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

BRIEF OF THE COUNCIL OF THE GREAT CITY SCHOOLS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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BRIEF OF THE COUNCIL OF THE GREAT CITY SCHOOLS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

This brief is submitted on behalf of the Council of the Great City Schools as *amicus curiae* in support of respondent.[1]

INTEREST OF *AMICUS CURIAE*

The Council of the Great City Schools ("Council") is a coalition of 66 of the nation's largest urban public school systems.[2] Founded in 1956 and incorporated in 1961, the

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[1] Pursuant to Rule 37, blanket letters of consent from the parties have been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus*, its members, or its counsel contributed monetarily to the brief.

[2] Member school districts include Albuquerque Public Schools, Anchorage School District, Atlanta Public Schools, Austin Independent School District, Baltimore City Public Schools, Birmingham City Schools, Boston Public Schools, Broward County Public Schools, Buffalo City School District, Caddo Parish School District, Charleston County Public Schools, Charlotte-Mecklenburg Schools, Chicago Public Schools, Christina School District, Cincinnati Public Schools, Clark County School District, Cleveland Municipal School District, Columbus Public Schools, Dallas Independent School District, Dayton Public Schools, Denver Public Schools, Des Moines Independent Community School District, Detroit Public Schools, District of Columbia Public Schools, Duval County Public Schools, East Baton Rouge Parish School System, Fort Worth Independent School District, Fresno Unified School District, Guilford County Schools, Hillsborough County School District, Houston Independent School District, Indianapolis Public Schools, Jackson Public School District, Jefferson County Public Schools, Kansas City Missouri School District, Long Beach Unified School District, Los Angeles Unified School District, Memphis City Public Schools, Metropolitan Nashville Public Schools, Miami-Dade County Public Schools, Milwaukee Public Schools, Minneapolis Public Schools, New Orleans Public Schools, New York City Department of Education, Newark Public Schools, Norfolk Public Schools, Oakland Unified School District, Oklahoma City Public Schools, Omaha Public Schools, Orange County Public Schools, Palm Beach County Schools, Philadelphia Public Schools,

Council is located in Washington, D.C., where it works to promote urban education through legislation, research, media relations, instruction, management, technology, and other special projects. The Council serves as the national voice for urban educators, providing ways to share promising practices and address common concerns. For the past several years, the Council's legislative and legal staff has participated extensively in congressional consideration of the Individuals with Disabilities Education Act Amendments of 1997 and the Individuals with the Disabilities Education Improvement Act of 2004.

INTRODUCTION AND SUMMARY OF ARGUMENT

The argument advanced by Petitioners and the United States – that the Individuals with Disabilities Education Act ("IDEA") permits parents to proceed *pro se* to assert claims under a statute that confers rights only on their children – completely ignores the long-settled, common law and statutory definition of what it means to proceed "*pro se*." It also flies in the face of what Congress actually intended in enacting the IDEA and what any reasonable State or school district official reading the statute would assume Congress intended.

Congress considered including in the IDEA the exact provision that Petitioners now wish was there. Ultimately, however, Congress rejected that provision, a decision consistent with its general reticence – demonstrated by many other provisions throughout the statute – to impose additional burdensome costs on school districts. In fact, the congressional

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Pittsburgh Public Schools, Portland Public Schools, Providence Public Schools, Richmond Public Schools, Rochester City School District, Sacramento City Unified School District, Salt Lake City School District, San Diego Unified School District, San Francisco Unified School District, Seattle Public Schools, St. Louis Public Schools, St. Paul Public Schools, Toledo Public Schools, and Wichita Public Schools.

fears underlying this policy decision would be (and have been) borne out by an overwhelmingly large percentage of frivolous *pro se* suits, as compared to ones brought by represented parties.

Furthermore, even if this clear congressional intent not to allow *pro se* suits had not been expressed in the text of the statute (it was), that would be insufficient to permit Petitioners to proceed here. The Spending Clause, upon which Congress relied in enacting the IDEA, requires that congressional intent be clear, so as to give notice to school districts upon whom the expensive burdens of the *pro se* suits would fall. School districts had no such notice, and the statute must therefore be interpreted not to impose such a burden. For all of these reasons, the decision below should be affirmed.

ARGUMENT

I. CONGRESS SPECIFICALLY INTENDED NOT TO ALLOW *PRO SE* SUITS BY PARENTS UNDER THE IDEA.

It is difficult, if not impossible, to imagine a statute with a legislative history that more clearly demonstrates congressional intent with respect to the exact question presented to this Court as the IDEA in this case. Furthermore, this clear legislative history, including Congress's rejection of the *precise* statutory provision Petitioners seek to read into this statute, is completely consistent with numerous other provisions in the statute all aimed at the same purpose – reducing litigation and the associated costs and burdens on the school districts that have to defend such suits.

A. The IDEA Evinces A Congressional Intent To Reduce The Burdens Of Litigation On School Districts.

Consistent with the core purpose of the IDEA – provision of a free appropriate public education ("FAPE") to children

with disabilities – Congress has always been mindful of the administrative and financial burdens that the statute inflicts on school districts, potentially to the detriment of that core purpose. *See Schaffer v. Weast*, 126 S. Ct. 528, 535 (2005) ("Congress has . . . repeatedly amended the Act in order to reduce its administrative and litigation-related costs.").[3] This concern – which has been echoed by this Court and the courts of appeals in numerous cases[4] – can be seen throughout the IDEA and its recent amendments.

Most obviously, the statute emphasizes the administrative process and strongly encourages informal resolution of *all* IDEA claims without resort to the judicial process. *See* 20 U.S.C. § 1400(c)(8) ("Parents and schools should be

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[3] In *Schaffer*, this Court cited examples of statutory provisions embodying Congress' goal of reducing IDEA compliance costs:

> For example, in 1997 Congress mandated that States offer mediation for IDEA disputes. In 2004, Congress added a mandatory "resolution session" prior to any due process hearing. It also made new findings that "parents and schools should be given expanded opportunities to resolve their disagreements in positive and constructive ways," and that "[t]eachers, schools, local educational agencies, and States should be relieved of irrelevant and unnecessary paperwork burdens that do not lead to improved educational outcomes."

126 S. Ct. at 535 (citing 20 U.S.C. §§ 1415(e), 1415(f)(1)(B), 1400(c)(8),(9)); *see also, e.g.*, 20 U.S.C. § 1408 (creating a pilot program to help States "identify ways to reduce paperwork burdens and other administrative duties that are directly associated with the requirements of this chapter, in order to increase the time and resources available for instruction and other activities aimed at improving educational and functional results for children with disabilities").

[4] *See, e.g.*, *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 126 S. Ct. 2455, 2463 (2006) ("the IDEA obviously does not seek to promote these goals at the expense of all other considerations, including fiscal considerations"); *Linda W. v. Indiana Dep't of Educ.*, 200 F.3d 504, 506 (7th Cir. 1999) (taking costs to school districts into account in interpreting the IDEA).

given expanded opportunities to resolve their disagreements in positive and constructive ways."). The legislative history of the recent amendments is replete with language encouraging mediation of IDEA disputes in order to avoid litigation and its attendant costs. S. Rep. No. 108-185, at 36 (2003) ("The committee is encouraged by the success of mediation occurring throughout the nation in resolving disputes between parties under IDEA."); *see also id.* (acknowledging states that have successfully encouraged mediation, and specifically noting "an estimated savings of $50 million in attorneys' fees and related expenses" in Texas alone); *see also* Statement of Chairman John A. Boehner, Comm. on Educ. and the Workforce, April 10, 2003, *available at* http://www.cec.sped.org/AM/Template.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=5469 (last visited Jan. 22, 2007) ("We must also take steps to reduce litigation and foster a sense of cooperation between parents and schools. There is no question that the rights of children and parents must be protected. But those rights should not overshadow the primary focus of this law – to provide educational opportunities to students with special needs."); 149 Cong. Rec. H3461 (2003) (statement of Chairman Michael N. Castle, Subcomm. on Educ. Reform) ("This bill seeks to reduce litigation and restore trust between parents and school districts.").

In keeping with this focus on early resolution of IDEA disputes, the statute lays out a detailed and expansive administrative procedure that is intended to establish a cooperative relationship among all the members of a child's Individualized Education Program ("IEP") team, including the parents. 20 U.S.C. § 1415. In this way, the process encourages joint decision-making between parents and school districts and discourages a more drawn-out and expensive litigation process that not only would be destructive to this team effort, but also would be inordinately time-consuming and burdensome

– to the detriment of both parents and school districts, and more importantly to the very students who are the focus of the IDEA.

Consistent with this collaborative focus, parents are authorized to proceed on behalf of their children in these administrative efforts. 20 U.S.C. §§ 1415(f)(1)(B), (h). As detailed as the administrative procedures are, the IDEA ensures that parents are provided with ample information to help them navigate the process, and to be as informed and capable of participating in the process as any other member of the IEP team. 20 U.S.C. § 1415. Once litigation in the courts has been initiated, however, the collaborative process necessarily gives way to an adversarial process that non-attorney parents are ill-equipped to navigate on their own. At that stage, Congress recognized, the playing field has changed so substantially that it no longer makes sense to continue allowing parents to represent their children. Accordingly, although Congress authorized parents to represent their children's interests in the administrative setting, the statute is conspicuously silent with respect to such representation in litigation. *Compare* 20 U.S.C. §§ 1415(f)(1), (h), *with id.* § 1415(i)(2). In the context of an adversarial proceeding, in which specialized training and knowledge is required, the usual common-law rule operates to bar non-attorney parental representation of a child's interests. This is consistent with both the IDEA's child-centered mission and congressional concerns about imposing litigation costs and associated burdens on school districts.

B. The Absence Of An Authorization In The IDEA For *Pro Se* Suits Reflects The Considered Judgment Of Congress.

The position advocated by Petitioners not only is inconsistent with the overall purpose and structure of the statute, but it also has been thoroughly considered and rejected by Congress. Indeed, a statutory provision that would have spe-

cifically allowed the relief Petitioners seek here – the right to prosecute their child's IDEA claim *pro se* – was explicitly rejected not long before this case was commenced. That legislative judgment should not be disturbed.

In 2003, parents' groups lobbied the members and staff of the Senate Health, Education, Labor and Pensions Committee to include a provision in the IDEA amendments that would allow non-attorney parents to represent their children in court. The Committee agreed and a provision was added to Senate Bill 1248 that stated as follows:

> Parents representing their children in court.--- Subject to subsection (m), and notwithstanding any other provision of Federal law regarding attorney representation (including the Federal Rules of Civil Procedure), a parent of a child with a disability may represent the child in any action under this part in State or Federal court, without the assistance of an attorney.

S. 1248, 108th Cong. § 614(i)(4) (as reported by S. Comm. on Health, Educ., Labor & Pensions, Nov. 3, 2003); S. Rep. No. 108-185 at 225. The provision was added to the committee bill in June 2003; several months later, in November 2003, the Committee issued its report supporting the addition of this provision. S. Rep. No. 108-185 at 4-5, 42. That report makes clear the Committee was aware that most circuits had rejected *pro se* litigation under the IDEA as drafted, and that a legislative amendment would be required to pave the way for such suits:

> It is unquestioned that parents have the right to bring a [due process] complaint and participate in a due process hearing without an attorney. However, there has been disagreement as to whether a parent may, in effect, 'represent' their child in a civil action that results from an appeal of a due process hearing. The

> committee is aware of the current conflict between a number of federal circuit courts regarding this issue.

Id. at 41.[5] Moreover, the Committee specifically recognized that *pro se* representation would be inconsistent with the long-established common-law practice throughout the nation. *Id.* ("Both Federal and State laws generally prevent a non-attorney parent from representing his or her child in a court proceeding, as these laws provide that a person can only represent himself or herself, and not proceed on behalf of their minor child."). Thus, it expressly included language demonstrating this recognition, *see id.* at 225 (drafting provision to permit *pro se* suits "notwithstanding any other provision of Federal law regarding attorney representation"), and overriding all other provisions of the IDEA except § 1415(m) (providing for transfer of rights to the child at the age of majority). *See* S1248, *supra*.

Although the new *pro se* provision was included in the bill approved by the full Senate, it did not survive the Conference and thereafter was rejected by the full Congress. *See* H.R. Rep. 108-779 (2004) at 220 n.233 (Conf. Rep.) (removing language of *pro se* provision from bill). In short, the precise rule advocated by Petitioners and their *amici* here was thoughtfully considered and specifically rejected by the full Congress.[6]

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[5] In fact, at the time the provision was added to the bill in Committee on June 25, 2003, *see* S. Rep. No. 108-185 at 4-5, the federal courts of appeals that had addressed the issue of *pro se* representation had unanimously held that it was not permitted under the statute. The First Circuit decision in *Maroni v. Pemi-Baker Regional School District*, 346 F.3d 247 (2003), created a split just before the Committee report was released in November of that year.

[6] Senators Kennedy, Harkin, and Dodd and Representatives Miller, Woolsey, and Owens, who are among the members of Congress filing an *amicus* brief in support of Petitioners in this case, participated in the conference committee that dropped the *pro se* provision, which had previ-

While the failure to amend a statute may not always be probative of legislative intent, the history of the unsuccessful *pro se* provision in this case is the best possible evidence that Congress simply did not intend to permit non-attorney parents to represent their children in court in IDEA disputes. As noted above, the Committee Report specifically acknowledged the common-law rules prohibiting such representation, as well as the majority rule (in fact, unanimous rule at the time the provision was accepted in committee) in the courts refusing to permit such representation. In this context, as this Court has just recently reaffirmed, the legislative failure to act is both relevant and susceptible to only one interpretation – that Congress did not intend to disturb the common law rule or to overturn the settled interpretation of the IDEA that was prevailing in the federal courts. *See Rapanos v. United States*, 126 S. Ct. 2208, 2231 (2006) (stating that this Court has "relied on congressional acquiescence when there is evidence that Congress considered and rejected the '*precise* issue' presented before the Court") (emphasis in original) (internal quotation marks omitted).

As explained in the next Part, this legislative judgment is consistent with sound policy under the statute: Congress understood that even more valuable school district resources would be diverted to litigation if *pro se* civil actions were allowed to proceed.

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ously passed in the Senate, from the final version of the 2004 IDEA amendments. *See* H.R. Rep. No. 108-779 at 262-63. These Senators and Representatives also voted in favor of the final version of the amendment (*i.e.*, the version lacking the *pro se* provision), as did all of the other members of Congress participating in this case as *amici* in support of Petitioners. *See* 150 Cong. Rec. H10022 (2004) (House Roll Call Vote Agreeing to Conference Report for H.R. 1350); 150 Cong. Rec. S11660 (2004) (Senate Unanimous Consent Vote Passing H.R. 1350).

II. PRO SE LITIGATION IN IDEA CASES IMPOSES HIGH COSTS ON SCHOOL DISTRICTS.

Public schools have diligently undertaken the great responsibilities with which they have been entrusted by the IDEA. For decades, they have scrupulously followed their statutory mandate to provide students with disabilities a FAPE.

Most public school systems, however, must operate with very limited budgets. The IDEA in particular imposes great costs on these school districts. During the 1999-2000 school year, for example, public schools spent over 20% of their general operating budgets on special education – for a total of $78.3 billion. Thomas Parrish et al., Center for Special Education Finance, *State Special Education Finance Systems, 1999-2000: Part II: Special Education Revenues and Expenditures* 22 (2004). More and more, a great percentage of these costs are devoted not to education but to litigation. *See, e.g.*, Andriy Krahmal, et al., *"Additional Evidence" Under the Individuals with Disabilities Education Act: The Need for Rigor*, 9 Tex. J.C.L. & C.R. 201, 220 (2004). As litigation under the IDEA continues to become more prevalent, the strain on school resources can only be expected to worsen. *Id*. at 219. Allowing parents to proceed *pro se* in IDEA cases in federal courts would only exacerbate the already high costs expended by school districts on litigation and litigation-related costs. In turn, the IDEA's goal of higher quality education for students with disabilities would be undermined by the diversion of monetary and other resources that could otherwise be spent on both special and general education services. *Pro se* litigation by non-attorney parents would also result in additional incalculable costs on children, who deserve to have their claims presented in court by attorneys who are well-versed in legal proceedings.

A. Allowing *Pro Se* Litigation By Parents Under The IDEA Would Increase The Already High Cost Of Litigation And Drain Scarce Resources From The Public Schools.

The monetary costs to school districts of compliance with the IDEA are substantial. This is so even before the additional costs associated with administrative proceedings and litigation related to statutory compliance are taken into account. During the 1999-2000 school year alone, an estimated $6.7 billion was spent on assessment, evaluation, and development of IEPs for disabled children. Jay G. Chambers, et al., American Institutes for Research, *What are We Spending on Special Education Services in the United States, 1999-2000?* 14 (2004). This figure, however, does not capture additional, significant costs associated with compliance with the IDEA such as the cost in teacher and other professional time. For example, above and beyond the standard administrative work that all teachers perform, special education teachers must devote substantial time – on average, a full hour every day – to their roles as members of the teams that work together to formulate IEPs and ensure that they are carried out. *See* John A. Kirlin, et al., *Final Report on Focus Study III: The Burden of Paperwork and Administrative Duties in Special Education* 31 (2004); *see also id.* at 86 Ex. 8.2 (showing that special education teachers spent an average of 9.4 hours per week on special education paperwork and administrative tasks, and related services staff spent an average of 13.5 hours per week on these tasks).

These IEP-related costs are all incurred in furtherance of the IDEA's fundamental goal of providing a free and appropriate public education for children with disabilities. School districts are deeply concerned, however, that their ability to achieve that goal for *all* students is being increasingly undermined by the high costs of litigating against the small percentage of students who bring claims under the statute.

During the 1999-2000 school year alone, school districts spent approximately $90.2 million on mediation and administrative hearings and $56.3 million on litigation. Jay G. Chambers, et al., American Institutes for Research, *What Are We Spending on Procedural Safeguards in Special Education, 1999-2000?* 5 (2003). Each case that was pending in the courts that year cost an average of $94,600 during that year alone. *Id.* at 22.[7] These costs will only rise as the volume of litigation under the IDEA continues to increase. Krahmal, *supra*, at 219-20.

Real-life examples of the severe impact such cases have on the districts against whom they are brought are legion. A single IDEA case, litigated through appeal, may rack up costs in the millions. *See, e.g.*, Kathleen Baydala, *Schools Pay $2.3 Million Legal Tab to Defend Special Education Lawsuit*, Chattanooga Times Free Press, Mar. 17, 2005, at B1 (noting that litigation costs in one IDEA case, *Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840 (6th Cir. 2004), reached $2.3 million).

Congress has demonstrated a keen awareness of the high costs associated with individual IDEA lawsuits. Senator Kay Bailey Hutchinson, for example, noted that in 2002, a year in which Congress decided to lift the cap it had imposed on attorneys' fees for lawsuits brought under the IDEA in the District of Columbia, "[a]ttorneys' fees as a percentage of total special education spending tripled to almost 6 percent, increasing by $10 million in 1 year." 150 Cong. Rec. S5351 (2004). Similarly, during the debate on the 2004 amendments to the IDEA, Senator Mike Enzi described "documented cases where schools have spent hundreds of thou-

[7] Notably, "[t]his figure does not represent the full expenditures on a litigation case from the time it was filed to its resolution. Rather the expenditure reflects what was spent on average in 1999-2000 on any given open case." *Id.*

sands of dollars battling frivolous complaints filed under IDEA." *Id.* at S5352. In particular, Senator Enzi noted "one instance of a school spending $154,000 over a 2-year period to address seven complaints from the same parent. Another school spent $195,000 on complaints from one parent." *Id.* As the Senator aptly pointed out, in his home state of Wyoming, "$154,000 is more than some school district[s'] entire special education administrative budget." *Id.*[8]

These examples, striking though they are, capture only the direct monetary costs of litigation to school districts. They do not account for the indirect costs of litigation on other educational resources.[9] Claims brought under the

[8] This example demonstrates that looking at the costs of litigation under the IDEA on a nationwide basis tells only part of the story. *Average* nationwide costs are high, but the costs associated with litigation in individual school districts are even higher. Even one prolonged IDEA case can have devastating effects on small communities with correspondingly small budgets.

[9] The costs of actual litigation also do not reflect the time and money that school districts must additionally spend preparing for the eventuality of litigation. Even if they have developed adequate IEPs, the failure of districts to prepare for litigation can result in adverse decisions. Indeed, in response to one such case, an article published in the *Education Law Reporter* warned that substantive legal compliance may not be enough to ensure victory in judicial proceedings and that school districts must also invest considerable time and resources specifically in preparation for litigation. Allan G. Osbourne, Jr., *Proving That You Have Provided a FAPE Under IDEA*, 151 Educ. L. Rep. 367 (2001); *see also* Kirlin, *supra*, at 75 ("Special education teachers and principals said they spent a great deal of time on documentation, noting the need to document everything related to a special education student in the event that litigation or a due process complaint was filed."). Similarly, a school district cannot assume that it will win what it views as a frivolous complaint and must prepare to litigate even these complaints to the fullest if necessary. *See* 150 Cong. Rec. at S5352 (statement of Sen. Enzi) ("Unfortunately, schools do not have the luxury of ignoring complaints, however frivolous they may be. They must assume that every complaint filed will be upheld and prepare accordingly.").

IDEA take teachers and other school district professionals away from their classrooms and offices to participate in hearings, depositions, and trials, not to mention less formal meetings with lawyers, parents, and other school personnel in relation to IDEA claims. The experience of the Council's member districts shows that, in administrative proceedings, parents who proceed *pro se* on behalf of their children often call numerous faculty members as witnesses, often unnecessarily. *See* Info. on File with Palm Beach County Schs. (demonstrating that unrepresented parents frequently call more potential witnesses than would ordinarily be the case, often listing any employee who may have had any relationship with the student or case). When regular classroom teachers become unavailable because of such litigation-related duties, schools are then forced to hire substitute teachers. *See* Info. on File with Clark County Sch. Dist. (demonstrating that the cost to the district of the hearing process in a case involving an unrepresented parent, including payment of substitute teachers, hearing officer fees, transcription, and staff time spent waiting to testify, averaged $5,000 per day). This not only inflicts yet more monetary expense, but it also imposes incalculable costs on the educational process, as substitutes are less likely to be knowledgeable about students' individualized needs and thus less able to provide high quality instruction for all children.[10] This

[10] Many children receiving services under the IDEA are placed in general education classrooms pursuant to the core statutory mission of placing children with disabilities in their least restrictive educational environment. *See* 20 U.S.C. § 1412(a)(5) ("To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily."). All school children, not just children with disabilities who are directly impacted by the IDEA, there-

situation is only exacerbated when complaints under the IDEA are filed in federal courts; the IDEA requires courts to hear additional evidence at the request of a party and federal litigation typically requires a greater expenditure of time by witnesses, including preparation for, travel to and from, and attendance at depositions, trials, and other proceedings. *See* 20 U.S.C. § 1415(i)(2)(C)(ii) ("In any [civil] action . . . the court . . . shall hear additional evidence at the request of a party."); *see also* Info. on File with New York City Dep't of Educ. (stating that federal litigation is more burdensome than administrative hearings due to liberal discovery rules, including the ability to take multiple depositions and serve multiple interrogatories, and substantial motions practice).

Examples of the monetary costs of litigation also do not encompass the intangible costs of diverting resources from students' educational opportunities. Every dollar spent on litigation is a dollar diverted away from educational programs and thus away from the educational mission that is the core purpose of both the IDEA and the schools administering it. The experience of the District of Columbia school system bears this out. When the attorneys' fee cap in IDEA cases was reinstituted in the District in fiscal year 2003, public schools there saved $4.4 million. 150 Cong. Rec. at S5352 (statement of Sen. Hutchinson). "Based on those savings, DCPS was able to create 550 new classroom seats at 50 schools during the 2003-2004 school year to serve children with special needs, including children with autism, students who are hearing or vision impaired, mentally retarded, learning disabled or emotionally disabled, and early childhood special education students." *Id.*; *see also id.* (stating that savings from the fiscal year 2004 attorneys' fee cap would again be "reinvested into capacity building" and was ex-

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fore suffer when teachers are pulled out of their classrooms for litigation-related activities.

pected to result in the creation of 450 additional classroom seats).

All of the costs detailed above are far higher when the suits are prosecuted by *pro se* litigants like Petitioners. *See, e.g.*, Resp. Br., Part II.B (discussing burdens to school district of defending this case when Petitioners were proceeding *pro se*). Even in the administrative context, where the prospect of parents proceeding *pro se* was at least contemplated by Congress, *see* 20 U.S.C. §§ 1415(f)(1), (h), proceeding against self-represented parents is more costly and time-consuming for school districts. As discussed above, school districts have found that in such proceedings, parents tend to call a multitude of witnesses, who often have little to add to the proceedings, and engage in other conduct that prolongs hearings unnecessarily. *See, e.g.*, Info. on File with Palm Beach County Schs., *supra* (unrepresented parents often call unnecessary witnesses and engage in repetitive questioning when cross-examining school district witnesses); Info. on File with New York City Dep't of Educ., *supra* (unrepresented parents often do not adhere to regulations limiting the scope of the hearing to the hearing request).

Likewise, in the litigation context, costs of *pro se* cases generally are higher, both on adverse parties and on courts, than costs in cases where both parties are represented by counsel. *See, e.g., Abdul-Akbar v. Watson*, 901 F.2d 329, 332 (3d Cir. 1990) (recognizing that "the cost in time and personnel to process *pro se* . . . pleadings requires some portion of the court's limited resources and ties up these limited resources to the detriment of other litigants"); *Jones v. Niagara Frontier Transp. Auth.*, 722 F.2d 20, 22 (2d Cir. 1983) ("[T]he conduct of litigation by a nonlawyer creates unusual burdens . . . for his adversaries and the court."); *see also, e.g., Report of the Working Committees to the Second Circuit Task Force on Gender, Racial and Ethnic Fairness in the Courts*, 1997 Ann. Surv. Am. L. 124, 299-300 (hereinafter

"*Report of the Working Committees*") (finding that *pro se* cases "present a substantial management problem for the circuit" and "consume a significant amount of court resources").

This same general trend holds true in IDEA cases, where school districts find themselves facing much higher costs when forced to proceed against parents acting *pro se* in civil actions than they do when all litigants are represented by counsel. *See, e.g.*, *Maroni,* 346 F.3d at 258-59 (adopting rule that parents may proceed *pro se* under the IDEA but acknowledging that "[*p*]*ro se* litigants also impose unusual burdens on courts, and there is a desire to save courts and school districts from poorly drafted, inarticulate, or vexatious claims") (internal quotation marks omitted). Thus, permitting parents to prosecute claims *pro se* would frustrate Congress's stated purpose of reducing the burden of IDEA litigation on school districts, and instead further stretch the districts' already tight budgets and impede their efforts to provide a FAPE to all students with disabilities.

B. The Core Purposes Of The Statute May Be Vindicated Without Authorizing *Pro Se* Litigation In IDEA Cases.

As discussed at Part I, *supra*, Congress made a conscious decision not to allow *pro se* actions by parents under the IDEA. This conclusion not only is consistent with both the text and history of the statute, but it also safeguards the substantive rights of children with disabilities by requiring their educational interests to be represented by trained counsel who can competently navigate the legal system on their behalf. Likewise, refusing to authorize *pro se* litigation will have none of the adverse consequences that Petitioners suggest because other statutory and procedural mechanisms – including attorneys' fee provisions, regulations requiring that parents be made aware of available legal services, and district courts' ability to appoint counsel – ensure that children

with meritorious claims will not be denied access to the judicial system. In light of these existing mechanisms, most claims that are likely to be cut off by a bar on *pro se* actions by parents under the IDEA are frivolous actions.

To start, the IDEA awards attorneys' fees to prevailing parties specifically to provide sufficient incentive to counsel to prosecute meritorious claims. In enacting similar attorneys' fees provisions in other statutes, Congress recognized that "[i]n order to ensure that lawyers would be willing to represent persons with legitimate . . . grievances . . . it would be necessary to compensate lawyers for all time reasonably expended on a case." *City of Riverside v. Rivera*, 477 U.S. 561, 578 (1986) (discussing legislative history and purposes of 42 U.S.C. § 1988); *see also Hannon v. Sec. Nat'l Bank*, 537 F.2d 327, 328 (9th Cir. 1976) (noting that purpose of Truth in Lending Act attorneys' fees provision is "to facilitate private enforcement of the . . . Act"). The IDEA's attorneys' fees provision serves the same purpose, as members of Congress have acknowledged. *See, e.g.*, 150 Cong. Rec. at S5352 (statement of Sen. Hutchinson) ("The rule that allows parents to receive payment to recover attorneys' fees when they win is intended to ensure parents who may not have the means can get representation.").

In addition to the attorneys' fee provision, regulations enacted pursuant to the IDEA require that school districts provide parents filing due process complaints with information about local pro bono and low-cost legal services. 34 C.F.R. § 300.507(b). The regulations therefore assure that parents are aware of the particular resources available to them in their local communities. The need for representation in IDEA cases has thus been contemplated and provided for in the statute itself as well as in its implementing regulations, without resort to allowing parents to proceed *pro se*.

Other mechanisms outside of the IDEA equally ensure legal representation for children with meritorious claims

who do not otherwise have access to counsel. Judges currently have the power to appoint counsel in civil cases, including the power to appoint counsel for children. *See* 28 U.S.C. § 1915(e)(1) ("The court may request an attorney to represent any person unable to afford counsel."). This power is supplemented in IDEA cases by Federal Rule of Civil Procedure 17(c), which provides that "[t]he court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action *or shall make such other order as it deems proper for the protection of the infant or incompetent person*." (Emphasis added.) As Rule 17(c) demonstrates, the courts are charged with looking out for children's best interests. *See also Doe v. Bd. of Educ.*, 165 F.3d 260, 264 (4th Cir. 1998) ("Indeed, courts must take special care to protect the interests of children, given that an infant is always the ward of every court wherein his rights or property are brought into jeopardy . . . .") (internal quotation marks omitted). Thus, if there are indeed meritorious cases in which parents are truly unable to obtain a lawyer despite the attorneys' fee incentives, the courts may step in to perform their traditional role of protecting children's best interests and appoint counsel.

The balance struck by these various statutes and regulations therefore works to assure competent legal representation and favors such representation exclusively over the non-attorney representation that Petitioners seek to read into the statute. This result is supported by sound policy considerations as well. A high volume of *pro se* litigation in federal courts involves claims that are borderline, if not outright, frivolous and simply have no place in the courts. *See Report of the Working Committees*, *supra*, at 299 ("The dismissal rates for *pro se* cases suggest that, in the end, the circuit's resources have often been expended on grievances that have no place in federal court."); *see also Abdul-Akbar*, 901 F.2d at 332 ("Often these litigious [*pro se*] plaintiffs are repeti-

tious, frivolous and even malicious in their pleadings."). This state of affairs is no different in IDEA cases. *See, e.g.*, 150 Cong. Rec. at S5352 (statement of Sen. Enzi) ("I am concerned about the effect frivolous lawsuits are having on the ability of our schools to provide services to special education students."); *see also, e.g.*, *Christian v. Clark County Sch. Dist.*, Nos. CV-S-04-0389 RLH (GWF), CV-S-04-0390 BES (GWF) (D. Nev., filed March 31, 2004) (unrepresented parent filed one apparently untimely district court action and another styled as a "Motion" rather than a complaint that necessitated the filing of eighteen pleadings by the school district even before discovery); Info. on File with New York City Dep't of Educ., *supra* (showing that the Department is engaged in protracted litigation with an unrepresented parent seeking a charter program for her autistic children even though hearing officers do not have the jurisdiction to order the Department to create a charter program).[11]

Given the array of options available both to parents and courts to protect a child's best interests via representation by competent counsel, it stands to reason that a parent's decision to proceed *pro se* is far more likely to arise where the claim lacks merit. And allowing parents to proceed *pro se*

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[11] The often-frivolous nature of claims brought by parents who do not have counsel is even more clear in administrative proceedings that have not yet reached litigation. In one New York City case, a parent represented by a parent advocate rather than an attorney spent several hearings pursuing a home instruction remedy for which the child was clearly not a candidate under the applicable regulations. *See* Info. on File with New York City Dep't of Educ., *supra* (observing that when counsel was eventually retained, the suggestions made previously by the Department were adopted and the case settled). Another district has faced a claim involving an unrepresented parent's assertion that the physical size of a classroom interfered with the provision of a FAPE, requiring the district to spend time and resources addressing this non-IDEA related issue, including utilizing the expertise of the district's architectural engineers. *See* Info. on File with Clark County Sch. Dist., *supra* (106 LRP 38959).

when their claims do have merit, and they could obtain counsel but simply choose not to, benefits no one. Continuing to encourage parents to retain counsel, and allowing district courts to exercise their discretion under these existing procedures, is far preferable to a system that sanctions *pro se* representation by non-attorney parents.[12] In the end, the true result of Petitioners' proposed rule would be that school districts would be forced to spend even more resources on frequently frivolous litigation – resources that could be better directed toward creating and maintaining the educational opportunities for children with disabilities that are at the heart of the IDEA.

C. Children Would Be Adversely Affected If *Pro Se* Litigation Were Allowed Under The IDEA.

1. Allowing courts to exercise their discretion to appoint counsel is important even beyond the obvious cost savings that the district court's Rule 17 gatekeeping function would serve. It would simultaneously protect the many individual children who stand to be adversely affected by the rule Petitioners advocate.

Even well-meaning and well-educated *pro se* parties make frequent and costly mistakes when they attempt to liti-

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[12] Advocacy groups supporting Petitioners cite various statistics to show that they have insufficient legal resources to assist every parent who wishes to pursue an IDEA claim on his or her child's behalf. *See* Amicus Br. of Autism Soc'y of Am. et al., at 7-8. These statistics, however, are misleading to the extent they imply that all requests for assistance that these organizations turned away involved meritorious claims for which counsel would have been otherwise unavailable but for the organization's ability to take the case. Rather, the fact that advocacy groups do take some cases, *in addition* to the myriad other mechanisms for obtaining counsel discussed above, simply highlights how many avenues are in fact available to non-attorney parents whose children have viable IDEA claims.

gate civil actions. As the working committees of the Second Circuit have observed:

> Although some of the individuals who proceed without counsel have either have legal training or have developed an advanced and sophisticated knowledge of litigation and the law, the overwhelming majority of *pro se* litigants are familiar with neither the intricacies of substantive law nor the procedures of federal courts. As a result, they are vulnerable to having their claims rejected and possibly to losing rights . . . .

Report of the Working Committees, *supra*, at 307; *see also* Drew A. Swank, *In Defense of Rules and Roles: The Need to Curb Extreme Forms of Pro Se Assistance and Accommodation in Litigation*, 54 Am. U.L. Rev. 1537, 1559 (2005) ("Despite liberal pleading requirements, *pro se* litigants are almost unanimously ill equipped to encounter the complexities of the judicial system.") (internal quotation marks omitted); Thomas H. Boyd, *Minnesota's Pro Bono Appellate Program: A Simple Approach That Achieves Important Objectives*, 6 J. App. Prac. & Process 295, 300 (2004) ("[D]ue to their lack of legal education and experience, *pro se* litigants may focus on facts and issues that, while important to them personally, are not relevant or that interfere with or compromise the development of the evidentiary record and the resolution of the true factual and legal issues."). When children are involved, a non-attorney parent's lack of legal expertise can lead to adverse consequences, ranging from less than optimal presentation of claims to unintended waivers of the children's important, substantive rights. *See, e.g.*, *Doe*, 165 F.3d at 263 (stating that even though attorney-parent proceeding on behalf of his child in an IDEA case obtained a favorable result, had he provided state officials with timely notice of his witness list prior to the initial administrative due process hearing, all ensuing proceedings might have

been avoided); *Osei-Afriyie v. Med. College of Penn.*, 937 F.2d 876, 882 (3d Cir. 1991) (observing, when vacating judgment that children's claims were time-barred because they were improperly represented by their father proceeding *pro se*, that although the father was well-educated, "[h]e is not, however, a lawyer, and his lack of legal experience has nearly cost his children the chance ever to have any of their claims heard").

Even in this case, Petitioners made costly litigation mistakes when proceeding *pro se* that resulted in the waiver of important arguments that could have been made on their son's behalf. For example, in the district court, Petitioners did not raise the argument that the preschool Jacob attended would be an appropriate stay-put placement for him as he became old enough to transition to kindergarten; instead, they confined themselves solely to the argument that his placement should have been at another school entirely. *See Winkelman v. Parma City Sch. Dist.*, 166 Fed. Appx. 807, 810 (6th Cir. 2006). Counsel retained by Petitioners for their appeal did raise this alternative argument, but by that time it was too late, and the Sixth Circuit deemed this key argument waived. *Id.*; *see also* Resp. Br., Part.I.A.2 (discussing procedural errors made by Petitioners when acting *pro se* in companion Sixth Circuit case).

2. In addition to their lack of legal expertise, parents may be poor legal advocates for their children for the additional reason that the interests of parents and children are not always aligned.

In one case involving a member school district, a mother brought continual complaints on behalf of her son under the IDEA beginning when he first started receiving services under the statute in the sixth grade. The district was forced to engage outside counsel to handle its defense due to the amount of time its in-house counsel had been spending on these complaints. When her son was in high school, the

mother filed multiple *pro se* federal appeals regarding these complaints. *See, e.g.*, *Wright v. Clark County Sch. Dist.*, Nos. CV-S-98-171 DWH (LRL) (D. Nev., filed Jan. 30, 1998), CV-S-98-998 DWH (LRL) (D. Nev., filed July 9, 1998). Finally, after initial discovery had taken place, this litigation settled when the son turned eighteen and told his mother and the court that he did not want to pursue the matter. This child was therefore involved litigation that he did not desire for a period of years.[13]

Parents may also unnecessarily jeopardize their children's rights by proceeding *pro se* even when they have the option to retain counsel. Petitioners and their *amici* imply that parents will only proceed *pro se* in IDEA cases when they cannot afford attorneys. Although some *pro se* litigants may choose to represent themselves because they cannot afford a lawyer, others represent themselves for a wide variety of reasons, including distrust of the legal profession or the belief that they can adequately represent their own interests. Drew A. Swank, *The Pro Se Phenomenon*, 19 B.Y.U.J. Pub. L. 373, 378-79 (2005) (citing one survey in which "forty-five percent of *pro se* litigants stated that they chose to represent themselves because their case was simple" and outlining various non-financial reasons that parties choose to proceed *pro se*). Parties who proceed *pro se* on behalf of themselves can generally be assumed to have made some informed choices regarding such representation and its consequences. But in this context, involving children who are not capable of making informed decisions, or weighing the real costs and risks associated with such decisions, the Court should not

[13] Likewise, in this case, Petitioners elected to keep Jacob out of school entirely in the 2004-2005 and the current school year in favor of pursuing claims for tuition reimbursement and multiple due process complaints. Petitioners made this choice notwithstanding the repeated findings both at the administrative level and in the district court that Jacob needs opportunities for peer interactions. *See* Resp. Br. at 3-6.

adopt a rule that would give their non-attorney parents the right to choose whether or not to retain competent counsel.

III. UNDER THE SPENDING CLAUSE, CONGRESS COULD NOT HAVE IMPOSED SUCH A BURDEN ON SCHOOL DISTRICTS WITHOUT PROVIDING CLEAR NOTICE.

Consistent with the goal of not unnecessarily burdening school districts while simultaneously ensuring adequate representation of the children whose rights are at the center of the IDEA, the plain language of the IDEA compels the conclusion that parents cannot bring *pro se* actions under the Act because the statute does not grant parents either substantive rights or the right to sue *pro se* on their child's behalf. *See* Resp. Br., Parts I, II. But even if that were not clearly the case, the Spending Clause independently mandates that result. The IDEA is notably silent on the issue of *pro se* civil actions by parents under the Act, and this silence is simply an insufficient basis on which to infer that Congress intended to impose the high costs of such actions on the States.

As Spending Clause legislation, the IDEA is subject to special scrutiny by this Court.[14] *See, e.g.*, *Arlington Central*,

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[14] Both Petitioners and the United States assert that the Spending Clause is irrelevant to this case because it is 28 U.S.C. § 1654, which is not Spending Clause legislation, rather than the IDEA, that allows parents to proceed *pro se* in federal court. *See* Pet'r Br. at 15 n.10; U.S. Br. at 11 n.4. Section 1654, however, does not create any right of action; it merely provides that for any pre-existing rights of action, "the parties may plead and conduct their own cases personally." *See Devine v. Indian River County Sch. Bd.*, 121 F.3d 576, 581 (11th Cir. 1997) ("Section 1654 . . . is inapposite because it does not speak to the issue before us – whether Devine may plead or conduct his son's case."). The Court must look to the substance of the IDEA itself to determine whether parents have any substantive rights under the statute that would then allow them to proceed *pro se* under Section 1654, or whether any authorization exists for them to proceed *pro se* on behalf of their children. Because this case

126 S. Ct. at 2458 ("Our resolution of the question presented in this case is guided by the fact that Congress enacted the IDEA pursuant to the Spending Clause."); *Cedar Rapids Cmty. Sch. Dist. v. Garret F.*, 526 U.S. 66, 83 (1999) (Thomas, J., dissenting) ("Because IDEA was enacted pursuant to Congress' spending power, our analysis of the statute in this case is governed by special rules of construction.") (citation omitted). The Court therefore should be particularly hesitant to conclude that Congress intended to allow costly *pro se* litigation under this statute.

This Court has repeatedly held that when Congress enacts legislation placing conditions on the receipt of federal funds pursuant to its Spending Clause power, as it has done here, the intent to impose such conditions must be made unambiguously clear in the text of the statute itself. *See, e.g.*, *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) ("[I]f Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously."). The Court emphasized in *Pennhurst* that "legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions." *Id.* Consistent with basic contract law principles, therefore, the terms of the bargain that Congress is asking the States to accept when it imposes conditions on federal funding must be made clear – if they are not, the States cannot make a knowing, fully informed decision whether to accept the deal they have been offered. *See id.*

Against the backdrop of this general Spending Clause jurisprudence, this Court made clear in *Arlington Central* that any inquiry into whether the IDEA is sufficiently clear as to the conditions placed on federal funding under it must be

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turns on the interpretation of the IDEA, not Section 1654, the Spending Clause is unquestionably implicated.

undertaken "from the perspective of a state official who is engaged in the process of deciding whether the State should accept IDEA funds and the obligations that go with those funds." 126 S. Ct. at 2459. Thus, in that case, the Court asked the crucial question "whether such a state official would clearly understand that one of the obligations of the Act is the obligation to compensate prevailing parents for expert fees." *Id.* Here, the crucial question is whether such a state official would clearly understand that one of the obligations of the Act is paying the high costs, and assuming the attendant burdens, of conducting federal court litigation against non-attorney parents bringing IDEA lawsuits *pro se*. The answer is plainly no.

First, the text of the IDEA is completely silent regarding the existence of any substantive rights for parents under it that would allow them to bring *pro se* actions on behalf of themselves or any provision that would indicate a parental right to bring a *pro se* civil action on behalf of minor children. *See* 20 U.S.C. § 1415(i)(2) (creating right to bring a civil action without specifying that *pro se* civil actions may be brought on behalf of minor children); *see also* Part I, *supra*; Resp. Br., Parts I, II (demonstrating that parents have neither substantive rights under the statute nor the right to proceed *pro se* on their child's behalf). In light of the clear statement requirement for Spending Clause legislation, if Congress intended for school districts to bear the increased costs of *pro se* litigation, *see* Part II, *supra*, as a condition for receiving federal funding under the IDEA, it was required to make that intent unambiguous in the text of the statute itself. The plain language of this statute provides school district officials with no notice at all, much less the clear notice required in Spending Clause legislation, that such litigation might occur under the IDEA. Indeed, if the statute were clear, six of the seven courts of appeals to have addressed

this issue surely would not have concluded that the parents may not bring *pro se* actions under the IDEA.

Second, not only has Congress not clearly expressed an intent to allow *pro se* civil actions under the IDEA, but in fact it has expressed just the opposite intent. As explained above, Congress made a conscious decision not to include in the final statute a provision that would have explicitly allowed for such actions. *See* Part I.B, *supra*. The consideration and rejection of that provision would have signaled to state officials determining whether to accept funds under the IDEA that Congress was satisfied with the overwhelming rejection of such suits by the federal courts, and did not intend to permit *pro se* civil actions by parents under the IDEA. School district officials are also undoubtedly aware of Congress's general effort to reduce administrative and litigation-related burdens under the Act, *see Schaffer*, 126 S. Ct. at 535, and this awareness makes it all the more likely that they would conclude that Congress did not intend to allow costly *pro se* litigation. At worst, the legislative history of the *pro se* provision would have rendered the issue of Congressional intent in this area highly ambiguous. But as discussed above, ambiguity cannot be condoned in the context of Spending Clause legislation when state officials must be afforded a fair opportunity to weigh the trade-offs associated with accepting conditional federal funding.

Third, a school district official looking at the structure of the IDEA as a whole would not be on clear notice of any intent on the part of Congress to allow *pro se* civil actions by parents under the statute. Congress included an authorization for parents to proceed without a lawyer on behalf of their minor children in administrative proceedings under the IDEA. *See* 20 U.S.C. §§ 1415(f)(1) (stating, *inter alia*, that "the parents . . . shall have an opportunity for an impartial due process hearing"), (h) (providing that parties to due process hearings have the right to be accompanied by coun-

sel). Given the contrast between this language contemplating proceedings without attorneys in the administrative context and the complete silence on that issue in the provision governing civil actions, a school district official undertaking a common-sense reading of the statute would naturally conclude that if *pro se* civil actions were permissible, Congress would have made that condition explicit as well.

Finally, imposing an additional condition for the receipt of federal funds – bearing the high costs of litigation against *pro se* parents in federal courts – on school districts that receive money under the IDEA is particularly inappropriate here because it would abrogate the clear, long-standing rule that a person cannot bring a *pro se* action on behalf of another. *See* 28 U.S.C. § 1654 ("the *parties* may plead and conduct *their own cases* personally or by counsel") (emphases added); *Herrera-Venegas v. Sanchez-Rivera*, 681 F.2d 41, 42 (1st Cir. 1982) ("The federal courts have consistently rejected attempts at third-party lay representation.") (citations omitted); *cf. United States v. Texas*, 507 U.S. 529, 534 (1993) ("In order to abrogate a common-law principle, the statute must 'speak directly' to the question addressed by the common law.").

For all of these reasons, Petitioners' interpretation of the IDEA is foreclosed by the clear notice requirement of the Spending Clause.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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