No. 05-983

In The
# Supreme Court of the United States

JACOB WINKELMAN, *et al.*,

*Petitioners,*

v.

PARMA CITY SCHOOL DISTRICT,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit**

## RESPONDENT PARMA CITY SCHOOL DISTRICT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether in adhering to the long-standing rule prohibiting lay representation of another's legal interests in court, the Sixth Circuit properly concluded non-attorney parents may not represent their child in court under the Individuals With Disabilities In Education Act ("IDEA").

## RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent Parma City School District states that it is not a subsidiary or affiliate of any corporation including any publicly held corporation.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued



STATUTES AND REGULATIONS

TABLE OF AUTHORITIES – Continued



MISCELLANEOUS

TABLE OF AUTHORITIES – Continued

## RESPONDENT'S BRIEF IN OPPOSITION

## OPINIONS BELOW

In addition to the opinion and order included in the Petition, Respondent includes the September 20, 2005 Order of the United States Court of Appeals for the Sixth Circuit in related case *Winkelman v. Parma City Sch. Dist.*, Case No. 04-4159 (6th Cir. 2004) as the court below referenced this order in the decision that Petitioners ask this Court to review. This order, (Respt. App., *infra.*, 1b-4b), is unreported and is available at 2005 U.S. App. LEXIS 20355.

## STATUTORY PROVISIONS INVOLVED

In addition to Section 1415(i)(2)(A) of the Individuals With Disabilities In Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.*, cited by Petitioners, Section 1415(f)(1), Section 1415(h) and 34 C.F.R. § 303.422(b)(2) are also at issue. Section 1415(f)(1) provides "parents . . . an opportunity for an impartial due process hearing" while Section 1415(h) and 34 C.F.R. § 303.422(b)(2) provide parents at state administrative due process hearings the "right to be accompanied and advised by counsel and by individuals with special knowledge or training * * * [and] present evidence and confront, cross-examine, and compel the attendance of witnesses." 20 U.S.C. § 1415(f)(1); 20 U.S.C. § 1415(h); 34 C.F.R. § 303.422(b)(2).

## INTRODUCTION

Once stripped of the sympathies and emotions that exist in any special education dispute, this case is a textbook example of a matter that does not warrant this Court's review as it merely involves application of well-settled law. In an unpublished interlocutory decision, the Sixth Circuit

adhered to the customary rule that non-attorneys may not represent the interests of another in court, concluding non-attorney parents may not prosecute their child's substantive IDEA[1] claims in court without legal representation.

There is no basis for this Court to intervene and judicially legislate an exception to this time-honored rule into the IDEA. First, Congress has repeatedly declined to abrogate the venerable common-law principle that non-attorneys cannot represent the interests of another in court. Indeed, while Congress provided non-attorney parents the express right to prosecute their child's IDEA actions during state ***administrative*** proceedings, as recently as the 2004 Reauthorization of the IDEA, it has declined the opportunity to provide a corresponding right during ***judicial*** review. It is well-settled that absent an express, clear Congressional intent to the contrary, common-law principles apply to statutes. Thus, the "party aggrieved" language relied upon by Petitioners merely allows non-attorney parents to bring a suit through counsel on their child's behalf. It does not give parents the right to act as the legal representative in that suit. As the decision below does not threaten the effective enforcement of the IDEA, but instead remains faithful to the IDEA's plain language and Congressional intent, the petition should be denied.

Second, legitimate policy considerations support Congress' refusal to abrogate the common-law rule against lay representation of another's interests in court. Not only is there a strong state interest in regulating the practice of

[1] In 2004, Congress amended and reauthorized the IDEA, renaming it the Individuals With Disabilities In Education Improvement Act ("IDEIA"). Since Petitioners refer to IDEA, Respondent will do likewise.

law, minor children with disabilities cannot make an informed choice to assume the risk of proceeding without counsel.

Third, Petitioners' alleged square and irreconcilable 1-4-1 split is illusory and premature. The Sixth Circuit joined four other circuits in finding that parents may not prosecute their child's substantive IDEA claims in court without an attorney. Petitioners' allegation that the Sixth Circuit created a three-way split by barring parents from proceeding *pro se* on their own procedural claims paints the picture with too broad a brush. The issue of whether a parent can proceed *pro se* with his/her own procedural claims was never presented to the Sixth Circuit – nor is it the focus here. Rather, the issue expressly before the Sixth Circuit was whether non-attorney parents could represent their children in court. Thus, Petitioners' alleged 1-4-1 split is illusory.

Nor is the split "intractable." In light of Congress' recent decision not to enact a proposed provision allowing parents to represent their child's legal claims in court, the lone circuit taking this position may reconsider given Congress' considered refusal to amend the IDEA on this point. Therefore, a square and irreconcilable split does not exist and this Court should deny the petition.

Finally, this case is not an appropriate vehicle for certiorari. For the majority of the proceedings, Petitioners have not been *pro se* but instead have been represented by counsel. They have also complied with a Sixth Circuit order to obtain counsel in a related appeal. Further, other less procedurally and factually complex cases resulting in a final, as opposed to an interlocutory, order would be a better vehicle for certiorari. Moreover, as Respondent has prevailed at all levels in this case, Petitioners are unlikely

to succeed on the merits of their appeal before the Sixth Circuit regardless of how this Court resolves the *pro se* representation issue.

For these reasons, as it has done with previous petitions on the same issue, *Devine v. Indian River County Sch. Bd.*, 121 F.3d 576 (11th Cir. 1997), *cert. denied*, 522 U.S. 1110 (1998); *Wenger v. Canastota Centr. Sch. Dist.*, 146 F.3d 123 (2d Cir. 1998), *cert. denied,* 526 U.S. 1025 (1999), this Court should deny the petition.

## STATEMENT OF THE CASE

### A. Statutory Framework And Legislative History.

#### 1. The IDEA Does Not Give Parents The Right To Legally Represent Their Child In Court.

As Petitioners note, the statutory framework of the IDEA provides parents with significant procedural protections to ensure their full participation "in the IEP process" and "at every stage of the administrative process." Pet. at 3. (citations omitted). One procedural protection is the express right for a parent to act as their child's legal representative during state administrative proceedings. 20 U.S.C. § 1415(f)(1); 20 U.S.C. § 1415(h). The IDEA does not extend this same right to parents during the judicial review process. 20 U.S.C. § 1415(i)(2)(A). This exclusion comports with the venerable common-law rule that non-attorneys may not represent the interests of another in court.

### 2. Congress Recently Refused To Enact A Proposed Amendment Providing Parents The Right To Prosecute Judicial IDEA Actions On Behalf Of Their Child.

In 2003, the Senate Committee on Health, Education, Labor and Pensions reviewed the IDEA and considered various amendments as part of the reauthorization process. *See generally* S. Rep. No. 108-185, 108th Cong., 1st Sess. (2003). The committee issued a report recommending a proposed amendment regarding the very issue presented by Petitioners:

> It is unquestioned that parents have the right to bring a [due process] complaint and participate in a due process hearing without an attorney.
>
> However, there has been disagreement as to whether a parent may, in effect, 'represent' their child in a civil action that results from an appeal of a due process hearing. ***The committee is aware of the current conflict between a number of federal circuit courts regarding this issue, and understands that some courts have decided this issue based upon a distinction between procedural and substantive claims brought by a parent.***
>
> ***Both Federal and State laws generally prevent a non-attorney parent from representing his or her child in a court proceeding, as these laws provide that a person can only represent himself or herself, and not proceed on behalf of their minor child. Moreover, it is well-settled law that a minor is disqualified from representing himself or herself in a civil action.***
>
> * * *
>
> [T]he committee believes that parents have a right to represent their child in court, without a lawyer, for purposes of IDEA law, regardless of

> whether their claims involve procedural or substantive issues. ***Therefore, the committee has amended section 615(i)(2) to clarify that a parent of a child with a disability may represent the child in any action under this part in State or Federal court, without the assistance of an attorney.***

*Id.* at 41-42 (emphasis added).

Yet, despite knowledge of the conflict among the courts, and the Committee's recommendation, Congress chose not to enact the proposed amendment which would have allowed parents to prosecute IDEA claims in court. Thus, the IDEA still does not include any express provision that abrogates the common-law principle prohibiting lay representation of another in court. 20 U.S.C. § 1415(i)(2).

### B. Factual And Procedural Background.

Contrary to Petitioners' claim that they cannot afford an attorney, they have been represented during the bulk of these complex proceedings, including during the administrative proceedings, before the District Court, and on a related appeal at the Sixth Circuit.

The fundamental underlying dispute arises from an alleged substantive error regarding Jacob Winkelman's least restrictive environment ("LRE"). Pet. App. 5a. On June 5, 2003, Petitioners filed a request for due process, alleging the Individualized Education Plan ("IEP") offered by Respondent did not offer Jacob a free appropriate public education ("FAPE"). *Id.* Prior to the hearing, the Impartial Hearing Officer (IHO) held that Jacob's stay-put placement during the pendency of the hearing was the Achievement Center for Children ("Achievement Center"). *Id.* Petitioners did not place Jacob at the Achievement Center but instead unilaterally placed him at the private

Monarch School prior to the start of the 2003-04 school year. *Id.*

On February 25, 2004, after conducting a due process hearing, the IHO issued a 56-page decision finding the program offered by Respondent provided Jacob a FAPE. *Id.* 6a. The Petitioners appealed this decision to a State Level Review Officer ("SLRO"). After reviewing the extensive record, on June 2, 2004, the SLRO concluded the IHO did not err in finding Respondent offered Jacob a FAPE. *Id.* Petitioners were represented by counsel throughout the state administrative proceedings. Pet. at 6.

On July 15, 2004, Petitioners, *pro se*, appealed the SLRO's decision to the U.S. District Court for the Northern District of Ohio. *See* Compl. at 10; Pet. App. 6a. On August 23, 2004, Petitioners filed a Motion for Temporary Restraining Order asking the District Court to issue an order making Monarch School Jacob's stay-put placement during the pendency of the court proceedings. Pet. Mot. for TRO 1, 18. The District Court denied the motion on August 24, 2004. *See* Aug. 24, 2004 Order. On September 13, 2004, Petitioners filed a Motion for Reconsideration requesting that the District Court overturn its August 24, 2004 stay-put ruling. Pet. Mot. Reconsider. On September 23, 2004, while their Motion for Reconsideration was pending, Petitioners, *pro se*, filed an interlocutory appeal of the District Court's denial of their request for a stay-put injunction. *See* Not. App. in *Winkelman v. Parma City Sch. Dist.*, Case No. 04-4159 (6th Cir. 2004) (hereinafter "Case No. 04-4159").[2] That same day, Petitioners filed an "Emergency

[2] As the docket in Petitioners' related appeal is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned," this Court may take judicial notice of it. FED. R. EVID. 201(b)(2). In the interest of brevity, Respondent will not

(Continued on following page)

Motion for Injunction Pending Appeal" requesting that the Sixth Circuit "stay" the District Court's August 24, 2004 Order and make the Achievement Center Jacob's stay-put placement. Pet. Em. Mot. Inj. 1, Case No. 04-4159.[3] The next day, Petitioners filed an "Emergency Motion for a Temporary Injunction Pending Adjudication of Request for Permanent Injunction" requesting that the Sixth Circuit issue an order placing Jacob at the Achievement Center. Pet. Em. Mot. Temp. Inj. 4, Case No. 04-4159.[4] Both "emergency" motions were denied. *See* Nov. 4, 2004 Order and March 3, 2005 Order, Case No. 04-4159.[5]

While the proceedings in related Case No. 04-4159 were ongoing, Petitioners obtained counsel to represent them in the District Court proceedings in the instant case and in March 2005, the parties briefed the substantive merits. *See* Pet. Mot. for SJ 16-17; Pet. App. 6a. On June 2, 2005, Judge Manos resolved the underlying dispute finding that the state-appointed hearing officers did not err in concluding Respondent had offered Jacob a FAPE and denied Petitioners' request for reimbursement for Jacob's unilateral placement at Monarch School. Pet. App. 23a. On July 1, 2005, proceeding *pro se*, Petitioners appealed Judge Manos' decision to the Sixth Circuit Court of Appeals. *See* Notice of Appeal.

On September 20, 2005, pursuant to its decision in *Cavanaugh v. Cardinal Local Sch. Dist.*, 409 F.3d 753 (6th Cir. 2005), the Sixth Circuit ordered Petitioners to obtain counsel for Jacob in their related appeal on the stay-put

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continue to recite the text of the rule each time it cites to the docket of this case but instead will merely cite to the judicial notice rule.

[3] FED. R. EVID. 201(b)(2).

[4] *Id.*

[5] *Id.*

issue, Case No. 04-4159, within 30 days. Respt. App., *infra,* 1b-4b.[6] On October 18, 2005, Petitioners retained Jean-Claude André, their counsel in the instant matter, to represent them in Case No. 04-4159. Respt. App. 5b-6b.[7] On January 25, 2006, after supplemental briefing and hearing oral arguments from counsel for both parties, the Sixth Circuit denied Petitioners' appeal regarding the stay-put issue. *See* Jan. 25, 2006 Order, Case No. 04-4159.[8]

On November 4, 2005, the Sixth Circuit ordered Petitioners to obtain counsel for Jacob in the instant case within 30 days. Pet. App. 1a-2a. In response, Petitioners filed a Motion for Stay Pending Certiorari with the Sixth Circuit which was denied on December 1, 2005. Petitioners then filed, through counsel, an Application for Stay Pending Certiorari to this Court which was granted on December 2, 2005. This petition followed.

## REASONS FOR DENYING THE PETITION

### I. THE DECISION BELOW COMPORTS WITH THE IDEA'S PLAIN LANGUAGE AND UNWAVERING CONGRESSIONAL INTENT.

This Court should reject the Petition as it asks this Court to effectively preempt the Congressional legislative process and legislate changes to the IDEA from the bench. Not only does this Court have an "obligation to avoid

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[6] As the court below referenced this September 20, 2005 order in the decision that Petitioners ask this Court to review, Respondent believes this decision is part of the record. Alternatively, it is properly appended hereto pursuant to Supreme Court Rule 14(i)(ii), or this Court may take judicial notice of it pursuant to Federal Rule of Evidence 201(b)(2).

[7] FED. R. EVID. 201(b)(2).

[8] *Id.*

judicial legislation," *United States v. Nat'l Treasury Employees*, 513 U.S. 454, 479 (1995), there is no reason for this Court to intervene. Congress has repeatedly decided to uphold the common-law ban on lay representation in court in IDEA actions. Therefore, in adhering to the well-settled prohibition against lay representation, the Sixth Circuit, along with four other circuits, remained faithful to the plain language of the IDEA and Congressional intent.

### A. Congress Did Not Abrogate The Common-Law Ban On Lay Representation Of Another's Interests In Court When It Originally Enacted The IDEA.

Consistent with the IDEA and Congressional intent, the Sixth Circuit and four other circuits properly applied the customary and long-standing rule that non-attorneys may not represent the interests of another in court under the IDEA. The "well-settled presumption" is that "Congress understands the state of existing law when it legislates." *Bowen v. Massachusetts*, 487 U.S. 879, 896 (1988); *see also Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-185 (1988). In fact, "courts may take it as a given that Congress has legislated with an expectation that the [common-law] principle will apply except 'when a statutory purpose to the contrary is evident.'" *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991). Further, "to [show that Congress intended to] abrogate a common-law principle, the statute must '***speak directly***' to the question addressed by the common law." *United States v. Texas,* 507 U.S. 529 (1993) (emphasis added).

Here, it is well-settled that a non-attorney may not represent the interests of another in court. *See e.g., Herrera-Venegas v. Sanchez-Rivera*, 681 F.2d 41, 42 (1st Cir. 1982) (noting that federal courts have consistently

rejected attempts at third-party lay representation); *Guajardo v. Luna*, 432 F.2d 1324, 1325 (5th Cir. 1970). This prohibition extends to non-lawyer parents representing their minor children in court. *See Devine*, 121 F.3d at 581-82; *Johns v. County of San Diego*, 114 F.3d 874, 876-877 (9th Cir. 1997) (compiling cases holding that non-attorney parents may not proceed *pro se* on behalf of their children); *Osei-Afriyie v. Medical College of Pa.*, 937 F.2d 876, 883 (3rd Cir. 1991); *Cheung v. Youth Orchestra Found.*, 906 F.2d 59, 61 (2d Cir. 1990); *Meeker v. Kercher*, 782 F.2d 153, 154 (10th Cir. 1986). Congress did not deviate from the default rule against lay representation in the IDEA as the statute fails to "speak directly" to the issue. Instead, the plain text of the IDEA speaks directly to the issue of non-attorney parents representing their child's interests only in administrative proceedings – not judicial proceedings.

As this Court recently explained in applying the default burden of persuasion rule to the IDEA:

> The plain text of IDEA is silent on the allocation of the burden of persuasion. We therefore begin with the ordinary default rule that plaintiffs bear the risk of failing to prove their claims. . . . Absent some reason to believe that Congress intended otherwise, therefore, we will conclude that the burden of persuasion lies where it usually falls, upon the party seeking relief.

*Schaffer v. Weast*, 126 S. Ct. 528, 534-35 (2005). As in *Schaffer*, there is no reason to believe Congress intended that the IDEA deviate from the default rule banning non-attorney representation of another's interests in court. To the contrary, although Congress included a provision allowing parents to proceed *pro se* at administrative hearings, it rejected a proposed amendment that would have included a corresponding right to represent their

child's interest in court. 20 U.S.C. § 1415(f)(1); 20 U.S.C. § 1415(h); 20 U.S.C. § 1415(i)(2)(A). Under the canon of *expressio unius est exclusio alterius*, Congress' considered refusal to include this provision implies that non-attorney parents cannot represent their children *pro se* in court. As the Sixth Circuit explained in *Cavanaugh*:

> The Cavanaughs can point to no language in the IDEA that abrogates the common law rule that non-lawyers may not represent litigants in court. To the contrary, the language of the IDEA evidences a congressional intent to prohibit non-lawyer parents from representing their minor children in suits brought under its provisions. The IDEA explicitly grants parents the right to a due process hearing as part of the administrative proceedings provided for by the statute, and the regulations provide to the parents the right to present evidence and examine witnesses on behalf of the child in such a proceeding. 20 U.S.C. § 1415(f)(1); 34 C.F.R. § 303.422(b)(2). In stark contrast, the provision of the IDEA granting "[a]ny party aggrieved" access to the federal courts, 20 U.S.C. § 1415(i)(2)(A), makes no mention of parents whatsoever. Applying the canon of *expressio unius est exclusio alterius*, which says that the mention of one thing implies the exclusion of another, . . . we conclude that the IDEA does not grant parents the right to represent their child in federal court.

*Cavanaugh*, 409 F.3d at 756 (internal citation omitted). *See also Collinsgru v. Palmyra Bd. of Educ.*, 161 F.3d 225, 232 (3rd Cir. 1998) ("That it did not also carve out an exception to permit parents to represent their child in federal proceedings suggests that Congress only intended to let parents represent their children in administrative proceedings.").

Again, this Court's rationale in the recent *Schaffer* decision is instructive:

> Petitioners in effect ask this Court to assume that every IEP is invalid until the school district demonstrates that it is not. The Act does not support this conclusion. IDEA . . . includes a so-called "stay-put" provision, which requires a child to remain in his or her "then-current educational placement" during the pendency of an IDEA hearing. § 1415(j). Congress could have required that a child be given the educational placement that a parent requested during a dispute, but it did no such thing.

*Shaffer*, 126 S. Ct. at 536. Likewise, Congress could have expressly allowed non-lawyer parents to proceed *pro se* on behalf of their children in court. Yet despite the opportunity to do so mere months after acknowledging a judicial split, Congress did no such thing. The fact that it did not compels the conclusion that Congress did not intend to abrogate the common-law rule and give parents the right to prosecute their child's IDEA actions in court without an attorney.

Petitioners' reliance upon the IDEA's "party aggrieved" language and the First Circuit's rationale in *Maroni v. Pemi-Barker Reg'l School District*, 346 F.3d 247 (1st Cir. 2003) is misplaced. According to the *Maroni* court, because the IDEA allows "any party aggrieved" by a final administrative decision to "bring a civil action"[9] in federal court, non-attorney parents may prosecute their child's IDEA claims *pro se*. *Maroni*, 346 F.3d at 250. This interpretation runs *contra* to the majority interpretation of similar language contained in Rule 17(c) of the Federal Rules of Civil Procedure. Rule 17(c) provides that "whenever an

[9] 20 U.S.C. § 1415(i)(2)(A).

infant or incompetent person has a representative, such as a general guardian, . . . the representative may sue or defend on behalf of the infant or incompetent person." FED. R. CIV. P. 17(c). As numerous courts have concluded, this rule allows the guardian to sue on the incompetent person's behalf; it does not allow a non-attorney guardian to represent the child in court. *See Navin v. Park Ridge Sch. Dist. 64*, 270 F.3d 1147 (7th Cir. 2001) (non-custodial parent could not bring suit on behalf of himself and his son, acting as the son's next friend, because parent "was free to represent himself, but as a non-lawyer he has no authority to appear as [son's] legal representative"); *Johns*, 114 F.3d at 876-877; *Devine*, 121 F.3d at 581-82; *Osei-Afriyie*, 937 F.2d at 882; *Cheung*, 906 F.2d 59; *Meeker*, 782 F.2d at 154. Likewise, the IDEA's "party aggrieved" language does not give non-lawyer parents the right to represent their child in court. Rather, it allows them to obtain counsel to seek judicial review of state administrative proceedings.

Therefore, this Court should reject Petitioners' call to usurp the Congressional legislative process.

### B. Congress Again Declined To Abrogate The Common-Law Rule When It Reauthorized The IDEA In 2004.

The fact that Congress recently considered this issue ***but declined to amend the IDEA to allow non-attorney parents to represent their children in court*** underscores the fact that there is no reason for this Court to intervene and judicially legislate an amendment that Congress expressly rejected. As Petitioners point out, the Senate Committee charged with studying the IDEA "devoted significant attention to the issue" in 2003 when it considered the reauthorization of the IDEA. Pet. at 16. As

discussed *supra*, the Committee recognized that some courts found that the plain language of the IDEA did not allow non-lawyer parents to represent their child without an attorney in court. S. Rep. No. 108-185, 108th Cong., 1st Sess. 41-42 (2003). In response, the Committee drafted a provision modifying the IDEA to expressly include such a right. *Id.* Yet, when it amended the IDEA less than a year later, Congress did not embrace the proposed amendment.[10] Given the Committee's express recognition that courts were interpreting the existing language as not allowing parents to proceed *pro se* in court, if Congress intended for parents to have such a right, it would have enacted the proposed amendment. As Congress did not enact the amendment, this Court's intervention is not warranted.

## II. LEGITIMATE POLICY CONSIDERATIONS SUPPORT CONGRESS' REFUSAL TO ABROGATE THE COMMON-LAW RULE UNDER THE IDEA.

Substituting judicial legislation for the Congressional legislative process is also not warranted as legitimate policy considerations support the rule against non-attorney legal representation of minor children in court. As the *Collinsgru* court noted, there is a strong state interest in regulating the practice of law as well as preventing vexatious claims:

> First, there is a strong state interest in regulating the practice of law. Requiring a minimum level of competence protects not only the party

[10] Significantly, as before, Section 1415(i)(2)(A) of the reauthorized IDEA still fails to grant non-attorney parents a right to proceed *pro se* on behalf of their children in judicial proceedings. 20 U.S.C. § 1415(i)(2)(A).

> that is being represented but also his or her adversaries and the courts from poorly drafted, inarticulate, or vexatious claims. . . . The second consideration is the importance of the rights at issue during litigation and the final nature of any adjudication on the merits. Not only is a licensed attorney likely to be more skilled in the practice of law, but he or she is also subject to ethical responsibilities and obligations that a lay person is not.

*Collinsgru*, 161 F.3d at 231 (citations omitted). A review of the docket in these proceedings supports the interests expressed in *Collinsgru*.

Another policy consideration is a child's inability to make an informed choice to assume the risk of proceeding without counsel. When a competent adult chooses to proceed without counsel, the adult has knowingly assumed the risk of mistakes associated with untrained representation. *Graham-Humphreys v. Memphis Brooks Museum of Art, Inc.*, 209 F.3d 552, 561 (6th Cir. 2000) ("In particular, a willfully unrepresented plaintiff volitionally assumes the risks and accepts the hazards, which accompany self representation."). However, the same cannot be said for Jacob and other minor disabled children. As the Second Circuit noted:

> The choice to appear *pro se* is not a true choice for minors who under state law, cannot determine their own legal actions. There is thus no individual choice to proceed *pro se* for courts to respect. . . . It goes without saying that it is not in the interests of minors or incompetents that they be represented by non-attorneys. Where they have claims that require adjudication, they are entitled to trained legal assistance so their rights may be fully protected.

*Cheung*, 906 F.2d at 61 (internal citations omitted).

Simply put, love and passionate advocacy for a child cannot substitute for appropriate legal training in a court of law. *Osei-Afriyie v. Medical College of Pennsylvania* particularly illustrates the risks associated with minor children being represented by well-intentioned non-attorney parents. In *Osei-Afriyie,* a father brought numerous tort claims on behalf of himself and his two daughters relating to the daughters' medical treatment for malaria. *Osei-Afriyie*, 937 F.2d 876. On appeal after a defense verdict, the Third Circuit noted that the district court had erroneously failed to instruct the jury on equitable tolling and directly attributed this error to Osei-Afriyie's lack of experience and legal training. *Osei-Afriyie*, 937 F.2d at 882. According to the court, "Osei-Afriyie is a well-educated economist. He is not, however, a lawyer, and his lack of legal experience has nearly cost his children the chance ever to have any of their claims heard." *Id.* The appellate court ultimately remanded the case to the district court and vacated the judgments against the children because the parent, as a non-lawyer, "was not entitled to represent his children in place of an attorney." *Id.* at 883.

These policy considerations are especially important in IDEA cases due to the procedural and substantive complexity of this area of the law. The fact that the IDEA allows parents to represent their children *pro se* during administrative proceedings does not obviate this risk. Court proceedings are more complex and formal than state administrative proceedings. For example, the Rules of Civil Procedure and Evidence are often applied loosely or not at all in administrative hearings.

The alleged difficulty in obtaining counsel to prosecute IDEA disputes does not overcome the risks associated with inadequate representation by non-lawyer parents. First, Petitioners paint an incomplete picture regarding legal

options available to parents with limited financial resources. While Petitioners are quick to note that 36% of the children receiving special education services live in households with incomes of $25,000 or less, Pet. at 15, they fail to recognize that these children may qualify for court-appointed counsel. *See* 28 U.S.C. § 1915(e). Additionally, low-cost[11] or *pro bono* legal services may be available. Indeed, Petitioners successfully obtained *pro bono* counsel both for the instant petition as well as the supplemental merit briefing in their related Sixth Circuit appeal, Case No. 04-4159. Respt. App. 5b-7b, 16b-17b.[12] They also were able to obtain legal representation for the bulk of the District Court proceedings below. *See generally* Docket in *Winkelman v. Parma City Sch. Dist.*, Case No. 1:04CV-1329 (N.D. Ohio 2004). Notably, Petitioners have not alleged that they attempted to obtain counsel and were turned down. Therefore, Petitioners' dire prediction that the decision below will allow school districts that lose at the administrative level to obtain *de facto* reversal if they seek judicial review against a parent of limited financial means is pure speculation. The IDEA also allows for reimbursement of attorney's fees to prevailing parents. 20 U.S.C. § 1415(i)(3)(b).

Finally, while Petitioners' claim about the alleged plight of parents of limited financial resources is sympathetic, it is the responsibility of Congress, not this Court, to abrogate the common-law rule barring lay representation. Petitioners fail to point to any IDEA provision that "directly speaks" to this issue and abrogates the prohibition

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[11] Congress apparently recognized parents may have limited financial resources and expressly required school districts to provide parents involved in due process proceedings with a list of free or low-cost legal services available in the area. 34 C.F.R. § 300.507(a)(3).

[12] FED. R. EVID. 201(b)(2).

on non-lawyers representing the interests of another in court. Therefore, certiorari should be denied.

## III. PETITIONERS' ALLEGED SQUARE AND INTRACTABLE THREE-WAY CIRCUIT "SPLIT" IS ILLUSORY AND PREMATURE.

### A. There Is No Three-Way Split.

Petitioners mischaracterize the circuits as being in a "well-recognized 1-4-1 split" regarding whether and under what circumstances non-lawyer parents may prosecute an IDEA case in court. Respondent agrees that five circuits have found that non-attorney parents may not represent their child in court on an IDEA action alleging violations of ***substantive*** rights. *See Mosley v. Bd. of Educ.*, 434 F.3d 527, 532 (7th Cir. 2006); *Cavanaugh*, 409 F.3d 753; *Collinsgru*, 161 F.3d at 231; *Wenger*, 146 F.3d at 124-26; *Devine*, 121 F.3d at 582. Further, one lone circuit has found that parents may proceed *pro se* on behalf of their child in an IDEA action regardless of whether substantive or procedural violations are alleged. *Maroni*, 346 F.3d at 249-50.

However, Petitioners read both the Sixth Circuit's decision in *Cavanaugh v. Cardinal Local School District* and in the instant case[13] too broadly when they assert that these decisions create a three-way split by imposing an absolute bar to parents' ability to bring an IDEA action *pro se* in court. In *Cavanaugh*, no procedural violations were at issue.[14] Instead, the *Cavanaugh* court found that parents

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[13] The decision below applied the *Cavanaugh* precedent. This Court's review was not sought in *Cavanaugh*.

[14] The *Cavanaugh* court framed the issue as follows: "The Cavanaughs, who are not lawyers, argue that their appeal is properly before this court because: 1) they may represent Kyle's rights under the IDEA

(Continued on following page)

cannot proceed *pro se* on a joint substantive rights theory. As the court explained:

> We are mindful that the IDEA does grant parents of disabled students a narrow set of procedural rights, *see Wenger*, 146 F.3d at 126; *Collinsgru*, 161 F.3d at 233, which include a parent's right to participate in meetings that evaluate the child's performance, 20 U.S.C. § 1415(b); to receive prior written notice whenever the agency proposes a change to the IEP, 20 U.S.C. § 1415(b)(3); and to participate in due process hearings. 20 U.S.C. § 1415(f)(1). However, these procedural rights exist only to ensure that the child's substantive right to a FAPE is protected and do not confer on the parents a vicarious, ***substantive*** right to a ***FAPE.***
>
> * * *
>
> Adopting instead the reasoning of *Collinsgru*, 161 F.3d at 232-37, we hold that the right of [sic] disabled child to a FAPE belongs to the child alone, and is not a right shared jointly with his parents. Therefore, any right on which the Cavanaughs could proceed on their own behalf would be derivative of their son's right to receive a FAPE, and wholly dependent upon the Cavanaughs' proceeding, through counsel, with their appeal on Kyle's behalf.

*Cavanaugh*, 409 F.3d at 757 (emphasis added). The *Cavanaugh* court's reference to adopting the *Collinsgru* court's

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and 2) the IDEA grants them a cognizable right of their own to a ***FAPE*** for their son." *Cavanaugh*, 409 F.3d at 755 (emphasis added). The right to a FAPE is not an enumerated procedural right given to parents under the IDEA but instead is one of the fundamental substantive rights provided by the IDEA. 20 U.S.C. § 1400(d)(1)(A) (FAPE substantive right); 20 U.S.C. § 1415(a) (procedural rights).

reasoning suggests its ruling was limited to substantive IDEA rights.[15]

Likewise, Mr. and Mrs. Winkelmans' right to proceed *pro se* on their procedural claims in the instant proceedings was never expressly before the Sixth Circuit. Rather, the focus of the parties was whether Mr. and Mrs. Winkelman, as non-lawyers, could represent Jacob in court.[16] *See* Pet. App. 1a-2a; Respt. App. 18b, 20b, 22b-23b, 33b-36b, 71b-75b. Indeed, the Sixth Circuit made no mention of any procedural rights being asserted by Petitioners. Instead, the appellate court stated, "As established in this Court's order filed on September 20, 2005, in related appeal No. 04-4159, Jeff and Sandee Winkelman are not permitted to represent their child in federal court nor can they pursue their own IDEA claim *pro se*." Pet. App. 1a-2a. The September 20, 2005 Order referenced by the Sixth Circuit did not expressly address procedural IDEA claims as it was issued in a related proceeding where only a substantive IDEA claim regarding Jacob's stay-put placement was

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[15] Other courts have interpreted the *Collinsgru* decision as allowing parents to proceed *pro se* on procedural claims but not substantive claims. *See, e.g.*, *Mosley*, 434 F.3d at 532; *Maroni*, 346 F.3d at 249.

[16] Even if Petitioners' alleged procedural violations had been expressly presented, they are intertwined with substantive IDEA claims. Specifically, their allegations that Respondent predetermined the IEP and the IHO issued an untimely decision fundamentally relate to Jacob's substantive right to a FAPE. Further, assuming *arguendo* that the Sixth Circuit erroneously concluded that Petitioners were only bringing substantive IDEA claims, this does not provide a basis for this Court's intervention as it is well-settled that this Court does not grant certiorari to correct erroneous factual findings. SUPREME COURT RULE 10 (2005).

raised.[17] Respt. App. 2b-4b. The appellate court's reference to its September 20, 2005 Order, and the fact that the Winkelmans' right to bring their own procedural claims was not expressly addressed, suggests that Mr. and Mrs. Winkelman were precluded from pursuing their own substantive IDEA claims – not their procedural claims. Thus, the decisions in *Winkelman* and *Cavanaugh* did not clearly create a three-way split.[18]

Further, contrary to Petitioners' assertion that the alleged 1-4-1 split is "well-recognized," no court appears to have expressly interpreted *Cavanaugh* or *Winkelman* as imposing an absolute bar to *pro se* representation.[19] In fact, the cases cited by Petitioners fail to mention the 1-4-1 split allegedly created by the Sixth Circuit. Indeed, the *Mosley*

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[17] In that Order, the Sixth Circuit stated that the *Cavanaugh* panel "concluded that parents cannot pursue their own substantive IDEA claim *pro se*." Respt. App. 3b.

[18] Even if the Sixth Circuit's rulings did preclude non-attorney parents from prosecuting their own procedural claims *pro se*, this ruling is of no practical consequence as parents alleging procedural violations may only recover under the IDEA if they show the procedural violation deprived the child of the substantive right to a FAPE. 20 U.S.C. § 1415(f)(3)(E)(ii). Therefore, a parent's procedural rights and their child's substantive right to a FAPE are inextricably intertwined.

[19] At the time this brief was printed, no cases citing these two decisions expressly interpreted them in this manner. *See Ryan v. Shawnee Mission U.S.D. 512*, 2006 U.S. Dist. LEXIS 7779 (D. Kan. Feb. 28, 2006) (unreported); *C.O. v. Portland Pub. Sch.*, 2005 U.S. Dist. LEXIS 39161, *23-27 (D. Or. Dec. 22, 2005) (unreported); *Green v. Cape Henlopen Sch. Dist.*, 2005 U.S. Dist. LEXIS 32268 (D. Del. Dec. 13, 2005) (unreported); *Dividock v. KCAD-FSU*, 2005 U.S. Dist. LEXIS 33470 (D. Mich. Dec. 6, 2005) (unreported); *Crawford v. Meyzeek Middle Sch.*, 2005 U.S. Dist. LEXIS 29410 (D. Ky. Nov. 17, 2005) (unreported); *Dividock v. KCAD-FSU*, 2005 U.S. Dist. LEXIS 36605 (D. Mich. Aug. 30, 2005) (unreported); *Avion v. Franklin County Prosecuting Atty's Office*, 2005 U.S. Dist. LEXIS 11669 (S.D. Ohio June 14, 2005) (unreported).

court never addressed *Cavanaugh* or *Winkelman* but instead merely stated, "Most of our sister circuits take the position that the IDEA thus confers different rights on children and parents: both substantive and procedural rights for the child, and procedural rights only for the parents." *Mosley*, 434 F.3d at 532. Likewise, the *C.O.* court did not reference the claimed "well-recognized" 1-4-1 split, but instead noted that the First Circuit is the only circuit to embrace the "party aggrieved" theory. *C.O. v. Portland Pub. Sch.*, 2005 U.S. Dist. LEXIS 39161, *23-27 (D. Or. Dec. 22, 2005) (unreported).

In sum, the Sixth Circuit's decisions in *Cavanaugh* and *Winkelman* do not clearly preclude parents from proceeding *pro se* on their own procedural IDEA claims. Thus, these decisions do not create a square and irreconcilable three-way conflict.

### B. Characterizing The Split Regarding Substantive IDEA Claims As Intractable Is Premature.

Although a split exists as to whether non-attorney parents may bring substantive IDEA claims *pro se* on behalf of their children in court, it is too early to characterize the split as intractable. The lone circuit to find that non-lawyer parents may always proceed without an attorney in a judicial IDEA action did so in a single ruling which has not been subsequently applied. *Maroni*, 346 F.3d at 249-50. Further, this circuit has not addressed the issue since Congress rejected a proposed amendment to the 2004 Reauthorized IDEA that would have permitted such representation. Given that Congress was aware of the split among the courts and did not adopt the First Circuit's position, the First Circuit may reconsider its

position in a future case. Consequently, it is premature to claim that an intractable split exists.

Thus, this Court's intervention is not warranted at this time as there is no evidence of an irreconcilable or intractable split among the Circuits.

## IV. THIS CASE PRESENTS A POOR VEHICLE FOR CERTIORARI.

Assuming *arguendo* that the *pro se* representation issue is appropriate for this Court's review, this case is not a proper vehicle for certiorari.

### A. The Decision Below Did Not Create A Square And Intractable Conflict.

First, as discussed *supra,* the ability of a parent to proceed *pro se* on procedural violations was neither squarely presented nor resolved by the court below. Further, even if Petitioners' procedural violations had been squarely presented, they are intertwined with substantive IDEA claims and do not provide a good vehicle for certiorari. Likewise, to the extent a square conflict exists regarding a non-attorney parent's ability to prosecute a substantive IDEA claim for their child in court, it is too early to proclaim that the split is intractable. Therefore, this case is not an appropriate vehicle to resolve the question presented.

### B. Petitioners Have Not Been *Pro Se* Throughout The Majority Of These Proceedings.

This case is also a poor vehicle to resolve the *pro se* question because Petitioners have not been *pro se* throughout all the proceedings. To the contrary, they were represented by an attorney at all levels of the state due

process proceedings and administrative review. Pet. at 6. Additionally, they were represented by an attorney at various times throughout the judicial proceedings, including during the briefing on the merits before the District Court. Pet. Mot. SJ 1, 18. Further, they were represented by counsel, *pro bono*, in the supplemental briefing and oral argument before the Sixth Circuit on a related appeal which was recently resolved against them by the Sixth Circuit.[20] *See* Docket in Case No. 04-4159.[21] Likewise, they are represented, *pro bono*, by counsel before this Court.

### C. Other Less Procedurally And Factually Complex Cases Would Be More Appropriate For Certiorari.

The three-year record in this case is factually and procedurally complex. *See* Pet. App. 3a-23a; Docket in *Winkelman v. Parma City Sch. Dist.*, Case No. 1:04CV1329 (N.D. Ohio 2004); Docket in Case No. 04-4159.[22] Therefore, other cases with less developed records would be more appropriate vehicles for certiorari. As Petitioners note, the *pro se* issue is currently awaiting decision in at least one appeal in another circuit and one district court proceeding.

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[20] Given the policy concerns surrounding representation of a child by a non-attorney parent in this complex area of law, one important consideration is whether a non-attorney parent will have the skills to adequately represent the child's interest. As Petitioners have had counsel through most of these proceedings, this case presents a poor vehicle for making this determination. As shown by the docket below, during the periods in which Petitioners attempted to represent their child's interests *pro se*, their struggles with the judicial process, resulting in inappropriate and needless filings, supports the very concerns identified by the circuit courts.

[21] FED. R. EVID. 201(b)(2).

[22] FED. R. EVID. 201(b)(2).

*See, e.g.*, Brief of Petitioners-Appellants, *Russell v. Dep't of Educ., State of Hawaii*, No. 04-15482 (9th Cir. Jul. 16, 2004) and accompanying docket; Def. Mot. S.J., *Sand v. Milwaukee Pub. Sch.*, No. 03-C-1014 (E.D. Wis. Sep. 20, 2005) and accompanying docket.[23]

While either of these cases would be a better vehicle for certiorari, *Russell* in particular is better suited for certiorari. First, because the District Court in *Russell* dismissed the case at the outset based upon the *pro se* representation issue without any decision on the underlying merits, the *pro se* question is the sole issue on appeal. *See* Docket in *Russell v. Dep't of Educ., State of Hawaii*, No. 1:03CV00654 (Hawaii 2003).[24] Here, unlike *Russell*, the District Court did not address the *pro se* representation issue as Petitioners obtained counsel before the court decided Respondent's motion to dismiss based on this issue. *See* Docket in *Winkelman v. Parma City Sch. Dist.*, Case No. 1:04CV1329 (N.D. Ohio 2004). Instead, the District Court below reached a decision on the merits of the underlying appeal after Petitioners obtained counsel. Additionally, the *Russell* parents appear to have been *pro se* throughout the proceedings and were never represented by counsel. *See* Docket in *Russell v. Dep't of Educ., State of Hawaii*, No. 1:03CV00654 (Hawaii 2003). Further, the judgment in the *Russell* case will be final after the appellate court's ruling. *Id.*

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[23] Because these dockets present facts "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned," this Court may take judicial notice of them. FED. R. EVID. 201(b)(2).

[24] FED. R. EVID. 201(b)(2).

### D. The Judgment Below Is Not Final.

This case also presents a poor vehicle for certiorari as the judgment below is not final. This Court has often noted that certiorari from interlocutory appeals is disfavored. *See, e.g., Virginia Military Inst. v. United States*, 508 U.S. 946 (1993) (Scalia, J., concurring in denial of cert.) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction."); *American Constr. Co. v. Jacksonville, T. & K.W. Railway Co.*, 148 U.S. 372, 384 (1893). This Court grants certiorari before a case has been disposed of only when the case is of such "imperative public importance as to justify deviation from normal appellate practice and to require immediate determination." SUPREME COURT RULE 11 (2005). These cases involve constitutional challenges, *Mistretta v. United States*, 488 U.S. 361, 371 (1989) (constitutionality of the Federal Sentencing Guidelines); *Clinton v. City of New York*, 524 U.S. 417, n.14 (1998) (constitutionality of the line-item veto), public emergencies, *United States v. United Mine Workers*, 330 U.S. 258, 269 (1947), or issues fundamental to further conduct in the case, *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685 n.3 (1949); *Land v. Dollar*, 330 U.S. 731, 734 n.2 (1947).

With all due respect to Petitioners, this case does not involve a similar issue of "imperative public" or fundamental importance. Petitioners' arguments in their supplemental brief regarding the unauthorized practice of law ("UPL") proceedings[25] are based entirely on speculation and therefore do not have a place in this Court's decision process. First, there is no evidence of any "impending

[25] Respondent questions whether these documents are properly before the Court but assuming *arguendo* that they are, they do not provide a basis for this Court to grant certiorari.

prosecution of the Winkelmans for UPL." While one of Petitioners' appended documents references a purported UPL investigation of them, Supp. Pet. App. 4a, it is pure speculation to suggest that this investigation is ongoing or that prosecution is impending. Indeed, given that the Cleveland Bar Association acknowledged that the Sixth Circuit Order in Petitioners' underlying appeal is stayed, *id.* App. 9a, impending prosecution of Petitioners is unlikely.

Further, the complaint against the Woods, who are not parties to the instant proceeding, does not make this case a matter of imperative public importance. This complaint appears to be an isolated charge that was prompted by Mr. Woods' failure to cooperate with the UPL investigation. Indeed, the Cleveland Bar Association noted:

> Since the Board of Commissioners issued an Order requiring Mr. Woods to appear and he failed to appear [for a deposition], the Relator, Cleveland Bar Association, has no other option but to seek application of this Court for an Order finding Mr. Woods in contempt of this Court and sanctioning him for costs and attorneys' fees for his willful disobedience of both lawful process under Rule 45 and willful disobedience of the Board of Commissioner's Orders.

*Id.* App. 5a-6a.[26]

Finally, Petitioners' predictions that the decision below may lead to similar charges by other "overzealous" bar associations and will "necessarily" have a chilling effect on non-attorney parental representation of their child in court are wholly speculative. Notably, Petitioners fail to identify any other pending state bar association

[26] This Court does not need to grant certiorari to provide a remedy to the Woods as they have a strong defense in arguing that retroactive application of the *Cavanaugh* decision is improper.

complaint. Therefore, none of the arguments in Petitioners' supplemental brief provide a basis for this Court's intervention.

Additionally, this case does not present an issue which is fundamental to the further conduct of the case. Petitioners allege that absent this Court's intervention, they will have to choose between either (1) allowing the appellate court's dismissal order to become final so they can again petition this Court for review or (2) obtain a lawyer they cannot afford and moot any future opportunity to test their belief in their right to prosecute their appeal *pro se*. Pet. at 22. These claims are unavailing. First, as discussed *supra,* Petitioners' assertion that they cannot afford to obtain legal counsel is speculative as other avenues to obtain legal counsel exist.

Likewise, over a century of this Court's precedent confirms that requiring Petitioners to proceed through the normal judicial process before challenging the Sixth Circuit's ruling will not moot the *pro se* representation issue. *See Church of Scientology of California v. United States*, 506 U.S. 9, n.9 (1992) (citing seven appellate cases concluding that compliance with a federal court order does not moot that issue for appeal); *Maher v. Roe*, 432 U.S. 464, n.4 (1977); *N.L.R.B. v. Mexia Textile Mills, Inc.*, 339 U.S. 563, Syllabus (1950); *Dakota Cty v. Glidden*, 113 U.S. 222, 225 (1885).

Therefore, given the exceptionally high standard of Rule 11, this Court should not deviate from normal procedure and grant interlocutory certiorari on this issue.

### E. Petitioners Are Unlikely To Succeed On The Merits Of Their Appeal Regardless Of The Outcome Of This Petition.

Finally, this case is a poor vehicle for certiorari as Petitioners are unlikely to succeed on the merits of their

appeal before the Sixth Circuit regardless of how this Court resolves the *pro se* representation issue. As Respondent has prevailed at all levels in this case, Petitioners face the heavy burden of showing that the Impartial Hearing Officer, State Level Review Officer and the District Court all erred in concluding that Respondent's proposed placement offered Jacob a FAPE. *Doe v. Board of Educ. of Tullahoma City Schs.*, 9 F.3d 455, 460-61 (6th Cir. 1993), *cert. denied*, 511 U.S. 1108 (1994); *Doe v. Defendant I*, 898 F.2d 1186, 1191 (6th Cir. 1990). Given this burden, it is unlikely that Petitioners will succeed on the merits of their underlying appeal. Further, while Respondent recognizes and respects Petitioners' right to vigorously prosecute Jacob's legal rights, Respondent and its taxpayers have a corresponding right to an efficient and timely resolution to these legal proceedings. Therefore, this case presents a poor vehicle for certiorari.

## CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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