No. 11-14859-EE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PHILLIP & ANGIE C., on behalf of their son A.C.,

Plaintiffs-Appellees

v.

JEFFERSON COUNTY BOARD OF EDUCATION,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PLAINTIFFS-APPELLEES AND URGING AFFIRMANCE

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Phillip & Angie C., et al. v. *Jefferson County Board of Education*
(Case No. 11-14859-EE)

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 11th Circuit Rule 26.1-1, counsel for *amicus curiae,* United States of America, files this Certificate of Interested Persons And Corporate Disclosure Statement. The following persons, law firms, associations, and corporation may have an interest in the outcome of this case:

1. Alabama Disabilities Advocacy Program
2. Alabama Parent Education Center
3. Armstrong, Jr., Hon. Robert R., United States Magistrate Judge for the Northern District of Alabama, Southern Division
4. Autism Society of Alabama
5. Bhargava, Anurima, Civil Rights Division, United States Department of Justice
6. Bowdre, Hon. Karon O., United States District Judge
7. C., Angie, Appellee
8. C., Phillip, Appellee
9. Coogler, Hon. L. Scott, United States District Judge for the Northern District of Alabama, Southern Division

10. Disability Rights of Florida
11. Fischbach, Jonathan, Civil Rights Division, United States Department of Justice
12. Georgia Advocacy Organization
13. Gross, Mark L., Civil Rights Division, United States Department of Justice, counsel for *amicus curiae* United States
14. Jefferson County Board of Education, defendant-appellant
15. Johnson, Carl, counsel for defendant-appellant
16. Lopez, Francisco, Deputy Assistant General Counsel for Education Equity and Research
17. Mattison, Deborah A., counsel for plaintiffs-appellees
18. McCarthy, Emily H., Civil Rights Division, United States Department of Justice
19. McGinely, Rachel L., counsel for plaintiffs-appellees
20. McKie, Melissa B., counsel for defendant-appellant
21. Minor Child, C., plaintiff-appellee
22. National Disability Rights Network

23. Perez, Thomas E., Assistant Attorney General, Civil Rights Division, United States Department of Justice, counsel for *amicus curiae* United States
24. Romine, Hon. Wesley, Due Process Hearing Officer
25. Rose, Charles P., General Counsel, United States Department of Education
26. Rosenfelt, Philip H., Acting General Counsel, United States Department of Education
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INTEREST OF THE UNITED STATES

This case involves the validity of a Department of Education regulation promulgated under the Individuals with Disabilities Education Act (IDEA) that guarantees parents a publicly-funded independent educational evaluation (IEE) under appropriate circumstances when they disagree with the school district's initial evaluation of their child. The Department of Education administers the IDEA and has authority to issue regulations necessary to ensure compliance with the Act. See 20 U.S.C. 1406. The Department of Justice may bring actions to

enforce the IDEA upon referral from the Department of Education. See 20 U.S.C. 1416(e)(2)(B)(vi), 1416(e)(3)(D). The United States therefore has an interest in ensuring that the IDEA and its regulatory provisions are properly interpreted. Towards that end, the United States has repeatedly filed *amicus* briefs in the Supreme Court and courts of appeal in IDEA cases. See, *e.g.*, *Forest Grove Sch. Dist.* v. *T.A.*, 557 U.S. 230, 129 S. Ct. 2484 (2009); *Cedar Rapids Cmty. Sch. Dist.* v. *Garret F.*, 526 U.S. 66, 119 S. Ct. 992 (1999); *Jefferson Cnty.* v. *Elizabeth E.*, No. 11-1334 (10th Cir.) (filed Nov. 23, 2011); *Klein Indep. Sch. Dist.* v. *Hovem*, No. 10-20694 (5th Cir.) (filed Apr. 22, 2011); *Payne* v. *Peninsula Sch. Dist.*, 653 F.3d 863 (9th Cir. 2011) (en banc), petition for cert. pending, No. 11-539 (filed Oct. 26, 2011). The United States sought to file an *amicus* brief in this case in the district court, but the court stated that the parties' submissions were adequate to resolve the issues.

STATEMENT OF THE ISSUE

Whether 34 C.F.R. 300.502, promulgated by the Department of Education (Department) under the IDEA and providing parents with the right under appropriate circumstances to an IEE at public expense when they disagree with a public agency's initial assessment of their child, is a lawful exercise of regulatory authority.

STATEMENT OF THE CASE

1. Facts And Prior Proceedings

This case arises out of a complaint filed in April 2007 under the IDEA, 20 U.S.C. 1400 *et seq*., and the Alabama Exceptional Child Education Act, Ala. Code § 16-39-1 *et seq.* (2011). The suit was filed by the parents of A.C., a child with a disability, against defendant/appellant Jefferson County Board of Education. Under the IDEA, in order to contend that a school district's action violated the IDEA, parents must exhaust administrative remedies before going to federal court. Plaintiffs did so here after the hearing officer at the due process proceedings ordered the school district to reimburse them for the cost of A.C.'s March 2006 IEE.[1]

Plaintiffs, in their district court action, sought attorney's fees and expenses as the prevailing party in the due process hearing.[2] Defendant filed a counterclaim appealing the hearing officer's decision and challenging the Department of Education's authority to issue 34 C.F.R. 300.502 (1999), which guarantees parents an IEE at public expense under appropriate circumstances when they disagree with

[1] Plaintiffs also challenged defendant's refusal to provide copies of A.C.'s educational records. Because that claim is not the subject of the current appeal, we have not summarized the facts and rulings relating to it.

[2] The transcript of the due process hearing was sealed at defendant's request.

a school's initial assessment of their child.[3] A magistrate judge filed a Report and Recommendation concluding that the regulation was void and violated the Spending Clause.

2. The District Court's Decision

The district court issued a Memorandum Opinion and a separate Order upholding the Department of Education's regulation and ordering the school district to reimburse plaintiffs for the cost of their child's IEE. The court ruled that 34 C.F.R. 300.502 (1999) is valid and entitled to deference under *Chevron, U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778 (1984) because it is not "arbitrary, capricious, or manifestly contrary to the IDEA." Doc. 67 at 20; see also Doc. 67 at 17-19. The court stated that while the IDEA does not specify who pays for the IEE guaranteed to parents pursuant to 20 U.S.C. 1415(b)(1), the Department's regulation requiring that the IEE be provided at public expense is not "inconsistent with the statutory mandate" and does not "frustrate the policy that Congress sought to implement." Doc. 67 at 18 (quoting *Sierra Club* v. *Johnson*, 541 F.3d 1257, 1265 (11th Cir. 2008)). See Doc. 67 at 20. The court also explained that the regulation was proper because the Department did not rely on improper factors, ignore important aspects of the problem, misstate

[3] Appellant agrees (see Br. 5 n.3) that the 1999 version of the regulation, which is similar to its current version, see note 4, *infra*, applies in this case.

the evidence, or offer an implausible explanation for the regulation. Doc. 67 at 19-20. The court rejected defendant's argument that 34 C.F.R. 300.502 (1999) constitutes an abuse of the Department's authority delegated by Congress that allows the Secretary to "issue regulations * * * only to the extent that [they] are necessary." Doc. 67 at 15-16 (quoting 20 U.S.C. 1406(a)). According to the court, the regulation is "necessary to ensure compliance with the [statutory] requirement that parents of a child with a disability have the 'opportunity' to obtain an IEE." Doc. 67 at 17. The court also concluded that the regulation does not impermissibly "regulate [an] area[] reserved and delegated to state and local educational agencies." Doc. 67 at 15 (citation omitted).

Moreover, the district court ruled that enforcement of 34 C.F.R. 300.502 (1999) does not violate the Spending Clause (U.S. Const. Art. I, § 8, Cl. 1). R. 67 at 23. The district court explained that a federal regulation that provides parents with a publicly-funded IEE has been in place since 1977, was acknowledged by the Supreme Court in *Schaffer* v. *Weast*, 546 U.S. 49, 60, 126 S. Ct. 528, 536 (2005), and was formally adopted in Alabama (Doc. 67 at 22-23). See Ala. Admin. Code r. 290-8-9.02(4)(d) (2011). Consequently, the district court held that requiring defendant to reimburse plaintiffs for the IEE at issue here does not violate the "clear notice" requirement of the Spending Clause. Doc. 67 at 23. *Arlington Cent.*

Sch. Dist. Bd. of Educ. v. *Murphy*, 548 U.S. 291, 297, 126 S. Ct. 2455, 2460 (2006).

Subsequently, the district court denied defendant's motion for reconsideration. Doc. 74 at 6. The court held that regardless of the federal regulation's validity, defendant is obligated to reimburse plaintiffs for A.C.'s IEE under state law, which mirrors the requirements of Section 300.502. Doc. 74 at 4-6. On August 30, 2011, the court also issued an order granting plaintiffs' motion to stay all proceedings relating to their request for attorney's fees in anticipation of defendants filing a notice of appeal.

SUMMARY OF ARGUMENT

The Jefferson County Board of Education contends that 34 C.F.R. 300.502 (1999), which provides parents with the right under appropriate circumstances to an independent educational evaluation (IEE) at public expense, is invalid and unenforceable. Appellant's claim lacks merit for two reasons.

First, two provisions of the IDEA – 20 U.S.C. 1415(b) and 20 U.S.C. 1406(b) – confirm that Congress intended to guarantee parents' right to an IEE at public expense in appropriate circumstances. In *Schaffer* v. *Weast*, 546 U.S. 49, 126 S. Ct. 528 (2005), the Supreme Court construed 20 U.S.C. 1415(b) along with the regulation at issue in this case and explained that together they effectuate Congress's intent that parents be provided a publicly funded IEE if they disagree

with the public school's initial evaluation of their child. The text of 20 U.S.C. 1406(b)(2), along with its legislative history, also confirms parents' right under appropriate circumstances to an IEE at public expense. In 1983, Congress added that provision in response to the Secretary's efforts to limit some of the procedural protections afforded parents under the IDEA, and expressly barred the implementation of any regulation that would lessen the rights afforded under the then current version of the regulations. Because the 1983 version of the regulations afforded parents a right to a publicly funded IEE, Congress's enactment of Section 1406(b)(2) and subsequent reauthorizations of the IDEA in 1990, 1997, and 2004, reaffirm that parents have a right to a publicly funded IEE in appropriate circumstances. Accordingly, because 34 C.F.R. 300.502(b)(1) (1999) provides the same guarantee that the IDEA itself creates, it is a lawful exercise of the Department's regulatory authority.

Second, even if the statutory language were ambiguous, 34 C.F.R. 300.502(b)(1) (1999) is entitled to *Chevron* deference as a valid and reasonable exercise of the Department's regulatory authority. The IDEA goes to great lengths to protect parents' rights to be both informed and active partners in the development of the plan for special education and related services necessary to provide their child appropriate special education. Congress expressly included language in the statute to guarantee that parents have the necessary information

and tools to challenge a school district's decisions about their child. Because an accurate educational evaluation is essential in ensuring that a child receives appropriate educational services, providing parents with a publicly funded IEE if they disagree with the school's assessment of their child is critical to achieving the goals of the IDEA. Consequently, a regulation that does precisely that is consistent with and effectuates Congress's intent.

ARGUMENT

34 C.F.R. 300.502(b)(1) (1999), WHICH PROVIDES PARENTS WITH A PUBLICLY FUNDED INDEPENDENT EDUCATIONAL EVALUATION (IEE) IN APPROPRIATE CIRCUMSTANCES IS A VALID EXERCISE OF THE SECRETARY OF EDUCATION'S REGULATORY AUTHORITY

For more than three decades, the Department of Education, pursuant to its authority to issue regulations, see 20 U.S.C. 1406, has promulgated regulations that provide parents with the right, under appropriate circumstances, to an IEE at public expense. See Education of Handicapped Children, 42 Fed. Reg. 42,494 (Aug. 23, 1977) (45 C.F.R. 121a.503(a), (a)(3)(ii) and (b) (1977)). While the regulation providing that right has been amended from time to time, a parent's core right to an IEE at public expense has remained unaltered and has been affirmed by Congress each time it has reauthorized the IDEA in 1983, 1990, 1997, and 2004. Consequently, the regulation quite clearly reflects Congress's intent.

> The regulation, at issue in this case, provides:
>
> (b) *Parent right to evaluation at public expense*
>
> (1) A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency.

34 C.F.R. 300.502(b)(1) (1999). Subsections (b)(2)-(b)(4) of the regulation set forth the sequence of events that occur once a parent requests a publicly-funded IEE. If a parent requests an IEE at public expense, "[a] public agency must, without unnecessary delay, either – (i) [i]nitiate a hearing * * * to show that its evaluation is appropriate; or (ii) [e]nsure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing * * * that the evaluation obtained by the parent did not meet agency criteria." 34 C.F.R. 300.502(b)(2)(i) and (ii). The regulations provide that "[i]f the public agency initiates a hearing and the final decision is that the agency's evaluation is appropriate, the parent still has the right to an independent evaluation, but not at public expense." 34 C.F.R. 300.502(b)(3) (1999).[4]

[4] The current version of the relevant regulations provides parents with the right to a publicly-funded IEE if they disagree with an agency's assessment of their child "subject to the conditions in paragraphs (b)(2) through (4)." 34 C.F.R. 300.502(b)(1). The substance of the current version of subsections (b)(2) through (4) remains essentially unchanged since 1999. Subsection (b)(5), which was not in effect during the period at issue in this case, provides that "[a] parent is entitled to

(continued…)

Appellant Jefferson County Board of Education (Board) contends (Br. 15, 17, 20) that 34 C.F.R. 300.502 (1999), which entitles parents to reimbursement for the cost of an IEE in appropriate circumstances, is invalid and unenforceable because the Secretary of Education exceeded his statutory authority in issuing it. The Board is wrong because: (1) two provisions of the IDEA – 20 U.S.C. 1415(b)(1) and 20 U.S.C. 1406(b)(1) – provide parents with a right to an IEE at public expense under appropriate circumstances if they disagree with an agency's assessment; and (2) assuming *arguendo* that the IDEA is ambiguous, 34 C.F.R. 300.502 (1999) is entitled to *Chevron* deference and should be upheld on that basis.

A court uses "a familiar two-step procedure for evaluating whether an agency's interpretation of a statute is lawful." *National Cable & Telecomm. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 986, 125 S. Ct. 2688, 2702 (2005); see also C*hevron, U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-843, 104 S. Ct. 2778, 2781-2782 (1984). "First, [it] must determine, 'whether Congress has directly spoken to the precise question at issue.'" *Sierra Club* v. *Johnson*, 541 F.3d 1257, 1264 (11th Cir. 2008) (quoting *Chevron*, 467 U.S. at 842,

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(…continued)
only one independent educational evaluation at public expense each time the public agency conducts an evaluation with which the parent disagrees."

104 S. Ct. at 2781). "If Congress's intent is clear from the statutory language, [a court] must give it effect." *Sierra Club*, 541 F.3d at 1264 (citing *Chevron*, 467 U.S. at 843 n.9, 104 S. Ct. at 2781 n.9). Second, if the statute is silent or ambiguous on that point, a court "defer[s] * * * to the agency's interpretation so long as the construction is 'a reasonable policy choice for the agency to make.'" *National Cable & Telecomm. Ass'n*, 545 U.S. at 986, 125 S. Ct. at 2702 (quoting C*hevron*, 467 U.S. at 845, 104 S. Ct. at 2778); see also *Sierra Club*, 541 F.3d at 1264. The federal regulation at issue here satisfies both standards.

A. Overview Of The IDEA

The IDEA provides federal grants to States to fund special education and related services for children with disabilities, and conditions those grants on compliance with specific standards and procedures. The Act requires recipients of federal funding, such as defendants here, to make a "free appropriate public education" (FAPE) available to all children with disabilities between the ages of 3 and 21 residing in the State. 20 U.S.C. 1412(a)(1)(A); see also *Forest Grove Sch. Dist*. v. *T.A.*, 557 U.S. 230, 129 S. Ct. 2484 (2009). A FAPE must include the special education and related services necessary to meet each child's unique needs, see 20 U.S.C. 1412(a)(4), 1414(d), and must be "provided at public expense," 20 U.S.C. 1401(9)(A), "at no cost to parents." 20 U.S.C. 1401(29).

The IDEA's statutorily guaranteed program of special education and related services must begin with an assessment of the child's disabilities, including the way in which they may interfere with learning. In accord with statutory requirements and "with parents playing 'a significant role' in this process," a school system then must develop an individualized education program (IEP) "designed … to meet the unique needs of [each] child with a disability" that must be evaluated at least annually for its effectiveness. *Winkelman* v. *Parma City Sch. Dist*., 550 U.S. 516, 524, 127 S. Ct. 1994, 2000 (2007) (quoting *Schaffer* v. *Weast*, 546 U.S. 49, 53, 126 S. Ct. 528, 532 (2005) and 20 U.S.C. 1401(29)); *Honig* v. *Doe*, 484 U.S. 305, 309, 108 S. Ct. 592, 596 (1988); see also 20 U.S.C. 1412(a)(4), 1414(d). The ability of the school system to develop an IEP specifically designed to address the child's unique needs depends significantly on an educational evaluation that accurately and thoroughly diagnoses a child's educational deficiencies and abilities. And without it, a school district cannot provide a child with a FAPE.

If a child's parents are not satisfied with a proposed IEP or "*any matter* relating to the identification, *evaluation*, or educational placement of the child, or the provision of a free appropriate public education to such child," 20 U.S.C. 1415(b)(6)(A) (emphasis added), they are entitled to "an impartial due process hearing" before the state or local educational agency. 20 U.S.C. 1415(f)(1)(A). In

the event of an adverse outcome at the hearing level, the parents may "bring a civil action" in federal district court or state court of competent jurisdiction. 20 U.S.C. 1415(i)(1), (2)(A) and (3). Section 1415(b)(6)(A) expressly provides parents with the right to file a complaint "with respect to any matter relating to the * * * evaluation * * * of the[ir] child."

The Act accords parents numerous safeguards "that apply throughout the IEP process" and are designed to "protect the[ir] informed involvement * * * in the development of an education for their child," including the right under appropriate circumstances to an independent evaluation of their child. *Winkelman*, 550 U.S. at 524, 127 S. Ct. at 2000. An IEE, requested by parents who are dissatisfied with the school district's initial assessment of their child, is conducted by an expert chosen by the parents, who reviews a child's records and independently evaluates whether a school's initial assessment of the child is accurate. See *School Comm. of Burlington* v. *Department of Educ. of Mass.*, 471 U.S. 359, 368, 105 S. Ct. 1996, 2002 (1985). Towards that end, 20 U.S.C. 1415 expressly provides that an "educational agency * * * shall establish * * * procedures * * * to ensure that * * * parents are guaranteed procedural safeguards with respect to the provision of a free appropriate public education," that "shall include * * * [a]n opportunity* * * to obtain an independent educational evaluation of a the[ir] child." 20 U.S.C. 1415(a) and (b)(1).

B. The IDEA Provides Parents A Right To A Publicly Funded IEE In Appropriate Circumstances

1. 20 U.S.C. 1415(b)(1), As Construed By The Supreme Court, Provides Parents With The Right Under Appropriate Circumstances To An IEE At Public Expense When They Disagree With A School's Assessment Of Their Child

In *Schaffer*, 546 U.S. 49, 126 S. Ct. 528, the Supreme Court addressed the burden of proof in an administrative hearing challenging an IEP, and in doing so addressed both Section 1415(b)(1) and the regulation at issue in this case. The Court confirmed that Congress intended that a publicly funded IEE be provided to parents in appropriate circumstances.

In *Schaffer*, the Court stated that the IDEA, as clarified by the Department of Education's regulations, entitles parents to an IEE of their child at public expense if they disagree with the public schools' initial evaluation of their child. *Schaffer*, 546 U.S. at 60, 126 S. Ct. at 536. Referring to Section 1415(b)(1), the Court maintained that parents "have the right to an 'independent educational evaluation of the[ir] child.'" *Ibid*. The Court stated that the Department of Education's regulations "clarify this entitlement" and Congress's intent to provide parents "the right to an independent educational evaluation at *public expense* if the parent disagrees with an evaluation obtained by the public agency." *Ibid.* (emphasis

added) (quoting 34 C.F.R. 300.502(b)(1) (2005)).[5] According to the Court, "Congress addressed" parents' need for accurate information about their child's disability to allow parents to be informed and participate fully in the development of their child's IEP, by "ensur[ing] parents access to an expert who can evaluate all the materials that the school must make available." *Schaffer*, 546 U.S. at 60-61, 126 S. Ct. at 536. The Court explained that Congress recognized that "[s]chool districts have a 'natural advantage' in information and expertise" and wanted to ensure that parents were "not left to challenge the government * * * without an expert with the firepower to match the opposition." *Schaffer*, 546 U.S. at 60-61, 126 S. Ct. at 536. Thus, the Court recognized that the IDEA's "entitlement" to an "independent educational evaluation * * * provid[es] * * * a 'parent [with] * * * the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency.'" *Shaffer*, 546 U.S. at 60, 126 S. Ct. at 536 (quoting 20 U.S.C. 1415(b)(1) and 34 C.F.R. 300.502(b)(1) (2005)). Because 34 C.F.R. 300.502(b)(1) (1999) merely guarantees the same right that Congress created in Section 1415(b), the regulation is valid and must be given effect. *National Cable & Telecomm. Ass'n*, 545 U.S. at 986, 125 S. Ct. at 2702 (quoting *Chevron*, 467 U.S. at 843, 104 S. Ct. at 2778).

[5] The 2005 version of Section 300.502(b)(1), is identical to the 1999 version, which is at issue in this case.

To conclude otherwise would not only provide a very unusual and extremely limited reading of the IDEA's language, but also would conflict with well established principles of statutory construction. When interpreting a statute, a court should "consider not only the bare meaning of [a] critical word or phrase, but also its placement and purpose in the statutory scheme." *Holloway* v. *United States*, 526 U.S. 1, 6, 119 S. Ct. 966, 969 (1999) (internal quotation marks and citation omitted). "It is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence or word shall be superfluous, void, or insignificant.'" *TRW Inc.* v. *Andrews*, 534 U.S. 19, 31, 122 S. Ct. 441, 449 (2001) (quoting *Duncan* v. *Walker*, 533 U.S. 167, 174, 121 S. Ct. 2120, 2125 (2001)). Accordingly, "[j]udges should hesitate . . . to treat [as surplusage] statutory terms in any setting." *Bailey* v. *United States*, 516 U.S. 137, 145, 116 S. Ct. 501, 506-507 (1995) (citation omitted); see *AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740, 1754 (2011).

To ensure parents' informed participation in the IEP process, Sections 1415(a) and (b)(1) provide parents with protections that "require[]" and "shall include * * * [a]n opportunity for the parents of a child with a disability * * * to obtain an independent educational evaluation." By the use of the terms "require" and "shall," 20 U.S.C. 1415(b), those provisions necessarily create a "mandatory" obligation. *Lexecon Inc.* v. *Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26,

35, 118 S. Ct. 956, 962 (1998). See *Winkelman*, 550 U.S. at 528, 127 S. Ct. at 2002 (Section 1415(a) "*mandates* that educational agencies establish procedures 'to ensure that * * * parents are guaranteed procedural safeguards'") (emphasis added); see also *National Ass'n of Home Builders* v. *Defenders of Wildlife*, 551 U.S. 644, 661, 127 S. Ct. 2531 (2007) ("Congress' use of a mandatory 'shall' * * * impose discretionless obligations") (quoting *Lopez* v. *Davis*, 531 U.S. 230, 241, 121 S. Ct. 714, 722 (2001)). Without assurance that an IEE will be publicly-funded, parents who cannot afford one very likely will be without one despite the statute's guarantee, frustrating Congress's language and intent and *Schaffer's* interpretation of the IDEA.

Rejecting the Secretary's regulation would also disregard a court's obligation to construe a statute to avoid "absurd" or "nonsensical" results. *Milavetz, Gallop & Milavetz, P.A.* v. *United States*, 130 S. Ct. 1324, 1341 (2010); *Department of Hous. & Urban Dev.* v. *Rucker*, 535 U.S. 125, 131, 122 S. Ct. 1230, 1234 (2002). Indeed, a court should interpret legislation so that it makes sense as a "practical matter." *Woodford* v. *Garceau*, 538 U.S. 202, 209, 123 S. Ct. 1398, 1403 (2003) (quoting *McFarland* v. *Scott*, 512 U.S. 849, 855, 114 S. Ct. 2568, 2572 (1994)). Obviously, Section 1415(b)(1) was unnecessary if Congress merely intended to allow parents to pay for an IEE themselves. They clearly have that

right even without the statute. Therefore, it would be surprising to presume that when Congress deliberately extended to parents the "opportunity * * * to obtain an independent educational evaluation," it merely provided them with an opportunity to secure what they already could obtain without the statute. 20 U.S.C. 1415(b)(1). Consequently, contrary to the Board's claim (Br. 17), the only interpretation of that provision that is sensible, sound, and reasonable is one that "obligates boards of education to pay for IEEs" in appropriate circumstances.

2. 20 U.S.C. 1406 Provides Parents With The Right Under Appropriate Circumstances To An IEE At Public Expense When They Disagree With A School's Assessment Of Their Child

In 1983, Congress amended the IDEA expressly to prevent the Secretary from lessening the protections extended to parents by the then-existing regulations, which expressly provided parents with an IEE at public expense when they disagreed with the school district's initial evaluation of their child. See 34 C.F.R. 300.503(b) (1983) ("A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency."). In response to the Secretary's efforts to limit some of the safeguards afforded parents under the IDEA,[6] Congress enacted 20 U.S.C.

[6] In 1982, the Secretary sought to circumscribe parents' right to an IEE at public expense when they disagree with a school district's evaluation of their child to include only those circumstances when a hearing officer determines that such an (continued…)

1406(b)(2). That provision states that the Secretary "may not implement, or publish in final form, any regulation * * * that[] procedurally or substantively lessens the protections provided * * * in regulations in effect on July 20, 1983 * * * except to the extent that such regulation reflects [Congress's] clear and unequivocal intent * * * in legislation." 20 U.S.C. 1406(b)(2). See Education of the Handicapped Act Amendments of 1983, Pub. L. 98-199, 97 Stat. 1359.

In so doing, Congress explained that it sought to "reaffirm support for the program and its existing regulations," and ensure that the "Secretary cannot propose any regulations which * * * have the direct or indirect effect of weakening the protections for handicapped children under existing law and regulation," 129 Cong. Rec. 33,316 (1983). See H.R. Rep. No. 410, 98th Cong., lst Sess. 21 (1983) ("The current regulations * * * have received the strong support of Congress. * * * The Committee remains strongly opposed to any attempts to alter current regulatory requirements which would result in diminished rights and protections for handicapped children under the Act."). The 1983 regulations, as stated above,

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(…continued)
assessment is necessary. See Assistance to States for Education of Handicapped Children, 47 Fed. Reg. 33,836, 33,856 (Aug. 4, 1982) (proposed regulations) ("An independent educational evaluation must be at public expense if a hearing or reviewing officer determines that an independent educational evaluation is necessary to resolve the issues in dispute in a hearing or review under" the due process hearing provisions.).

provided parents with an IEE at public expense and Congress expressly manifested its intent to maintain the rights contained in those regulations.

Thus, by enacting Section 1406(b), Congress not only expressly affirmed its approval of 34 C.F.R. 300.503(b) (1983), which preserves a parents' right to a publicly-funded IEE, but also provided that a parents' entitlement to a free IEE cannot be circumscribed in the absence of unequivocal congressional intent to achieve that end. Accordingly, contrary to the Board's claims, the text of the IDEA in two separate sections provides parents with a right to an IEE at public expense.

C. 34 C.F.R. 502(b)(1) (1999) Is Entitled To Deference And A Proper Exercise Of The Department Of Education's Regulatory Authority

Assuming *arguendo,* that the IDEA's statutory language is ambiguous as to whether parents have a right to a publicly-funded IEE, the Court should defer to the Department of Education's determination that parents have that right because the Department's regulation to that effect is not "arbitrary, capricious, or manifestly contrary to the statute." *Morgan Stanley Capital Grp. Inc.* v. *Public Util. Dist. No. 1*, 554 U.S. 527, 558, 128 S. Ct. 2733, 2753 (2008). Congress expressly stated that IDEA's purpose is "to ensure" that: (1) "all children with disabilities have available to them a free appropriate public education," 20 U.S.C. 1400(d)(1)(A); (2) "the rights of children with disabilities and parents of such children are protected," 20 U.S.C. 1400(d)(1)(B); and (3) "educators and parents

have the necessary tools to improve educational results for children with disabilities." 20 U.S.C 1400(d)(3). The IDEA requires "participating States to educate *all* disabled children" "at no cost to parents," and there is "nothing in the statute to indicate that * * * Congress * * * intended that only some parents would be able to enforce that mandate." *Honig*, 484 U.S. at 324, 108 S. Ct. at 604-605; *Winkelman*, 550 U.S. at 533, 127 S. Ct. at 2005. The Act seeks "the informed involvement of parents in the development of an education[al plan] for their child" and "incorporate[s] an elaborate set of * * * 'procedural safeguards'" to protect parents' rights, achieve that end, and "facilitate the provision of a 'free appropriate public education.'" *Winkelman*, 550 U.S. at 524, 127 S. Ct. at 2000 (quoting 20 U.S.C. 1401(9)); see *Burlington*, 471 U.S. at 368, 105 S. Ct. at 2002.

As the Supreme Court has repeatedly emphasized: (1) "[an] IEP [is] the centerpiece of the statute's education delivery system," *Honig*, 484 U.S. at 311, 108 S. Ct. at 598;[7] (2) "parent[] participation in both the development of the IEP and any subsequent assessments of its effectiveness" is "indeed [a] necessity,"

[7] *Honig*, 484 U.S. at 311, 108 S. Ct. at 597 ("The primary vehicle for implementing * * * [C]ongress['s] goals is the individualized educational program (IEP)."); *Burlington*, 471 U.S. at 368, 105 S. Ct. at 2002 ("The *modus operandi* of the Act is the * * * 'individualized educational program.'").

ibid.;[8] and (3) "the importance Congress attached" to "the elaborate and highly specific procedural safeguards" afforded to parents "cannot be gainsaid." *Board of Educ. of the Hendrick Hudson Cent. Sch. Dist.* v. *Rowley*, 458 U.S. 176, 205, 102 S. Ct. 3034, 3050 (1982).[9] The Court has also explained that "[t]he statute's procedural * * * rights are intertwined with the substantive adequacy of the education provided to a child," and Congress incorporated those rights, including a parents right to an IEE, because it "recognize[d] that * * * in any disputes the school officials would have a natural advantage" and Congress therefore sought "to insure the full participation of parents and the proper resolution of substantive disagreements." *Winkelman*, 550 U.S. at 531-532, 127 S. Ct. at 2004; *Burlington*, 471 U.S. at 368, 105 S. Ct. at 2002. Thus, providing parents with a publicly funded IEE under appropriate circumstances if they disagree with the school's assessment of their child is essential to achieving the goals of the IDEA. That entitlement guarantees parents meaningful participation throughout the development of the IEP, provides them with "an expert who can evaluate * * *

[8] *Burlington*, 471 U.S. at 368, 105 S. Ct. at 2002 ("[T]he Act emphasizes the participation of the parents in developing the child's educational program and assessing its effectiveness.").

[9] *Honig*, 484 U.S. at 311-312, 108 S. Ct. at 598 ("the Act['s] * * * various procedural safeguards that guarantee parents both an opportunity for meaningful input into all decisions affecting their child's education and the right to seek review of any decisions they think inappropriate").

[and] give an independent opinion" as to "the materials that the school must make available," and allows them to effectively challenge "decisions they think inappropriate" to ensure their child receives a FAPE. *Schaffer*, 546 U.S. at 60-61, 126 S. Ct. at 536; *Honig*, 484 U.S. at 312, 108 S. Ct. at 598; see *Warren G.* v. *Cumberland Cnty. Sch. Dist.*, 190 F.3d 80, 87 (3d Cir. 1999) ("the object of parents' obtaining their own evaluation is to determine whether grounds exist to challenge the [d]istrict's"). Consequently, 34 C.F.R. 300.502(b)(1) (1999) is entitled to *Chevron* deference and constitutes a reasonable interpretation of the statute.

Relying on Section 1415(a)'s language, which requires state and local agencies to "establish and maintain procedures * * * to ensure that * * * parents are guaranteed procedural safeguards with respect to the provision of a free appropriate public agency," the Board argues (Br. 17, 20), that the statute "assigns exclusive responsibility to state and local recipients of federal funding to develop IEE procedures." That statutory provision does not limit the Department's authority to issue regulations, particularly one, as here, that merely "clarifies" an existing statutory entitlement. *Schaffer*, 546 U.S. at 60, 126 S. Ct. at 536. Rather, Section 1415(a) merely is a directive to ensure that state and local educational agencies, which administer the IDEA, enact sufficient guidelines so that parents' statutory rights are protected.

In addition, the IDEA actually limits local agencies' authority to issue mandates. As the district court correctly noted (Doc. 67 at 20), 20 U.S.C. 1407, which outlines a State's rule-making authority, "urges restraint" since it directs a State to "minimize the number of rules, regulations, and policies to which the local educational agencies and schools located in the State are subject." 20 U.S.C. 1407(a)(3). Moreover, since Congress authorized 34 C.F.R. 300.502(b)(1) (1999) when it reenacted and amended the IDEA in 1983, 1990, 1997, and 2004, the Board's argument fails.

Finally, the Board's cites (Br. 1, 21-23, 30-33) *Alexander* v. *Sandoval*, 532 U.S. 275, 276, 121 S. Ct. 1511, 1514 (2001), and cases analyzing whether a particular statute or regulation is enforceable by means of a private right of action,[10] to argue that 34 C.F.R. 300.502 (1999) cannot provide parents with a free IEE because that "remedy" is not provided in the statute. Aside from the fact, as stated above, that the text of the IDEA itself provides parents with the right to a publicly financed IEE, the Board's reliance on *Sandoval* and the other cases is entirely misplaced. In *Sandoval*, the Supreme Court held that there was no private right of action to enforce regulations imposing liability for disparate impact

[10] See, *e.g.*, *American Ass'n of People with Disabilities* v. *Harris*, 605 F.3d 1124 (11th Cir. 2010), opinion vacated and superseded on reh'g, 647 F.3d 1093 (2011); *Love* v. *Delta Air Lines*, 310 F.3d 1347 (11th Cir. 2002).

discrimination pursuant Title VI of the Civil Rights Act when that statute did not provide private individuals with the right to sue on that basis. Indeed, the Court merely ruled that a regulation cannot "create a freestanding private right of action" when "no such right of action exists" in the statute. *Sandoval*, 532 U.S. at 293, 121 S. Ct. at 1523. First, *Sandoval* is inapposite since it involved a fundamentally different issue than the one presented here. The question, here, unlike in *Sandoval*, is the validity of 34 C.F.R. 300.502(b)(1) (1999) – not whether plaintiffs/parents have an enforceable private right of action to obtain an IEE. In fact, in *Sandoval*, the Court expressly presumed that the regulation proscribing disparate impact discrimination was "valid[]." 532 U.S. at 281, 121 S. Ct. at 1517.

Sandoval is also easily distinguishable because a parent's statutory right to sue under the IDEA is fundamentally different than plaintiffs' right to enforce the regulation establishing disparate impact liability under Title VI. After all, the IDEA expressly provides parents with a right of action to bring suits for violations of the statute and specifically authorizes parents to file a complaint "with respect to *any matter relating to the* * * * *evaluation* * * * of the[ir] child." 20 U.S.C. 1415(b)(6)(A); see *Shotz* v. *City of Plantation*, 344 F.3d 1161, 1166 n.6 (11th Cir. 2003) (quoting *Davis* v. *Passman*, 442 U.S. 228, 239, 99 S. Ct. 2264, 2274 (1979)) ("If a litigant is an appropriate party to invoke the power of the courts, it is said that he has a 'cause of action' under the statutes.").

Further, because the Board does not challenge parents' right to sue to obtain an IEE, the issue of who is to pay for the assessment is properly characterized as a question of "relief" or what "remedies" attached to the statutory right and "a federal court may make available." *Shotz,* 344 F.3d at 1166 n.6 (emphasis omitted) (quoting *Davis*, 442 U.S. at 239 n.18, 99 S. Ct. at 2274 n.18). Accordingly, because this case, unlike *Sandoval* and other decisions the Board cites, does not involve "the appropriate scope of liability under the statute," *ibid.*, they do not dictate the outcome here.

CONCLUSION

This Court should conclude that 34 C.F.R. 300.502 (1999) is a valid and enforceable exercise of the Department of Education's regulatory authority.

Respectfully submitted,

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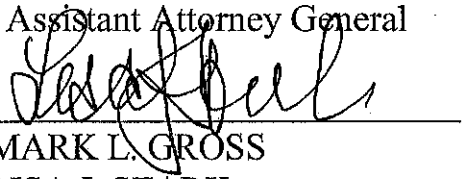

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CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), that the attached Brief For The United States As Amicus Curiae Supporting Plaintiffs-Appellees And Urging Affirmance:

(1) complies with Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B), because it contains 5,991 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii); and

(2) complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Word 2007, in 14-point Times New Roman font.

LISA J. STARK
Attorney

Dated: February 21, 2012

CERTIFICATE OF SERVICE

I hereby certify that on February 21, 2012, the original and six copies of the Brief For The United States As Amicus Curiae Supporting Plaintiffs-Appellees And Urging Affirmance, as well as original appearance of counsel forms, were served by federal express on the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit.

I further certify that one copy of the foregoing brief and one copy of the appearance of counsel forms were served by federal express on the following counsel of record:

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