

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 JACOB WINKELMAN, A :

4 MINOR, BY AND THROUGH :

5 HIS PARENTS AND LEGAL :

6 GUARDIANS, JEFF AND :

7 SANDEE WINKELMAN, ET :

8 AL., :

9 Petitioners :

10 v. : No. 05-983

11 PARMA CITY SCHOOL :

12 DISTRICT. :

13 - - - - - x

14 Washington, D.C.

15 Tuesday, February 27, 2007

16

17 The above-entitled matter came on for oral  
18 argument before the Supreme Court of the United States  
19 at 10:03 a.m.

20 APPEARANCES:

21 JEAN-CLAUDE ANDRE, ESQ., Los Angeles, Cal.; on behalf of  
22 the Petitioners.

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1 DAVID B. SALMONS, ESQ., Assistant to the Solicitor  
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3 behalf of the United States, as amicus curiae,  
4 supporting the Petitioners.

5 PIERRE H. BERGERON, ESQ., Cincinnati, Ohio; on behalf of  
6 the Respondent.

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P R O C E E D I N G S

[10:03 a.m.]

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

ORAL ARGUMENT OF JEAN-CLAUDE ANDRE

ON BEHALF OF THE PETITIONERS

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

This case asks the Court to decide to what extent non-lawyer parents of a child with a disability may litigate an IDEA case pro se in Federal court.

Under two distinct theories, the answer to that question should be without limitation. But I would like to focus today on petitioner's primary and first theory, which is that parents are real parties in interest in IDEA suits regardless of the claims being asserted.

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

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

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

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

22 JUSTICE KENNEDY: If we say that the parents  
23 are the real party in interest and are entitled to sue  
24 in their own right, is that the end of the case, or do  
25 we reach the second -- a second question as to whether

1 or not they can represent the children?

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

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

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

1 There's a number of ways --

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

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

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

17 MR. ANDRE: Correct.

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

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

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

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

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



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

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

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

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

22 CHIEF JUSTICE ROBERTS: Isn't there a bit  
23 of -- there's a leap from saying they have these various  
24 procedural rights and they're are a party aggrieved by  
25 the decision rendered after the hearing, that's a

1 different question, isn't it?

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

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

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

20 MR. ANDRE: No, not at all,  
21 Justice Ginsburg. Congress sensibly recognized that  
22 because the process proceedings are run on a State by  
23 State basis, certain unauthorized practice of law  
24 statutes or other laws require prohibiting counsel in  
25 administrative proceedings might come into play. So

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

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

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

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

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

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

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

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

1 appropriate.

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

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

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

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

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

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

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

1 MR. ANDRE: Well, actually, if I could  
2 clarify one thing. If you look closely at section  
3 1415(h)(1), it does not provide that a parent can  
4 represent their child in the administrative proceeding.  
5 It just says that any party may litigate that  
6 administrative proceeding.

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

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

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

25 MR. ANDRE: Well, we thought that -- we

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

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

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

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

23 If parents can represent their -- can -- a  
24 non-lawyer parent can appear in court, isn't there a  
25 risk that in some instances where a lawyer could be



1 found if the parent made an effort to do that, they're  
2 going to be lured into trying to provide the  
3 representation themselves?

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

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

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

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

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

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

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

16 Mr. Salmons.

17 ORAL ARGUMENT OF DAVID B. SALMONS

18 ON BEHALF OF THE UNITED STATES,

19 AS AMICUS CURIAE, SUPPORTING PETITIONERS

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

22 Congress made parents of children with  
23 disabilities parties in their own right in  
24 administrative and judicial proceedings under the IDEA,  
25 and granted parents their own rights under the Act. One

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

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

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

17 MR. SALMONS: Well, I think that's right,  
18 Your Honor, but the difference here is that the statute  
19 in section 1412(a)(10)(C)(2), and this is on page 6A of  
20 Petitioner's brief, expressly provides a right to  
21 parents to seek reimbursement for the -- for their --  
22 the educational expenses that they incur.

23 And while the parents have to show that  
24 there was a denial of a free appropriate public  
25 education, we think it's clear that the statute makes

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

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

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

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

23 Our position is that parents share in the  
24 substantive right to a free appropriate public education  
25 under the Act. And there are two things we would point

1 to in regard to the definition of a free appropriate  
2 public education that we think makes this clear. And  
3 this is in section 1401 of the Act on pages 2A and 4A of  
4 Petitioner's brief.

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

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

14           JUSTICE SCALIA: I think you quoted from  
15 4(a).

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

1 education, is defined to mean "specially designed  
2 instructions at no cost to parents."

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

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

23           And when there is a dispute with regard to  
24 whether the IEP team has adopted the right educational  
25 program for the child, we think that the Act makes

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

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

11 MR. SALMONS: That's correct.

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

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

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

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

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

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

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

7 MR. SALMONS: Well --

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

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

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

24 JUSTICE SCALIA: Fine. You've given the  
25 procedure but where does the Act guarantee the parents



1 the proper outcome? The proper -- assignment?

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

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

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

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

22 MR. SALMONS: The right to initiate --

23 JUSTICE SCALIA: The right to initiate a  
24 suit solely on the basis -- not that I was denied  
25 procedures, not that I, I paid money for private

1 schooling, but I do not believe the outcome, the  
2 education given to my child in the public school was  
3 enough.

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

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

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

17 MR. SALMONS: They have a right --

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

22 MR. SALMONS: Our way of looking at the  
23 statute, Your Honor, says that if they are the ones that  
24 initiate the hearing, they file the complaint, they are  
25 parties to that hearing, then when, when their claims

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

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

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

23 And it refers to parents as a prevailing  
24 party. There are other provisions that do so as well  
25 and while we're on the topic of the 2004 amendments -- I

1 see my time is up.

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

4 Mr. Bergeron?

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

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

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

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

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

24 MR. BERGERON: Your Honor, I would classify  
25 that as not a right, it's a remedy. It is a remedy

1 premised on the denial of the FAPE to the child. And as  
2 a result, it is simply a derivative claim for the  
3 parents to recover those funds.

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

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

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

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

24 JUSTICE STEVENS: Why don't we go back to my  
25 other question to be sure I got your point. The

1 reimbursement is paid to whom?

2 MR. BERGERON: Your Honor --

3 JUSTICE STEVENS: The child or the parents?

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

8 JUSTICE STEVENS: You reimburse the child  
9 for money that his parents spent?

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

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

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

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

24 MR. BERGERON: You've got to assume --

25 JUSTICE STEVENS: Maybe, maybe these

1 children don't. Do they set up trust funds for these  
2 reimbursements?

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

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

13 MR. BERGERON: That's right.

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

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

22 JUSTICE STEVENS: But the guardian can't the  
23 funds that belong to the child.

24 MR. BERGERON: Well, but Your Honor, we  
25 believe that that's the pragmatic result that Congress

1 intended here.

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

8 MR. BERGERON: Well, Your Honor --

9 JUSTICE SOUTER: You can't have it -- you  
10 can't have it both ways.

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

21 JUSTICE BREYER: What is this to do -- I  
22 mean, I'm -- I'm puzzled about why we're talking about  
23 this complicated thing. I mean why -- the statute as I  
24 read it has a section and it's called procedural,  
25 procedural rights.



1 JUSTICE STEVENS: Yes.

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

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

19 I mean, I find that hard to read the statute  
20 that way.

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

24 JUSTICE BREYER: No, I'm not. I'm talking  
25 about the whole Act. Throughout the whole Act, they

1 talk about parents and students.

2 MR. BERGERON: Right.

3 JUSTICE BREYER: And who writes the check?

4 The student?

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

6 JUSTICE BREYER: No. Of course. The parent

7 writes the check. And has the interest? I have an

8 interest in educating my children as you do in yours.

9 And this statute talks about that throughout.

10 MR. BERGERON: Just --

11 JUSTICE BREYER: So I'm looking at the

12 particular words in the procedural section, and the

13 particular words explicitly say that every subsection is

14 both for parent, through child; and then we get to the

15 Court one and it talks about person aggrieved.

16 And you, I guess, have to convince me --

17 which as I'm putting it, sounds like an uphill battle --

18 (Laughter.)

19 JUSTICE BREYER: But you have --

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

21 JUSTICE BREYER: You have to convince me

22 that person aggrieved at the at the end of this section

23 is meant to apply to only some of the people whom every

24 other section talks about, namely just children, not

25 parents.

1 Now why should I read that it way?

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

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

18 JUSTICE SCALIA: What's that section you  
19 just alluded to? I'm blasting by it. Where is it, in  
20 the --

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

22 JUSTICE SCALIA: F --

23 MR. BERGERON: Oh, 1415(f)(3)(E), I'm  
24 focusing on 21 A of the blue brief, Your Honor. And  
25 once that section --

1 JUSTICE SCALIA: 21 A or -- -

2 MR. BERGERON: 21 A of the blue brief, Your  
3 Honor.

4 JUSTICE SCALIA: And which is the statutory  
5 section again.

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

7 JUSTICE SCALIA: I thought you said 14.

8 MR. BERGERON: (f)(3)(E).

9 JUSTICE SCALIA: Are you sure it's not  
10 18(a)?

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

16 JUSTICE SCALIA: It's in 18(a) of mine, too.  
17 Maybe I have a different brief there.

18 MR. BERGERON: That's not my brief, Your  
19 Honor, I apologize. In any event, it limits the hearing  
20 officer's ability to reward relief based on the  
21 substantive, whether the substantive right to the FAPE  
22 has been awarded or not. And then we return to  
23 Justice Breyer's point about the party aggrieved, the  
24 party aggrieved by the finding or decision. Because the  
25 decision is limited to substantive grounds, that is what

1 we are really talking about here. And I think one of  
2 the confusing aspects about what the nature of the  
3 substantive right is, and I think we've heard some  
4 different versions of that this morning, is what is the  
5 scope.

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

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

19           MR. BERGERON: I would not --

20           JUSTICE BREYER: He can't complain in court  
21 or -- well, it sounds as if you were saying that.  
22 You're saying that the hearing officer has to decide  
23 against the parent and if he doesn't decide against the  
24 parent, obviously the parent can't go into court because  
25 he doesn't have anything to complain about, the parent.

1 Isn't that your point?

2 MR. BERGERON: Well, he can't decide against  
3 the parent because the only issue at stake is the right  
4 of the child.

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

10 MR. BERGERON: Well, he won't have a right  
11 taken away from him because it's not -- it's not his  
12 claim at stake in the due process hearing.

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

15 MR. BERGERON: Right.

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

1 MR. BERGERON: That's correct, Your Honor.  
2 That's what it says.

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

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

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

24 The conceptual problem I have is that I  
25 don't understand why it makes sense to say that the

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

15 So conceptually, how do you defend the  
16 distinction that you make between substantive rights on  
17 one person and procedural rights in another?

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

20 The right, the substantive right is the  
21 right to a FAPE to the child. And because the child  
22 does not have capacity, Congress implemented a pragmatic  
23 system to allow the parents to protect those rights.  
24 It's derivative for the parent to protect the child's  
25 right --



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

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

13 JUSTICE GINSBURG: But that's when the child  
14 reaches majority.

15 MR. BERGERON: That's right.

16 JUSTICE GINSBURG: The child is no longer a  
17 child, the child is an adult.

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

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

21 MR. BERGERON: Oh. Well, what I'm trying to  
22 say is because the child lacks capacity, they can't do  
23 all these things on their own until they reach majority.  
24 But once they do and the rights transfer, it illustrates  
25 that it's not really the parents' rights, it is the

1 child's right that they are protecting.

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

6 Not only doesn't that help you, it seems to  
7 me it hurts you. It acknowledges that there are rights  
8 accorded to parents.

9 MR. BERGERON: Right. And those would be  
10 the procedural safeguards that are delineated in the  
11 Act.

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

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

25 JUSTICE SOUTER: Isn't that the problem? On

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

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

13 JUSTICE SOUTER: No, but before you direct  
14 me to cases --

15 MR. BERGERON: Okay.

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

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

24 JUSTICE SOUTER: Yeah, but instead of saying  
25 they're not eclipsed, you're saying they are totally

1 blocked out. Because you analysis, I thought was, in  
2 response to my earlier objection, that the procedural  
3 right, in fact, can only ultimately be invoked for the  
4 vindication of the substantive right. And because the  
5 substantive right is the child's, not the parents, it  
6 would follow that the parents cannot even invoke their  
7 procedural rights, and we know that that can't be  
8 correct.

9 MR. BERGERON: Right, and I'm not saying  
10 that the parent -- the parent's procedural rights are  
11 gone. I mean, remember --

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

21 MR. BERGERON: Yes.

22 JUSTICE SOUTER: Okay. Then why do not the  
23 parents, when they are claiming that they are aggrieved,  
24 have as much right to make a claim that goes to the  
25 substantive denial as to the procedural denial, simply

1 because the two are inseparable?

2 MR. BERGERON: Your Honor, because that --  
3 again, that was what Congress was trying to clarify in  
4 2004. And if you look at the DiBuo case and the Lesesne  
5 case cited on page 27 of the SG's brief, both those  
6 cases make clear that notwithstanding procedural  
7 violations, there must actually be a causation, there  
8 must actually be substantive harm before any relief can  
9 flow from that.

10 CHIEF JUSTICE ROBERTS: Does a parent have a  
11 right to bring a 1983 action if their procedural rights  
12 under this statute are interfered with by the state  
13 actors?

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

18 CHIEF JUSTICE ROBERTS: I think I understand  
19 your argument based on 3(E), but when I look at 21a of  
20 my blue brief there's another provision on attorneys'  
21 fees and it's phrased in a very curious way. It says  
22 that fees are allowed to a prevailing party who is the  
23 parent of a child with a disability. It seems to me  
24 that's the most difficult express language for you to  
25 deal with. It doesn't say attorneys' fees happen to be

1 allowed to parents, it's to a prevailing party who is a  
2 parent. And I understand your argument to be that a  
3 parent can never be a prevailing party.

4 MR. BERGERON: That's right. And let me try  
5 to explain why. If you look at 1411(e)(3)(E), which is  
6 5a of the red brief, and I'm sorry to keep jumping  
7 briefs on you, that provides that litigation brought to  
8 secure the right of the child to a FAPE is brought on  
9 behalf of the child. So Congress added both that  
10 section and the section you were just referring to at  
11 the same time, and the only way to read them  
12 harmoniously is that any action that is being brought on  
13 behalf of the child to secure the FAPE, it's not the  
14 parent's own action that they are bringing, they are  
15 bringing it on their own -- on behalf of the child.

16 JUSTICE SCALIA: What was the section you  
17 cited?

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

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

21 MR. BERGERON: Yes.

22 JUSTICE SCALIA: Legal fees. The  
23 disbursements under subparagraph (d) shall not support  
24 legal fees, court costs, or other costs associated with  
25 the cause of action brought on behalf of a child with a

1 disability to ensure a free and appropriate public  
2 education for such child.

3 What do you think that proves?

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

18 And I'd like to make the --

19 JUSTICE GINSBURG: There's a section you  
20 pointed to that says disbursements under subparagraph  
21 (d), but your brief doesn't include subparagraph (d).

22 MR. BERGERON: It's the high cost, one of  
23 the high cost funds for states, Justice Ginsburg.

24 I'd like to make --

25 JUSTICE GINSBURG: Well then, if this

1 provision is limited to subparagraph (d), how can you  
2 argue that it covers the waterfront?

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

12 Your Honor, I'd like to make one point, if I  
13 can, about the spending clause, in response to  
14 petitioner's argument in the reply brief.

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

22 CHIEF JUSTICE ROBERTS: Are attorneys' fees  
23 allowed to a parent who is bringing one of these cases  
24 on behalf of a child pro se?

25 MR. BERGERON: No.



1 CHIEF JUSTICE ROBERTS: It's a convoluted  
2 question. Okay. So there's no issue under the spending  
3 clause that a non-attorney parent would be able to claim  
4 some sort of attorneys' fees?

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

9 CHIEF JUSTICE ROBERTS: So how is the  
10 spending clause issue very significant in terms of the  
11 exposure of the school boards?

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

24 And their second point regarding the  
25 spending clause is that not every single detail needs to

1 be fleshed out in clear notice.

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

7 MR. BERGERON: No.

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

10 MR. BERGERON: Right.

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

13 MR. BERGERON: I'm sorry?

14 JUSTICE BREYER: States --

15 MR. BERGERON: Right.

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

21 MR. BERGERON: Well, Your Honor, it's a  
22 little bit different because part of the -- part of the  
23 real issue here is not necessarily an award of  
24 attorneys' fees to the other party, but it's the  
25 incurrence of attorneys' fees defending --

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

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

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

16 JUSTICE BREYER: Okay. It is an argument.

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

22 And their other argument on the spending  
23 clause is that it's, you don't have to flesh out  
24 everything in the statute but here we're talking about  
25 two core issues. One is abrogating the common rule law

1 and the other is creation of substantive rights to an  
2 entirely new class of beneficiaries.

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

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

20           And I'm just wondering how significant  
21 additional exposure we're talking about? And what turns  
22 on that is whether to take the spending clause argument  
23 seriously or not.

24           MR. BERGERON: Well -- and I think the  
25 answer to that is it's still not clear to me from --

1 from listening to the argument today, I mean, Petitioner  
2 acknowledged the child falls out of the equation.

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

8 JUSTICE GINSBURG: So if you agree we're  
9 talking about. What is the toll on the states, it seems  
10 to me that if the state would have to pay for a lawyer,  
11 if it lost, and that parents who brings the case is not  
12 entitled to reimbursement, how is the state's pocketbook  
13 affected?

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

18 CHIEF JUSTICE ROBERTS: Right. But you  
19 would have had to do that if they had gotten a lawyer to  
20 take the case. What, what your spending clause argument  
21 is, the State agreed to undertake this liability, that  
22 they would have to provide a free and appropriate  
23 education, that if they litigated, they would have pay  
24 the other side's attorneys' fees. But if they knew that  
25 in the case where an attorney wouldn't take it, the

1 parents could prosecute it, and that might result in  
2 overturning their decision and that might result in  
3 greater expense, well, in that case they would not have  
4 bought into this deal at all. That seems a little  
5 implausible.

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

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

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

24 JUSTICE KENNEDY: Could the court appoint  
25 the parent guardian ad litem and just the parent proceed

1 as guardian ad litem?

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

7 JUSTICE KENNEDY: The guardian ad litem  
8 cannot proceed pro se?

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

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

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

23 MR. BERGERON: Justice Souter, we don't  
24 because most of the circuits were saying this is --  
25 we're not going to allow pro se --

1 JUSTICE SOUTER: We don't have any First  
2 Circuit numbers --

3 MR. BERGERON: No.

4 JUSTICE SOUTER: -- versus other numbers?

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

7 JUSTICE SOUTER: Okay. Thank you.

8 CHIEF JUSTICE ROBERTS: Thank you,  
9 Mr. Bergeron.

10 Mr. Andre, you have three minutes remaining.

11 REBUTTAL ARGUMENT OF JEAN-CLAUDE ANDRE,

12 ON BEHALF OF PETITIONERS

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

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

21 On the page 153, that Respondent refers to,  
22 I assume that that point in time we were now on appeal  
23 to the second tier of the Ohio administrative  
24 proceeding, and perhaps at that point in time, Monarch  
25 School was actually paying for Jake's education on a



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

8 JUSTICE GINSBURG: Are you claiming that  
9 hiring an attorney would be a cost, if the phrase "at no  
10 cost to the parent," if they have to hire an attorney,  
11 that the cost --

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

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

24 MR. ANDRE: We don't know. The legislative  
25 record is entirely silent. But one plausible inference

1 could be, could be reached based on looking at the  
2 addition of attorney's fees provision and the timing of  
3 the Maroni decision in the First Circuit. Maroni came  
4 down after the parental lay representation provision was  
5 proposed by the Senate.

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

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

20 Finally, I would like to address two -- two  
21 points about the spending clause. Of course we believe  
22 the spending clause is totally inapplicable, but I want  
23 to respond to Respondent's suggest that we're advocating  
24 creation of a new substantive right here.

25 CHIEF JUSTICE ROBERTS: Why do you think

1 it's totally inapplicable?

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

7 CHIEF JUSTICE ROBERTS: Please --

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

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

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

21 CHIEF JUSTICE ROBERTS: Thank you, Counsel.  
22 The case is submitted.

23 [ Whereupon, the case in the above-titled  
24 matter was submitted at 11:04 a.m.]

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