WINKELMAN V. PARMA CITY SCHOOL DISTRICT:
A MAJOR VICTORY FOR PARENTS OR MORE AMBIGUITY?

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I. INTRODUCTION

In Winkelman v. Parma City School District,1 the Supreme Court of the United States was poised to determine "whether, and if so, under what circumstances, non-lawyer parents of a disabled child may prosecute an Individuals with Disabilities in Education Act (IDEA) [2] . . . case pro se in federal court."3 IDEA is a federal statute that guarantees over 6.8 million children with disabilities4 the right to a "free appropriate public education" (FAPE).5 The Judiciary Act of 1789 provides that individuals granted a private right of action under a federal statute, such as IDEA, may represent themselves pro se or hire an attorney.6 However, individuals proceeding pro se may only represent their rights.7 Since IDEA grants rights to children and children are unable to adequately represent themselves pro se, children must obtain a lawyer to vindicate their rights.8

* J.D., 2009, Seton Hall University School of Law; B.A., 2004, Drew University. I sincerely thank Professor Thomas Healy for his excellent guidance, unwavering support, and critical advice in writing this Comment. I would also like to thank Jamie Gottlieb for her excellent advice and incredible assistance in editing my Comment. This Comment is dedicated to the students in class 1-146, SSB, and to all children who strive to reach their full academic potential.

3 Brief of Petitioner-Appellant at i, Winkelman, 550 U.S. 516 (No. 05-983).
7 Id.
8 Fed. R. Civ. P. 17(c); see also Chase v. Mesa County Valley Sch. Dist. No. 51, No. 07-cv-00205-REB-BNB, 2007 U.S. Dist. LEXIS 72485 (D. Colo. Sept. 27, 2007) (holding that a parent does not have standing to represent his or her minor son in IDEA action because Fed. R. Civ. P. 17(c) and 28 U.S.C. § 1654 (1994) preclude a minor child from bringing suit through a parent acting as next of friend, if that parent does not have an attorney).
However, many families of children with disabilities do not have the financial resources to retain a special education attorney. Therefore, parents have tried to prosecute IDEA claims pro se. While courts have allowed attorney-parents to prosecute the claims of their children, they have precluded lay parents from prosecuting IDEA claims. Thus, the discrete question presented in *Winkelman* was whether a lay parent may vindicate rights conferred by IDEA.

The Court answered this question by clarifying that IDEA provides a *parent* with a substantive right for the child to obtain a FAPE. The Court determined that IDEA confers upon a parent a substantive right that is separate from the child's right to a FAPE. Because IDEA confers rights upon parents, "they are, as a result, entitled to prosecute IDEA claims on their own behalf." Accordingly, lay parents may prosecute an IDEA claim pro se because they are vindicating *their own* independent rights (the parent's substantive right to the child receiving a FAPE), rather than stepping into the shoes of their children to vindicate the children's rights.

*Winkelman* is the ninth major ruling from the Court under IDEA since the Education for All Handicapped Children Act (EHA)—IDEA's predecessor—became law in 1975. The decision has been

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10 See infra notes 64–65 and accompanying text.

11 See infra notes 64–65 and accompanying text.

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

13 Id. at 531.

14 Id. at 535.

15 Id.

widely publicized as a major victory for parents.\footnote{See generally Staff Editorial, Bright Spot: Supreme Court Ruling Backing Parents of Learning Impaired Children Is a Rare Victory for the Little Guy, HOUS. CHRON., July 9, 2007, at B6; Linda Greenhouse, Legal Victory for Families of Disabled Students, N.Y. TIMES, May 22, 2007, at A14; Jennifer Radcliffe, Ruling Levels Field in School Suits, HOUS. CHRON., July 5, 2007, at A1; Karen Roebuck, High Court Ruling Victory for Parents of Special-Needs Children, PITT. TRIB. REV. (May 26, 2007), available at http://www.pittsburghlive.com/x/pittsburghtrib/news/rss/s_509645.html; infra Part III.E.\footnote{Mark Walsh, Experts Ponder Whether Parents Will Rush to Court, EDUC. WK., June 6, 2007, at 18–19.\footnote{In these decisions the Court determined that IDEA does not authorize prevailing parents to recover expert fees under 20 U.S.C. § 1415(i)(3)(B) and that the burden of proof in IDEA disputes lies on the party seeking relief. Arlington, 548 U.S. 291; Schaffer, 546 U.S. 49.\footnote{Posting of Mitchell H. Rubinstein to Adjunct Law Prof Blog, http://lawprofessors.typepad.com/adjunctprofs/2007/05/supreme-court-d.html (May 22, 2007).\footnote{The Kojo Nnamdi Show, Supreme Court & Special Education (WAMU 88.5FM radio broadcast May 24, 2007), available at http://www.wamu.org/programs/kn/07/05/24.php#1619 (on file with author). Peter Wright, a special education attorney, explained that the special education pendulum swung heavily toward school districts after the decisions in Arlington and Schaffer. "[W]e saw the pendulum having swung pretty far out and many parents being intimidated around the country." Id. Wright opines that the special education pendulum is swinging back in favor of parents following the decision in Winkelman. Id. Wright’s comment was made prior to the Court’s ruling in Tom F. and the Court’s denial of certification in Frank G. See supra note 16.}}}} Advocates have characterized the Court’s resolution as one of the top three decisions under IDEA.\footnote{See supra note 16.\footnote{The "parent friendly" opinion is garnering positive recognition because the Court’s two previous rulings under IDEA favored school districts.\footnote{As articulated by one legal scholar, the decision "provides a badly needed stop to a trend of recently decided anti-disabled child decisions." Another advocate has gone further and opined that the decision in Winkelman shifts the special education pendulum back toward parents.\footnote{The news frenzy surrounding the decision in Winkelman has created a sense of optimism among parents and advocates that the decision will enable more families to prevail in special education disputes from a public agency, contradicted "the plain language of 20 U.S.C. § 1412(a)(10)(C)(ii) which authorizes tuition reimbursement to the parents of a disabled child 'who previously received special education and related services under the authority of a public agency.'" Question Presented, Tom F., 128 S. Ct. 1 (No. 05-0566), available at http://www.supremecourtus.gov/qp/06-00637qp.pdf. The Court divided equally in a four to four decision, with Justice Kennedy not participating; therefore, the Court affirmed the decision of the United States Court of Appeals for the Second Circuit. Less than a week later, the Court declined to grant certiorari in a case that presented the same question as Tom F., Hyde Park Board of Education v. Frank G., 459 F.3d 356 (2d Cir. 2006), cert. denied, 128 S. Ct. 436 (Oct. 15, 2007) (No. 06-580). As in Tom F., Justice Kennedy did not participate. Id.\footnote{See Mark Walsh, Experts Ponder Whether Parents Will Rush to Court, EDUC. WK., June 6, 2007, at 18–19.\footnote{In these decisions the Court determined that IDEA does not authorize prevailing parents to recover expert fees under 20 U.S.C. § 1415(i)(3)(B) and that the burden of proof in IDEA disputes lies on the party seeking relief. Arlington, 548 U.S. 291; Schaffer, 546 U.S. 49.\footnote{Posting of Mitchell H. Rubinstein to Adjunct Law Prof Blog, http://lawprofessors.typepad.com/adjunctprofs/2007/05/supreme-court-d.html (May 22, 2007).\footnote{The Kojo Nnamdi Show, Supreme Court & Special Education (WAMU 88.5FM radio broadcast May 24, 2007), available at http://www.wamu.org/programs/kn/07/05/24.php#1619 (on file with author). Peter Wright, a special education attorney, explained that the special education pendulum swung heavily toward school districts after the decisions in Arlington and Schaffer. "[W]e saw the pendulum having swung pretty far out and many parents being intimidated around the country." Id. Wright opines that the special education pendulum is swinging back in favor of parents following the decision in Winkelman. Id. Wright’s comment was made prior to the Court’s ruling in Tom F. and the Court’s denial of certification in Frank G. See supra note 16.}}}}}}
putes. However, this may not necessarily be the case. The Court determined that IDEA gives parents independent and enforceable rights and, in turn, parents may appear in court to vindicate their parental rights under IDEA.\textsuperscript{22} The Court’s holding greatly expanded parental rights under IDEA by lifting a bar on lay parents prosecuting claims pro se, but it did not alter the standard that parents must establish in order to be a prevailing party under IDEA. Additionally, the Court declined to entertain the petitioner’s alternative argument that parents may litigate the claims of their children.\textsuperscript{23} Most importantly, the Court failed to discuss the implications of its ruling on key sections of IDEA’s statutory scheme. As a result of this last failure, parents and school districts will have to test IDEA’s key provisions to discern whether the new rights given to parents under \textit{Winkelman} will alter judicial interpretation of IDEA. Whether \textit{Winkelman} actually helps parents successfully prosecute violations of IDEA will likely depend on lower court interpretations of IDEA post-\textit{Winkelman}.

Part II of this Comment provides an overview of IDEA that includes the history of the statute, the statute’s framework, and highlights of the “anti-parent” decisions that have made it more difficult for parents to prosecute IDEA claims successfully. Part III describes the procedural history of \textit{Winkelman}, the Court’s decision in \textit{Winkelman}, and reactions to the Court’s holding. Part IV identifies the three questions that lower courts may face following the Court’s holding: (1) whether a parent may prosecute a child’s rights in court, (2) whether parents are entitled to attorney fees if they prevail, and (3) to what standard should parents be held when a prevailing school district seeks attorney fees. Part V provides recommendations for how courts should resolve those ambiguities: (1) a parent may not prosecute a child’s rights, but courts should allow a parent to continue litigating the substance of the claim, (2) attorney-parents may be able to recover attorney fees for prosecuting the rights of a child, but attorney-parents and lay parents will be precluded from recovering attorney-fees for prosecuting parental rights pro se, and (3) parents should have attorney fees shifted to them for violations of either § 1415(i)(3)(B)(i)(II) or § 1415(i)(3)(B)(i)(III).


\textsuperscript{23} \textit{Id.}
II. IDEA BEFORE WINKELMAN V. PARMA CITY SCHOOL DISTRICT

A. History of IDEA

The EHA, the predecessor to IDEA,24 was a "groundbreaking piece of legislation that reshaped the American educational landscape and remains the foundation of special education programs in all fifty states."25 Prior to the EHA's passage, Congress articulated that "[t]here are over 8 million handicapped children in the United States; yet only 3.9 million are currently receiving an appropriate education; 1.75 million handicapped youngsters are receiving no aid at all; and 2.5 million children are receiving inadequate education."26 Congress enacted IDEA to ensure that children with disabilities are not ignored in the classroom.27 As a funding statute, IDEA provides federal grants to states to assist in educating students with disabilities.28 In exchange for accepting federal funds, a state educational agency must assume responsibility for ensuring that children with disabilities within its jurisdiction receive a free and appropriate education (FAPE).29

B. IDEA's Framework

Today more than 6.8 million students in the United States receive services pursuant to IDEA.30 The touchstone of IDEA is ensuring "children with disabilities and the families of such children access to a [FAPE]."31 To guarantee that children with disabilities are pro-

24 The EHA was renamed IDEA in December 1990. THOMAS F. GUERNSEY & KATHE KLARE, SPECIAL EDUCATION LAW 1 (2d ed. 2001).
26 Id. at 5 (quoting 121 CONG. REC. 37024 (1975) (statement of Rep. Brademas)).
28 GUERNSEY & KLARE, supra note 24, at 6.
29 Id. at 6.
30 Data Accountability Center, supra note 4.
(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 pre-school, 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.
provided with the substantive right to a FAPE, IDEA contains aggressive procedural safeguards.\textsuperscript{32}

Students with disabilities are provided their substantive right to a FAPE through the development and implementation of an individualized education plan (IEP).\textsuperscript{33} The IEP process is comprised of an evaluation, a conclusion of eligibility for specialized services, a creation of an IEP, and ultimately a determination of an educational placement.\textsuperscript{34} The IEP document must include the student’s current educational levels and set forth a plan for achieving measurable annual goals.\textsuperscript{35} Additionally, the IEP must detail the special education services, related services, supplementary services, and supplementary aids that will be provided to the student.\textsuperscript{36} Parents are intimately involved throughout the process of developing a student’s IEP.\textsuperscript{37}

Section 1415 of IDEA sets forth multiple procedural safeguards to ensure that students with disabilities receive a FAPE. These procedural safeguards require a school district to notify a parent of any proposed change to an IEP.\textsuperscript{38} Section 1415 also provides avenues for a parent to challenge an IEP when they believe it does not provide the child with a FAPE.\textsuperscript{39} Parents are first entitled to an impartial due

\textit{Id.} § 1401(9).
\textsuperscript{32} Congress was explicit in articulating the procedural protections, but articulated the substantive protections vaguely. Nevertheless, the Court has recognized the importance of both the procedural and substantive protections equally:

[I]t seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process . . . as it did upon the measurement of the resulting IEP against a substantive standard.

\textsuperscript{33} See generally 20 U.S.C. § 1414.
\textsuperscript{34} \textit{Id.}
\textsuperscript{35} \textit{Id.} § 1414(d)(1)(A)(i)(I)–(III).
\textsuperscript{36} \textit{Id.} § 1414(d)(1)(A)(i)(IV). Related services include transportation, speech language pathology, occupational therapy, audiology, and other services or aids necessary to enable a child to utilize the education being provided to them. \textit{Id.} § 1401(26)(A).
\textsuperscript{37} Parents must be informed of and consent to evaluations, they must be included as members of the IEP team and must be given access to the child’s records, and they must give final consent before an IEP may be implemented. \textit{Id.} §§ 1414(a)(1)(D), (c)(5), (d)(1)(B)(i), 1415(b)(1).
\textsuperscript{38} \textit{Id.} § 1415(b)(3).
\textsuperscript{39} For an interesting discussion on the “creeping judicialization” of special education hearings, see Perry A. Zirkel, Zorka Karanxha & Anastasia D’Angelo, \textit{Creeping Judicialization in Special Education Hearings?: An Exploratory Study, 27 J. NAT’L ASS’N ADMIN. L. JUD. 27 (2007).}
process hearing, where a hearing officer will determine whether there has been a substantive or procedural violation which has resulted in the denial of a FAPE to the student. A parent aggrieved by the decision may appeal to the state educational agency, which will conduct an impartial review and make an independent decision as to whether there was a denial of a FAPE. After exhausting these administrative remedies, parents may bring a civil action in state or federal court.

To help encourage parents to actively enforce the provisions of IDEA, Congress created a fee-shifting provision in IDEA. Courts have explained that "fee-shifting statutes are meant to encourage the effective prosecution of meritorious claims, and [these statutes] seek to achieve this purpose by encouraging parties to obtain independent

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40 Parents may submit a written complaint to their state educational agency alleging that their child is being denied a FAPE. 20 U.S.C. § 1415(f)(1)(A). In turn, the state educational agency will convene an impartial due process hearing. Id. However, prior to the hearing, the parents and Local Educational Agency, the school district, must submit to a resolution session. Id. § 1415(f)(1)(B). A representative of the state educational agency with decision making authority will conduct the session. Id. § 1415(f)(1)(B)(i)(II). The parties will discuss the complaint and the facts forming the basis of the complaint. Id. § 1415(f)(1)(B)(i)(IV). The Local Educational Agency is provided an opportunity to resolve the complaint at the resolution session. Id. However, the parent(s) and Local Educational Agency may waive the resolution session or submit to mediation, pursuant to 20 U.S.C. § 1415(e). If the Local Educational Agency has not resolved the dispute to the satisfaction of the parents within thirty days of the filing of the complaint, then the due process hearing timelines will commence. Id. § 1415(f)(1)(B)(ii). At the hearing, a hearing officer, an employee of the state educational agency, will hear and review evidence presented by the parties as to whether the child received a FAPE. Id. § 1415(f)(3)(A)(i)(I).

41 Id. § 1415(f)(3)(E).
(i) In general. Subject to clause (ii), a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a [FAPE]. (ii) Procedural issues. In matters alleging a procedural violation, a hearing officer may find that a child did not receive a [FAPE] only if the procedural inadequacies – (I) impeded the child's right to a free public education; (II) significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a [FAPE] to a parent's child; or (III) caused a deprivation of educational benefits.

42 Id. § 1415(g)(1). States are allowed to develop and maintain a mediation process to resolve disputes as to whether a child is receiving a FAPE. Id. § 1415(g)(1). Some states require parent(s) and a school district to engage in mediation prior to the impartial due process hearing. Id.

43 Id. § 1415(g)(2).

44 Id. § 1415(i)(2)(B).

45 Id. § 1415(i)(2)(A).

Thus, when a court determines that a parent is the prevailing party in an IDEA dispute, the parent may recover reasonable attorney fees and costs for prosecuting the claim. However, Congress did not want to encourage parents to bring frivolous IDEA suits. The 2004 amendments to IDEA reflect this notion in two new provisions. First, an attorney may be required to pay the attorney fees of a prevailing school district or state educational agency when the attorney files an action that is "frivolous, unreasonable, or without foundation," or when the attorney litigates "after the litigation clearly became frivolous, unreasonable, or without foundation." Second, a parent or the attorney for the parent may be required to pay attorney fees if a claim was filed "for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation."

C. Recent IDEA Decisions Have Made It More Difficult for Parents to Prevail

Two Supreme Court decisions prior to Winkelman—Schaffer v. Weast and Arlington Central School District Board of Education v. Murphy—have been characterized as "anti-disabled child" decisions. In Schaffer, the Court held that the burden of proof in IDEA cases lies with the party that wishes to change an IEP. A parent is usually the party seeking to change an IEP and, in turn, will bear the burden of showing that an IEP does not provide the child with a FAPE. Six

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49 See infra Part V.C.
51 Id. § 1415(i)(3)(B)(i)(III).
54 Posting of Mitchell H. Rubinstein to Adjunct Law Prof Blog, supra note 20.
55 Schaffer, 546 U.S. at 51, 62.
56 See Andrew Trotter, High Court Boosts Districts in IDEA Cases, EDUC. WK., Nov. 30, 2005, at 27, 29.
57 The Court in Schaffer chose not to address whether a state may independently pass legislation that always places the burden of proof on the school district. Schaffer, 546 U.S. at 62. However, at least eleven states and the District of Columbia maintain statutes that have placed the burden of proof on school districts, none of which have been struck down since the decision in Schaffer. DEP'T OF THE PUB. ADVOCATE, DIV. OF DEVELOPMENTAL DISABILITY ADVOCACY, ALLOCATION OF THE BURDEN OF PROOF IN SPECIAL EDUCATION DUE PROCESS HEARINGS 5-6 (2007), available at http://www.state.nj.us/publicadvocate/public/BurdenofProofReport.pdf; Press Release, Governor Spitzer Signs Legislation Shifting Burden of Proof to School Districts In Disputes
months after Schaffer, the Court in Arlington determined that prevailing parents may not recover expert fees for services involved in litigating an IDEA claim.\textsuperscript{58} The Court asked whether a state official would understand that accepting IDEA funds would obligate the state to compensate prevailing parents for expert fees incurred in asserting an IDEA claim.\textsuperscript{59} The Court determined that states would not clearly have understood the text of IDEA to obligate them to pay the expert fees of prevailing parents.\textsuperscript{60} Parent organizations were offended by the Court's analysis and reasoning.\textsuperscript{61} The practical effect of the decision is that Arlington placed a financial hurdle in front of a parent bringing an IDEA suit who, subject to the decision in Schaffer, has to show the child was denied a FAPE.\textsuperscript{62}

III. THE WINKELMAN DECISION

A. The Circuit Split Leading Up to Winkelman

Before Winkelman, a three-way circuit split existed between six circuits as to whether parents were an aggrieved party under § 1415(i)(2)(A).\textsuperscript{63} The United States Court of Appeals for the First Circuit held that parents were permitted to prosecute their own procedural claims pro se, as well as their children’s substantive IDEA

\begin{footnotesize}
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\item \textsuperscript{58} Arlington Cent. Sch. Dist., 548 U.S. at 294.
\item \textsuperscript{59} Id. at 296.
\item \textsuperscript{60} Id. at 303.
\item \textsuperscript{61} Maura A. Collinsgru, Director for the Parent Information Center, saw the decision as "decimating to parents," and remarked that "[t]he majority speaks about our disabled children as though they are commodities under the spending clause . . . . It was very insulting to parents and those who work with them." Mark Walsh, Justices Rule Against Parents in IDEA Case, EDUC. WK., July 12, 2006, at 32.
\item \textsuperscript{62} Drew S. Days III, who filed an amicus brief for the National Disability Rights Network and the Center for Law and Education, commented on the effect of this decision on families with children with disabilities: "The fact they will not be able to hire an educational consultant with the expectation that, even if they are successful, they could be reimbursed will substantially limit the degree to which parents can represent their interests effectively." Id.
\item \textsuperscript{63} 20 U.S.C. § 1415(i)(2)(A) (2006) states that a party aggrieved by the findings and decision made under subsection (f) or (k) who does not have the right to an appeal under subsection (g), and any party aggrieved by the findings and decision made under this subsection, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States, without regard to the amount in controversy.
\end{itemize}
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The United States Courts of Appeals for the Second, Third, Seventh, and Eleventh Circuits held that parents were permitted to appear pro se to assert their own procedural rights, but were not permitted to appear pro se to assert the substantive rights of their children. The United States Court of Appeals for the Sixth Circuit, in Cavanaugh v. Cardinal Local School District, went further than any of its sister circuits in restricting a parent's ability to appear pro se. The court of appeals held that "the right to receive a FAPE belongs to the child alone," and that any right a parent may have to appear pro se is a derivative of the child's right to a FAPE. This meant that parents in the Sixth Circuit could never prosecute an IDEA claim pro se in federal court, regardless of whether the claims were procedural or substantive in nature.

B. The Winkelman Family and Procedural History

Jacob Winkelman was a ten-year-old boy with an autism spectrum disorder. He first entered the Parma City School District as a preschooler and suffered severe emotional outbursts in his first educa-

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64 Maroni v. Plymouth Sch. Dist., 346 F.3d 247, 250 (1st Cir. 2003) ("Congress has granted parents a right of action under IDEA regardless of whether their IDEA suits present procedural or substantive claims.").

65 Mosely v. Bd. of Educ. of Chicago, 434 F.3d 527, 532, 535 (7th Cir. 2006) (recognizing that parents are entitled to sue pro se when their procedural rights under IDEA are infringed, but they may not represent their children's claims pro se); Wenger v. Canastota Cent. Sch. Dist., 146 F.3d 123, 125-26 (2d Cir. 1998) (noting that a parent may appear pro se to assert "his claims that his own rights as a parent under the IDEA were violated by defendants," but claims brought on behalf of the child should be dismissed without prejudice if parent is unable to find attorney representation and if the court concludes a guardian ad litem should not be appointed sua sponte); Collinsgru v. Palmyra Bd. of Educ., 161 F.3d 225, 233, 236 (3d Cir. 1998) (noting that IDEA grants specific procedural rights to parents but that "Congress did not clearly intend to create joint rights in parents under the IDEA"); Devine v. Indian River County Sch. Bd., 121 F.3d 576, 582 (11th Cir. 1997) ("Parents who are not attorneys may not bring a pro se action on their child's behalf . . . because it helps to ensure that children rightfully entitled to legal relief are not deprived of their day in court by unskilled, if caring, parents.").

66 Cavanaugh v. Cardinal Local Sch. Dist., 409 F.3d 753 (6th Cir. 2005).


68 Cavanaugh, 409 F.3d at 757.

69 See id.

70 See Winkelman, 550 U.S. at 519.
tional placement.\textsuperscript{71} Jacob’s mother, Sandee Winkelman, described his experience in the first placement, “His behaviors were extremely severe and aggressive . . . . Teachers and aides would have to hold him down. He was miserable.”\textsuperscript{72} In response, the school district placed Jacob in a private school and funded the cost of the tuition.\textsuperscript{73} For Jacob’s kindergarten year, the school district proposed placing him in a special education classroom within the district.\textsuperscript{74} The Winkelmans opposed this placement and challenged Jacob’s IEP through the state’s administrative appeal process; however, their efforts proved futile, as they lost each appeal.\textsuperscript{75}

Before the court of appeals’ ruling in Cavanaugh, Jacob’s parents\textsuperscript{76} filed a claim\textsuperscript{77} in the United States District Court for the Dis-

\textsuperscript{72} Id.
\textsuperscript{73} Id.
\textsuperscript{74} Id.
\textsuperscript{75} Id. The Winkelmans challenged the IEP because it “did not contain a specific plan to implement occupational therapy, did not contain a sufficient amount of speech therapy or one-on-one instruction, and did not include music therapy.” Petition for Writ of Certiorari, supra note 67, at 5.
\textsuperscript{76} The Winkelmans are a family with five children, who live on a household income of less than $40,000 per year. Id. at 5 n.2. Jacob’s sister Jenna also suffers from autism. Id. The Winkelmans “have no savings, face a monthly mortgage payment of $1300, and incur significant medical expenses for Jacob and Jenna.” Id. Due to the amount of time needed to take care of Jacob and Jenna, Mrs. Winkelman has been unable to work. Id. Jacob’s current school, the Monarch School, costs $56,000 a year. Id. at 5. The Winkelmans finance Jacob’s education through a combination of loans and second mortgages. Mauro, supra note 71. Mrs. Winkelman has remarked that it may take up to thirty years to pay off the school expenses. Id.
\textsuperscript{77} It is important to note that parents representing their children pro se have been accused of engaging in the unauthorized practice of law. The Cleveland Bar Association (CBA) alleged that Mr. Woods, a parent who represented his son’s claims pro se, was engaged in the unauthorized practice of law. Adam Liptak, Nonlawyer Father Wins His Suit over Education, and the Bar Is Upset, N.Y. TIMES ONLINE, May 6, 2006, http://www.nytimes.com/2006/05/06/us/06parents.html?_r-1&oref=slogin. The CBA “sought a $10,000 fine, lawyers’ fees and a promise that he would not continue to assist other parents seeking to represent their own children in court.” Id. Following an order from the Supreme Court of Ohio to produce evidence supporting the allegations in the CBA’s complaint, the CBA withdrew its complaint, noting that it should have waited until the court decided Winkelman and that its board did not approve the filing of the claim. Id. There have also been reports that the CBA considered fining the Winkelmans $10,000 for the unauthorized practice of law in their pro se representation of Jacob. See Patrick O’Donnell, Bar Association Battles Parents, CLEV. PLAIN DEALER (Apr. 27, 2006), available at http://www.bridges4kids.org/articles/4-06/PlainDealer4-27-06.html. Following the decision in Winkelman, it is unclear whether the CBA will continue bringing suit against parents representing IDEA
trict of Ohio. The appeal challenged the decision of an Independent Hearing Officer and State Level Review Officer that Jacob received a FAPE and simultaneously alleged that the Independent Hearing Officer violated the Winkelmans’ procedural rights under IDEA. The district court granted judgment for the local school administration (“Parma City”). The Winkelmans appealed to the United States Court of Appeals for the Sixth Circuit, but the court handed down its decision in Cavanaugh before the Winkelmans filed their appeal. Parma City filed a motion to dismiss the pro se appeal. The court of appeals granted the motion and dismissed the Winkelmans’ entire appeal, holding that the Winkelmans “are not permitted to represent Jacob in this court nor can they pursue their own IDEA claims pro se.” On October 27, 2006, the Supreme Court granted the Winkelmans’ writ of certiorari.

claims pro se, especially since the Court in Winkelman declined to answer whether parents may represent their children’s IDEA claims pro se. See infra Part IV.

Petition for Writ of Certiorari, supra note 67, at 9.

Petitioners alleged that three substantive violations in Jacob’s 2003–04 IEP denied him a FAPE. They asserted that the IEP: (1) “did not contain specific goals and objectives for occupational therapy,” (2) did not provide one-on-one academic instruction for speech therapy and reduced the duration of Jacob’s speech therapy instruction, and (3) failed to include music therapy. They also alleged three procedural violations: (1) in developing the 2005–04 IEP, the school district predetermined an education placement for Jacob without receiving meaningful input from Jacob’s parents, (2) the IHO “impermissibly allowed her research assistant to ‘co-preside’ over the proceedings,” and (3) the administrative hearings failed to render a decision within the forty-five days allowed by IDEA. Id. at 6–8.

Id. at 8. The district court ruled for the respondents, on the pleadings, on June 2, 2005. Id.

Id.

Cavanaugh v. Cardinal Local Sch. Dist., 409 F.3d 753 (6th Cir. 2005). The decision in Cavanaugh was handed down on May 18, 2005. Id.

Petition for Writ of Certiorari, supra note 67, at 8.

Id. at 9. The court of appeals stayed its order for thirty days to allow the Winkelmans the opportunity to secure counsel. Id. Two weeks later, the Winkelmans moved to the United States Court of Appeals for the Sixth Circuit for an extension to the thirty-day stay to allow the Winkelmans the chance to submit a petition for certiorari to the Supreme Court. Id. On December 1, 2005, the court of appeals denied the Winkelmans’ motion. Id. However, that same day, the Winkelmans submitted an application to stay the order of the court to Justice Stevens, the Circuit Justice for the United States Court of Appeals for the Sixth Circuit. Id. A day later, Justice Stevens granted the Winkelmans’ application and stayed the decision of the court of appeals until after the Supreme Court determined whether to grant certiorari. Id.

C. **The Majority Decision in Winkelman**

In *Winkelman*, the Court set out to clarify "whether parents, either on their own behalf or as representatives of the child, may proceed in court unrepresented by counsel though they are not trained or licensed as attorneys."\(^{86}\) The Court determined that "parents enjoy rights under IDEA; and they are, as a result, entitled to prosecute IDEA claims on their own behalf."\(^{87}\)

It is beyond dispute that the relationship between a parent and child is sufficient to support a legally cognizable interest in the education of one's child; and, what is more, Congress has found 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 have meaningful opportunities to participate in the education of their children at school and at home."\(^{88}\)

In discerning that parents have rights under IDEA, the Court chose not to resolve the petitioner's alternative argument that IDEA enables parents to litigate the child's claims pro se.\(^{89}\) This narrow holding may trigger problems for parents, special education practitioners, school districts, and judges in interpreting key provisions of IDEA.\(^{90}\)

The Court reached its holding by acknowledging that IDEA's "interlocking statutory provisions" answer the question of whether parents have independent, enforceable rights.\(^{91}\) The Court looked to IDEA's statutory text and engaged in a thorough analysis\(^{92}\) of IDEA's entire statutory scheme.\(^{93}\) Following this overview, the Court discerned that it would be inconsistent with IDEA's statutory scheme to prohibit parents from proceeding pro se in federal court because parents have rights at the administrative stage.\(^{94}\) The Court explained that the express terms of IDEA contemplate that parents will be the parties bringing the administrative complaints . . . . Nothing in these interlocking provisions excludes a parent who has exercised his or her own rights from statutory protection the moment the administrative hearings end . . . . Through its

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86 *Winkelman*, 550 U.S. at 520.
87 *Id.* at 535.
88 *Id.* (quoting 20 U.S.C. § 1400(c)(5)).
89 *Id.*
90 See infra Parts IV, V.
91 *Winkelman*, 550 U.S. at 522.
92 Following precedent, the Court considered IDEA’s statutory scheme in its entirety, *Id.* at 523 (citing *Dolan v. Postal Service*, 546 U.S. 481, 486 (2006)).
93 *Id.* at 523–26.
94 *Id.* at 526.
provisions for expansive review and extensive parental involvement, the statute leads to just the opposite result.\(^{95}\)

Because parents are accorded rights under IDEA, they may prosecute IDEA claims pro se.\(^{96}\)

The remainder of the opinion focused on refuting the respondent's arguments. First, the respondents asserted that a parent is only involved in the IEP process to represent the interests of the child.\(^{97}\) The Justices in the majority disagreed, determining that IDEA's provisions bar that interpretation because one purpose of IDEA is "to ensure that the rights of children with disabilities and parents of such children are protected."\(^{98}\) The Court explained that "[t]he word 'rights' in the quoted language refers to the rights of parents as well as the rights of the child; otherwise the grammatical structure would make no sense."\(^{99}\) IDEA "presumes parents have rights of their own" because IDEA provides a section that defines how "States might provide for the transfer of the 'rights accorded to parents' by IDEA."\(^{100}\) Adopting the respondent's reading of IDEA "would require an interpretation of these statutory provision (and others) far too strained to be correct."\(^{101}\)

The majority also disagreed with respondent's assertion that references to parents within IDEA are "best understood as accommodations to the fact of the child's incapacity."\(^{102}\) The sole purpose of parental involvement is not merely "to facilitate vindication of a child's rights."\(^{103}\) Rather, a parent has an established legal interest in the child's upbringing and specifically in the education of the child: "[w]ithout question a parent of a child with a disability has a particular and personal interest in fulfilling 'our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities.'"\(^{104}\)

Bolstering its analysis, the majority carefully pointed out the incongruent outcomes that would result from allowing parents to assert only procedural violations. The Court observed that IDEA's "proce-
dural and reimbursement-related rights are intertwined with the substantive adequacy of the education provided to a child . . . and it is difficult to disentangle the provisions in order to conclude that some rights adhere to both parent and child while others do not." Additionally, if a distinction is drawn between the procedural and substantive rights accorded in IDEA a "confusing and onerous legal regime" would be imposed upon parties. This would be compounded by the fact that IDEA does not delineate for a court how to distinguish between substantive and procedural rights. Moreover, such a reading would leave some parents without a remedy because a parent asserting a substantive violation of the child's FAPE would have recourse in only two situations: (1) when the claim is "related to the procedures employed," and (2) "when he or she is able to incur, and has in fact incurred, expenses creating a right to reimbursement." Ultimately, the Court concluded that IDEA gives parents their own independent and enforceable rights, "which are not limited to certain procedural and reimbursement-related matters." Rather, the rights "encompass the entitlement to a free appropriate public education for the parents' child."110

D. The Dissent in Winkelman

Justices Scalia and Thomas concurred in part and dissented in part from the majority opinion. The dissenting Justices agreed that

105 Id. at 531-32 (internal citations omitted).
106 Id. at 532.
107 Id.
108 Id. at 532-33.
109 Winkelman, 550 U.S. at 533.
110 Id. Although not central to the Court's holding, the Court also addressed the respondent's argument that recognizing that parents have rights under IDEA would violate the Spending Clause. Id. at 533-35. Pursuant to the Spending Clause, a law must provide a clear notice before it can "burden a State with some new condition, obligation, or liability." Id. at 533. The respondents premised their argument on Arlington and asserted that states were not provided with clear notice because IDEA is ambiguous as to whether parents have independent rights. Id. at 533-34. The Court clarified that situation as not analogous to Arlington because determining 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." Id. at 534. Additionally, the amount and types of recovery under IDEA are "not expanded by recognizing that some rights repose in both the parent and the child." Id. The Court explained that although the class of individuals who have rights under the statute is now expanded, it does not increase a State's statutory obligations. Id. Moreover, States may recover attorneys fees, pursuant to § 1415(i) (3) (B) (i) (III), when a parent presents a complaint "for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation." Id. at 535.
111 Id. (Scalia, J., dissenting).
parents may proceed in federal court pro se when asserting procedural violations or when seeking reimbursement.\footnote{Id. at 535–36.} However, the dissent explained that parents may not proceed pro se when seeking "a judicial determination that their child's [FAPE] is substantively inadequate."\footnote{Id. at 536.}

Like the majority, the dissenting Justices looked to IDEA's statutory text.\footnote{Id.} The dissent expressed that the majority opinion "sweeps far more broadly than the text [of IDEA] allows."\footnote{Id.} Justices Scalia and Thomas found that the express language of IDEA only granted parents two types of rights: (1) procedural protections and (2) the right to reimbursement for educating the child privately when the local school district failed to provide the child with a FAPE.\footnote{Winkelman, 550 U.S. at 538 (Scalia, J., dissenting).} The Justices asserted that IDEA "is replete with references to the fact that a FAPE belongs to the child."\footnote{Id. at 537.} The dissent went on to explain that "parents of a disabled child no doubt have an interest in seeing their child receive a proper education. But there is a difference between an interest and a statutory right. The text of the IDEA makes clear that parents have no right to the education itself."\footnote{Id. at 538 (emphasis added).}

In the dissenting Justices' view, whether parents may prosecute a claim pro se hinges on the interaction of IDEA and the Judiciary Act of 1789, 28 U.S.C. § 1654.\footnote{Id. at 536.} The Judiciary Act allows parties to represent their rights pro se: "In all courts of the United States the parties may plead and conduct their own cases personally or by counsel."\footnote{Id.} Under the dissent's analysis, a parent is not a "party aggrieved" when asserting a substantive violation of the child's FAPE.

\footnotetext{\hspace{1em}112}{Id. at 535–36.}
\footnotetext{\hspace{1em}113}{Id. at 536.}
\footnotetext{\hspace{1em}114}{Id.}
\footnotetext{\hspace{1em}115}{Id.}
\footnotetext{\hspace{1em}116}{Winkelman, 550 U.S. at 538 (Scalia, J., dissenting).}
\footnotetext{\hspace{1em}117}{Id. at 537.}
\footnotetext{\hspace{1em}118}{Id. at 538 (emphasis added).}
\footnotetext{\hspace{1em}119}{Id.}
\footnotetext{\hspace{1em}120}{Id. at 536. The ability to assert one's rights is rooted in the Judiciary Act of 1789. It is one of our country's oldest and most formative legal statutes. See United States Marshals Service, The Judiciary Act of 1789: Charter for U.S. Marshals and Deputies, http://www.usdoj.gov/marshals/history/judiciary/judiciary_act_of_1789.htm (last visited Feb. 16, 2009). The Act was the first bill passed by our country's First Congress, and it chartered a federal judiciary system which set forth the jurisdiction and powers of circuit and district courts and qualifications for federal judges. Id.}
\footnotetext{\hspace{1em}121}{28 U.S.C. § 1654 (2006). When Congress confers rights on individuals and provides a private right of action to vindicate those rights, individuals may prosecute their claims pro se, pursuant to 28 U.S.C. § 1654. Prior to the decision in Winkelman, lower courts concluded, similar to the dissent, that parents may not utilize 28 U.S.C. § 1654 to represent their child in federal court. See, e.g., Devine v. Indian River County Sch. Bd., 121 F.3d 576, 581 (11th Cir. 1997).}
because parents are not expressly accorded the right to have the child receive a FAPE.\footnote{Winkelman, 550 U.S. at 538 (Scalia, J., dissenting).} Therefore, parents may not prosecute a substantive claim pro se because they are not a party aggrieved under the statute, pursuant to § 1415(i) (2) (A).\footnote{Id. at 536–37.}

E. Reactions to the Decision

Following the release of Winkelman, media outlets throughout the country reported the outcome. Amici for the petitioners, parent advocacy organizations, self-help organizations, blogs, and even the generalized media hailed the decision in Winkelman as a major victory for parents. Autism Aspergers Digest Magazine pointed out that Winkelman "allows for a consistent and logical progression between administrative proceedings, at which parents are permitted to participate without legal representation, and judicial actions, at which, prior to Winkelman, many federal courts prohibited parents from proceeding unless they either were represented by counsel or were attorneys themselves."\footnote{Barbara E. Etkind & Prashant K. Khetan, Post-Winkelman: Ensuring Good Education for Special Needs Children, AUTISM ASPERGER'S DIG. MAG., Nov.–Dec. 2007, at 48, 56.} The Council for Parent Attorneys and Advocates echoed similar comments: "This is a significant victory for parents in many circuits who found the courthouse door barred unless they had a lawyer or presented only a claim on a narrow set of procedural rights."\footnote{Council of Parent Attorneys and Parent Advocates, supra note 9. The Council, also an amici in the case, cautioned, however, that "the victory remains bittersweet as many parents still cannot afford attorneys and cannot afford due process because they are unable to pay for the expert witnesses needed to bear their burden of proof." Id. For these parents IDEA is the only tool available to ensure their children receive FAPE. The IDEA was not intended to deny children FAPE or other IDEA rights because of the shortage of qualified lawyers willing and able to accept unprofitable IDEA cases. Congress included parents in every critical point of the statutory scheme. To do otherwise would unnaturally dismantle rights which are inherently married and interdependent. Id.} The Autism Society of America "applauded the Supreme Court's decision,"\footnote{Marguerite Kirst Colston, Supreme Court Decides for Parents in Winkelman v. Parma, AUTISM SOC'Y OF AM., May 21, 2007, http://www.autism-society.org/site/News2?page=NewsArticle&id=9591. The Autism Society of America is the country's largest parent-led autism advocacy organization and submitted an amicus brief in support of petitioners in Winkelman. Id.} and a Houston Chronicle editorial remarked, "In a welcome exception, the nation's highest court put its opinion behind

\footnotesize{\textsuperscript{121} Winkelman, 550 U.S. at 538 (Scalia, J., dissenting).  
\textsuperscript{122} Id. at 536–37.  
\textsuperscript{124} Council of Parent Attorneys and Parent Advocates, supra note 9. The Council, also an amici in the case, cautioned, however, that "the victory remains bittersweet as many parents still cannot afford attorneys and cannot afford due process because they are unable to pay for the expert witnesses needed to bear their burden of proof." Id. For these parents IDEA is the only tool available to ensure their children receive FAPE. The IDEA was not intended to deny children FAPE or other IDEA rights because of the shortage of qualified lawyers willing and able to accept unprofitable IDEA cases. Congress included parents in every critical point of the statutory scheme. To do otherwise would unnaturally dismantle rights which are inherently married and interdependent. Id.  
the rights of parents of special needs children to take school districts to court without having to hire high-priced lawyers."\textsuperscript{126}

In contrast, amici for respondents and education news outlets focused their commentary on the day-to-day implications of the decision for schools, attorneys, and courts. \textit{Education Week} pondered whether parents will now rush to court.\textsuperscript{127} Similarly, the National School Boards Association (NSBA) commented that "[w]hile we understand the court's desire not to foreclose a parent's day in court, we are concerned that the decision may encourage parents to litigate rather than collaborate."\textsuperscript{128} The NSBA advised that attorneys representing schools will have to "take extra steps and extra time to ensure that parents understand the intricacies of litigation, which could increase districts' costs."\textsuperscript{129} Additionally, the organization went on to caution that "[s]pecial education cases often amount to a battle of the experts," and "[i]t is not certain that a non-lawyer parent will have the legal know-how to properly elicit or challenge testimony that will ultimately help the court decide what is in the best interest of a child."\textsuperscript{130}

IV. \textbf{WINKELMAN MAY NOT BE A VICTORY BECAUSE OF THE AMBIGUITIES CREATED BY ITS NARROW HOLDING}

The practical effect of the \textit{Winkelman} decision is that, while it solved an important discrete ambiguity in IDEA,\textsuperscript{131} it simultaneously created new ambiguities in IDEA's statutory text. The majority in \textit{Winkelman} crafted a narrow holding and failed to discuss how the decision affects key provisions of IDEA. As a result, at least three key provisions are ambiguous. These ambiguities may be resolved by lower court interpretations of IDEA post-\textit{Winkelman}. Lower courts will need to clarify: (1) whether a parent may prosecute a child's rights in court, (2) whether parents are entitled to attorney fees if they prevail, and (3) to what standard parents will be held when a

\textsuperscript{126} Staff Editorial, \textit{supra} note 17.
\textsuperscript{127} Walsh, \textit{supra} note 18, at 18–19.
\textsuperscript{129} \textit{Id}.
\textsuperscript{130} Walsh, \textit{supra} note 18, at 18–19.
\textsuperscript{131} "Whether, and if so, under what circumstances, non-lawyer parents of a disabled child may prosecute an [IDEA] . . . case pro se in federal court." Petition for Writ of Certiorari, \textit{supra} note 67, at i.
prevailing school district seeks attorney fees. The Court’s holding in *Winkelman* has already caught families prosecuting claims pro se off-guard and has triggered more issues of statutory interpretation for the judicial branch.

**A. Ambiguity #1: May a Parent Prosecute a Child’s Rights in Court?**

The *Winkelman* Court determined that although the rights of the child and parent are separate, the parent and child retain the same rights and remedies individually.\(^{132}\) The Court explained “that IDEA does not differentiate, through isolated references to various procedures and remedies, between the rights accorded to children and the rights accorded to parents.”\(^{135}\) Moreover, the Court recognized that the “procedural and reimbursement-related rights are intertwined with the substantive adequacy of the education provided to a child and *it is difficult to disentangle the provisions* in order to conclude that some rights adhere to both parent and child while others do not.”\(^{134}\)

The Court acknowledged that difficulties would arise from drawing a distinction between the rights and remedies held by children and those held by parents:

> [I]t would impose upon parties a confusing and onerous legal regime, one worsened by the absence of any express guidance in IDEA concerning how a court might in practice differentiate between these matters . . . . The adequacy of the educational program is, after all, the central issue in the litigation. The provisions of IDEA do not set forth these distinctions, and we decline to infer them.\(^{135}\)

After acknowledging that parents and children retain identical rights and remedies under IDEA, the Court stopped short and declined to address whether a parent may represent a child’s claim pro se.\(^{136}\) Therefore, it is unclear after *Winkelman*’s narrow holding whether a parent may prosecute a child’s IDEA claim when the parent prosecutes an IDEA claim pro se.\(^{137}\)

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133 Id.
134 Id. at 531–32 (emphasis added).
135 Id. at 532.
136 Id. at 533.
137 See infra Part V.A. for a discussion of the effect of the Court’s failure to address whether a parent may prosecute a child’s IDEA claim pro se.
B. Ambiguity #2: Are Parents Entitled to Recover Attorney Fees if They Prevail?

Prior to Winkelman, courts allowed parents who are attorneys to prosecute IDEA violations in court. IDEA contains an attorney fee-shifting statute, but the statute is silent as to whether attorney-parents may recover attorney fees if they are the prevailing party. As of yet, courts have not awarded attorney fees to an attorney-parent representing a child. However, courts are split as to whether an attorney-parent may recover attorney fees.

The Court in Winkelman failed to discuss how its holding would affect attorney-parents. As a result, it is unclear in what capacity an attorney-parent asserts an IDEA violation—as an attorney representing the child or as a pro se parent. This is problematic because courts use different analyses to determine whether attorney fees are available to attorney-parents. Therefore, after Winkelman, questions arise regarding the scope of the attorney fee-shifting statute. First, may an attorney-parent who prevails in prosecuting violations of a child's rights recover attorney fees? Second, may an attorney-parent who prevails in prosecuting a violation of a parental right recover attorney fees? If so, can the same reasoning extend to a lay parent to permit the parent to recover attorney fees? The answer to those questions will likely turn on how courts characterize the relationship between attorney-parent and child post-Winkelman.

Courts have characterized the relationship between attorney-parent and child in three ways: pro se, not pro se, and principal-agent. Historically, federal statutes denied awarding attorney fees to pro se litigants who are attorneys. In Kay v. Ehrler, the Court determined that an attorney could not recover fees under 42 U.S.C. § 1988 for successfully representing himself. The language of 42

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138 See Doe v. Bd. of Educ. of Baltimore County, 165 F.3d 260, 265 (4th Cir. 1998) (attorney-parents representing their children pro se may not recover attorney fees).
141 Compare Rappaport, 812 F. Supp. at 612, and Doe, 165 F.3d at 263, with Matthew V., 244 F. Supp. 2d at 1337–38.
142 See infra note 143 and accompanying text.
143 For an overview of the way in which courts have characterized the attorney-parent and child relationship, see generally Kimberly J. Winbush, Annotation, Rights of Parents to Proceed Pro Se Under Individuals with Disabilities Education Act, 16 A.L.R. FED. 2d 467 (2007).
145 Id. at 437–38.
U.S.C. § 1988 provides that, "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee."\(^{146}\) The Court reasoned that a party, even a lawyer, is at a disadvantage when representing herself because the lawyer is deprived of the judgment of an independent third-party.\(^{147}\) Therefore, the Court determined that "the statutory policy of furthering the successful prosecution of meritorious claims is better served by a rule that creates an incentive to retain counsel in every such case."\(^{148}\)

IDEA contains a provision almost identical to the statutory provision at issue in Kay.\(^{149}\) Before Winkelman, some courts defined an attorney's representation of a child as pro se.\(^{150}\) One court reasoned that the statute refers to both parent and child and "because of the close, natural relationship between parent and child, a parent's representation of a disabled child is effectively pro se representation."\(^{151}\) Based on the close relationship, the court determined that parents were effectively representing themselves; therefore, the court extended the reasoning of Kay and precluded the attorney-parent from collecting attorney fees under IDEA.\(^{152}\)

Kay has been extended even when the court characterized the attorney-child relationship as not pro se. The United States Court of Appeals for the Fourth Circuit upheld a denial of attorney fees to an attorney-parent who successfully represented his son in administrative hearings and district court.\(^{153}\) In the court's view, an attorney-parent does not represent a child's claim pro se because parents and children are distinct legal entities under IDEA.\(^{154}\) The court of appeals opined that "like attorneys appearing pro se, attorney-parents are generally incapable of exercising sufficient independent judgment on behalf of their children to ensure that 'reason, rather than emotion,' will dictate the conduct of litigation."\(^{155}\) The court emphasized that IDEA's attorney fee provisions "should be read to encourage parents to obtain independent legal services," because statutory fees are not


\(^{147}\) Kay, 499 U.S. at 437.

\(^{148}\) Id. at 498.

\(^{149}\) "[T]he court, in its discretion, may award reasonable attorneys' fees as part of the costs . . . . to a prevailing party who is a parent of a child with a disability." 20 U.S.C. § 1415(i)(S)(B)(i) & (l) (2000).


\(^{151}\) Id. at 612.

\(^{152}\) Id.


\(^{154}\) Id. at 263.

\(^{155}\) Id. (quoting Kay v. Ehrler, 499 U.S. 432, 437 (1991)).
needed to encourage a parent to litigate a child’s IDEA claims to ensure that they receive an adequate education.\textsuperscript{156}

Building off of the reasoning that parents and children are distinct legal entities, another court has concluded that attorney-parents and a child are in a principal-agent relationship.\textsuperscript{157} The United States District Court for the District of Georgia determined that IDEA’s statutory language does not prohibit an award of fees to attorney-parents.\textsuperscript{158} First, IDEA contains a provision prohibiting attorney fees in certain instances,\textsuperscript{159} but it does not mention any prohibition on attorney-parents who are prevailing parties.\textsuperscript{160} Second, parents and children are distinct legal entities under IDEA; therefore, the “separate status supports the conclusion that a parent-attorney performs in the ‘agency relationship.’”\textsuperscript{161} Third, Georgia’s Rules of Professional Conduct would deter an attorney-parent from acting in an unprofessional manner.\textsuperscript{162} Fourth, an economic analysis supports the notion that attorney-parents should be able to recover fees since the “parent is subject to opportunity costs inherent in performing legal work for her child rather than for a paying client.”\textsuperscript{163} Finally, the court indicated that “[i]n some cases, a parent-attorney may be the best attorney the child could obtain, and the availability of fees would align the economic realities of practicing law with the IDEA’s primary purposes.”\textsuperscript{164} Despite its principal-agent categorization of the relationship between an attorney-parent and a child, the court declined to award attorney fees to the attorney-parent because the court concluded that the attorney-parent was not a prevailing party as required to trigger fee-shifting under § 1415(i) (3) (B) (i) (I).\textsuperscript{165}

The \textit{Winkelman} Court did not address the effect of its holding on the attorney fee-shifting provision in IDEA. The narrow holding has perpetuated the ambiguity regarding the capacity in which attorney-parents may represent their children’s claims, and consequently has

\textsuperscript{156} \textit{Id}. at 264.
\textsuperscript{158} \textit{Id}. at 1337.
\textsuperscript{160} \textit{Matthew V.}, 244 F. Supp. 2d at 1337.
\textsuperscript{161} \textit{Id}. at 1337.
\textsuperscript{162} \textit{Id}. at 1337–38. The court indicated that Georgia’s Rules do not limit who may make a grievance about an attorney. Therefore, “such a grievance could be made by opposing counsel, or even the child’s other parent or another family member.” \textit{Id}. at 1338 n.7 (noting GA. RULES OF PROF’L CONDUCT R. 4-202 (2001)).
\textsuperscript{163} \textit{Id}. at 1338.
\textsuperscript{164} \textit{Id}.
\textsuperscript{165} \textit{Id}. at 1338–43.
left open whether attorney-parents may recover fees under IDEA. The Court’s conclusion that parents have distinct rights, combined with its failure to discuss the relationship of the attorney-parent and child, will likely encourage attorney-parents to continue applying to recover fees. Moreover, the Court’s holding triggers the question of whether lay parents who prevail are entitled to attorney fees under IDEA.\footnote{See \textit{infra} notes 228–31 and accompanying text for analysis of this question.}

C. Ambiguity #3: To What Standard Will Parents Be Held When a Prevailing School District Seeks Attorney Fees?

In 2004, Congress reauthorized and amended IDEA to allow a prevailing school district to recover attorney fees.\footnote{20 U.S.C. § 1415(i) (3)(B)(i)(II)–(III) (2006).} IDEA allows a court to award attorney fees to a prevailing state educational agency or school district in two instances. First, § 1415(i)(3)(B)(i)(II) provides for recovery from the \textit{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.”\footnote{\textit{Id.} § 1415(i)(3)(B)(i)(II) (emphasis added).} Second, § 1415(i)(3)(B)(i)(III) provides for recovery from the \textit{attorney of a parent or 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.”\footnote{\textit{Id.} § 1415(i)(3)(B)(i)(III) (emphasis added).} Therefore, it appears that attorneys and parents are held to different standards when a state educational agency or school district tries to recover attorney fees.

\textit{Winkelman} creates ambiguity in IDEA’s frivolous suit provisions because the majority did not clearly specify to which standards an attorney-parent or lay parent will be held. The Court did acknowledge the attorney fee-shifting provisions when refuting the respondent’s argument that recognizing parents as having rights would violate the spending clause.\footnote{Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 534–35 (2007).} The Court explained that school districts will not have to face increased costs from unconstrained lawsuits because monetary relief may be awarded to school districts to recover attorney fees when parents violate § 1415(i)(3)(B)(i)(III).\footnote{\textit{Id.} at 535.} However, it is unclear what standard pro se parents are held to, what standard at-
torney-parents are held to when representing personal parental claims, and what standard attorney-parents are held to when representing a child's claim. Based on predicted increases in IDEA litigation as a result of *Winkelman*, school districts will likely be faced with increasing legal costs. In turn, the frivolous suit provision may become more attractive to prevailing school districts looking to recover the costs of the litigation. Courts may be faced with school districts asserting claims for attorney fees from parents who filed frivolous claims.

V. CLARIFYING NEW QUESTIONS CREATED BY *WINKELMAN*

A. Ambiguity #1: A Parent May Not Prosecute a Child's Rights, But Courts Should Allow a Parent to Continue Litigating the Substance of the Claim

Initially, the Court's failure to answer whether a parent may represent the child's claim may seem of no moment because either may vindicate the rights personal to him or her and receive the same remedy. However, cases subsequent to *Winkelman* reveal that lay parents do not understand that *Winkelman* only allows parents to prosecute parental rights pro se. Parents are proceeding pro se and listing the name of the child on the complaint. In response, lower courts have held that rights held by a child under IDEA are separate from the rights of the parent, and as a result, the parent may not represent the child's claim pro se. Lower courts have precluded a parent from prosecuting the rights of a child since many jurisdictions maintain a ban against parents vindicating a child's rights.

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174 The United States District Court for the Southern District of Indiana has indicated that the ban against a parent representing a child's IDEA claims will stand even after *Winkelman*. *See Bell*, 2007 U.S. Dist. LEXIS 57428, at *27 n.13 (dismissing of claim brought by parents applies only to parents' IDEA claims, but not dismissing children's claims with prejudice).
Jurisdictions that have precluded parents from bringing their child's IDEA claims have based their underlying reasoning on tort cases.175 These jurisdictions have rationalized that

[t]he choice to appear pro se is not a true choice for minors who under state law . . . cannot determine their own legal actions. There is thus no individual choice to proceed pro se for courts to respect, and the sole policy at stake concerns the exclusion of non-licensed persons to appear as attorneys on behalf of others.176

In the tort context, children have rights distinct from those of their parents. The child maintains rights and can receive remedies that the parent cannot. This reasoning should not be extended to the context of special education law, because under IDEA parents have rights that are separate but indistinguishable from the rights of a child. Thus, parents and children enjoy the same rights and remedies under IDEA. This is a key distinction between IDEA and instances where courts have refused to allow a parent to represent the child's claims.

If the rights and remedies held by parents and children under IDEA are indistinguishable and the same remedies are available regardless of whose rights are alleged to have been violated, then the ultimate outcome of the underlying dispute will not depend on the names listed as plaintiff. Nevertheless, school districts have an incentive to exploit pro se parents unaware that they may only name themselves as plaintiffs. School districts may move to have the claim dismissed on the ground that the parents brought the case on behalf of themselves and the child. Consequently, another level of litigious posturing is endured to determine the preliminary issue of standing. In turn, a resolution of the underlying issue—whether the school district violated IDEA—is delayed.

For example, in Chase v. Mesa County Valley School District Number 51, a mother motioned the United States District Court for the District of Colorado to reconsider a previous dismissal of an IDEA claim that she prosecuted pro se.177 In the initial prosecution, the mother asserted that her son's rights were violated.178 In response, the court

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176 Johns v. County of San Diego, 114 F.3d 874, 876 (9th Cir. 1997) (quoting Osei-Afriyie, 937 F.2d at 882–83 (quoting Cheung v. Youth Orchestra Found. of Buffalo, Inc., 906 F.2d 59, 61 (2d Cir. 1990)).
178 Id. at *1.
issued an order that the mother "lacks standing to represent her minor son because 'under Fed.R.Civ.P. 17(c) and 28 U.S.C. §1654 (1994), . . . a minor child cannot bring suit through a parent acting as a next friend if the parent is not represented by an attorney.'" Following the grant of certiorari for *Winkelman*, the mother moved the court to allow her to bring suit on behalf of her son or to stay proceedings until the Court ruled in *Winkelman*. The court handed down its order following the decision in *Winkelman*.

The court acknowledged that *Winkelman* recognized that parents have substantive rights under IDEA that are independent of those conferred by IDEA upon children. The court went on to note that *Winkelman* declined to determine whether parents may assert the rights of a child pro se. But the court stopped its analysis there and denied the mother's motion, holding that "[n]othing in *Winkelman* suggests that parents may act pro se to assert the rights of their children, and long standing law is directly to the contrary." The court failed to consider that while the rights of the parent and child are separate, the rights and remedies available to each are the same. Thus, a simple substitution of the mother's name for the child's name would have sufficed. Now, however, should the mother want to proceed with the litigation, she will have to either file a pro se complaint with only her name or retain a lawyer to represent her son's rights.

The court's failure to realize that the mother could have simply been substituted for the child likely delayed resolution of the underlying dispute—whether the school district failed to provide a child with a FAPE. The court's initial order that the mother lacked standing to pursue her son's claims was issued on January 29, 2007, and the court issued its denial of the motion to reconsider the order on September 27, 2007. Nine months passed before the mother knew how to proceed in prosecuting the IDEA violations. For a child,
nine months is approximately a school year. In this case, it is likely that the child remained in his inadequate educational placement during the pendency of the suit. He would have had to remain in that educational placement until his mother decided how to proceed in alleging the IDEA violations or until an agreement was made with the school district over his IEP. Should the mother have decided to continue to prosecute the IDEA violations, the child would have likely remained in the current educational setting until the suit was resolved. If the mother was able to prevail in showing a violation of IDEA, the child would be entitled to compensatory education for the time period in which he was denied a FAPE—approximately one school year plus the time for the new suit. Courts must take a more pragmatic approach than that of the United States District Court for the District of Colorado.

Should a court receive a complaint filed by a pro se parent that lists the name of the child, the court should proceed in one of two ways. First, the court may simply substitute the names on the complaint with only the names of the parents without naming the child as a plaintiff. Second, the court may dismiss the claims of the child without prejudice and either continue litigating the claims of the parents or allow the parents to amend the complaint without cost. School districts have already moved to dismiss claims prosecuted by pro se parents who have mistakenly listed the name of the child on the pro se complaint.187

In Alexandra R. v. Brookline School District, the United States District Court for the District of New Hampshire took the first approach of simply substituting the parents' names on the complaint. 188 The parents of a student, Sasha, who was eligible for special education services, appealed a decision of the New Hampshire Department of Education, which had denied the parents' request for an administrative due process hearing.189 When the parents filed their appeal in district court, they listed their names as well as Sasha's name on the complaint. 190 The school district moved to dismiss the claim, arguing that Sasha's parents could not represent her legal interests because

189 Id. at *1.
190 Id. at *1–3.
neither parent was an attorney.\textsuperscript{191} The court acknowledged that while the Supreme Court and the United States Court of Appeals for the First Circuit have been presented with the issue of "whether pro se parents can represent their minor children in IDEA proceedings," neither has decided the issue.\textsuperscript{192}

The court recognized that "the rights and interests of parents and their children under the IDEA are coextensive. Consequently, even if Sasha's parents cannot, strictly speaking, represent her in pursuing her IDEA claims against the School District, they may pursue their own identical claims, in their own right."\textsuperscript{193} Therefore, the court concluded that "[t]he fair and equitable resolution to the problem pointed out by the School District's motion to dismiss is, then, simply to recognize that Sasha's parents are effectively proceeding on their own behalf and pursuing their own co-extensive rights under the IDEA."\textsuperscript{194} The court denied the school district's motion to dismiss and substituted Sasha's parents as plaintiffs, without requiring any further motions, because "Sasha's parents are actual parties in interest (and might well be barred from representing Sasha in this proceeding), and because their rights under the IDEA are co-extensive with Sasha's."\textsuperscript{195}

The United States District Court for the Southern District of Florida took the second approach in \textit{L.J. v. Broward County School Board}.\textsuperscript{196} In \textit{L.J.}, a mother asserted multiple allegations on behalf of herself and her son against her son's school, including the failure to provide her son with a FAPE.\textsuperscript{197} The school district motioned to dismiss the complaint, arguing that the Eleventh Circuit maintains a ban

\begin{flushright}
\textsuperscript{191} Id. at *1–2.
\textsuperscript{192} Id. at *2.
\textsuperscript{193} Id.
\textsuperscript{194} Alexandra R., 2007 U.S. Dist. LEXIS 66091, at *2–3.
\textsuperscript{195} Id. at *5. Similar to \textit{Alexandra R.}, a mother submitted an application to the U.S. District Court for the District of New Jersey for pro bono counsel for representation in an IDEA action. Montclair Bd. of Educ. v. M.W.D., No. 05-3516 (DMC), 2007 U.S. Dist. LEXIS 46212, at *1 (D.N.J.June 26, 2007). Although the mother listed her name and her son's name, the court considered both parent and child to be interested parties in the action and allowed the application to be considered on behalf of the mother and child. \textit{Id}. at *4. Ultimately, the mother's application was denied because it did not meet the Third Circuit's guidelines for appointing pro bono representation to an indigent applicant. \textit{Id}. at *4–6. However, the court indicated that either mother or child may reapply for pro bono counsel in the future. \textit{Id}. at *5.
\textsuperscript{197} Id. at *1–2.
\end{flushright}
against parents representing a child's rights.\textsuperscript{198} The court acknowledged that \textit{Winkelman} did not address whether a parent may litigate a child's claims under IDEA and held that "[b]ecause the Supreme Court did not make that ruling, the Eleventh Circuit rule prohibiting such representation controls."\textsuperscript{199}

The court determined that the mother may not represent her child's rights and dismissed the child's claims without prejudice.\textsuperscript{200} The mother could litigate violations of her parental rights, but the son must have an attorney to litigate his claims.\textsuperscript{201} The judge noted that if the son were to "obtain an attorney to represent him in the future, he may file a motion requesting to join this action and to amend the complaint to add his claims."\textsuperscript{202} Ultimately, the court granted the school district's motion to dismiss the child's claims and granted the mother leave to file an amended complaint that clearly alleges violations of the mother's rights.\textsuperscript{203}

If moved by a school district to dismiss a pro se claim that asserts violations of a parent's and a child's rights, courts should take one of the two aforementioned approaches to foster faster resolution of the IDEA case. Faster resolution is beneficial for families, school districts, and Congress. First, families will not have to expend time and forgo potential work commitments. Second, children will not have to re-

\textsuperscript{198} \textit{Id.} at *2-3. The U.S. Court of Appeals for the Eleventh Circuit has held that "parents who are not attorneys may not bring a \textit{pro se} action on their child's behalf—because it helps to ensure that children rightfully entitled to legal relief are not deprived of their day in court by unskilled, if caring, parents." \textit{Id.} at *5 (quoting Devine v. Indian River County Sch. Bd., 121 F.3d 576, 582 (11th Cir. 1997)).

\textsuperscript{199} \textit{Id.}

\textsuperscript{200} \textit{Id.} at *5-6.

\textsuperscript{201} \textit{Id.}

\textsuperscript{202} \textit{L.J.} 2007 U.S. Dist. LEXIS 41925, at *17.

\textsuperscript{203} \textit{Id.} at *16-17. Following the court's decision in \textit{L.J.}, in a subsequent case, the mother filed an amended complaint in which she alleged violations of IDEA, that the school district illegally discriminated against her son due to his disability, and that the school district knowingly put her son's well-being, safety, and quality of life at risk. N.N.J. v. Broward County Sch. Bd., No. 06-61282-CIV-MOORE/GARBER, 2007 U.S. Dist. LEXIS 78709, at *2 (S.D. Fla. Oct. 23, 2007). The school district motioned to dismiss the amended complaint asserting that the mother failed to exhaust IDEA's administrative remedies in regards to the retaliation and discrimination issues. \textit{Id.} at *3. Additionally, the school district argued "that the portions of each Count which seek to enforce the rights of L.J. should be dismissed because in the Eleventh Circuit a parent cannot represent her child \textit{pro se}." \textit{Id.} The court dismissed the mother's retaliation and discrimination claims without prejudice for failing to file a separate administrative complaint for the retaliation issue pursuant to IDEA. \textit{Id.} at *5-6. Additionally, the court dismissed without prejudice the claims brought on her son's behalf, specifically the claim that her son was discriminated against because of his disability. \textit{Id.} at *7. The court again noted that the mother could continue to litigate her IDEA rights but that her son would need representation to assert his claims. \textit{Id.}
main in educational settings that do not meet their needs. Third, school districts will not have to expend financial resources to file extra motions or to fund additional compensatory education. Finally, federal tax dollars will be spent on litigating the substance of whether the school district violated IDEA, rather than on procedural motions to dismiss or to fund additional compensatory education incurred as a result of drawn out litigation. These benefits are particularly persuasive considering the attention that Winkelman has received.

Winkelman has received notoriety from multiple press outlets, which have quoted special education experts forecasting an increase in the number of parents prosecuting violations of IDEA pro se. Dr. Richard S. Vacca, Editor of the Commonwealth Educational Policy Institute Education Law Newsletter, warned that “public school officials and administrators can expect to experience an increase in legal and policy issues involving parental rights and legal representation of children covered under IDEA.” An advocate from the National ARD/IEP Advocates commented, “I’m advising my people, if they can’t afford counsel, to go for it; go pro se.” There is a strong likelihood that federal courts will see an increase in parents prosecuting IDEA claims pro se; accordingly, courts should follow one of the two approaches to move the parties toward resolving the substance of the IDEA claim, as initially intended by Congress.

B. Ambiguity #2: Attorney-Parents May Be Able to Recover Attorney Fees if They Are the Prevailing Party

Before Winkelman, lower courts retained differing views on the status of the representative relationship between an attorney-parent and a child. In Winkelman, the Court did not address the status of attorney-parents representing a child. Now that parents have distinct rights under IDEA, the determination of whether an attorney-parent prosecutes an IDEA claim pro se, not pro se, or as an agent is more complicated. Whether attorney-parents may recover attorney fees if they are a prevailing party likely turns on the status of the relation-
ship between parent and child. However, whether a prevailing lay parent is entitled to attorney fees likely turns on the legislative history of the fee-shifting provision.

1. Attorney-Parents Prosecuting Claims of a Child

As a result of the holding in *Winkelman*, the agency theory proffered by the United States District Court for the District of Georgia is persuasive and should be adopted by other courts. The agency theory defined by the Supreme Court of the United States contemplates representation of another individual by the attorney: "a legal agent qualified to act for suitors and defendants in legal proceedings." The United States District Court for the District of Georgia predicated its recognition of an agency relationship between an attorney-parent and a child upon the separate legal status of a parent and a child under IDEA. The Court in *Winkelman* confirmed that parents and children retain independent stakes in procedural and substantive rights under IDEA. The independent legal status of parents under IDEA provides support for courts to characterize the relationship between attorney-parent and child as an agency relationship to allow prevailing attorney-parents to recover attorney fees when prosecuting the claims of a child.

In discussing the recognized agency relationship, the United States District Court for the District of Georgia reasoned that attorney-parents may be entitled to attorney fees because a state bar association’s rules of professional conduct may deter a parent from acting in an unprofessional manner. That consideration can still be validly applied to the attorney fee-shifting provision after *Winkelman*.

A state bar’s ethical and procedural rules, combined with the intricacies of the attorney fee-shifting provision, will serve as an external check to ensure that a child is represented in a professional manner. Any failure by an attorney to represent a claim in a professional manner may be taken into consideration by the court when determining the amount of fees to award a prevailing party.

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208 See *supra* notes 157–63 and accompanying text.


212 *Matthew V.*, 244 F. Supp. 2d at 1338.

A court considers multiple factors when determining the amount of fees to award, which serve only to compensate the professional and effectuate an efficient resolution of claims. The court considers the prevailing party's application for fees, but also compares the attorney's hourly rate to that of a special education attorney in that jurisdiction with similar experience to ensure that the rate is not exorbitant.\textsuperscript{214} Additionally, the court considers the attorney's experience when looking at the number of hours the attorney submitted for litigating the claims.\textsuperscript{215} Courts have awarded less than a prevailing party attorney has applied for when the court deems that the fee or the hours spent litigating the claims were not reasonable.\textsuperscript{216} Thus, an excellent criminal defense attorney who chooses to represent her child's IDEA claims would not likely be able to command the hourly rates that she would normally receive. Moreover, if an attorney acted in any unprofessional manner, the court is within its discretion to completely withhold attorney fees.\textsuperscript{217} Furthermore, attorney-parents may have a school district's fees shifted to them if they bring a suit that is frivolous, unreasonable, or without foundation.\textsuperscript{218} Therefore, permitting fee-recovery would encourage an attorney-parent to litigate in a professional and efficient manner and would simultaneously undermine the extension of Kay to relationships which are not pro se.\textsuperscript{219}

An attorney-parent is also encouraged to represent a child's claim effectively and efficiently because of the unavoidable opportunity costs involved in representing a child, rather than a client.\textsuperscript{220} Representation of an IDEA case will take an attorney-parent away from representing paying clients. An attorney-parent will have to reorganize professional endeavors to accommodate a child's litigation. Attorney-parents will, of course, want to zealously advocate for a child, but they will also have to contend with lost opportunity costs that may result from forgoing the advancement of current cases and from having to turn down potential clients.

Attorney-parents may also have to contend, like all parents looking to prosecute an IDEA violation, with the reality that there is a sig-

\textsuperscript{214} Id. § 1415(i)(3)(F)(ii).
\textsuperscript{215} Id. § 1415(i)(3)(F)(iii).
\textsuperscript{218} Id. § 1415(i)(3)(B)(i)(II)–(III).
\textsuperscript{219} See supra note 156 and accompanying text.
\textsuperscript{220} Matthew V. v. Dekalb County Sch. Sys., 244 F. Supp. 2d 1331, 1338 (N.D. Ga. 2003).
significant shortage of competent lawyers willing to litigate complex and costly IDEA claims. The petitioners in *Winkelman* discussed this shortage, noting that the "majority of lawyers in private practice in the United States work in law firms that represent institutions, not people." Additionally, amici in *Winkelman* presented statistics to illustrate the severity of the shortage: Maine has six special education attorneys, Alabama has five, Arizona has two known private attorneys who will accept referrals, and Alaska has only one private attorney accepting IDEA cases. In some instances an attorney-parent may search for a special education attorney to no avail.

If a parent is able to find an attorney in the jurisdiction, hiring an attorney may nevertheless be financially unobtainable, even for an attorney-parent. IDEA cases come at a high cost to litigate and often endure years of litigation. The total cost of litigating an IDEA claim may range from $10,000 to more than $100,000. These practical realities may leave an attorney-parent with only the option of representing his child.

Based on the Court's acknowledgment that parents and children retain independent and enforceable rights under IDEA, courts should recognize the relationship between an attorney-parent and a child as an agency relationship and, in turn, permit a prevailing attorney-parent to recover attorney fees. Attorney-parents have multiple incentives to litigate a child's claims efficiently and effectively. Conversely, as noted by the United States District Court for the District of Georgia, state rules of professional conduct may permit a child, an alternate parent, or school district to assert improper representation by an attorney. Therefore, outside checks exist to assure that a child is not harmed by inappropriate representation by an attorney-parent. Permitting prevailing attorney-parents the ability to recover attorney fees will help ensure that violations of IDEA are

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223 Special education lawyers generally charge between $150 and $450 an hour. Brief for Council of Parent Attorneys and Advocates, Inc., *supra* note 9, at 9 n.4.

224 *Id.*


226 *See supra* note 162 and accompanying text.
prosecuted and help assure that a child receives an appropriate education. 227

2. Attorney-Parents and Lay Parents Prosecuting Parental Rights Pro Se

The agency relationship cannot be recognized in the context where an attorney-parent or a lay parent prosecutes parental rights pro se. The Court in Kay explained that the term “attorney” in the fee-shifting provision in § 1988, which is almost identical to that in IDEA, “assumes an agency relationship, and it seems likely that Congress contemplated an attorney-client relationship as the predicate for an award under § 1988.” 228 An attorney-parent or a lay parent who prosecutes a parental right that is his or her own cannot form an agency relationship because there are not two individuals, as contemplated by an agency relationship. 229 Therefore, it is not likely that courts could use the agency theory to allow attorney-parents or lay parents prosecuting IDEA claims pro se to recover. However, this is not necessarily problematic for an attorney-parent because parents and children retain the same rights and remedies under IDEA. 230 Thus, the attorney-parent can choose to prosecute the claims of the child, instead of prosecuting parental rights pro se, in order to create the agency relationship necessary to permit the award of attorney fees. 231 However, lay parents will likely never be permitted to recover attorney fees because lay parents are precluded from prosecuting claims of a child, 232 which would prevent them from forming the agency relationship through which attorney fees may be awarded. 233

227 Cf. Doe v. Bd. of Educ. of Baltimore County, 165 F.3d 260, 264 (4th Cir. 1998) (noting IDEA’s attorney fee provisions “should be read to encourage parents to obtain independent legal services” because parents do not need statutory fees to encourage them to prosecute IDEA violations to ensure their children receive an adequate education).
229 See id. at 436 n.6.
230 Winkelman, 550 U.S. at 531.
231 However, attorney-parents should be cautious not to assert violations of personal parental rights at the same time. An attorney-parent would effectively be representing themselves pro se, while simultaneously representing the rights of the child. This could cause a court to question whether there was an actual agency relationship, in which the attorney-parent was vindicating the rights of the child. Additionally, it may undermine the ability of the child or another parent to sue the attorney-parent for malpractice, a safeguard upon which an agency relationship may be recognized to permit the recovery of attorney fees.
C. Ambiguity #3: Parents May Have Attorney Fees Shifted to Them
Under Both § 1415(i)(3)(B)(i)(II) and § 1415(i)(3)(B)(i)(III)

IDEA contains two attorney fee-shifting provisions that allow a school district or state educational agency to collect fees from a parent or the attorney of the parent.\(^{234}\) Parents and attorneys are held to different standards under these provisions.\(^ {235}\) Under § 1415(i)(3)(B)(i)(II), an attorney may be liable for the attorney fees of a school district or state educational agency if the attorney initiates a due process claim or subsequent action that is "frivolous, unreasonable, or without foundation" or if the attorney continues to litigate "after the litigation clearly became frivolous, unreasonable, or without foundation."\(^ {236}\) Comparatively, under § 1415(i)(3)(B)(i)(III), a parent or the attorney of a parent may be liable if a due process complaint or subsequent action "was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation."\(^ {237}\)  

Winkelman did not shed light on the capacity in which lay pro se parents or attorney-parents prosecute IDEA claims. The Court's omission creates ambiguity over whether lay parents and attorney-parents are "parents" or "attorneys" under IDEA's fee-shifting statutes.

While the statute expressly states that an attorney or a parent may be liable to an opposing party that can establish one of the elements in § 1415(i)(3)(B)(i)(III), it is unclear whether parents prosecuting IDEA claims fall under the scope of § 1415(i)(3)(B)(i)(II). Since § 1415(i)(3)(B)(i)(II) refers to "an attorney of a parent," attorney-parents likely fall within its scope, regardless of whether they are prosecuting an IDEA claim vindicating the rights of a child or personal parental rights. However, it is unclear whether a lay parent may be liable for a school district or state educational agency's attorney fees under § 1415(i)(3)(B)(i)(II).

The legislative history of §§ 1415(i)(3)(B)(i)(II)–(III) reveals that Congress fashioned the new attorney fee provisions\(^ {238}\) after the provision developed by the Supreme Court in Christiansburg Garment Ward County Sch. Bd., No. 06-61282-CIV-MOORE/GARBER, 2007 U.S. Dist. LEXIS 41925 (S.D. Fla. June 8, 2007).

\(^{234}\) Kay, 499 U.S. at 435–36.
\(^{236}\) See id.
\(^{237}\) Id. § 1415(i)(3)(B)(i)(II).
\(^{238}\) Id. § 1415(i)(3)(B)(i)(III).
Co. v. Equal Employment Opportunity Commission. In Christiansburg, the Court determined that defendants may recover attorney fees when the plaintiff’s case is “frivolous, unreasonable, or without foundation,” even if the plaintiff does not subjectively bring the claim in bad faith. Congress explained that the addition of the provisions was intended to deter the limited situations where a parent brought a frivolous suit, or continued to litigate after the case clearly became frivolous, or where a parent harassed a school district by filing a meritless complaint and subsequently dropped it. The standard that school districts or state educational agencies must establish is very strict and “it would still be to the advantage of school districts to settle all but the most egregious, frivolous complaints.” Nevertheless, Congress felt it was important to add the provision because defending frivolous suits “drains funds away from needed services for other disabled children.” Congress emphasized that a legitimate IDEA dispute would not fall within the scope of these new provisions, and would not trigger fee-shifting.

To trigger fee-shifting under § 1415(i)(3)(B)(i)(II), a school district or state educational agency must be deemed a prevailing party by the court. Additionally, the defendant must show that the underlying claim was “frivolous, unreasonable, or without foundation.” When considering the defendant’s motion for fees, the Christiansburg Court cautioned:

[I]t is important that a district court resist the understandable temptation to engage in post hoc reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation. This kind of hindsight logic could discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success . . . . Even when the law or the facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit.

240 Id. at 421.
242 Id. (statement of Sen. Grassley).
243 Id.
244 Id. at 5352 (statement of Sen. Enzi).
246 Id.
Moreover, § 1415(i)(3)(B)(i)(II) allows a court discretion in determining whether to award fees and discretion over the amount awarded to the school district.\textsuperscript{248}

Prior to \textit{Winkelman}, courts were reluctant to award fees under § 1415(i)(3)(B)(i)(II). A district court has only shifted fees against the attorney of a parent in one instance. In \textit{R.W. v. Georgia Department of Education}, an attorney for a parent filed an IDEA claim against the Georgia Board of Education, the Georgia Department of Education, and the Georgia State Superintendent, averring that they "aided and abetted denials of the due process rights of disabled children in certain administrative hearings held to enforce IDEA rights."\textsuperscript{249} However, precedent in the jurisdiction revealed two prior cases which explained that the named defendants in \textit{R.W.} were not proper parties to such a suit.\textsuperscript{250} More specifically, the prosecuting attorney in \textit{R.W.} had prosecuted those two cases and therefore "knew that no legal foundation existed" to include the defendants in the complaint.\textsuperscript{251} The court determined that a shift of attorney fees was appropriate "in light of clear existing precedent, the absence of any persuasive justification from Plaintiff's counsel, and the obvious knowledge on the part of Plaintiff's counsel that some of her claims would be subject to dismissal."\textsuperscript{252}

Although § 1415(i)(3)(B)(i)(II) expressly states that a school district or state educational agency may seek fees "against the attorney of a parent," it is likely that the scope of § 1415(i)(3)(B)(i)(II) will be judicially extended to parents prosecuting IDEA claims pro se. Courts have applied the standard developed in \textit{Christiansburg} to pro se litigants in § 1988 claims, § 1983 claims, and Title VII claims.\textsuperscript{253} Therefore, should a parent prosecuting an IDEA claim pro se file a claim that is frivolous, unreasonable, or without foundation, the parent may be held liable for the school district's or state educational agency's attorney fees. However, courts have noted that pro se plaintiffs should be afforded some leniency when determining whether attorney fees should be shifted to defendants.\textsuperscript{254} "The fact that a [pro se] plaintiff may ultimately lose his case is not in itself a sufficient jus-

\textsuperscript{250} \textit{Id.} at *2.
\textsuperscript{251} \textit{Id.} at *18-19.
\textsuperscript{252} \textit{Id.} at *19.
\textsuperscript{253} Hughes v. Rowe, 449 U.S. 5, 14-15 (1980).
\textsuperscript{254} \textit{Id.} at 15.
tification for the assessment of fees. Moreover, in the context of a Title VII claim, the Court has noted that “[t]o take the further step of assessing attorney’s fees against plaintiffs simply because they do not finally prevail would substantially add to the risks inhering in most litigation and would undercut the efforts of Congress to promote the vigorous enforcement of the provisions of Title VII.”

Similar to Title VII, IDEA relies on parents to utilize procedural safeguards in order to enforce the provisions of IDEA. Following precedent set by Title VII, in regard to attorney fee-shifting, courts would likely be cautious in applying § 1415(i)(3)(B)(i)(II) so as not to chill the enforcement of IDEA.

Courts should follow precedent in extending the Christiansburg standard to pro se parents prosecuting IDEA claims. Legislative history supports the notion that pro se parents are within the scope of § 1415(i)(3)(B)(i)(II). When Congress amended IDEA to add the fee-shifting provisions, multiple legislators noted that they supported adding the provisions to specifically target parents who bring frivolous or improper lawsuits. To illustrate the danger of frivolous lawsuits, Senator Judd Gregg discussed a school district that spent over $154,000 to defend itself against seven due process requests within two years from one parent. Another school district spent $195,000 litigating a parent’s fifteen due process and fair hearing requests over a six-year span. Requiring § 1415(i)(3)(B)(i)(II) to apply to pro se parents will help assure that federal IDEA funds go toward special education services and legitimate IDEA claims rather than frivolous or unreasonable claims.

VI. CONCLUSION

While the decision in Winkelman was arguably a victory for parents, it simultaneously created problematic ambiguities in key provisions of IDEA’s statutory text. Following the Court’s recognition of parental rights, the Court failed to discuss how the recognition would affect standing and the attorney fee-shifting provisions. That failure necessitates a cautious “wait and see” approach before calling Winkelman a major victory for parents.

255 Id. at 14.
256 Id. at 14–15.
259 Id.
260 Id. at 5350.
Courts should respond to the ambiguities in IDEA triggered by *Winkelman* by clarifying the scope of the decision’s effect on IDEA claims. Courts should clarify whether a parent may represent a child’s claim, whether an attorney-parent or lay parent who prevails is permitted to recover attorney fees, and to what standard attorney-parents and lay parents will be held when a prevailing school district seeks to recover attorney fees. How courts reconcile these ambiguities will ultimately determine whether *Winkelman* is a major victory for parents.

The first ambiguity should be resolved by substituting a child’s name on a complaint with only the parents’ names or by dismissing any claims asserted on behalf of a child and allowing parents the opportunity to amend the complaint. This course of action helps ensure that courts focus on the substance of the complaint, whether the child received a FAPE, rather than the name listed on the complaint. If courts take one of the two approaches, IDEA claims will be resolved faster. If a parent prevails, a child will receive faster access to the appropriate educational environment and will receive any compensatory education necessary. In this regard, *Winkelman* is beneficial for families seeking to prosecute an IDEA claim pro se because the family may assert that parental rights were violated in order to quickly litigate the substance of the dispute.

The second ambiguity should be resolved by permitting attorney-parents to recover attorney fees for prevailing in prosecuting the claims of a child. Under *Winkelman*’s holding parents now have independent and enforceable rights. Therefore, courts may recognize that attorney-parents are in an agency relationship with the child and, in turn, permit the recovery of fees to a prevailing attorney-parent. Unfortunately, the agency relationship cannot be extended to attorney-parents or lay parents prosecuting parental rights pro se because the relationship does not involve the representation of another individual, as contemplated by an agency relationship. Should courts interpret the ambiguity as argued, attorney-parents will have the opportunity to collect fees for a prevailing prosecution. This would remove cost barriers from an attorney-parent contemplating the prosecution of a child’s claim. Interpreting IDEA in that way would be a victory for parents, but would be limited in scope to only attorney-parents representing the claims of a child.

The third ambiguity should be resolved by availing both attorney-parents and lay-parents of both of the provisions in IDEA that allow a school district to recover attorney fees. The legislative history of the adoption of the provisions supports the extension of §
Parents and advocates may be upset with such an interpretation; however, the provisions serve as a check against frivolous, unreasonable, and unsupported claims. Such claims hurt all families with disabilities because school districts must use funds to defend their delivery of educational services that could have otherwise been used to deliver special education services.

Ensuring that IDEA is unambiguous and works effectively is of significant importance to the future of our nation. Young children, who receive appropriate services at a young age, require fewer special education services later in their education, are held back less frequently, and maintain higher test scores than children who do not receive the appropriate interventions and accommodations. Therefore, when children receive appropriate services early in their lives, as intended by IDEA, they will be able to contribute to our nation and will need less support and services from the government as adults. Courts must properly interpret IDEA’s provisions to ensure that children receive the services necessary for them to lead meaningful and productive lives.

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261 F.A. Campbell et al., Early Childhood Education: Young Adult Outcomes from the Abecedarian Project, in 6 APPLIED DEVELOPMENTAL SCI. 2, 42–57 (2002).