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The Scales Tip In Favor of Parents in *Winkelman v. Parma City School District*

By Nidia Aldana Paredes*

I. INTRODUCTION

The Individuals with Disabilities Education Act ("IDEA") was enacted to provide children with disabilities with a free appropriate public education.¹ One of the stated purposes of the IDEA is "to ensure that the rights of children with disabilities and parents of such children are protected."² In enacting the IDEA³ Congress considered approximately thirty years of research which proved that children with disabilities tend to learn better when the role and responsibility of parents is strengthened.⁴ In light of this research, Congress mandated procedural safeguards within the IDEA that would ensure

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3. 20 U.S.C. § 1400(2)(1)(A). Originally the IDEA was the Education for All Handicapped Children Act of 1975 ("EHA") but in 2004 was changed to the Individuals with Disabilities Education Act of 2004. While the names and methodology are different, their purpose remains the same: to provide children with disabilities with a free appropriate public education. 20 U.S.C. § 1400 (d)(1)(A).
4. 20 U.S.C. § 1400 (c)(5)(B) states that 30 years of research have shown that "strengthening the role and responsibility of parents and ensuring that families of such children have meaningful opportunities to participate in the education of their children at school and at home" has a positive effect on the education of children with disabilities.
that parents have an opportunity to participate and to be heard in the
creation and implementation of their child’s educational plan.\(^5\)
Congress recognized that school districts alone could not guarantee
that children with disabilities would receive an effective education.\(^6\)
By vesting certain powers and rights in parents, Congress’ goal was
to balance the scales in the sometimes adversarial relationship
between parents and school districts.

In recent years, however, the Supreme Court has tipped the scale
the burden of proof in administrative hearings to parents.\(^7\) One year
later, a second case was decided by the Supreme Court which also
lent support to the school districts: *Arlington Central School District
v. Murphy*.\(^8\) The Court in *Arlington* held that parents who prevail in
court would no longer be able to recover expert fees as part of their
litigation costs.\(^9\) This decision made it even more difficult for
parents who could not afford to pay for experts out of pocket to carry
their burden of proof in court.\(^10\) However, on May 21, 2007, with the
Court’s decision in *Winkelman v. Parma City School District*, the
scales are finally rebalancing by tipping in favor of parents.\(^11\)
*Winkelman* is a significant victory for parents as it allows them to
represent their children’s interests in court without the assistance of
counsel.\(^12\) Not only does this decision allow parents who could not
afford legal assistance to defend their children’s rights, but in a much
broader sense, the decision affirms parental rights under the IDEA.\(^13\)

This case note presents a thorough examination of the Supreme
Court’s recent opinion in *Winkelman* and its effect on parents and
school districts involved in special education law. Part II relates the
historical background of special education law with an emphasis on
the role of parents. In Part III the facts of the *Winkelman* decision are

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5. Procedural safeguards are addressed in the IDEA § 1415 et seq. They are
discussed in depth in Part II of this case note.
9. Id.
10. Id.
12. Id.
13. Id.
summarized. Part IV sets forth an analytical critique of the Supreme Court majority and dissenting opinions. Then Part V of the article contains the impact of the Winkelman decision on special education law in general and on parents and school districts. Part VI concludes the article.

II. HISTORICAL BACKGROUND

The IDEA was enacted to serve two main purposes: "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services to meet their unique needs..." and "to ensure that the rights of children with disabilities and parents of such children are protected..."¹⁴

A child's legal right to a basic education was first established by the Supreme Court in Brown v. Board of Education.¹⁵ In Brown the Supreme Court held that racial segregation of African American children from public schools was unjust and detrimental to both Caucasian and African American children.¹⁶ Special education rights advocates relied on the language in Brown v. Board in arguing that separation based on physical or mental disability was also detrimental and unjust.¹⁷ The language of Brown was seen as applying to children with disabilities who were not receiving appropriate educational services to which they were entitled.¹⁸ Statements like the following were applied to special education

17. PETER WRIGHT & PAMELA WRIGHT, SPECIAL EDUCATION LAW 13 (2d. ed. 2007).
18. 20 U.S.C. § 1400 (c)(2)(A). (explaining in further detail the reasons why children with disabilities were not having their educational needs met: "(A) the children did not receive appropriate educational services; (B) the children were excluded entirely from the public school system and from being educated with their peers; (C) undiagnosed disabilities prevented the children from having a successful educational experience; or (D) a lack of adequate resources within the public school system forced families to find services outside the public school system"). 20 U.S.C. § 1400 (c) (2) (A)-(D).
advocacy and references to race were replaced with references to disabilities:

Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the Negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racially integrated school system.\textsuperscript{19}

\textit{A. Early Case Law Establishing Parental Involvement}

Before the enactment of the Education for All Handicapped Children Act of 1975, one special education case paved the way for change: \textit{PARC} v. \textit{Commonwealth of Pennsylvania}.\textsuperscript{20} \textit{PARC} dealt particularly with parental involvement in a child's educational placement. In \textit{PARC} the United States District Court for the Eastern District of Pennsylvania held certain state statutes permitting school districts to bar the enrollment of children who were mentally retarded were unconstitutional. A consent decree was agreed to by the state and the parents forming the class action whereby the state would provide children with mental retardation with the same free public education guaranteed to the rest of its children. Equally significant, however, was the stipulation between the parties which provided that before a child with mental retardation could be assigned or re-assigned to regular or special educational status, or excluded altogether from public education, a prior recorded hearing before a special hearing officer must be held.\textsuperscript{21} At this hearing a parent would have the right \textit{"to representation by counsel, to examine their child's}

\begin{footnotesize}
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  \item \textsuperscript{19} \textit{Brown}, 347 U.S. at 494.
  \item \textsuperscript{21} \textit{PARC}, 343 F. Supp. at 284-85.
\end{itemize}
\end{footnotesize}
records, to compel the attendance of school officials who may have relevant evidence to offer, to cross-examine witnesses testifying on behalf of school officials and to introduce evidence of their own.”

Though PARC did not set precedent it did influence the Congressional Investigation of 1972 where findings revealed the extreme numbers of children with disabilities who were not receiving appropriate educations and urged changes be made to special education law.  It was recognized that failure to provide individuals with disabilities with appropriate education would not only be a burden on the individuals themselves but on society as a whole, “taxpayers will spend billions of dollars over the lifetimes of these individuals to maintain such persons as dependents and in a minimally acceptable lifestyle.”

If an appropriate education were to be provided, however, children with disabilities might be prepared to become more independent individuals who could contribute to society. This investigation and its findings prompted Congress to enact Public Law 93-142, also known as the Education for All Handicapped Children Act of 1975 (“Act of 1975”).

The Act of 1975 ensured that children with disabilities had a right to an education and—through the establishment of procedural safeguards—that school districts were held accountable for providing such. Protection of parental rights was mentioned as another reason for the necessity of the legal checks and balances of procedural safeguards. The most recent amendment made to the Act of 1975 was on December 3, 2004 and created the Individuals with Disabilities Education Act (“IDEA”).

22. PARC at 285. See Also, WRIGHT & WRIGHT, supra note 17, at 13 which says “In the subsequent settlement, it was agreed that educational placement decisions must include a process of parental participation and a means to resolve disputes.”

23. WRIGHT & WRIGHT, supra note 17, at 14. Out of approximately 8 million children with disabilities, only 3.9 were receiving an appropriate education, 1.75 million received no educational services at all, and 2.5 million were receiving an inappropriate education. Id. (citing to United States Code Congressional and Administrative News 1975 at 1430).


25. Id.

26. WRIGHT & WRIGHT, supra note 17, at 14.
B. The Individuals With Disabilities Education Act

The most significant section of the IDEA is Section 1400 which relays the findings and purposes of the Act. The findings\textsuperscript{27} that led to the amendments of the IDEA explain that the fundamental objectives of the Act have over time been hindered by "low expectations, and an insufficient focus on applying replicable research on proven methods of teaching and learning for children with disabilities."\textsuperscript{28} The findings go on to state that "almost 30 years of research and experience" have shown that children with disabilities will learn more effectively when their instructors have "high expectations" and when parental involvement is strengthened.\textsuperscript{29} Building on these findings, Congress stated the purposes of the IDEA as being, "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living" and "to ensure that the rights of children with disabilities and parents of such children are protected."\textsuperscript{30} The remaining sections of the IDEA provide detailed application of the law all the while promoting the purposes intended by Congress.

Under the IDEA special education is defined as "specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including—(A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and (B) instruction in physical education."\textsuperscript{31} This "specially designed instruction"\textsuperscript{32} is delivered to a child with disabilities in the form of a "Free Appropriate Public Education" ("FAPE"). FAPE is defined as special education and related services at public expense, meeting state educational standards, including appropriate placement at a public school, and provided in conformity with the

\textsuperscript{27} 20 U.S.C. § 1400(c).
\textsuperscript{28} 20 U.S.C. § 1400 (c)(4).
\textsuperscript{29} 20 U.S.C. § 1400 (c)(5).
\textsuperscript{30} 20 U.S.C. § 1400 (d)(1).
\textsuperscript{31} 20 U.S.C. § 1401 (29).
\textsuperscript{32} \textit{Id.}
individualized education program ("IEP"). The IEP is the heart of special education and is the curriculum or the substance of the child’s education. It is “a written statement for each child with a disability that is developed, reviewed, and revised” by teachers, school faculty including therapists and principals, and parents.

C. Parental Participation as Required by the IDEA

The Congressional Findings of the IDEA place the role of parental involvement in high regard:

Almost 30 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by... strengthening the role and responsibility of parents and ensuring that families of such children

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33. 20 U.S.C. § 1401 (9) defines a “Free Appropriate Public Education” (FAPE) as,

[S]pecial education and related services that – (A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State educational agency; (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and (D) are provided in conformity with the individualized education program required under Section 1414 (d) of this title.

20 U.S.C. § 1401 (9).

34. 20 U.S.C. § 1401 (14).

35 Id. The written statement that is the “IEP” includes among other factors –

(I) A statement of the child’s present levels of academic achievement and functional performance...(II) a statement of measurable annual goal, including academic and functional goals...(III) a description of how the child’s progress toward meeting the annual goals described in sub-clause (II) will be measured and when periodic reports ...will be provided...(IV) a statement of the special education related services and supplementary aids and services ...that will be provided for the child...” and “(VII) the projected date for the beginning of the services...and the anticipated frequency, location, and duration of those services and modifications...

having meaningful opportunities to participate in the education of their children at school and at home.\textsuperscript{36}

One of the IDEA’s main purposes is to “ensure that the rights of children with disabilities and \textit{parents} of such children are protected.”\textsuperscript{37} States are required to “establish and maintain procedures...to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of a free appropriate public education.”\textsuperscript{38} Both federal and state law currently give parents of children with disabilities rights with regards to the foundational decisions related to their child’s education.\textsuperscript{39} Parental involvement rights and responsibilities can be categorized as they pertain to one of the following three areas: 1) Assessments and Evaluations; 2) The IEP Process; and 3) Procedural Safeguards.\textsuperscript{40}

1. Assessments and Evaluations

An initial evaluation of whether a child can or should be placed in special education begins after a written referral from a teacher or other education professional or by written request from a parent.\textsuperscript{41} However, before the actual evaluation may begin a parent must approve the district’s proposed assessments and evaluations by

\begin{itemize}
\item \textsuperscript{36} 20 U.S.C. § 1400 (c)(5)(A)-(C) (emphasis added).
\item \textsuperscript{37} 20 U.S.C. § 1400 (d)(1)(B) (\textit{emphasis added}). Parent in the IDEA means “(A) a natural adoptive, or foster parent of a child...(B) a guardian...(C)an individual acting in the place of a natural or adoptive parent with whom the child lives, or an individual who is legally responsible for the child’s welfare.” 20 U.S.C. § 1401(23).
\item \textsuperscript{38} 20 U.S.C. § 1415 (a).
\item \textsuperscript{39} COMMUNITY ALLIANCE FOR SPECIAL EDUCATION & PROTECTION AND ADVOCACY, INC., SPECIAL EDUCATION RIGHTS AND RESPONSIBILITIES 1-14, Q. 13 (9\textsuperscript{th} ed. 2005) (explaining that along with the rights, a parent also has the “responsibility to be knowledgeable and concerned about the child’s educational needs and to participate in the procedures set forth in the laws”).
\item \textsuperscript{40} Richard Peterson, Professor at Pepperdine University School of Law, Special Education Law Lecture (August 23, 2007) (lecture slides in possession of Professor Richard Peterson and author).
\item \textsuperscript{41} 20 U.S.C. § 1414 (a)(1)(B).
\end{itemize}
written consent.\textsuperscript{42} After the evaluations and assessments have been conducted a copy of such must be provided to the parents at no cost.\textsuperscript{43} Parental consent is required before the services determined by the evaluations and assessments can be delivered to the child; this consent must be separate from the initial evaluation consent mentioned before.\textsuperscript{44} Prior to conducting any re-evaluation of a child with disabilities written consent is required from the parent.\textsuperscript{45}

2. The IEP Process

Once evaluations and assessments have been administered, the Individualized Education Program ("IEP") is developed.\textsuperscript{46} Parents are regarded as important members of the IEP team and have the right to receive written notice of the time, location, and purpose of the IEP.\textsuperscript{47} This notice must be given "early enough to ensure that [the parent(s)] will have an opportunity to attend; and...[must be held] at a mutually agreed on time and place."\textsuperscript{48} The parent has the right to invite any other individual at their discretion to the IEP meeting.\textsuperscript{49} The Local Education Agency (the school district in most cases) "must take whatever action is necessary to ensure that the parent understands the proceedings of the IEP Team meeting, including arranging for an interpreter for parents with deafness or whose native language is other than English."\textsuperscript{50} If the public agency has developed a draft proposal of an IEP then it must be provided to

\textsuperscript{42} 20 U.S.C. § 1414(a)(1)(B). \textit{See also} 20 U.S.C. §1414 (a)(1)(D)(i) (requiring that prior to an initial evaluation, the agency proposing the evaluation obtain informed consent from the parent).

\textsuperscript{43} 20 U.S.C. §1414 (b)(4)(B) ("a copy of the evaluation report and the documentation of determination of eligibility shall be given to the parent"). \textit{See} 34 C.F.R. § 300.306(a)(2) (2004) (evaluation reports should be provided at no cost to the parent).

\textsuperscript{44} 20 U.S.C. §1414 (a)(1)(D)(ii).

\textsuperscript{45} 20 U.S.C. § 1414 (c)(3).

\textsuperscript{46} 20 U.S.C. § 1414 (d).

\textsuperscript{47} \textit{See} 34 C.F.R. § 300.322(b)(1)(i).

\textsuperscript{48} 34 C.F.R. § 300.322(a)(1)-(2).

\textsuperscript{49} \textit{See} 20 U.S.C. § 1414 (d)(1)(B). Parents can invite other individuals whom they feel have "knowledge or special expertise regarding the child, including related services personnel as appropriate." \textit{Id.}

\textsuperscript{50} 34 C.F.R. § 300.322.
the parent before the IEP meeting so that the parent can review it and thereby be able to fully participate in the IEP meeting. 51 The public agency is not permitted to have the final IEP completed before the IEP team meeting is held. 52 The attendance of an IEP team member can only be excused or waived after a parent gives informed consent in writing. 53 Without this written consent of the parent the IEP meeting must be postponed. 54 Once convened, the IEP team must give due deference to the concerns of the parents regarding the education of their child. 55 Among other aspects of the IEP statement, the team must include a statement describing the method by which the student’s parents will be made aware of the student’s progress toward realizing the annual goals. 56 Finally, a parent also has the right to obtain a copy of the IEP 57, have the IEP reviewed annually 58 and have the IEP implemented as soon as possible. 59

51. See WRIGHT & WRIGHT, supra note 17, at 99, fn. 73 (stating that “it is not permissible for an agency to have the final IEP completed before an IEP Team meeting begins”).

52. See id.

53. 20 U.S.C. §1414 (d)(1)(C)(i)-(iii). IEP team members include:
(i) the parents of the child with a disability; (ii) not less than 1 regular education teacher of such child (if the child is, or may be, participating in the regular education environment); (iii) not less than 1 special education teacher; (iv) a representative of the local education agency; (v) an individual who can interpret the instructional implications of evaluation results; (vi) at the discretion of the parent or agency, other individuals who have knowledge or special expertise regarding the child; and whenever appropriate, (vii) the child with the disability. 20 U.S.C. §1414 (d)(1)(B)(i)-(vii).


56. 20 U.S.C. § 1414 (d)(1)(A)(i)(III)(requiring “a description of how the child’s progress toward meeting the annual goals described in subclause (II) will be measured and when periodic reports on the progress the child is making toward meeting the annual goals...will be provided”)

57. 34 C.F.R. § 300.322(e).


59. See 34 C.F.R. § 300.323(a) & (c)(2)
3. Procedural Safeguards

An entire section of the Act is devoted to procedural safeguards to ensure that the rights of the parents are in fact protected. Procedural safeguards established by the IDEA require, for example, that a parent’s concerns regarding his or her child’s lack of or slow progress be addressed. Parents are allotted an opportunity to review all records pertinent to their child and to attend and participate in all meetings regarding identification, evaluation, and educational placement of their child. A parent has the right to request an Independent Educational Evaluation (“IEE”), per the IDEA, if she disagrees with the school’s assessments and evaluations of her child. An IEE allows a parent who disagrees with the school district’s evaluation of his child to hire an independent qualified examiner, not employed by the school, to evaluate the child. Once a parent makes a request for an IEE the school district can agree to provide one at public expense or they can file a due process complaint to request a hearing to show the appropriateness of the evaluation. Yet another procedural safeguard built into the IDEA is the requirement of “written prior notice” to be given to the parents before the school initiates, refuses or makes any changes to a child’s services. Other procedural safeguards include the opportunity for alternative dispute resolution through mediation, and the

61. See WRIGHT & WRIGHT, supra note 17, at 103, fn. 98.
64. See also 34 C.F.R. § 300.502.
65. Public expense means that the school district or public agency pays for the evaluation making sure it is at no cost to the parent. 34 C.F.R. 300.502 § 300.103.
66. 34 C.F.R. § 300.502(b)(2)(i)-(ii).
68. 20 U.S.C. § 1415(b)(5). See also § 1415(e) requiring that the mediation process is
   (i) voluntary on the part of the parties; (ii) is not used to deny or delay a parent’s right to a due process hearing . . . or to deny any other rights afforded under this part; and (iii) is conducted by a qualified and impartial mediator who is trained in effective mediation techniques.
opportunity to present a complaint regarding any matter related to the identification, evaluation or placement of a child, or the provision of FAPE to that child.69

D. Case Law History Implied in Winkelman v. Parma City School District

1. Supreme Court Case Law

Though the IDEA provided many provisions to protect the rights of parents and children, following its enactment, school districts fought hard for an interpretation of the Act in their favor. School districts were successful in Schaffer v. Weast,70 a significant case for parents because it placed the burden of persuasion in administrative hearings regarding the appropriateness of their child’s IEP on them.71 The school district offered placement at one of two middle schools to the Schaffer’s son, Brian, who suffered from learning disabilities and speech-language impairments.72 The Schaffers disagreed with the placement, so they enrolled Brian in a private school, then filed for a due process hearing to challenge the IEP and receive reimbursement for Brian’s private school tuition.73 The issue at the administrative hearing, and on subsequent appeals, centered around whether the burden of persuasion should lay on the parents or the district.74 The Supreme Court granted certiorari and held that the burden lays on the

The State bears the cost of the mediation and not the parents. 20 U.S.C. § 1415 (e)(2)(D).


Id.


71. Id. at 51.

72. Id. at 54.

73. Id. at 55.

74. Id. The Shaffers appealed this decision to the United States District Court for the District of Maryland where it was reversed and the burden placed on the school district. Id. Before the appeal was decided in the appellate court, the administrative law judge reconsidered the case and reversed his opinion in favor of the parents, placing the burden on the school district. Id. The district court reaffirmed its ruling that the school had the burden and on appeal, a divided panel of the United States Court of Appeals for the Fourth Circuit reversed. Id. The Supreme Court granted certiorari to resolve the question. Id. at 55-56.
party seeking relief, in most cases the parent. The Court noted that while the IDEA remains silent on this issue, the ordinary default rule is that plaintiffs bear the burden of proving their claims. The Court also considered the expense of administrative hearings on schools and the IDEA’s heavy reliance upon the school districts to meet its goals.

No less than one year after Schaffer made parents think twice before filing a due process complaint, another case made its way to the Supreme Court that would also hit parents hard: Arlington Central School District v. Murphy. Arlington addressed whether parents who prevail in court can recover fees for services rendered by experts. After prevailing in the district court and Second Circuit, the Murphys, parents of Joseph Murphy, sought $29,350 in fees for the expert services of Marilyn Arons, an educational consultant who assisted them in the IDEA administrative proceedings. The district and appellate courts held that while the Murphys were entitled to some reimbursement, it was significantly less than what they were asking for. The Supreme Court granted certiorari and held that reimbursement of expert’s fees is not appropriate under the IDEA. The Court noted that the condition of reimbursement of expert’s fees is nowhere to be found in the IDEA, and that the IDEA was passed pursuant to the Spending Clause, which requires clear and "unambiguous" notice of any imposed conditions to the states before the federal government can enforce them. Since the condition of

75. See id. at 62.
76. See id. at 56.
77. The cost is approximately $8,000 to $12,000 per hearing. Id. at 59.
78. See id.
80. See id. at 2457.
81. See id. at 2457-58.
82. See id.
83. See id. at 2463-64.
84. The Court pointed out that the governing provision of the IDEA provides that “[i]n any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorney’s fees as part of the costs” to parents. Id. at 2459. There is no mention of “expert’s fees.” Id.
85. Id. at 2459.
reimbursement for expert's fees appears nowhere in the IDEA, it cannot be imposed.

The last two Supreme Court special education cases were far from favorable to parents, only making it harder for them to protect their children's and their own rights. However, another issue had been brewing in the lower courts that eventually found its way to the Supreme Court. Much to everyone's surprise, the issue tipped the scales in favor of parents. This case was *Winkelman*, which brought to bear the issue of whether a parent can represent their children's interest in court without the assistance of legal counsel. The question had been addressed by district courts and appellate courts alike, but the answer varied across the board.

2. Case Law in the Lower Courts

Federal statute 28 U.S.C. § 1654 (2006) states that "[i]n all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein."\(^{86}\) This statute leaves no question as to the fact that the assistance of counsel is not required for parties who represent their own interests in federal court.\(^{87}\) The question thus becomes whether parents in special education cases are parties for purposes of this statute: does the IDEA grant parents "interests" or rights?

In 1998, *Doe v. Board of Education* addressed the question whether a prevailing parent who is also an attorney is entitled to receive attorney's fees for the work performed on behalf of his child.\(^{88}\) The court held that such a parent is not entitled to attorney's fees.\(^{89}\) While this issue is not the same as the one in *Winkelman*, school districts have used some of the court's language in *Doe* to support their argument that the IDEA does not give parents a real party interest in any proceeding.\(^{90}\) *Doe* stands for the proposal that "[t]hough parents have some rights under the IDEA, the child, not the

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89. *See Doe*, 165 F.3d at 265.
parents, is the real party in interest in any IDEA proceeding. The references to parents are best understood as accommodations to the fact of the child’s incapacity.”

The same year, another case made it to the Third Circuit, Collinsgru v. Palmyra\(^9\), addressing the very same issue later to be decided by Winkelman. The Collinsgrus appealed the decision of a state administrative agency denying their son special education services, and proceeded to represent his rights at the district court level.\(^9\) The district court gave the Collinsgrus thirty days to hire an attorney since they could not represent their child in court and when they failed to do so, dismissed their claim with prejudice.\(^9\) On appeal of their dismissal, the Collinsgrus argued that “(1) the IDEA creates the same rights in parents that it creates in children; (2) the claims in their son’s complaint are functionally their own; and (3) they should therefore be allowed to proceed pro se on those claims.”\(^9\) The court of appeals reasoned that neither the IDEA’s language nor legislative history suggest that Congress did not intend to create joint rights in parents under the IDEA, and therefore affirmed the district court’s dismissal.\(^9\) The Court noted that the language in the IDEA is “unclear on its face,” at times seeming to intend that parents and children each have substantive rights, and yet at other times suggesting the opposite.\(^9\) Due to the ambiguity in both the IDEA and legislative history and precedent case law suggesting no such right exists in parents, the Court ruled that parents could proceed pro se for procedural violations\(^9\) but not for substantive claims.\(^9\)

Finally in 2003, the First Circuit reached a decision that would give parents the right to sue pro se in all respects with Maroni v.

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91. Doe, 165 F.3d at 263.
93. See Collinsgru, 161 F.3d at 227.
94. Id. The district court was bound by a Third Circuit decision, Osei-Afriyie v. Med. College of Pa., where the court held that a non-attorney parent could not represent his children in a tort action in federal court. Collinsgru, 161 F.3d at 227.
95. Collinsgru, 161 F.3d at 227.
96. Id.
97. Id. at 235.
98. Id. at 233.
99. Id. at 235-36.
Pemi-Baker Regional School District.\textsuperscript{100} Dissatisfied with their son Michael’s proposed IEP and the procedures employed to develop it, the Maronis, without the assistance of counsel, proceeded to file suit in federal court.\textsuperscript{101} The district court dismissed the suit on the grounds that the Maronis had no individual claim under the IDEA.\textsuperscript{102} Following the dismissal, Michael’s father filed a motion to reconsider in which he included an affidavit stating that while he and his family did not meet the financial need criteria for court-appointed legal assistance, they also were unable to find a lawyer who would take the case on pro-bono or for an affordable fee.\textsuperscript{103} After the district court dismissed once more, the Maronis filed an appeal with the First Circuit, claiming their right to proceed pro se on two grounds: 1) the IDEA grants “parties aggrieved” the right to bring suit in federal court, and they are “parties aggrieved” and in the alternative, 2) an exception should be created to exempt IDEA cases from the common law rule that prevents parents from proceeding pro se.\textsuperscript{104} The court considered the decisions of other circuits, including the decision in Collinsgru and prior court practice under the Education for All Handicapped Children Act of 1975 in which parents were allowed to sue pro se.\textsuperscript{105} In determining whether the parents are “parties aggrieved” under 28 U.S.C. § 2344,\textsuperscript{106} the court turned to Article III of the Constitution which defines an aggrieved party as one who can show injury-in-fact, causation, and redressability.\textsuperscript{107} The court reasoned that parents suffer the injury-in-fact when their child is denied FAPE by the school district.\textsuperscript{108} Also, the court noted that a distinction is never made between the right of parents to seek relief for substantive or procedural issues.\textsuperscript{109} For these reasons, the court

\textsuperscript{100} Maroni v. Pemi-Baker Reg’l Sch. Dist., 346 F.3d 247 (1st Cir. 2003).
\textsuperscript{101} Id. at 248.
\textsuperscript{102} Id.
\textsuperscript{103} Id.
\textsuperscript{104} Id. at 249.
\textsuperscript{105} According to the Maroni Court, under the EHA courts almost uniformly allowed parents to sue pro se. Id. at 250.
\textsuperscript{106} 28 U.S.C. § 2344 is a statute that permits “parties aggrieved” to seek judicial review of final orders by specified agencies. Maroni, 346 F.3d at 253.
\textsuperscript{107} Maroni, 346 F.3d at 253-54.
\textsuperscript{108} Id. at 254.
\textsuperscript{109} Id.
held that parents were “parties aggrieved” and so were permitted to sue pro se in regards to both procedural and substantive issues.\textsuperscript{110} Maroni also addressed some of the drawbacks of not allowing parents to sue on behalf of their children.\textsuperscript{111} Many children with special needs would be robbed of their day in court if a rule prohibiting pro se representation were enacted.\textsuperscript{112} The difficulty in obtaining pro-bono representation and the under-resourced nature of many legal aid organizations\textsuperscript{113} makes parental representation almost necessary.\textsuperscript{114} One consequence of permitting parents to sue pro se, that the school district in Maroni as well as in Winkelman most heavily argued was that children would not receive the best representation from their untrained parents.\textsuperscript{115} But, the court responds, that the possibility of having a less than skilled parent representing a child is better than no advocate at all.\textsuperscript{116} The court concluded that this risk and others can be dealt with as they arise because the benefit of some representation far outweighs the risks of no representation at all.\textsuperscript{117} Quite the opposite conclusion was reached in Cavanaugh v. Cardinal Local School District decided by the Sixth Circuit in 2005.\textsuperscript{118} The Cavanaughs, who were not lawyers, appealed from the decision of a magistrate judge’s order denying their claim that the Cardinal Local School District failed to provide their son with

\begin{itemize}
  \item \textit{Id.} at 250.
  \item \textit{Id.} at 257.
  \item \textit{Id.}
  \item The Disability Rights Center (“DRC”) and National Association of Protection and Advocacy Systems (“NAPAS”) submitted an amicus brief in which they recounted the scarcity of representation available. \textit{Id.} at 258, fn. 9. In 2002, the DRC was able to represent 35 out of 390 special education inquiries; other similar agencies report these strikingly low ratios as well. \textit{Id.} The amicus brief also revealed that for parents who do not meet the financial need criteria to receive assistance from these legal aid organizations, the shortage of private representation is also a barrier. \textit{Id.} In Michigan, the Protection and Advocacy Agency lists eight private attorneys on its referral list; Rhode Island has six; Texas has twenty-nine and Arizona only one. \textit{Id.}
  \item \textit{Maroni}, 346 F.3d at 257.
  \item \textit{Id.} at 258.
  \item \textit{Id.}
  \item \textit{Id.}
  \item Cavanaugh v. Cardinal Local Sch. Dist., 409 F.3d 753 (6th Cir. 2005).
\end{itemize}
FAPE. The school district filed a motion to dismiss on the grounds that the Cavanaughs, in asserting their son’s right, had no right to proceed pro se. In rebutting that claim, the Cavanaughs argued that their appeal was appropriate because: “1) they may represent Kyle’s rights under the IDEA and 2) the IDEA grants them a cognizable right of their own to a FAPE for their son.” In its analysis the court turned to an interpretive guideline established by the Supreme Court:

[S]tatutes which invade the common law... are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident ...[i]n order to abrogate a common-law principle, the statute must ‘speak directly’ to the question addressed by the common law.

The court then laid down a common-law rule stating that a non-lawyer is not permitted to represent another person in court. It also and pointed out that there is no language in the IDEA that overrides this common-law rule. Rather, the court went on to say, Congress made a significant distinction in the IDEA between the rights of a parent in an administrative hearing and their rights once in federal court. Congress explicitly granted parents the right to present evidence and to examine witnesses on behalf of their children during an administrative hearing, but, in stark contrast, failed to mention any such parental rights when it granted “any aggrieved party access to federal courts.” Consequently, the court held that the IDEA does

119. Id. at 755.
120. Id.
121. Id.
122. Id. at 756. (citing United States v. Texas, 507 U.S. 529, 534 (1993)).
124. Cavanaugh, 409 F.3d at 756.
125. Id. (citing to 20 U.S.C. §1415 (f)(1)). Here the court used the interpretive rule of canon “expression unius est exclusion alterius” which means that the mentioning of one thing excludes another. Cavanaugh, 409 F.3d at 756. Here, since Congress did listed the rights a parent has during an administrative
not grant non-lawyer parents the right to represent their child.\textsuperscript{126} Furthermore, the court observed that while the IDEA does grant parents limited procedural rights,\textsuperscript{127} the right to FAPE belongs to the child and not the parents.\textsuperscript{128}

With the Courts of Appeal split on the question of \textit{pro se} representation, it was no wonder that the Supreme Court chose to resolve the issue once and for all with \textit{Winkelman}.

\section*{III. FACTS}

\subsection*{A. Substantive Facts}

Jeff and Sandee Winkelman ("the "Winkelmans") are the parents of Jacob Winkelman, a child diagnosed with autism spectrum disorder.\textsuperscript{129} At the age of six, Jacob was enrolled at Pleasant Valley Elementary School, a school of the Parma City School District in Parma, Ohio.\textsuperscript{130} Seeking review of Jacob’s progress at school, the Winkelmans collaborated with the school district to develop an Individualized Education Program ("IEP") for the 2003-2004 school year.\textsuperscript{131} The school district’s proposed IEP placed Jacob at a public elementary school.\textsuperscript{132} The Winkelmans regarded this proposal as deficient.\textsuperscript{133} Parma City School District is a participant in the federal funding program provided for by the IDEA.\textsuperscript{134} In order to receive monetary assistance, the school district must comply with the IDEA’s

\begin{itemize}
\item \textsuperscript{126} \textit{Cavanaugh}, 409 F.3d at 756.
\item \textsuperscript{127} Examples of these limited rights include the right to participate in and attend IEPs, receive prior written notice of any proposed changes to the IEP, and to take part in IEP hearings. \textit{Id.} at 757.
\item \textsuperscript{128} \textit{Id.}
\item \textsuperscript{129} \textit{Winkelman}, 127 S. Ct. at 1998.
\item \textsuperscript{130} \textit{Id.}
\item \textsuperscript{131} \textit{Id.}
\item \textsuperscript{132} \textit{Id.}
\item \textsuperscript{133} \textit{Id.}
\item \textsuperscript{134} \textit{Id.}
\end{itemize}
requisites, which include providing every child who has a disability with a “free appropriate public education.”

Availing their rights as provided by the IDEA, the Winkelmans sought administrative review. In their complaint they alleged that the school district failed to provide Jacob with a free appropriate public education. After the hearing officer rejected their claim, the Winkelmans appealed to a state-level review officer only to be rejected once more.

Still concerned that their child was not receiving an appropriate education and aware that the process was becoming ever lengthy, the Winkelmans proceeded to remove Jacob from his current public school and placed him in a private school. They paid the tuition out of their own pocket. They then filed a complaint in the United States District Court for the Northern District of Ohio on their own behalf and on behalf of Jacob. The complaint challenged the administrative decision making the following allegations: (1) Jacob had not been provided a free appropriate public education; (2) his IEP was inadequate; and (3) the school district did not follow procedures as laid out by the IDEA. In the complaint they sought reversal of the administrative decision, reimbursement for the private-school expenditures, declaratory relief, and attorney's fees already incurred. Because they were not themselves attorneys, the Winkelmans hired an attorney to help them with certain aspects of the proceedings, although they filed the complaint on their own.

135. *Id.* A “free appropriate public education” must be in accordance with the IEP that is created by a joint collaboration between school faculty and officials together with the parents of the child. *Id.*
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.* at 1999.
144. *Id.* at 1998.
B. Decision Below

1. The District Court's Decision

Upon filing of the complaint, the school district made a motion for judgment on the pleadings. The District Court granted respondent school district's motion finding it did had in fact provided Jacob with a free appropriate public education. Proceeding without counsel, the Winkelmans filed an appeal with the Court of Appeals.

2. The Decision of the Court of Appeals for the Sixth Circuit.

Basing their decision on Cavanaugh, the Court of Appeals entered an order to dismiss the appeal unless the Winkelmans obtained counsel to represent Jacob. The court reasoned that non-lawyer parents are not able to litigate IDEA claims on behalf of their child because “the IDEA does not abrogate the common-law rule prohibiting non-lawyer parents from representing their minor children.” This decision, like the one in Cavanaugh, brought the Sixth Circuit in direct conflict with the First Circuit. The First Circuit had concluded in Maroni, under a theory of “statutory joint rights,” that the IDEA does in fact give parents the right to assert IDEA claims on their own behalf. Due to the disagreement between the Circuits the Supreme Court granted certiorari in 2006. Arguments were presented by each side on February 27, 2007 and a decision was made on May 21, 2007. A 7-2 decision reversed the lower courts' decisions and held in favor of the Winkelmans, stating

145. Id. at 1999.
146. Id.
147. Id. In Cavanaugh the Court of Appeals decided that per the IDEA non-lawyer parents raising IDEA claims in federal court cannot proceed pro se. Id. (See Section supra Section II for further summary of Cavanaugh).
152. Id.
that the “IDEA grants parents independent, enforceable rights” thereby entitling them to prosecute IDEA claims on their own behalf.\textsuperscript{153}

IV. ANALYSIS AND CRITIQUE OF OPINION

The majority opinion, authored by Justice Kennedy, was joined by Justice Roberts, Justice Stevens, Justice Souter, Justice Ginsburg, Justice Breyer, and Justice Alito.\textsuperscript{154} Justice Scalia concurred in judgment in part and dissented in part, he was joined by Justice Thomas.\textsuperscript{155}

A. Justice Kennedy's Majority Opinion

Justice Kennedy begins his opinion by giving a cursory recount of the facts of the case and stating the main question at the center of the dispute: whether the IDEA provides the parent of a child with disabilities the right to proceed in court on their own behalf and/or on behalf of their child, unrepresented by counsel?\textsuperscript{156} In answering this question Justice Kennedy’s analysis breaks down into three areas. In part A, Justice Kennedy analyzes and takes particular note of certain terms within the IDEA that “mandate or otherwise describe parental involvement.”\textsuperscript{157} Part B addresses the extent and limitations of parental rights in special education law.\textsuperscript{158} The final section, part C, addresses the applicability and effects of the Spending Clause’s “clear notice” requirement.\textsuperscript{159} The majority opinion concludes that Congress clearly intended parents to enjoy rights under the IDEA and so entitle them to prosecute IDEA claims on their own behalf.\textsuperscript{160} The

\textsuperscript{153} Id. at 2005.  
\textsuperscript{154} Id. at 1997.  
\textsuperscript{155} Id. at 2007.  
\textsuperscript{156} Id. at 1998.  
\textsuperscript{157} Id. at 2000.  
\textsuperscript{158} Id. at 2002.  
\textsuperscript{159} Id. at 2006.  
\textsuperscript{160} Id.
judgment of the Court of Appeals is reversed and the case remanded for further proceedings.\textsuperscript{161}

1. Parental Involvement per the IDEA

Justice Kennedy initiates his discussion of parental involvement as intended by Congress by returning to the fundamental goals of the IDEA which include “ensur[ing] that all children with disabilities have available to them a free appropriate public education” and “ensur[ing] that the rights of children with disabilities and parents of such children are protected.”\textsuperscript{162} According to Justice Kennedy, the Individuals with Disabilities Education Act (IDEA) includes requirements which govern four areas pertinent to the Winkelman’s case:

[P]rocedures to be followed when developing a child’s IEP; criteria governing the sufficiency of an education provided to a child; mechanisms for review that must be made available when there are objections to the IEP or to other aspects of IDEA proceedings; and the requirement in certain circumstances that States reimburse parents for various expenses.\textsuperscript{163}

While there are other areas that might have been noted, Justice Kennedy recognizes that these areas mandate or otherwise describe parental involvement and are illustrative of the entire IDEA’s purpose for parents.\textsuperscript{164}

Justice Kennedy lists several of the procedures that must be followed when developing a child’s IEP to make sure parents play a “significant role” in the process.\textsuperscript{165} Parents must be allowed to serve as members of the team that develops the IEP.\textsuperscript{166} Any concerns that

\textsuperscript{161} Id.
\textsuperscript{163} Winkelman, 127 S. Ct. at 2000.
\textsuperscript{164} Id.
\textsuperscript{165} Id. (citing Schaffer v. Weast, 546 U.S. 49, 53 (2005)).
\textsuperscript{166} Winkelman, 127 S. Ct. at 2000. (citing 20 U.S.C. §§ 1414 (d) (1) (B) & §1414 (e)).
parents might have regarding the education of their child are required to be considered by the IEP team.\textsuperscript{167} If the parents have new information regarding their child, then the IEP needs to be revised to conform with the new information.\textsuperscript{168} Parents have the right to examine all relevant records.\textsuperscript{169} Finally, states are required to "establish and maintain procedures...to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of a free appropriate public education."\textsuperscript{170}

According to Justice Kennedy there are certain criteria that govern the sufficiency of an education provided to a child with a disability. The education must be "free, appropriate and public."\textsuperscript{171} An "appropriate" education is "specially designed...to meet the unique needs of a child" coupled with any additional "related services...required to assist a child with a disability to benefit from [that instruction]."\textsuperscript{172} A "free" education, Justice Kennedy notes, means just that: an education that is at no cost to the parents.\textsuperscript{173} This final criterion lends credence to the IDEA's fundamental principle of considering parental involvement and rights.

Parental involvement does not end at the formation of the IEP however; it also extends into the review process put in place so that parents can object to IEPs or any other aspects of IDEA proceedings.\textsuperscript{174} Justice Kennedy vehemently notes that a parent is an interested party and is therefore entitled to request review with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education.\textsuperscript{175} To further strengthen the argument that the IDEA intends parents to be involved, Justice Kennedy considers the standards of Due Process hearings.\textsuperscript{176} He particularly

\begin{itemize}
\item \textsuperscript{167} *Winkelman*, 127 S. Ct. at 2000. (citing § 1414 (d) (3)(A)(ii)).
\item \textsuperscript{168} *Winkelman*, 127 S. Ct. at 2000. (citing § 1414 (d)(4)(A)).
\item \textsuperscript{169} *Winkelman*, 127 S. Ct. at 2000. (citing § 1415 (b)(1)).
\item \textsuperscript{170} *Winkelman*, 127 S. Ct. at 2000. (citing §1415 (a)).
\item \textsuperscript{171} *Winkelman*, 127 S. Ct. at 2000.
\item \textsuperscript{172} Id. at 2000-01. (citing §§ 1401(26)(A)), &(29)).
\item \textsuperscript{173} *Winkelman*, 127 S. Ct. at 2000-01.
\item \textsuperscript{174} Id. at 2001.
\item \textsuperscript{175} Id.
\item \textsuperscript{176} Id.
notes a subsection of § 1415 of the IDEA which states that in matters where a procedural violation is alleged, the failure to provide FAPE will be found if the violation to do so “significantly impeded the parents’ opportunity to participate in the decision-making process regarding of the provision of a free appropriate public education to the parents’ child.”

In conclusion of his section on the involvement of parents as required by the IDEA, Justice Kennedy focuses on cost recovery available to parents. Referencing to § 1412 of the IDEA, Justice Kennedy points out that in certain circumstances the court or hearing officers are allowed to require state agencies “to reimburse the parents...for the cost of [private school] enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child.” Second, he notes that the IDEA provides rules to govern when and to what extent a court may award attorney’s fees and an award “to a prevailing party who is the parent of a child with disability.”

Justice Kennedy agrees that the above provisions allot parents independent, enforceable rights under the IDEA. These rights can be enjoyed by parents at the administrative stage, and Justice Kennedy finds it “inconsistent with the statutory scheme” if parents were disallowed from continuing to affirm these rights in federal court.

2. Parental Rights: Extent and Limitations

Justice Kennedy builds a foundation for his argument that parents do have the right to assert claims in federal court by first laying out the many provisions that allow parents to bring a complaint at the
Believing it would be absurd that the IDEA would give rights to parents that would be barred as soon as they attempted to claim them in federal court, Justice Kennedy lists the many provisions giving parents the right to bring administrative complaints. Among these he mentions the requirement that the State Educational Agency develop and provide a model form to help parents in filing a complaint, the section of the IDEA which addresses the manner and time requirements of an agency’s response to a parent’s due process complaint, and section 1415(i)(3) which refers entirely to the parent’s complaint.

Having laid this foundation, the Court reasons that the Act does not “sub silentio” or “by implication” prevent the parents of a child with a disability from vindicating their rights via the filing of a civil action. In fact, the opposite result is the case when taking into consideration the expansive provisions of the IDEA and the extensive parental involvement they call for. In response to the school district’s argument that the IDEA merely gives parents “collateral tools” with regard to the rights of their child and not independent rights, the Court returns once again to the grammatical structure of one of the IDEA’s main stated purposes: “to ensure that the rights of children with disabilities and parents of such children are protected.” Justice Kennedy writes that it would “make no sense” if the word “rights” referred only to the rights of the children; it clearly also includes the rights of parents.

183. Id.
184. Id.
186. § 1415 (c)(2).
189. Id.
190. Id. (citing 20 U.S.C. § 1400(d)(1)(B)).
191. Id. at 2002. Further provisions are listed to support this view, including § 1415(a) which requires educational agencies establish procedures that would to “ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of a free appropriate public education.” Id. (citing 20 U.S.C. §1415 (a)).
In defense of its argument, the respondent school district turns to case law by citing to *Doe v. Board of Education*.192 *Doe* would have the Court read all references to parent’s rights as inherently referring to the child’s rights.193 Passionately, Justice Kennedy opines that,

> [E]ven if [the Court] were inclined to ignore the plain text of the statute (the IDEA) in considering this theory, [the Court] disagree[s] that the sole purpose driving IDEA’s involvement of parents is to facilitate vindication of a child’s rights. It is not a novel proposition to say that parents have a recognized legal interest in the education and upbringing of their child.194

Not wanting to only address the respondent’s argument for why a parent does not have his/her own rights, the Court also explains and rejects a variation on respondent’s argument that some courts appeals have adopted.195 The variation considered asserts that a parent does have rights, but only as they pertain to certain aspects of the hearing officer’s findings and decision; however, the rights are limited and not all IDEA-based challenges are available to the parent.196 The reasoning behind this argument is that a “party aggrieved” is entitled to receive a remedy, and under the IDEA, parents are only entitled to certain procedural remedies and reimbursements, therefore a parent can only be a “party aggrieved” in matters that would call for such remedies, no other matters.197

192. *Id.* at 2003.
193. *Id. See also*, Doe v. Bd. of Educ. of Baltimore City, 165 F.3d 260, 263 (4th Cir. 1998).
196. *Id.* An example of the limited rights a parent would have under this view is found in *Collinsgru*, where a parent would have a cause of action for several *procedural* violations and reimbursement requests, but not substantive for all IDEA challenges. *Winkelman*, 127 S. Ct. at 2003. *See also, Collinsgru*, 161 F.3d, at 233; 20 U.S.C. § 1412(a)(10)(C)(ii).
Justice Kennedy refutes this argument on two grounds. First, he notes that while there are provisions that provide for procedural remedies and reimbursements, there are other provisions that give other entitlements, so it is unclear whether the limitation to certain remedies was intended. Second, there is little support to suppose that when a child is mentioned in the IDEA, parents are excluded by implication, or vice versa. With this uncertainty, Justice Kennedy turns to the statutory structure once again, raising several examples of the importance of parental involvement and the rights parents have. Considering the statutory structure, the Court concludes that the IDEA "creates in parents an independent stake not only in the procedures and costs implicated by this process but also in the substantive decisions to be made." Therefore a parent may be considered a "party aggrieved" with regards to any matter implicating their rights.

Recognizing that this alternative argument that parents' rights are limited to certain nonsubstantive matters might convince some of his colleagues, Justice Kennedy delves into the "incongruous results" that would follow if the proposition were to be accepted. He notes the difficulty that would arise in disentangling procedural and reimbursement rights from substantive rights since they are interwoven in the IDEA's provisions. Also, the IDEA gives no

198. Id.
199. Id.
200. Id. at 2004. Justice Kennedy recalls the importance of parental participation in the implementation and substantive formulation of the IDEA's procedures and their child's education. Id. The statute, the Justice notes, gives parents the right to request a hearing on "any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." Id. (citing 20 U.S.C. § 1415(b)(6)(A)). And if dissatisfied with the hearing officer's decision the Act also gives parents the right to appeal to a state level officer and then "any party aggrieved" may bring "a civil action." Id. (citing 20 U.S.C. § 1415(i)(2)(A)).
202. Id.
203. In fact it did because this is the heart of the Justice Scalia's reason for concurring in part and dissenting in part and for Justice Thomas joining. See section (B) below.
205. Id. at 2005.
direction as to how a court or a parent might be able to differentiate between these matters in practice.\textsuperscript{206} Under this approach a parent who wishes to challenge the school district’s offer of free and appropriate public education would only be able to do so under two circumstances: “when the parent happens to have some claim related to the procedures employed; and when he or she is able to incur, and has in fact incurred, expenses creating a right to reimbursement.”\textsuperscript{207} Without either of these two circumstances at issue then a parent would not be able to challenge the adequacy of the child’s education because it would not be considered “relevant” to the causes of action a parent would be allowed to raise.\textsuperscript{208} Justice Kennedy concludes by writing of the great injustice that would arise from such an approach since it would disallow many parents from participating in the exercise of their rights, and would flatly contradict the IDEA’s main purpose of ensuring that the rights of children \textit{and} their parents are protected.\textsuperscript{209}

3. The Spending Clause Is Not Applicable

To conclude his opinion, Justice Kennedy confronts Respondent’s contention that even with all of the reasoning applied by the Court the Winkelmans cannot prevail without satisfying the requirements of the Spending Clause.\textsuperscript{210} Since the IDEA was passed pursuant to the Spending Clause it must fulfill the requirement of providing “clear notice” to the states of any new conditions, obligations, or liabilities placed on them.\textsuperscript{211} Respondent argues thereby, that since the IDEA is imprecise as to the independent rights it confers on parents it does not provide “clear notice” and therefore cannot encumber the states with a new burden.\textsuperscript{212} In support of their argument, the school district relies on the \textit{Arlington} case in which it was held that the since the IDEA did not “furnish clear notice

\begin{itemize}
\item \textsuperscript{206} \textit{Id.}
\item \textsuperscript{207} \textit{Id.}
\item \textsuperscript{208} \textit{Id.}
\item \textsuperscript{209} \textit{Id. See also} 20 U.S.C. § 1400(d)(1)(B).
\item \textsuperscript{210} \textit{Winkelman}, 127 S. Ct. at 2005-06.
\item \textsuperscript{211} \textit{Id.} at 2006.
\item \textsuperscript{212} \textit{Id.}
regarding the liability at issue” for expert’s fees, the school districts were not liable for such.213

Justice Kennedy responds by distinguishing between the issue in Arlington and the issue in the present case. In Arlington the issue was whether the IDEA gave clear notice as to the liability being claimed by the parents, whereas in the Winkelman case there is no new question of liability.214 The determination that parents have independent, enforceable rights “does not impose any substantive condition or obligation on States they would not otherwise be required by law to observe.”215 The monetary recovery will be the same and not increased by recognizing that some rights reside not just in the child but in both the parent and the child.216 Justice Kennedy concedes that were there independent, enforceable rights being attributed to a distinct class of people then the Arlington analysis would apply, but such is not the situation in the present case.217

In closing his opinion, Justice Kennedy concludes that the Congressional intent in granting parents rights in the IDEA was harmonious with the purpose of the IDEA and aligned with “our social and legal traditions.”218 The relationship that exists between a parent and child, he fervently writes, makes it clear that a parent does have a legal interest in the education of their child.219 Congress also identified this legal and social interest when it found that “the education of children with disabilities can be made more effective

213. Id.
214. Id.
215. Id.
216. Id.
217. Id. Respondent further argued that a ruling in favor of the Winkelmans would in fact increase costs to the States in that they would be forced to defend complaints and suits against parents who are not trained in law and ethics. Id. Justice Kennedy responds that such a concern is not sufficient to create Spending Clause concerns. Id. Finally, there is already a built-in protection in the IDEA for such cases. Id. Courts hold the power “to award attorney’s fees to a prevailing educational agency whenever a parent has presented a ‘complaint or subsequent case of action...for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation.’” Id. (citing 20 U.S.C. § 1415(i)(3)(B)(i)(III)).
219. Id.
by...strengthening the role and responsibility of parents and ensuring that families of such children have meaningful opportunities to participate in the education of their children at school and at home." Because of this, the judgment of the Court of Appeals was reversed and the case remanded for further proceedings.

**B. Justice Scalia’s Concurrence in Part and Dissent in Part**

Justice Scalia, with whom Justice Thomas joins, concurs with the majority that parents have the right to proceed pro se in court under the IDEA in certain circumstances such as when they ask for reimbursement for private school expenses or seek to rectify violations of their personal procedural rights. However, Justice Scalia does not agree that parents should be able to proceed pro se when they seek a "judicial determination that their child’s free appropriate public education (or FAPE) is substantively inadequate."

1. The IDEA Endows Parents with Certain Rights

Justice Scalia concedes that parents certainly do have rights to plead and bring their own civil actions, under federal law, specifically under the IDEA, when they are the "party aggrieved." A "party aggrieved" is "[a] party entitled to a remedy; espy., a party whose personal, pecuniary, or property rights have been adversely affected by another person's actions or by a court's decree or judgment." So, for Justice Scalia, the focus turns to identifying what the rights of parents are as awarded by the IDEA, because it is

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220. *Id.* at 2006-07 (citing 20 U.S.C. § 1400(c)(5)).
222. *Id.*
223. *Id.* Justice Scalia points to statutory law that says "in all courts of the United States the parties may plead and conduct their own cases personally or by counsel." 28 U.S.C. § 1654 (emphasis added). He also points to the IDEA’s terms under §1415(i)(2)(A) which provide that, "any party aggrieved by the findings and decision [of a hearing officer] shall have the right to bring a civil action with respect to the [administrative] complaint." *Id.* (emphasis added).
only for these rights that a parent can be a party aggrieved, and consequently, file their own case in federal court.\(^{225}\) He identifies parents’ rights as limited to two areas: the right of reimbursement for private school expenditures\(^ {226}\) and the right to various procedural protections.\(^ {227}\) Any rights falling outside of these two areas are not and should not be accorded to the parents for they belong to the child alone.\(^ {228}\)

2. The Flawed Reasoning of the Majority

Justice Scalia writes that the majority’s decision to go further and grant parents even more rights is troubling.\(^ {229}\) Justice Scalia admits that parents have an interest in their child’s education, but “there is a difference between an interest and a statutory right.”\(^ {230}\) In fact, he writes, “[t]he text of the IDEA makes clear that parents have no right to the education itself.”\(^ {231}\) The “statutory right” to a free appropriate public education is inherent in the child, and as evidence of this the Justice lists various sections of the IDEA, noting that the Court is unable to provide even one section or provision giving parents this


\(^ {226}\) Justice Scalia cites to 20 U.S.C. § 1412(a)(10)(C)(ii) (2000 ed., Supp. IV) noting that “a court or hearing officer may require the [school district] to reimburse the parents’ for private school expenditures ‘if the court or hearing officer finds that the [school district] had not made a free appropriate public education available to the child.’” Winkelman, 127 S. Ct. at 2007-08.

\(^ {227}\) A parent has a right to certain procedural protections during the development of the IEP (individualized educational program) of their child and during subsequent administrative challenges. Winkelman, 127 S. Ct. at 2008. During the IEP, for example parents must be considered “a member of their child’s IEP team” and they must be given the “opportunity to examine records and participate in IEP meetings.” Id. (citing to 20 U.S.C. § 1415(b)(1) and §§ 1415(b)(6), (8)). After the IEP, and consequent to any complaints the parent may also file an administrative complaint through which the parent may receive protection of their rights for a number of procedural infractions. Winkelman, 127 S. Ct. at 2008.

\(^ {228}\) See Winkelman, 127 S. Ct. at 2008.

\(^ {229}\) The Court (majority) held that parents are free to appear pro se in court for procedural violations, to seek reimbursement and when they wish to challenge the “substantive adequacy of their child’s FAPE.” Winkelman, 127 S. Ct. at 2008.


\(^ {231}\) Id.
right.\footnote{232} "The Court's spraying statutory sections about like buckshot cannot create a substantive parental right to education where none exists."\footnote{233} To allow parents to act without a lawyer in all IDEA cases "sweeps far more broadly than the text allows."\footnote{234} In the majority opinion the Court admits that the IDEA does not grant parents with reimbursement and procedural protection rights because they have a right to the education itself.\footnote{235} Justice Scalia posits that the logical step to be taken after such a concession is that the rights that \textit{are} given to parents are not by accident, neither are those that are \textit{not} given to the parents.\footnote{236} To conclude otherwise, as the majority has done, is erroneous.\footnote{237} A clear distinction has been made in the IDEA, according to Justice Scalia, between the rights given to parents and those given to children.

In furtherance of his position, Justice Scalia distinguishes the Court's claim that the "IDEA does not differentiate...between the rights accorded to children and the rights accorded to parents" as

\begin{quote}
\footnotetext{232} As examples of FAPE belonging to the child, Justice Scalia cites to §§ 1400(d)(1)(A); 1408 (a)(2)(C)(i); 1411(e)(3)(F)(i); 1414(a)(1)(D)(i)(II) and 1415(b)(6)(A). \textit{Winkelman}, 127 S. Ct. at 2008. Justice Scalia goes on to say that it is understandable that the IDEA fails to mention the parent's right to FAPE and that is because it is "obviously" inherent in the child because the child is the one who receives the education. \textit{Id}.
\footnote{233} \textit{Winkelman}, 127 S. Ct. at 2009.
\footnote{234} \textit{Id}. at 2008.
\footnote{235} \textit{Id}. at 2009.
\footnote{236} \textit{Id}.
\footnote{237} \textit{Id}. The majority relies on the many procedural guarantees that parents are given during the administrative process to conclude that parents have "substantive rights" to FAPE. \textit{Id}. Justice Scalia insists that the granting of procedural rights is "not the same as giving [the parents] the right to that education." \textit{Id}. He also argues that the Court cannot reasonably rely on any rights granted to the parents to be used explicitly at the administrative level because they are just that: administrative level rights. \textit{Id}. They should extend no further than the administrative level. \textit{Id}. He writes,

[p]arents thus have the power, at the administrative stage, to litigate \textit{all} of the various rights under the statute since at that stage they are acting not only on \textit{their own} behalf, but on behalf of \textit{their child} as well. This tells us nothing whatever about \textit{whose} rights they are. \textit{Id}.
\end{quote}
being clearly wrong. The IDEA does give parents separate rights including claiming a reimbursement on private school tuition and excusing an IEP member from attending the IEP meeting. These are rights which are obviously only applicable by and created for parents; a child would not be able to exercise such rights. To the Court’s argument that even those rights previously mentioned require a parent to prove the substantive inadequacy of a FAPE, consequently granting the parent substantive rights to their child’s education, Justice Scalia responds by calling the Court’s logic “a total non sequitur.” Congress may have required parents to prove the inadequacy of their child’s FAPE, but that right sheds no light upon whether the right to education is possessed by parents. Per Congress the right belongs to the “party aggrieved” and Justice Scalia stresses that it is the Court’s duty to apply the term and “not to run from it.”

3. Applying This Distinction Is Not As Difficult As The Majority Claims

Justice Scalia then turns to the administrative reasoning that the Court provided for their decision. First he addresses whether, as the Court claims, applying the distinction between parental and child rights will truly be too complicated for the courts to apply. Justice Scalia points out that a majority of Federal Courts of Appeals already administer this distinction by allowing parents to file pro se as to

238. Id. at 2009-10. Justice Scalia cites to Emery v. Roanoke City Sch. Bd. quoting “[P]arents and children are distinct legal entities under the IDEA.” Winkelman, 127 S. Ct. at 2010. (citing to 432 F.3d 294,299 (Cal. 2005)). He also cites to petitioner’s amici as agreeing with him in saying “Congress specifically indicated that parents have rights under the Act that are separate from and independent of their children’s rights.” Winkelman, 127 S. Ct. at 2010. (citing to Brief for Senator Edward M. Kennedy et al, as Amici Curiae Supporting Petitioners at 18, Winkelman v. Parma City Sch. Dist., 127 S. Ct. 1994 (2007)).


240. Id.

241. Id. Even if, as the Court claims, the right to FAPE is the “most fundamental [right] to the Act” that still does not justify giving that right to the parent and allowing him/her to file suit. Id.

242. Id.

243. Id.
some claims, but not as to a claim of denial of FAPE. In contrast, the Court provides no evidence of this confusion in actual practice, and rightly so because as Justice Scalia reiterates, the IDEA’s distinctions are clear and easy to understand, so the Court would be hard pressed to find examples to support their claim.

Second, Justice Scalia turns to the Court’s argument that to make such a distinction would be an injustice as it would leave many parents seeking to file suit for substantive issues without remedy. Justice Scalia suggests their remedy would be the same remedy that all parents have in such a case: to hire an attorney and bring suit. Cases that involve substantive issues are by nature more complicated than reimbursement requests or procedural violations, without the aid of an attorney, courts will be burdened by the influx of pro se cases. Since parents will be filing without the assistance of an attorney, many of these will be unmeritorious cases simply encumbering the already burdened court system. Accordingly, Justice Scalia repeats his decision that the Winkelmans should be allowed to proceed with respect to their first two claims of reimbursement and procedural violations, but not with regard to the third: the request of a declaration that their child’s FAPE was substantively inadequate.

244. Id. Justice Scalia cites to many appellate cases where this distinction has been applied. See Mosely v. Bd. of Educ., 434 F.3d 527, 532 (7th Cir. 2006); Collingsru, 161 F.3d at 233; Wenger v. Canastota Cent. Sch. Dist., 146 F.3d 123, 126 (2d Cir. 1998) (per curiam); Devine v. Indian River City Sch. Bd., 121 F.3d 576, 581, fn. 17 (11th Cir. 11 1997).
246. Id.
247. Id.
248. According to Justice Scalia, a request for reimbursement by nature is less likely to be sought after frivolously since most parents will only pay for private school tuition if they believe they have a strong case for proving that FAPE was inadequate. Winkelman, 127 S. Ct. at 2011. Similarly, an action that is brought forth to rectify a procedural violation is less complex in nature and, if frivolous, can be disposed of by a court quite rapidly. Id.
249. Id. at 2011.
250. Id.
V. IMPACT

With recent decisions like Schaffer shifting the burden of proof to parents and Arlington taking away from parents the possibility of reimbursement of expert’s fees even when they win, parents of children with disabilities remained attentive to the Court’s decision in Winkelman, hoping the Court would finally acknowledge their rights. On May 21, 2007 such acknowledgement occurred at last. The decision to allow parents to proceed pro se will naturally bring with it both benefits and potential drawbacks; however, with the benefits being far weightier and the drawbacks avoidable, the Winkelman decision has proven to be a success for parents.

A. Low Income Parents Have a Venue for Asserting their Children’s Rights

Parents are possibly the fittest agents “to ferret out inadequate education.” They are aware of their child’s progress or lack thereof, whether or not the proposed IEP is being followed, and inherently are protective of their child. So long as they take an interest in their child’s disability and education, parents can become some of the most passionate advocates on behalf of their children. With the Winkelman decision the Court has finally given them the opportunity to do so.

251. See discussion supra, Part II, Historical Background (exploring history of Schaffer and Arlington).

252. During oral arguments in the Winkelman case, parent’s counsel was noted as saying “It is our position that those public policy concerns about pro se litigants burdening the court, burdening opposing counsel, are dramatically outweighed by the fact that -- by the reality that two-thirds of the disabled children in the United States come from families that cannot afford counsel. Oral arguments before Supreme Court Feb 2007.


254. In working at the Pepperdine Special Education Advocacy Clinic, I have worked with many parents who become very knowledgeable of their child’s needs and very effective at advocating for their children at IEP meetings and elsewhere. Additionally the IDEA included in it’s findings that “the education of children with disabilities can be made more effective by...strengthening the role and responsibility of parents...” 20 U.S.C. § 1400(c)(5)(B).
Due to the complexity and specialization needed for handling an IDEA case, there is a severe lack of lawyers who are willing to take them on without a considerable retainer.\textsuperscript{255} For those parents who can afford to, the safest option is likely still to be to hire a special education attorney. The Council of Parent Attorneys and Advocates ("COPAA") conducted an informal survey of their membership to determine the average hourly rate, retainer and total cost for handling an IDEA case.\textsuperscript{256} The results indicated the hourly rate can range from $150 to $450 an hour depending on the attorney’s experience. The majority of attorneys surveyed require a retainer fee of $3000, but some ask for up to $10,000. The survey also revealed that the total cost for practitioners may range from $10,000 to more than $100,000. Many parents are rendered unable to obtain qualified counsel as these high fees are insurmountable.

"[S]pecial education disabilities have long been linked to poverty and minority status."\textsuperscript{257} Currently there are approximately seven million school-aged children with disabilities who qualify to receive services under the IDEA.\textsuperscript{258} A large percentage of these children come from families who are considered "low-income." In 2000, the Department of Education conducted a study in which they discovered that thirty-six percent (or over two million) of children with disabilities come from families earning less than $25,000 annually, and approximately twenty-four percent live in poverty.\textsuperscript{259} Over two

\begin{itemize}
  \item \textsuperscript{255} The Third Circuit recognized this dilemma in \textit{Collinsgru v. Palmyra Board of Education}, stating, "[w]e acknowledge this to be true, for most attorneys will be reluctant to take on cases like this, characterized as they are by voluminous administrative records, long administrative hearings, and specialized legal issues, without a significant retainer." 161 F.3d 225, 236 (3d Cir. 1998).
  \item \textsuperscript{256} COPAA is a non-profit organization that provides information, training and resources for parents, advocates, and attorneys to ensure that every child receives FAPE as guaranteed by the IDEA. (citing to Brief for Council of Parent Attorneys and Advocates, Inc. et al., as Amici Curiae Supporting Petitioners at 9, fn. 4, Winkelman v. Parma City Sch. Dist., 127 S. Ct. 1994 (2007)).
  \item \textsuperscript{258} \textit{Id.} (citing to \textit{Schaffer}, 546 U.S. at 49).
  \item \textsuperscript{259} Brief for Petitioners, \textit{supra} note 257, at 10-11. (citing MARY WAGNER, \textsc{The Children We Serve: Demographic Characteristics of Elementary and Middle School Students with Disabilities and Their Households}, 28-29,
thirds of children with disabilities (or approximately 4.5 million) come from families earning less than $50,000 annually.\textsuperscript{260}

Before Winkelman, many of these families would likely have turned to legal aid assistance and been turned away. One reason they might be turned away is for not meeting the annual income requirement.\textsuperscript{261} Yet, while their income might not have been low enough to be able to receive the free legal assistance, they probably would not be able to afford a private attorney.\textsuperscript{262} The Winkelmans are an example of such a family caught in this dilemma: their annual income is above the requirement to receive free legal assistance, but much too low to hire a private attorney. With an annual income of $40,000, no savings, and a monthly mortgage payment of $1,300, the Winkelmans could not afford to agree to exorbitant fees like the one asked for by one lawyer: a fee of $2,600 to be paid biweekly.\textsuperscript{263}

\textsuperscript{260} Two years later a follow-up survey was performed known as “Wave 2” which revealed that the situation did not improve. Brief for Petitioners, \textit{supra} note 257, at 11. (citing JOSE BLACKORBY, ET AL., \textsc{Wave I Wave 2 Overview}, 2-6 (2004), \url{http://www.seels.net/designdocs/w1w2/SEELS_W1W2_complete_report.pdf}).

Although there were four percent less children with disabilities in families making under $50,000 per year, the changes, according to the surveyors, “[were] not sufficient to cause a meaningful decline in the percentage of students with disabilities who live in poverty; 21\% are living in poverty in Wave 2, a significantly higher rate than among children in the general population (16\% US Department of Commerce, 2002).” \textit{Id.} at 2-5. Furthermore the more recent survey revealed that approximately 8\% of the families who were earning between $25,000 to $50,000 per year in the first survey dropped down to poverty level in Wave 2. \textit{Id.} at 2-6.

\textsuperscript{261} A family of four who lives in the lower forty-eight states can receive legal aid if their annual income is less than or equal to $20,750. Brief for Petitioners, \textit{supra} note 257, at 12, fn. 5.

\textsuperscript{262} “Families above the poverty line living on less than $50,000 per year...who do not qualify for subsidized legal assistance, ‘seldom are able to afford help from the private bar.’” Brief for Petitioners, \textit{supra} note 257, at 12 (citing ALBERT H. CANTRIL, \textsc{American Bar Association, Agenda for Access: The American People and Civil Justice}, (1996), \url{http://www.abanet.org/legalservices/downloads/sclaid/agendaforaccess.pdf}).

\textsuperscript{263} Brief for Petitioners, \textit{supra} note 257, at 9, fn. 3. (citing Adam Liptak, \textit{Nonlawyer Father Wins His Suit over Education, and the Bar Is Upset}, \textsc{N.Y. Times}, May 6, 2006, at A8).
If a family were to meet or fall under the maximum annual income mark required to receive free legal assistance, they might still be turned away if there were not enough resources at the legal clinic to handle their cases. Approximately four of every five families who meet the income requirements to receive free representation by legal clinics are nevertheless turned away due to insufficient resources. Prior to Winkelman, parents would have been limited or simply prevented from accessing the federal courts; if their complaint was not settled or did not reach a favorable decision in administrative court the parent was out of luck. Today, parents who would otherwise have no other option are allowed to legally proceed as far as is necessary to defend the rights of their children.

B. The Avoidable Drawbacks

The respondent School District argued, as did the dissenting Justice Scalia, that allowing parents to proceed in court pro se would only be detrimental to their children and depletive of funds for the school districts. Respondent argued that parents were not trained and to allow them to proceed pro se into federal court would not only impose high costs on school districts but also deprive their children of less than competent representation. Justice Scalia also argued that allowing parents to proceed pro se would impose burdens on the courts as the amount of unmeritorious claims would see a sharp rise.

According to the Respondent School District giving parents the reigns of their child’s legal recourses will only make them less likely to enter into alternative dispute resolution and instead head straight towards the courts. Public school systems have limited budgets

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264. Brief for Petitioners, supra note 257, at 12.
266. Winkelman, 127 S. Ct. at 2011.
267. Brief for Respondent, supra note 265, at 5. Respondent argues, “The legislative history of the recent amendments is replete with language encouraging mediation of IDEA disputes in order to avoid litigation and its attendant costs.” Id. The detailed and broad reach of the administrative process as laid out by the IDEA shows this focus on “early resolution...intended to establish a cooperative
and by permitting parents to proceed *pro se* more and more of the school’s money will be spent on litigation costs than on education. 268 Justice Scalia’s dissent addressed similar concerns. 269 The school argued that a “prohibition on *pro se* representation” may have served the child more than costly litigation by encouraging informal resolution between parents and schools, giving them the opportunity to settle matters in “positive and constructive ways.” 270 Whereas lawyers are bound professionally and ethically not to bring cases that are frivolous or without merit, parents do not have such restraints and are likely to be emotionally engaged in the case bringing far more cases that are without merit before the courts. 271

Advocates for parents strongly disagree that courts will be struck with an increase in frivolous suits. Parents are still going to have to be concerned with attorney’s fees awards going to the school district if they proceed with a case without merit. 272 Also many parents will

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269. See *supra* Sec. IV (B).
272. The pertinent section of the IDEA addressing Attorney’s Fees reads:

“(i) In general. In any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorney’s fees as part of the costs—(I) to a prevailing party who is the parent of a child with a disability; (II) to a prevailing party who is a State educational agency or local educational agency against the attorney of a parent who files a complaint or subsequent cause of action that is frivolous, unreasonable, or without foundation, or against the attorney of a parent who continued to litigate after the litigation clearly became frivolous, unreasonable, or without foundation; or (I) to a prevailing State educational agency or local educational agency against the attorney of a parent, or against the parent, if the parent’s complaint or subsequent cause of action was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation.” 20 U.S.C. § 1415(i)(3)(B)(i)(I)-(III) (emphasis added).
simply not proceed on their own without a lawyer because they are afraid to "do it alone."\textsuperscript{273}

Another potential drawback of the \textit{Winkelman} case is that since the federal phase of an IDEA case is so different from the administrative stage, untrained parents are likely to make matters worse for the children they are representing. For example, children’s rights may be waived unintentionally by the parents.\textsuperscript{274} This consequence is avoidable, however, since the special education community is tight-knit and there are many resources available for parents who do choose to progress legally past the administrative level.\textsuperscript{275}

These potential dangers will require both parents and school districts to take more responsibility upon their actions. School districts desiring to save financial resources for educational purposes and not legal ones will have to be more mindful and careful in following IDEA procedures. They will have to give serious consideration to parental concerns and complaints. If failing to

\begin{footnotesize}
\textsuperscript{273} Jay Kravetz, \textit{School Attorneys: Publicity of Winkelman may Generate more Parent-led Litigation}, LRP PUBLICATIONS (2007). Kravetz interviewed parent’s Attorney Deborah A. Mattison, with Wiggins, Childs, Quinn & Pantazis in Birmingham, Alabama who opined that she doesn’t expect an increase in lawsuits because most parents will be unwilling to “do it alone.” She says, “This case does give parents more rights—and I think they will take advantage of their additional rights to help their child receive FAPE—but I don’t think most parents will want to have their case in court without the help of a lawyer.” \textit{Id.}

\textsuperscript{274} Brief for Respondent, \textit{supra} note 265, at 22.

\textsuperscript{275} The internet is abundant with sources for the parent seeking to proceed to federal court. Websites like www.wrightslaw.com provide free articles and opinions that can inform parents as to their rights and how to go about advocating for them. Additional sites online can be accessed by a cursory command on a search engine. Also, for example the state of California has 21 regional centers where parents can learn and find more information regarding their rights. The Council of Parent Attorneys and Advocates also has a myriad of resources and information and provides an annual conference to train parents on how to advocate for their children’s rights. Parents can also choose to visit local law school libraries and seek the assistance of legal reference librarians to learn more about special education law. More and more law schools are focusing on special education law allowing their students to gain experience by implementing Special Education Clinics and parents may be able to find assistance from students and professors through these schools. Among these are Pepperdine Law School, Whittier Law School, Stanford Law School, Harvard Law School, New York Law School, and University of Minnesota Law School, to name a few.
\end{footnotesize}
include a parent in the IEP decisions might mean legal action (which it does) then school districts will have to be even more cautious and considerate in their inclusion of parents at all stages. This is great news for parents who often feel left out of the process and consequently dissatisfied. But Winkelman also places more responsibility on parents to be thoughtful before filing a complaint, to consider alternative dispute resolution, and to engage even more in their child’s education.

While there are several pitfalls for the parent who chooses to proceed in federal court pro se the benefits of being allowed to do so are much weightier. Parents are in a far better position now that lack of finances and the scarcity of legal aid are no longer obstacles to their children’s rights. What this case really does is tip the balance in the parent’s favor; the Court is acknowledging the important role of the parent in a child’s education.276

C. Impact on Special Education Law

Only twelve special education cases have ever been decided by the U.S. Supreme Court, with the most recent two cases in the year 2007. Prior to these cases were Schaffer and Arlington, decided in 2005 and 2006 respectively. Both were cases that clearly made a parent’s fight in court an upward struggle by imposing on them the burden of proof and striking the expert’s fees award opportunity. Winkelman brought with it a breath of fresh air to parents and their advocates, and after its 7-2 decision left begging the question whether this relief was temporary or a reflection of what was to come. The answer came unexpectedly sooner than anticipated with the case Board of Education v. Tom F., the most recent special education case to be heard by the Supreme Court, decided on October 10, 2007.277

276. Kravetz, supra note 273. Kravetz also interviewed parent’s Attorney, William Hurd, with Troutman Sanders in Richmond, Va, who opined that Winkelman “may not increase the number of lawsuits by a large number that parents represent themselves in, [but] it will give them additional avenues for advocating for their children.” Id.

The issue presented in *Tom F.* was whether the parent of a child with disabilities can sue for a reimbursement of private school tuition despite the fact that his child was never enrolled in a public school.\footnote{278} The parent in the case, Tom F., enrolled his son Gilbert in kindergarten at Stephen Gaynor School, a private school, specializing in the education of children with disabilities.\footnote{279} Although having already paid for two years of his private schooling, Petitioner school district sent Tom F. a letter recommending changing Gilbert’s placement to a public school.\footnote{280} Parent Tom F. disagreed with the placement, kept Gilbert at the private Gaynor School, and filed a complaint seeking reimbursement for the current school year.\footnote{281} Losing at the administrative level, the school district appealed to the federal district court who held in their favor.\footnote{282} On appeal, the Appellate court for the Second Circuit held in favor of Tom F. in light of recent precedent.\footnote{283} On writ, the Supreme Court released a split decision, 4-4, meaning the ruling of the Appellate court was affirmed and Tom F. would be receiving the private school tuition reimbursement.\footnote{284} While the case only has authority with respect to those parents and school districts within the Second Circuit, it nevertheless has inspired many parents and upset school districts across the nation.

Whether *Winkelman* and *Tom F.* signify the Supreme Court’s permanent turn in favor of parents is unclear. The pendulum has swung in both directions over the history of special education case

\footnote{278}{Brief for The United States as Amicus Curiae Supporting Respondent at 8, Bd. Of Educ. of the City Sch. Dist. of the City of New York v. Tom F., No. 06-637 (2007).}  
\footnote{279}{Brief for Respondent, *supra* note 265, at 3.}  
\footnote{280}{Id. at 4.}  
\footnote{281}{Id.}  
\footnote{282}{Id. at 5.}  
\footnote{283}{Id. The recent precedent was Frank G. v. Board of Educ., 459 F. 3d 356 (2d Cir. 2006) in which the Second Circuit decided in favor of the parent in finding that nowhere in the IDEA is there a requirement that a child with a disability first receive public school special education before being eligible for reimbursement of private school tuition. Brief for Respondent, *supra* note 265, at 5.}  
\footnote{284}{*Tom F.*, 128 S.Ct, 1 at 1.}
However, it is certain that currently parents are reaping the long awaited recognition of their rights as granted by the IDEA. Parental judgment is being awarded more consideration, as parents are now able to pursue federal court proceedings on their own behalf without representation when they feel it is necessary, and at least in the 2nd Circuit are able to use their own judgment in deciding their child’s placement.

VI. CONCLUSION

With Winkelman, parents are not only seeing their rights acknowledged but are also beginning to see the scales being tipped in their favor for the first time in many years. Despite recent case law being decided in favor of school districts, the Winkelman Court has held that the IDEA gives parents independent, enforceable rights thereby entitling them to prosecute IDEA claims on their own behalf. The impact of this decision is for the most part only speculative as only time will tell if parents and school districts are able to settle cases out of court or if litigation increases, but it certainly favors parents. Parents can now protect their children’s rights beyond the administrative court level regardless of their economic standing. As a result both parents and school districts will have to be more responsible in the manner in which the early stages of interaction are handled to prevent a flooding of courts with parental complaints.

285. Pete Wright is credited with using “the swinging pendulum” in reference to the Supreme Court’s swaying from limiting parental rights to promoting parental rights. http://www.wrightslaw.com/law/art/winkleman.pwanalysis.htm