Hearing #05.083H

STATE OF MAINE
SPECIAL EDUCATION DUE PROCESS HEARING

Parents	)	
v.	)	**PREHEARING ORDER LIMITING**
	)	**ROLE OF LAY ADVOCATE**
Gorham School Department	)	

Prior to the prehearing in this case, the school requested that the parents' representative, a lay advocate, be barred from presenting evidence, confronting and cross-examining witnesses, making legal arguments to the hearing officer, and otherwise engaging in actions requiring the use of legal skill or knowledge during the special education due process proceeding in this case authorized by federal and state special education law at 20 U.S.C. § 1415(f)(1) and 20-A M.R.S.A. § 7207-B. The school's motion was discussed during the prehearing conference, at which time the school submitted a legal memorandum in support of its argument. The hearing officer granted the parents' request for additional time in which to respond to the school's argument. The parents subsequently submitted a legal memorandum through an attorney representing them and the school provided a brief written rebuttal.

The school acknowledges that the parents are entitled by federal special education law to be accompanied by and receive advice from a lay advocate during this due process proceeding. *See* 20 U.S.C. § 1415(h)(1). Nevertheless, the school argues that the Maine statute prohibiting the unauthorized practice of law, 4 M.R.S.A. § 807, prevents the lay advocate from undertaking full legal representation of the parents in this proceeding by presenting witnesses, evidence, and argument, and otherwise acting in the parents' stead. The parents respond with an interpretation of the federal Individuals with Disabilities Education Act ("IDEA") that allows lay advocates to provide full representation in special education administrative proceedings and contend that the Maine unauthorized practice law does not prohibit such conduct.

At the outset, the hearing officer notes that she does not have jurisdiction to enforce Maine's unauthorized practice of law statute. She is, however, required by virtue of the school's motion to decide whether applicable special education laws allow the parents' lay advocate to provide full representation in this proceeding. In order to determine the meaning of federal and state special education laws, their relation to Maine's regulation of the unauthorized practice of law must be considered. Although both sides have presented strong arguments in support of their positions, the applicable special education laws, when viewed in context with Maine's unauthorized practice of law statute, do not allow the parents' lay advocate in this case to provide full legal representation.

I. Maine Unauthorized Practice of Law Statute.

Maine's unauthorized practice of law statute provides that "[n]o person may practice law or profess to practice law within the State or before its courts," unless that person has been admitted to the Maine bar. 4 M.R.S.A. § 807(1). Although the statute does not define what it means to "practice law", the Maine Law Court has explained that it is

> a term of art connoting much more than merely working with legally-related matters. The focus of the inquiry is, in fact, whether the activity in question requires legal knowledge and skill in order to apply legal principles and precedent. Even where trial work is not involved but the preparation of legal documents, their interpretation, the giving of legal advice, or the application of legal principles to problems of any complexity, is involved, these activities are still the practice of law.

Board of Overseers of the Bar v. Mangan, 2001 ME 7, ¶ 13, 763 A.2d 1189, 1193 (Me. 2001) (internal quotations omitted).

Whether an action constitutes the practice of law is a fact specific inquiry. *Id.* ¶ 14; 763 A.2d at 1193; *see also* Op. Tex. Att'y Gen. No.H-974 (Apr. 2, 1977) (noting that whether representation before an agency is the unauthorized practice of law depends on the context and the empowering statute). Although the rules of evidence and other rules of civil procedure do not apply to this special education due process proceeding, formal rules institute a prehearing conference at which witness lists and documents are exchanged, hearing procedures which mimic courtroom procedures, and the requirement of a written decision with findings of fact to be issued within fifteen days. *See* Maine Special Education Regulations §§ 12.11.K; 13.10; 13.12; & 13.14. The actions at issue here are the presentation of evidence, examination and cross-examination of witnesses, and argument of legal principles in the context of an administrative hearing. In this particular case, the interpretation of state and federal statutes, as well as the application of the facts to those laws, will govern the outcome of the hearing. Because representation of the parents by a lay advocate in this context would require "legal knowledge and skill" as well as the "interpretation" of legal principles and their application to "problems of . . . complexity," it necessarily constitutes the practice of law. *See Mangan*, 2001 ME 7, ¶ 13, 763 A.2d at 1193. As such, it is allowable only if authorized by an exception to Maine's unauthorized practice of law statute.

II. Exceptions to Maine's Unauthorized Practice of Law Statute.

Maine's unauthorized practice of law statute provides a variety of exceptions allowing non-attorneys to represent a party, usually the state or a state agency, in specific administrative and court proceedings. 4 M.R.S.A. § 807(3)(D)-(N); *see also* 4 M.R.S.A. § 807-A. Although there is no exception in the statute for non-attorneys to represent parties in special education administrative proceedings,[1] the parents note that the statute's

[1] Several states explicitly disallow representation by lay advocates at special education hearings. *See, e.g.,* "Most States Haven't Placed Limits on Lay Advocates, Report Says" LRP Publications (Nov. 6, 2001) (referencing survey by Project Forum, an initiative of the National Association of State Directors of Special Education, finding that Nebraska, Tennessee, and Delaware ban the use of lay advocates in special

exceptions relate to administrative proceedings grounded in Maine law. Additional exemptions can be found in both state and federal law. For example, a non-attorney court-appointed *guardian ad litem* is authorized by separate state statute to "subpoena, examine and cross-examine witnesses" in a court proceeding. 22 M.R.S.A. § 4005(1)(C); 4 M.R.S.A. § 1501. Another state statute authorizes the appearance of non-attorneys before the Workers' Compensation Board and deems such actions immune from prosecution as the unauthorized practice of law. 39-A M.R.S.A. § 317.

Within federal law, the Food Stamp Act allows households to be "represented" in the certification process by a designated non-attorney advocate. 7 U.S.C. § 2020(e)(7). In addition, federal regulations allow non-attorneys to provide representation in Social Security hearings, including the ability to "present or elicit evidence and allegations as to facts and law in any proceeding." 20 C.F.R. § 410.686.

A. The Lay Advocate Provision of the IDEA.

The parents argue that a provision of the federal IDEA, which is also embodied in a state regulation, provides an exception to Maine's unauthorized practice of law statute allowing lay advocates to provide legal representation in special education hearings. At issue is the scope and meaning of the IDEA provision stating that any party to a 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); Maine Special Education Regulation § 12.11.K.1 (identical language).[2]

Statutory construction begins with an analysis of the actual language of a provision, giving the text its "ordinary meaning." *In re Bajgar*, 104 F.3d 495, 497 (1st Cir. 1997); *see also Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). If a word or phrase is not defined within a statute, a court must "examine the statute as a whole, giving due weight to design, structure, and purpose as well as to aggregate language." *Cablevision of Boston, Inc. v. Pub. Improvement Comm'n,* 184 F.3d 88, 101 (1st Cir. 1999) (internal quotations omitted); *see also Robinson*, 519 U.S. at 341. If the meaning of a statute is ambiguous, courts may turn to the legislative history for clarification.

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education proceedings); "Notice to Advocates and Attorneys Not Admitted to Practice in Connecticut" (Sept. 20, 2001) (unanimous position of Connecticut special education hearing officers prohibiting lay advocates from filing motions, making opening or closing arguments, examining or cross-examining witnesses, introducing evidence, and making or arguing objections). On the other hand, some states specifically authorize lay advocate representation. *See* "Most States Haven't Placed Limits on Lay Advocates, Report Says," LRP Publications (citing New Jersey and New Hampshire regulations).

[2] The parents also rely on Maine Special Education Regulation 12.8, which provides that "[e]ach school unit shall allow the parents of a student to be represented or assisted by an individual or individuals of their choosing." The meaning of Regulation 12.8 is not entirely clear. While Regulation 12.8 is within the "Due Process Requirements" section of the regulations, it is not within any of the subsections that directly relate to due process hearings, i.e. Maine Special Education Regulations §§ 12.7 ("Hearing Rights"); 12.11("Communication of Procedural Safeguards"); 13.10 ("Hearing Participants"); and 13.12 ("Hearing Procedures"). Moreover, due process hearings are administered by the Maine Department of Education through a fair hearing officer rather than by a school. Finally, the regulation's use of both "represent" and "assist" implies a demarcation between the roles of attorneys and lay advocates.

Summit Inv. & Dev. Corp. v. Leroux, 69 F.3d 608, 610 (1st Cir. 1995).

Beginning with the plain language of the IDEA provision at issue, the definition of "advise" is "to give advice to; counsel; . . . to give information or notice to." *Webster's Ninth New Collegiate Dictionary* 59 (1991). Congress's selection of the words "accompany" and "advise" rather than "represent" is telling since "represent" "would be expected if Congress intended to place expert and legal counsel on the same footing." *Arons v. New Jersey State Bd. of Educ.*, 842 F.3d 58, 62 (3d Cir. 1988), *cert. denied*, 488 U.S. 942 (1988). In contrast to "advise," the word "represent" in the legal sense means "to act in the place of or for usually by legal right." *Webster's Ninth New Collegiate Dictionary* 1000 (1991).

Considering the provision in the greater context of the statute, the subsequent provision guarantees each party to a hearing the right to "present evidence and confront, cross-examine, and compel the attendance of witnesses." 20 U.S.C. § 1415(h)(2). These functions are particular to the parties, however, and are not designated to be executed by lay advocates. *See Arons*, 842 F.3d at 62. The statute also requires state agencies to adopt procedures requiring either party "or the attorney representing a party" to provide notice of information regarding a complaint to the appropriate agency. 20 U.S.C. § 1415(b)(7). The absence of reference to a lay advocate in this provision indicates that Congress did not intend for lay advocates to play the same role as attorneys. *See In the Matter of Arons,* 756 A.2d 867, 871 (Del. 2000). Finally, the statute permits a prevailing party to recover attorneys' fees but do [sic] not grant fees for representation by lay advocates. 20 U.S.C. § 1415(i)(3)(B). Presumably if lay advocates were authorized to provide full representation at a fair hearing, then fees for such representation would have been authorized. *See Arons*, 842 F.3d at 62.

Although the statutory language suggests that the role of a lay advocate was not intended to cross into the practice of law, because the language of the statute is somewhat ambiguous, the legislative history of the provision may be consulted. Most telling is the legislative history of the 2004 amendments to the IDEA.[3] An amendment passed by the House of Representatives would have explicitly allowed non-attorney lay advocates to "represent" parents in due process proceedings. H. Rept. 108-77 on H.R. 1350 (Apr. 29, 2003) (including language giving parents "the right to be represented by counsel and by non-attorney advocates"). The Senate version of the bill, on the other hand, kept the "accompany" and "advise" language. The Conference Committee, working out differences in the House and Senate versions of the bill, retained the language from the prior statute and chose not to adopt the House amendment. H. Rept. 108-779 (Nov. 17, 2004) (conference committee report). This consideration and rejection of a greater role for lay advocates confirms an interpretation of the statutory language as authorizing a lay advocate role of something less than full legal representation in special education hearings.[4]

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[3] Although the amendments do not apply to this case since it was filed one day prior to their July 1, 2005, effective date, the legislative history of the amendments is informative.

[4] Agency interpretations may also be consulted and if a reasonable agency interpretation of the language exists, a court should defer to it. *Chevron USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984). Less deference may be due to informal agency interpretations, which are not subject to notice and comment, than formal agency regulations. *Cleary v.Waldman*, 167 F.3d 801, 807-08 (3d Cir. 1999).

B. Court Interpretations of the IDEA's Lay Advocate Provision.

The two courts that have had occasion to interpret the provision at issue both held that the role of lay counsel was limited. Although neither opinion is binding legal authority, both are instructive.[5]

Before the United States Court of Appeals for the Third Circuit in *Arons*, a lay advocate sought to overturn a New Jersey regulatory provision barring her from collecting fees for legal representation in a special education due process hearing, arguing that the language of the then-effective Education for All Handicapped Act ("EHA") allowed her to act in a representative capacity and superceded the state regulatory language barring her remuneration for such representation. The Third Circuit held that the "carefully drawn statutory language" of the EHA regarding lay advocates "does not authorize these specially qualified individuals to render legal services" and therefore did not preempt the state regulation disallowing legal fees. *Arons*, 842 F.2d at 62; *see also Victoria L. v. Dist. Sch. Bd.,* 741 F.2d 369, 372 (11th Cir. 1984) (overruled on other grounds by *Church of Scientology Flag Serv. Org., Inc. v. Clearwater*, 2 F.3d 1415 (11th Cir. 1993)) (holding that EHA did not create [sic] right to direct lay representation). The court noted that the EHA's silence on the right of lay advocates to charge fees for legal representation likely reflected the historic dominion of states in regulating the professional conduct of attorneys. *Id.* at 63. The court concluded that "[i]n the absence

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There have been no recent United States Department of Education opinions on this debate. Prior Department of Education interpretations of this provision provide inconsistent viewpoints. On three occasions between 1979 and 1981, interpreting identical language from the predecessor to the IDEA, the Education of All Handicapped Children Act, the Department issued opinions suggesting that a non-attorney advocate was permitted to act as a representative of a party at an administrative hearing. *See* Letter from Ray Myers for William D. Tyrell, Chief, Policy Section, Bureau of Education for the Handicapped, to George S. Bellas, Esq., (Sept. 26, 1979), 211 IDELR 131 (stating that lay advocate with specialized knowledge may act as parent representative); Letter from Shirley A. Jones, Acting Chief, State Policy Development Branch of the Office of Special Education, to Michael J. Eig, Esq., 211 IDELR 270 (Nov. 13, 1980) (stating that attorney not admitted in the state where due process proceeding occurring allowed to represent parents as lay advocate and concluding that "[a]n individual acting as a lay advocate should be able to engage in the same activities whether or not he is a licensed attorney"); Letter from Theodore Sky, Acting General Counsel, Department of Education, to Superintendent of Public Instruction, State of Washington (Apr. 8, 1981) (noting that lay advocates may practice at administrative hearings) (despite extensive efforts, the hearing officer was not able to locate the text of this letter). In a fourth letter, issued the same day as the Letter to Bellas, the Department took a different stance, opining that the legal limitations on a non-attorney advocate are a matter of state policy related to the regulation of the practice of law. Letter from Ray Myers for William D. Tyrell, Chief, Policy Section, Bureau of Education for the Handicapped to Carole Van Lieu, Parent Advocate, 211 IDELR 129 (Sept. 26, 1979).

[5] The hearing officer located several administrative hearing decisions in other states that suggested full representation by a lay advocate was allowed. *See, e.g., West Layfayette*, 104 LRP 39154 (Ind. 2004); *Miami-Dade Sch. Bd.*, 102 LRP 17915 (Fla. 2002); *El Paso Idep. Sch. Dist.,* 34 IDELR 226 (Tex. 2001); *Montgomery Bd. Of Educ.*, 34 IDELR 27 (Ala. 2001). Only one, however, confronted a direct challenge to such representation, in which the hearing officer prohibited the lay advocate from representing evidence, confronting or cross-examining witnesses, or otherwise engaging in actions requiring the use of legal skill and knowledge. *Lancaster Indep. Sch. Dist.*, 105 LRP 20224 (Tex. SEA 2005) (holding that where state law was clear that representation before an administrative hearing by a non-lawyer advocate was permitted only by agency rule, "the language of IDEA and 34 C.F.R. § 300.509(a)(1) does not create an independent right under Federal law to legal representation by a non-lawyer in a special education due process hearing").

of explicit provisions, we are not convinced that Congress intended to limit the states' traditional control over the practice of law." *Id.*; *see also Z.A. v. San Bruno Park Sch. Dist.*, 165 F.3d 1273, 1276 (9th Cir. 1999) (disallowing an attorney not licensed in the state from collecting attorneys' fees for representation in a special education hearing and noting that "[e]xceptions to bar admission are matters for the state legislature").

Likewise, the Supreme Court of Delaware, in *In the Matter of Arons*, affirmed a ruling by that state's Board on the Unauthorized Practice of Law that a lay advocate who represented families in due process proceedings was engaging in the unauthorized practice of law. Acknowledging that the IDEA's lay advocate provision "is ambiguous to the extent it appears to confer joint authority on lawyers and non-lawyers to accompany and advise parents," the court, without the benefit of the legislative history of the 2004 IDEA amendments, found persuasive 1975 Senate Report language describing a lay advocate's role as one of a consultant rather than a representative and contrasted language in other federal statutes that more clearly permitted lay representation. *In the Matter of Arons*, 756 A.2d at 870-72 (citing S. Rept. 94-168 (June 2, 1975), *reprinted in* 1975 U.S.C.C.A.N. 1470-71).

This review of the language of the statute, its legislative history, and court interpretations demonstrates that the language of the IDEA authorizing non-attorney advocates with specialized special education knowledge to accompany and advise parties at a due process hearing was not intended to allow full representation by lay advocates constituting the practice of law. Given that states have "a compelling interest in the practice of professions within their boundaries [and] broad power to establish standards for licensing practitioners and regulating the practice of professions," *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975), the language of the IDEA is not sufficiently clear to provide an exception to Maine's unauthorized practice of law statute.

III. Equitable Arguments Raised by Parents.

The parents eloquently argue that the practice of lay advocate representation in special education hearings is a common one that has been allowed by consensus for years in Maine and an appropriate one given the aim of a user-friendly, accessible hearing process. A review of the past four years of hearing decisions reveals several instances in which lay advocates represented parents in special education proceedings. In none of those decisions, however, was the ability of the lay advocate to act as a legal representative challenged nor was there a specific affirmation by the hearing officer that such was an authorized practice.[6]

The parents also cite the cautionary language of *In the Matter of Arons* suggesting that if an unmet need for legal assistance existed, a rule change allowing representation by lay advocates in special education administrative proceedings would be considered. The parents argue that in Maine that [sic] are few attorneys who are skilled in special education law, that free and low-cost assistance is not readily available, and that therefore non-attorney representation is necessary in order to ensure that parents are able to

[6] Although the parents point out that school departments have been represented by special education directors at due process hearings, such representation is more akin to a party representing itself, since the special education director is an employee of the school department.

meaningfully access special education proceedings.[7] Finally, the parents make the compelling argument that allowing their lay advocate to attend and provide advice at the hearing, but to act through them despite their lack of experience in these proceedings, will unduly protract the hearing. Although the hearing officer is sympathetic to many of the parents' arguments, the balancing of risks and benefits to the public of allowing lay persons with specialized knowledge and training to serve as legal representatives of parents and students in due process proceedings is within the province of the legislature and not the jurisdiction of the hearing officer.

IV. Order.

Because neither state nor federal law provides an exception to Maine's prohibition on the unauthorized practice of law for lay representation in special education administrative hearings, the parents' lay advocate in this matter is not authorized to present evidence, examine and confront witnesses, or otherwise make legal arguments. The parents' lay advocate may, of course, attend the hearing and advise the parents in this case. The parents will be afforded ample opportunities during the hearing to consult with and gain the advice of their lay advocate.

Dated: September 13, 2005

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Rebekah Smith, Esq.
Hearing Officer

[7] *See also* Kay Hennessy Seven & Perry A. Zirkel, "*In the Matter of Arons:* Construction of the IDEA's Lay Advocate Provision Too Narrow?," 9 Geo. J. Poverty Law & Pol'y 193, 220-21 (2002) (reporting survey results showing an insufficient supply of low cost or *pro bono* attorneys).