

November 16, 2020

Via Electronic Submission: Mailbox@njcourts.gov

Committee on the Unauthorized Practice of Law
Attention: Carol Johnston, Committee Secretary
Richard J. Hughes Justice Complex
P.O. Box 970
Trenton, New Jersey 08625-0970

Re: Comments on Opinion 56

Dear Committee Members:

Thank you for the opportunity to submit comments on Opinion 56 which pertains to the Unauthorized Practice of Law in special education matters. These comments are submitted by Disability Rights New Jersey.

Disability Rights NJ is the federally-funded, non-profit organization that has been designated as the protection and advocacy system for people with disabilities in the State of New Jersey. Disability Rights NJ provides the following services free of charge: legal representation, advocacy, technical assistance, education and training, and information and referral to people with disabilities, their families, and the professionals who assist them. Disability Rights NJ's priorities are set by its Board of Directors, consisting of a majority of people with disabilities and family members of people with disabilities.

For over 20 years, Disability Rights NJ has advocated for children with disabilities to ensure they receive a free, appropriate public education under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C.A. §§ 1400-1487, and its implementing New Jersey regulations, N.J.A.C. 6A:14-1.1 to -10.2(b). That Disability Rights NJ has had its attorneys and non-attorney advocates (lay advocates) attend multiple IEP meetings and mediation conferences on behalf of parents gives us a unique perspective as to why Opinion 56 would harm the constituents we serve.

A. Lay Advocates Are Permitted To Fully Participate In IEP Meetings.

Disability Rights NJ is concerned that Opinion 56 would prevent parents and students with disabilities from having assistance at IEP meetings and mediations. Under IDEA, the IEP process is designed to be a collaborative process in which the IEP creates an appropriate education program for the student. The IEP team includes members of the child study team and the

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parent. An IEP meeting must be held at least once a year for every year the student is classified. Since students can receive special education services from the age of 3 through the age of 21, the parent and district will have a longstanding relationship devoted to ensuring the student receives an appropriate education.

Even though the parent is an important member of the IEP team, most of the other members of the IEP are school district officials. As a result, when a parent attends an IEP meeting, the parent can feel intimidated and overwhelmed, especially if they disagree with the recommendations of the district. The framers of IDEA recognized this imbalance, so IDEA includes a provision permitting parents, at their discretion, to bring someone with “knowledge or special expertise” regarding the student to the IEP meeting. 34 C.F.R. § 300.321(a)(6); N.J.A.C. 6A:14-2.3(k)(2). The IDEA recognizes such an individual as a member of the IEP team. 34 C.F.R. § 300.321(a)(6); N.J.A.C. 6A:14-2.3(k)(2).

Parents get to decide whether the individual they wish to invite has the necessary “knowledge or special expertise.” N.J.A.C. 6A:14-2.3(k)(1); 34 C.F.R. § 300.321(c). Districts do not have authority to veto their determination. *Horen v. Bd. of Educ. of City of Toledo Pub. Sch.*, 655 F. Supp.794, 804 (N.D. Ohio 2009)(stating that a party does not have the authority to veto attendance by persons whom another party wants to have present which in this particular case was the district’s legal counsel). The U.S. Department of Education made it clear when promulgating the IDEA regulations that the parents’ determination of “knowledge or special expertise” is unfettered and thus does not need to be corroborated by evidence of the invited individual’s qualifications. Federal Register, Vol. 71, No. 156, August 14, 2006, pp. 46669-46673 (“We also believe that it would be inappropriate to regulate on the specific knowledge and expertise that an individual must have to be included on an IEP Team because it would be burdensome for both parties and public agencies.”).

Given that IEP meetings are not legal proceedings, the individual with “knowledge or special expertise” cannot be deemed to represent the parent or engage in the practice of law. And as a member of the IEP team, it would be nonsensical for the individual with “knowledge or special expertise” to be barred from speaking during the IEP meeting when IEP members are there to provide input regarding the child’s education.

The relevant language in Opinion 56 that prohibits a lay advocate from “representing” or “speaking” on behalf of parents is nebulous and thus would discourage the appearance of lay advocates at IEP meetings out of fear of running afoul of ethical rules. It is our understanding that some school district counsel have already interpreted this language to mean lay advocates may only speak with parents and not to the district directly during the meeting. This chilling effect would frustrate the IDEA’s goal of ensuring parents and school districts are equal partners when it comes to educational decisions over a child with an IEP.

Disability Rights NJ has a longstanding special education practice. For many years, special education assistance was one of the most common calls that our intake received. Most of the calls were from parents who wanted assistance at the IEP meeting. They had questions about the services the student was receiving and felt they needed someone at the meeting to help them advocate. In addition, the parents felt that if they had an advocate present, the district personnel would be more likely to listen to them. Due to this rising need, Disability Rights NJ hired lay advocates who attended IEP meetings at the request of parents. Our lay advocates were well versed in the special education process, and were supervised by an attorney. The advocates would discuss the parent's concerns with them, request the student's records and review the documentation, would request additional evaluations if necessary, and then discuss the evidence with the parents. The advocates would then attend the IEP meeting with the parents. The advocates would allow the parents to discuss their concerns and lead the discussion, but would then step in to assist the parents, especially when discussing evaluation reports and recommendations for the student's program. In cases where there had been a breakdown in the relationship between the district and the parent, the advocate served to bring some of the emotionality down and focus on the specific issues regarding the proposed educational program. Finally, the non-attorney advocates who worked for Disability Rights NJ successfully resolved many special education matters through the IEP process, which then prevented the matter from escalating to mediation or due process. As a result, the special education process remained non-adversarial, which is important as the parent and district will continue to have a relationship for as long as the student remains in the district. In addition, the parent gained knowledge and experience about the process so that they could successfully advocate on their own in the future.

Unfortunately, due to budget restrictions, Disability Rights NJ no longer has any non-attorney special education advocates. However, because Disability Rights NJ continued to receive calls requesting assistance with IEP meetings, and knew how successful non-attorney advocates were during the IEP process, three years ago we collaborated with the New Jersey Council on Developmental Disabilities and SPAN Parent Advocacy Network to create the Special Education Volunteer Advocates (SEVA) program. SEVA, which SPAN oversees, was developed to identify parent volunteers who, after undergoing free intensive training on special education, would then agree to work with individual parents to prepare for the IEP meeting and to attend the meeting with them. The goal of the program is to give the parent support and assist them with learning how to better self-advocate on behalf of their child. Since its creation SEVA volunteer advocates have successfully attended IEP meetings with 36 parents helping these parents address their concerns and create an IEP with which they agreed.

B. Lay Advocates Should Be Permitted To Represent Parents In Mediation.

Lay advocates should be permitted to appear and speak on behalf of parents at mediation. Mediation is alternative dispute resolution process in which the parties work to achieve a consensus resolution. A neutral mediator presides over the process. School districts will have

their legal counsel, and will bring several of their personnel (e.g., teachers, child study team members) to support its perspective. Unfortunately, many times parents cannot afford an attorney, and will come to the mediation alone. The parents may believe that the mediator will serve as their advocate, but the mediator must remain neutral, and the parents feel as though the process is unfair to them, and consensus is then not likely to be achieved. Without consensus, the mediation will fail, and the parties will then have to proceed to a due process hearing, which will require the parents and the school district to expend valuable time and money.

One of Disability Rights NJ's lay advocates appeared to represent parents at mediation at least three times. She articulated the parents' positions and outlined possible resolutions at the beginning. To prevent a signer's remorse scenario, she knew what questions to ask for clarification of what the district was proposing. Each mediation conference resulted in a successful resolution that benefited both parties as it obviated the need to transmit the matter to the Office of Administrative Law for a due process hearing.

During all of the aforementioned mediation conferences, our advocate was always under the supervision of a Disability Rights NJ attorney; more specifically, the supervising attorney was available to speak with the advocate via telephone on an as-needed basis during the mediation. This representative arrangement allowed the Disability Rights NJ's attorneys to remain in their offices or attend elsewhere to devote their time assisting other parents.

C. Public Policy Is Served When Lay Advocates Participate At IEP Meetings And Mediation.

Without a doubt, it is in the public interest to permit lay advocates to fully participate at IEP meetings and mediation conferences. According to data from the New Jersey Department of Education, over 240,000 students between the ages of 3 through 21 in New Jersey had IEPs as of October 15, 2019.¹ Regrettably, many parents do not have the financial means to hire lawyers, and there is a scarcity of free and low-cost legal assistance available for them.

Based on Disability Rights NJ's history as reflected above, the presence of an experienced lay advocate at IEP meetings and mediation conferences have proved significantly helpful for parents. Special education law is extremely complex and constantly evolving, thus making many parents – especially those who do not have a solid educational background or cannot even speak English – feel overwhelmed by the IEP process.

¹ Data for special education students between the pages of 3 and 5 can be accessed at https://www.state.nj.us/education/specialed/data/2019/6_21Fape.pdf. For students between the ages of 5 through 21, the data can be accessed at https://www.state.nj.us/education/specialed/data/2019/6_21Fape.pdf.

Our advocates' involvement forced districts to be more cooperative and forthcoming during IEP meetings and mediation, given the districts' awareness that the advocates educated parents about evaluation data and their rights under the IDEA. For example, before our advocates got involved, many parents were unaware of their right to tape record an IEP meeting. Many also did not know how to request an independent evaluation at the district's expense should they disagree with the district's evaluation reports.

School districts have actually benefited from our advocates' involvement as well. In situations where the tension between the parent and district was high, our advocates kept both parties' emotions in check by zeroing in on the relevant issue/s and articulating the parents' concerns more clearly, thus minimizing misunderstandings between the parties. Furthermore, because our advocates were not attorneys, the districts often did not feel the need to bring their attorneys to the IEP meeting and thus make it more adversarial.

There are approximately 245,000 special education students in New Jersey. Although many parents have the resources and knowledge to advocate effectively for their child, many parents with limited incomes, limited language proficiency, and/or limited education do not. As stated above, these parents are at a significant disadvantage during the special education process as most of the parties present during the IEP meeting and mediations are district officials. For these parents, having access to non-attorney advocates during non-legal proceedings such as IEP meetings and mediations is critical so that they can understand the process, understand the proposed program, and effectively question and provide their own insight into their child's needs. Because Opinion 56 will have a chilling effect on the ability of parents to have advocates assist them in IEP meetings and mediations, DRNJ requests that the provision of Opinion 56 that relates to IEP meeting and mediations be withdrawn.

Again, thank you for the opportunity to comment on Opinion 56, and please contact me at mciccione@drnj.org or (609) 292-9742 should you have any questions or want more information.

Respectively,



Mary Ciccone
Director of Policy