

# WINKELMAN: PRO SE PARENTS OF CHILDREN WITH DISABILITIES IN THE COURTS (OR NOT?)

SONJA KERR\*

## ABSTRACT

*In this Article, the Author examines the rights of parents to litigate pro se on behalf of their children under the Individuals with Disabilities Education Act (IDEA). The Author reviews Alaska and non-Alaska jurisprudence that predates the United States Supreme Court's decision in Winkelman v. Parma City School District. The Author then examines the Winkelman decision itself, as well as the impact of Winkelman on IDEA-related pro se litigation. The Author notes the difficulties that parents continue to face in IDEA-related litigation and concludes by proposing reforms designed to aid parents in protecting the interests of children with disabilities.*

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\* Sonja D. Kerr is a Senior Attorney with the Public Interest Law Center of Philadelphia. Ms. Kerr has represented children with disabilities in special education hearings since the late 1980s. Prior to joining the Law Center in March 2009, Ms. Kerr practiced for five years in Alaska, in both private practice and with firms, with her work resulting in many of the initial decisions on special education matters in Alaska. Ms. Kerr opened and operated the first special education law firm in Minnesota, representing children in that state and throughout the Midwest for fifteen years. Ms. Kerr holds a law degree from Indiana University and a Master's Degree in Psychology from Purdue University. She was the first chairperson of the Council of Parent Attorneys and Advocates and remains on the Council's board. Ms. Kerr is currently licensed in Alaska, Pennsylvania, and Indiana, and is admitted to the United States Supreme Court, the Seventh, Eighth, and Ninth Circuits, and various federal and state courts.

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## INTRODUCTION

Alaska has a long and proud history of pro se litigation.<sup>1</sup> Nevertheless, parents of children with disabilities have faced difficulties when attempting to represent themselves and their children in court proceedings seeking to protect the educational opportunities to which the children are entitled under the federal Individuals with Disabilities Education Act (IDEA).<sup>2</sup> In May 2007, the United States Supreme Court held, in *Winkelman ex rel. Winkelman v. Parma City School District*,<sup>3</sup> that parents of children with disabilities have the right to represent themselves in special education proceedings in federal courts.<sup>4</sup> The Court, however, reserved the question of whether parents could represent their children in the same proceedings, focusing instead on the parents' right to proceed pro se to protect their own rights arising under federal law.<sup>5</sup> This Article examines the impact of *Winkelman* in Alaska, where, prior to the Supreme Court's decision, at least two unrepresented parents were prohibited from representing their children in the federal courts.<sup>6</sup> The Article also examines the policy implications of permitting parents, some of whom may be disabled, to attempt to navigate through the muddy waters of state and federal courts without counsel. The Author hopes that this Article will foster a close examination of the *Winkelman* issue in Alaska and other states, especially given the dearth of special education attorneys throughout the United States.<sup>7</sup>

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1. See, e.g., *Breck v. Almer*, 745 P.2d 66, 75 (Alaska 1987).

2. 20 U.S.C. §§ 1400-1482 (2006).

3. 550 U.S. 516 (2007).

4. *Id.* at 535.

5. *Id.*

6. See *Anchorage Sch. Dist. v. W.O. ex rel. C.O.*, No. 3:06-cv-00233-TMB, slip op. at 3 (D. Alaska Apr. 10, 2007); *Hansen v. Anchorage Sch. Dist.*, No. A06-00069 CV (TMB), slip op. at 3 (D. Alaska Apr. 19, 2006).

7. The United States Department of Education, Office of Special Education, states that the IDEA serves approximately 6,800,000 children and youth with disabilities. See United States Department of Education, Office of Special Education, <http://www.ed.gov/about/offices/list/osers/osep/index.html> (last visited Dec. 1, 2009). There are two common resources for parents to find special education attorneys to assist them. The website of the Council of Parent Attorneys and Advocates (COPAA) lists attorneys. COPAA estimates that it has 486 active attorney members with a total of 1,113 combined active and lapsed

## I. THE IDEA

The Individuals with Disabilities Education Act is a federal law that funds state educational services for disabled children.<sup>8</sup> States that accept IDEA funding are obligated to identify students with disabilities and ensure that each eligible student receives a “free appropriate public education” (FAPE).<sup>9</sup> The primary vehicle for delivering a FAPE is the Individualized Education Program (IEP).<sup>10</sup> An IEP is a document that describes the student’s learning goals, as well as the services, strategies, modifications, and accommodations that will be used to reach those goals.<sup>11</sup> Under the IDEA, school districts must develop and implement IEPs meeting the unique educational needs of each eligible student.<sup>12</sup>

The IDEA strictly mandates parental involvement throughout the development and implementation of a student’s IEP.<sup>13</sup> This mandate is, in large part, a result of the IDEA’s history. The IDEA was born as a result of parental advocacy, particularly by those parents who, long before most states allowed it, demanded that children with disabilities be educated by public schools.<sup>14</sup>

Parents are critical members of the “IEP Team,” and the IDEA intends that parents and schools work together to ensure the adequacy of student services. Parents must, for example, be given written notice of any changes a school district proposes for their child’s education program.<sup>15</sup> When the parents and the school cannot agree on an IEP’s terms, the parents have a specific right to appeal the school’s proposed program through an administrative hearing, often referred to as a “due process” hearing.<sup>16</sup> Dissatisfied parents can request an impartial due process hearing to contest specific elements of an IEP, the denial of requested services, or any other objectionable aspects of a proposed

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attorney members. Email from Denise Marshall, Executive Director of COPAA, to Sonja Kerr (Sept. 21, 2009) (on file with author). Each state does have a federally mandated disability protection and advocacy office. *See* National Disability Rights Network, <http://www.napas.org>. Only some of the offices provide special education representation.

8. *See* 20 U.S.C. § 1400 (2006).

9. 20 U.S.C. § 1412 (2006).

10. 20 U.S.C. § 1414(d) (2006).

11. *Id.*

12. *Id.*

13. *Id.*

14. *See, e.g.,* Bd. of Educ. v. Rowley, 458 U.S. 176, 191-93 (1982); Mills v. Bd. of Educ., 348 F. Supp. 866, 868 (D.C. 1972); Pa. Ass’n for Retarded Children v. Commonwealth, 343 F. Supp. 279, 281-82 (E.D. Pa. 1972); Pa. Ass’n for Retarded Children v. Commonwealth, 334 F. Supp. 1257, 1259 (E.D. Pa. 1971).

15. 20 U.S.C. § 1415(b)(3) (2006).

16. 20 U.S.C. § 1415(f) (2006).

plan.<sup>17</sup> A hearing examiner is empowered to determine whether a proposed IEP satisfies the requirements of a FAPE, whether the changes requested by the parents will be granted, and whether specific relief, such as ordering private school placement, is appropriate.<sup>18</sup>

As the Alaska Supreme Court has pointed out, due process hearings are “formal adjudicatory proceedings in which parents and children have the rights to counsel, to present evidence, and to call, confront, and compel the attendance of witnesses.”<sup>19</sup> Due process hearings are required to be expedited: once a parent asks for a hearing, a hearing officer has forty-five days in which to issue a final, written decision.<sup>20</sup> Parents also have several other rights: the right to bring a child to proceedings concerning the child; the right to an open, public hearing; and the right to free copies of the decision and record.<sup>21</sup> Notably, parents typically bear the burden of proof in the administrative process, unless a school district, in the unusual instance, brings the hearing.<sup>22</sup> Additionally, the expenses of experts called by the parents are not recoverable as a litigation cost.<sup>23</sup>

In short, these “due process hearings” are essentially full-blown trials. By long-standing practice, parents can represent themselves in the due process stage in every state and are permitted to be accompanied by a lawyer or persons with special knowledge or training regarding children with disabilities, known as “lay advocates.”<sup>24</sup> These lay

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17. 20 U.S.C. § 1415(b)(6) (2006).

18. 20 U.S.C. § 1415(f)(3)(E) (2006).

19. *Bickford v. State*, 155 P.3d 302, 304 (Alaska 2007).

20. 20 U.S.C. § 1415(k)(4)(B) (2006); 34 C.F.R. § 300.515(a) (2007). *But see Anchorage Sch. Dist. v. D.K.*, 3:08-cv-00031 TMB, slip op. at 11 (D. Alaska Sept. 30, 2009) (holding that exceeding the forty-five day rule did not deprive the hearing officer of jurisdiction).

21. 34 C.F.R. § 300.512(c) (2007).

22. ALASKA ADMIN. CODE tit. 4, § 52.550(i)(11) (2009). Some states do place the burden of proof on the school district. Following the Supreme Court’s decision in *Schaeffer v. Murphy*, 546 U.S. 49 (2005), some states changed the burden of proof, placing it on parents; Alaska was one of those states.

23. *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 300 (2006).

24. 34 C.F.R. § 300.512 (2007). Alaska has had no ruling on the use of lay advocates as representatives at due process hearings, and there is no specific Alaskan statute or rule on the subject. New Jersey Administrative Code 1:6A-4.2 permits lay advocates to represent parents in due process hearings. States, however, have held that lay advocates may risk charges of unauthorized practice of law if they charge parents for their work in due process hearings. *See Arons v. New Jersey State Bd. of Educ.*, 842 F.2d 58 (3d Cir. 1987) (finding that charging parents for services constitutes unauthorized practice of law). In some states, the state provision permits representation without payment. *In re Arons*, 756 A.2d 867 (Del. 2000) (finding that Arons, a lay advocate, had engaged in the unauthorized practice of law).

advocates, however, must be very careful to avoid the unauthorized practice of law, as courts have previously held in some instances that parents seeking to use lay advocates were unable to represent themselves.<sup>25</sup>

Once administrative processes have been exhausted, a parent who remains dissatisfied has the right to file an appeal in federal district court or state court.<sup>26</sup> In Alaska state court, a party may have as little as thirty days to file an appeal.<sup>27</sup> The decisions of the trial court may be appealed to the Alaska Supreme Court or the Ninth Circuit Court of Appeals, depending upon whether the IDEA claim was brought in state or federal court.

## II. RULES REGARDING PRO SE PLAINTIFFS IN ALASKA

Parents of students with disabilities, including those who have represented themselves and their children in administrative forums, may encounter barriers to representation at the appellate stage. In light of these barriers, parents in Alaska should carefully consider which court system they should utilize.

In Alaska state court, plaintiffs who file without legal representation may be able to benefit from rules that are somewhat more relaxed than the rules governing parties with attorneys. The Alaska Supreme Court held, in *Breck v. Almer*,<sup>28</sup> that “[t]he pleadings of pro se litigants should be held to less stringent standards than those of lawyers.”<sup>29</sup> The court elaborated that judges have a duty to inform a pro se plaintiff of the “proper procedure for the action he or she is obviously attempting to accomplish.”<sup>30</sup> This holding has developed into a rule that bars Alaska state court judges from dismissing unrepresented plaintiffs’ cases on technicalities.<sup>31</sup> Instead, judges must ensure that unrepresented

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25. Delaware’s highest court, for example, held that a parent who sought to use a lay advocate was unable to represent herself. *In re Machette*, No. 239, 2004 WL 1535729, at \*2 (Del. June 17, 2004).

26. 34 C.F.R. § 300.516(a) (2007).

27. See ALASKA STAT. § 14.30.193(a) (2008); ALASKA STAT. § 44.62.560(a) (2008). The IDEA provides for ninety days to appeal, unless state law contains an explicit time limitation. 34 C.F.R. § 300.516(b) (2007). It is not clear if Alaska has an explicit time limitation, but if it does, the limit is thirty days from the date of decision. See ALASKA STAT. § 14.30.193(a) (2008); ALASKA STAT. § 44.62.560(a) (2008).

28. 745 P.2d 66 (Alaska 1987).

29. *Id.* at 75.

30. *Id.*

31. See *Gilbert v. Nina Plaza Condo Ass’n*, 64 P.3d 126, 129 (Alaska 2003) (“It is well settled that in cases involving a pro se litigant the superior court must relax procedural requirements to a reasonable extent.”).

plaintiffs are aware of the rules they need to follow and the procedures that are available to them. Under this holding, the Alaska Supreme Court has identified a variety of specific rules and procedures about which judges must inform pro se plaintiffs. For example, a judge must inform a plaintiff of his or her rights to file a reply to a defendant's answer and to defeat a defendant's summary judgment motion by filing opposing affidavits.<sup>32</sup> Additionally, pro se plaintiffs should be informed of the correct method for withdrawing admissions so that they do not lose on summary judgment based on those admissions.<sup>33</sup> Judges should also inform unrepresented plaintiffs of deficiencies in their appellate paperwork and provide them with opportunities to rectify the problems.<sup>34</sup> Further, the Alaska Supreme Court has held that adjudicative officers of administrative agencies generally have the same duties to pro se plaintiffs as state court judges.<sup>35</sup> In spite of these and other rulings, a judge's obligations to a pro se plaintiff are case-specific.<sup>36</sup>

While the line of cases flowing from *Breck* does demonstrate that pro se plaintiffs are afforded a degree of leniency in Alaska state courts, this leniency is not without limits. In *Bauman v. Division of Family and Youth Services*,<sup>37</sup> the Alaska Supreme Court explained that while *Breck* applied to unrepresented plaintiffs with defective motions, it did not extend to unrepresented plaintiffs who failed to submit any motions.<sup>38</sup> The court observed that the complicated nature of lawsuits is common knowledge and that pro se plaintiffs must demonstrate some effort to comply with procedural rules.<sup>39</sup> Those rules were adopted to provide fair and reasonable notice to all parties, and requiring judges to instruct pro se plaintiffs at every step of the litigation could compromise their neutrality.<sup>40</sup> Alaska courts tend to balance the competing concerns of *Breck* and *Bauman* when deciding whether a judge's treatment of a pro se plaintiff has been appropriate.<sup>41</sup>

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32. *Id.*

33. *Genaro v. Municipality of Anchorage*, 76 P.3d 844, 846–47 (Alaska 2003).

34. *Dougan v. Aurora Elec. Inc.*, 50 P.3d 789, 795 (Alaska 2002).

35. *Bohlmann v. Alaska Constr. & Eng'g*, 205 P.3d 316, 320 (Alaska 2009).

36. *See, e.g., Adkins v. Stansel*, 204 P.3d 1031, 1033 (Alaska 2009) (stating that judges should consider discernable pro se arguments if they are based on established law and if consideration will not prejudice the opposing party); *Hymes v. Deramus*, 119 P.3d 963, 966 (Alaska 2005) (trial judge has a duty to inform pro se litigant of proper procedure for whatever the litigant is trying to accomplish).

37. 768 P.2d 1097 (Alaska 1989).

38. *Id.* at 1099.

39. *Id.*

40. *Id.*

41. *See, e.g., Snyder v. Am. Legion Spenard Post No. 28*, 119 P.3d 996, 999–1000 (Alaska 2005); *Collins v. Arctic Builders*, 957 P.2d 980, 982 (Alaska 1998).

Alaska courts have self-help assistance in other areas. Although there is no direct self-help center for parents of children with disabilities, there are general family law resources. For example, the Alaska Supreme Court has a “Family Law Self-Help Center” that provides explanations, forms, and classes on representing both oneself and one’s children in family court proceedings.<sup>42</sup> The website includes the Self-Help Center’s toll-free number, which pro se litigants may call for advice on procedures.<sup>43</sup> It also includes explanations and examples of general motion practice,<sup>44</sup> trial preparation,<sup>45</sup> and finishing a trial.<sup>46</sup> This material can provide background information for a pro se parent attempting to appeal a special education matter. The Alaska courts also have a general website on pro se representation in appeals of civil matters.<sup>47</sup> The website includes explanations of timelines, procedures, and assistance available to those seeking to file or defend an appeal.<sup>48</sup>

In contrast, the federal district court in Alaska has generally been less responsive to pro se litigants. The court does have an assistance manual, “Representing Yourself in Alaska’s Federal Court,”<sup>49</sup> though individuals reading the manual are cautioned that the court staff cannot assist any litigant and that the “same rules of practice and procedure” apply as if the readers were represented by attorneys.<sup>50</sup>

### III. ALASKA’S PRE-WINKELMAN CASES

Prior to the *Winkelman* decision, parents in Alaska attempted to represent their children’s interests in both administrative and court proceedings, and at least one parent previously litigated matters up to

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42. Alaska Court System, Family Law Self-Help Center, <http://www.state.ak.us/courts/selfhelp.htm> (last visited Dec. 1, 2009).

43. *Id.*

44. Alaska Court System, Motion Practice—Requesting an Order From the Court, <http://courts.alaska.gov/motions.htm> (last visited Dec. 1, 2009).

45. Alaska Court System, Hearing and Trial Preparation, <http://courts.alaska.gov/shctrtrial.htm> (last visited Dec. 1, 2009).

46. Alaska Court System, Finishing the Case: Findings of Fact and Conclusions of Law and Decree and Judgment, <http://courts.alaska.gov/shcfinish.htm> (last visited Dec. 1, 2009).

47. Alaska Court System, Self-Help Services: Appeals, <http://www.courts.alaska.gov/shc/appeals/appeals.htm> (last visited Dec. 1, 2009).

48. Alaska Court System, Self-Help Services: Appeals—Forms and Instructions for Civil Appeals, <http://courts.alaska.gov/shc/appeals/appealsins.htm> (last visited Dec. 1, 2009).

49. U.S. DIST. COURT FOR THE DIST. OF ALASKA, REPRESENTING YOURSELF IN ALASKA’S FEDERAL COURT (THE PRO SE HANDBOOK) (2002), available at [http://www.akd.uscourts.gov/reference/pro\\_se/Pro\\_Se\\_Handbook.pdf](http://www.akd.uscourts.gov/reference/pro_se/Pro_Se_Handbook.pdf).

50. *Id.* at 3.

the Alaska Supreme Court.<sup>51</sup> It does not appear that the Department of Education or the Commissioner of Education in that case challenged her right to litigate on behalf of her child. However, in two cases in federal district court, the Anchorage School District did challenge the right of the parents to proceed on behalf of their children, and the school district was successful in both instances.

In *Anchorage School District v. W.O. ex rel. C.O.*,<sup>52</sup> a disabled student, proceeding through his mother, prevailed at the administrative hearing stage of the IEP process.<sup>53</sup> The school district appealed the outcome in federal court, naming the student as the defendant.<sup>54</sup> The judge held that the mother was not permitted to represent her son in the matter because she was not an attorney.<sup>55</sup> Recognizing that the mother had a potentially meritorious claim but could not afford to pay an attorney, the judge granted her motion for the appointment of volunteer counsel.<sup>56</sup> However, the judge cautioned that granting the motion did not guarantee that volunteer counsel would be found.<sup>57</sup> He acknowledged that in such a case, both the parents and the district would be in a catch-22.<sup>58</sup> The district had a right to appeal, yet it could not sue an unrepresented minor.<sup>59</sup> The child had a right to defend the outcome of the hearings, but he could not lawfully do so without a lawyer.<sup>60</sup> Ultimately, the issue in the case evaporated when the parents were assisted by Alaska Legal Services Corporation.<sup>61</sup> However, the *W.O.* ruling sends a signal to parents: if they are successful in the administrative forum, but unable to afford appellate counsel, they may be able to avoid additional litigation because the school district will be without recourse to proceed.

A similar case, *Hansen v. Anchorage School District*,<sup>62</sup> involved a father attempting to represent his disabled son in a civil complaint filed in the United States District Court for the District of Alaska.<sup>63</sup> The

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51. *Bickford v. State*, 155 P.3d 302, 303 (Alaska 2007).

52. No. 3:06-cv-00233-TMB, slip op. at 1 (D. Alaska Dec. 13, 2006).

53. *Id.* at \*2.

54. *Anchorage Sch. Dist. v. W.O. ex rel. C.O.*, No. 3:06-cv-00233-TMB, slip op. at 1 (D. Alaska Apr. 10, 2007).

55. *Id.* at 3.

56. *Id.*

57. *Id.* at 3 n.10.

58. *Anchorage Sch. Dist. v. W.O. ex rel. C.O.*, No. 3:06-cv-00233-TMB, slip op. at 3 (D. Alaska Dec. 13, 2006).

59. *Id.*

60. *Id.* at 1.

61. *Anchorage Sch. Dist. v. W.O. ex rel. C.O.*, No. 3:06-cv-00233-TMB, Doc. 8, Notice of Entry of Appearance (D. Alaska Apr. 24, 2007).

62. No. A06-00069 CV (TMB), slip op. at 1 (D. Alaska Apr. 19, 2006).

63. *Id.*

complaint stated that he wished to “appeal a special education matter.”<sup>64</sup> The father also requested a waiver of the filing fee.<sup>65</sup> In an order denying these requests, the judge stated that unless the father was himself an attorney, he could not represent his son in court.<sup>66</sup> This was because a litigant may act as his own counsel but may not represent another individual.<sup>67</sup> The judge recommended that the father contact the Alaska Bar Association’s Lawyer Referral Service for assistance in securing counsel.<sup>68</sup> In order to avoid dismissal, the father would have to file an amended complaint through an attorney and pay the filing fee.<sup>69</sup> The case was later dismissed when the father failed to do so by the given deadline.<sup>70</sup>

#### IV. NON-ALASKA PRE-WINKELMAN CASES

Prior to *Winkelman*, a body of case law had developed in courts outside of Alaska. In these cases, both district and circuit courts were deciding whether parents who had exhausted available administrative remedies were barred from proceeding on behalf of their children in federal court.

In *Cavanaugh ex rel. Cavanaugh v. Cardinal Local School District*,<sup>71</sup> the parents of a disabled child proceeded without counsel in federal court after exhausting all administrative remedies available to contest the IEP that the school district had proposed for their son.<sup>72</sup> The parents argued that the IDEA abrogated the common law prohibition on non-lawyer parents representing their children.<sup>73</sup> The court disagreed on the grounds that any statute, including the IDEA, must explicitly overturn background legal principles; it cannot do so by implication, as the parents had argued.<sup>74</sup> The *Cavanaugh* court also rejected the notion that parents had their own enforceable rights under the IDEA.<sup>75</sup> It held that substantive rights under the IDEA belong solely to students, and that parents have only a narrow band of procedural rights.<sup>76</sup> Thus, the

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64. *Id.*

65. *Id.*

66. *Id.* at 3.

67. *Id.* at 2.

68. *Id.* at 3.

69. *Id.* at 4.

70. *Hansen v. Anchorage Sch. Dist.*, No. 3:06-cv-00069-TMB, slip op. at 2 (D. Alaska May 24, 2006).

71. 409 F.3d 753 (6th Cir. 2005).

72. *Id.* at 755.

73. *Id.*

74. *Id.* at 756.

75. *Id.* at 757.

76. *Id.*

parents were required to furnish counsel for their child to avoid dismissal of the claim.<sup>77</sup>

The Eleventh Circuit previously reached the same result in *Devine v. Indian River County School Board*.<sup>78</sup> In that case, the district court denied a father's motion to remove counsel and personally represent his son in a lawsuit over a school's proposed IEP.<sup>79</sup> The circuit court affirmed the district court's decision, holding that parents do not have a right to represent their children in IDEA-related claims.<sup>80</sup> It acknowledged that the statute explicitly permits parents to do so during administrative appeals, but it found no evidence that Congress intended to extend that right to proceedings in district court.<sup>81</sup>

The Seventh Circuit reached a similar legal conclusion in *Mosely v. Board of Education*,<sup>82</sup> though the ultimate outcome of the proceedings was notably different. In *Mosely*, a mother, acting without legal representation, sued in federal court to challenge the treatment of her disabled son.<sup>83</sup> The district court judge dismissed the case for failure to exhaust the IDEA's administrative remedies.<sup>84</sup> On appeal, the Seventh Circuit addressed the mother's ability to represent her son in an IDEA action in federal court.<sup>85</sup> The court stated that "[t]he short answer . . . is that she cannot [represent her son], unless she hires counsel."<sup>86</sup> However, the court recognized that parents' rights under the IDEA give them certain procedural interests.<sup>87</sup> Based on these interests and the specific factual allegations in the case, the court held that the mother was suing for her own injuries.<sup>88</sup> The court remanded the case and explicitly authorized the mother to proceed pro se, though only on her own behalf.<sup>89</sup>

However, the First Circuit interpreted matters differently, finding that parents could proceed on behalf of their children. In *Maroni ex rel. Michael M. v. Pemi-Baker Regional School District*,<sup>90</sup> the parents of a disabled student were dissatisfied with the IEP proposed by the child's

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77. *Id.* at 757-58.

78. 121 F.3d 576 (11th Cir. 1997).

79. *Id.* at 577-78.

80. *Id.* at 581.

81. *Id.* at 582.

82. 434 F.3d 527 (7th Cir. 2003).

83. *Id.* at 529.

84. *Id.* at 531.

85. *Id.* at 532.

86. *Id.*

87. *Id.*

88. *Id.* at 529.

89. *Id.* at 535.

90. 346 F.3d 247 (1st Cir. 2003).

school.<sup>91</sup> After exhausting administrative remedies, the parents filed suit in federal district court.<sup>92</sup> The parents' income exceeded the limits for free legal assistance, and they stated that they could neither afford an attorney nor find one who would take the case on a contingency basis.<sup>93</sup> The United States District Court for the District of New Hampshire dismissed the lawsuit, ruling that the plaintiffs could not proceed on their child's behalf.<sup>94</sup> The First Circuit Court of Appeals reversed, holding that parents are "aggrieved parties" under the IDEA regardless of whether the underlying claim is procedural or substantive.<sup>95</sup> Based largely on the text of the IDEA, the court held that Congress intended for parents to be able to vindicate their children's rights under the Act.<sup>96</sup> Requiring parents to secure counsel when they are unable to do so would be inconsistent with this intent.<sup>97</sup>

### V. THE WINKELMAN DECISION

The Winkelmans were the parents of a child diagnosed with an autism spectrum disorder, a condition which qualified him for services under the IDEA.<sup>98</sup> The Winkelmans actively participated in the IEP process, but they felt that the final IEP proposed by the school district was inadequate for their son's educational needs.<sup>99</sup> At the parents' request, impartial due process hearings were held—first before a hearing officer, and then before a state-level review officer.<sup>100</sup> Both officers upheld the district's proposed IEP as providing an adequate FAPE for the Winkelmans' son.<sup>101</sup>

As permitted by the IDEA, the Winkelmans filed a complaint in the United States District Court for the Northern District of Ohio after exhausting their administrative remedies.<sup>102</sup> The complaint alleged that the proposed IEP illegally denied a suitable FAPE.<sup>103</sup> The Winkelmans were not represented by counsel in their suit.<sup>104</sup> The district court granted summary judgment to the school district on the merits; the

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91. *Id.* at 248.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* at 250-51.

96. *Id.*

97. *Id.* at 257-58.

98. *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 519 (2007).

99. *Id.* at 519-20.

100. *Id.* at 520.

101. *Id.*

102. *Id.* at 520-21.

103. *Id.* at 521.

104. *Id.*

parents, again proceeding on behalf of their son, appealed to the Sixth Circuit Court of Appeals.<sup>105</sup> Without reaching the merits of the case, the Sixth Circuit entered an order to dismiss the claim unless the Winkelmans secured counsel for their son.<sup>106</sup> The court reasoned that since the right to a FAPE belonged to the student and not to his parents, the parents were not actually parties to the case, but had instead brought the claim on behalf of their son.<sup>107</sup> By a longstanding common law rule, non-lawyer parents were prohibited from representing minor children, so the parents could not proceed per se.<sup>108</sup>

The Sixth Circuit's order was appealed to the United States Supreme Court, which granted certiorari on the narrow issue of whether parents may proceed pro se on IDEA claims in federal court.<sup>109</sup> The Supreme Court reversed the Sixth Circuit, holding that parents are "entitled to prosecute IDEA claims on their own behalf."<sup>110</sup> The Court concluded that the IDEA bestows enforceable rights on parents, independent of the rights bestowed on disabled students.<sup>111</sup> It pointed out that a comprehensive reading of the IDEA reveals that parental rights are embedded throughout the IEP process, both as a safeguard for students' rights and in recognition of parents' fundamental interests in their children's educations.<sup>112</sup> Among the rights afforded to parents are automatic membership on the IEP team, administrative remedies when they disagree with the outcome of the IEP process, and the right to reimbursement for various expenses.<sup>113</sup> Although some circuits have held that parents have only procedural rights and thus cannot proceed pro se on substantive claims, the Supreme Court found that this position led to incongruous results.<sup>114</sup> It would permit some parents to vindicate their children's rights in federal court, while others would be required to retain counsel.<sup>115</sup>

It should be noted that the Court did not overturn the common law principle that non-lawyer parents may not represent minor children, even in the context of IDEA cases. While this issue was raised in *Winkelman*, the Court did not reach it.<sup>116</sup> Instead, it found that non-

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105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* at 522.

109. *Id.*

110. *Id.* at 535.

111. *Id.*

112. *Id.* at 528-31.

113. *Id.* at 530-31.

114. *Id.* at 531.

115. *See id.* at 532-33.

116. *Id.* at 535.

lawyer parents have their own claims under the IDEA and may bring those claims pro se.<sup>117</sup> The result is that parents' personal claims relating to their children's eligibility for services under the IDEA will not be dismissed because the children are not represented by counsel. The IDEA bestows independent rights upon parents of disabled children, allowing the parents to bring claims on a pro se basis.<sup>118</sup>

In *Winkelman*, the Supreme Court recognized that parental involvement is a strong principle underlying the IDEA, as Congress believed that parental involvement would enhance educational prospects for disabled children.<sup>119</sup> The IDEA is more effective if parents have a meaningful opportunity to advocate for their children at every stage of the process, including through pro se complaints in federal court.<sup>120</sup> However, while hailed as a victory for parents to proceed pro se, it is not entirely clear whether the Court has limited that representation to the parents or whether the parent is also permitted to represent the child. The Court concluded that because the IDEA does not differentiate between the rights accorded to children and those accorded to parents, a parent may be an aggrieved party for purposes of the IDEA with regard to any matter implicating those rights.<sup>121</sup> At the same time, it appears that the Court may have restricted parents' rights to advocating solely on their own behalf, and not on behalf of their children.

## VI. THE IMPACT OF WINKELMAN

Because of the Supreme Court's ruling in *Winkelman*, parents of children with disabilities can now represent themselves in federal and state courts. This result is coherent and consistent with the significant role that the IDEA has always afforded to parents of children with disabilities. The first case examining the IDEA, *Board of Education v. Rowley*,<sup>122</sup> explained that: "[a]s this very case demonstrates, parents and guardians will not lack ardor in seeking to ensure that handicapped children receive all of the benefits to which they are entitled by the Act."<sup>123</sup> While the courts have continued to weigh in on the interpretation of *Winkelman*, parents have maintained their fight to represent not only themselves, but also their children.

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117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* at 531.

122. 458 U.S. 178 (1978).

123. *Id.* at 209.

The Third Circuit Court of Appeals has twice ruled on the issue of parental representation after *Winkelman*. In *Muse B. ex rel. Hanna B. v. Upper Darby School District*,<sup>124</sup> the court interpreted *Winkelman* as allowing parents to represent themselves pro se because under the IDEA, parents' substantive rights are not limited to procedural and reimbursement-related matters.<sup>125</sup> The Third Circuit reasoned that parents have the right to prosecute actions on their own behalf, and thus an appeal filed by parents in an IDEA case should not be dismissed for lack of counsel.<sup>126</sup> According to the Third Circuit, "the Supreme Court reasoned that the IDEA requires school districts to develop an IEP for each child with a disability, with parents playing a significant role in this process."<sup>127</sup> Further, since "parents enjoy enforceable rights at the administrative stage . . . it would be inconsistent with the statutory scheme to bar them from continuing to assert those rights in federal court."<sup>128</sup> The Third Circuit went on to state that the Supreme Court has expressly reserved the question of whether the IDEA entitles parents to litigate their children's claims without the assistance of counsel.<sup>129</sup> Accordingly, it held that, under *Winkelman*, parents may litigate pro se in federal court with regard to their IDEA rights to challenge the substantive adequacy of their children's FAPEs.<sup>130</sup>

In *Woodruff v. Hamilton Township Public Schools*,<sup>131</sup> the Third Circuit further clarified that parents cannot represent their children in every issue being litigated, even if one of the claims is under the IDEA.<sup>132</sup> The parents in *Woodruff* filed pro se claims in federal district court on behalf of themselves and their child.<sup>133</sup> The Woodruffs brought claims for violations of the IDEA, as well as various state law, due process, and common law claims.<sup>134</sup> The district court concluded that *Winkelman* does not grant parents the right to litigate non-IDEA claims on their children's behalf.<sup>135</sup> After the Woodruffs filed an amended complaint purportedly containing only their own claims, the district court dismissed the alleged injuries as insufficiently personal.<sup>136</sup> On appeal,

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124. 282 Fed. App'x 986 (3d Cir. 2008).

125. *Id.* at 990.

126. *Id.*

127. *Id.* (citing *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 524 (2007)).

128. *Id.* (quoting *Winkelman*, 550 U.S. at 526) (internal quotation marks omitted).

129. *Id.*

130. *Id.*

131. 305 Fed. App'x 833 (3d Cir. 2009).

132. *Id.* at 836.

133. *Id.* at 835.

134. *Id.*

135. *Id.* at 835-36.

136. *Id.* at 836.

the Third Circuit affirmed the district court, concluding that “*Winkelman* does not translate into a broad right to pursue any statutory or common law claims on a child’s behalf. With the exception of an IDEA action on their own behalf, the Woodruffs may not represent [their child] in the federal courts in this circuit.”<sup>137</sup>

Similarly, in *J.R. v. Sylvan Union School District*,<sup>138</sup> the United States District Court for the Eastern District of California concluded that *Winkelman* limits parents’ pro se representation to representing only themselves.<sup>139</sup> The court drew a careful distinction, noting that *Winkelman* enables plaintiff parents “to pursue their IDEA claims without counsel,” but does not recognize a right to pursue non-IDEA claims on behalf of their children.<sup>140</sup> The court cited the general rule that “a parent or guardian cannot bring an action on behalf of a minor child without retaining a lawyer.”<sup>141</sup> According to *J.R.*, only where the rights of the child and parents are coterminous can the parents pursue, on their own behalf, the claims they share with their child.<sup>142</sup>

Parents of children with disabilities clearly have the “right” to represent themselves pro se in the courts. Yet, it appears unlikely at this juncture that courts will allow them to represent their children in matters relating to the children’s substantive rights. As a policy matter, without the right to represent their children in regard to substantive rights, parents may not have the ability or resources to protect those rights. As a result, the children’s underlying claims may be permanently lost.

## VII. THE FUTURE OF IDEA LITIGATION

Federal and state courts can be a labyrinth of confusing procedures and practices. Even experienced attorneys can make errors that have critical implications for cases. How, then, are parents supposed to navigate these systems? Parents are unlikely to simply retreat or give up on advocating for their children, and they will continue to make efforts to represent themselves and their children in seeking to obtain the

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137. *Id.* (citing *Osei-Afriyie ex rel. Osei-Afriyie v. Med. Coll. of Pa.*, 937 F.2d 876, 882 (3d Cir. 1991)).

138. No. CIV S-06-2136 LKK GGH PS, 2008 U.S. Dist. LEXIS 18168 (E.D. Cal. Mar. 10, 2008).

139. *Id.* at \*4.

140. *Id.*

141. *Id.* (quoting *Johns v. County of San Diego*, 114 F.3d 874, 877 (9th Cir. 1997)) (internal quotation marks omitted). In *Johns*, the Ninth Circuit wrote that where minors “have claims that require adjudication, they are entitled to trained legal assistance so their rights may be fully protected.” *Johns*, 114 F.3d at 877.

142. *J.R.*, 2008 U.S. Dist. LEXIS 18168, at \*4.

education to which their children are lawfully entitled. As explained by the Department of Justice's amicus brief in the *Winkelman* case, the rights of parents and the rights of children under the IDEA are intermixed and interrelated; separation of these rights is difficult due to the interlocking nature of the rights conferred by the IDEA.<sup>143</sup> Courts in each state need to reexamine their own procedures and the processes in light of *Winkelman*.

We know that many states, including Alaska, have developed "self-help" programs and assistance in other types of law (for example, family law). Alaska has a well-developed "self-help" program that guides individuals through divorce and custody processes. The same type of assistance should be made available to parents who wish to represent themselves and their children with disabilities, whether in special education hearings, federal court, or state court. Without such a process, parents will likely stumble and their children's rights will be left unprotected.

Alaska has approximately 19,000 of this country's 6,800,000 children with disabilities.<sup>144</sup> There are simply not enough lawyers to assist even the small percentage of parents who need representation in order to fully protect their own rights and their children's rights under the *Winkelman* standard. This problem is not unique to Alaska, but is evident throughout the United States, where fewer than five hundred lawyers practice exclusively in the area of special education law.<sup>145</sup>

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143. See, e.g., Brief of the Equal Justice Foundation et al. as Amici Curiae Supporting Petitioners, *Winkelman ex rel. Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516 (2006), 2006 WL 3735956; Brief of Council of Parent Attorneys and Advocates Inc. et al. as Amici Curiae Supporting Petitioners, *Winkelman ex rel. Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516 (2006), 2006 WL 3740368; Brief for the United States as Amicus Curiae, Supporting Petitioners, *Winkelman ex rel. Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516 (2006), 2006 WL 3740370 at \*6-7, nn.2-3.

144. DEP'T OF EDUC. AND EARLY DEV., STATE OF ALASKA, REPORT CARD TO THE PUBLIC 2 (2008), available at <http://www.eed.state.ak.us/reportcard/2007-2008/reportcard2007-08.pdf>. This report reflects an average daily membership of 128,975 students with 14.8% in special education, which is approximately 19,088. *Id.*

145. The Author was the only full-time private attorney specializing in special education in Alaska. According to the listings on the website of the Council of Parent Attorneys and Advocates, <http://www.copaa.net>, this is not a unique phenomenon. COPAA's membership is about 1200, including approximately 500 attorneys, with the remainder being parents and lay advocates. Each state does have a federally mandated disability protection and advocacy office. National Disability Rights Network, History, <http://www.napas.org/aboutus/history.htm> (last visited Dec. 1, 2009). However, only some of these offices provide special education services.

With the *Winkelman* decision, it is critical that states, including Alaska, develop ways to help parents navigate administrative and court systems. Each state is responsible for creating ways to train parents and provide them with information about their rights and how to protect those rights. Yet only a few states have begun the process of developing manuals or training materials for parents who want to represent themselves. Pennsylvania, for example, is in the process of developing a special education hearing manual for parents who wish to represent themselves, but even this manual is primarily limited to the proceedings on the administrative level.<sup>146</sup>

The IDEA's administrative proceedings, as well as the court appeals based on those proceedings, were originally designed to be parent-friendly. They were also designed to allow parents to speak on behalf of themselves and their children. However, the appeals from those proceedings have become procedurally and substantively complicated. Courts, legislatures, the Federal Office of Special Education Programs, and the United States Congress should examine this problem by convening a national taskforce on the issue. The taskforce would examine: (1) the resources parents need to represent themselves and their children adequately in due process hearings and in the courts; (2) the availability of a process whereby, similar to juvenile court, children with disabilities will have "educational" public defenders to fight for their rights free of charge; and (3) the repercussions if children with disabilities are left without recourse if their parents cannot afford an attorney, as well as how a child's claims will be lost at the appellate stage if parents cannot afford counsel and the child's claims are found to be separate from, and not coterminous with, the parents' claims.

## CONCLUSION

Following the Supreme Court's ruling in *Winkelman*, states may see an increase in pro se representation by parents, both in federal court and in due process hearings. Yet, those same parents may not be able to represent their own children in federal district court if an appeal is taken by either side, leaving the child without recourse and both parties without a fair resolution.

The purpose of the IDEA will be best served if this problem is addressed directly as a policy matter, rather than leaving parents of

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146. OFFICE FOR DISPUTE RESOLUTION, PENNSYLVANIA SPECIAL EDUCATION DISPUTE RESOLUTION MANUAL (2009), available at [http://odr.pattan.net/files/ODR/SEDR\\_Man.pdf](http://odr.pattan.net/files/ODR/SEDR_Man.pdf); cf. U.S. DIST. COURT FOR THE W. DIST. OF PA., PRO SE PACKAGE: A SIMPLE GUIDE TO FILING A CIVIL ACTION (2006), available at <http://www.pawd.uscourts.gov/Documents/Forms/PROSEman.pdf>.

these 6,800,000 children with disabilities to scramble and scratch their way through the labyrinth of various legal systems. No one wins if one party is not adequately represented, particularly where the educational needs of a child are at stake. A national taskforce must be convened to examine the problem caused by the lack of representation for the very children that the IDEA is designed to serve. If a child's parents cannot represent them, parents and schools need to know who will. The taskforce must ultimately decide whether to amend the statute to permit parents to represent their children as well as themselves, or to provide specific funding to ensure that parents and children are sufficiently represented by lawyers or lay advocates at all levels of litigation.