No. 24-718

IN THE

Supreme Court of the United States

BLAKE WARNER,
Petitioner,

v.

SCHOOL BOARD OF HILLSBOROUGH COUNTY, FLORIDA,
Respondent.

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

BRIEF OF *AMICUS CURIAE* CAPABILITY CONSULTING, LLC IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[*]

Capability Consulting, LLC is a small business dedicated to disability-related education and advocacy. Founded in January 2024 by Melissa Ortiz, *amicus* provides disability-related services to companies and individuals. The company provides disability policy guidance, evaluations for Americans with Disabilities Act (ADA) compliance, and keynote speaking for private and public entities. *Amicus* also offers a mentoring program for young adults with disabilities.

Amicus and its founder Melissa Ortiz have a longstanding interest in providing appropriate education for Americans with disabilities. As a woman with a disability growing up before Congress passed the Individuals with Disabilities Education Act (IDEA), Ms. Ortiz was forced to rely on her own and her family's advocacy to receive appropriate accommodations. IDEA provides procedural safeguards ranging from mediation to due-process hearings to civil litigation to ensure that children with disabilities receive appropriate accommodations.

The decision below threatens those safeguards, by placing them out of reach of families that lack the resources to hire counsel required by the Eleventh Circuit's counsel mandate. *Amicus* urges this Court to grant certiorari and reverse.

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[*] Pursuant to Supreme Court Rule 37.6, *amicus* represents that this brief was not authored in whole or in part by any party or counsel for any party. No person or party other than *amicus* or its counsel made a monetary contribution to the preparation or submission of this brief. All parties received timely notice of *amicus's* intent to file this brief.

STATEMENT AND SUMMARY OF ARGUMENT

The decision below threatens the ability of minors to access the federal courts by imposing a counsel mandate that prevents parents who can otherwise vindicate their children's rights in court from proceeding pro se. This *amicus* brief explains how that counsel mandate affects children with disabilities in particular, by cutting off their access to remedies that Congress created to allow them to obtain an appropriate education from their public schools.

The counsel mandate that the Eleventh Circuit imposed is not justified by the statute that other courts have cited as justification for that mandate, 28 U.S.C. § 1654. Reading that provision to forbid parents' pro se prosecution of their children's case because it is not "their own" would also cut off the ability of parents to bring cases by counsel. The better source of authority on the question is Federal Rule of Civil Procedure 17, which bases capacity to sue on the state where the district court is located. In Florida, as in many states, parents may bring causes of action on behalf of their children, including on a pro se basis. That should have resolved the issue and allowed Blake Warner to bring J.W.'s suit here.

Courts across the country have also expressed skepticism about a counsel mandate for minor children. The decision below acknowledged that petitioner's argument was "appealing" before explaining how it was bound by circuit precedent. Pet. App. 8a. Recent decisions imposing the counsel mandate have shied away from defending it, resting instead on circuit precedent and even acknowledging that prior opinions imposing the mandate had engaged in "little

discussion" of its merits. *Maras* v. *Mayfield City Sch. Dist. Bd. of Educ.*, 2024 WL 449353, at *2 (6th Cir. Feb. 6, 2024). And recent decisions have also carved out exceptions from the counsel mandate. For instance, some circuits permit parents to appeal the denial of certain social security benefits pro se on behalf of their children, recognizing that many children, especially from low-income families, might otherwise have no means to appeal as a practical matter. *Adams ex rel. D.J.W.* v. *Astrue*, 659 F.3d 1297, 1300 (10th Cir. 2011). Often, the exceptions are justified in cases where the interests of parent and child are seen as closely aligned. *E.g.*, *Kennedy* v. *Sec'y of Health & Hum. Servs.*, 99 Fed. Cl. 535, 547 (2011), *aff'd*, 485 F. App'x 435 (Fed. Cir. 2012) (per curiam). These exceptions further undermine support for a policy that is supposedly based in a federal statute that contains no exceptions.

The impact of this ill-conceived policy is felt particularly strongly by children with disabilities attempting to receive appropriate educational accommodations through IDEA. Children with disabilities are more likely to come from impoverished backgrounds, which makes the cost of procuring specialized education law counsel prohibitive in many instances. IDEA's statutory scheme depends on parental involvement and advocacy, but a counsel mandate threatens to cut parents out or price them out if a dispute between parents and their children's school escalates into litigation. And the mandate at the litigation stage stands in sharp contrast to the pro se representation that IDEA allows at the administrative, mediation, and due process hearing stages. The counsel

mandate poses a real barrier to disability accommodation in education through IDEA.

ARGUMENT

I. THIS COURT'S REVIEW IS NEEDED TO CLARIFY THAT 28 U.S.C. § 1654 DOES NOT IMPOSE A COUNSEL MANDATE.

The Eleventh Circuit's holding below and the circuit precedent it was based upon find no support in the U.S. Code or the Federal Rules. To the contrary, as the petition explains well, several canons of statutory construction counsel against reading any counsel mandate into the federal statute.

A. Neither 28 U.S.C. § 1654 nor Federal Rule 17 Prohibits Parents Representing Minors pro se in Federal Court.

The Federal Rules of Civil Procedure provide that, as relevant here: "Capacity to sue or be sued is determined * * * by the law of the state where the court is located." Fed. R. Civ. P. 17(b). They further allow that for children in particular, "a general guardian" "may sue or defend on behalf of a minor." *Id.* 17(c)(1). Taken together, these two provisions lead to the straightforward conclusion that a guardian's capacity to sue on behalf of his or her minor child is determined based on state law.

Florida law allows parents to file lawsuits on behalf of their minor children, including on a pro se basis. Florida civil procedure provides that when a minor has a guardian, that guardian "may sue or defend on behalf of the minor." Fla. R. Civ. P. 1.210(b). In fact, the Florida Supreme Court has concluded that a minor may only act through his or her guardian in

court: "Children ordinarily cannot sue on their own behalf. * * * Instead, children's claims can only be brought by and through 'a guardian or other like fiduciary,' or in the absence of any such representative 'by next friend or by a guardian ad litem.'" *D.H.* v. *Adept Cmty. Servs., Inc.*, 271 So. 3d 870, 877 (Fla. 2018) (quoting Fla. R. Civ. P. 1.210(b)). Therefore, parents have been vested with the responsibility of defending the rights of their children in court under Florida law and "ha[ve] standing in [their] capacity as 'next friend' to file the suit on behalf of [their] minor children." *Goodman* v. *Goodman*, 126 So. 3d 310, 314 (Fla. Dist. Ct. App. 2013); *accord Gordon* v. *Colin*, 997 So. 2d 1136, 1137 (Fla. Dist. Ct. App. 2008) ("[T]he parent having primary residential custody is the one who has standing to bring a suit on behalf of the child for an alleged injury to the child." (quotation marks omitted)). At least one recent Florida appellate court decision has concluded that this ability of parents to sue on behalf of their children extends to cases where the parent is proceeding pro se. *A.C.* v. *Agency for Health Care Admin.*, 322 So. 3d 1182, 1183 (Fla. Dist. Ct. App. 2019) (concluding "authority for [a parent's] pro se representation of her disabled daughter can be discerned from various sources," citing Florida statutes and Constitution). In this case, Florida law should have conclusively established Blake Warner's ability to bring claims on behalf of J.W. pro se.

Courts that have reached a contrary conclusion have imposed a counsel mandate based on a mistaken reading of 28 U.S.C. § 1654. That section provides that in federal courts, "the parties may plead and conduct their own cases personally or by counsel." 28 U.S.C. § 1654. This provision provides for pro se

representation in federal courts, and it stems from the Judiciary Act of 1789, which provided "in all the courts of the United States, the parties may plead and manage their own causes personally or by the assistance of * * * counsel." Ch. 20, § 35, 1 Stat. 73, 92. According to this wooden reading, parents may not bring their child's case pro se because the cause of action is not "their own."

But a "good textualist is not a literalist." Antonin Scalia, *A Matter of Interpretation* 24 (1997). First, as petitioner explains (at 13), under the statute's text, parents would also be prohibited from bringing their child's claims by counsel under the reasoning of decisions embracing a counsel mandate. The adverbs "personally or by counsel" both modify the parties who "conduct their own cases." Therefore, if "own cases" creates a restriction on the type of action that a parent may bring, then it does so for parents who bring that action "by counsel" as well. *Cf.* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 147 (2012) ("Scalia & Garner") (under the series-qualifier canon, adverb reaches the entire phrase); *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 68 (1994) ("most natural grammatical reading" is that adverb modifies surrounding verbs). Taken to its logical conclusion, this overly restrictive interpretation of "own cases" would take away a child's right to sue entirely, since state law assigns their cause of action to their parents to bring by counsel, if not pro se. Under Florida law, "[c]hildren ordinarily cannot sue on their own behalf." *D.H.*, 271 So. 3d at 877 (quotation marks omitted). In this case, if Blake Warner cannot bring J.W.'s claim by counsel either, then J.W.'s access to the federal courts is cut off

completely, which cannot be the intention of the statute.

Second, as petitioner explains (at 14), overreading "own cases" to impose a counsel mandate for children also runs afoul of the constitutional avoidance canon. This Court has consistently held in statutory cases that "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." *Jones* v. *United States*, 529 U.S. 848, 857 (2000) (quotation marks omitted); Scalia & Garner at 247–51 (explaining the constitutional-doubt canon). As the petition explains (at 5–13), interpreting "own cases" to bar parents from bringing cases on behalf of their children pro se raises serious constitutional issues for the rights of both parents and children. The clearer constitutional path is to interpret "own cases" to include cases which a parent may bring as the representative of a child under state law, rather than requiring parents to hire counsel in order to bring this exact same case.

The decisions imposing a counsel mandate misconstrue 28 U.S.C. § 1654, where the phrase "their own cases" should be read to include causes of action assigned to parents by state law as well. The ability of parents to sue on behalf of their children pro se is better resolved by reference to state law, as Federal Rule 17 explicitly requires, which in this case would allow Blake Warner to pursue J.W.'s claims in federal court on a pro se basis.

B. Circuit Courts Have Questioned the Assumption that Parents Cannot Litigate pro se on Behalf of Their Children in Federal Courts.

Recently, the rationale underlying the decision below—that parents cannot represent their children pro se in federal court—has come under increasing scrutiny. As the Eleventh Circuit noted in this case, both federal and Florida law prohibit children from suing on their own. Pet. App. 8a; Fed. R. Civ. P. 17(c); Fla. R. Civ. P. 1.210(b). This inability of children to sue on their own behalf, combined with concerns about non-lawyer representation of third parties, *see Devine* v. *Indian River Cnty. Sch. Bd.*, 121 F.3d 576, 581 (11th Cir. 1997), led the court to reaffirm, as it had held earlier in *Devine*, that "a parent may not advance his child's cause of action *pro se*." Pet. App. 9a. At the same time, however, the court recognized the "appeal[]" of Warner's policy argument that the federal courts should not be effectively creating a "counsel mandate" for children. *Id.* at 8a.

This counsel mandate for children has vexed federal courts for some time. Two decades ago, the Second Circuit noted that "[a]though the rule stems largely from our desire to protect the interests of minors, we think it may, in some instances, undermine a child's interest in having claims pursued for him or her when counsel is as a practical matter unavailable," and that in some cases the rule "may force minors out of court altogether." *Tindall* v. *Poultney High Sch. Dist.*, 414 F.3d 281, 286 (2d Cir. 2005) (citation omitted). Recently, other circuit courts considering this issue have recognized similar concerns. The Fifth Circuit has gone the furthest to address the problem,

making a "course correction" to its 28 U.S.C. § 1654 jurisprudence, and noting that although prior authority "ha[d] adopted an absolute bar against pro se parent representation," this was done "without fully accounting for the text of § 1654." *Raskin ex rel. JD* v. *Dallas Indep. Sch. Dist.*, 69 F.4th 280, 285–86 (5th Cir. 2023). The Fifth Circuit determined that the district court should have considered whether federal or state law made the children's claims the parent's "own" before it dismissed the case for lack of standing. *Id.* at 282–83, 287.

Separately, the Federal Circuit recently considered this question and permitted pro se representation in the parent-child context. In a Vaccine Act case, the Federal Circuit *sua sponte* requested supplemental briefing on whether 28 U.S.C. § 1654 permitted "pro se representation by one family member of another * * * in federal courts" before determining that the parents could proceed pro se on behalf of their minor child—finding this to be "consistent with some of [its] own non-precedential decisions." *W.J. ex rel. R.J.* v. *Sec'y of Health & Hum. Servs.*, 93 F.4th 1228, 1236–37 (Fed. Cir. 2024).

Other circuit courts have likewise expressed unease about the counsel mandate. For example, the Ninth Circuit noted that the issue "unquestionably raises concerns with grave implications for children's access to justice" but was settled by circuit precedent. *Grizzell* v. *San Elijo Elementary Sch.*, 110 F.4th 1177, 1180–81 (9th Cir. 2024). The Sixth Circuit also voiced concerns—in a case it had otherwise determined to be moot—that federal courts had adopted this rule "[i]n opinions with little discussion." *Maras*, 2024 WL 449353, at *2, *5 (recognizing the issue "raise[s]

important questions about the ability of parents with limited means to vindicate the constitutional rights of their children").

Despite their increasing unease with the counsel mandate, courts have been reluctant to part with it. Instead, they tend to fall back to a series of policy rationales to justify an uncomfortable rule. As petitioner details (at 15–20), federal courts sometimes characterize this rule as part of the prohibition against non-lawyers representing others or as incidental to the regulation of the practice of law. These decisions sometimes suggest that the mandate protects children or that it preserves the child's right to individual autonomy.

As both the petitioner and Judge Oldham have recently argued, these policy justifications are simply insufficient, in part because they would functionally bar many children from low-income families from federal court. *See Raskin*, 69 F.4th at 287–99 (Oldham, J., dissenting in part and concurring in the judgment); Pet. 15–20. The rule also specifically hinders the ability of parents of children with disabilities to safeguard and protect the rights of their children. Indeed—as discussed in further detail in section II, *infra*—although federal law seeks to guarantee the rights of children with disabilities, the counsel mandate serves to functionally close the courthouse doors to many families of children with disabilities—who may be low-income, and who may not be able to represent their children's interests at all absent the ability to proceed pro se.

Setting aside the rationale of the rule writ large, the counsel mandate for children has already yielded

to various exceptions. These exceptions undermine the rule's most stringent textual interpretation—that 28 U.S.C. § 1654 does not "permit[] a parent to represent his/her child in federal court," *Devine*, 121 F.3d at 581, and call into question the soundness of the rule's justification.

First, several circuit courts have created an exception to the rule for parents seeking supplemental security income benefits on behalf of their minor children under the Social Security Act. These are cases where courts have determined that "non-attorney parent[s] may proceed *pro se* in federal court on behalf of [a] minor child to challenge the denial of [supplemental security income] benefits." *Astrue*, 659 F.3d at 1300. This exception exists because courts have concluded the reasoning for the general rule prohibiting parents from litigating the claims of their minor children does not apply. Courts have explained that in these circumstances, minors in low-income families "usually cannot exercise the right to appeal" except by their parent or guardian, and that "prohibiting non-attorney parents from proceeding *pro se* [on behalf of their minor child] * * * would jeopardize seriously the child's statutory right to judicial review." *Id.* at 1300–01 (quotation marks omitted); *see also Harris* v. *Apfel*, 209 F.3d 413, 416–17 (5th Cir. 2000); *Machadio* v. *Apfel*, 276 F.3d 103, 106–07 (2d Cir. 2002).

Second, the Federal Circuit has also relaxed this rule in the context of Vaccine Act cases. These are cases where individuals can seek compensation for injuries sustained as a result of vaccination. Case law under the Vaccine Act has created an exception here under the rationale that, "as in the social security

context, the interests of parent and child here are 'closely intertwined.'" *Kennedy*, 99 Fed. Cl. at 547.

Third, this rule has also been relaxed in other particular and discrete circumstances. For instance, in *Elustra* v. *Mineo*, the court relaxed the counsel mandate, allowed a parent to file a Rule 59(e) motion pro se for her children during a relatively short period of time (of approximately one month) when the parent "was in the process of lining up new counsel and while the 10-day clock that applied * * * for Rule 59(e) motions was ticking," and determined that the motion would not be "a nullity because [the family] did not yet have replacement counsel." 595 F.3d 699, 705–06 (7th Cir. 2010).

As the petition explains (at 24), these exceptions undermine the force of the statutory mandate that the decisions adopting a counsel mandate purport to derive from 28 U.S.C. § 1654. If the phrase "their own cases" bars parental pro se representation of minors, then it does so across the board.

II. A COUNSEL MANDATE FRUSTRATES THE ABILITY OF MINOR STUDENTS TO RECEIVE DISABILITY ACCOMMODATIONS FROM SCHOOLS.

The Individuals with Disabilities Education Act (IDEA) "ensur[es] that the rights of children with disabilities and parents of such children are protected" as the children receive a free education. *Winkelman ex rel. Winkelman* v. *Parma City Sch. Dist.*, 550 U.S. 516, 523 (2007) (quoting 20 U.S.C. § 1400(d)(1)(B)). This goal requires full parental involvement at all stages—both substantive, like developing the child's Individual Education Plan (IEP), and procedural, like

advocating for the child in mediation and due-process hearings with state education agencies. By curtailing parents' involvement in securing IDEA's promises for their children with disabilities, a counsel mandate threatens the rights guaranteed to both parents and children by federal law.

A. Families of Children with Disabilities Are More Likely to Live in Poverty, Hindering Access to IDEA's Benefits.

For children in the United States, disability and poverty are inextricably intertwined. Studies have found that 28% of children with disabilities in America lived in poverty, compared to only 16% of children without disabilities. Jiyeon Park et al., *Impacts of Poverty on Quality of Life in Families of Children with Disabilities*, 68 Exceptional Children 151, 152 (2002). And among secondary-school students with disabilities, 37% lived in households with family incomes below $25,000, compared to 20% of children generally. Eloise Pasachoff, *Special Education, Poverty, and the Limits of Private Enforcement*, 86 Notre Dame L. Rev. 1413, 1432 (2011). Mothers of children with disabilities are far less likely to earn income—especially in single-mother households, where childhood disability "may be financially devastating." Shirley L. Porterfield, *Work Choices of Mothers in Families with Children with Disabilities*, 64 J. Marriage & Fam. 972, 972 (2002). Children with disabilities tend to experience familial wealth disparities with the result that "low-income students are overrepresented in special education" compared to "their more affluent peers." Grace Tatter, *Low-Income Students and a Special Education Mismatch*, Harv. Grad. Sch. of Educ. (Feb. 21, 2019).

Under IDEA's private-enforcement mechanism, these financially vulnerable families often bear the costs associated with protecting their own rights. Unsurprisingly, poorer parents struggle to invest the substantial time and money required to navigate IDEA's dispute-resolution process. Indeed, one federally funded national study revealed that "districts serving families with the highest median family income were more likely to have" parent-initiated due-process cases, mediations, and litigation "than districts serving families with the middle or lowest median family income." Pasachoff, *supra* at 1426. Nationwide, "only four percent of the lowest income and ten percent of middle-income districts had due process hearings, while fifty-two percent of the highest income districts did." *Id.*

What's more, all parents seeking counsel for IDEA enforcement face a "scarcity of representation" due to "shortages nationwide" of willing and able counsel. *Maroni* v. *Pemi-Baker Reg'l Sch. Dist.*, 346 F.3d 247, 257 n.9 (1st Cir. 2003). The severe deficit results from lawyers "reluctant to take on cases * * * characterized * * * by voluminous administrative records, long administrative hearings, and specialized legal issues, without a significant retainer." *Collinsgru* v. *Palmyra Bd. of Educ.*, 161 F.3d 225, 236 (3d Cir. 1998). As a result, the few attorneys specializing in this complex area of law often cater to more affluent clients who can afford to pay up front. *See Maroni*, 346 F.3d at 257–58 (in IDEA proceedings, "attorneys' fees are a partial incentive at best, as they are awarded only to prevailing parties").

B. IDEA Empowers Parents to Fight for the Education of their Children with Disabilities, but a Counsel Mandate Hinders that Objective.

IDEA guarantees a number of protections for parents and their children with disabilities. Parents are part of the "individualized education program team" to help craft their child's IEP and modify it as needed. 20 U.S.C. § 1414(d)(1)(B)(i). If schools violate IDEA or the IEP, parents have multiple options: initiating mediation, *id.* § 1415(e); lodging a complaint with the state education agency, *id.* § 1412(a)(11); 34 C.F.R. § 300.151(a); conducting a due-process hearing, 20 U.S.C. § 1415(f)(3)(C); appealing unfavorable hearing results to the state educational agency, *id.* § 1415(g)(1); and, if all other options fail, "bring[ing] a civil action" in state or federal court, *id.* § 1415(i)(2)(A).

IDEA's protections are increasingly vital as America's population of children with disabilities continues to climb: The number of IDEA-served students rose from 6.4 million to 7.5 million from 2012 to 2022—an increase from 13 to 15 percent of all students enrolled in public school. Inst. of Educ. Stats., U.S. Dep't of Educ., *Report on the Condition of Education 2024*, at 3 (2024). These students rely on IDEA to secure their rights, and IDEA, in turn, relies on parents to engage with schools at every step of their children's education.

This Court has recognized "the legislative conviction" expressed in IDEA that parents fully participate in their children's education, from "development of the IEP" to navigating "every stage of the administrative

process" required to enforce it. *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cnty.* v. *Rowley*, 458 U.S. 176, 205–06 (1982). Since the 1975 passage of IDEA's predecessor, Congress has worked to steadily amplify parental involvement and advocacy. The statute's amendments in 1997 and 2004 strengthened parental access to information, consent to all education services, and involvement in IEP development.

Despite IDEA's strong emphasis on parental representation and advocacy throughout all administrative proceedings, parents still lack clarity on their freedom to represent their children pro se if disputes ultimately reach federal court. *See Winkelman*, 550 U.S. at 535 (explicitly declining to reach the issue of whether IDEA "entitles [non-attorney] parents to litigate their child's claims *pro se*"). Such a "counsel mandate" can be devastating to IDEA's cooperative structure. Without guidance on how to access the capstone of IDEA's protections—the right to sue when all else fails—indigent parents may simply forfeit their rights and their children's rights rather than risk the prohibitive costs of continuing the fight in litigation.

This dilemma is especially cruel because low-income parents are less likely to succeed in due-process hearings, and are thus more likely to require litigation to protect their children's rights. A five-year study of 343 IDEA due-process hearings in Illinois found that "[r]epresentation by an attorney is the most important single predictor" of the hearing's outcome. Melanie Archer, *Access and Equity in the Due Process System: Attorney Representation and Hearing Outcomes in Illinois, 1997–2002*, at 7 (2002). Schools have representation "more than twice as frequently as parents,"

leading to victory for 50.4% of parents with representation and just 16.8% of parents without it. *Id.* Indigent parents are thus more likely to face the choice of whether to pursue litigation to challenge an adverse due-process hearing. Their decision should not be driven by uncertainty about whether that path requires the expense of obtaining legal counsel.

IDEA's fee provisions also render a counsel mandate particularly damaging to low-income families. Congress added a fee-shifting structure in 1986 "out of concern about the lack of lawyers taking IDEA cases." M. Brendhan Flynn, *In Defense of* Maroni*: Why Parents Should Be Allowed to Proceed* Pro Se *in IDEA Cases*, 80 Ind. L.J. 881, 884 (2005). But the amendment created a disincentive for IDEA attorneys by providing that school districts may recover their attorneys' fees "against the attorney of a parent" if the IDEA claim was "frivolous, unreasonable, or without foundation," or if the litigation was intended "to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation." 20 U.S.C. § 1415(i)(3)(B)(i)(II)–(III). By placing attorneys personally at risk for schools' fees based, potentially, on their clients' subjective motives, IDEA deters representation for parents, but not for schools. So in addition to a scarcity of IDEA attorneys and the costs of representation, parents could struggle to secure counsel due to skepticism about their motivation—or perceived motivation—for bringing suit in the first place. This fee-shifting threat significantly undermines all parents' negotiating power with schools while reinforcing indigent parents' fear of IDEA suits that might eventually impose a prohibitive cost.

Even if parents succeed in securing legal counsel, IDEA bars full reimbursement because it does not authorize recovery of parents' expert witness fees. *Arlington Cent. Sch. Dist. Bd. of Educ.* v. *Murphy*, 548 U.S. 291, 293–94 (2006). Expert testimony is crucial to IDEA cases because "[w]ithout skilled experts to counter the expertise enjoyed by school systems, parents are at a distinct disadvantage." Elisa Hyman et al., *How IDEA Fails Families Without Means: Causes and Corrections from the Frontlines of Special Education Lawyering*, 20 Am. U. J. Gender Soc. Pol'y & L. 107, 141 (2011). This additional, and often substantial, expense places yet another hurdle in the path of low-income families already facing the difficulty of affording representation due to a counsel mandate.

Finally, the Department of Education has acknowledged that schools have engaged in gamesmanship to thwart indigent parents' enforcement actions under IDEA. U.S. Dep't of Educ., *Dear Colleague Letter on Use of Due Process Procedures After a Parent Has Filed a State Complaint* (Apr. 15, 2015). Rebuking agencies for filing targeted due-process complaints against parents who had filed less-expensive complaints with state education agencies, the Department admonished agencies for trapping parents in "a potentially more adversarial, lengthy, and costly" proceeding that the parents had acted to avoid "precisely because of the time, expense, and complexity" it requires. *Id.* at 4. Such antics illustrate that low-income parents are already vulnerable to financial pressure tactics even absent a counsel mandate, and these obstacles can deter concerned parents by inflating the price of their relief.

Leveraging a counsel mandate, schools could also nullify a pro se parent's success in the administrative process by simply appealing the case to federal court, forcing the parent to either hire counsel to defend their victory or surrender to avoid the bill. Another available tool to evade IDEA's protections is removal. IDEA guarantees parents the right to sue in state or federal court, 20 U.S.C. § 1415(i)(2)(A), and some states permit pro se parental representation, *e.g.*, N.H. Rev. Stat. Ann. § 311:1 (2006). But pro se parents in such states are defenseless against a school's choice to remove an IDEA case to federal court, where a counsel mandate would force the parent to then pay for counsel or abandon their case.

These loopholes—available only due to a counsel mandate—stand against congressional intent by threatening parents' and children's rights to litigate IDEA actions when administrative remedies have failed. Clarifying that parents may represent their children pro se would safeguard the IDEA process and further the statute's objective.

C. IDEA Authorizes Parents to Represent Their Children in Academic, Administrative, and Dispute Resolution Proceedings, and No Reason Exists to Ban Parents from Continuing that Representation in Court.

Shortly after IDEA became law, this Court described it as "no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process as it did upon the measurement of

the resulting IEP against a substantive standard." *Rowley*, 458 U.S. at 205–06 (citation omitted). In short, IDEA values parents' *procedural* involvement as highly as their *substantive* involvement. A counsel mandate unnecessarily and unjustifiably curtails both forms of parental advocacy.

From the outset, "IDEA designates parents as part of the IEP team," requiring parental membership in "any group making decisions regarding the educational placement of their child." *Maroni*, 346 F.3d at 256 (citing 20 U.S.C. § 1414(d)(1)(B)(i); *id.* § 1414(f)). Because "IDEA expressly contemplates that parents will act as advocates for their children at every stage of the administrative process," its "regulations actually discourage parents and school districts from bringing attorneys to IEP meetings." *Id.*

To help parents become the best possible advocates for their children with disabilities, IDEA authorizes the establishment of "parent training and information centers" to equip parents to, among many other skills, "participate in decisionmaking processes" for their children. 20 U.S.C. § 1471(a)(1), (b)(4)(C). Parents are so central to IDEA's structure and mission that "whenever the parents of the child are not known," schools may appoint "an individual to act as a surrogate for the parents" "to protect the rights of the child." *Id.* § 1415(b)(2)(A).

When schools fail to uphold their obligations under IDEA, parents may file a complaint with the appropriate state education agency or represent their child in mediation. 20 U.S.C. § 1415(b)(6), (e)(2). IDEA also authorizes parents to initiate and conduct due-process hearings pro se, including the right to

"present evidence and confront, cross-examine, and compel the attendance of witnesses." *Id.* § 1415(f)(3)(C), (h)(1)–(2). Though parents may vindicate their own rights under IDEA via such hearings, *Winkelman*, 550 U.S. at 535, children have constitutional due-process rights that require, at least, "notice and opportunity for hearing" before they may be deprived of their liberty and property interests in their education, *Goss* v. *Lopez*, 419 U.S. 565, 576, 579 (1975). This means that due-process hearings under IDEA are not solely for the sake of the parents' interest in their child's education, but also for the child's own constitutionally protected interests. Thus, IDEA's protection of parents' right to conduct due-process hearings pro se is a guarantee that parents may represent their children in administrative proceedings in addition to themselves. "[A]ny party aggrieved" by the results of the due-process hearing—including pro se parents—may appeal it to the state education agency. 20 U.S.C. § 1415(g)(1).

Finally, once a parent has exhausted all administrative options, they and their children—as the "part[ies] aggrieved"—"shall have the right to bring a civil action" in state or federal court. 20 U.S.C. § 1415(i)(2)(A). Only at this point do the rights guaranteed by IDEA become doubtful. A counsel mandate casts a sudden shadow of uncertainty over all proceedings just after the lengthy and laborious administrative gauntlet has been run. Parents who have successfully represented their children pro se in, potentially, mediation, a complaint filed with their state education agency, a due-process hearing, and an appeal of that hearing to the state education agency, may abruptly find that the statutory scheme (as interpreted

by decisions like the one below) has lost faith in them to advocate for their children in federal court. And children, likewise, may find their rights thrown into jeopardy despite their legal guardian's competent and successful representation throughout IDEA's administrative labyrinth.

A counsel mandate for IDEA litigation harms children with disabilities and their families, serves no defensible purpose, and contravenes the text and structure of IDEA as a whole. IDEA safeguards children's right to their parents' pro se representation throughout all of its administrative proceedings, and that right should not cease simply because a dispute escalates to litigation.

CONCLUSION

For the reasons stated above, the Court should grant the petition.

Respectfully submitted,

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