Issued by Committee on the Unauthorized Practice of Law
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COMMITTEE ON THE UNAUTHORIZED PRACTICE OF LAW

Appointed by the Supreme Court of New Jersey

OPINION 57

Non-Lawyer Special Education Advocates and the Unauthorized Practice of Law – Superseding Opinion 56

After receiving a grievance regarding a non-lawyer who represents parents and children in special education proceedings before the Office of Administrative Law, the Committee issued Opinion 56 on September 30, 2020 to provide guidance to non-lawyers who advocate or consult with parents of children with special needs and/or represent them or their children in administrative hearings. Shortly after the issuance of Opinion 56, the Committee was asked to stay the Opinion. The Committee granted the request and solicited comments from interested persons. After reviewing the comments, the Committee hereby issues Opinion 57, which supersedes and modifies the findings made in Opinion 56.

The Individuals with Disabilities Education Act, 20 U.S.C. § 1400 to § 1500 (IDEA), is designed to "ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. §§ 1400(d)(1)(A), 1412(a). In New Jersey, the requirements of the IDEA have been

incorporated in statute and in the Administrative Code. N.J.S.A. 18A:46-1 to -55; N.J.A.C. 6A:14-1.1(b)(1); N.J.A.C. 6A:14-1.1 to -10.2.

Pursuant to the IDEA, the federal government provides assistance to States to identify each child with a disability who may be eligible for special education and related services and to provide a "free appropriate public education" for each eligible child. Under the IDEA, a "child with a disability" is a child who has been evaluated as required by the federal statute and found to have one or more of a list of disabilities: an intellectual disability, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), a serious emotional disturbance, an orthopedic impairment, autism, traumatic brain injury, an other health impairment, a specific learning disability, deaf-blindness, or multiple disabilities, and who, because of the disability, needs special education and related services. 20 U.S.C. § 1401(3); 34 C.F.R. § 300.8(a). The determination as to whether a child should be classified as eligible for special education and related services is made by educators of the child's local school district, who conduct evaluations of the child upon notice to the child's parent and receipt of consent from the parent. 34 C.F.R. §§ 300.300, 300.304; 300.311.

For each classified child, an appropriate education must be tailored to the unique needs of the child, for whom an "individualized education program" (IEP) is developed by the child's IEP team. The IEP team includes local school district educators, the child's parent or guardian, and others whom the parties believe will assist in the IEP development process. 20 U.S.C. § 414(d)(1)(B). The team reviews the child's present levels of functional and academic performance and develops measurable goals for the child, including functional and academic goals, to meet the child's needs that result from his or her disability. The objective is to enable the child "to be involved in and make progress in the general education curriculum and to meet

each of the child's other educational needs that result from the child's disability." 20 U.S.C. § 1414(d).

To ensure that parents have adequate input into whether the IEP for their child is appropriate, the IDEA requires the State to "establish and maintain procedures . . . to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of a free appropriate public education" by State or local agencies that receive aid under the IDEA. 20 U.S.C. § 1415(a). The State is required to offer an impartial due process hearing on any complaint regarding the identification, evaluation, or educational placement of a classified child or the provision of a "free appropriate public education" to such child. 20 U.S.C. § 1415(f). Any aggrieved party may appeal a decision of a local educational agency to the State or a decision of a State agency in a civil action in State court or federal district court. 20 U.S.C. § 1415(g) and § 1415(i)(2)(A).

Significantly, the IDEA provides that any party to the administrative 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 New Jersey Supreme Court recognizes the role of non-lawyers in Court Rule 1:21-1(f) which provides that, subject to applicable limitations and procedural rules established by the Office of Administrative Law, a non-lawyer may appear in a contested case before that Office "to represent parents or children in special education proceedings, provided the non-attorney has knowledge or training with respect to handicapped pupils and their educational needs so as to enable the non-attorney to facilitate the presentation of the claims or defenses of the parent or child." R. 1:21-1(f)(8). The Court Rule further provides, however, that "[n]o representation or assistance may be undertaken pursuant to subsection (f) by any disbarred or

suspended attorney or by any person who would otherwise receive a fee for such representation." R. 1:21-1(f).

Accordingly, non-lawyers may represent parents or children with disabilities in Office of Administrative Law contested special education cases provided they are qualified, submit an application, and do not charge a fee for the representation. The Office of Administrative Law regulations mirror these requirements. See N.J.A.C. 1:1-5.4(b)(4); N.J.A.C. 1:6A-5.1. Specifically, a parent or child "may be represented by individuals with special knowledge or training with respect to handicapped pupils and their educational needs." N.J.A.C. 1:6A-5.1(a). The non-lawyer who seeks to represent parents or children with disabilities in special education proceedings must follow the procedures requiring an application for permission to appear. N.J.A.C. 1:6A-5.1(b); N.J.A.C. 1:1-5.4(a)(7). The non-lawyer must submit a written Notice of Appearance/Application. N.J.A.C. 1:1-5.4(b)(4). The Notice must include an "explanation certifying how he or she has knowledge or training with respect to handicapped pupils and their educational needs so as to facilitate the presentation of the claims or defenses of the parent or child. The applicant shall describe his or her relevant education, work experience or other qualifications." N.J.A.C. 1:1-5.4(b)(4)(iv). The Notice also includes a certification stating that the non-lawyer "is not receiving a fee for the appearance." N.J.A.C. 1:1-5.4(b)(4)(vii). The Notice must be signed by the applicant and be served on all parties. N.J.A.C. 1:1-5.4(b)(4)(viii).

At the Office of Administrative Law contested case hearing, the non-lawyer may submit evidence, speak for the party, make oral arguments, and conduct direct and cross-examinations of witnesses. N.J.A.C. 1:1-5.5(e). The non-lawyer may not, however, sign a consent order or stipulation for a party. N.J.A.C. 1:1-5.5(f). A non-lawyer advocate in special education proceedings is accorded an advocate-client privilege and work-product privilege. Woods v. New Jersey Dep't of Education, 858 F. Supp. 51 (D.N.J. 1993).

Special education is one of the fields of law where the Court permits non-lawyers to represent and assist parties in Office of Administrative Law cases when such conduct would otherwise be the unauthorized practice of law. R. 1:21-1(f)(8). If non-lawyers are sufficiently qualified, make the required application, and do not charge a fee for the representation, they are not engaging in the unauthorized practice of law.

Therefore, it is not the unauthorized practice of law for a non-lawyer with special knowledge or training with respect to children with disabilities and their educational needs to represent parents or children before the Office of Administrative Law, including submitting evidence, speaking for the party, making oral arguments, and conducting direct and cross-examinations of witnesses. However, the non-lawyer must submit the required application and no fee may be charged for these services. If no application is filed or a fee is charged for these services, the non-lawyer is engaging in the unauthorized practice of law.

While non-lawyers with knowledge or training with respect to children with disabilities and their educational needs are prohibited from charging fees for representation in the Office of Administrative Law, they may charge fees for advising parents regarding educational problems, evaluating such problems, the proper educational placement for children with disabilities, and producing technical reports. Arons v. New Jersey State Bd. of Education, 842 F. 2d. 58, 60 (3d Cir. 1988); Connors v. Mills, 34 F. Supp. 2d 795, 808 (N.D.N.Y. 1998). As the Third Circuit noted, the non-lawyer's role is "one of consultation, with emphasis on the responsibility to identify educational problems, evaluate them, and determine proper educational placement." Arons, 842 F. 2d at 62 (quoting Senate Report No. 168, 94th Cong., 1st Sess.). Non-lawyers may serve as expert witnesses in administrative hearings before the Office of Administrative Law and receive compensation for that service. Non-lawyers may charge fees for their expert advice or

expert testimony, but they may not charge fees for representing the parents in an administrative hearing in the Office of Administrative Law.

While the New Jersey Supreme Court recognized the role of non-lawyers in due process hearings in the Office of Administrative Law, Court Rule 1:21-1(f)(8) is silent regarding the conduct of non-lawyers at meetings with the child's school to develop the child's IEP and at formal mediations should the parties be unable to agree to the IEP. In Opinion 56, the Committee stated that it is in the public interest for non-lawyer advocates to participate in IEP meetings, but they cannot (1) represent; or (2) speak on behalf of the parents; and imposed the further conditions that the parents must (3) also participate in the meeting or contribute to the effort; and (4) be present at the meeting. The Committee hereby modifies its prior decision.

As a threshold matter, the Committee finds that non-lawyer advocates are practicing law when they advise, represent, or speak on behalf of parents and children about the child's legal rights or the legal obligations of the school district at IEP meetings. The IEP is binding on the school district; IEP meetings, the rights of the parents and children, and the obligations of the school district are all governed by statute. The conduct of the non-lawyer advocate is akin to negotiating a legal agreement on behalf of another person. Advising, representing, and speaking on behalf of another about legal rights and obligations is the practice of law; it is also the practice of law to represent another person in the development of a legally binding plan.

At IEP meetings, the non-lawyer advocate may have a different focus than a consultant, such as a speech therapist, who presents factual arguments about how a child's disabilities manifest and how an educational program may address them. The Committee recognizes that the activities of a consultant such as a speech therapist and an advocate overlap. A consultant's discussion of disabilities can dovetail with an argument, explicit or implicit, that the child has rights and the school district is legally obligated to address such disabilities in an educational

program. Because it can be difficult to separate advocacy focused on the child's disability and how best to address it from advocacy focused on the child's rights and the school district's obligations, the Committee does not draw lines based on the content or focus of the consultant's or advocate's communications. The standard would be unworkable if the Committee were to attempt to craft a hard separation between a consultant who focuses on "the facts," such as what programs can meet a child's needs, and an advocate who focuses on "the law." The facts and the law are often intertwined in this setting.

The Committee further finds that non-lawyer advocates engage in the practice of law when they advise, represent, or speak on behalf of parents at mediation proceedings. Representing a party in arbitration or mediation is the practice of law and the Committee has consistently prohibited non-lawyers from representing parties in arbitration or mediation. See Committee on the Unauthorized Practice of Law Opinion 28 (1994) and Opinion 43 (2007). Opinion 43, which supplements Opinion 28, clarified the circumstances when an out-of-state lawyer may represent a party in arbitration or mediation.

As the Committee noted in Opinion 43, the New Jersey Supreme Court amended Rule of Professional Conduct 5.5, titled "Lawyers Not Admitted to the Bar of This State and the Lawful Practice of Law," in 2010. This Rule of Professional Conduct sets forth several activities that are the practice of law but that out-of-state lawyers may engage in, provided they adhere to certain restrictions. The Rule includes, in the list of activities that are considered the practice of law, representation of a party in arbitration and mediation. RPC 5.5(b)(3)(ii). Hence, when "the lawyer engages in representation of a party to a dispute by participating in arbitration, mediation, or other alternate or complementary dispute resolution program," the lawyer is engaging in the practice of law. RPC 5.5(b)(3)(ii). An out-of-state lawyer may do so in New Jersey in

accordance with Rule of Professional Conduct 5.5(b)(3), but a non-lawyer may not unless otherwise authorized by Court Rule, case law, or Committee opinion.[1]

As noted above, the Committee finds that serving as a non-lawyer advocate in IEP meetings and mediation is the practice of law. There are, however, many areas in which lawyers and non-lawyers can perform similar services, particularly when the non-lawyers have a unique expertise in a field. "[I]n cases involving an overlap of professional disciplines we must try to avoid arbitrary classifications and focus instead on the public's realistic need for protection and regulation." In re Application of New Jersey Society of CPAs, 102 N.J. 231, 237 (1986). While the Court has the power to prohibit a nonlawyer from engaging in conduct that is the practice of law, it exercises this power only when doing so is in the public interest. In re Opinion No. 26 of the Committee on the Unauthorized Practice of Law, 139 N.J. 323, 340 (1995). "The question of what constitutes the unauthorized practice of law involves more than an academic analysis of the function of lawyers, more than a determination of what they are uniquely qualified to do. It also involves a determination of whether non-lawyers should be allowed, in the public interest, to engage in activities that may constitute the practice of law." Id. at 327. Accordingly, the Committee first decides whether an activity is the practice of law and then decides whether it is in the public interest to permit non-lawyers to engage in that activity.

The determination of whether activities are in the public interest involves a common-sense review of practical considerations and a weighing of competing policies and interests. In re Opinion No. 26, supra, 139 N.J. at 340. The public needs to be protected against "unlearned

[1] Advisory Committee on Professional Ethics Opinion 676 (1994) provides that when lawyers serve as a third-party neutral in arbitration or mediation proceedings, they are engaged in the practice of law but if non-lawyers serve as a third-party neutral, they are not engaged in the unauthorized practice of law. Opinion 676 concerns the third-party neutral – the arbitrator or mediator – not the people who represent a party appearing before the third-party neutral.

and unskilled advice and service in matters relating to the science of the law." Id. at 341, quoting Auerbacher v. Wood, 142 N.J.Eq. 484, 486 (E.&A. 1948). The Committee must consider whether there is a public need for the service by non-lawyers, and whether the practice is widespread, affecting many people, or affecting only a limited number of people. Other factors include whether the practice "has been conducted without any demonstrable harm to [the parties], that it saves money, and that those who participate in it do so of their own free will presumably with some knowledge of the risk . . . ." In re Opinion No. 26, supra, 139 N.J. at 353. The Committee also considers the public interest of furthering access to justice for those without means.

The Committee is guided in its determination about the public interest by the numerous comments it received from parents, consultants, school administrators, teachers, non-profit organizations, and institutions.[2] Many commenters noted that parents are often intimidated at IEP meetings, as the school district has many professionals present, far outnumbering the parents. The parents are often less educated, they may not understand the technical jargon being used, and they may not be familiar with the educational standards being discussed. Parents may not speak English as a first language. Intellectual or developmental disabilities are often genetic

[2] One of the commenters stated that a member of the Committee had a disqualifying conflict of interest because she represents school districts in her private practice, so she should not have participated in the Committee's discussions in this matter. Of the 25 members that comprise the Committee, one represents school districts, one is a former school board president, one is a CASA volunteer, and three are parents of special needs children who have used non-lawyer advocates. Counsel for the Committee determined that none of these members had a conflict of interest that disqualified them from participating in this matter. Rather, the Committee was benefited by input from members who have specialized personal and professional experience in this area of law. While Committee members recuse in other matters for various reasons, personal or professional experience in an area of law generally does not present a conflict of interest.

and parents may suffer from similar learning deficiencies as their children, affecting the parents' ability to comprehend what is being discussed and their ability to effectively communicate.

Some commenters noted that IEP meetings are intended to be collaborative ventures between schools and parents, and advocates generally help in this process by assisting meaningful participation by parents. Other commenters noted that it is better to have a non-lawyer advocate than a lawyer assisting the parents and children at IEP meetings, as the presence of lawyers may shift the meeting into a more adversarial mode. Many parent commenters stated that they preferred non-lawyer advocates to lawyers in IEP meetings.

A review of the comments reflected deep divisions between parents and school districts. While many parent commenters praised their advocates in glowing terms, some school commenters noted that advocates can be unduly confrontational, making demands that are not supported by the law or prolonging the IEP process by requesting evaluations that do not ultimately alter the appropriate educational program. Many commenters stated that a non-lawyer advocate is better than no advocate at all and suggested that it is in the public interest to provide some assistance to parents even if that assistance is not optimal. As one commenter stated, the Committee should not make the reach for perfection the enemy of the good.

The Committee finds that there is little doubt that parents often need advocates, lawyer or non-lawyer, at such meetings. There is also little doubt that lawyers are more expensive than non-lawyer advocates and lower-income and even moderate-income parents would not be able to afford a lawyer. There are some pro bono lawyers but the need far exceeds the demand. Many parents would not qualify for pro bono assistance. There are far more non-lawyer advocates offering services pro bono through various non-profit organizations than there are lawyers offering such services.

The commenters sufficiently showed that non-lawyer advocates are generally helpful to parents; that there is little demonstrable harm to the public by permitting them to operate; that they provide a less-expensive option to parents and children; and that parents and children who use them are aware of the risk and willingly accept that risk. The Committee finds that the public interest favors permitting non-lawyer advocates who have knowledge or training with respect to children with disabilities and their educational needs to engage in this activity.

The Committee makes similar findings with regard to the conduct of non-lawyer advocates at mediations. Mediation proceedings include an opening statement and presentation of concerns and requests to the mediator. Several commenters noted that many parents and children are not effective communicators, they may be intimidated with the process, they may not have a firm grasp of the technical jargon, and they may prefer that their position be presented by the non-lawyer advocate. The public interest favors permitting non-lawyer advocates who have knowledge or training with respect to children with disabilities and their educational needs to engage in this activity.

When determining whether to permit non-lawyers to practice law, the Committee often limits the non-lawyers to those who are duly licensed or certified by a governmental agency. The public interest is served and potential harm is mitigated by the protections inherent in the regulatory framework supporting governmental licensure and certification. See In re Application of the N.J. Society of Certified Public Accountants, 102 N.J. 231 (1986) (licensed New Jersey certified public accountant may prepare and file inheritance tax returns); UPL Opinion 45 (2009) (certified HUD or NJHMFA housing counselor, a New Jersey licensed debt adjuster, and a New Jersey licensed lender such as a mortgage broker are permitted to negotiate the terms of a mortgage). A license or certification requires a demonstration of requisite knowledge accompanied by a code of conduct and discipline for violations of the code of conduct.

Non-lawyer special education advocates should have special knowledge or training with respect to children with disabilities and their educational needs, but there currently is no governmental licensing or certification program. Some non-profit organizations offer training and certification, but many non-lawyer advocates have not undergone such training. Several commenters noted that a requirement that non-lawyer advocates obtain certification from one of these non-profit organizations would limit the pool of advocates. Many advocates are self-taught, having previously advocated for their own special needs children. Further, a training requirement could pose problems for parents of low income or who seek an advocate with a shared cultural or linguistic background.

A licensure requirement is most necessary when there is a showing that the public may be harmed by an unskilled and unlearned advocate. Many comments submitted by school personnel and school district lawyers focused on advocates' unprofessional behavior and difficulties when the advocate unduly prolongs the process. This is not sufficient demonstrable harm on which to base a certification requirement. While the Committee supports the efforts of the organizations offering training and hopes that it can be expanded, and we encourage the State Department of Education to initiate a licensing or certification program, the Committee does not require non-lawyer advocates to obtain a certification.

The Committee withdraws its prior requirement that a non-lawyer advocate cannot attend an IEP meeting if a parent or guardian is not present. The advocate, however, must have explicit authorization and consent from a parent or guardian to attend the IEP meeting if the parent or guardian is absent. Of course, if federal or state regulation or guidance were to prohibit the advocate's attendance at an IEP meeting without the presence of a parent or guardian, the federal or state regulation or guidance takes precedence. The requirement that the advocate must have explicit authorization and consent from a parent or guardian does not apply to court-appointed

special advocate (CASA) volunteers, whose presence at IEP and other meetings with school personnel serve a broader function. Non-lawyer advocates can speak on behalf of parents with school personnel in less formal settings, such as to relay or obtain information, without explicit authorization and consent from a parent or guardian.

While a non-lawyer advocate can advise, represent, or speak on behalf of parents and children at a mediation, the parent or guardian must be physically present. An advocate may not appear at a mediation when the parent or guardian is absent.

In sum, non-lawyers with knowledge or training with respect to children with disabilities and their educational needs may advise, represent, and/or speak on behalf of parents and children at meetings with the child's school to develop the child's IEP and at formal mediations should the parties be unable to agree to the IEP. While this is the practice of law, it is not the unauthorized practice of law when the non-lawyer has the requisite knowledge or training.