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ACCESS GRANTED: THE WINKELMAN CASE USHERS IN A NEW ERA IN PARENTAL ADVOCACY

*Laura McNeal**

I. INTRODUCTION

According to the U.S. Department of Education, nearly 6.8 million children currently receive special education services in secondary schools.¹ Historically, our nation's response to students with disabilities was segregation from the general classroom, exclusion, and institutionalization.² However, groundbreaking legislation, such as the Education for All Handicapped Children Act, opened our nation's schools to students with special needs, and also served as the catalyst for a major culture shift toward a higher quality education for students with disabilities. This trend toward increasing the quality of special education continued with the enactment of the Individuals with Disabilities Education Act (IDEA)³, Section 504 of the Rehabilitation Act⁴, the Americans with Disabilities Act (ADA)⁵, and the No Child Left Behind Act⁶. Collectively, these laws form the legal landscape for special education in America's schools.

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1. United States Department of Education, <http://www.ed.gov/about/offices/list/osep/index.html> (last visited Dec. 7, 2007).

2. LARRY D. BARTLETT, SUSAN ETSCHIEDT & GREG R. WEISENSTEIN, *SPECIAL EDUCATION LAW AND PRACTICE IN PUBLIC SCHOOLS 5-8* (2d ed. 2007).

3. Individuals with Disabilities Act, 20 U.S.C. § 1400 (2006).

4. Rehabilitation Act of 1973, § 504, 29 U.S.C. § 794(a) (2006).

5. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified at 42 U.S.C. §§ 12,101-12,213 (1988 & Supp. II 1988)). Many of the Act's key provisions are drawn from the Rehabilitation Act of 1973, 29 U.S.C. §§ 701-796i (1988 & Supp. II 1988), which provided limited employment protection for "handicapped" employees of the federal government, federal contractors, and recipients of federal aid.

6. No Child Left Behind Act of 2001, 20 U.S.C.A. §§ 6301-7941.

In recent years, there has been an increased interest in promoting educational equity within America's schools. Researchers, educators, and policymakers have struggled to find solutions to the nation's achievement gap and provide all students with a high quality education. As a result, there has been an increased focus on improving the quality of education for students with disabilities. This is evidenced by the enhanced accountability measures embedded within federal education mandates (such as the Elementary and Secondary Education Act). The primary purpose of these mandates is to promote substantive—as opposed to symbolic—special education reform in America's K-12 schools.

The parents of special needs children have also taken an active role in ensuring that their child receives a quality education. Current special education laws provide parents with legally-enforceable rights regarding their child's education. Although parents may contribute to a dialogue regarding their child's education, such as the development of an Individualized Education Plan (IEP), school officials make the final decisions as to the degree and scope of special education services; this is due to the fact that parents' legal rights are procedural—as opposed to substantive—in nature. Thus, although parents are permitted to actively participate in their child's education process, the law does not require parental consent with respect to the contents of the final IEP.

Although, the area of special education law concerning parental legal rights is relatively clear, certain important aspects of it are not. Specifically, there has been uncertainty whether non-lawyer parents have the right in court proceedings to challenge pro se the suitability of their child's special education services. The ambiguities of this topic are highlighted by the immense variability in circuit courts decisions throughout the country. Recently, the Supreme Court resolved this unsettled area of law in *Winkelman v. Parma School District*.

According to Fisher, "Laws serve two functions: (1) symbolic and (2) substantive. The symbolic function of law includes such goals as reaffirming cherished values and showing that 'something is being done' about a perceived social problem."⁷

7. Bonnie S. Fisher, Jennifer L. Hartman, Francis T. Cullen & Michael G. Turner, *Making Campuses Safer for Students: The Clery Act as Symbolic Legal Reform*, 32 STETSON L. REV. 61 (2002).

Symbolic legislation is designed to satisfy those who advocated for the cause, regardless of its effectiveness in addressing the problem. On the other hand, the substantive function of law is designed to promote changes that have practical utility: changes that directly help solve the issue the law was created to address.⁸ Thus, in applying this principle to the *Winkelman v. Parma City School District* decision and the current special education milieu, the question emerges: will the *Winkelman* decision make a symbolic or substantive impact on special education?

This article explores the *Winkelman* decision and its implications on public schools, teachers, and parents of children with disabilities. Part II provides a brief history of IDEA and describes its statutory framework as it relates to the substantive and procedural rights of parents. Part III provides an overview of the legal milieu pertaining to the rights of non-lawyer parents to proceed pro se in court proceedings challenging whether their child with a disability is receiving a free appropriate public education as mandated by IDEA. Part IV analyzes the *Winkelman* decision and asserts that it will have a substantive, as opposed to symbolic impact on the quality of special education in public schools. Additionally, I assert that the *Winkelman* decision will help transform IDEA into a more robust education reform through increased teacher and school leader accountability for the quality of education provided to children with disabilities. Finally, Part V explores the implications of *Winkelman* on K-12 schools and the parents of children with disabilities. Specifically, this section argues that the *Winkelman* decision is likely to provide more parents of students with disabilities a forum to advocate for their child's education, regardless of their socioeconomic status.

II. IDEA STATUTORY FRAMEWORK

The Individuals with Disabilities Education Act ("IDEA") is a federal statute that requires any school receiving federal funding to provide disabled students a free appropriate public education.⁹ IDEA has become the single most important legal tool in ensuring that children with mental, physical, emotional,

8. *Id.*

9. Individuals with Disabilities Act, 20 U.S.C. § 1400 (2006); *Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982).

or behavioral disabilities have access to a beneficial education. Originally passed by Congress as “The Education for All Handicapped Children Act,” IDEA was adopted at a time when the educational needs of many disabled children were either severely underserved or ignored all together.¹⁰ In the early 1970’s, as many as one million disabled children were not being provided any education at all.¹¹ The impetus behind the passage of IDEA was two federal district court cases from the early seventies.¹² According to these cases, Equal Protection commands that States which provided free education for the general student population needed to extend that same benefit to disabled students.¹³ These courts went on to hold that Due Process requires a hearing before educational benefits can be withheld from a disabled student.¹⁴ Prior to these two landmark decisions, some state laws, such as those in Pennsylvania and the District of Columbia, allowed public schools to deny admission to children with an I.Q. below seventy until they reached the age of eight.¹⁵ It was with this legal backdrop that Congress created the various provisions of IDEA focusing on procedural safeguards and increased protection for children with special education needs.

IDEA guarantees procedural safeguards for students with disabilities and their parents in all areas relating to identification, evaluation, and placement.¹⁶ At one time, it was common practice to evaluate students and make changes in their educational program without their parents’ knowledge or consent.¹⁷ IDEA elevates the status of parents to that of important participants in the planning and execution of their child’s educational program. IDEA provides that parents must be notified and give their consent before their child is assessed and before the educational program is changed. Specific

10. BARTLETT ET AL., *supra* note 2.

11. *Id.*

12. *Pennsylvania Assoc. for Retarded Children v. Pennsylvania*, 343 F. Supp. 279 (E.D. Pa. 1972); *Mills v. Bd. of Ed.*, 348 F. Supp. 866, 875 (D.D.C. 1972).

13. *Pennsylvania Assoc. for Retarded Children*, 343 F. Supp. 279; *Mills*, 348 F. Supp. at 875.

14. *Id.*

15. Suzanne Solomon, *The Intersection of 42 U.S.C. § 1983 and the Individuals with Disabilities Education Act*, 76 *FORDHAM L. REV.* 6 (2008).

16. 20 U.S.C. § 1415(a).

17. LAURA R. MCNEAL & COLLEEN M. O’ROURKE, *SPECIAL EDUCATION FOR TEACHERS* 31–62 (5th ed. 2009).

procedures are established in the Act, which must be followed from evaluation through placement and programming in order to protect the rights of students and their parents.

The Individualized Education Plan ("IEP") is the most significant right afforded to disabled students and their parents by IDEA.¹⁸ IDEA guarantees disabled students the substantive right to a free appropriate public education.¹⁹ To this end, the statute requires that, once a child is found through an evaluation to be disabled, the school must prepare an IEP for that child.²⁰ The IEP is meant to bring together the school administration, parents, the student, and other helpful parties in order to create an educational plan custom-tailored to address the particular needs of the student.²¹ The written IEP must include, among other things, a statement of measurable education goals and how those goals are to be met in the classroom.²² The required members of the IEP team are spelled out. In addition to school personnel, it includes the child's parents, along with any person whom the parents believe would be of assistance.²³ Further, parents must receive extensive notifications of any change or refusal to change their child's IEP.²⁴ Parents are also explicitly given several procedural safeguards during the IEP process—all at the school's expense—including the right to participate at any stage, examine documents relating to the IEP process, obtain an independent evaluation of their child, and mediation.²⁵ Finally, parents are afforded the option to enroll their child in private school and seek reimbursement from the school district if the parents prove that the school district failed to provide their child with a free appropriate public education.²⁶

If the IEP is determined to be unsatisfactory, IDEA gives parents the specific right to challenge the appropriateness of the IEP in addressing their child's specific needs and any diagnostic findings upon which the plan is based. The parents' first option is to dispute the IEP through administrative

18. 20 U.S.C. § 1414.

19. *Id.* § 1414(d).

20. *Id.* § 1414(a) & (d).

21. MCNEAL & O'ROURKE, *supra* note 17.

22. 20 U.S.C. § 1414(d)(1)(A)(i).

23. *Id.* § 1414(d)(1)(B).

24. *Id.* § 1415(b) & (c).

25. *Id.*

26. *Id.* § 1412(a)(10)(C)(ii).

proceedings. For example, the parents may demand a Due Process Hearing before an impartial hearing officer to decide both the sufficiency of the IEP and whether the school followed all of the procedural processes.²⁷ If the parents are still unsatisfied after the administrative level review, then they can bring a suit for judicial review in Federal District Court.²⁸ Courts reviewing the administrative decisions are empowered to receive new evidence and make a decision based, first, on whether “the State has complied with the procedures set forth in the Act and, second, whether the IEP is reasonably calculated to enable the child to receive educational benefits.”²⁹ Only if both of these prongs are met is the state deemed to have provided a free appropriate public education.³⁰ Parents who are able to succeed on the merits when challenging the appropriateness of their child’s IEP may be entitled to attorneys’ fees.³¹ However, until recently it was unclear whether a disabled student’s parents had an independent substantive right to proceed pro se in a judicial review of the administrative hearings. Federal circuit courts throughout the country interpreted this aspect of IDEA differently. The United States Supreme Court resolved this legal issue in *Winkelman v. Parma City School Districts*.³²

III. LEGAL MILIEU

A. A Split in the Circuits

All but one of the Federal Circuits held that non-lawyer parents pursuing solely substantive claims were not allowed to represent their children without the assistance of an attorney, based on their legislative interpretation of IDEA.³³ The outlying decision, the First Circuit in *Maroni v. Pemi-Baker*

27. *Id.* § 1415(e)(2)(A)(ii).

28. *Id.* § 1415(i)(2)(A).

29. *Bd. of Ed. v. Rowley*, 458 U.S. at 207.

30. *Id.*

31. 20 U.S.C. § 1415(i)(3)(B).

32. *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516 (2007).

33. *Maroni v. Pemi-baker Reg'l Sch. Dist.*, 346 F.3d 247 (1st Cir. 2003) (allowed parental pro se representation); *Collinsgru v. Bd. of Educ.*, 161 F.3d 225 (3d Cir. 1998); *Cavanaugh v. Cardinal Local Sch. Dist.*, 409 F.3d 753 (6th Cir. 2005); *Mosely v. Bd. of Educ.*, 434 F.3d 527 (7th Cir. 2006); *Wenger v. Canastota Cent. Sch. Dist.*, 146 F.3d 123 (2d Cir. 1998).

Reg'l School District, held that IDEA endowed parents with the right to represent their child in both administrative and judicial proceedings without the assistance of legal counsel.³⁴ The First Circuit reasoned that parents were “parties aggrieved” within the meaning of the IDEA and, thus, could sue a school district pro se regardless of whether the rights asserted were procedural or substantive. However, the vast majority of federal circuits had a very different interpretation of IDEA. This position was well represented in the Third Circuit’s opinion in *Collinsgru v. Palmyra Board of Education*.³⁵ This court reasoned that appearing pro se is explicitly provided for in IDEA, but only when a party is pursuing their own rights.³⁶ Furthermore, the Third Circuit commented that it is settled common law that non-lawyer parents are not allowed to represent their children pro se if the rights asserted are the child’s alone.³⁷ Proceeding from this basis, the court went on to note that parents may represent their children under IDEA only if pursuing the parent’s own statutory rights or if Congress had intended for IDEA to allow for parents, without counsel, to represent their children. The Third Circuit held that, based on the relevant legal landscape, there was no evidence that Congress ever intended to allow parents the option to represent their children in judicial proceedings.³⁸

This second allowance was based on the assumption that Congress is aware of the existing laws and inherent limitations at the time it passes legislation.³⁹ Therefore, since Congress knew that parents were not allowed to appear pro se for their children under the existing legal landscape, they would have explicitly designated in the statute that parents have this right if it was their intent. The court further reasoned that the plaintiffs in *Collinsgru* were unable to show any intent on the part of Congress to grant them the right of pro se representation and that such a showing was required to change the current legal regime.⁴⁰ The court went on to use a canon of

34. *Maroni*, 346 F.3d 247.

35. *Collinsgru*, 161 F.3d 225.

36. 28 U.S.C. § 1654 (2006).

37. *Osie-Afriyie v. Med. Coll. of Pennsylvania*, 937 F.2d 876, 883 (3d Cir. 1991).

38. *Collinsgru*, 161 F.3d at 231.

39. *Id.* at 232.

40. *Id.*

statutory construction, namely *expressio unius est exclusio alterius*, to hold that Congress never intended to allow parental representation in judicial review.⁴¹ The court further reasoned that because Congress provided for parental representation in administrative proceedings, but failed to do the same in federal judicial proceedings, they clearly intended to limit parental pro se representation to the administrative phase.⁴² Once the Third Circuit had disposed of the argument that Congress intended to allow parents to represent their children in IDEA cases, the only remaining issue was whether parents personally had any justiciable rights.

In this particular case, the Third Circuit held that the parents had not alleged that any rights particular to the parents had been abridged, which would allow the parents to proceed pro se.⁴³ There are two possible rights that the parents could have alleged. The first is whether parents have a right to an education for their children, since parents do have a Due Process right to make decisions regarding their children's education.⁴⁴ The Court quickly rejected this argument and proclaimed that "IDEA itself must be the source of any such right[.]" whether by giving the parents enforceable rights of their own or by granting the parents joint rights with their child.⁴⁵ It was undisputed that parents could claim that their procedural rights, such as ability to participate in the IEP process, had been abridged and that would provide standing to proceed on their own rights. However, in this case, where the procedural process had been followed correctly, the parents could not rely on the substantive claim that the student had been denied a free appropriate public education.⁴⁶

After discussing the statutory language and legislative history of IDEA, the Third Circuit determined that it was unclear whether Congress intended to give joint rights to parents. Additionally, the court ruled that it would refuse to grant joint rights without clear implication from Congress.⁴⁷

41. *Id.*

42. *Id.*

43. *Id.* at 233.

44. *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925).

45. *Collinsgru*, 161 F.3d at 233.

46. *Id.* at 234.

47. *Id.* at 235.

After *Collinsgru*, the Third Circuit joined a nearly unanimous federal judiciary in holding that non-lawyer parents could not prosecute IDEA claims on behalf of their children pro se.

As noted previously, the only federal court circuit that did allow pro se parental representation for substantive violations of IDEA was the First Circuit.⁴⁸ The First Circuit “conclude[d] that parents are parties aggrieved within the meaning of IDEA, and thus may sue pro se.”⁴⁹ The court based this conclusion primarily on the statutory language of IDEA and basic precepts of administrative law. By including parents as parties aggrieved in administrative hearings, the court reasoned that Congress, likewise, intended parents be included as parties aggrieved for judicial review.⁵⁰ The court quickly established the parents’ standing by pointing out that review of administrative decisions is not generally governed by whether the right is procedural or substantive, but rather whether the challenging party has constitutional standing.⁵¹ Further, the court explained that Congress obviously understood that “IDEA . . . relies upon the central role played by parents in assuring that their child receives a free appropriate public education,” and that allowing parents to represent their children pro se for all claims was necessary to foster that goal. Concomitantly, both the First and Third Circuit Courts solidified the need for judicial clarity on this issue. It was evident that the circuits were intractably split.

B. Split Resolved: Winkelman v. Parma City School District

Recognizing the division among the various circuit court decisions regarding parental pro se representation for substantive IDEA claims, the United States Supreme Court resolved this unsettled area of law in its review of *Winkelman v. Parma City School District*.⁵² The Winkelman’s were the parents of a six-year-old child with autism named Jacob, who was a student of the Parma City School District.⁵³ Prior to the 2003-2004 school year, the Winkelman’s and the school district,

48. *Maroni*, 346 F.3d 247.

49. *Id.* at 250.

50. *Id.* at 252.

51. *Id.* at 253.

52. *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 522 (2007).

53. *Winkelman v. Parma City Sch. Dist.*, 411 F. Supp. 2d 722, 724-25 (N.D. Ohio 2005).

as required under IDEA, worked together to create an IEP for Jacob.⁵⁴ The Winkelmans opposed the IEP created for Jacob because it failed to provide him with enough music and speech therapy and one-on-one interaction. The Winkelman's preferred that Jacob be placed in a private school that specialized in educating autistic children, at the school district's expense, in lieu of attending a special education classroom in a public school. Dissatisfied with the contents of the proposed IEP, the Winkelman's placed Jacob in private school at their own expense and pursued administrative review of their son's IEP.⁵⁵

After both the initial hearing officer and a state-level review officer rejected their challenge to the quality and appropriateness of Jacob's IEP, the Winkelman's sought review of the decision in federal district court.⁵⁶ In their complaint, the Winkelman's insisted that Jacob's IEP did not provide him with a free appropriate public education as required by IDEA.⁵⁷ The district court found that Jacob had been provided with a free appropriate public education as required by IDEA.⁵⁸ Representing their son pro se, the Winkelman's appealed the district court's decision; however, the Sixth Circuit dismissed the case because the Winkelman's had not retained a licensed attorney to represent their son. The court relied on its prior decision in *Cavanaugh v. Cardinal Local School District*,⁵⁹ which held that IDEA only intended for parents to represent their children during the administrative stage of the dispute—not in judicial proceedings. The parents sought certiorari⁶⁰ and the United States Supreme Court granted it; finally, the stage was set for a resolution of this issue.

The petitioners, the Winkelmans, argued before the Supreme Court, that they should be allowed to proceed past the administrative review stage without the services of a lawyer.⁶¹ The petitioners asserted that a comprehensive reading of IDEA showed that Congress clearly intended to give parents

54. *Id.* at 725.

55. *Id.*

56. *Id.* at 725-26.

57. *Winkelman*, 550 U.S. at 520-21.

58. *Id.* at 521.

59. *Cavanaugh v. Cardinal Local Sch. Dist.*, 409 F.3d 757 (6th Cir. 2005).

60. *Winkelman*, 550 U.S. at 522.

61. *Id.* at 522.

independent enforceable rights and make them an interested party.⁶² Conversely, the school district contended that IDEA “accords parents nothing more than ‘collateral tools related to the child’s underlying substantive rights—not freestanding or independently enforceable rights.’”⁶³ Alternatively, the school district argued that, even if parents have independent rights, spending clause legislation requires that the statute provide clear notice that parents may represent themselves, which IDEA failed to do.⁶⁴ With a 7-2 vote, the Supreme Court announced its decision.⁶⁵

IV. ANALYSIS OF WINKELMAN V. PARMA CITY SCHOOL DISTRICT

In *Winkelman v. Parma City School District*, the United States Supreme Court ruled in favor of giving non-lawyer parents the right to proceed pro se in court proceedings regarding whether their disabled children are receiving a free appropriate public education under IDEA.⁶⁶ Justice Kennedy explains the Court’s rationale by outlining the parts of IDEA that were particularly relevant to the Winkelman’s claim: “procedures 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; and the requirements in certain circumstances that States reimburse parents for various expenses.”⁶⁷ By examining various provisions of the statute bearing parental involvement, the Court explains that IDEA provides parents with their own substantive rights.⁶⁸

Justice Kennedy, writing for the majority, highlights the parts of IDEA that guide the process of creating and challenging an IEP and the inclusion of parental involvement in that process.⁶⁹ These provisions require that parents be provided with certain information, involved in developing an IEP, and included in the decision-making process.⁷⁰ The

62. *Id.*

63. *Id.* at 527-28 (citation omitted).

64. *Id.* at 533-34.

65. *Id.* at 518.

66. *Winkelman*, 550 U.S. at 533.

67. *Id.* at 523.

68. *Id.* at 523-26.

69. *Id.* at 523-24.

70. *Id.* at 524.

parental right to involvement in the IEP process is intended to ensure that children are provided with a suitable education.⁷¹ Furthermore, “the instruction must, in addition, be provided at no cost to parents.”⁷² The Court’s review of this issue continues with a meticulous examination of provisions allowing parents dissatisfied with the IEP to seek administrative review and the legislative purpose of those hearings guaranteed to parents by IDEA.

IDEA also provides rights with respect to litigation and review. IDEA explicitly provides that parents will be participating parties during the administrative hearings.⁷³ The cost-recovery portion of IDEA provides a venue for parents to be reimbursed by their child’s school district for the cost of private school enrollment and attorney’s fees if the parent is a prevailing party.⁷⁴ The Court holds that these provisions clearly show that “[p]arents enjoy enforceable rights at the administrative stage, and it would be inconsistent with the statutory scheme to bar them from continuing to assert these rights in federal court.”⁷⁵

The Court disposes of the argument that these provisions merely give parents a procedural right, not the freestanding right to challenge whether the student has been provided a free appropriate public education.⁷⁶ The purpose of IDEA is “to ensure that the rights of children with disabilities and parents of such children are protected.”⁷⁷ Then the Court showcases past precedent for the proposition that “parents have a recognized legal interest in the education and upbringing of their child.”⁷⁸

Acknowledging the current legal landscape, the Court finds it highly likely that Congress intended the same right to accrue to parents under IDEA.⁷⁹ The statute explicitly states that parents will be participating parties during the administrative

71. *Id.* at 523.

72. *Id.* at 525 (quoting Individuals with Disabilities Education Act § 1401(29)) (emphasis added).

73. *Id.* at 525.

74. *Id.* at 526.

75. *Id.* at 528.

76. *Id.*

77. *Id.* (quoting 20 U.S.C. § 1400(d)(1)(B)).

78. *Id.* at 529.

79. *Id.*

hearings⁸⁰ and also that any party aggrieved by the administrative decision has a right to bring action in federal court.⁸¹ The majority reasons that “party aggrieved” must include the parents since they had participated in the administrative hearing.⁸² It would be incongruous to make some of the parents’ rights, such as tuition reimbursement and attorney’s fees, contingent on a successful outcome, and yet not allow the parents to litigate the central issue and achieve that necessary successful outcome.⁸³ These procedural rights are “intertwined with the substantive adequacy of the education provided to the child,” and the difficulty in deciding which provision gives rights to parents or a child would be a confusing judicial practice.⁸⁴ These procedural mechanisms were given to parents so that they may properly defend their own substantive right to ensure that their child receives a free appropriate public education.⁸⁵ The majority finishes by arguing that principles of equity and justice demand that parents possess the substantive right to proceed without a lawyer; otherwise, only those families that could afford to retain counsel could challenge their disabled children’s education despite the obvious congressional intent to the contrary, evidenced by the provision of attorney’s fees in the statute.⁸⁶

Justice Scalia, writing for the dissent, uses his usual plain textual style to rebuke the majority for reading substantive parental rights into the statute. The dissent reasoned that parents do not have a right for their child to receive a free appropriate public education, and thus cannot proceed pro se on that claim.⁸⁷ The dissent agrees that parents do have a procedural right to represent themselves in federal court, but when the claim is concerned only with the adequacy of the free appropriate public education, the right remains only with the child.⁸⁸ Therefore, parents may not represent themselves.

80. *Id.* at 525, 530.

81. *Id.* at 531.

82. *Id.*

83. *Id.* at 530-31.

84. *Id.* at 531-32.

85. *Id.* at 532-33.

86. *Id.*

87. *Id.* at 538 (Scalia, J., dissenting).

88. *Id.*

The dissent further supports their argument by highlighting that the parts of the statute discussing a free appropriate public education only name the child as the beneficiary.⁸⁹ Unlike the majority, the dissent does not believe that a parent's rights are synonymous with the child's, but rather each has specific dichotomous rights explicitly assigned by Congress. He examines several provisions, such as the right to dismiss an IEP team member⁹⁰ and the right to reimbursement,⁹¹ which all grant rights to parents that would be absurd if granted to children in an attempt to discredit the majority's stance.⁹² Additionally, certain procedural guarantees allow parents to participate in the challenging IEPs, but does not grant parents any rights in that education.⁹³ The dissent attempts to rebut the argument that allowing attorney's fees only if parents can show an inadequate free appropriate public education says nothing about that underlying right, but merely what must be shown to vindicate the parent's right.⁹⁴ Finally, the dissent ends with its own policy argument contending that, under IDEA, parents are provided with the same option that parents are usually afforded: namely, the right to sue in federal court *with a lawyer*.⁹⁵ The dissent points out the ills that may arise from allowing a greater number of pro se cases in federal courts, such as an influx of frivolous cases in federal district courts.⁹⁶ Without specific language in the statute, the dissent refuses to infer any congressional intent to allow non-lawyer parents to challenge the quality of education their children are receiving under IDEA.⁹⁷

Winkelman seems to be a case that was decided predominantly on policy concerns rather than strict legal reasoning. The argument for both sides hinges on whether parents are "parties aggrieved," as used in IDEA.⁹⁸ The majority grasps for various provisions in the statute to bolster the argument that Congress intended to provide parents the

89. *Id.*

90. 20 U.S.C. §1414(d)(1)(C)(i)-(iii)(2004).

91. *Id.* § 1412(a)(10)(C)(ii).

92. *Winkelman*, 550 U.S. at 541 (Scalia, J., dissenting).

93. *Id.* at 539.

94. *Id.* at 541-42.

95. *Id.* at 542.

96. *Id.* at 542-43.

97. *Id.* at 538.

98. 20 U.S.C § 1415(i)(2)(A)(2004).

right to challenge the substantive education plan for their child. However, never do they present a provision that definitively silences the debate. The decision could have come to the same result with greater effect by merely accepting that parents and children must share the same substantive rights to allow the structure of IDEA to function properly and that parents' interest in their children receiving a free appropriate public education is enough to warrant parents to have the right to pursue this end without legal representation.

The substantive function of law is to promote changes that solve the issue in which the law was intended to address. Given the salience of misdiagnosis of appropriate educational services for students with special needs,⁹⁹ it is imperative that parents are empowered with substantive rights that will allow them to ensure their child receives an appropriate education.

There can be little doubt that Congress provided these various procedural rights to parents for any reason other than to ensure parents could demand that their disabled child had access to a free appropriate public education. Congress recognized the inability of disabled students to serve as advocates for themselves and challenge the quality of their education on their own, and thus provided a system which appoints a representative for the child when parents are unavailable.¹⁰⁰ To this end, Congress provided parents with the means to serve as effective advocates throughout the entire procedural process contemplated by IDEA, not just select stages.

There would be a disconnect if parents are intended to have every tool available to vigorously defend their child's rights, but then be foreclosed the opportunity to defend those rights in court. The strongest argument for the majority is the absurdity that would result from parents being able to challenge for procedural violations, but not be able to obtain judicial review of what is the central concern of the parents, namely, the quality of their child's education. What parent is actually concerned with whether they were provided the opportunity to review all of the relevant documents as long as their disabled child is receiving the best education available? It is illogical to

99. Daniel J. Losen & Kevin G. Welner, *Discrimination in Our Public Schools: Comprehensive Legal Challenges to an Inadequate Special Education Services for Minority Children*. 36 HARV. C.R.-C.L. L. REV. 407 (2001).

100. *Id.* § 1415(b)(2).

allow parents to recover tuition costs and attorney's fees, but then limit that recovery to prevailing on a cause of action not their own and one the parents cannot litigate without a lawyer.

A telling part of IDEA is the provision that classifies parents as "parties aggrieved" for administrative hearings.¹⁰¹ Apparently, the only logical progression would use the same definition later when discussing judicial review. Congress obviously intended to give parents substantive rights and to include them as a "party aggrieved," otherwise they would have only named the child as having the right to bring an action in federal district court. The majority is correct in that the procedural and substantive rights are so intertwined that they rely on each other to ensure the legislative intent of the Act, which is to guarantee that every disabled student gets a free appropriate public education. The parents' rights and the child's rights are synonymous; their use is merely apportioned to the parent or child in a way that allows IDEA to function by providing them to the party most able to exercise that function.

The majority could have greatly simplified their decision merely by announcing that parents also have an enforceable right to their children receiving a free appropriate public education. Parents already possess a constitutional right to control the education of their children.¹⁰² Therefore, it is a short leap from that proposition to giving parents the right to ensure that their children receive a free appropriate public education. In a sense, this right is a necessary corollary to the right to control a child's education. Control implicates the ability to ensure that education occurs in an appropriate manner. The drafters of IDEA envisioned this, as evidenced by the substantial amount of statutory language that is designed to give parents the tools to ensure their children receive a quality education. Neither side of the debate disputes the notion that parents have an interest in their children receiving a free appropriate public education, which is an interest more than strong enough to create a right to sue under IDEA. The profound benefits that accrue to parents from their child receiving a free appropriate public education, such as a lesser likelihood that parents will have to continuously support their child later in life, is well-established in the special education

101. *Id.* § 1415(g)(1).

102. *Pierce*, 268 U.S. at 534-35.

literature.¹⁰³ In fact, individuals have been allowed to bring suit for far less important interests. Therefore, it seems unnecessary to entangle the parents' and child's rights because the parents have such a strong interest on which to support judicial review.

IDEA has the goal to provide disabled children throughout the country access to a free appropriate public education, as a substantive, and not symbolic, right. A free appropriate *public* education implies that Congress intended it to be provided regardless of whether the family has the ability to pay for the education. Failure to provide parents full access to the judicial review process, simply because they lack the financial means to hire a lawyer, directly contradicts the purpose of the law, which seeks to ensure that every child in America has access to a quality education. Although, it is likely that the *Winkelman* decision will increase the number of frivolous lawsuits, the benefits of ensuring that every parent of a child with a disability has an enforceable right to their child receiving a free appropriate education, far exceeds the costs of increased litigation.

Justice Scalia's proposed regime would run counter to this purpose. The ability to pay for representation would define which families could challenge the quality of the education provided to their disabled child. The families at the bottom of the socio-economic scale with disabled children are the families that likely are unable to afford expensive private school tuition or attend well-funded schools in affluent districts. These are the families that have the greatest need for the public education envisioned by IDEA. These are the families IDEA was designed to protect. This is evidenced by a recent report from the U.S. Department of Education, which found that two-thirds (approximately 4.5 million) of children with disabilities come from families who earn less than \$50,000 per year.¹⁰⁴ Additionally, over two million children with disabilities live in households that earn less than \$25,000 annually.¹⁰⁵ Therefore, prior to the *Winkelman* decision it is likely that many parents

103. Marlene Simon, *Beyond Broken Promises: Reflections on Eliminating Barriers to the Success of Minority Youth with Disabilities*, *The Journal of the Association for Persons with Severe Handicaps*, 26 (3) (2001).

104. *The Scales Tip in Favor of Parents in Winkelman v. Parma City School District*, 28 J. NAT'L ASS'N ADMIN. L. JUDICIARY 277, 313-14 (2008).

105. *Id.* at 313.

of children with disabilities were unable to advocate for their child's right to a free appropriate public education through the legal system because they did not have the monetary resources to obtain legal representation. The ability of parents to ensure the quality of their child's education should not be dependent upon their ability to afford legal representation. According to a study conducted by the Council of Parent Attorneys and Advocates, legal representation for special education claims can range anywhere from \$10,000 to \$100,000, which far beyond what the majority of special education households are able to pay.¹⁰⁶

Despite the laudable goals of IDEA to improve the quality of special education, legal cases such as *Winkelman* illuminate the inability of many parents to serve as advocates for their child's education due to their inability to pay for legal representation. The underlying principle of IDEA is the notion that *all* students should be afforded the opportunity to excel academically through high quality instruction.¹⁰⁷ For various reasons, such as low expectations or exclusion from the general classroom, children with disabilities often do not receive access to the same quality of education as general education students. Furthermore, children with disabilities are arguably the most vulnerable student population because they are often unable to communicate their educational experiences to parents and teachers. Therefore, it is imperative that parents of children with disabilities have meaningful opportunities to both participate in and evaluate the education of their child. Although some may argue that non-lawyer parents of children with disabilities are not qualified to represent their child in court pro se, special education parents are often the most well-versed on their child's education needs because they typically are the primary caregiver. Furthermore, it is better for children with special needs to have a parental advocate as opposed to having no representation at all.

106. The Council of Parent Attorneys and Advocates is a non-profit organization that seeks to provide special education law resources and training for parents, attorneys, and special education advocates (citing to Brief for Council of Parent Attorneys and Advocates, Inc. et al., as Amici Curiae Supporting Petitioners at 9-10, n.4, *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516 (2007)).

107. MCNEAL & O'ROURKE, *supra* note 17, at 31-62.

V. CONCLUSION

In recent years, there has been an increased interest in promoting social justice within America's schools, as researchers, educators, and policymakers struggle to provide all students with a high quality education. Social justice may be defined as "an ideal condition in which all members of a society have the same basic rights, protection, opportunities, obligations, and social benefits."¹⁰⁸ The Supreme Court ruling in *Winkelman v. Parma City School District* will help promote social justice in America's schools by empowering parents of students with disabilities with substantive rights to appear pro se in federal court to challenge the appropriateness of their child's IEP. As the special education landscape continues to shift its focus from access to quality, commendable decisions such as *Winkelman v. Parma City School District* will continue to ensure that all disabled students receive a quality education, regardless of their race, gender, or socioeconomic status. The alternative—excluding parents from full participation in their child's education process—would directly contradict the spirit of special education law, which seeks to guarantee educational excellence for *all*. The *Winkelman* decision suggests that the current judicial terrain supports this notion of strengthening the substantive role and responsibility of special education parents in the educational lives of their children both today and in the years to come. Ultimately, *Winkelman* will help transform IDEA into more substantive, robust education reform through increased teacher and school leader accountability for the quality of education provided to children with disabilities.

108. ROBERT L. BARKER, SOCIAL WORK DICTIONARY, (5th ed. 2003), s.v. Social Justice.