tle VII.[91] The Court has essentially imported wholesale an analysis of statutes of limitations better suited to classic suits between similarly situated private parties than to claims involving large power differences between the plaintiff and defendant[92] and implicating an "integrated, multistep enforcement procedure."[93] Moreover, the Court has done this in applying a broad, remedial statute aimed squarely at the type of behavior in which Goodyear engaged.[94]

Ledbetter is not irreversible. In the wake of the decision, congressional leaders moved to supersede the Court's unduly restrictive reading by enacting a legislative fix, similar to the 1991 amendments to the Act.[95] But such a fix may not counter the message that the Court has sent, and a future Court may read it as narrowly as *Ledbetter* read the 1991 Act. The central question in this case remains open: if five of the most intelligent, most accomplished jurists can seemingly turn a deaf ear to a policy that Congress has repeatedly stressed, what hope is there that thousands of employers nationwide will not do the same?

D. Individuals with Disabilities Education Act

Parental Rights. — School districts and parents have been battling over enforcement of the Individuals with Disabilities Education Act[1] (IDEA) since its passage in 1975. In 2005, the Supreme Court handed a victory to school districts by placing the burden of persuasion on the student in IDEA administrative hearings.[2] Circuit courts have also sided with schools on another important issue: whether money damages are available under the IDEA.[3] Last Term, after this string of IDEA decisions in favor of school districts, the Court in *Winkelman v. Parma City School District*[4] held that parents are entitled to pursue IDEA claims pro se.[5] When examined alongside other judicially created IDEA enforcement schemes, *Winkelman* arrives at the proper

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91 One can speculate that the Court might employ a similar approach in cases brought, for example, by consumers against corporations.

92 Title VII plaintiffs are often reluctant to challenge supervisors in the first place. *Cf.* Anne Lawton, *The Bad Apple Theory in Sexual Harassment Law*, 13 GEO. MASON L. REV. 817, 847 (2005) (noting that most sexual harassment victims do not report the conduct).

93 *Ledbetter*, 127 S. Ct. at 2170 (quoting Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 359 (1977)) (internal quotation marks omitted).

94 *See, e.g.*, Brief for the Plaintiff-Appellee, *supra* note 15, at 18 (noting that Goodyear's plant manager had previously asked Ledbetter's supervisor, "When are you going to get rid of the drunk and the damn woman?").

95 *See* Press Release, House Speaker Nancy Pelosi, Pelosi Statement on Passage of Ledbetter Fair Pay Act (July 31, 2007), http://www.speaker.gov/newsroom/pressreleases?id=0268.

1 20 U.S.C. §§ 1400–1482 (2000 & Supp. IV 2004).

2 *See* Schaffer v. Weast, 126 S. Ct. 528 (2005).

3 *See infra* note 55.

4 127 S. Ct. 1994 (2007).

5 *See id.* at 2006.

balance between the educational benefits guaranteed by the IDEA and the costs for school districts to provide them.

In 2003, Jacob Winkelman was a six-year-old autistic student in Ohio's Parma City School District.[6] As a child with a disability under the IDEA, he was guaranteed a "free appropriate public education."[7] Jacob's parents worked with the school district and attempted to craft an "individualized education program" (IEP) for Jacob.[8] However, when Jacob's parents wanted to send Jacob to a private school that specialized in teaching children with autism, the school district refused to pay.[9] The Winkelmans sought an administrative hearing, as provided for by the IDEA.[10] Unconvinced by testimony from a medical expert that Jacob required one-on-one interaction, the hearing officer rejected the Winkelmans' challenge to the proposed IEP.[11]

The Winkelmans then filed a pro se complaint in federal district court.[12] By this time, the Winkelmans had placed Jacob in the private school at their own expense, and they asked the court to reverse the administrative decision and award reimbursement for the private school expenditures.[13] Noting that the burden of proof lay with the parents[14] and finding no reversible error by the hearing officer,[15] the court granted the school district's motion for judgment on the pleadings.[16]

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[6] *Id.* at 1998.

[7] 20 U.S.C. § 1400(d)(1)(A) (2000 & Supp. IV 2004). Autism is one of several disabilities enumerated in the IDEA. *See id.* § 1401(3)(A)(i).

[8] *See Winkelman*, 127 S. Ct. at 1998. The IDEA requires school districts to develop an IEP for every disabled child. *See id.* §§ 1412(a)(4), 1414(d). Parents may serve as members of the IEP team. *See* 20 U.S.C. § 1414(d)(1)(B)(i). The IEP team must consider parents' concerns for "enhancing the education of their child," but it does not need to meet the parents' demands. *See id.* § 1414(d)(3)(A)(i).

[9] *Winkelman*, 127 S. Ct. at 1998–99. If a student is placed in a private school in order to receive a free appropriate public education (FAPE), the public school must pay the full tuition at no expense to the parents. *See* 20 U.S.C. § 1412(a)(10)(B). Although the school district's proposed IEP offered to place Jacob in a small-group setting in a public school with teachers trained in educating autistic children, the Winkelmans complained that this arrangement was inadequate because it "did not include music therapy, did not contain a sufficient amount of speech therapy nor one-on-one interaction, and did not contain any specific plan to implement the need for occupational therapy." Winkelman v. Parma City Sch. Dist., 411 F. Supp. 2d 722, 725 (N.D. Ohio 2005).

[10] *See Winkelman*, 127 S. Ct. at 1998. IDEA allows parents to file administrative due process complaints. *See* 20 U.S.C. § 1415(b)(6), (8).

[11] *See Winkelman*, 411 F. Supp. 2d at 725–26.

[12] *Id.* at 726.

[13] *See id.* at 725–26. After enrolling Jacob in the private school for a year, the Winkelmans were unable to afford the expense of continuing his education there. They did not enroll Jacob in any school for the next year, although Jacob participated in an outreach program run by the private school for one to two hours per week. *Id.*

[14] *Id.* at 726.

[15] *Id.* at 727.

[16] *Id.* at 727, 734.

Jacob's parents, again without counsel, appealed to the Sixth Circuit.[17] In a short per curiam opinion, the court entered an order dismissing the appeal within 30 days if the Winkelmans did not retain counsel.[18] The court relied on its decision in *Cavanaugh v. Cardinal Local School District*,[19] which held that the right to a free appropriate education "belongs to the child alone" and not the parents, thus requiring a lawyer to represent the child's rights in federal court.[20] The *Cavanaugh* court noted that this interpretation brought the Sixth Circuit into conflict with the First Circuit,[21] which had construed the IDEA under a theory of "statutory joint rights" that gave parents the right to assert IDEA claims on their own behalf in federal court.[22]

The Supreme Court granted certiorari to resolve the circuit split, reversed the Sixth Circuit, and remanded.[23] Writing for the Court, Justice Kennedy[24] adduced that because the IDEA gives parents enforceable rights in administrative hearings,[25] it would be inconsistent to then deny them those rights in federal court.[26] "Put another way," the Court stated, "the Act does not *sub silentio* or by implication bar parents from seeking to vindicate the rights accorded to them once the time comes to file a civil action."[27]

The Court first examined the statutory text. The IDEA seeks to "ensure that the rights of children with disabilities and parents of such children are protected."[28] The "rights" referred to in the text must apply to parents, too, the Court held, because "otherwise the grammatical structure would make no sense."[29] Moreover, this concept of parental rights fit with Supreme Court precedent. As the majority wrote, "[i]t is not a novel proposition to say that parents have a recognized legal interest in the education and upbringing of their child."[30]

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17 Winkelman v. Parma City Sch. Dist., 150 F. App'x 406 (6th Cir. 2005).

18 *Id.* at 407.

19 409 F.3d 753 (6th Cir. 2005).

20 *Winkelman*, 150 F. App'x at 406–07 (citing *Cavanaugh*, 409 F.3d at 757).

21 *Id.* at 407.

22 Maroni v. Pemi-Baker Reg'l Sch. Dist., 346 F.3d 247, 249, 250 (1st Cir. 2003).

23 *Winkelman*, 127 S. Ct. at 2006.

24 Justice Kennedy was joined by Chief Justice Roberts and Justices Stevens, Souter, Ginsburg, Breyer, and Alito.

25 *See Winkelman*, 127 S. Ct. at 2002 (citing 20 U.S.C. § 1415(b)(8), (c)(2), (e)(2)(A)(ii), (f)(3)(C), (i)(3)(B)(i) (2000 & Supp. IV 2004)).

26 *See id.*

27 *Id.*

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

29 *Id.* To confirm this view, the Court outlined other provisions that it said presume that "parents have rights of their own." *See id.* at 2002–03.

30 *Id.* at 2003 (citing Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925)).

The only rights that the IDEA expressly assigns directly to parents are some procedural and cost recovery rights.[31] However, the overall statutory structure "creates in parents an independent stake not only in the procedures and costs implicated by this process but also in the substantive decisions to be made."[32] For example, the majority observed that parents may serve on the IEP team and help determine their child's free appropriate public education — the statute's "central entitlement."[33] As result, a parent is a "party aggrieved"[34] when a school district does not provide a free appropriate public education, and the parent may bring suit on his or her own behalf.[35] This right extends beyond procedural and cost recovery rights.[36] To hold otherwise would be unjust, Justice Kennedy declared, because the statute does not indicate that only "some parents" can enforce it.[37]

Switching from the text to policy, the majority deemed it would be misguided to hold — as the dissent would have held[38] — that parents have procedural and cost recovery rights but not other IDEA substantive rights.[39] This, the Court said, "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."[40] Lastly, the Court rejected the school district's argument that a Spending Clause[41] violation would follow if states had to defend against parents' pro se suits "unconstrained by attorneys trained in the law and the rules of ethics."[42]

Justice Scalia concurred in the judgment in part and dissented in part.[43] He would have held that parents may proceed pro se under the IDEA "when they seek reimbursement for private school expenses or redress for violations of their own procedural rights, but not when they seek a judicial determination that their child's free appropriate public

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31 The IDEA grants parents the right to reimbursement for private school expenditures "if the court or hearing officer finds that the [school district] had not made a free appropriate public education available to the child." 20 U.S.C. § 1412(a)(10)(C)(ii). Moreover, the IDEA allows courts to award successful parents attorneys' fees. *See id.* § 1415(i)(3). The IDEA also provides parents with a slew of procedural protections. *See, e.g.*, *id.* § 1415(b)(6), (8).

32 *Winkelman*, 127 S. Ct. at 2004.

33 *See id.* (citing 20 U.S.C. § 1414(i)(3)(B)(i)).

34 *Id.* The IDEA provides that "[a]ny party aggrieved by the findings and decision [of an administrative hearing officer] shall have the right to bring a civil action with respect to the [administrative] complaint." 20 U.S.C. § 1415(i)(2)(A).

35 *See Winkelman*, 127 S. Ct. at 2004.

36 *See id.* at 2004–05.

37 *Id.* at 2005.

38 *See id.* at 2007 (Scalia, J., concurring in the judgment in part and dissenting in part).

39 *See id.* at 2005 (majority opinion).

40 *Id.*

41 U.S. CONST. art. 1, § 8, cl. 1.

42 *Winkelman*, 127 S. Ct. at 2006.

43 Justice Scalia was joined by Justice Thomas.

education . . . is substantively inadequate."[44] Justice Scalia stressed that according to the text only a "party aggrieved" — meaning a party entitled to a remedy — has IDEA-based rights in federal court.[45] Because the IDEA expressly grants parents only some reimbursement and procedural rights, Justice Scalia argued that parents are simply not aggrieved when a hearing officer rules against them on other substantive matters.[46] Justice Scalia also protested that the majority's decision was bad policy because pro se litigation would unduly burden school districts.[47] He stated that "[s]ince *pro se* complaints are prosecuted essentially for free, without screening by knowledgeable attorneys, they are much more likely to be unmeritorious."[48] Moreover, he continued, such cases are "much more difficult and time-consuming."[49]

Justice Scalia was right to pay attention to costs. IDEA outlays increasingly burden school districts during a time when the special education population has grown and corresponding federal funds have declined.[50] Any court ruling likely to spur additional IDEA-mandated spending will exacerbate the funding problem.[51] However, courts should balance these costs with the benefits of deterring IDEA violations and delivering a free appropriate public education to more students who are entitled to one. In the past several years, the Supreme Court and the inferior federal courts have favored the cost-reduction side of the equation. Individually, these pro–school district decisions were correct from a policy perspective. However, the overall result was an IDEA enforcement scheme with several gaps that worked against parents and their children. With *Winkelman* now on the

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[44] *Winkelman*, 127 S. Ct. at 2007 (Scalia, J., concurring in the judgment in part and dissenting in part).

[45] *See id.* (quoting 20 U.S.C. § 1415(i)(2)(A) (2000 & Supp. IV 2004)). For a definition of "party aggrieved," Justice Scalia turned to Black's Law Dictionary. *Id.* The dictionary provides the following definition: "A party entitled to a remedy; esp., a party whose personal, pecuniary, or property rights have been adversely affected by another person's actions or by a court's decree or judgment." BLACK'S LAW DICTIONARY 1154 (8th ed. 2004).

[46] *Winkelman*, 127 S. Ct. at 2007–08 (Scalia, J., concurring in the judgment in part and dissenting in part).

[47] *See id.* at 2011.

[48] *Id.*

[49] *Id.*

[50] *See* Ashley Oliver, Survey, *Should Special Education Have a Price Tag? A New Reasonableness Standard for Cost*, 83 DENV. U. L. REV. 763, 780–81 (2006). Oliver shows that a dramatic increase in state and local special education spending over the past few years is "more likely due to increased enrollment of special education students and a decrease in federal funding, rather than a function of an actual increase in per pupil special education expenditures." *Id.*

[51] According to one comprehensive, albeit somewhat dated, study, average annual special education expenditures per pupil are over $12,000, almost double the expenditures per pupil in the general education population. *See* JAY G. CHAMBERS ET. AL., CTR. FOR SPECIAL EDUC. FIN., TOTAL EXPENDITURES FOR STUDENTS WITH DISABILITIES, 1999–2000, REPORT 5 at 15 (2003), http://www.csef-air.org/publications/seep/national/Final_SEEP_Report_5.pdf.

books, the judiciary has created a proper balance for IDEA-based policies to shield school districts from excessive special education spending and yet still encourage parents to pursue enforcement of IDEA rights.[52]

There are three points on the IDEA dispute timeline where courts have recently ruled on the statute's enforcement mechanisms: (i) during the administrative hearing, (ii) after the hearing and during preparations to file in federal court, and (iii) at the damages stage. Two years ago, in *Schaffer v. Weast*,[53] the Supreme Court, looking at point (i), held that parents have the burden of persuasion in an administrative hearing challenging an IEP.[54] Regarding point (iii), the federal courts that have considered the issue have established that parents cannot collect monetary damages under the IDEA outside of reimbursement for private school expenses and attorneys' fees.[55] *Winkelman*, of course, addressed point (ii).

As a policy matter, courts were right to hold that money damages are inappropriate under the IDEA because they are not cost-effective. Nonetheless, an enforcement scheme without money damages has gaps and may not adequately entice parents to bring challenges under the IDEA. *Winkelman* fills some of those gaps.

Certainly, money damages would bolster IDEA compliance, but they are neither an appropriate nor a cost-effective remedy.[56] A remedial scheme that allows only for injunctive relief and compensation for parents' out-of-pocket expenses is sufficient to deter violations in many cases. The most common IDEA claims involve disputes over the ap-

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[52] *Winkelman* is not the first victory for parents on a special education law issue before the Court. In *Honig v. Doe*, 484 U.S. 305 (1988), the Court held that the "stay-put" provision of the Education of the Handicapped Act — the precursor to IDEA — established a presumption that schools may not move children from their current placement pending any proceedings brought under the Act. *See id.* at 328 (citing 20 U.S.C. § 1415(e)(3) (1988)).

[53] 126 S. Ct. 528 (2005).

[54] *See id.* at 531.

[55] The First, Second, Third, Fourth, Sixth, Eighth, and Tenth Circuits do not allow money damages for any IDEA-based claims. *See* A.W. v. Jersey City Pub. Sch., 486 F.3d 791 (3d Cir. 2007); Diaz-Fonseca v. Puerto Rico, 451 F.3d 13 (1st Cir. 2006); Bradley v. Ark. Dep't of Educ., 301 F.3d 952 (8th Cir. 2002); Polera v. Bd. of Educ., 288 F.3d 478 (2d Cir. 2002); Padilla v. Sch. Dist. No. 1, 233 F.3d 1268 (10th Cir. 2000); Sellers v. Sch. Bd., 141 F.3d 524 (4th Cir. 1998); Crocker v. Tenn. Secondary Sch. Athletic Ass'n, 980 F.2d 382 (6th Cir. 1992). District courts in the Ninth and District of Columbia Circuits have allowed money damages for IDEA claims brought under § 1983, but the Courts of Appeals have not yet reviewed these decisions. *See* Zearley v. Ackerman, 116 F. Supp. 2d 109 (D.D.C. 2000); Emma C. v. Eastin, 985 F. Supp. 940 (N.D. Cal. 1997). The remaining circuits have not directly addressed the issue.

[56] Proponents of money damages under the IDEA argue that a remedy with more economic bite would boost school districts' compliance with the law. *See, e.g.*, David Stewart, *Expanding Remedies for IDEA Violations*, 31 J.L. & EDUC. 373, 379 (2002) ("Greater compliance should be encouraged by allowing § 1983 to put teeth into IDEA . . . .").

propriate placement or extent of services for a student.[57] The services at issue in a typical claim translate to a cost of several thousand dollars annually,[58] a price tag that can easily be surpassed by the expense of litigation. These potential costs provide a strong financial incentive for school districts to acquiesce to parents' demands and avoid legal wrangling.[59] Moreover, the IDEA's fee-shifting provision, which establishes that a court may award attorneys' fees to parents who prevail on a claim at an administrative hearing or at trial,[60] also pressures school districts to settle before trial.[61] Therefore, even without money damages, the awards incentive structure is favorable to parents who file legal claims. Of course, this parental bargaining advantage does not exist for parents who cannot afford an attorney. However, as discussed below, *Winkelman* helps extend this advantage to those parents as well.

Another deficiency with allowing IDEA-based money damages is that doing so would undermine the statute's core purpose and deviate from it in form. As the Second Circuit noted, "[t]he purpose of the IDEA is to provide educational services, not compensation for personal injury, and a damages remedy — as contrasted with reimbursement of expenses — is fundamentally inconsistent with this goal."[62] Damages would transform the IDEA into a tort-like mechanism focused on personal injury to the student,[63] which would increase costs to school districts and lure parents to press ahead with cases that they might have settled for the guarantee of educational services.[64] To af-

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[57] *See* Terry Jean Seligmann, *A Diller, a Dollar: Section 1983 Damage Claims in Special Education Lawsuits*, 36 GA. L. REV. 465, 527 (2002).

[58] *See supra* note 51.

[59] School districts rationally capitulate to parents' demands even when they feel they would win in court because legal fees to defend the cases are often greater than the costs of the requested services. *See* Seligmann, *supra* note 57, at 535 nn.350–51.

[60] *See* 20 U.S.C. § 1415(i)(3) (2000 & Supp. IV 2004) ("[T]he court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents of a child with a disability who is the prevailing party." Courts typically, but not always, award attorneys' fees to prevailing parents in IDEA cases. For example, in *Johnson v. Bismarck Public School District*, 949 F.2d 1000 (8th Cir. 1991), the Eighth Circuit held it was not an abuse of discretion for the district court to deny attorneys' fees because the prevailing parent "frustrated the statute's purpose by withholding efforts at meaningful cooperation until formal litigation was commenced." *Id.* at 1004.

[61] *See* Seligmann, *supra* note 57, at 535. Professor Seligmann observes that "[p]otential attorneys' fees claims up the ante facing a school district that disputes a special education claim." *Id.*

[62] Polera v. Bd. of Educ., 288 F.3d 478, 486 (2d. Cir. 2002); *see also* Diaz-Fonseca v. Puerto Rico, 451 F.3d 13, 29 (1st Cir. 2006) (noting that "the purpose of the IDEA . . . 'is to ensure FAPE'" (quoting Nieves-Marquez v. Puerto Rico, 353 F.3d 108, 125 (1st Cir. 2003))).

[63] *See Diaz-Fonseca*, 451 F.3d at 37 ("In choosing not to authorize tort-like monetary damages or punitive damages in cases under the IDEA, Congress made a balanced judgment that such damages would be an unjustified remedy for this statutorily created cause of action.").

[64] *See* Seligmann, *supra* note 57, at 534 ("Indeed, the principal practical significance of the legal rulings in some jurisdictions allowing the possibility of damage awards has probably been to

ford the costs of money damages, school districts might be forced to siphon funds from special education services.[65] In this way, money damages would lead to windfalls for a few parents — likely not the lower income parents primarily helped by *Winkelman* — as well as increase litigation costs that would deplete resources meant for all students' education.[66] This parallels Professor Daryl Levinson's assertion that, in the context of having government compensate victims for constitutional torts, money damages "cannot be expected to bring society closer to any just distributive pattern and will, in many cases, exacerbate the injustice of the existing distribution by channeling wealth collected from taxpayers to plaintiffs who are less deserving beneficiaries of wealth transfers."[67] Moreover, Professor Levinson's arguments suggest that damages may not induce school officials' greater compliance with the IDEA. He has convincingly demonstrated that, "[b]ecause government actors respond to political, not market, incentives, we should not assume that government will internalize social costs just because it is forced to make a budgetary outlay."[68]

Admittedly, there are gaps in an IDEA remedial scheme that excludes money damages. First, many parents cannot find affordable lawyers who are versed in the IDEA and who practice in their geographic area.[69] Money damages might attract affordable personal injury attorneys to the field to act as counsel for parents who might otherwise file pro se or not at all. Second, many parents lack the money and savvy to challenge school districts. This underenforcement means that school systems avoid paying for services the IDEA requires them to provide.

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increase the risk for school districts faced with such claims, generating more expensive settlements.").

65 *See* Angela Hamilton, *Damage Control: Promoting the Goals of the Individuals with Disabilities Education Act by Foreclosing Compensatory Damage Awards*, 2001 UTAH L. REV. 659, 693 ("[M]oney damages would drain the funding earmarked for providing a FAPE to all disabled children.").

66 As the First Circuit stated, Congress likely did not authorize money damages under the IDEA because public schools have "limited resources and . . . a sizeable damages award would divert resources to litigants and away from direct expenditure on education." *Diaz-Fonseca*, 451 F.3d at 37.

67 Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 412 (2000).

68 *Id.* at 347. Professor Levinson continues to argue that the only way to predict government actors' responses to public law remedial systems is to "convert the financial costs they impose into political costs," a process he suggests would be highly contextual and complex. *Id.*

69 One recent study concluded that "the supply of readily affordable attorneys for parents in IDEA cases falls far short of the demand in several parts of the country." Perry A. Zirkel, Commentary, *Lay Advocates and Parent Experts Under the IDEA*, 217 EDUC. L. REP. 19, 25 (2007).

However, these gaps in IDEA enforcement are mitigated by the *Winkelman* decision.[70] Although the costs of allowing money damages to attract more personal injury IDEA lawyers would be too great, *Winkelman* offers a compromise by allowing parents to file pro se. Of course, *Winkelman* on its face helps only the subset of parents who had the capacity and the will but not the attorney to challenge the school district — overlooking the parents who also lack the significant non-financial resources needed to engage effectively in pro se litigation. However, a school is a nexus of parental interactions. What begins as a small subset of parents may grow as one determined parent — now capable of filing litigation on his or her own behalf — challenges the school district, encouraging other parents to follow suit.[71] If the cost and aggravation from fighting these claims are high enough, school districts should then aim to avoid litigation by cooperating more with parents early. Incidentally, any newfound parental engagement may also chip away at the well-documented issue that schools see parents as part of the problem, not part of the solution, of educating children with disabilities.[72]

From a financial perspective, it seems plausible that money damages would increase the costs of IDEA litigation more than would a post-*Winkelman* uptick in pro se suits. At the very least, though, allowing parental self-representation but not money damages likely moves toward a more equitable disbursement of IDEA resources. That is, it opens the door to more low-income students receiving the free appropriate public education that the IDEA guarantees, rather than offering mostly wealthier parents with attorneys the potential to receive damages windfalls.

Moreover, *Winkelman* helps restore an IDEA enforcement mechanism that the Court weakened in *Schaffer*. In that case, the Court held that, because the IDEA is silent on the burden of persuasion at the administrative hearing, the default rule of assigning the burden to

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[70] The harms from these problems are also dampened somewhat by the noneconomic factors involving schools. For example, schools benefit when parents engage in school activities and their children's education, and they suffer when relations with parents turn adversarial.

[71] *See* Laura F. Rothstein, Commentary, *Special Education Malpractice Revisited,* 43 EDUC. L. REP. 1249, 1262 (1988). Rothstein observes that after the first decade of the passage of the IDEA's precursor, the Education for All Handicapped Children Act, there was "certainly an increased tendency for parents to litigate in cases where they believed the school has acted inappropriately." *Id.* This suggests that, although it took several years, parents became familiar with and began legally pursuing their children's rights after they saw pioneering parents take advantage of education law protections.

[72] *See generally* JOEL F. HANDLER, THE CONDITIONS OF DISCRETION: AUTONOMY, COMMUNITY, BUREAUCRACY 83–119 (1986) (describing Madison, Wisconsin, as an example of a school district that made a successful effort to include parents as part of the problem-solving community).

the challenging party applied.[73] The Court received more criticism than praise for its decision.[74] Because many hearings pit the school district's expert against the parents', a common argument has been that the burden should fall on the school districts, who have ready access to school psychologists, and not on parents who may be hindered by the expense of hiring experts.[75]

Nonetheless, as a policy matter, the *Schaffer* Court was correct to establish the presumption in favor of the school district's education experts.[76] Every dollar schools spend on IEP administration and litigation means money taken away from educational services. *Schaffer*, according to two education law experts, rightly recognized "that school board officials can spend less on that entire [IEP] process if they are free of the burden of later proving the adequacy of every statement contained in IEPs."[77] Put another way, if the *Schaffer* Court's decision had gone against school districts, then a few children in close cases would benefit, but the costs of those victories would trickle down and burden the entire IEP process for everybody else. This is an inequitable result when scarce resources across the board already hinder special education services for many clearly deserving students.

However, on its own, the *Schaffer* decision leaves a gap in IDEA enforcement — one that *Winkelman* partially closed. Some have observed that "a virtual cottage industry of educational experts" exists for parents.[78] Although these experts frequently win cases for parents,[79] a distributive justice problem emerges when a deserving claim fails because either the parents cannot afford an expert or the school district's expert outshines the parents' less impressive but affordable expert — thus convincing the hearing officer that the case is close when it is not.

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[73] *See* Schaffer v. Weast, 126 S. Ct. 528, 534 (2005).

[74] *See, e.g.*, Kevin Pendergast, Schaffer*'s Reminder: IDEA Needs Another Improvement*, 56 CASE W. RES. L. REV. 875 (2006); Sandra M. Di Iorio, Comment, *Breaking IDEA's Silence: Assigning the Burden of Proof at Due Process Hearings and Judicial Proceedings Brought by Parents Against a School District*, 78 TEMP. L. REV. 719 (2005); Jordan L. Wilson, Note, *Missing the Big Idea: The Supreme Court Loses Sight of the Policy Behind the Individuals with Disabilities Education Act in* Schaffer v. Weast, 44 HOUS. L. REV. 161 (2007).

[75] *See* Di Iorio, *supra* note 74, at 737.

[76] *See Schaffer*, 126 S. Ct. at 536 ("IDEA relies heavily upon the expertise of school districts to meet its goals.").

[77] Charles J. Russo & Allan G. Osborne, Jr., Commentary, *The Supreme Court Clarifies the Burden of Proof in Special Education Due Process Hearings:* Schaffer ex rel. Schaffer v. Weast, 208 EDUC. L. REP. 705, 714 (2006); *see also* Jennifer M. Burns, Note, Schaffer v. Weast*: Why the Complaining Party Should Bear the Burden of Proof in an Administrative Hearing to Determine the Validity of an IEP Under IDEA*, 29 HAMLINE L. REV. 567, 591 (2006) ("[T]he school's resources should be used for education, not preparing to prove IEPs in an administrative hearing.").

[78] *See* Russo & Osborne, *supra* note 77, at 713.

[79] *See id.*

Hopefully, these cases are rare.[80] Nonetheless, when they do arise, *Winkelman* offers a potentially important check on a hearing officer's poor judgment by allowing low-income parents to seek reversal pro se in federal court.

Ultimately, *Winkelman* provides a counterweight to previous court rulings on IDEA enforcement mechanisms that favored school districts. Taken together, barring money damages under the IDEA and placing the burden of persuasion on the challenging parents, while permitting parents to file claims pro se in court, create the right mix of cost-saving measures and incentives to deter IDEA violations. Of course, *Winkelman* will likely increase costs, as more parents who before could not afford to file challenges head to federal court.[81] However, it does so by offering a commensurate benefit. *Winkelman* allows low-income parents access to courts to vindicate the aspirational provisions of the IDEA for their children. As one education law specialist described, "[t]he spectre of accountability is an important incentive to schools to ensure that their personnel are adequately trained and their procedures and practices are appropriate."[82] Allowing that "spectre" to roam more freely among school districts that have more than their share of low-income students creates the right cost-benefit balance for the IDEA.

E. Patent

Obviousness. — One of the most vexing and important questions in patent law has long been how to determine if an invention is "obvious" without using hindsight in making the assessment.[1] Under § 103 of the Patent Act,[2] a patent may not issue when the patented design would have been obvious to a person having ordinary skill in the art.[3] In 1966, the Supreme Court set forth a four-part framework for applying § 103 in *Graham v. John Deere Co.*[4] In interpreting the *Graham* factors, the Federal Circuit created a test requiring evidence of some teaching, suggestion, or motivation to combine elements of prior art

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[80] In his *Schaffer* dissent, Justice Breyer observed that burden of persuasion is a "relatively minor issue that should not often arise." *Schaffer*, 126 S. Ct. at 541 (Breyer, J., dissenting). The issue should arise even less frequently under the narrow circumstances stated above.

[81] *See* Linda Greenhouse, *Legal Victory for Families of Disabled Students*, N.Y. TIMES, May 22, 2007, at A14 ("Many parents, including the couple from Parma, Ohio, who brought this case, either cannot afford a lawyer or cannot find one.").

[82] Rothstein, *supra* note 71, at 1262.

[1] *See* Lee Petherbridge & R. Polk Wagner, *The Federal Circuit and Patentability: An Empirical Assessment of the Law of Obviousness*, 85 TEX. L. REV. 2051, 2063 (2007). *See generally* NONOBVIOUSNESS — THE ULTIMATE CONDITION OF PATENTABILITY (John F. Witherspoon ed., 1980).

[2] 35 U.S.C. § 103 (2000 & Supp. IV 2004).

[3] *Id.*

[4] 383 U.S. 1 (1966).