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,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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Brief of *Amici Curiae* Nat'l School Boards Assoc., American Assoc. of School Administrators, Ohio School Boards Assoc., Buckeye Assoc. of School Administrators, Ohio Assoc. of School Business Officials and Greater Cleveland School

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INTERESTS OF *AMICI CURIAE*[1]

The National School Boards Association ("NSBA") is a federation of state associations of school boards from throughout the United States, the Hawai'i State Board of Education, and the boards of education of the District of Columbia and the U.S. Virgin Islands. NSBA represents the nation's over 95,000 school board members. The NSBA Council of School Attorneys is the national professional association for attorneys who represent school districts. The Ohio School Boards Association ("OSBA"), founded in 1955, is a private, not-for-profit statewide organization of public school boards. OSBA currently has 99.9% membership from Ohio public schools. OSBA's purpose is to encourage and advance public education through local citizen responsibility.

NSBA and OSBA recognize that all children, including those with disabilities, have a right to be provided with a free appropriate public education ("FAPE"). Both organizations have consistently supported the rights of disabled children. At the same time, NSBA and OSBA are fully cognizant of the financial and human resources that their members devote each and every year to the education of disabled children. These resources are above and beyond the partial funding provided by the federal government for the education of students with disabilities pursuant to the federal Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.* (2006) ("IDEA").[2]

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[1] Consistent with Rule 37.6 of this Court,

The American Association of School Administrators ("AASA") is a professional organization of over 14,000 educational leaders across the United States and in other countries. AASA supports school district leaders who are dedicated to quality public education in their communities.

The Buckeye Association of School Administrators (BASA) is a professional organization of school administrators in Ohio and has 826 members. BASA's mission is to support and inspire its members, develop exemplary school system leaders and advocate for public education.

The Greater Cleveland School Superintendents' Association ("GCSSA") is a regional superintendents association whose membership comprises approximately 90 superintendents from Northeastern Ohio.

School administrators play an important role in the day-to-day enforcement and implementation of state and federal laws, including the IDEA. As such, members of AASA, BASA and GCSSA are integrally involved in ensuring that children with disabilities receive a FAPE. School administrators understand the collaborative nature of the education process for children with disabilities and understand that there have to be avenues available when there are disagreements about a child's education. AASA, BASA and GCSSA believe that the due process complaint procedure should be reserved for disagreements relating to a child's education. Further, these organizations are concerned the educatiien with dis]TJlaws, ins. rt.002 Tc 0.6348 Tw .05805 0 Tdese orga Ra

organization dedicated to learning, utilizing, and sharing the best methods and technology of school business administration. OASBO has over 1000 members, made up of individuals employed in the fiscal management of schools. OASBO members manage the financial responsibility of school districts to educate all children, including children with disabilities. OASBO members understand and are concerned about the heavy financial burden of special education court litigation, particularly when non-lawyers are representing parties to the litigation.

SUMMARY OF ARGUMENT

The purpose of the IDEA is to provide disabled children with a free appropriate public education. *See* 20 U.S.C. § 1400(d)(1)(A); *Board of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley,* 458 U.S. 176, 179 (1982) ("The Act represents an ambitious federal effort to promote the education of handicapped children."). Children are the focus of the Act and the focus of due process complaints and any appeals of those complaints to federal court.

The plain reading of the IDEA provides that due process complaints are to be brought about problems of the child—not the parents. 20 U.S.C. §§ 1415(b)(6)(A), (b)(7)(A)(ii)(III). The impartial hearing officer's decision at the administrative level is limited to a determination of whether the child received a FAPE. 20 U.S.C. § 1415(f)(3)(E)(i). Any resulting appeal to the State educational agency ("SEA") and then to court must be limited to the issues raised in the due process complaint, that is, the problems of the child. 20 U.S.C. §§ 1415(g)(1), (i)(2)(A). Accordingly, parents have no independent private cause of action and cannot represent themselves *pro se* in any federal court action.

While parents cannot bring their own claims in federal court, they do have other avenues to pursue their

concerns under the IDEA. They can request a records hearing, bring a state complaint or request mediation. Such avenues provide possible remedies for parents and have been used frequently by parents with positive results for children, parents and school districts.

Children do have private causes of action under the IDEA to appeal a due process decision to federal court. Minor children need to have a next friend under Federal Rule of Civil Procedure 17(c) to bring such an action, and the child's parents can serve as that next friend. The parent, however, cannot represent the child *pro se*. When enacting

ARGUMENT

I. Parents do not have a private cause of action to appeal a due process decision to federal court.

A. Plain reading of the statute does not support a cause action for parents.

Parents have rights under the IDEA. *See Schaffer v. Weast*, 126 S.Ct. 528, 532 (2005) (noting examples of parental rights). [3] For example, parents have the right to be a member of their child's individualized education program (IEP) team, 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); and to examine any records relating to their child, 20 U.S.C. § 1415(b)(1). However, the IDEA does not allow parents to pursue these rights in a due process complaint or a resulting civil action. Due process complaints are limited to disputes involving *the child*.

The IDEA allows a due process complaint to be brought, "with respect to any matter relating to the identification, evaluation, or educational placement *of the child*, or the provision of a free appropriate public education *to such child*." 20 U.S.C. § 1415(b)(6)(A) (emphasis added). This section makes no refere

grounds" based on whether "*the child*" received a FAPE. 20 U.S.C. § 1415(f)(3)(E)(i) (emphasis added). If procedural violations are alleged, then the hearing officer "may find that *a child* did not receive a [FAPE]" only if the procedural inadequacies impeded the child's right to a FAPE, significantly impeded the parents' opportunity to participate in the decisionmaking process, or caused a deprivation of educational benefits. 20 U.S.C. § 1415(f)(3)(E)(ii) (emphasis added). Thus the parents' opportunity to participate in the decisionmaking process is not a separate cause of action in a due process complaint; rather, it is evidence that can be submitted in support of an argument that the child did not receive a FAPE.

The *amici* brief by members of Congress unintentionally supports this focus on the rights of the child—not parents. The brief asserts that Congress elevated substance over form in the IDEA but in so doing cites to legislative history found at H.R. Rep. No. 108-77, at 85 (2003): "Litigation under the Act has taken the less productive track of searching for technical violations of the Act by school districts rather than being used to protect *the substantive rights of children* with disabilities" (emphasis added). Brief for Senator Edward Kennedy et al. as Amici Curiae Supporting Petitioners at 26. *See also*, S. Rep. No. 208-185, at 41-42 (2003).

After the impartial hearing officer's decision, the aggrieved party may appeal the findings and the decision to the SEA. 20 U.S.C. § 1415(g)(1). The focus of Petitioners and their *amici* on the "aggrieved party" language in the Act is a red herring. The focus should be that the appeal to the SEA does not allow the issues in the due process proceedings to expand or change. The appeal is limited to the impartial hearing officer's decision as it relates to the complaint. *Id*. Similarly, a civil action is limited to the underlying complaint brought to initiate the due process proceeding. 20 U.S.C. § 1415(i)(2)(A). Accordingly, the

federal court action is limited to the issues raised in the complaint, which as indicated above, are limited to the problems of the child. 20 U.S.C. §§ 1415(b)(6)(A), (b)(7)(A)(ii)(III). Just as the United States suggests, the child is the "aggrieved party," with the parent as the next friend.

A plain reading of the statute indicates that the IDEA provides that due process complaints are about the child. Due process complaints are not about claims that parental rights—whether procedural or substantive—have been violated. Accordingly, this statutory language simply cannot support a conclusion that parents have an independent cause of action to bring a due process complaint on their own behalf to the administrative level or ultimately to federal court. Parents may only bring civil actions in federal court on behalf of their child under Federal Rule of Civil Procedure 17(c) since only the problems of the child may be raised in a complaint appealed through a civil action.

B. Parents have alternative avenues to pursue any rights they may have under the IDEA.

While parents cannot bring a due process complaint about any rights they may have under the Act, they do have other avenues of redress available to them under the IDEA and its implementing regulations. Indeed, as discussed below, some of these other avenues have been used more effectively than due process proceedings.

1. With respect to parental rights about their child's educational records, Congress directed the Secretary to take appropriate action to ensure the confidentiality of any personally identifiable data, information and records. 20 U.S.C. § 1417(c). Regulations promulgated on August 14, 2006 include the parents' right to request a hearing before the school district to challenge information in education

records in certain circumstances. 34 C.F.R. § 300.619. These hearing procedures are completely separate and distinct from due process hearings. *See* 34 C.F.R. § 300.621.

2. The regulations also provide another forum for parents to bring disagreements: through the SEA complaint procedure. 34 C.F.R. § 300.151(a)(1). SEAs are required to

ODE/ODEDetail.aspx?page=3&TopicRelationID=968&Content=16899.[7]

Mediations also have other beneficial byproducts. The GAO found in conversations with officials from four states, including Ohio, that mediation offered benefits to all parties involved. Specifically, state officials said that mediations help foster communications between schools and parents and strengthen relationships. Also, mediations resolved disputes more quickly than state complaints or due process hearings. GAO Report, *supra*, at 18. In *Schaffer v. Weast*, 126 S.Ct. at 532, the Court recognized that the "cooperative process . . . between parents and schools" is at the core of the IDEA. Mediation provides this opportunity effectively.

4. It was these kinds of alternative avenues that the Court considered in its decision that there is no private cause of action, for either children or parents, under the Family Educational Rights and Privacy Act. 20 U.S.C. § 1232g *et seq.* ("FERPA"). *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002). Like the IDEA, FERPA is Spending Clause legislation. *Gonzaga Univ.*, 536 U.S. at 278.[8] "For a statute to create such private rights, its text must be 'phrased in terms of the persons benefited.'" *Id.* at 284 (quoting, *Cannon v. University of Chicago*, 441 U.S. 677, 692, n.13 (1979)). The Court noted, for example, that Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972 created individual rights because those statutes had "an *unmistakable focus* on the benefited class." *Id*. As indicated above, under the IDEA disabled children are the benefited class in due process complaints. Due

[7] It should be noted that due process hearings are fairly uncommon in Ohio. In 2004-05, there were 184 requests for due process, but only 15 impartial due process hearing decisions were issued that year. *Id*. at 122.

[8] Respondents discuss further how a Spending Clause analysis of the IDEA results in a conclusion that non-lawyer parents may not proceed *pro se* in federal actions under the IDEA. Resp. Br. at 40-49.

have wrongly concluded that the use of "parent" in the due process section of the Act means that parents have their own private cause of action to bring a due process complaint and any resulting civil action in federal court. Such a reading, however, would lead to absurd results.

As discussed in Part I.A., *supra*, the logical reading of parent in the due process section of the Act is that it means the parent is bringing the cause of action on behalf of the child under Rule 17(c). If "parent" actually means that it is the parent who has the right to bring the cause of action on his or her own behalf, then the child gets lost in the process. *See Doe v. Board of Educ. of Baltimore Cty.*, 165 F.3d 260, 263 (4th Cir. 1998) ("The references to parents are best understood as accommodations to the fact of the child's incapacity. That incapacity does not collapse the identity of the child into that of his parents."). The logical extension of Petitioners' reading would be that, indeed, the child's rights do collapse into the parents' and only parents may bring due process complaints. This would effectively extinguish any right a child would have (presumably with a next friend under Rule 17(c)) to bring an action under the IDEA for that child's rights. The child would have to rely solely on a parent to choose what claims to bring or not to bring. Such a reading would be contrary to

rights are simply one component of an Act, the purpose of which is to provide children with a FAPE. *Rowley*, 458 U.S.

own behalf, regardless of what may be in the best interest of the child or the opinion of a custodial parent.

School districts are often caught in the middle of heated and passionate disagreements between divorcing parents, parents and stepparents, and parents and grandparents over what is in the best interest of the child. With Petitioners' reading of the Act, these disagreements would play out in federal court. For example, a non-custodial parent, with no rights to make educational decisions, could bring his own lawsuit in federal court under the IDEA. The school district would be forced to defend itself in that lawsuit even though the custodial parent had not brought a due process complaint about the child's education.

This was exactly the result in *Navin v. Park Ridge Sch. Dist.*, 270 F.3d 1147 (7th Cir. 2001). The father, the non-custodial parent, brought a due process request on his own behalf and on behalf of his son. The mother, the custodial parent, was not a party to the lawsuit. Under the divorce decree, the child's mother had the right to make educational decisions. The father maintained the right to inspect education records, communicate with school staff and participate in school activities. *Id*. at 1149. The Seventh Circuit recognized that the father's claims could be contrary to the mother's, but held that the father had a right to proceed. The court remanded the case to the district court to determine whether the father's claims were incompatible, not with the divorce decree itself, but with the mother's use of her rights under the decree. *Id*. at 1149-50. On remand the district court would presumably have to determine what interests the mother, a non-party, had in the claim and then how those interests related to the father's interests and whether he could proceed with his claim. All the while, the school district would have to be party to a federal court proceeding with all the attendant costs. *See* discussion at Part II.B.2., *infra*. Such litigation focuses on the squabbles of the adults and leaves out the interest of the child.

Under Petitioners' reading, all of these "parents," including grandparents, stepparents and non-custodial parents, would also have the right to bring actions *pro se* to federal court. As a result, a school district could possibly face two court actions (or more) about the same child, where one "parent" claims that a child needs a certain educational plan and another "parent" claims that the child needs the exact opposite. Having diametrically opposed claims in federal court does not serve a child's interest. Such a possibility only results in more legal costs for school districts. This is not the result intended by the Act. The due process complaint is supposed to be about the child.

II. Lay parents may not represent their child *pro se* under the IDEA.

A. The common law rule prohibiting parent *pro se* representation applies in IDEA cases.

For example, within a short period of time after a due process complaint is filed, parents and school districts are to

applicable to personal injury and medical malpractice actions should govern IDEA appeals). Because tort cases are more analogous to IDEA cases than SSI cases, the same rule prohibiting parental *pro se* representation should apply in both contexts.

Petitioners argue that these tort cases are distinguishable because in the IDEA context the interests of the parents and children will always be aligned. This is a false assumption. In the IDEA context, the interests of the children and parents will not always be consistent. *See* Part II.A.3., *infra*). Therefore, the common law rule prohibiting parent *pro se* representation as upheld in tort cases should also apply in IDEA cases.

3. *Amici* to Respondent acknowledge that most parents act in what they believe to be the best interest of their child. Some parents, however, may be motivated by financial considerations, like tuition reimbursement, or other personal motives, such as in a divorce situation, or may be too emotionally invested in their child's situation to be objective. For example, in a recent state level decision, the hearing officer denied a guardian's request to refer a fifth-grade student with 20/40 corrected vision for placement in a residential facility for blind students. *Conway Sch. Dist.*, 46 IDELR 208 (Ark. SEA Feb. 17, 2006). Such a placement was clearly inappropriate and against the child's best interest. The hearing officer held the school's IEP placement in a regular classroom was proper, noting that the student did not even have a "visual impairment" as defined under Arkansas law. *Id*.

In *A.S. v. Board of Educ. for the Town of West Hartford*, 47 Fed. Appx. 615 (2d Cir. 2002), the parent claimed that the district's plan to transition his son from a residential placement to a public high school did not adequately address his child's needs and proposed a placement at a private, non-special education boarding school. *Id*. at 616. While the parents may have wanted the

school district to pay for boarding school, the court upheld the trial court's determination that the district's placement at its high school would have provided the student with a meaningful educational benefit in the least restrictive environment. *Id*. at 617.

Parents' interests may also not be aligned with those of their children if the parents are divorced. "When there is a divorce and the divorced parents disagree about their child's special education, they lose the ability to be effective advocates for their child." *See* Daggett, 38 U. Mich. J.L. Reform at 739.

Congress recognized that parents have the potential to abuse the IDEA process when it amended the IDEA in 2004 to allow school districts to recover attorney fees. 20 U.S.C. § 1415(i)(3)(B)(i)(II), (III). Congress recognized that some parents may pursue IDEA actions for the wrong reasons, *i.e*., monetary gain, which demonstrates that the interests of parents and their children are not always the same in the IDEA context. [12]

Sometimes, parents, while well meaning, may have their judgment clouded by emotion or other reasons and reach the wrong conclusions about the educational needs of their children. In the instant case, the parents, presumably motivated by what they thought was in their son's best interest, kept their son out of school programming during the 2004-05 school year while decision after decision found that the school district had offered FAPE. *See* Resp. Br. at 4-6.

In *Pachl v. School Bd. of Anoka-Hennepin Indep. Sch. Dist. No. 11*, 453 F.3d 1064 (8th Cir. 2006), the parents sued the school district when it developed an IEP that provided for their daughter to spend two hours per day in a special education classroom, as opposed to the general education classroom. *Id*. at 1066. The parents insisted that their daughter spend her entire school day in the regular education classroom. *Id*. The school district fought to provide more services in a special education setting, presumably at greater cost to the school district, because the educators involved believed the student would receive a greater benefit from the small structure of the special education class rather than the large, lecture-driven general classroom. *Id*. at 1069. The court of appeals upheld the district court's decision in favor of the school district. This case shows the interest of the child is sometimes harmed when parents make bad educational choices for their child.

B. The purpose of the IDEA is served if children have legal representation.

The purpose of the IDEA—to provide a free appropriate education for children with disabilities—is furthered if children's interests are protected by competent legal counsel. Children in IDEA cases deserve skilled, independent counsel to represent their interests, not only because their parents' interests may not be the same as theirs, as explained *supra*, but also because as courts have recognized, a party is at a disadvantage without independent, ay2 0 0 12f

administrators at every step in the development of a student's IEP and the determination of his or her educational placement and services. 20 U.S.C. § 1414(d). Parents and educators need to focus their energies on working together to develop educational programming for the child and not on adversarial legal proceedings. When parents act *pro se*, they must act as zealous advocates in a litigation posture and then later revert to cooperative partners with school officials when the legal proceedings end.[13] These roles are hardly complementary, making it difficult at best for parents to be effective at both.

The collaborative process required under the Act is not easy and requires effort by all parties: "[p]articularly in this difficult area of education for a disabled child, it takes a firm resolve, by parents and educators alike, to work collaboratively, in pursuit of a child's education, even when that collaboration is challenging, choices are limited, and patience runs thin."

almost 22% of elementary and secondary schools' total spending and is double the amount spent on all other students. *Id*. These costs are borne primarily by state and local governments. While the federal government committed to funding 40% of the per pupil special education costs when it first enacted the predecessor statute to the IDEA in 1975, more than 30 years later, it still funds less than 20 percent of those costs, creating a cumulative funding deficit of more than $59 billion for the last four fiscal years. NSBA, *Priority Issue: Federal Funding for Education* (Jan.

tolling would allow children's problems to persist for years. The school needs to be put on notice of problems in the child's education as soon as possible so that changes can be made to ensure the child receives a FAPE sooner rather than later. Daggett, 38 U. Mich. J.L. Reform at 764. Finally, allowing parents to wait to file claims would "undercut[] the intent and framework of the act and put[] both the child and the school district at risk of untimely proceedings and wasted resource allocation." *Id*. at 765.

3. Petitioners express fear that children with disabilities will not have their "d

actually a reasonable number of attorneys to take on these claims.

If, however, in this technical field there really is a dearth of competent private legal counsel as Petitioners and their *amici* assert, the answer is not to turn over these highly complex legal disputes to untrained parents. Rather, Congress has legislated a solution to this problem by creating Protection and Advocacy groups, known as "P&As." The P&A system comprises the nation's largest provider of legally based advocacy services for persons with disabilities. *See* Brief for National Disability Rights Network As Amicus Curiae Supporting Petitioners, *U.S. v. Georgia*, 546 U.S. 151 (2006) (Nos. 04-1203 and 04-1236). P&As are mandated under various federal statutes to provide legal representation and related advocacy services on behalf of all people with disabilities in a variety of settings. In fiscal year 2004, P&As served over 76,000 persons with disabilities through individual case representation and systemic advocacy. *Id*. at 1. The 301 IDEA civil actions filed in 1998-99 school year would equal less than half of one percent of the total volume of cases handled by P&As. Thus, P&As appear to have the ability to meet the representation needs of special education children and, if not, a modest increase in their funding could provide for such representation.

Second, children have access to the court system through Federal Rule of Civil Procedure 17(c). Under Rule 17, minors are precluded from determining their own legal actions. Rule 17(c) provides that a representative or guardian "may sue or defend on behalf of the infant." Circuit courts have already applied this rule to handle IDEA cases where parents have attempted to proceed *pro se*. For instance, in *Tindall v. Poultney High Sch. Dist.*, 414 F.3d 281 (2d Cir. 2005), the court deferred its decision regarding the merits of the IDEA claims for the limited purpose of permitting counsel to be retained to represent the minor child under Rule 17(c). In support of that conclusion, the court

quoted its own precedent for the proposition that "[t]he choice to appear *pro se* is not a true choice for minors who under state law, see Fed. R. Civ. P. 17(b), cannot determine their own legal actions." *Id*. at 284 (quoting *Cheung v. Youth Orchestra Found. of Buffalo, Inc*., 906 F.2d 59, 61 (2d Cir. 1990) (court remanded civil rights action of daughter so father who acted *pro se*

CONCLUSION

For the above reasons, *Amici* urge that this Court hold that a non-lawyer parent of a minor child with a disability may not proceed *pro se* in a federal court action under the IDEA.

Respectfully submitted,

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