Oral Argument in *Winkelman v. Parma City School District*

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.

No. 05-983

Washington, D.C. Tuesday, February 27, 2007

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

APPEARANCES:

Jean-Claude Andre, Esq. Los Angeles, Cal.; on behalf of the Petitioners.

David B. Salmons, Esq., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting the Petitioners.

Pierre H. Bergeron, Esq., Cincinnati, Ohio; on behalf of the Respondent.

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

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

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

JUSTICE KENNEDY: If we say that the parents are the real party in interest and are entitled to sue in their own right, is that the end of the case, or do we reach the second -- a second question as to whether or not they can represent the children?

MR. ANDRE: I don't think you would need a reach a second question, Justice Kennedy. It's our position that the remedies in an IDEA case are co-extensive and that the rights are inseparable. And so, this case was pleaded in such a way as to have both the parents and the child be before the court. But if this court were to agree with us on our first and primary theory,

we don't believe it would be necessary to have the child listed as a plaintiff to a future suit, and we imagine that on remand the child might be dismissed from the suit. It's our position that he's not an indispensable party.

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

MR. ANDRE: Well, clearly the relief primarily sought by my clients -- in fact, if you look just at the relief section of the complaint that my clients filed, which is in joint appendix, page 19, the only relief they actually seek is reimbursement. There's a number of ways -

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

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

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

MR. ANDRE: Correct.

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

MR. ANDRE: Well, in -- and this could be a very easy case if the Court wants to look just at the specific procedural violations that my clients assert and also the reimbursement claim that they assert. But it's of course our position also that the full bundle of rights can be asserted by parents. I think maybe the best way to answer your question, Justice Scalia, is that -- to direct you back to the definition of a free appropriate public education itself, and that's in

1401(9) and (29) in the statute. That definition provides that a free appropriate public education is one that's provided at no cost to parents. So if a school district provides a free and inappropriate public education, then it's the parents' obligation -- or not obligation -- they have the choice of whether to supplement the inappropriate public education with additional services, or to replace the public education with one that provides an appropriate bundle of services.

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

JUSTICE SCALIA: The child is. The child is entitled to an appropriate public education and the parents are entitled to have it provided free. That's really the only interest they have on the table, it seems to me, separate and apart from their status as representatives or guardians of the child.

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

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

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

CHIEF JUSTICE ROBERTS: Isn't there a bit of -- there's a leap from saying they have these various procedural rights and they're are a party aggrieved by the decision rendered after the hearing, that's a different question, isn't it?

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

requirement.

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

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

MR. ANDRE: No, not at all, Justice Ginsburg. Congress sensibly recognized that because the process proceedings are run on a State by State basis, certain unauthorized practice of law statutes or other laws require prohibiting counsel in administrative proceedings might come into play. So Congress had to make it express in section 1415(h)(1) that any party may appear in the administrative proceedings with or without counsel.

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

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

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

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

MR. ANDRE: That's correct, Mr. Chief Justice. But our primary theory in this case is not that parents are seeking to represent their children as lay advocates in court. Our primary

theory is that a parent suing under the statute is suing in their own right. In fact, that's why my clients pleaded this case with -- as -- with themselves on the caption, and asserted claims that are their own, because they believed that those claims are their own, and they believed they should be able to litigate those claims under section 1654.

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

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

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

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

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

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

MR. ANDRE: No, there was not. And then that brings me to my last point, which is, as

a practical matter, there is a very limited private special ed bar and they cherry-pick only the best cases. But that doesn't mean that all the cases that are left are frivolous or meritless. There's a whole universe of cases out there, some of which may be quite strong, some of which may be on the borderline, and some which may be meritless.

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

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

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

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

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

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

MR. ANDRE: Well, we thought that -- we believe that Congress thought of it as the parents because of all the statutory references to the parents' complaint. Of course, we don't take

the absurd position that the child could not also be a party to those proceedings.

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

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

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

If parents can represent their -- can -- a non-lawyer parent can appear in court, isn't there a risk that in some instances where a lawyer could be found if the parent made an effort to do that, they're going to be lured into trying to provide the representation themselves?

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

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

MR. ANDRE: I'm not sure we agree, with all due respect, Justice Scalia. But even if that's true, the nature of IDEA court action, I think, addresses some of the concern. These are not pure record review proceedings, like in merit systems protection board cases, or immigration cases. But they are quasi review proceedings. And so what we're advocating here is really access to the courts. Let the parents, whether they are brilliant writers or they're not so good at writing, let them at least have access to the courts, so that will then -- a capable district judge can look at the

case and decide whether the school should have complied with the statutory mandates.

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

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

CHIEF JUSTICE ROBERTS: Thank you, Mr. Andre.

Mr. Salmons.

ORAL ARGUMENT OF DAVID B. SALMONS

ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE, SUPPORTING PETITIONERS MR. SALMONS: Thank you, Mr. Chief Justice, and may it please the Court:

Congress made parents of children with disabilities parties in their own right in administrative and judicial proceedings under the IDEA, and granted parents their own rights under the Act. One of the rights granted expressly to parents is the right to seek reimbursement for private educational expenses when the parents believe the school has failed to provide an appropriate education.

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

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

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

And while the parents have to show that there was a denial of a free appropriate public education, we think it's clear that the statute makes the claim the parent's claim. And there are cases, for example, out of the Fourth District, in Emery, that would suggest that it is not even

clear that the child would have standing to assert a claim for reimbursement when they're not out of pocket any expenses.

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

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

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

Our position is that parents share in the substantive right to a free appropriate public education under the Act. And there are two things we would point to in regard to the definition of a free appropriate public education that we think makes this clear. And this is in section 1401 of the Act on pages 2A and 4A of Petitioner's brief.

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

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

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

MR. SALMONS: There's -- That's correct. The definition begins on page 2(a) "which says free appropriate public education on section 1401 and it says, "the term free appropriate public education means special education related services that -- and under subparagraph A have been provided at public expense under public supervision and direction and without charge -- Then in subparagraph 29 on page 4(a)the term special education is defined which is again the term from the definition of free appropriate public education, is defined to mean "specially designed instructions at no cost to parents."

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

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

And when there is a dispute with regard to whether the IEP team has adopted the right educational program for the child, we think that the Act makes parents, who again, who are full members of that team, when their views are rejected as far as what is appropriate, they are given the procedural safeguard of initiating a due process hearing. Again the Act refers repeatedly to -

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

MR. SALMONS: That's correct.

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

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

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

able to sue claiming that it was inadequate under the terms of the Act.

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

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

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

MR. SALMONS: Well -

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

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

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

JUSTICE SCALIA: Fine. You've given the procedure but where does the Act guarantee the parents the proper outcome? The proper -- assignment?

MR. SALMONS: Well, we think the way -

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

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

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

MR. SALMONS: The right to initiate -

JUSTICE SCALIA: The right to initiate a suit solely on the basis -- not that I was denied procedures, not that I, I paid money for private schooling, but I do not believe the outcome, the education given to my child in the public school was enough.

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

It referred to the parents' cause of action

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

MR. SALMONS: They have a right -

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

MR. SALMONS: Our way of looking at the statute, Your Honor, says that if they are the ones that initiate the hearing, they file the complaint, they are parties to that hearing, then when, when their claims are denied, they are parties aggrieved within the meaning of the statute. It's the same term, parties aggrieved, that refers to the right to an appeal in the administrative process that refers to the ability to initiate a civil cause of action.

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

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

And it refers to parents as a prevailing party. There are other provisions that do so as well and while we're on the topic of the 2004 amendments -- I see my time is up.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Salmons. Mr. Bergeron?

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

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

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

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

JUSTICE STEVENS: How do you classify right to reimbursement?

MR. BERGERON: Your Honor, I would classify that as not a right, it's a remedy. It is a remedy premised on the denial of the FAPE to the child. And as a result, it is simply a derivative claim for the parents to recover those funds.

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

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

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

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

JUSTICE STEVENS: Why don't we go back to my other question to be sure I got your

point. The reimbursement is paid to whom?

MR. BERGERON: Your Honor -

JUSTICE STEVENS: The child or the parents?

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

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

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

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

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

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

MR. BERGERON: You've got to assume -

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

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

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

MR. BERGERON: That's right.

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

MR. BERGERON: Well, because the claim would have to be brought on behalf of the

child, because they would not have the capacity to bring the claim itself, the award would go straight to the, to the guardian, who may be the parent that is proceeding on their behalf.

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

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

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

MR. BERGERON: Well, Your Honor -

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

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

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

JUSTICE STEVENS: Yes.

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

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

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

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

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

MR. BERGERON: Right.

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

MR. BERGERON: Generally, no, Your Honor.

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

MR. BERGERON: Just -

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

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

(Laughter.)

JUSTICE BREYER: But you have -

MR. BERGERON: I'll do my best.

JUSTICE BREYER: You have to convince me that person aggrieved at the at the end of this section is meant to apply to only some of the people whom every other section talks about, namely just children, not parents.

Now why should I read that it way?

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

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

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

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

JUSTICE SCALIA: F -

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

JUSTICE SCALIA: 21 A or --

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

JUSTICE SCALIA: And which is the statutory section again.

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

JUSTICE SCALIA: I thought you said 14.

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

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

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

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

MR. BERGERON: That's not my brief, Your Honor, I apologize. In any event, it limits the hearing officer's ability to reward relief based on the substantive, whether the substantive right to the FAPE has been awarded or not. And then we return to Justice Breyer's point about the party aggrieved, the party aggrieved by the finding or decision. Because the decision is limited to substantive grounds, that is what we are really talking about here. And I think one of the confusing aspects about what the nature of the substantive right is, and I think we've heard some different versions of that this morning, is what is the scope.

Petitioners in their reply brief seem to try to retreat a little bit and make the rights more

palatable. But if they -- in doing so, the question is, what is the right different than the child's right? And we simply do not have the answer to that, and for the school districts applying this act on a daily basis, and for courts interpreting it, it simply poses numerous problems trying to apply to a parent a statute that was designed to benefit children.

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

MR. BERGERON: I would not -

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

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

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

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

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

MR. BERGERON: Right.

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

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

JUSTICE BREYER: So, now it looks as if the parent has something to complain about.

The parent hasn't got the money that he was supposed to get. Now we have something to complain about, so therefore, we're aggrieved, and then the last section says an aggrieved person can go to court.

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

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

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

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

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

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

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

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

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

MR. BERGERON: That's right.

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

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

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

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

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

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

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

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

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

JUSTICE SOUTER: Isn't that the problem? On the analysis that you're coming up with, parents end up without even the procedural rights, because you're saying the only person who

can basically invoke a violation of procedural right is the person whose been denied the substantive right. The parent hasn't been denied the substantive right. Therefore, the parent cannot invoke even the procedural right which ostensibly on your own analysis, the parent has been given. That can't be correct.

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

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

MR. BERGERON: Okay.

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

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

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

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

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

MR. BERGERON: Yes.

JUSTICE SOUTER: Okay. Then why do not the parents, when they are claiming that they are aggrieved, have as much right to make a claim that goes to the substantive denial as to the procedural denial, simply because the two are inseparable?

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

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

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

CHIEF JUSTICE ROBERTS: I think I understand your argument based on 3(E), but when I look at 21a of my blue brief there's another provision on attorneys' fees and it's phrased in a very curious way. It says that fees are allowed to a prevailing party who is the parent of a child with a disability. It seems to me that's the most difficult express language for you to deal with. It doesn't say attorneys' fees happen to be allowed to parents, it's to a prevailing party who is a parent. And I understand your argument to be that a parent can never be a prevailing party.

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

JUSTICE SCALIA: What was the section you cited?

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

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

MR. BERGERON: Yes.

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

behalf of a child with a disability to ensure a free and appropriate public education for such child.

What do you think that proves?

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

And I'd like to make the -

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

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

I'd like to make -

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

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

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

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

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

MR. BERGERON: No.

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

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

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

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

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

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

MR. BERGERON: No.

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

MR. BERGERON: Right.

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

MR. BERGERON: I'm sorry?

JUSTICE BREYER: States -

MR. BERGERON: Right.

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

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

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

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

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

JUSTICE BREYER: Okay. It is an argument.

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

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

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

CHIEF JUSTICE ROBERTS: Well, that's where I have a little bit of trouble. It's not --

the underlying right is still the same. It's the right of the child to a free and appropriate public education. And that can be vindicated in court actions by attorneys who get their fees paid if they prevail, and all we're talking about is a situation where the parents can assert that same right when an attorney won't.

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Right. But you would have had to do that if they had gotten a lawyer to take the case. What, what your spending clause argument is, the State agreed to undertake this liability, that they would have to provide a free and appropriate education, that if they litigated, they would have pay the other side's attorneys' fees. But if they knew that in the case where an attorney wouldn't take it, the parents could prosecute it, and that might result in overturning their decision and that might result in greater expense, well, in that case they would not have bought into this deal at all. That seems a little implausible.

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

CHIEF JUSTICE ROBERTS: I'm not disputing that it results in additional exposure. I'm

just disputing that it affects the voluntariness of their agreement to undertake the program.

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

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

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

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

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

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

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

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

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

MR. BERGERON: No.

JUSTICE SOUTER: -- versus other numbers?

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

JUSTICE SOUTER: Okay. Thank you.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Bergeron.

Mr. Andre, you have three minutes remaining.

REBUTTAL ARGUMENT OF JEAN-CLAUDE ANDRE, ON BEHALF OF

PETITIONERS

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

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

On the page 153, that Respondent refers to, I assume that that point in time we were now on appeal to the second tier of the Ohio administrative proceeding, and perhaps at that point in time, Monarch School was actually paying for Jake's education on a grant-like basis, because that was something that happened in this case. And that perhaps at that point in time Petitioners referenced reimbursement to Monarch because Monarch had actually been expending the fund. But by and large my clients expended the funds to educate Jake at Monarch School, and they certainly did exhaust that claim to reimbursement.

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

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

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

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

Maroni was the first court of appeals case to recognize that parents may litigate these cases pro se. The way Maroni did it however was by adopting our primary argument here today, which is that parents possess the right to -- to sue in their own name, as pro se litigants, not as

lay representatives of their children, and seek to enforce the full bundle of rights.

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

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

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

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

CHIEF JUSTICE ROBERTS: Please -

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

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

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

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

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