No. 07-613

In the Supreme Court of the United States

D.P. ON BEHALF OF E.P. , D.P., AND K.P.; AND L.P. ON BEHALF OF E.P., D.P., AND K.P.,
Petitioners,

v.

SCHOOL BOARD OF BROWARD COUNTY, FLORIDA,
Respondent.

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

REPLY BRIEF FOR PETITIONERS

BRETT DIGNAM
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4800

ANDREW J. PINCUS
Counsel of Record
CHARLES A. ROTHFELD
Mayer Brown LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

REGULATIONS

OTHER AUTHORITIES

REPLY BRIEF FOR PETITIONERS

We showed in the petition that the holding below squarely conflicts with a decision of the Third Circuit regarding a question of substantial national importance: whether, when a three-year-old child transitions from early intervention services to preschool services, the stay-put provision of the Individuals with Disabilities Education Act ("IDEA") precludes a school district from unilaterally modifying the existing services plan until after review of the school board's proposed substitute preschool program is completed.

The amicus brief submitted by Autism Speaks confirms the very significant practical importance of this question. It explains that for autism, as with other disabilities, "early and intensive intervention is effective"; failure to intervene properly in the early years can be "irreparable" because "[c]hildren with autism cannot make up for lost time. When the opportunity presented during this narrow window passes, the squandered potential cannot be regained later." Am. Br. 12, 17. Thus,

> the importance of IDEA's pendency provision is even more important for young children in transition from Part C to Part B than it is for older children already covered by Part B. Parents should not be forced to watch as their young children's early intervention services lapse (or are materially reduced) when every passing moment erodes potential benefits that can never be regained.

Id. at 18-19. Because "[t]he decision below exposes children with autism to the risk of seismic catastrophe at a time they can afford it least," the question presented is "of great importance to thousands of young children with autism across this nation and their families." *Id.* at 3, 24-25.

Respondent does not dispute that the issue presented for review affects large numbers of children or that the proper interpretation of the stay-put provision is an issue of substantial national importance. Rather, most of the brief in opposition is devoted to defending the decision below on the merits. See Br. in Opp. 17-22. Those arguments, which are addressed in the petition (at 21-30), provide no basis for denying review.

Respondent does argue that there is no conflict among the courts of appeals, claiming that *Pardini* does not represent binding precedent in the Third Circuit because of the composition of the panel that decided the case. That contention is frivolous.

Respondent also contends that an amendment to the IDEA in 2004 and a federal regulation issued in 2006 demonstrate that the court of appeals' interpretation of the statute is correct and provide a basis for distinguishing the decision below from the Third Circuit's ruling in *Pardini* v. *Allegheny Intermediate Unit*, 420 F.3d 181 (3d Cir. 2005). See Br. in Opp. 15-17. But respondent's contention is undercut substantially by the fact that the court below did not rest its decision on either the amendment or the regulation—even though both were before that court. Indeed, the court below expressly acknowledged that its decision could not be reconciled with *Pardini*.

Far from supporting the court of appeals' decision, moreover, the 2004 amendment weighs heavily in favor of the interpretation of the statute that was adopted by the Third Circuit in *Pardini*. And the 2006 regulation simply reaffirms the Department of Education's longstanding view of the statute—a view relied on by neither the Third Circuit nor the court below, each of which based its decision on the statute's plain meaning.

The conflict between the lower courts is clear. The importance of the issue is confirmed by amicus Autism Speaks and is not disputed by respondent. Review by this Court is clearly warranted.

A. *Pardini* Is Binding Third Circuit Precedent.

The court below acknowledged that its decision was directly "at odds with the Third Circuit's holding in *Pardini*." Pet. App. 9a. Faced with this express recognition of a conflict, respondent asserts—without citation of authority—that *Pardini* lacks precedential effect because of the composition of the panel in that case. See Br. in Opp. 15.

In fact, *Pardini* is binding precedent in the Third Circuit, and is recognized as such. See *Case* v. *Allegheny Intermediate Unit*, No. 2:07-cv-374, 2007 WL 1876523 (W.D. Pa. June 28, 2007) (concluding that *Pardini* is controlling). See also *United States* v. *Parker*, 462 F.3d 273, 277 n.4 (3d Cir. 2006) ("This court 'strictly adheres to [the rule] that the holding of a panel in a precedential opinion is binding on subsequent panels.'" (citation omitted)). Respondent's argument to the contrary is baseless.

B. Respondent's Reliance On Section 1435(c) Is Completely Misplaced.

Respondent contends (Br. in Opp. 15) that "[r]ecent amendments to IDEA demonstrate that Pardini was wrongly decided, and that the Third Circuit Court of Appeals would likely not reach the same decision today," citing (*id.* at 16) the addition of subsection (c) to 20 U.S.C. § 1435 in 2004 (see Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, sec. 101, § 635(c), 118 Stat. 2647, 2749-51).

To begin with, respondent made the same argument in the court below, which did not even mention Section 1435(c) in its opinion. That omission substantially undercuts respondent's position that the 2004 amendment is dispositive of the proper interpretation of the stay-put provision. The omission is not surprising, however, because to the extent the amendment is relevant, it actually supports the result in *Pardini*, not the holding below.

Section 1435(c) authorizes a State to adopt a policy permitting parents to agree to continue past the child's third birthday the services that had been provided to that child under Part C. The provision thus allows the parents and school board to dispense with the statutory requirement that the school board develop a new Part B plan for the child prior to the child's third birthday, and permits them instead simply to continue the existing services.

Respondent contends that Section 1435(c) "addresses the situation found in both *Pardini* and *D.P.*" Br. in Opp. 16. That assertion is plainly incorrect. Section 1435(c) governs situations in which the par-

ents and the school board *agree* on the continuation of the services that had been provided under Part C.

The stay-put provision, by contrast, governs situations in which the parents and the school board *do not agree* on the child's proper placement. It protects children and their parents against unilateral changes in services by school boards—precisely what respondent has done here. Section 1435(c) by its terms does not apply in that situation.

To the extent Section 1435(c) is relevant to the question here, it actually undercuts respondent's position. One of respondent's principal arguments is that Part C plans are not an "educational placement" within the meaning of the stay-put provision because in respondent's view Part C plans typically do not include an educational component. See *id.* at 2-3, 5, 17, 21. But Section 1435(c) makes clear that a Part C plan can appropriately serve the purposes of Part B. Congress's determination that services under Part C plans may be continued after the child turns three conclusively establishes that Part C plans are "educational placement[s]."

Respondent suggests that Section 1435(c)'s parenthetical reference that Part C services "shall include an educational component" was meant to permit the continuation only of the services provided under a subset of all Part C programs that include such a component. See *id.* at 16-17. As we explained in the petition (at 24-25), however, Congress mandated in Section 1436(d) that *all* Part C plans include an educational component; the parenthetical reference in Section 1435(c) simply reaffirms that requirement. Indeed, Section 1435(c) underscores the common sense conclusion that Part C plans for children who have not yet turned three and Part B plans

for children who are just past their third birthday are likely to be quite similar. It therefore would make little sense to draw an arbitrary line between the two types of plans for purposes of the stay-put provision. See *Pardini*, 420 F.3d at 186 ("Congress has clearly recognized that realities dictate that there must often be significant overlap in services provided under Part C and Part B.").

C. The Department Of Education's Long-standing Interpretation Of The Stay-Put Provision Provides No Basis For Denying Review.

Respondent's final argument is that the Department of Education's revised regulation would prompt the Third Circuit to reverse its decision in *Pardini*. See Br. in Opp. 17. That is wrong for two reasons.

First, both the Third Circuit in *Pardini* and the Eleventh Circuit below expressly rested their decisions solely on the plain language of the statute; neither court relied on the agency's interpretation of the statute. The *Pardini* court found the "plain meaning of 'current educational placement'" dispositive. 420 F.3d at 192. Similarly, the majority below did not defer to the agency's position, instead "rely[ing] on the plain language of the 'stay put' provision." Pet. App. 11a. The 2006 regulation could not alter the Third Circuit's determination because that court's decision was based entirely on the plain statutory language.

Second, the regulation would not lead to a different result in the Third Circuit because it simply reaffirms the Department's "longstanding" interpretation of the stay-put provision (Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities, 71 Fed.

Reg. 46,540, 46,709 (Aug. 14, 2006))—an interpretation that was before the Third Circuit in *Pardini*. The Department has maintained this position since at least 1997, well before the decision in *Pardini*. Assistance to States for the Education of Children With Disabilities and the Early Intervention Program for Infants and Toddlers With Disabilities, 64 Fed. Reg. 12,406, 12,558 (Mar. 12, 1999); *Letter to Klebanoff*, 28 IDELR 478 (Dep't of Educ., Office of Special Educ. Programs, July 1, 1997). Indeed, the federal government, as amicus in *Pardini*, argued that this position was entitled to deference. See Brief for the United States as Amicus Curiae at 18-19, *Pardini*, 420 F.3d 181 (No. 03-2897, 03-3988).

Because the Third Circuit rested its decision on the plain statutory language, even though the agency's interpretation of the statute was before it, the recodification of the Department's interpretation provides no basis whatever for denying review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

BRETT DIGNAM
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4800

ANDREW J. PINCUS
Counsel of Record
CHARLES A. ROTHFELD
Mayer Brown LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Petitioners

December 2007