" and the extent to which such relief was "favorable to the parents." 20 U.S.C. 1415(i)(3)(D)(i)(III).[6] Indeed, the attorneys' fees provisions specifically identify the *parent* as a "prevailing party" in an IDEA action. 20 U.S.C. 1415(i)(3)(E) (authorizing an attorneys' fees award to "a parent *who is the prevailing party* and who was substantially justified in rejecting the settlement offer") (emphasis added); see *Arlington Cent. Sch. Dist.* v. *Murphy*, 126 S. Ct. 2455, 2460 (2006) (noting authority of courts to award reasonable attorneys' fees in IDEA actions to "prevailing parents"); *Schaffer*, 126 S. Ct. at 532-533 (same).[7] It would be more than passing strange for the statute to classify parents as "prevailing parties," but not "parties aggrieved" under 20 U.S.C. 1415(i)(2)(A).

d. The 2004 amendments to IDEA reaffirm that parents are real parties in interest when they pursue IDEA

---

[6] While Congress presumably assumed that parents would oversee litigation involving the rights of their children and so might be the target of settlement offers in that context, the repeated focus on the rights of the parents, here and throughout the statute, and the classification of parents as the "prevailing party" indicate that the parents' rights are more than merely derivative.

[7] The statutory language cited above appears in both the pre- and post-2004 versions of the statute. The pre-2004 version of the statute also authorized the award of attorneys' fees "to the parents of a child with a disability who is the prevailing party." 20 U.S.C. 1415(i)(3)(B) (2000). That provision, however, does not affect the other provision recognizing that parents may be a prevailing party, because the fact is that either parents or children, or both, may be prevailing parties under IDEA. In any event, in 2004, Congress amended Section 1415(i)(3)(B) to provide for attorneys' fees "to a prevailing party who is the parent of a child with a disability." 20 U.S.C. 1415(i)(3)(B)(i)(I).

claims in court. As amended in 2004, the statute authorizes an award of attorneys' fees.

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

20 U.S.C. 1415(i)(3)(B)(i) (emphasis added). In addition, with limited exceptions, the current version of IDEA mandates that a court reduce the amount of attorneys' fees if "the parent, or the parent's attorney, during the course of the action or proceeding, unreasonably protracted the final resolution of the controversy." 20 U.S.C. 1415(i)(3)(F). Those provisions reflect Congress's understanding that parents are real parties in interest in IDEA litigation.

The wording of the 2004 amendments is significant in three respects. First, as amended, IDEA refers to the

parent, not the child, as the "prevailing party." 20 U.S.C. 1415(i)(3)(B)(i)(I). Before 2004, the statute referred to both children and parents as prevailing parties. Compare 20 U.S.C. 1415(i)(3)(B) (2000) (authorizing an award of attorneys' fees "to the parents of a child with a disability who is the prevailing party") with 20 U.S.C. 1415(i)(3)(E) (2000) (authorizing an attorneys' fees award to "a parent who is the prevailing party and who was substantially justified in rejecting the settlement offer"). The 2004 amendments, however, omitted any reference to the child as a prevailing party. This omission bolsters the conclusion that Congress viewed parents as real parties in interest when they pursue IDEA claims in court.

Second, although IDEA repeatedly refers to the "attorney of a parent," the "parent's attorney" or the "attorney representing the parent," 20 U.S.C. 1415(i)(3)(B) and (F), the current version of the statute never mentions the *child's* attorney. Before the 2004 amendments, the statute referred both to "the attorney representing the parent," 20 U.S.C. 1415(i)(3)(F)(iv) (2000), and "the attorney representing the child." 20 U.S.C. 1415(b)(7) (2000). The 2004 amendments, however, deleted the phrase "the attorney representing the child" and replaced it with "the attorney representing a party." 20 U.S.C. 1415(b)(7). It is unlikely that the 2004 amendments would have omitted a reference to the *child's* attorney while including multiple references to the *parent's* attorney, if Congress viewed the child as the only interested party in a civil action under IDEA.

Finally, by referring to "the parent's complaint *or subsequent cause of action*," 20 U.S.C. 1415(i)(3)(B)(i)(III) (emphasis added), the 2004 amendments signal that Congress viewed parents as real parties in

interest when they file both administrative complaints and civil actions under IDEA. That language also demonstrates that Congress viewed the civil cause of action authorized by Section 1415(i)(2)(A) as inherently connected to the filing of the administrative complaint, which, as discussed, Congress plainly envisioned would be filed by parents as real parties in interest to the administrative proceedings. See pp. 12-13, *supra*. Furthermore, while the language of the 2004 amendments reaffirms that parents are real parties in interest in IDEA litigation, nothing in the statute (or legislative history) suggests that this represented any shift in Congress's understanding as to how IDEA was always intended to work.[8]

---

[8] Although the Court need not decide which version of the statute applies here, the 2004 amendments govern petitioners' case with respect to the question presented. Those amendments took effect on July 1, 2005, see Pub. L. No. 108-446, § 302(a)(1), 118 Stat. 2803, before the filing of petitioners' merits appeal to the Sixth Circuit. Thus, the statute as amended in 2004 was the version in effect at the time of the proceedings in the court of appeals. Contrast *Schaffer*, 126 S. Ct. at 532 (applying pre-2004 version of IDEA because that version "was in effect during the proceedings below"). Moreover, there was no reason not to give that provision immediate effect in pending cases. Under *Landgraf* v. *USI Film Products*, 511 U.S. 244, 280 (1994), a statute operates retroactively only if "it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Ibid*. Respondent surely cannot claim any of its interests are implicated. The opposing party would hardly seem to have a vested interest in precluding the other party from proceeding *pro se*. Nor is applying this rule to pending cases a retroactive application at all, because the relevant event for judging retroactivity is the ongoing self-representation prospectively. See *id*. at 290-293 (Scalia, J., concurring); cf. *Martin* v. *Hadix*, 527 U.S. 343, 360-361 (1999) (applying attorneys' fees limitations of Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat.

3. In support of the court of appeals' decision, respondent has relied heavily on congressional *inaction*. See Br. in Opp. 5-6, 14-15. In May 2004, the Senate passed a bill that would have amended 20 U.S.C. 1415(i) to provide that "a parent of a child with a disability may represent *the child* in any action under [IDEA] in Federal or State court, without the assistance of an attorney." 150 Cong. Rec. S5430 (daily ed. May 13, 2004) (emphasis added). The Conference Committee—without explanation—omitted this provision from the final version of the IDEA amendments that Congress enacted in 2004. See H.R. Conf. Rep. No. 779, 108th Cong., 2d Sess. 220 (2004). This failed amendment, however, "lacks persuasive significance." *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994).

As this Court has emphasized, "failed legislative proposals are 'a particularly dangerous ground on which to rest an interpretation of a prior statute.'" *Central Bank of Denver*, 511 U.S. at 187 (citation omitted). "Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change." *Ibid.* (citation omitted). At any rate, even if the failed Senate amendment were relevant to whether parents may proceed *pro se* on behalf of their *children*, it does

---

1321, in pending cases to legal services provided after effective date of the Act). Thus, applying the 2004 amendments is consistent with *Landgraf*. In any event, the 2004 amendments did not change the law with respect to *pro se* representation because, for the reasons explained above, parents enjoyed the right to proceed *pro se* in federal court under the version of IDEA before 2004. The 2004 amendments simply make the law clearer.

not undermine the conclusion that parents may represent *themselves* in federal court on their *own* substantive and procedural IDEA claims. Indeed, one natural inference is that Congress ultimately concluded that the Senate amendment was unnecessary because other provisions of IDEA confirm that parents are real parties in interest entitled to pursue their own substantive and procedural IDEA claims in court, and 28 U.S.C. 1654 already provides that such parties may proceed *pro se*. See pp. 20-23, *supra*.

4. Respondent also has relied on the canon of *expressio unius est exclusio alterius*, pointing out that although IDEA contains a provision expressly allowing parties to proceed in an administrative hearing without an attorney, see 20 U.S.C. 1415(h),[9] the statute contains no comparable provision pertaining to court actions. See Br. in Opp. 11-12. The *expressio unius* canon has limited force, see *Barnhart* v. *Peabody Coal Co.*, 537 U.S. 149, 168 (2003), and thus cannot overcome the persuasive textual evidence discussed above. But the canon has no application when there is an independent explanation for Congress's failure to address the issue explicitly in one of the contexts. Here, the omission reveals nothing about whether Congress intended to authorize parents to proceed *pro se* in federal court. Congress had no need to address the issue in IDEA because—unlike the situation with respect to administrative proceed-

[9] "Any party to [an administrative] hearing * * * shall be accorded * * * the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities," and "the right to present evidence and confront, cross-examine, and compel the attendance of witnesses." 20 U.S.C. 1415(h). These procedural rights apply to "all parties," *Schaffer*, 126 S. Ct. at 532, including local educational agencies.

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

C. Because Procedural And Substantive Claims Under IDEA Are Inextricably Intertwined, The Act Should Not Be Interpreted To Allow Parents To Proceed *Pro Se* To Enforce Procedural, But Not Substantive, Rights

Unlike the Sixth Circuit, which appears to prohibit parents from proceeding *pro se* in federal court on any type of IDEA claim (see pp. 5-6, *supra*), the Third Circuit has held that parents may litigate their own procedural claims *pro se*, but are barred from proceeding without an attorney when bringing substantive IDEA claims relating to the provision of a free appropriate public education to their children. *Collinsgru* v. *Palmyra Bd. of Educ.*, 161 F.3d 225, 227, 230-236 (3d Cir. 1998). The Third Circuit's approach—under which the right to proceed *pro se* hinges on whether the claim is deemed procedural or substantive—not only conflicts with the plain language and structure of the statute (see pp. 12-23, *supra*), but also is unworkable in practice.

"[P]rocedural and substantive rights under IDEA are inextricably intertwined," and thus the "distinction between procedural and substantive claims" under the statute "is often far from clear." *Maroni*, 346 F.3d at 253, 255. This Court recognized as much in *Rowley*, when it observed that "Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process * * * as it did upon the measurement of the resulting IEP against a substantive standard." 458 U.S. at 205-206. The statute's clear emphasis on procedural guarantees, the

Court concluded, "demonstrates the legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP." *Id.* at 206.

The connection between procedural guarantees and substantive rights is underscored by the 2004 amendments to IDEA, in which Congress limited the grounds on which an administrative hearing officer could grant relief for IDEA violations. Those amendments added a new provision mandating that "a decision made by a hearing officer [in a due process hearing] shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education." 20 U.S.C. 1415(f)(3)(E)(i). Congress provided that, under this provision, procedural violations are deemed sufficiently serious to qualify as a denial of the substantive right to a free appropriate public education where the "procedural inadequacies" (1) "impede[] the child's right to a free appropriate public education"; (2) "significantly impede[] the parents' opportunity to participate in the decisionmaking process"; or (3) "caused a deprivation of educational benefits." 20 U.S.C. 1415(f)(3)(E)(ii). See H.R. Conf. Rep. No. 779, *supra*, at 219 (explaining that the new provision "allows procedural violations to rise to the level of a substantive violation under certain circumstances").

Similarly, several courts of appeals have held that parents who bring procedural claims under IDEA can obtain relief in federal court only if they demonstrate that the procedural violations interfered with the substantive right to a free appropriate public education. See *Kingsmore* v. *District of Columbia*, 466 F.3d 118, 119 (D.C. Cir. 2006) (joining "the majority of other cir-

cuits in ruling that a claim based on a violation of IDEA's procedural requirements 'is viable only if those procedural violations affected the student's *substantive* rights'") (quoting *Lesesne* v. *District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006)).[10] Consequently, even where the parents' complaint focuses on alleged procedural violations, the action will typically turn on whether there has been a denial of the substantive right to a free appropriate public education. See *Knable* v. *Bexley City Sch. Dist.*, 238 F.3d 755, 764-767, 771 (6th Cir.) (concluding that violation of parents' procedural rights constituted a substantive denial of a free appropriate public education, entitling parents to reimbursement for the costs of sending their son to private school), cert. denied, 533 U.S. 950 (2001).

Because procedural and substantive IDEA claims are inextricably intertwined, this Court should reject as unworkable an interpretation of the statute that would make the right to proceed *pro se* dependent on whether the parents' claims are deemed procedural or substantive. Instead, consistent with congressional intent, the Court should construe IDEA to permit parents to pursue both procedural and substantive claims *pro se* in federal court.

---

[10] Accord *Maroni*, 346 F.3d at 254 (1st Cir.); *DiBuo* v. *Board of Educ.* 309 F.3d 184, 190-191 (4th Cir. 2002); *Adam J.* v. *Keller Indep. Sch. Dist.*, 328 F.3d 804, 811-812 (5th Cir. 2003); *Nack* v. *Orange City Sch. Dist.*, 454 F.3d 604, 609 (6th Cir. 2006); *T.S.* v. *Independent Sch. Dist. No. 54*, 265 F.3d 1090, 1095 (10th Cir. 2001), cert. denied, 535 U.S. 927 (2002); *School Bd. of Collier County* v. *K.C.*, 285 F.3d 977, 981-982 (11th Cir. 2002).

D. Policy Concerns About The Burdens Of Meritless Litigation Do Not Justify Adopting An Interpretation Of IDEA At Odds With Its Plain Language And Structure

Respondent has argued (Br. in Opp. 15-16), as a policy matter, that permitting non-attorney parents to proceed *pro se* may increase the number of meritless IDEA lawsuits and thereby burden school districts and divert scarce resources from the education of children with disabilities. It is true that Congress expressed a concern about ensuring that litigation costs do not detract from the ultimate objectives of the program, but the balancing of such policy objectives is for Congress, not the courts. See *Buckhannon Bd. & Care Home, Inc.* v. *West Va. Dep't of Health & Human Res.*, 532 U.S. 598, 610 (2001) (refusing to "disregard the clear legislative language" on the basis of "policy arguments").

Congress may have determined that prohibiting parents from proceeding *pro se* would have even greater countervailing costs because it could deny some individuals who have meritorious IDEA claims their day in court. Some lower courts have recognized the difficulty that many parents of disabled children face in finding attorneys willing to represent them in IDEA actions. See *Collinsgru*, 161 F.3d at 236 ("most attorneys will be reluctant to take on cases like this, characterized as they are by voluminous administrative records, long administrative hearings, and specialized legal issues, without a significant retainer"); see also *Maroni*, 346 F.3d at 257-258 & n.9. It is for Congress to decide whether the burden imposed by meritless litigation outweighs the risk that proper claimants will be denied their day in court.

Moreover, Congress has demonstrated that it is sensitive to the costs imposed by IDEA litigation and has

amended the statute to address those costs. In that regard, the 2004 amendments to IDEA may reduce the risk that *pro se* lawsuits will unduly burden school districts. As amended in 2004, IDEA expressly allows States and local school districts to recover attorneys' fees from a parent "if the parent's complaint or subsequent cause of action was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation." 20 U.S.C. 1415(i)(3)(B)(i)(III). This provision may serve as a check on meritless *pro se* lawsuits or possibly defray their costs. If the 2004 amendments prove to be an inadequate deterrent to frivolous IDEA lawsuits, Congress can further amend the statute to address the problem. But the risk of such lawsuits in itself provides no basis to override the clear indications of Congress's intent to permit parents to proceed *pro se* in IDEA litigation.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

WAN J. KIM
Assistant Attorney General

GREGORY G. GARRE
Deputy Solicitor General

DAVID B. SALMONS
Assistant to the Solicitor General

DAVID K. FLYNN
GREGORY B. FRIEL
Attorneys

KENT D. TALBERT
General Counsel
Department of Education

DECEMBER 2006