No. 07-825

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

BRIEF IN OPPOSITION

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January 18, 2008

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COUNTERSTATEMENT OF QUESTION PRESENTED

Does 42 U.S.C. §1983 provide a cause of action for damages to compensate a parent for her *pro se* participation in a due process hearing under the Individuals with Disabilities Act?

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STATEMENT OF THE CASE

I. OVERVIEW OF THE PROCEEDINGS BELOW

The Respondent Morton School District is a small district located in a rural community in southwest Washington. The District serves approximately four hundred students.

The Petition arises from Cheryl Blanchard's disagreement with the December 3, 2007 decision of the Ninth Circuit Court of Appeals affirming the district court's order granting summary judgment of dismissal of her case.[1]

In her district court complaint, Blanchard requested damages under 42 U.S.C. §1983 for emotional distress and loss of profits incurred from a home based business during the time she participated in an administrative hearing under the Individuals with Disabilities Education Act ("IDEA") concerning her son's educational program. E.R. 9. Because Blanchard did not appeal the district court's dismissal of her emotional distress claim, the Ninth Circuit concluded that the claim was waived. App. 9. Blanchard's claim for lost profits was the only damages claim remaining in the case when decided below,

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[1] Individual defendants Russ Davis, Regine Alexsunas, Jim Grossman and Robyn Goodwyn were dismissed with prejudice by the district court. App. 17-18. Blanchard did not appeal dismissal of these individuals to the Ninth Circuit, and they are no longer parties to the case.

and it is the only issue encompassed by the Petition now before the Court.

Blanchard's damages claim relates to her participation in an IDEA due process hearing that took place in April 2000, concerning the 1999-2000 school year. E.R. 135. The hearing, conducted by an administrative law judge (ALJ), was convened to address Blanchard's concerns about the District's implementation of the Individual Education Program (IEP) in effect for her son when he was in the first grade. E.R. 4-9, 27. The ALJ focused on Blanchard's concern that the District had not used a specific teaching methodology known as Applied Behavior Analysis with her son and that data relating to his progress at school was lacking. E.R. 27.

The ALJ decided in Blanchard's favor at the conclusion of the hearing, and ordered the District to provide additional training for staff and compensatory education for her son before the beginning of the next school year. E.R. 55-56.

II. OVERVIEW OF RELATED PROCEEDINGS

Blanchard states in her Petition that the case below followed "years of administrative proceedings against the District," implying that the District repeatedly denied proper educational services to her son. [Petition at 5]. In fact however, the issues in the complaint spanned only the time between October 1999 and April 2002. E.R. 1-9. During that period, Blanchard obtained only one favorable decision, that

being the decision following the due process hearing in April 2000, described above.

With respect to other due process hearings described below, Blanchard either abandoned her request for a hearing, or the ALJ ordered that the District provide only a portion of what Blanchard requested, or the ALJ denied relief to Blanchard and decided in favor of the District.

Spring 2001 due process hearing. Blanchard requested a hearing concerning Extended School Year (ESY) services because she disagreed with the District's proposal to provide eight weeks of services for her son during the upcoming summer break. The ALJ decided in favor of the District, concluding that its proposal for ESY services was acceptable and met IDEA standards. E.R. 116.

June 2001 due process hearing. Blanchard requested a hearing concerning implementation of her son's IEP for the preceding school year and other issues. E.R. 120-21. After the ALJ dismissed some of the claims on summary judgment, Blanchard canceled her hearing request and did not respond to the ALJ's request for clarification. The ALJ dismissed the proceeding without a hearing on October 29, 2001. E.R. 123-26.

April 2002 due process hearing. Blanchard requested a hearing because she wanted more ESY services for her son during the upcoming summer break than the District offered to provide. E.R. 59, 60. The ALJ did not adopt either Blanchard's or the

District's proposal, and ruled that services should be provided at a rate of three hours per day, four days per week, for a period of eight weeks during the summer break. E.R. 68.

Spring 2003 due process hearing. Blanchard again requested a hearing concerning the District's ESY proposal for the upcoming summer months. The hearing did not occur because Blanchard and the District reached an agreement concerning the extent of services to be provided. E.R. 107.

March 2006 due process hearing. Blanchard requested a hearing concerning the District's implementation of her son's IEP, training of staff, and other issues relating to the 2005-2006 school year. After the ALJ decided in favor of the District on all issues, Blanchard filed a second complaint in district court entirely separate from the complaint in this case.

In the second district court case filed in 2006, Blanchard again requested an award of damages and fees for her *pro se* representation under 42 U.S.C. §1983 and §1988 even though she was not the prevailing party at the underlying due process hearing. The district court dismissed the complaint and Blanchard appealed. On December 26, 2007, the Ninth Circuit affirmed dismissal of Blanchard's §1983 and §1988 claims, and reversed the dismissal of other claims in an unpublished opinion dealing only with

that case.[2] The case is currently pending in district court.

REASONS TO DENY THE PETITION

I. THE QUESTION RAISED DOES NOT INVOLVE A RECURRING ISSUE OF SUBSTANTIAL IMPORTANCE

Throughout this case, Blanchard has requested damages under 42 U.S.C. §1983 as compensation for the profits claimed to be lost from a home based business due to the time she spent preparing for and participating in the April 2000 due process hearing. This request is not properly viewed as a claim for damages at all, as it is essentially a request for a fee based on Blanchard's *pro se* representation during the IDEA administrative process.

This fee request, disguised as a request for damages, does not represent a recurring issue of substantial importance warranting the Court's review. To the contrary, the answer to this issue is determined by the universally accepted rule that a *pro se* plaintiff is not entitled to an award of fees.

The Ninth Circuit characterized Blanchard's damages claim as a request for compensation for

[2] *Blanchard, et al. v. Morton School District, et al.*, 2006 WL 2459167 (W.D. Wash., Aug. 25, 2006), *aff'd in part, rev. in part*, 2007 WL 4533472 (Dec. 26, 2007).

acting as her own lawyer. Relying upon the decision in *Kay v. Ehler*, 499 U.S. 432 (1991),[3] the court decided against Blanchard, explaining that a *pro se* plaintiff is not entitled to an award of attorneys' fees. App. 9.

Blanchard argues that the Ninth Circuit decision is an incentive for parents to hire attorneys to provide representation for their children in IDEA proceedings. [Petition at 20]. Assuming this is so, this incentive is one specifically intended by the Supreme Court. As explained in *Kay*:

> A rule that authorizes awards of counsel fees to *pro se* litigants – even if limited to those who are members of the bar – would create a disincentive to employ counsel whenever such a plaintiff considered himself competent to litigate on his own behalf. The statutory policy of furthering the successful prosecution of meritorious claims is better served by a rule that creates an incentive to retain counsel in every such case.

499 U.S. at 438. This reasoning has been followed by the circuit courts that have addressed the issue of fees for parents who proceed *pro se* in IDEA proceedings. In *Doe v. Board of Education*, 165 F.3d 260 (4th Cir. 1998), the court explained:

[3] In *Kay v. Ehler*, the *pro se* plaintiff that requested an award of fees under §1988 was a licensed attorney.

> (T)he central trust of *Kay* is that fee-shifting statutes are meant to encourage the effective prosecution of meritorious claims, and that they seek to achieve this purpose by encouraging parties to obtain independent representation. Like attorneys appearing *pro se*, attorney-parents are generally incapable of exercising sufficient independent judgment on behalf of their children to ensure that "reason, rather than emotion" will dictate the conduct of the litigation.
>
> . . .
>
> Precisely because disabled children deserve independent legal services, the IDEA fee-shifting provision should be read to encourage parents to obtain independent legal services.

Id. at 263-64. All circuit courts deciding this issue are in accord.

In *Woodside v. School Dist. of Philadelphia Bd. of Educ.*, 248 F.3d 129 (4th Cir. 2001) the court denied a *pro se* parent's fee request, noting that the danger of inadequate representation is as great when an emotionally charged parent represents his minor child as when the parent represents himself. *Id.* at 131.

In *S.N. ex rel. J.N. v. Pittsford Cent. Sch. Dist.*, 448 F.3d 601 (2d Cir. 2006), the court affirmed dismissal of an attorney-parent's fee request following a settlement reached after conclusion of a due process hearing. The court recognized the risk that a parent-attorney lacks sufficient emotional detachment to

provide effective representation is a risk which is "undeniably present in disputes arising under the IDEA." *Id.* at 603.

Concluding that the fee shifting provision in 42 U.S.C. §1988 is nearly identical to that contained in the IDEA, the Ninth Circuit follows the Second, Third and Fourth Circuits to hold that fees are not available to parents, who are also attorneys, for their representation in IDEA proceedings. *Ford v. Long Beach Uni. Sch. Dist.*, 461 F.3d 1087 (9th Cir. 2006); *Van Duyn v. Baker Sch. Dist.*, 502 F.3d 811 (9th Cir. 2007) [court awarded fees for work done by retained counsel during a successful administrative proceeding, but not for the attorney-parent who also participated in that proceeding].

When Blanchard's claim for damages is viewed for what it is – a request for compensation based on *pro se* representation during the IDEA administrative process – it does not qualify as a recurring issue of substantial importance warranting review by the Court.

II. THE INSUBSTANTIAL CIRCUIT SPLIT DOES NOT WARRANT REVIEW

A. Supreme Court precedent provides direction for courts to conclude that 42 U.S.C. §1983 does not provide a remedy for violations of the Individuals With Disabilities Education Act (IDEA).

The Court's decisions in *Smith v. Robinson*, 468 U.S. 992 (1984) and *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113 (2005) provide the definitive analysis for courts to apply when determining whether a violation of a federal statutory right can be remedied through §1983. Given this clear guidance, there is no need for the Court to resolve what is only an illusory circuit split.

In *Smith v. Robinson*, the Court addressed whether parents were entitled to recover attorneys' fees under 42 U.S.C. §1988 for their successful efforts challenging the school district's decision to withdraw funding for their child's private educational program. At the time, the predecessor to the IDEA, the Education of the Handicapped Act (EHA)[4] did not include an attorneys' fee provision. *Id.* at 995. As a result, the parents' claim for attorneys' fees was based on constitutional equal protection and due process grounds, and not on the IDEA itself. *Id.* at 1008-1009.

In reaching its decision that an award of attorneys' fees was not available to the parents through a constitutional challenge that was virtually identical to the IDEA claim, the Court in *Smith* concluded that the comprehensive remedy provided by the IDEA precludes a fee award through an ancillary action

[4] The IDEA was first named the Education for all Handicapped Children Act (EHACA). In 1990, Congress renamed the EAHCA as the Education for Handicapped Act (EHA). Since 1990, the act has been named the Individuals with Disabilities Education Act (IDEA). To be consistent with Blanchard's method of referring to this legislation, the EAHCA and the EHA will be referred to as the IDEA throughout this response.

under §1983. The Court noted with approval that courts in the Second, Seventh and Ninth Circuits[5] had already reached a similar conclusion. *Id.*, n.11.

After *Smith* was decided, Congress responded to its specific holding concerning attorneys' fees and amended the IDEA in 1986 to include a provision allowing for an award of fees. *See* 20 U.S.C. §1415(e)(4)(B). This provision permits awards of attorneys' fees to prevailing parties under the IDEA itself,[6] without the need to assert a claim under §1983.

The 1986 amendments to the IDEA also added a savings clause to clarify that the right to pursue *constitutional* claims is not limited by the IDEA. 20 U.S.C. §1415(f) [now §1415(l)]. With several changes of no significance here, the clause now states in relevant part:

> Nothing in this title . . . shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, Title V of the Rehabilitation Act of 1973 [], or other Federal laws protecting the rights of children with disabilities . . .

[5] *Quackenbush v. Johnson City School District*, 716 F.2d 141 (2d Cir. 1983); *Department of Education of Hawaii v. Katherine D.*, 727 F.2d 809 (9th Cir. 1983); *Anderson v. Thompson*, 658 F.2d 1205 (7th Cir. 1981).

[6] The current version of the IDEA authorizes the district court to award reasonable attorneys' fees as part of the costs to a parent who is the prevailing party, and also against the parent, or the attorney for the parent in specific circumstances as set forth in the statute. 20 U.S.C. §1415(i)(3)(B).

The IDEA savings clause makes no reference whatsoever to §1983, and cannot be read to allow an IDEA based statutory claim to be pursued through §1983. Nor does the savings clause overrule the Court's explanation in *Smith v. Robinson*, 468 U.S. 992, relating to the analysis to be applied when determining whether a statutory violation can be the basis of a §1983 claim.

In 2005, the Court decided *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113. The decision provides detailed clarification as to when a statutory right can provide the basis for a §1983 claim. With specific reliance on its earlier decision in *Smith v. Robinson*, the Court explained:

> The existence of a more restrictive private remedy for statutory violations has been the dividing line between those cases in which we have held that an action would lie under Section 1983 and those in which we have held it would not.
>
> . . .
>
> (I)n all of the cases in which we have held that §1983 is available for a violation of a federal statute, we have emphasized that the statute at issue, in contrast to those in *Sea*

> *Clammers*[7] and *Smith*, did not provide a private judicial remedy (or in most cases, even a private administrative remedy) for the rights violated.
>
> . . .
>
> *Sea Clammers* and *Smith* adopt the . . . assumption . . . that limitations upon the remedy contained in the statute are deliberate and are not to be evaded through Section 1983.

Id., 544 U.S. at 121-24 [internal text and citations omitted].

Accordingly, federal courts have been provided a clear and specific methodology to apply to the question of whether a federal statute confers rights that may be enforced through an action under 42 U.S.C. §1983. Notably, the Ninth Circuit decision below, and every other circuit court applying the methodology described in *Rancho Palos Verdes*, have reached the same conclusion: §1983 is not available as a damages remedy for claims based on asserted violations of the IDEA.

[7] *Middlesex County Sewerage Authority v. National Sea Clammers Assn.*, 453 U.S. 1 (1981).

B. All circuit courts deciding the issue conclude that the IDEA does not provide a damages remedy as part of its comprehensive enforcement scheme.

The IDEA provides timely access to an administrative hearing process – referred to in the IDEA as an "impartial due process hearing" – for parents to present complaints with respect to any matter relating to the identification, evaluation, educational placement, or the provision of a free appropriate public education for their child. 20 U.S.C. §1415(f).

Should parents disagree with the outcome of a due process hearing, they are entitled to bring a civil action with respect to their complaint in district court, without regard to the amount in controversy. 20 U.S.C. §1415(i)(2)(A). Prompt resolution of the complaint is encouraged, as the district court case is to be initiated within ninety (90) days of the administrative hearing officer's decision. 20 U.S.C. §1415(i)(2)(B). The district court is authorized to grant appropriate relief, including an award of reasonable attorneys' fees to parents if they are determined to be the prevailing party. 20 U.S.C. §1415(i)(3)(B)(i).

The IDEA provides a comprehensive remedial and enforcement scheme for violations of its provisions, but it is silent concerning the availability of a damage remedy. This distinction is recognized by the First, Second, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth and Eleventh Circuits, and all of these circuits

have concluded that a damages award is not available under the IDEA.

Circuit courts deciding this issue during the last five years include *Blanchard v. Morton School District*, 420 F.2d 918, 921 (9th Cir. 2005) ["money damages for retrospective and non-educational injuries are not available under the IDEA];[8] *Ortega v. Bibb County School District*, 397 F.3d 1321, 1325 (11th Cir. 2005) [damages are inconsistent with IDEA's statutory scheme]; *Nieves-Marquez v. Puerto Rico*, 353 F.3d 108, 124 (1st Cir. 2003) ["tort-like money damages, as opposed to compensatory equitable relief, are not available under IDEA"]; *Polera v. Board of Education*, 288 F.3d 478, 486 (2d Cir. 2002) ["the purpose of the IDEA is to provide educational services, not compensation for personal injury, and a damages remedy – as contrasted with reimbursement of expenses – is fundamentally inconsistent with that goal."]

Circuit courts deciding this issue more than five years, but less than fifteen years ago include *Sellers ex rel. Sellers v. Sch. Bd. of Manassas*, 141 F.3d 524, 527 (4th Cir. 1998) ["tort-like damages are simply

[8] This is the decision in Blanchard's first appeal to the Ninth Circuit in this case, referred to as *Blanchard I* in the Petition. The court reversed the district court's dismissal on exhaustion of remedy grounds and remanded the case. The Petition arises from the Ninth Circuit's decision following her second appeal.

inconsistent with IDEA's statutory scheme"]; *Charlie F. v. Board of Education of Skokie School Dist.*, 98 F.3d 989, 991 (7th Cir. 1996) ["the structure of the statute – with its elaborate provision for education services and payments to those who deliver them – is inconsistent with monetary awards to children and parents; damages are not relief that is available under the IDEA"]; *Heidemann v. Rother*, 84 F.3d 1021, 1033 (8th Cir. 1996) [general and punitive damages for the types of injuries alleged by plaintiffs are not available under the IDEA]; *Crocker v. Tennessee Secondary Sch. Athletic Assoc.*, 980 F.2d 382, 386 (6th Cir. 1992) [no recovery of general damages under the IDEA].

Circuit courts deciding this issue more than fifteen years ago include *Hall v. Knott Bd. of Educ.*, 941 F.2d 402, 407 (6th Cir. 1991) [no right to recover damages for a student's loss of earning power attributed to a school board's failure to provide appropriate education]; *Marvin H. v. Austin School District*, 714 F.2d 1348, 1356 (5th Cir. 1983) [relief under the IDEA generally includes only prospective relief and a damage remedy is not generally consistent with the goals of the statute].

All circuit courts considering the issue have uniformly concluded that the comprehensive enforcement and remedial scheme of the IDEA does not allow for an award of damages.

C. The clear trend in the circuit courts is to conclude that §1983 does not provide a damages remedy for a violation of the IDEA.

Given the complete unanimity among the circuit courts deciding that damages are not available in a direct action under the IDEA, it is a short step for all courts to eventually conclude that this limitation in the IDEA cannot be circumvented through resort to a damages claim under 42 U.S.C. §1983.

In *A.W. v. Jersey City Pub. Sch.*, 486 F.3d 791 (3d Cir. 2007) (en banc), the Third Circuit decided that the comprehensive enforcement scheme of the IDEA precludes enforcement of its provisions through an action under §1983. *Id.* at 803. The court was guided by the Supreme Court's methodology described in *Rancho Palos Verdes*, 544 U.S. 113, to abrogate its earlier decision in *W.B. v. Matula*, 67 F.3d 484 (3d Cir. 1995), where the court previously decided that §1983 was available to redress rights secured by the IDEA.

In *Diaz-Fonseca v. Puerto Rico*, 451 F.3d 13 (1st Cir. 2006), the First Circuit rejected resort to §1983 to evade the limited remedial structure of the IDEA. The Court noted that allowing a plaintiff to claim money damages under §1983 would "subvert the overall scheme that Congress envisioned for dealing with educational disabilities, as well as the purpose of the IDEA, which is to ensure a free appropriate public education." *Id.* at 29.

In *Padilla ex. rel. Padilla v. Sch. Dist. No. 1, Denver*, 233 F.3d 1268 (10th Cir. 2000), the Tenth Circuit decided that a cause of action under §1983 is not available to remedy IDEA violations, noting that the Supreme Court has cited the IDEA as an example of an exhaustive legislative enforcement scheme that precludes resort to §1983. The Tenth Circuit recognized that the Court considers the decision in *Smith v. Robinson*, 466 U.S. 992, to be "alive and well insofar as it asserts that §1983 claims may not be used to remedy IDEA violations." *Id.* at 1274.

In *Sellers ex rel. Sellers v. Sch. Bd. of Manassas*, 141 F.3d 524 (4th Cir. 1998), the court noted that the Supreme Court has never approved an award of compensatory or punitive damages under the IDEA for a violation of its terms. Noting that tort-like damages are simply inconsistent with IDEA's statutory scheme, the Fourth Circuit explained that the purpose of the IDEA's procedural mechanisms is to preserve the right to a free appropriate public education, not to provide a forum for tort-like claims of educational malpractice. The court stated that under *Smith v. Robinson,* 468 U.S. 992, the parents "undoubtedly would be precluded from circumventing IDEA's limits on remedial relief by suing instead under §1983." *Id.* at 530.

In *Crocker v. Tennessee Secondary Sch. Athletic Assoc.*, 980 F.2d 382, 387 (6th Cir. 1992), the Sixth Circuit reached the same conclusion that §1983 is not available to provide a damages remedy for a violation of rights secured by the IDEA, although it made that

decision without reference to the underlying analysis it used.

In *Anderson v. Thompson*, 658 F.2d 1205 (7th Cir. 1981), even before the decision in *Smith v. Robinson*, the Seventh Circuit rejected a claim that an IDEA based complaint was cognizable under §1983. The court explained that the IDEA provided a detailed statutory administrative and judicial scheme for enforcement of its provisions but did not include a traditional damages remedy, thereby precluding resort to §1983 as a "conduit to attorneys' fees" under §1988. *Id.* at 1217.

In recent months, district courts have followed the majority view. In the Eleventh Circuit, where the issue has not yet been decided by the Court of Appeals, a district court followed the majority to conclude that a claim based on a violation of the IDEA cannot be remedied through §1983. *Sammons v. Polk County School Board*, 2007 WL 4358266 (M.D. Fla. 2007). In the Fifth Circuit, a district court relied on the majority view to reach the same result. *S.D. by D.B. v. Houston Independent School District*, 2007 WL 2947443 (S.D. Tex. 2007).

The clear trend in the lower federal courts is to adopt the majority view that a damages claim under §1983 is not available or a claimed violation of the IDEA.

D. Circuit courts deciding that §1983 provides a remedy for a violation of the IDEA are in the clear minority.

The decisions Blanchard relies on to argue that a reviewable circuit split exists have decided that §1983 is available as a remedy without consideration of the Court's refined analysis concerning when a federal statutory violation can be remedied through §1983, or they are distinguishable in other respects.

In *Mrs. W. v. Tirozzi*, 832 F.2d 748 (2d Cir. 1987), the Second Circuit considered a parents' claim that the State Board of Education did not provide adequate complaint procedures or access to due process hearings where they could pursue complaints concerning system-wide violations of the IDEA. The case did not include a damages claim based on an IDEA violation, as the parents sought only declaratory and injunctive relief through §1983. The court concluded only that the parents were entitled to pursue a §1983 claim for the declaratory and injunctive relief they sought in that case.

Fifteen years after the decision in *Mrs. W. v. Tirozzi*, the Second Circuit decided *Polera v. Board of Education*, 288 F.3d 478 (2d Cir. 2002). In *Polera*, the court differentiated between equitable relief that is available under the IDEA, and damages that are not. *Id.* at 486. Now that the Second Circuit has joined the majority of circuits to hold that IDEA's comprehensive remedies do not include a damages remedy, it is likely that the court will ultimately

follow the majority and decide that §1983 is not available to pursue a damages claim under §1983 for violations of the IDEA.

Blanchard also relies on the Second Circuit decision in *Weixel v. Board of Educ. of City of New York*, 287 F.3d 138 (2d Cir. 2002). *Weixel* was decided on March 29, 2002, one month before the Second Circuit decided *Polera*, 288 F.3d 478. Without the benefit of the analysis in that case, the court in *Weixel* summarily concluded that the district court erred in dismissing a §1983 claim on a motion to dismiss under Fed. R. Civ. P. 12(b)(6). While further proceedings in *Weixel* are not reported, the outcome of the case would surely have been persuaded by the Second Circuit's decision in *Polera* that an award of damages is not available under the IDEA.

Furthermore, the Second Circuit has already applied the refined methodology explained in *Rancho Palos Verdes*, 544 U.S. 113, in a case concerning the availability of §1983 to remedy a statutory violation in a different context. In *Morris-Hayes v. Board of Education of the Chester Union Free School District*, 423 F.3d 153 (2d Cir. 2005), the court decided that the comprehensive remedies provided by the Uniform Services Employment and Reemployment Rights Act, 38 U.S.C. §4311 *et seq.* ("USERRA") preclude a §1983 claim for damages against individual defendants, a remedy not authorized by USERRA. Given the Second Circuit's recognition of the methodology to apply to claims for damages under §1983 based on a federal statutory right, it is likely that the court will

ultimately conclude that §1983 is not available for such claims under the IDEA.

In *Marie O. v. Edgar*, 131 F.3d 610 (7th Cir. 1997), the Seventh Circuit determined that §1983 was available to provide a basis for parents to pursue declaratory and injunctive relief to require state officials to bring Illinois into compliance with the mandates of the IDEA. Like the Second Circuit in *Mrs. W. v. Tirozzi*, the court did not address the issue of availability of damages under §1983 for violations of the IDEA. Significantly, *Marie O.* did not overrule the Seventh Circuit's earlier decision in *Anderson v. Thompson*, 658 F.2d 1205, where the court concluded that the IDEA did not include a damages remedy, thereby precluding resort to §1983 as a "conduit to attorneys' fees" under §1988. *Id.* at 1217.

The Fifth Circuit decision in *Angela L. v. Pasadena Independent School District*, 918 F.2d 1188 (5th Cir. 1990), cited by Blanchard, is not instructive. In a footnote, the court stated without discussion that parents can assert violations of §1983, *id.* at 1193, n.3, and affirmed an award of attorneys' fees to parents following a due process hearing.[9] Significantly, a district court in the Fifth Circuit acknowledged within the last year that courts have

[9] Blanchard also cites to an unpublished decision in *Pace v. Bogalusa City Sch. Bd.*, 2001 WL 969103 (E.D. La. 2001), *aff'd in part on other grounds*, 403 F.3d 272 (5th Cir. 1983). The Fifth Circuit did not consider the §1983 claim because it was not briefed on appeal. *Id.* at 275.

determined that §1983 liability *cannot* be predicated on violations of the IDEA, and dismissed a §1983 claim on that basis. *S.D. by D.B. v. Houston Independent School District*, 2007 WL 2947443 (S.D. Tex. 2007).

In *Gean v. Hattaway*, 330 F.3d 758 (6th Cir. 2003), cited by Blanchard, the Sixth Circuit did not decide that §1983 provides a cause of action for damages under the IDEA. The court noted that the plaintiffs' claim was *not* a claim for general damages, but a claim for relief available under the IDEA, and the court required the plaintiffs to use the IDEA's prescribed administrative process before bringing such claims to court.

The Second, Fifth, Sixth and Seventh Circuit decisions referred to above either did not address the issue raised in the Petition, or they pre-date the decision in *Rancho Palos Verdes*, 544 U.S. 113. These decisions did not take into account the Court's explanation that a damages remedy under §1983 is not available for a federal statutory violation when the statute, like the IDEA, provides a comprehensive enforcement for violation of its terms.

None of the decisions relied upon by Blanchard provide a definitive analysis supporting a damages remedy under §1983 for an IDEA violation. Nor did any of those cases specifically decide the legal issue raised by the Petition – are damages available under §1983 for asserted violations of the IDEA?

III. THERE IS NO WIDELY RECOGNIZED CIRCUIT CONFLICT.

Six circuit courts and numerous district courts now conclude that §1983 is not available to provide a damages remedy for IDEA violations. These courts have, generally applied the methodology explained in *Smith v. Robinson*, 468 U.S. 992 (1984), as refined in *Rancho Palos Verdes v. Abrams*, 544 U.S. 113 (2005). When courts use the required methodology, as they all must, they uniformly conclude that §1983 is not available to provide a damages remedy for an IDEA violation. The circuit courts deciding differently have not yet had the opportunity to apply this methodology. Thus, it cannot be said that a true circuit split exists at this time.

A closer look at decisions cited by Blanchard further illustrates this point. Four of the five district court decisions she cites to were decided prior to 2001, before the decision in *Rancho Palos Verdes,* and without its guidance concerning the methodology to apply when determining whether a statutory violation can be the basis of a §1983 claim.[10] At the time of those district court decisions, only the Fourth, Seventh and Tenth Circuits had determined that IDEA

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[10] *Goleta Union Elem. Sch. Dist. v. Ordway*, 166 F. Supp.2d 1287 (C.D. Cal. 2001); *M.H. v. Bristol Board of Education*, 169 F. Supp.2d 21 (D. Conn. 2001); *Zearly v. Ackerman*, 116 F. Supp.2d 109 (D.D.C. 2000); *Andrew S. ex rel. Margaret S. v. Sch. Comm. of Greenfield*, 59 F. Supp.2d 237 (D. Mass. 1999). [Petition at 18-20].

based rights did not provide the basis for a damages claim under §1983. *Sellers*, 141 F.3d 524; *Anderson*, 658 F.2d 1205; *Padilla*, 233 F.3d 1268. Now, the First, Third and Ninth Circuits have reached the same conclusion. *Diaz-Fonseca*, 451 F.3d 13; *A.W. v. Jersey City.*, 486 F.3d 791; *Blanchard v. Morton School District*. App. 1.

The remaining district court decision cited by Blanchard on this issue, *Carney ex rel. Carney v. Nevada ex rel. Department of Education*, 2007 WL 777697 (D. Nev. Mar. 12, 2007), *clarified on other grounds*, 2007 WL 3256573 (D. Nev. Oct. 31, 2007), concluded §1983 was *not* available to provide a damages remedy even when the parties had not addressed the issue in their briefs. The court found persuasive the reasoning in *Alex G. v. Board of Trustees of Davis Joint Unified Sch. Dist.*, 332 F. Supp.2d 1315, 1319 (E.D. Cal. 2004), where the court concluded that the comprehensive enforcement scheme in the IDEA, directed at resolution of complaints, is incompatible with enforcement through §1983. Both *Carney* (decided in Nevada) and *Alex G.* (decided in California) arose in states within the Ninth Circuit, and were decided before the Ninth Circuit decision below. This demonstrates that the trend is clearly toward a uniform conclusion in the federal courts that §1983 is not available to provide a damages remedy for claims arising under the IDEA.

CONCLUSION

The Petitioner has not established the grounds for this Court to grant the Petition. The Respondent respectfully requests that the Petition be denied.

Respectfully submitted,

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