No. 440, 1999

IN THE SUPREME COURT
OF THE STATE OF DELAWARE

In the Matter of

MARILYN ARONS, RUTH WATSON, and
PARENT INFORMATION CENTER OF NEW JERSEY, INC.,

Petitioners

ON APPEAL FROM THE BOARD OF THE UNAUTHORIZED
PRACTICE OF LAW OF THE SUPREME COURT
OF THE STATE OF DELAWARE

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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INTEREST OF THE UNITED STATES

This case involves the interpretation of a federal statute, the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 et seq., and presents the question whether the IDEA authorizes lay experts to advocate on behalf of parents at mandatory due process hearings. The Act authorizes the Department of Education to issue "rules and regulations" and administer "programs and activities" to carry out its provisions. 20 U.S.C. 1402(a), 1417(b). It also provides the Department with authority to determine that States receiving federal funds have "policies and procedures" to comply with its terms. 20 U.S.C. 1412(a). The United States has previously filed amicus briefs in cases where the interpretation of the IDEA is at issue. Participation in this case is particularly important since it involves a fundamental issue relating to the purpose of the Act, as well as the procedural protections the Act guarantees parents

of children with disabilities. The assistance of informed lay persons for parents without counsel is critical to parents' ability to protect fully their childrens' right to an education guaranteed by the IDEA.

NATURE OF PROCEEDINGS

Petitioners are non-lawyers trained to help parents at due process hearings held pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 et seq. On August 8, 1996, the Delaware Office of Disciplinary Counsel filed a petition with the Board on the Unauthorized Practice of Law of the Supreme Court of the State of Delaware seeking to bar petitioners from engaging in the unauthorized practice of law by representing parents at IDEA due process hearings. The parties stipulated to the facts.

On September 24, 1999, the Board issued its Findings and Recommended Disposition. The Board concluded that petitioners had engaged in the unauthorized practice of law by representing parents at IDEA due process hearings. It recommended that an injunction be issued ordering petitioners to "cease and desist * * * from the unauthorized practice of law in the State of Delaware." In re Arons, No. UPL-4, 1996 (Del. Sept. 24, 1999), slip op. 29.

On the same date as the Board's decision, petitioners filed a timely petition with this Court. Del. S. Ct. R. 86(e).

SUMMARY OF ARGUMENT

The Board erred in concluding that petitioners are not authorized to advocate on behalf of parents at due process hearings held pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 et seq. The statute provides that any party to a mandatory due process hearing has "the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities." 20 U.S.C. 1415(h)(1).

The IDEA's language and structure unambiguously entitle lay persons "with special knowledge or training" to advocate at due process hearings on behalf of parents for two reasons: (1) Section 1415(h)(1) uses the same language to authorize attorneys and lay experts to act on behalf of parties at an administrative hearing; and (2) since Section 1415(h)(1) clearly authorizes lay experts to advise parents, who have the right to question witnesses and present evidence at an administrative hearing, Congress could not have intended to create a clearly wasteful, time-consuming, and imprecise process whereby the expert's questions and evidence are funneled through parents.

Moreover, consistent with the Supremacy Clause of the Constitution, the Board's decision cannot stand because it is contrary to the purpose of the IDEA by effectively precluding parents from obtaining the impartial due process hearing the statute guarantees. The IDEA was enacted "to ensure that

children with disabilities and their parents are guaranteed procedural safeguards," including a mandatory due process hearing, and "to guarantee parents * * * an opportunity for meaningful input into all decisions affecting their child's education." 20 U.S.C. 1415(a); Honig v. Doe, 484 U.S. 305, 311 (1988); see 20 U.S.C. 1400(d)(1)(B). The parties stipulated that the parents were unable to secure representation by counsel, and would never have exercised their right to a due process hearing without petitioners' advocacy (Stipulation ¶ 28). Accordingly, because petitioners' advocacy at the due process hearings was essential to effectuate Congress's purpose that parents have "full participation * * * and proper resolution of substantive disagreements" regarding their child's education, the Board's ruling undermines both the statute's goal and guaranteed right that parents have a meaningful due process hearing. School Comm. v. Department of Educ., 471 U.S. 359, 368 (1985).

STATEMENT OF THE FACTS

1. The State of Delaware receives federal funds pursuant to the IDEA (Stipulation ¶ 5). To fulfill obligations required by the IDEA, the Delaware Department of Public Instruction provides due process hearings to any parent who seeks to challenge a decision of local school authorities regarding the educational placement of his or her child. 20 U.S.C. 1415(b)(6) and (f). This case is an outgrowth of five such hearings.

Each of the hearings at issue included three parties: the parents of a child who has a disability, the local school board, and the State Department of Public Instruction. The issues and testimony "involve[d] complex factual questions relating to the unique learning needs of the disabled child, * * * the adequacy and accuracy of the school board's testing, evaluation, and diagnosis of the child's problem, and the remedial measures needed to address the child's disability" (Stipulation ¶ 14).

During the hearings, the school board and the Department of Public Instruction were each represented by legal counsel (Stipulation ¶ 11). Each set of parents initially sought to retain an attorney to represent his or her child's interests at the due process hearings. None could afford the fees of private counsel or find an attorney willing to handle the case on a pro bono basis (Stipulation ¶¶ 20, 21). Thus, each set of parents sought the assistance of petitioners, who are affiliated with a nonprofit organization and have "special knowledge and training with respect to the problems of children with disabilities"

(Stipulation ¶ 14). See 20 U.S.C. 1415(h)(1). The parties agree that "lawyers ordinarily lack" such "skills and training" (Stipulation ¶ 14).

The hearings were held before a three-person panel. See Del. Code Ann tit. 14, § 3137(d). State law requires that the panel consist of one attorney licensed to practice in Delaware, one "educator knowledgeable in the field of special education and special educational programming," and "a lay person with demonstrated interest in the education of the handicapped." Del. Code Ann. tit. 14, § 3137(d)(1),(2), and (3). "Although [the] due process hearings ha[d] the trappings of formal adjudications," "the rules of evidence [did] not strictly apply" (Stipulation ¶¶ 14, 12).

During the course of the hearings, petitioners made statements, presented witnesses, cross-examined witnesses, raised objections, offered evidence, and submitted briefs on behalf of the parents. The parties stipulated that, but for the assistance of petitioners, none of the parents would have sought a due process hearing (Stipulation ¶¶ 26, 27, 28). Petitioners obtained some form of relief for each set of parents at the due process hearing itself, on judicial review (which is based upon the record created at the due process hearing), or through negotiation or settlement (Stipulation ¶ 33).

2. On September 24, 1999, the Board issued its decision. It concluded that the IDEA does not preempt Delaware laws regarding the unauthorized practice of law and prohibits non-

lawyers from advocating on behalf of parents at IDEA due process hearings.

Focusing on the language of the IDEA, the Board concluded that Congress did not intend to authorize non-lawyer lay experts to advocate for parents at IDEA due process hearings. The Board reasoned that because the statute provides that a party may be "accompanied and advised" by a "person with special knowledge or training," and does not specify that the party can be "represented" by that lay expert, Congress did not "intend[] to allow representation of parties by nonlawyers." In re Arons, No. UPL-4, 1996 (Del. Sept. 24, 1999), slip op. 13. The Board explained, "[t]he usage of the phrase 'accompanied and advised' * * * when viewed against the long-established regulation of the practice of law under State, not federal or administrative, authority, and the evidence that Congress well knew how to authorize lay representation in clear terms when it wished to do so, establish that Congress did not intend to mandate a right to lay representation in due process hearings." Id. at 18-19. Thus, the Board concluded, because "we find no ambiguity in the carefully drawn language of the statute," we need not "resort to extrinsic aids" to reach our decision. Id. at 15.

The Board cited the IDEA's legislative history for support, concluding that a Senate Conference Report that explained that the procedural rights included in the IDEA's predecessor statute included the "'right to counsel and to be advised and accompanied by individuals with special knowledge, training or skills with

respect to the problems of handicapped children'" "confirm[ed] the clear distinction between the representational role of counsel and the advisory role of nonlawyers." In re Arons, No. UPL-4, 1996 (Del. Sept. 24, 1999), slip op. 15, quoting S. Conf. Rep. No. 455, 94th Cong., 1st Sess. 49 (1975).

The Board refused to defer to an opinion expressed in a 1981 letter by the Acting General Counsel of the United States Department of Education (the "Sky Letter") that the IDEA provides lay advocates the right to represent parents at administrative IDEA hearings. The Board refused to defer because, it said, "Congress did not explicitly delegate to the United States Department of Education the responsibility to determine issues of authority to practice law," and therefore only "a 'reasonable' administrative interpretation requires deference." In re Arons, No. UPL-4, 1996 (Del. Sept. 24, 1999), slip op. 19. It then rejected the Department's analysis as "unreasonable" merely because it disagreed with the interpretation of the statute's language, its legislative history, and other legislation in the Sky Letter.

Finally, analyzing the doctrine of preemption mandated by the Supremacy Clause of the Constitution, the Board concluded that the IDEA did not "override Delaware's regulatory authority" as to the unauthorized practice of law. In re Arons, No. UPL-4, 1996 (Del. Sept. 24, 1999), slip op. 22. It found that "the regulation of the practice of law is a traditional State function," Congress did not demonstrate a "'manifest intent'" to

regulate a "historic police power," and there is "no actual conflict between the state and federal schemes." Id. at 24, 25, 26. The Board explained, "[t]he Congressional mandate [of the IDEA] is that [parents] 'shall have an opportunity for an impartial due process hearing.' We cannot conclude on the evidence before us that under the procedures adopted by the State that opportunity is lacking." Id. at 26-27.

On the final page of its decision, the Board noted that its interpretation of the IDEA, and its conclusion as to the limited role of lay experts at the mandatory due process hearings, is an aberration. It explained, "[m]any other states--perhaps all except Delaware--have decided to allow nonlawyer representation and have presumably settled upon schemes of regulation and oversight which they have concluded are sufficient in their local circumstances." In re Arons, No. UPL-4, 1996 (Del. Sept. 24, 1999), slip op. 28.

ARGUMENT

THE BOARD ERRED IN HOLDING THAT LAY EXPERTS MAY NOT ADVOCATE ON BEHALF OF PARENTS AT DUE PROCESS HEARINGS HELD PURSUANT TO THE IDEA

A. Scope Of Review

The interpretation of a statute is a legal question that is subject to de novo review.

B. Federal Law Controls Whether Lay Experts May Advocate On Behalf Of Parents At Due Process Hearings Held Pursuant To The IDEA

The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 et seq., formerly entitled the Education of the Handicapped Act (EHA), provides federal money to assist States and local agencies in educating children who have disabilities.[1] The Act was passed to ensure that proper educational opportunities are provided for children with disabilities after Congress found that many of these children were either entirely excluded from public education or placed in settings that had little relationship to their special needs. The Act confers substantive and procedural rights that guarantee these students a

[1] Congress initially addressed the education of children with disabilities in the Elementary and Secondary Education Amendments of 1966 (ESEA), Pub. L. No. 89-750, Tit. I, § 161, 80 Stat. 1204. In 1970, Congress replaced ESEA with the Education of the Handicapped Act(EHA), Pub. L. No. 91-230, Tit. VI, 84 Stat. 175. In 1974, Congress enacted the Education of the Handicapped Amendments, Pub. L. No. 93-380, Tit. VI, Pt. B, 88 Stat. 579, as an interim measure, and a year later the Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773. The statute was amended in 1977, 1983, 1986, and 1988. In 1990, Congress changed the name of EHA to IDEA, see Education of the Handicapped Act Amendments of 1990, Pub. L. No. 101-476, Tit. IX, 104 Stat. 1141, and subsequently amended the statute in 1991, 1994, and 1997.

"free appropriate public education." 20 U.S.C. 1400(d). See Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 12 (1993). It provides parents with the right to challenge at a mandatory due process hearing any decision affecting his or her child's educational placement and provides them with "the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities" at the hearing. 20 U.S.C. 1415(h)(1).

A state recipient must comply with the procedural requirements of the Act. Honig v. Doe, 484 U.S. 305, 310 (1988); Board of Educ. v. Rowley, 458 U.S. 176, 179, 183 (1982). See also Smith v. Robinson, 468 U.S. 992, 1010 (1984). Section 1415(a) provides that "[a]ny * * * educational agency * * * that receives assistance * * * shall establish * * * procedures * * * to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of free appropriate public education." 20 U.S.C. 1415(a). Once a State, such as Delaware, receives federal IDEA funds, local agencies must abide by the statute's terms. Honig, 484 U.S. at 310; Rowley, 458 U.S. at 179, 183; Beth V. v. Carroll, 87 F.3d 80, 82 (3d Cir. 1996).

In addition to the requirements of the statute, the Supremacy Clause of the Constitution, Art. VI, Cl. 2, guarantees federal rights regardless of state law. It provides for the preemption of state laws that are either in conflict with the

express terms of a federal statute or "'stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597, 605 (1991), quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941). "'The purpose of Congress is the ultimate touchstone' in every pre-emption case." Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996), quoting Retail Clerks Int'l Ass'n, Local 1625 v. Schermerhorn, 375 U.S. 96, 103 (1963).

Consistent with these principles, Congress can enact statutes providing for the licensing of individuals to practice in specific areas of federal law, and those statutes preempt incompatible state laws. For example, in Sperry v. Florida, 373 U.S. 379 (1963), the Supreme Court unanimously held that the State of Florida could not enjoin a non-lawyer registered by the Patent Office from preparing and prosecuting patent applications before the Patent Office, even though such activity constituted the unauthorized practice of law in Florida. It emphasized, "the law of the State, though enacted in the exercise of powers not controverted, must yield when incompatible with federal legislation." Id. at 384, quoting Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 211 (1824). Because the federal statute "expressly permits the Commissioner to authorize practice before the Patent Office by non-lawyers, and the Commissioner has explicitly granted such authority," a "State may not enforce licensing requirements * * * which impose * * * additional conditions not contemplated by Congress." Id. at 385. Thus, federal law can

unquestionably preempt state standards regarding the unauthorized practice of law.

In accordance with this precedent, federal courts have consistently recognized that when there is a conflict between the safeguards mandated by the IDEA and state law, the federal law controls. See, e.g., Hacienda La Puente Unified Sch. Dist. v. Honig, 976 F.2d 487, 492-493 (9th Cir. 1992); In re Conklin, 946 F.2d 306, 308 (4th Cir. 1991); Tokarcik v. Forest Hills Sch. Dist., 665 F.2d 443, 449 (3d Cir. 1981), cert. denied, 458 U.S. 1121 (1982); Helms v. McDaniel, 657 F.2d 800, 804-806 (5th Cir. Unit B Oct. 1981), cert. denied, 455 U.S. 946 (1982); Town of Burlington v. Department of Educ., 655 F.2d 428, 431 (1st Cir. 1981); Robert M. v. Benton, 634 F.2d 1139, 1142 (8th Cir. 1980). Several state courts have likewise recognized the same. See, e.g., County of L.A. v. Smith, 88 Cal. Rptr. 2d 159, 173-174 (Cal. Ct. App. 1999); In re Adoption of Amendments to N.J.A.C. 6:28-2.10, 3.6 & 4.3, 702 A.2d 838, 844-845 (N.J. Super. Ct. App. Div. 1997); Doolittle v. Meridian Joint Sch. Dist. No. 2, 919 P.2d 334, 342 (Idaho 1996). As one federal court described:

> The Education of All Handicapped Children Act provides specific procedural safeguards which must be adopted by states receiving funds under the Act. These safeguards govern educational proceedings [within a state that] is a recipient of funds under the Act. Thus, any * * * law [in a state receiving federal funds] which is inconsistent with these federally mandated procedures is superseded by the federal law.

Monahan v. Nebraska, 491 F. Supp. 1074, 1091 (D. Neb. 1980), aff'd in part and vacated in part, 645 F.2d 592 (8th Cir. 1981).

Thus, the IDEA's "elaborate and highly specific procedural safeguards," Rowley, 458 U.S. at 205, preempt state law, including licensing requirements regarding the unauthorized practice of law, to the extent that they are in conflict with or fail to meet minimum federal requirements. See also Robinson, 468 U.S. at 1010.[2]

C. Federal Law Establishes That Lay Experts Are Entitled To Advocate On Behalf Of Parents At IDEA Due Process Hearings

1. The IDEA's Language And Structure Unambiguously Entitle Lay Experts To Advocate At Due Process Hearings On Behalf Of Parents

a. The Applicable Law

In any case involving statutory interpretation, the objective is to ascertain the intent of Congress. Dole v. United Steelworkers of Am., 494 U.S. 26, 35 (1990). To achieve that goal, the "first step * * * is to determine" the "plain * * * meaning" of the statutory language. Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997). See Bailey v. United States, 516 U.S. 137, 144-145 (1995). To do so, a court must "consider not only the bare meaning of the word[s] but also [their] placement and purpose in the statutory scheme." Id. at 145. When "the statutory language is unambiguous and 'the statutory scheme * * * coherent and consistent,'" "'there is no room for construction.'" Shell Oil Co., 519 U.S. at 340, quoting United States v. Ron Pair

[2] Because the IDEA merely sets a mandatory minimum, it does not preempt state law if the latter provides procedural safeguards more stringent than federal requirements. See, e.g., Antkowiak v. Amback, 838 F.2d 635, 641 (2d Cir.), cert. denied, 488 U.S. 850 (1988).

Enters., Inc., 489 U.S. 235, 240 (1989); United States v. Gonzales, 520 U.S. 1, 8 (1997), quoting United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 96 (1820) (Marshall, C.J.).

"[T]he normal rule of statutory construction [is] that identical words used in different parts of the same act are intended to have the same meaning." Commissioner v. Lundy, 516 U.S. 235, 250 (1996), quoting Sullivan v. Stroop, 496 U.S. 478, 484 (1990), and Sorenson v. Secretary of Treasury, 475 U.S. 851, 860 (1986) (internal quotation marks omitted). As the Supreme Court has explained, "the case for different definitions within a single text is difficult to make. * * * But to give a single term two different and inconsistent meanings * * * for a single occurrence is an offense so unlikely that no common prohibition has ever been thought necessary to guard against it." BFP v. Resolution Trust Corp., 511 U.S. 531, 557 (1994) (Souter, J., dissenting). Thus, when Congress uses the same phrase and applies it to two groups within a single sentence, the phrase shall be identically interpreted to apply equally to the two groups. Cf. Cohen v. de la Cruz, 523 U.S. 213, 220 (1998) (words that serve the identical function have equivalent meaning).

b. The IDEA's Procedural Safeguards

Section 1415 sets forth the IDEA's procedural safeguards that "'in and of themselves form the substance of [the] IDEA.'" Collinsgru v. Palmyra Bd. of Educ., 161 F.3d 225, 235 (3d Cir. 1998), quoting Heldman v. Sobol, 962 F.2d 148, 155 (2d Cir. 1992). They "guarantee parents both an opportunity for

meaningful input into all decisions affecting their child's education," Honig, 484 U.S. at 311, and establish "a comprehensive system of administrative and judicial safeguards [that] facilitate[] review of decisions that [they] contest," Arons v. New Jersey State Bd. of Educ., 842 F.2d 58, 61 (3d Cir.), cert. denied, 488 U.S. 942 (1988). As the Supreme Court has explained:

> we think that the importance Congress attached to these procedural safeguards cannot be gainsaid. It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process, see, e.g., §§ 1415(a)-(d), as it did upon the measurement of the result * * * against a substantive standard.

Rowley, 458 U.S. 176, 205-206 (1982). To facilitate parental involvement, the IDEA provides, inter alia, parents or guardians the right to file a "complaint" and have an "impartial due process hearing" when they are dissatisfied with "any matter relating to the identification, evaluation, or educational placement of the[ir] child, or the provision of a free appropriate public education" for the child. Id. at 182-183, 204-205; 20 U.S.C. 1415(b)(6) and (f).

Section 1415(h), entitled "Safeguards," sets forth the procedural protections to be afforded parties, including parents and guardians, during the "impartial due process" hearing, and "ensure[s] that hearings conducted by the State are fair and adequate." Smith v. Robinson, 468 U.S. 992, 1011 (1984). Like all the IDEA's procedural guarantees, the Section is designed to

"maximize parental involvement in decisions." Beth V., 87 F.3d at 82. It provides four specific rights, including the provision at issue here, which specifies that any party has "the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities." 20 U.S.C. 1415(h)(1) (emphasis added). The Section also designates that any party has "the right to present evidence and confront, cross-examine, and compel the attendance of witnesses," 20 U.S.C. 1415(h)(2); "the right to a written or * * * verbatim record of such hearing," 20 U.S.C. 1415(h)(3); and "the right to written, or * * * electronic findings of fact and decisions," 20 U.S.C. 1415(h)(4). Thus, by its terms, Section 1415(h)(1) entitles attorneys and lay experts alike to assist parents.[3]

Section 1415(h)(1) uses the identical words to authorize lay experts and attorneys to act on behalf of parties at an administrative hearing. Within a single phrase, Section 1415(h)(1) groups attorneys and lay experts together and authorizes either to "accompan[y] and advise[ ]" parties at due process hearings. It neither distinguishes between the roles of attorneys and lay experts, nor implies that their roles, authority, or responsibilities at an administrative hearing are any different. By its terms, the statute authorizes a person

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[3] The decision from a due process hearing may be appealed to a state educational agency, if reached at the local level, and ultimately to a federal district court. 20 U.S.C. 1415(g).

"with special knowledge or training" to advocate on behalf of a party just as "counsel" may. Cf. Melendez v. United States, 518 U.S. 120, 134 (1996) (Breyer, J., concurring in part and dissenting in part) (noting that identical words in two places creates the same standard in the absence of evidence to the contrary); Union Bank v. Wolas, 502 U.S. 151, 162 (1991) (refusing to interpret short term and long term debt differently because "the statutory text * * * makes no distinction"); Miller v. Youakim, 440 U.S. 125, 135 (1979) (refusing to distinguish between related and unrelated foster homes where Congress made no distinction).

The structure and language of Section 1415 also authorizes persons with "special knowledge or training" to advocate at an administrative hearing because the statute expressly provides the parents, whom they are to assist, with the right to offer evidence and examine witnesses. Section 1415(h)(2) provides "'any party to any hearing,'" which necessarily includes parents or guardians, with the right to "'present evidence and confront, cross-examine, and compel the attendance of witnesses.'" Arons, 842 F.2d at 62, quoting what was then 20 U.S.C. 1415(d)(1). See Collinsgru, 161 F.3d at 232, citing Section 1415(h)(2) and 34 C.F.R. 303.422(b)(2) ("parents have the right to present evidence and examine witnesses in [IDEA] administrative due process hearings"); Devine v. Indian River County Sch. Bd., 121 F.3d 576, 582 (11th Cir. 1997), citing what was then 20 U.S.C. 1415(d)(2) and 34 C.F.R. 303.422(b)(2) ("it is true that parents

have the right to present evidence and examine witnesses in due process hearings held pursuant to IDEA"), cert. denied, 118 S. Ct. 1040 (1998). See also Susan N. v. Wilson Sch. Dist., 70 F.3d 751, 755 (3d Cir. 1995) (explaining that the IDEA authorizes parents to "contest in an impartial due process hearing decisions regarding the evaluation of their child or the appropriateness of the child's program"). Accord Doe v. Board of Educ., 165 F.3d 260, 262-263 (4th Cir. 1998) (recognizing that the child is the real party at interest and parents act on his or her behalf), cert. denied, 119 S. Ct. 2049 (1999). Since Congress authorized parents and guardians, regardless of legal training, to advocate on behalf of their children at administrative hearings, it is illogical to presume that Congress would deny that function to the persons "with special knowledge or training" that Congress designated to assist these parents.

To conclude otherwise would lead to absurd results. After all, a parent presenting a witness could utilize the advice of a lay expert at a hearing by stopping after each answer and then repeating the next question the expert suggests. That being so, it is unreasonable that Congress would have intended that lay experts, presumably with superior skills to the parent, would be unable to present evidence and question witnesses on behalf of the parent, but could act only through untrained parents. See McFarland v. Scott, 512 U.S. 849, 855 (1994) (construing language so as to give "meaning to the statute as a practical matter"); United States v. Granderson, 511 U.S. 39, 56 (1994), quoting In

re Chapman, 166 U.S. 661, 667 (1897) (adopting "'a sensible construction'" that would avoid "'an absurd conclusion'").

Consistent with the language and structure of the statute, several courts have explicitly recognized that lay experts have the right to advocate on behalf of parents at IDEA hearings. See Z.A. v. San Bruno Park Sch. Dist., 165 F.3d 1273, 1276 (9th Cir. 1999) (lawyer not admitted to the California bar "could appear as a lay advisor" at an administrative hearing pursuant to the IDEA even though he could not recover attorney's fees); Woods v. New Jersey Dep't of Educ., 858 F. Supp. 51, 55 (D.N.J. 1993) (attorney-client privilege applies to communications between parent and lay expert during administrative hearing pursuant to the IDEA in part because "substance of [the] relationship is one of an attorney and client").

By concluding that the IDEA authorizes lay experts to present evidence and argument and question witnesses, we do not intend to suggest that they are entitled to attorney's fees or actually have engaged in the practice of law. The fact that lay experts can and do provide valuable services while advocating on behalf of a party at IDEA hearings should not entitle them to remuneration as an attorney. See Arons, 842 F.2d at 62; Z.A., 165 F.3d at 1276. After all, lay experts are not attorneys and thus, by definition, have not provided the assistance of counsel. The fact that the IDEA provides parents with the right to have lay experts advocate at due process hearings on their behalf does not imply that there is a simultaneous obligation to compensate

the advocate as if he or she were an attorney.[4]

The Board concluded that petitioners were not entitled to advocate on behalf of parents at IDEA due process hearings. Relying primarily on the language from unrelated federal statutes, the Board reasoned that because Congress did not utilize the word "represent," and merely authorized trained lay persons to "accompan[y] and advise[ ]" parents, it intended to preclude lay experts at administrative hearings from performing any function also performed by lawyers.

At the outset, the absence of the word "represent" in Section 1415(h)(1) is not persuasive evidence of Congress's intent. After all, the Supreme Court has frequently cautioned that "'[i]t is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law.'" United States v. Wells, 519 U.S. 482, 496 (1997), quoting NLRB v. Plasterers' Local Union No. 79, 404 U.S. 116, 129-130 (1971). See, e.g., Dickinson v. Zurko, 119 S. Ct. 1816, 1819 (1999).

The Supreme Court has also explained that "[l]anguage in one statute usually sheds little light upon the meaning of different language in another statute." Russello v. United States, 464

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[4] Courts have recognized that a parent, who is a lawyer and represents his or her child in IDEA proceedings, is not entitled to attorney's fees. See Doe v. Board of Educ., 165 F.3d 260, 264 (4th Cir. 1998), cert. denied, 119 S. Ct. 2049 (1999); Rappaport v. Vance, 812 F. Supp. 609 (D. Md. 1993), appeal dismissed, 14 F.3d 596 (4th Cir. 1994). While lay experts are not lawyers and thus are not entitled to attorney's fees, "nothing prevents [them] from receiving compensation for work done as an expert consultant." Arons, 842 F.2d at 62; Connors v. Mills, 34 F. Supp. 2d 795, 808 (N.D.N.Y. 1998).

U.S. 16, 25 (1983). Thus, the Board's citation to "unrelated statutes does not assist * * * in determining Congress' intent with respect to the" role of persons "with special knowledge or training" at IDEA hearings. United States v. Mitchell, 39 F.3d 465, 470 n.7 (4th Cir. 1994), cert. denied, 515 U.S. 1142 (1995).

The language and structure of the IDEA establishes that there is no import to the fact that Congress did not include the term "represent" in Section 1415(h)(1). In 20 U.S.C. 1415(f) and (h)(2), Congress did not use the word "represent" when it authorized parents and guardians, regardless of their legal expertise or education, to question witnesses, present evidence, and otherwise act on behalf of their child at administrative hearings. Parents are not acting pro se for themselves; they are representing the interests of their child. Thus, there is no reason to presume that Congress would have utilized the word "represent" when providing persons "with special knowledge or training" who assist parents the authority to perform those same functions.[5]

Nor is a different conclusion mandated by the Third Circuit's decision in Arons v. New Jersey State Bd. of Educ., 842

[5] The Board found it significant that Congress did not use the term "represent" and merely authorized parties to be "accompanied and advised" by trained lay persons. It is interesting to note that Delaware, like Congress, has not always used the term "represent" when providing non-lawyers with the authority to act on behalf of a party at a hearing. For example, the Delaware Code provides that a person charged with a violation of Title 3, Chapter 15, be given an opportunity "to appear * * * to introduce evidence either in person or by agent or attorney at a private hearing." Del. Code Ann. tit. 3, § 1510 (emphasis added).

F.2d 58 (1988). In Arons, the court of appeals merely held that a lay advocate who represents a party at an administrative hearing is not entitled to collect attorney's fees. While it did not decide the issue presented here, the court noted that its denial of attorney's fees "is not to say that plaintiff [the petitioner here] may not perform traditional representation functions during administrative hearings." Id. at 62. In any event, Arons is not controlling since unlike here, there was no claim "that the state rule conflicts literally with the federal statute." Id. at 61.

2. The Board's Decision Effectively Precludes Parents From Obtaining The Impartial Due Process Hearing The Statute Guaranteed

The language of a statute "must be understood in accord with [the] objective" of the legislation, Brotherhood of Locomotive Eng'rs v. Atchison, Topeka & Santa Fe R.R., 516 U.S. 152, 157 (1996), since "[a] statute's meaning is inextricably intertwined with its purpose." Rowland v. California Men's Colony, 506 U.S. 194, 211 n.12 (1993). Thus, a court should "consider not only the bare meaning of the word[s] but also [their] placement and purpose in the statutory scheme." Bailey, 516 U.S. at 145.

The IDEA provides that its primary purposes are "to ensure that all children with disabilities have available to them * * * a free appropriate public education and * * * to ensure that the rights of children with disabilities and parents of such children are protected." 20 U.S.C. 1400(d)(1)(A) and (B) (emphasis added). To effectuate that goal, the IDEA requires that "each

child's individual educational needs be worked out through a process that begins on the local level and includes ongoing parental involvement, detailed procedural safeguards, and a right to judicial review." Robinson, 468 U.S. at 1011. "In several places, the Act emphasizes the participation of the parents in developing the child's educational program and assessing its effectiveness." School Comm. v. Department of Educ., 471 U.S. 359, 368 (1985). Accord Robinson, 469 U.S. at 1011. See 20 U.S.C. 1400(c)(5)(B), 1401(19), 1413(g)(6)(A), 1413(i)(1), 1414(a)(1)(c), 1414(b)(1), 1414(c)(1), 1414(c)(3), 1414(c)(4), 1414(d)(1)(B)(i), 1414(d)(3)(A)(i), 1415(b); 34 C.F.R. 300.345; 34 C.F.R. Pt. 300, App. C § 300.345.

In this case, petitioners' advocacy was essential to effectuate Congress's purpose that parents have "full participation * * * and proper resolution of substantive disagreements" during the due process hearing. School Comm., 471 U.S. at 368. First, both the local school board and the State had attorneys at the hearings (Stipulation ¶ 11). None of the parents petitioners advised had an attorney, could afford the services of a private attorney, or could find an attorney willing to represent them "on a standard-fee-for-service basis" or some "reduced-cost or pro bono basis" (Stipulation ¶¶ 20, 21). In addition, there are no legal services or organizations in Delaware that either provide low-cost legal services or expert assistance in the form of attorneys for due process hearings (Stipulation ¶¶ 22, 23). Consequently, without petitioners'

advocacy, the parents clearly would have been out-matched by both the school district's and State's legal counsel. Thus, the Board's decision barring advocacy by a person "with special knowledge or training" substantially frustrates a parent's statutory right to have meaningful input at a due process hearing.

Even more fundamentally, without petitioners' assistance, the parents never even would have had a due process hearing. The parties stipulated that the parents who were assisted by petitioners never "would have exercised their right to a due process hearing * * * but for [petitioners'] availability and assistance" (Stipulation ¶ 26). The parents, none of whom are college graduates except for one couple, all explained that, without the assistance of petitioners, they would not have participated in the hearing because of its "formality and complexity," their lack of knowledge of technical issues, the fact that "[it] was convened by the Department of Public Instruction * * * an adverse party," and the fact that the local district and State were represented by counsel (Stipulation ¶¶ 27, 28). Thus, the Board's decision will effectively deny parents, like these, their guaranteed right to "'an impartial due process hearing.'" In re Arons, No. UPL-4, 1996 (Del. Sept. 24, 1999), slip op. 26, 27, quoting 20 U.S.C. 1415(f). Accordingly, Delaware law and the Board's interpretation must yield. See Beth V., 87 F.3d at 86, citing W.G. v. Board of Trustees, 960 F.2d 1479, 1484 (9th Cir. 1992) (noting that "'[p]rocedural

inadequacies that * * * seriously infringe the parents' opportunity to participate' * * * give rise to liability under IDEA's predecessor statute").

To reach such a conclusion is not to challenge or minimize the State's substantial interest in regulating the practice of law in Delaware. See Sperry, 373 U.S. at 383. Rather, it is to recognize a well-established constitutional principle that state law is preempted when effectively imposing an obstacle to the rights guaranteed by federal law. Mortier, 501 U.S. at 605, quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941). Because the IDEA was intended to ensure the full participation of parents in all educational decisions involving their children, see Honig, 484 U.S. at 311, 324, and the Board's ruling unquestionably subverts a parent's right to challenge such a decision during the mandatory due process hearing, it cannot stand.

To the extent that the Board reached its conclusion based on a perceived need "to protect the public" from the unauthorized practice of law, its analysis is misguided. In re Arons, No. UPL-4, 1996 (Del. Sept. 24, 1999), slip op. 11 n.2. The parties stipulated that petitioners ably represented parents and that "nonlawyers with 'special knowledge and training with respect to the problems of children with disabilities' * * * are fully capable of presenting [a] parent's case" during an IDEA due process hearing (Stipulation ¶ 14).

Not surprisingly, the views of the State in that regard are not unique. Scholars have recognized that "in administrative

hearings, trained nonlawyers may be more effective * * * than attorneys with little experience in this specialized area." Note, Enforcing the Rights to an "Appropriate" Education: Education for All Handicapped Children Act of 1975, 92 Harv. L. Rev. 1103, 1112 & n.56 (1979). After all, "the issues presented for resolution [at an IDEA hearing] typically involve complex factual questions relating to the unique learning needs of the disabled child, * * * the adequacy and accuracy of the school board's testing, evaluation, * * * diagnosis of the child's problem, and the remedial measures needed to address the child's disability" (Stipulation ¶ 14). In addition, while "due process hearings have the trappings of formal adjudications," "the rules of evidence do not strictly apply" (Stipulation ¶¶ 12, 14). Thus, because lay representatives "must be familiar with, and able to understand, the clinical aspects of the child's condition -- skills and training which lawyers ordinarily lack * * * [--] nonlawyers with 'special knowledge and training with respect to the problems of children with disabilities,' like [petitioners], are fully capable of presenting * * * parents' case[s]" (Stipulation ¶ 14, quoting 20 U.S.C. 1415(h)).

The Board's reliance on state law to restrict the role of non-lawyers "with special knowledge or training" at IDEA hearings is obviously misplaced in light of the qualifications the State has adopted for IDEA hearing examiners. In accordance with Delaware law, the State requires only one of three hearing examiners at an IDEA due process hearing to be an attorney. Del.

Code Ann. tit. 14, § 3137(d)(1). As to the other two, one must be an "educator knowledgeable in the field of special education and special educational programming" and the other a "lay person with demonstrated interest in the education of the handicapped." Del. Code Ann. tit. 14, § 3137(d)(2) and (3). Since state law demonstrates Delaware's conviction that lay persons and educators are competent to evaluate the complex educational evidence before them and render a decision at an IDEA hearing, it cannot logically provide the basis for concluding that persons "with special knowledge or training" are unqualified to advocate on behalf of parents at those hearings.[6]

The experience in other States and the established practices in Delaware are further evidence that the Board's concern about the assistance to be provided by lay experts is overblown. As the Board acknowledged, "[m]any other States -- perhaps all except Delaware -- have decided to allow nonlawyer representation" at administrative IDEA hearings. In re Arons, No. UPL-4, 1996 (Del. Sept. 24, 1999), slip op. 28.

Finally, it is not uncommon in Delaware to allow children guaranteed federal rights to be advised by lay persons. For example, Delaware law provides that "[f]or purposes of a Child

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[6] Moreover, to the extent that Delaware is concerned about the competency of the advocacy of lay experts, it can adopt standards to ensure they are qualified. That should pose no problem in Delaware since the State has already done the same with regard to IDEA hearing examiners, requiring them to "complete[] [certain] training" and have certain "competency [and] expertise." Del. Code Ann. tit. 14, § 3137(c) and (e).

Abuse Prevention and Treatment Act [42 U.S.C. 5101 et seq.] * * * [a] court-appointed special advocate shall be deemed a guardian ad litem to represent the interests of the minor in proceedings before the Court." Del. Code Ann. tit. 31, § 3608. The Delaware Code does not require the special advocate to be an attorney and specifies that the special advocate may "provide advocacy for the children involved in the cases to which they are appointed," "request a hearing before the Court," "examine and cross-examine witnesses and may subpoena, introduce and examine the special advocate's own witnesses." See Del. Code Ann. tit. 31, §§ 3603(e)(2), 3607(b) and (c). Similarly, Delaware permits a child victim or witness "to be accompanied, in all proceedings," in court "by a 'friend' or other person in whom the child trusts, which person shall be permitted to advise the judge, when appropriate and as a friend of the Court, regarding the child's ability to understand proceedings and questions." Del. Code Ann. tit. 11, § 5134(b). Thus, since Delaware already allows lay persons to represent children and protect their federal rights in court, there appears little justification for not allowing a person "with special knowledge or training" from advocating on behalf of parents at IDEA due process hearings when Congress provided them, and the parents they represent, that right.[7]

[7] The Court-Appointed Special Advocate Program is not the only instance in Delaware where non-lawyers are permitted to represent the interest of parties. For example, even though the Delaware Code does not specify that the Public Advocate must be a lawyer, it authorizes him:

....(continued)

Contrary to the Board's conclusion, the legislative history does not demonstrate that Congress intended to bar lay experts from advocating on behalf of parties at IDEA due process hearings.[8]

In its decision, the Board relied on a single sentence from a Senate Conference Report to the predecessor statute to the IDEA. The sentence enumerates the procedural protections afforded at due process hearings and provides that parties have a "right to counsel and to be advised and accompanied by individuals with special knowledge, training or skills with respect to the problems of handicapped children." S. Conf. Rep. No. 455, 94th Cong., lst Sess. 49 (1975). Even if the sentence

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(continued)....

> (1) [t]o appear before the Public Service Commission on behalf of the interest of consumers in any matter or proceeding over which the Commission has jurisdiction * * *; (2) [t]o advocate the lowest reasonable rates for consumers consistent with the maintenance of adequate utility service and consistent with equitable distribution of rates among all classes of consumers[; and] (3) [t]o appear on behalf of the interest of consumers in the courts of this State, the federal courts and federal administrative and regulatory agencies and commissions in matters involving rates, service and practices of public utilities.

Del. Code Ann. tit. 29, § 8808.

[8] The Supreme Court has repeatedly ruled that a court should not "resort to legislative history" when the statutory language is clear. United States v. Gonzales, 520 U.S. 1, 6 (1997); Ratzlaf v. United States, 510 U.S. 135, 147-148 (1994); accord Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 254 (1992). In fact, "contrary indications in the statute's legislative history" must be ignored when the statutory text is unambiguous. Ratzlaf, 510 U.S. at 147.

is interpreted to be evidence that Congress intended to distinguish between the functions of lay experts and attorneys at administrative hearings, the legislative history of the IDEA does not consistently articulate this view. For example, Senator Cranston, thanking Congressman Miller of California who sponsored the House amendment proposing the procedural protections, noted that "the procedural requirements in the conference report are consistent with the existing California statutory and master plan requirements on this subject," which allow lay experts to advocate on behalf of parties at an administrative hearings. 121 Cong. Rec. 37,418-37,419 (1975). Accordingly, the legislative history does not support the Board's decision.

3. The Board Erred In Refusing To Defer To The Department Of Education's Interpretation Of The IDEA

"When Congress expressly delegates to an administrative agency the authority to make specific policy determinations, courts must give the agency's decision controlling weight unless it is 'arbitrary, capricious, or manifestly contrary to the statute.'" ABF Freight Sys., Inc. v. NLRB, 510 U.S. 317, 324 (1994), quoting Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984). This is so even when "Congress has not 'directly spoken to the precise question at issue,' [so long as the interpretation] is 'based on a permissible construction of the statute.'" Auer v. Robbins, 519 U.S. 452, 457 (1997), quoting Chevron U.S.A. Inc., 467 U.S. at 842-843.

Even if an agency's opinion is not articulated in a regulation, it is nonetheless entitled to considerable deference. See Herman v. NationsBank Trust Co., 126 F.3d 1354, 1363 (11th Cir. 1997), cert. denied, 119 S. Ct. 54 (1998). For example, several federal courts have recognized that agency letters provide "an important informative function * * * [that] may prove helpful to a decision in a given case." Basham v. Finance Am. Corp., 583 F.2d 918, 925 (7th Cir. 1978), cert. denied, 439 U.S. 1128 (1979). See Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944); Eby v. Reb Realty, Inc., 495 F.2d 646, 649-650 (9th Cir. 1974); Yankton Sch. Dist. v. Schramm, 900 F. Supp. 1182, 1190 & n.3 (D.S.D. 1995) (policy letters issued by the Department of Education pursuant to the IDEA), aff'd as modified, 93 F.3d 1369 (8th Cir. 1996). Indeed, the weight to be provided such judgments will ultimately depend on such factors as the thoroughness of the analysis, the validity of its reasoning, and consistency with other official pronouncements. Skidmore, 323 U.S. at 140.

The IDEA provides the Secretary of Education with the authority to issue rules and "regulations" to carry out the provisions of the Act. 20 U.S.C. 1417(b). Pursuant to that authority and consistent with the plain language and purpose of the IDEA, the Department has issued numerous regulations that emphasize the necessity of having full parental participation in all phases of decision-making regarding the educational placement of a child.

Consistent with this precedent, the Board was not entitled to substitute its own opinion for the Department's specific view that persons "with special knowledge or training" are entitled to advocate on behalf of parties at IDEA due process hearings. In 1981, the Acting General Counsel, in response to an inquiry from the State of Washington, issued a nine page letter setting forth "a legal analysis regarding the role of lay advocates in educational agency administrative hearings" pursuant to the Education of the Handicapped Act. In the letter, the General Counsel painstakingly analyzed the Act, the legislative history and caselaw, and indicated that he was expressing the "Department's view" in concluding that lay experts were entitled to advocate on behalf of parties to administrative hearings. This opinion from the agency Congress designated to implement and interpret the IDEA is reasonable and clearly a "permissible construction of the statute." Auer v. Robbins, 519 U.S. at 457. Therefore, it is entitled to deference.

CONCLUSION

The decision of the Board should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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