No. 07-_____

In The
Supreme Court of the United States

CHERYL BLANCHARD,

Petitioner,

v.

MORTON SCHOOL DISTRICT, et al.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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December 18, 2007

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QUESTION PRESENTED

Does 42 U.S.C. § 1983 provide a cause of action to enforce the Individuals with Disabilities Education Act?

PARTIES

In addition to the parties listed in the caption, the following parties were defendants below and are respondents in this case:

Russ Davis

Regine Aleksunas

Jim Grossman

Robyn Goodwyn

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Cheryl Blanchard respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The district court's unpublished order granting respondents' motion for summary judgment and dismissing this action is reproduced in the appendix ("Pet. App.") at 10-19. The Ninth Circuit's December 3, 2007 opinion affirming the district court's order is published at __ F.3d __ (9th Cir. 2007) (*Blanchard II*), and is reproduced at Pet. App. 1-9. That opinion modified *sua sponte* the opinion the court of appeals earlier issued on September 20, 2007.

Ms. Blanchard also appealed an earlier order of the district court. That earlier order, dismissing Ms. Blanchard's claims on exhaustion grounds, which is not officially reported, is reproduced at Pet. App. 28-30. The Ninth Circuit's opinion reversing that order is published at 420 F.3d 918 (9th Cir. 2005) (*Blanchard I*), and is reproduced at Pet. App. 20-27.

JURISDICTION

The Ninth Circuit filed its original opinion on September 20, 2007. On December 3, 2007, the court

of appeals issued *sua sponte* a modified opinion. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

Section 1415(*l*) of Title 20 to the United States Code provides:

> Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973, or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under this subchapter.

Section 1983 of Title 42 to the United States Code provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in

> an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Sections 1415(i)(2)(A)-(C) of Title 20 to the United States Code provide:

> (A) In general
>
> Any party aggrieved by the findings and decision made under subsection (f) or (k) who does not have the right to an appeal under subsection (g), and any party aggrieved by the findings and decision made under this subsection, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States, without regard to the amount in controversy.
>
> (B) Limitation
>
> The party bringing the action shall have 90 days from the date of decision of the hearing officer to bring such an action, or, if the State has an explicit time limitation for

bringing such action under this subchapter, in such time as the State law allows.

(C) Additional requirements

In any action brought under this paragraph, the court—

(i) shall receive the records of the administrative proceedings;

(ii) shall hear additional evidence at the request of a party; and

(iii) basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

STATEMENT OF THE CASE

This petition arises out of Cheryl Blanchard's ongoing effort—already spanning more than eight years—to ensure that her autistic son, Daniel Blanchard, receives the free appropriate public education mandated by the Individuals with Disabilities Education Act ("IDEA"). The issues regarding Daniel's educational needs initially arose in 1999 when he transferred into the first grade in the Morton School District. This is an action seeking damages for financial losses and injuries sustained by Ms. Blanchard as a result of the respondents' repeated violations of the IDEA. Whether petitioner can recover such relief turns on whether § 1983 provides a cause of action to

enforce the IDEA, a question on which the courts of appeals are sharply divided.

I. THE YEARS OF ADMINISTRATIVE PROCEEDINGS AND COMPLAINTS

In September 1999, first-grader Daniel Blanchard transferred into the Morton School District. Because Daniel was autistic, the IDEA required that the District provide him with a "free appropriate public education," 20 U.S.C. § 1400(d)(1)(A), and adopt for him an effective individualized education plan ("IEP"). Less than a month after Daniel enrolled in the first grade, Ms. Blanchard objected that he was not being provided with the appropriate education mandated by the IDEA.

After Ms. Blanchard's complaints to school officials failed to bring about the needed action, she requested a formal due process hearing required by the IDEA. At that hearing, held over three days in April 2000, Ms. Blanchard represented herself and her son. The District, represented by counsel, called a series of witnesses, including three experts. Despite the obvious disadvantages in proceeding pro se against a defendant represented by skilled counsel and outside experts, Ms. Blanchard prevailed.

The administrative law judge ("ALJ") concluded that "[t]he District's failure to implement the IEP as adopted, failure to revise the IEP when it determined that it was inappropriate, and failure to get the training necessary to properly implement the IEP has

resulted in a denial of" the free appropriate public education to Daniel mandated by the IDEA. E.R.[1] 54. The ALJ made extensive findings regarding the failure of the District to obey the IDEA, identifying at least ten different areas in which the district had "not implemented" the elements of Daniel's IEP, in some cases "wholly" or "completely disregard[ing]" those elements. E.R. 31-52. The ALJ ordered the District to (1) implement Daniel's IEP, including obtaining the necessary training, (2) monitor the implementation of the IEP, including providing monthly progress reports to Ms. Blanchard, and (3) provide compensatory education services to Daniel in order to remedy the District's failure to comply with the IDEA's statutory mandate "during a crucial period in [Daniel's] development." E.R. 54-55.

The 2000 ALJ order, however, was not successful in bringing about compliance with the IDEA. Over the years that followed Ms. Blanchard was forced to file a series of complaints with the District, objecting to repeated violations of Daniel's IEP or to other serious problems. In 2002, following a two-day due process hearing, an ALJ concluded that the District had failed to meet the requirement of the IDEA that it provide Daniel with extended school year services. E.R. 68. In 2003, Ms. Blanchard had to initiate yet another due process hearing, asserting among other

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[1] "E.R." refers to the Excerpts of Record filed with the Ninth Circuit in *Blanchard II*.

things that the District had improperly interfered with an evaluation of Daniel and that the District staff assigned to work with Daniel were not adequately trained or skilled. The issues raised by that complaint were settled after the hearing began. E.R. 148-49. In 2005, Ms. Blanchard filed yet another complaint, this time with the Office of Superintendent of Public Instruction ("OSPI"), asserting that the District had not properly implemented Daniel's IEP in a number of respects, including by failing to provide her with certain required written notices, failing to provide Daniel with a communication device that was required by the IEP, failing to implement portions of the IEP, and failing to prepare adequate progress reports as required by the IEP. E.R. 150. The OSPI sustained Ms. Blanchard's contention that the District did not adequately implement Daniel's IEP. E.R. 150-52. Since 1999, Ms. Blanchard has prevailed at other due process hearings and made additional complaints to the District that were resolved before hearing, or without resort to such a hearing.

II. THE PROCEEDINGS BELOW

Before the end of these administrative proceedings and complaints, Ms. Blanchard filed the complaint at issue here, seeking redress under § 1983 for the asserted violations of the IDEA. The complaint requested damages for the emotional distress and over $25,000 in lost income that Ms. Blanchard had

suffered during her ultimately successful efforts to obtain benefits for Daniel under the IDEA. E.R. 9.

In 2003, the District Court dismissed Ms. Blanchard's complaint, reasoning that she had failed to exhaust administrative remedies under the IDEA. Pet. App. 29-30. In 2005, the Ninth Circuit reversed. The court of appeals held that because Ms. Blanchard sought monetary relief on her own behalf, rather than on behalf of her son, there were no administrative remedies for her to exhaust under the IDEA. Pet. App. 21-22, 25-27. In so holding, it acknowledged that "the remedies available under the IDEA . . . do not provide an adequate remedy for Blanchard." Pet. App. 25 (citation omitted).

On remand, the District court again dismissed Ms. Blanchard's claims as a matter of law. The District Court reasoned that the IDEA only establishes rights for children with disabilities, not for their parents. Because on this view Ms. Blanchard "ha[d] no individually enforceable right under the IDEA," there was no right that she could enforce by means of § 1983. Pet. App. 16.

While this case was again pending on appeal, this Court decided *Winkelman ex rel. Winkelman v. Parma City School District*, __ U.S. __, 127 S. Ct. 1994 (2007). *Winkelman* held that parents themselves, as well as their disabled children, have rights under the IDEA. *Id.* at 2005. The Ninth Circuit recognized that "in light of *Winkelman*, the district

court was not correct in ruling that the IDEA creates no individual rights in parents." Pet. App. 8.

The Ninth Circuit nonetheless affirmed the dismissal of Ms. Blanchard's complaint. The court of appeals reasoned that statutory requirements established by the IDEA can only be enforced in a civil action under the IDEA itself. Pet. App. 4-8; 20 U.S.C. § 1415(i)(2). Although § 1983 ordinarily provides a cause of action to enforce rights created by federal statutes, the court of appeals concluded that the IDEA itself is a "comprehensive . . . scheme" evincing a congressional intent not to permit enforcement of the IDEA by means of a § 1983 action. Pet. App. 8. The court rejected Ms. Blanchard's argument that a 1986 amendment to what is now the IDEA, 20 U.S.C. § 1415(*l*), preserves such § 1983 claims. Pet. App. 6-8.

The court of appeals candidly acknowledged that its decision was in conflict with decisions on the same issue in the Second and Seventh Circuits. "There is an existing circuit split on whether, with the [1986] amendment, Congress intended the IDEA rights to be enforceable under § 1983." Pet. App. 6.

REASONS FOR GRANTING THE PETITION

I. THERE IS A WELL-ESTABLISHED INTER-CIRCUIT CONFLICT REGARDING WHETHER § 1983 PROVIDES A CAUSE OF ACTION TO ENFORCE THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT.

This case presents a mature and intractable inter-circuit conflict regarding whether § 1983 provides a cause of action to enforce the IDEA. This growing conflict has existed for over a decade. Today ten circuits have addressed the question. Four circuits have concluded that § 1983 does provide such a cause of action, and would permit the claim in the instant case to proceed. Six circuits, including the Ninth Circuit in the instant case, have concluded to the contrary that § 1983 cannot be utilized to enforce the IDEA.

This conflict has its roots in this Court's decision in *Smith v. Robinson*, 468 U.S. 992 (1984). *Smith* concerned the availability of a § 1983 action under the Education for All Handicapped Children Act ("EHA"), the statute later superseded by the IDEA.[2] *Smith* held that the EHA itself provides the exclusive

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[2] Many of the provisions in the IDEA were originally enacted as the EHA. In 1990, Congress renamed this legislation the Individuals with Disabilities Education Act. The changes in this legislation, other than the adoption of § 1415(*l*), are not material to this litigation. For simplicity we have substituted bracketed references to the IDEA in decisions that in fact reference the EHA.

means of enforcing any rights related to the education of disabled children in public primary and secondary schools. More specifically, *Smith* concluded that § 1983 could not be utilized to enforce such rights. Noting that the EHA, unlike § 1983, contains a specific exhaustion requirement, the Court reasoned that

> [i]f § 1983 stood as an independent avenue of relief for petitioners, then they could go straight to court to assert it. . . . [Section] 1983 is a statutory remedy and Congress retains the authority to repeal it or replace it with an alternative remedy. . . . In this case, we think Congress' intent is clear. Allowing a plaintiff to circumvent the EHA administrative remedies would be inconsistent with Congress' carefully tailored scheme.

Id. at 1012 (citations and footnote omitted).

In response to *Smith*, Congress adopted the Handicapped Children's Protection Act of 1986. *See* Pub. L. No. 99-372, 100 Stat. 796. Section 3 of that Act, codified in 20 U.S.C. § 1415(*l*), now provides with regard to the IDEA:

> Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973, or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws

> seeking relief that is also available under this subchapter, the procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under this subchapter.

The effect of § 1415(*l*) is to permit plaintiffs to seek to utilize "procedures[ ] and remedies" not included in the IDEA itself, provided that they first exhaust any administrative remedies available to them under the IDEA.

The courts of appeals are sharply divided regarding whether the "procedures[ ] and remedies" authorized by § 1415(*l*) include an action under § 1983, including an action under § 1983 to enforce the IDEA, or its predecessor the EHA. The question is important because the remedies provided by § 1983 may not be available under the IDEA itself.

A. The Second, Fifth, Sixth, and Seventh Circuits Have Concluded That § 1983 Provides a Cause of Action to Enforce the IDEA.

The Second Circuit was the first court of appeals to address this question. *Mrs. W. v. Tirozzi*, 832 F.2d 748, 754-56 (2d Cir. 1987). In resolving the issue only a year after the enactment of § 1415(*l*), the Second Circuit relied heavily on the fact that both the House Report and the Conference Report regarding § 1415(*l*)

expressly stated that § 1983 actions would be permitted. *Id.* at 754-55.[3] "In light of this clear legislative history, we hold that parents are entitled to bring a § 1983 action based on alleged violations of the [IDEA]." *Id.* at 755.

In *Weixel v. Board of Education of New York*, 287 F.3d 138, 151 (2d Cir. 2002), the Second Circuit reaffirmed its view that § 1983 provides a cause of action to enforce the IDEA, specifically sustaining a § 1983 action for damages caused by a violation of the IDEA. Earlier this year that court of appeals again reiterated that in the Second Circuit "[i]t is well-settled that, while the IDEA itself does not provide for monetary damages, plaintiffs may sue pursuant to § 1983 to enforce its provisions . . . and to obtain damages for violations of such provisions." *Smith v. Guilford Bd. of Educ.*, No. 06-1094-cv, 2007 WL 1725512, at **4 (2d Cir. June 14, 2007).

In *Marie O. v. Edgar*, 131 F.3d 610 (7th Cir. 1997), the Seventh Circuit also concluded that § 1415(*l*) provides a civil action to enforce the IDEA.

> [Section] 1415([*l*]) makes clear that Congress intended that a § 1983 remedy be available to the beneficiaries of the statute. . . . [Section] 1415([*l*]) was enacted in response to the

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[3] At the time of this decision what is now § 1415(*l*) was contained in § 1415(f). For simplicity we have substituted bracketed references to § 1415(*l*) in decisions that in fact reference the same provision when it was codified as § 1415(f).

> Supreme Court's decision in *Smith v. Robinson*. . . . *Smith* had held that. . . . [IDEA]'s extensive administrative scheme . . . foreclosed a § 1983 or similar action. Congress responded by enacting § 1415([*l*]) which allowed . . . § 1983 claims under the [IDEA]. . . .
>
> . . . [Section] 1415([*l*]) was enacted for the express purpose of ensuring that § 1983 claims would be available to enforce the [IDEA].

Id. at 621-22 (footnotes and citations omitted).

The Fifth Circuit has aligned itself with the Second and Seventh Circuits. In *Angela L. v. Pasadena Independent School District*, 918 F.2d 1188 (5th Cir. 1990), the court stated that by enacting the 1986 amendment to the IDEA Congress "rejected the Court's conclusion in *Smith* that the [IDEA] was an 'exclusive remedy.' 20 U.S.C. § 1415([*l*]). Consequently, parents may continue to allege violations of 42 U.S.C. § 1983 and section 504 of the Rehabilitation Act. These statutes permit parents to obtain relief which otherwise is unavailable from the [IDEA]." *Id.* at 1193 n.3. In light of *Angela L.*, the availability of § 1983 actions is "well settled" in the Fifth Circuit. *Pace v. Bogalusa City Sch. Bd.*, No. Civ.A. 99-806, 2001 WL 969103, at *2 (E.D. La. Aug. 23, 2001)

(citing *Angela L.*), *aff'd in part on other grounds*, 403 F.3d 272 (5th Cir. 2005) (en banc).[4]

Finally, in *Gean v. Hattaway*, 330 F.3d 758 (6th Cir. 2003), the Sixth Circuit held that a plaintiff may bring an action pursuant to § 1983 for damages based on underlying violations of the IDEA, and that when a plaintiff's claim for money damages seeks relief not available under the IDEA, the plaintiff need not exhaust administrative remedies provided for in the Act. *Id.* at 774 ("It is when a plaintiff has a legitimate claim for 'general damages' not available under the IDEA that we have been willing to allow her to by-pass the administrative process detailed in that statute. . . .").[5]

B. Six Other Circuits Hold That § 1983 Does Not Provide a Cause of Action to Enforce the IDEA.

The Third Circuit has expressly rejected the view of the Second, Fifth, Sixth, and Seventh Circuits that § 1415(*l*) assures the viability of a § 1983 claim. *A.W. v. Jersey City Pub. Sch.*, 486 F.3d 791, 802-03 (3d Cir.

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[4] *See also R.J. v. McKinney Ind. Sch. Dist.*, No. 4:05CV257, 2005 WL 3576839, at *3 (E.D. Tex. Dec. 29, 2005) (citing *Angela L.*); *Doe ex rel. Doe v. S & S Consol. I.S.D.*, 149 F. Supp. 2d 274, 303 (E.D. Tex. 2001) (citing *Angela L.*), *aff'd*, 309 F.3d 307 (5th Cir. 2002).

[5] Because the plaintiff in *Gean* was seeking restitution for past payments for educational services, the Sixth Circuit concluded that exhaustion of these claims was required. *Id.*

2007) (en banc). The Third Circuit disagreed in particular with the Seventh Circuit's reliance on the legislative history of § 1415(*l*).

> We . . . reject [the plaintiff's] contention that the references to § 1983 in the legislative history of § 1415(*l*) show that Congress intended to preserve the availability of § 1983 to remedy violations of IDEA-created rights. . . .
>
> . . . Given th[e] comprehensive scheme [in the IDEA], Congress did not intend § 1983 to be available to remedy violations of the IDEA. . . .

Id. at 803 (footnote and citations omitted). The Ninth Circuit in the instant case adopted a similar view, explaining that the court was "persuaded by" the Third Circuit decision in *A.W.*, and quoting the Third Circuit's reasoning that the "comprehensive scheme" in the IDEA precluded enforcement under § 1983. Pet. App. 7.

In *Diaz-Fonseca v. Puerto Rico*, 451 F.3d 13, 28 (1st Cir. 2006), the First Circuit held that § 1983 could not be used to enforce the IDEA because that would permit a plaintiff in a § 1983 action to obtain remedies that were not provided by the IDEA itself. The Eighth Circuit relied on the same reasoning to reject § 1983 actions to enforce the IDEA. "[P]laintiffs' claims based upon defendants' alleged violations of the IDEA may not be pursued in this § 1983 action because general and punitive damages for the types of injuries alleged by plaintiffs are not available

under the IDEA." *Heidemann v. Rother*, 84 F.3d 1021, 1033 (8th Cir. 1996).

In *Padilla ex rel. Padilla v. School District No. 1, Denver*, 233 F.3d 1268, 1273-74 (10th Cir. 2000), the Tenth Circuit reasoned that this Court's post-*Smith* decisions preclude use of § 1983 to enforce the IDEA. On two occasions since *Smith*, the court of appeals noted, the Court has continued to cite *Smith* in determining the availability of § 1983 to remedy violations of a statute. "Based on these cases, it appears the Supreme Court considers *Smith* to be alive and well insofar as it asserts that § 1983 may not be used to remedy IDEA violations." *Id.* at 1274.

In *Sellers ex rel. Sellers v. School Board of Manassas*, 141 F.3d 524, 529-31 (4th Cir. 1998), the Fourth Circuit rejected on a different ground reliance on § 1983 to enforce the IDEA. Section 1415(*l*), the Fourth Circuit reasoned, allows only § 1983 actions to enforce constitutional rights related to the education of disabled children, but does not permit § 1983 actions to enforce statutory rights, such as the rights created by the IDEA. "[S]ection 1415([*l*]) does permit plaintiffs to resort to section 1983 for *constitutional* violations, notwithstanding the similarity of such claims to those stated directly under IDEA. But section 1415([*l*]) does not permit plaintiffs to sue under section 1983 for an IDEA violation, which is

statutory in nature." *Id.* at 530 (emphasis in original).[6]

C. This Inter-Circuit Conflict Is Widely Recognized.

The Ninth Circuit's decision below candidly recognized the well-established inter-circuit conflict that exists about this recurring question of law.

> There is an existing circuit split on whether, with the amendment [adding section 1415(*l*)], Congress intended the IDEA rights to be enforceable under § 1983. The First, Third, Fourth, and Tenth Circuits have held that Congress did not so intend. The Second and Seventh Circuits have held that Congress did so intend. . . . *See A.W. v. Jersey City Pub. Sch.* . . . (surveying the existing circuit split . . .).

Pet. App. 6-7 (footnotes omitted).[7]

In *Padilla*, the Tenth Circuit acknowledged that the "[c]ircuits that have addressed the question [of whether § 1983 may be used to enforce the IDEA]

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[6] The Sellers urged the Fourth Circuit to adopt the contrary position. *See* Brief for Appellants, *Sellers*, 141 F.3d 524 (No. 97-1762), 1997 WL 33492433, at *17-21, 29-38.

[7] In its briefing before the Ninth Circuit, the District likewise acknowledged the split among the circuits on this issue. *See* Brief of Appelles [sic] at 13-14, 17, *Blanchard II*, __ F.3d __ (No. 06-35388) (discussing, inter alia, the Fourth Circuit's opinion in *Sellers* and the Second Circuit's opinion in *Mrs. W.*).

have not come to the same conclusion." 233 F.3d at 1272. In *A.W.*, the Third Circuit pointed out that "reasonable minds have differed as to the . . . interpretation of the congressional reaction to *Smith v. Robinson* embodied in § 1415(*l*)." 486 F.3d at 797; *id.* at 798 ("[T]he issue ha[s] created a circuit split."). The Third Circuit noted that decisions in the Second and Seventh Circuits "have concluded that Congress intended to allow recourse to § 1983 to remedy IDEA violations," *id.* at 799 n.12, while decisions in the Fourth and Tenth Circuits had reached the opposite conclusion, *id.* at 797-98.

Many district courts have likewise recognized that the circuits are split on this issue. Earlier this year, the court in *Carney ex rel. Carney v. Nevada ex rel. Department of Education*, No. 03:05-CV-00713-LRH-RAM, 2007 WL 777697 (D. Nev. Mar. 12, 2007), *clarified on other grounds by* 2007 WL 3256573 (D. Nev. Oct. 31, 2007), observed that "[t]here is a split of authority in the federal circuits as to whether redress for violations of IDEA may be pursued through a § 1983 claim." *Id.* at *2. The Connecticut District Court in *M.H. v. Bristol Board of Education*, 169 F. Supp. 2d 21 (D. Conn. 2001), similarly noted "[t]here is currently a split among the circuit courts regarding whether the IDEA provides the exclusive remedy for violations of its provisions, or whether § 1983 is available to assert a cause of action for damages." *Id.* at 28. Several other decisions have also recognized this well-established conflict. *Zearley v. Ackerman*, 116 F. Supp. 2d 109, 114 (D.D.C. 2000)

("The circuits are split on the issue of whether section 1983 claims may be premised on IDEA violations."); *Goleta Union Elem. Sch. Dist. v. Ordway*, 166 F. Supp. 2d 1287, 1292 (C.D. Cal. 2001) (discussing the "split of opinion among the Courts of Appeals regarding the relationship between section 1983 and the IDEA"), *overruled on other grounds by Blanchard II*, __ F.3d __; *Andrew S. ex rel. Margaret S. v. Sch. Comm. of Greenfield*, 59 F. Supp. 2d 237, 242 (D. Mass. 1999) (noting "a split of opinion among the Courts of Appeals regarding the relationship between section 1983 and the IDEA").

II. THE QUESTION PRESENTED INVOLVES A RECURRING ISSUE OF SUBSTANTIAL IMPORTANCE.

The decision below creates a system of economic incentives that undermines both the interest of disabled children and their parents in obtaining an effective education and the due administration of justice.

For the parents of a disabled child, the Ninth Circuit decision results in a powerful incentive to hire an attorney to handle disputes with local school officials rather than attempting to resolve education issues without the assistance or involvement of counsel. The IDEA provides that parents who retain counsel to pursue IDEA rights, and who ultimately prevail on the merits of those claims, are entitled to an award of counsel fees. 20 U.S.C. § 1415(i)(3)(B)(i)(I).

Thus, in the instant case, if Ms. Blanchard had retained an attorney to handle the protracted struggle required to obtain an appropriate education for her son, she would have been entitled to an award of counsel fees that could easily have totaled hundreds of thousands of dollars.

Ms. Blanchard took the far less costly course of pursuing the proceedings pro se. Although doing so forced her to forego $25,000 in self-employment income, that was only a fraction of the cost that would have been incurred—and for which the school board would have been liable—if Ms. Blanchard had instead retained an attorney. The Ninth Circuit decision, by holding that the parent of a disabled child can never obtain redress for costs incidental to self-representation, strongly encourages parents able to do so to opt for the more expensive alternative of retaining counsel to pursue IDEA claims that the parents themselves might have been able to obtain on their own. Whether the resulting additional cost is ultimately borne by the school district (because the parents prevail) or by the parents (because they do not), that incentive is highly undesirable.

Many parents, however, will not be able to afford to hire attorneys to enforce their IDEA rights, even though under the Ninth Circuit decision that is the only way the parents could obtain recompense for the expense involved in winning an effective education for their children. Most families are not in a position to pay (or incur liability for) the tens of thousands of dollars in legal fees that would be involved in even a

modest administrative proceeding. *See Frank G. v. Bd. of Educ. of Hyde Park*, 459 F.3d 356, 362 (2d Cir. 2006) (awarding counsel fee of $34,567), *cert. denied*, 128 S. Ct. 436 (2007); Adam Liptak, *Nonlawyer Father Wins His Suit Over Education, and the Bar Is Upset*, N.Y. Times, May 6, 2006, at A8 (stating that family could not afford to hire a lawyer to represent them in their IDEA case and that one lawyer quoted them $60,000 to handle the case). The potential legal bills will at times be greater than the cost of simply giving up on the public schools and paying tuition at a private school willing—for a fee—to provide an effective education to the disabled child.

If a child's parents, after unsuccessful efforts to obtain a free appropriate public education, are forced (and have the financial ability) to put the child in a private school, a subsequent successful challenge to the school board's practices will entitle the parents to reimbursement for those private school expenses. *Sch. Comm. of Burlington v. Dep't of Educ. of Mass.*, 471 U.S. 359, 369 (1985). But many families do not have the financial ability to pay for such private education in the hope that, at some point in the future, an administrative or judicial determination will entitle them to reimbursement. *Id.* at 370 (option of educating disabled children in private schools is available only to "conscientious parents who have adequate means"). Parents of children with disabilities are substantially more likely than others to have

income below the poverty level.[8] Thus, for many families with disabled children, the only financially realistic option is to keep their children in public schools and attempt—without the assistance of counsel, and without hope of an award of counsel fees or tuition reimbursement—to pursue their rights through pleas to school officials and resort to the administrative process.

In dealing with such families under the Ninth Circuit decision, school officials have an obvious financial interest in refusing to comply with the IDEA, postponing as long as possible—indefinitely, perhaps—providing the free appropriate public education guaranteed by federal law. Providing such an effective education to a disabled child can be expensive, in some cases substantially so.[9] If an effective education requires

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[8] Children with disabilities are disproportionately raised by households in poverty. "At 24%, the rate of poverty among the households of students with disabilities is higher than the 16% found in the general population. Despite the fact that parents are about equally likely to be employed, households of students with disabilities are much more likely to have low and very low incomes." *See* Mary Wagner & Jose Blackorby, *Overview of Findings from Wave 1 of the Special Education Elementary Longitudinal Study* (SEELS) (June 2004) at 5, *available at* http://www.seels.net/designdocs/seels_wave1_9-23-04.pdf.

[9] For this reason, the IDEA provides "billions of dollars to States" to defray these costs. Brief for the United States as Intervenor at 4, *A.W.*, 486 F.3d 791 (02-2056) ("The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 *et seq.*, is a federal grant program that provides billions of dollars to States to educate children with disabilities.").

placing a disabled child in a private school, a school district that ultimately agrees (or is forced) to do so will be required to pay tuition bills that can easily total in the tens of thousands of dollars. Each year that the school board refuses to provide the appropriate education mandated by the IDEA represents a substantial financial savings to the school district, either in internal costs or in payments for outside tuition.

In the Second, Fifth, Sixth, and Seventh Circuits, school officials have a substantial financial incentive to comply with the IDEA. If the parents of the disabled child ultimately prevail in those circuits, they may be entitled in a § 1983 action to a damage award that exceeds the money the school district initially saved by failing to provide the child with an effective education. But in the Ninth Circuit, a school board's intransigence shifts those costs to the families of the disabled children, in the form of damage to the children or their parents or the expenses (including related losses in income) of pursuing their claims pro se.

The Ninth Circuit's decision results in a dual system for children with disabilities. If their parents are well off—and can afford to hire an attorney and pay for private schooling until a dispute is resolved—the children will suffer no educational harms, and their parents may be fully reimbursed for every dollar spent in connection with the dispute. The prospect of ultimately having to pay for those attorneys' fees and tuition bills provides a school district with a persuasive economic reason to respect the rights of children of affluent parents. But if a child has parents

of modest means, injuries the child suffers during the duration of the dispute, and any injuries and financial costs and losses to the family, will never be redressed. For as long as it postpones complying with the IDEA, the decision below spares a school district the cost of providing an appropriate public education, and transfers that burden, in the form of uncompensated damages, to the less affluent families of children with disabilities.

The circumstances of *Board of Education of the City School District of New York v. Tom F. ex rel. Gilbert F.*, 128 S. Ct. 1 (2007) (per curiam), illustrate this dual system. The father in that case, the former chief executive of Viacom, had unlimited assets with which to pursue his IDEA claim and thereby ensure that his child received the education mandated by the IDEA.[10] He had the resources needed both to place his child in private school, despite an annual tuition of over $21,000, and to hire a lawyer to represent himself and his son throughout a decade-long battle with the school district, including due process hearings and a subsequent court action.[11] For the fortunate few, the Ninth Circuit decision leaves in place a highly efficacious remedial scheme. But if the Ninth

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[10] *See* David Stout & Jennifer Medina, *With Justices Split, City Must Pay Disabled Student's Tuition*, N.Y. Times, Oct. 11, 2007, at B1.

[11] Brief for Petitioner at 6-18, *Tom F.*, 128 S. Ct. 1 (No. 06-637). Mr. F. even brought a representative from his attorney's office to the Committee on Special Education meeting called to design Gilbert F.'s IEP. *Id.* at 7.

Circuit's opinion is permitted to stand, then for ordinary parents, like Ms. Blanchard, hard-fought struggles to obtain an appropriate education for their children may lead to no more than pyrrhic victories.

CONCLUSION

For each of these reasons, this Court should grant a writ of certiorari to review the judgment and opinion of the Ninth Circuit.

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