Supreme Court, U.S.
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No. -

In The

Supreme Court of the United States

CATHERINE BURKE and MIKAEL ROLFHAMRE,
PETITIONERS,
v.

THE BROOKLINE
SCHOOL DISTRICT,
RESPONDENT.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Millions of children in the United States are identified as disabled under the Individuals with Disabilities Education Act ("IDEA") (20 U.S.C. § 1401 et seq.). This IDEA case presents the Court with an ideal opportunity to resolve a split among the federal courts of appeals and to ensure that students who are disabled and resident within the boundaries of the First Circuit do not have radically narrower rights under the IDEA than do students resident within the boundaries of nearly every other federal judicial circuit. The question presented is:

Whether parents of a child who has been identified as disabled under the IDEA can maintain a claim for compensatory damages under the Americans with Disabilities Act (42 U.S.C. § 12132 et seq.) and/or section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794) for retaliatory-type conduct against them for their advocacy for their child's rights under the ADA, section 504, and the IDEA.

LIST OF THE PARTIES TO THIS PROCEEDING

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The order of the United States Court of Appeals for the First Circuit was entered on December 13, 2007. It is reprinted in Appendix A. The order of United States District Court for the District of New Hampshire denying the motion for reconsideration was entered on March 15, 2007. It is reprinted in Appendix B. The order of the United States District Court for the District of New Hampshire granting the defendant's motion to dismiss plaintiffs' claims was entered on January 29, 2007. It is reprinted in Appendix C.

STATEMENT OF JURISDICTION

The order of the United States Court of Appeals for the First Circuit sought to be reviewed was entered on December 13, 2007. The statutory provision that confers jurisdiction on the Supreme Court to review a judgment of a federal court of appeals on a writ of certiorari is 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND REGULATIONS

The statutory provisions and regulations relevant to this case and set forth verbatim in Appendix D are:

The Individuals with Disabilities Education Act, 20 U.S.C. § 1415(l)

42 U.S.C. § 1983

The Rehabilitation Act of 1973, 29 U.S.C. § 794

The Americans with Disabilities Act, 42 U.S.C. § 12132

The Americans with Disabilities Act, 42 U.S.C. § 12203

STATEMENT OF THE CASE

Basis for Jurisdiction in the First Instance

The United States District Court for the District of New Hampshire, pursuant to 28 U.S.C. § 1291, exercised subject matter jurisdiction over plaintiffs' claims that they were retaliated against, coerced, and intimidated, in violation of certain provisions in Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794) and the Americans with Disabilities Act (42 U.S.C. § 12132 et seq.), by the Brookline School District because of plaintiffs' advocacy on behalf of their children, who were identified as disabled under the Individuals with Disabilities Education Act (20 U.S.C. § 1400 et seq.).

Factual Background

Petitioners Catherine Burke and Mikael Rolfhamre (sometimes, the "Parents") are the parents of three children identified by the Brookline School District (the "School District") as students in need of special education under the Individuals with Disabilities Education Act ("IDEA") (20 U.S.C. § 1400 et seq.). Each of the children is also an individual with a disability under the Americans with Disabilities Act ("ADA") (42 U.S.C. § 12132 et seq.) and a handicapped person as defined by section 504 of the Rehabilitation Act of 1973 ("Section 504") (29 U.S.C. § 794).

In their pro se complaint, Parents alleged that on numerous occasions the School District coerced, intimidated, interfered with, and retaliated against Parents while Parents were engaged in educational advocacy on behalf of their children. Parents alleged that the School District: denied procedural safeguards guaranteed by the ADA and Section 504; interfered with Parents' ability to exercise rights secured by the ADA and their right to assist their disabled children in obtaining and enjoying rights secured by both the ADA and Section 504; interfered with access to dispute resolution procedures required by Section 504; and retaliated against them by spreading false and damaging rumors, making excessive and indeed oppressive demands for medical and mental health records, and imposing policies to limit access to independent evaluators.

Procedural Background

Catherine Burke and Mikael Rolfhamre filed a pro se complaint in this matter in the United States District Court for the District of New Hampshire on August 25, 2006. In their complaint, they set forth claims under Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794), the Americans with Disabilities Act, (42 U.S.C. § 12203), and 42 U.S.C. § 1983, among others. The claims sought compensatory damages to remedy the harm caused by the Brookline School District's acts of coercion, intimidation, interference and retaliation against the plaintiffs for plaintiffs' advocacy on behalf of their daughters, each of whom is identified as a student with disabilities under the IDEA.

The United States District Court for the District of New Hampshire granted the School District's motion to dismiss for failure to state a claim on January 29, 2007.

Parents then moved for reconsideration on February 12, 2007. On March 15, 2007, the District Court denied the motion for reconsideration.

Notice of Appeal was timely filed on April 12, 2007, pursuant to Federal Rule of Appellate Procedure 4(a)(1), by which plaintiffs appealed from the final judgment of the District Court. The First Circuit had appellate jurisdiction over the appeal pursuant to 28 U.S.C. § 1291, as an appeal as of right from a final judgment of a United States District Court. Appellants filed an appeal on July 20, 2007.

The First Circuit affirmed the District Court's dismissal December 13, 2007.

REASONS FOR GRANTING THE PETITION

The First Circuit Court of Appeals (the "First Circuit") has parted company with its sister circuits while neglecting the plain language of section 1415(l) of the Individuals with Disabilities Education Act ("Section 1415(l)") (20 U.S.C. § 1415(l)). Even though Section 1415(l) contains a savings clause that expressly states that the passage of the IDEA in no way restricts claimants' rights under, inter alia, section 504 of the Rehabilitation Act of 1973 ("Section 504") (29 U.S.C. § 794) and the Americans with Disabilities Act ("ADA") (42 U.S.C. § 12203), the First Circuit has held that claimants may not recover compensatory damages under these provisions where the "essence of the claim" is one stated under the IDEA.

I. THE FIRST CIRCUIT NOW STANDS ALONE ON THE IMPORTANT FEDERAL QUESTION WHETHER CLAIMS FOR COMPENSATORY DAMAGES MAY BE BROUGHT UNDER THE ADA AND SECTION 504 WHERE SUCH CLAIMS OVERLAP WITH THE IDEA.

A. There is Conflict on this Issue Between the First and Every Other Circuit That Has Addressed the Issue

This proceeding involves a question of exceptional national importance on which the First Circuit has staked out an untenable position. The First Circuit is a true outlier on this issue: Of the

eleven federal courts of appeals, it is the only one that has ruled that compensatory damages available under the ADA and Section 504 are precluded in IDEA–related contexts.[1] Because cases brought

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[1] This issue is distinct from the question whether the IDEA (or its predecessor, the Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773) (1975) (referred to by courts variously as "EAHCA," "ECHA," or "EHA")) itself provides for compensatory damages. Courts that have considered this question have uniformly determined that the IDEA bars such damages. See, e.g., Nieves-Marquez v. Puerto Rico, 353 F.3d 108, 125 (1st Cir. 2003) (concluding money damages not available under the IDEA because "IDEA's primary purpose is to ensure [a free appropriate public education], not to serve as a tort-like mechanism for compensating personal injury"); Polera v. Bd. of Educ. of Newburgh Enlarged City Sch. Dist., 288 F.3d 478, 483-86 (2nd Cir. 2002) (concluding monetary damages not available under the IDEA); Sellers v. School Bd., 141 F.3d 524, 526-28 (4th Cir. 1998) (holding "tort-like damages" unavailable under the IDEA because they are "inconsistent with IDEA's statutory scheme" and "present acute problems of measurability"); Marvin H. v. Austin Indep. Sch. Dist., 714 F.2d 1348, 1356-57 (5th Cir. 1983) (holding damage remedy not "generally consistent" with goals of IDEA predecessor); Crocker v. Tenn. Secondary Sch. Athletic Ass'n, 980 F.2d 382, 386-87 (6th Cir. 1992) (holding "appropriate relief" under EHA includes restitutionary types of relief but not general damages for emotional injury or injury to a dignitary interest); Charlie F. by Neil F. v. Board of Educ., 98 F.3d 989, 991 (7th Cir. 1996) (holding money damages not available under the IDEA); Heidemann v. Rother, 84 F.3d 1021, 1033 (8th Cir. 1996) (holding general and punitive damages not available under the IDEA); Witte v. Clark County Sch. Dist., 197 F.3d 1271, 1275 (9th Cir. 1999) (holding "ordinarily monetary damages are not available under [the IDEA]"); Powell v. Defore, 699 F.2d 1078, 1081 (11th Cir. 1983) (recognizing "[a]s a general rule, compensatory damages are not available under the [EHA]").

under the statutes at issue in this petition are legion and because the rights protected by the statutes are of such fundamental importance, resolution of this circuit split is therefore imperative.

While it is well-settled that parties may not seek damages for denial of a so-called "free appropriate public education" ("FAPE") under the IDEA, the reach of the First Circuit's affirmance of the District Court's grant of dismissal in this matter extends far beyond this broadly accepted position. The First Circuit's affirmance reveals that it will apply its holding from Diaz-Fonseca v. Puerto Rico, 451 F.3d 13 (1st Cir. 2006) to bar a parent of a child identified as disabled under the IDEA from seeking compensatory damages under Section 504 or the ADA on the theory that such damages are based on denial of FAPE, even if those damages are, as here, for retaliation, coercion, interference and intimidation based on the pursuit of FAPE and of rights provided under Section 504 and ADA.

If it is allowed to stand, the First Circuit's holding in Diaz-Fonseca will allow school districts to retaliate against and otherwise harass parents of IDEA-disabled children with impunity, secure in the knowledge that they cannot – by law – be liable for compensatory damages.

By stark contrast, the Ninth Circuit Court of Appeals – the circuit most directly at odds with the First Circuit – recently held that "the availability of relief under the IDEA does not limit the availability

of a damages remedy under" Section 504. Mark H. v. Lemahieu, 513 F.3d 922, *9 (9th Cir. 2008).

B. Other Federal Courts of Appeals are Aligned More Closely with the Ninth than with the First Circuit.

Other federal courts of appeals have adopted approaches much more akin to that developed in the Ninth Circuit than to the First Circuit.

The United States Court of Appeals for the Third Circuit (the "Third Circuit") has long-endorsed an approach to the availability of compensatory damages under Section 504 for IDEA-related conduct that is consistent with that articulated by the Ninth Circuit in Mark H. In Matula, the Third Circuit reversed a summary judgment holding by a district court that would have barred recovery of damages awarded to a plaintiff parent by an administrative law judge as part of a settlement of claims. W.B. v. Matula, 67 F.3d 484, 494 (3d Cir. 1995), overruled on other grounds by A.W. v. Jersey City Public Schools, 486 F.3d 791, 797-98 (3d Cir. 2007). The court concluded that the plaintiffs could "seek monetary damages directly under § 504." 67 F.3d at 494.

The Third Circuit's ruling in Matula has been relied upon for numerous adjudications of Section 504 claims for compensatory damages separately from IDEA claims. See, e.g., J.L. v. Ambridge Area Sch. Dist., 2008 U.S. Dist. Lexis 13451, *45-46 (W.D. Pa. February 22, 2008) ("Plaintiffs need not allege any new facts aside from those previously litigated in the IDEA administrative proceedings to establish a

violation of section 504, as long as those facts state a prima facie case").

In the Second Circuit, courts routinely analyze Section 504 claims distinctly from IDEA claims, even if both claims rely on the same locus of FAPE-related facts. For example, in See, e.g., S.W. v. Warren, 528 F.Supp.2d 282, *14-15 (S.D.N.Y. 2007), the court stated:

> [C]ourts have considered Section 504 claims in conjunction with IDEA claims and determined that plaintiffs can rely on Section 504 to claim that they are denied access to a free appropriate education, . . . if they can show that defendants acted with bad faith or gross misjudgment in the administration of disability services. . . . Indeed, if the very fact that plaintiffs were challenging the denial or inadequacy of disability services meant they could not assert a Section 504 claim, then there would be no need for courts to distinguish Section 504 claims from IDEA claims. As we discuss below, this is not the case, and courts on numerous occasions have recognized both claims.

Id. (discussing Rothschild v. Grottenthaler, 907 F.2d 286, 289-90 (2d Cir. 1990) and Cushing v. Moore, 970 F.2d 1103 (2d Cir. 1992))

The United States Court of Appeals for the Eighth Circuit, too, is more closely aligned with the Ninth Circuit – and the plain language of section 1415(l) – than it is with the First Circuit. In M.P. v.

Independent Sch. Dist. No. 721, 439 F.3d 865, 868 (8th Cir. 2006), a case brought by a student with learning disabilities, the court held that, "Our precedent indicates that even when a plaintiff's IDEA claims fails for lack of jurisdiction, a Section 504 claim may still be considered," and reversed and remanded the case to the district court for further proceedings. Id.

In Board of Education v. Ross, 486 F.3d 267, 278 (7th Cir. 2007), the United States Court of Appeals for the Seventh Circuit (the "Seventh Circuit") addressed itself to a district court's entry of summary judgment (not a dismissal) against parents' claims under Section 504 and the ADA on the basis that related IDEA claims had been similarly disposed of. The Seventh Circuit affirmed the summary judgment, but only because the district court had applied the "correct standard" to the section 504 and ADA claims, i.e., the district court had found that "no reasonable trier of fact could find that the [school district] intentionally discriminated against [the student]." Id. at 279. By insisting that the elements of claims under section 504 and the ADA be addressed distinctly from the IDEA, the Seventh Circuit in Ross approached those statutes consistently with the Ninth Circuit's approach and inconsistently with the First Circuit's approach. If the parents in Ross were to bring their claim in the First Circuit today, they would not progress past the school district's motion to dismiss.

The United States Court of Appeals for the Tenth Circuit recently ruled that plaintiffs' claims

for retaliation under Section 504 can be distinct from those under the IDEA and can survive the dismissal of related IDEA claims. Ellenberg v. New Mexico Military Institute, 478 F.3d 1262, 1267 (2007).

C. This Issue Presents an Important Federal Question.

The question presented by this petition has grave implications for the millions of students across the United States who are living with disabilities – and their parents. Over six million (6,000,000) students in the United States participate in IDEA-provided education plans, and this figure represents 9.1 percent of the general population of the United States, ages 6 through 21. Office of Special Education Program, U.S. Department of Education, 27th Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act, Vol. 1, (2005), p. 44. There was an average of more than 90,000 students in each state learning under individual education plans as of the 2004-2005 school year, and approximately twelve percent of school districts had conducted or participated in one or more formal mediations following a due process request. Ellen Schiller, Fran O'Reilly, Tom Fiore, eds., Marking the Progress of IDEA Implementation: The Study of State and Local Implementation and Impact of Individuals with Disabilities Education Act, Report to the Office of Special Education Programs, U.S. Department of Education (April 2006), p. 19-20. Furthermore, four percent of districts participated in some kind of litigation about the IDEA provisions and its rights.

This Court last year held that the rights of parents and children to special education are coextensive. Winkelman v. Parma City Sch. Dist., 550 U.S. __, 127 S.Ct. 1994, 2002 (2007) ("IDEA defines one of its purposes as seeking 'to ensure that the rights of children with disabilities and parents of such children are protected.' §1400(d)(1)(B). The word 'rights' in the quoted language refers to the rights of parents as well as the rights of the child; otherwise the grammatical structure would make no sense."). Accordingly, the question presented by this case affects students and parents alike.

II. THE FIRST CIRCUIT'S DECISION BELOW DIRECTLY CONTRAVERTED BOTH THE PLAIN LANGUAGE OF AND THE CONGRESSIONAL INTENT BEHIND SECTION 1415(l), AND THE COURT SHOULD SETTLE THIS IMPORTANT QUESTION OF FEDERAL LAW

A. Section 1415(l) of the IDEA Unambiguously Preserves Claims Under the ADA and Section 504

There is no ambiguity in Section 1415(l). The provision states, in relevant part:

> 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 law protecting the rights of children with disabilities . . . .

(emphasis added). In view of the absence of ambiguity in the provision, it must be applied as written. Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 842-843 (1984) ("First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.")

B. The First Circuit has Nonetheless Failed to Apply the Plain Language of Section 1415(l)

Even though the First Circuit lacks the discretion to impose upon parents of IDEA-disabled children requirements not present in the ADA or Section 504, it has done just this in its recent IDEA decisions. In Diaz-Fonseca, the First Circuit held that "[w]here the essence of the claim is one stated under the IDEA for denial of FAPE, no greater remedies than those authorized under the IDEA are made available by recasting the claim as one brought under . . . Title II of the ADA[] or section 504 of the Rehabilitation Act." 451 F.3d at 19.

Without this Court's redress, IDEA-disabled children and their parents who reside within the boundaries of the First Circuit will be denied rights that Congress long ago took great pains to provide.

C. The Legislative History of Section 1415(l) of the IDEA Reveals that Congress Intended for the Full Panoply of Remedies under Section 504 and the ADA to be Available to Claimants in IDEA-Related Contexts

No further argument is necessary to demonstrate the First Circuit's departure from accepted standards of statutory interpretation than has already been provided. But because the clarity of the congressional record on the passage of section 1415(l) rivals that of the section's language, petitioners include a summary here.

Congress amended the EAHCA to add what eventually became section 1415(l) of the IDEA as a response to this Court's decision in Smith v. Robinson, 468 U.S. 992 (1984). In Smith, the Court denied an award of attorney's fees to plaintiffs, who had prevailed under 20 U.S.C. § 1415 of the EAHCA. The Court's holding restricted the availability of certain remedies under Section 504 in circumstances where such claim related to a claim under the EAHCA. In denying the award of attorney's fees, the Court affirmed a decision of the First Circuit. See Smith v. Cumberland Sch. Comm., 703 F.2d 4 (1st Cir. 1983).

This Court in Smith held that when Congress passed the EAHCA in 1975, it intended for that law to be the only avenue for legal claims involving the provision of FAPE for children with disabilities.

Smith, 468 U.S. at 1009. Under this reading, FAPE-based claims under Section 504 and/or Section 1983 were precluded. To that point, Section 504 and section 1983 had been important, in no small part, because of their explicit provisions for attorney fees and money damages, provisions which the EAHCA lacked. Thus, prior to Smith, when parents prevailed on claims under Section 504 and section 1983, courts would often award attorney fees. See, e.g., Espino v. Besteiro, 708 F.2d 1002 (5th Cir. 1983). This stopped after Smith, which made it less likely that parents with limited means would be able to obtain representation in EAHCA cases. Justice Brennan, dissenting in Smith, noted:

> Congress will now have to take the time to revisit the matter. And until it does, the handicapped children of this country whose difficulties are compounded by discrimination and by other deprivations of constitutional rights will have to pay the costs.

Id. at 1031.

Congress did revisit the matter, and when it did so, it rejected this Court's holding in Smith. This rejection is evidenced, in part, by Section 3 of PL 99-372, which then provided that nothing in it shall be construed to limit "the rights, procedures and remedies available under the constitution or title V of the Rehabilitation Act of 1973 . . ." or other laws.[2]

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[2] As PL 99-372 was passed in 1986, there is no reference in Section 3 to the Americans with Disabilities Act of 1990. The

Representative Steven Bartlett stated:

> Those of us in Congress familiar with Public Law 94-142, our special education law, considered the Smith v. Robinson decision to be an erroneous interpretation of congressional intent: It wrongly cut off access to our judicial system by parents seeking to enforce their handicapped child's rights. We have, with this conference agreement, properly restored access to our judicial system, but, we have gone well beyond that.

132 Cong. Rec. H4842-43 (daily ed. July 24, 1986) (statement of Rep. Bartlett). These sentiments were also expressed by Senator Lowell Weicker, one of the prime sponsors of the legislation:

> The purpose of S. 415 is simple--to overturn the Smith v. Robinson decision and thereby to clarify congressional intent regarding these matters. The fact that Congress did not intend to leave unprotected the rights of handicapped children and their parents to secure the free appropriate public education promised to them by EHA was made clear in the 1978 passage of section 505(b) of the Rehabilitation Act which

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reference to the ADA was subsequently added to Section 1415(l) of the IDEA. As noted further below, the ADA's passage after the IDEA renders completely untenable the First Circuit's implied holding that Congress impliedly repealed the ADA in IDEA-related contexts.

> made attorney's fees available under section 504. Section 505(b) clearly does not make an exception for handicapped children seeking an appropriate education. Indeed, the 1978 Senate and House reports accompanying section 505(b) explain that disabled individuals were one of the very few minority groups in this country who had not been specifically authorized by Congress to seek attorney's fees. The purpose of section 505(b) was "to correct the omission [sic] and thereby assist handicapped individuals in securing the legal protection guaranteed them."
>
> Unfortunately, because the court in Smith v. Robinson misinterpreted Congress' intent, handicapped children are now provided substantially less protection against discrimation [sic] than other vulnerable groups of people. S. 415 would remove these inequities by restoring equivalent protection to handicapped children, a group undeniably deserving congressional protection.

131 Cong. Rec. S10397-10398 (daily ed. July 30, 1985) (statement of Sen. Weicker).

Since 1986, the federal special education law has been amended three times: in 1991, and again, more generally, in 1997 and 2004, as the result of reauthorizations. Despite these general revisions to the federal special education law, the provision that was Section 3 of the Handicapped Children's Protection Act has remained essentially unchanged,

except for the important addition of the ADA to the savings clause. As noted above, the Section 1415(1), now provides that:

> 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 law 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 (1) and (g) of this chapter shall be exhausted to the same extent as would be required had the action been brought under this subchapter. 20 U.S.C.A. § 1415(1).

Notwithstanding the very clear and strong directive in Section 1415(1) that "[n]othing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies," available under the ADA and Section 504, the First Circuit held in Diaz-Fonesca v. Commonwealth of Puerto Rico, 451 F. 3d 13, 19 (1st Cir. 2003) that "where the essence of the claim is one stated under the IDEA for denial of FAPE, no greater remedies than those authorized under the IDEA are made available by recasting the claim as one brought under 42 U.S.C. 1983, Title II of the ADA, or section 504 of the Rehabilitation Act" and that "[n]o general compensatory damages may be awarded in such a suit regardless of which of the causes of action listed above [42 U.S.C. 1983, Title II

of the ADA, or section 504] is invoked." The First Circuit's decision in Diaz-Fonesca was predicated on its rulings that section 1983 may not be used as a vehicle for monetary damages to remedy the denial of a free appropriate public education under the IDEA. Diaz-Fonesca, 451 F. 3d at 28; Nieves-Marquez v. Commonwealth of Puerto Rico, 353 F. 3d 108, 124 (1st Cir. 2003). Because section 1983 supplies no rights of its own, it is significantly different from the ADA and section 504, which do supply rights independent of the IDEA.

III. THE FIRST CIRCUIT HAS INTERPRETED THE IDEA AS IMPLIEDLY REPEALING THE ADA AND SECTION 504 IN IDEA-RELATED CONTEXTS, AND THIS APPROACH CONFLICTS WITH DECISIONS OF THIS COURT

The First Circuit's approach to the overlapping statutes at issue in this petition is directly at odds with longstanding principles of statutory construction endorsed by the Court in Posadas v. National City Bank, 296 U.S. 497, 503 (1936) and recently reinforced in Rancho Palos Verdes v. Abrams, 544 U.S. 113 (2005). In Posadas, the Court noted that implied repeals "are not favored." 296 U.S. at 503. While the two "well-settled categories of repeals by implication" – the occasion of "irreconcilable conflict" between the provisions of two acts and when a later act covers the "whole subject" of a former one – remain viable, they are viable only when "the intention of the legislature to repeal [is]

clear and manifest." Id. Absent such clarity, "the later act is to be construed as a continuation of, and not a substitute for, the first act." Id.

As a threshold matter, because Congress passed the ADA in 1990, i.e., after the passage of the IDEA, there is simply no basis to conclude that Congress intended the IDEA to supply the exclusive remedy for harm redressable by both the IDEA and the ADA. Implied repeal operates where a later act covers a "whole subject."

Furthermore, because Section 504 supplies rights, it is not a candidate for implied repeal in the way that section 1983 is. In Rancho Palos Verdes, the Court addressed whether money damages and attorney's fees under section 1983 were available for a violation of the Telecommunications Act of 1996 ("TCA") (47 U.S.C. § 332(c)(7)). 544 U.S. at 119. In concluding that recovery under section 1983 was incompatible with the comprehensive enforcement scheme established by the TCA, the Court reasoned, that "[t]he provision of an express, private means of redress in the statute itself is ordinarily an indication that Congress did not intend to leave open a more expansive remedy under section 1983." Id. at 121 (emphasis added). The canon against implied repeal did not operate to preserve remedies under section 1983 because that statute does not create rights "but merely provides a civil cause of action to remedy 'some otherwise defined federal right.'" Id. at 120, n. 2, quoting Great Am Fed. Sav. & Loan Ass'n v. Novotny, 442 U.S. 366, 376 (1979).

The inverse of the Court's conclusion in Rancho Palos Verdes is that where, as in the cases of the ADA and Section 504, a later statute that "creates rights" overlaps with a former statute that supplies its own "private means of redress," implied repeal is untenable. This is doubly so in the context of section 1415(l) because not only was the "intention of the legislature to repeal" not "clear and manifest," the reverse was true. Congress could not have been clearer in its language that it intended to avoid implied repeal. And, as demonstrated above, the legislative history of section 1415(l) buttresses this reading of the section, which reading is, in any event, dictated by the clarity of the language.

Finally, to look for a moment at the two "well-settled" categories of repeal by implication, neither "irreconcilable conflict" nor legislation of a "whole subject" is present here. Section 1415(l)'s savings clause eliminates any notion of irreconcilable conflict. Congress made it eminently clear that both FAPE-based remedies and compensatory damages should be available to claimants under Section 504 and the ADA. Furthermore, as the Ninth Circuit has correctly noted, there are elements of proof required of claims under Section 504 that are not required of claims under the IDEA.

The notion that Congress impliedly repealed section 504 and the ADA when it passed the IDEA is strained well past the point of breaking by the language and legislative history of the IDEA's savings clause, section 1415(l). Petitioners respectfully urge this Court to supply an avenue

whereby they could redress the First Circuit's nullification of such rights, which abdication conflicts not only with section 1415(l)'s plain language and legislative history but also with important decisions of this Court.

IV. THE FIRST CIRCUIT'S DECISIONS SO FAR DEVIATE FROM THE USUAL AND ACCEPTED PRACTICE AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWERS

The First Circuit's affirmance of the District Court's dismissal of the Parent's complaint on the basis of the former's decision in Diaz-Fonseca constitutes a dramatic departure from the manner in which other federal courts of appeals approach the overlapping statutes at issue in this case. This case involves the alleged actions of a school district to thwart parental advocacy on behalf of children identified as disabled under the IDEA. Section 1415(l) clearly maintains that children so identified and their parents retain the protections granted by Section 504 and the ADA. Among these protections is the entitlement to compensatory damages, provided that the elements of the provisions are satisfied.

The First Circuit has gone well beyond the proper scope of barring damages claims for denial of FAPE under the IDEA and extended its reach effectively to bar any claim under Section 504 or the ADA brought by a child or parent of a child identified under the IDEA. Indeed, in the face of statutory

language as clear as 1415(l) is – and, although it is unnecessary to resort to such history, legislative history that, too, possesses crystalline clarity – petitioners respectfully submit that if this Court's supervisory powers are ever properly invoked, this must be such context where they ought to be.

CONCLUSION

Petitioners respectfully request that this Court grant this petition for certiorari to review the questions that would be presented on this appeal.

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Respectfully submitted,

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APPENDICES

A. Judgment of the United States Court of Appeals for the First Circuit affirming the District Court (December 13, 2007) A-1

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C. Order of the United States District Court for the District of New Hampshire, dismissing plaintiff's claims dated (January 29, 2007) .. A-5

D. Statutes and Regulations Involved in the Case A-17

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2. Rehabilitation Act of 1973, 29 U.S.C. § 794 .... A-18

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