



November 15, 2020

Via Electronic Mail

Committee on the Unauthorized Practice of Law
Attention: Carol Johnston, Committee Secretary
Comments.Mailbox@njcourts.gov

Re: Comments on Opinion 56

Dear Ms. Johnston and Members of the Supreme Court Committee on the Unauthorized Practice of Law:

Education Law Center (ELC) appreciates the opportunity to submit comments related to the now-stayed Opinion 56 (Non-Lawyer Special Education Consultants and the Unauthorized Practice of Law). ELC has worked for over 45 years to secure the legal rights to high quality education under state and federal law for New Jersey's 1.4 million public school children, particularly our state's at-risk students, students with disabilities, and students of color. As a non-profit public interest law firm, one aspect of our work has been the provision of legal services to parents and students with disabilities in public school cases. Through our efforts in the area of special education, ELC has developed substantial interest and expertise in the legal rights of students with disabilities, and in ensuring that those rights are protected and appropriate educational programming is provided.

Unfortunately, ELC's capacity to provide direct representation to parents in special education cases is extremely limited. Because our current funding supports direct representation in only a small number of cases, we are limited to giving brief legal advice - or, in select cases, referrals to our partner, Volunteer Lawyers for Justice, for possible *pro bono* representation - to hundreds of parents each year who request representation in special education matters. We also work cooperatively with organizations such as Disability Rights New Jersey, Advocates for Children of New Jersey, Rutgers Education and Health Law Clinic, and SPAN Parent Advocacy Network, and we are well aware of the shortage of free and

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affordable legal services available to the parents of nearly 247,000 students with disabilities in New Jersey.¹ ELC itself does not employ non-attorney advocates, but is familiar with the beneficial role that such advocates have long played in this state.² From our perspective, Opinion 56 came out of left field, since we have not received complaints about non-attorney advocates in the decades that we have been serving parents and have heard nothing to suggest that these advocates have engaged in the unauthorized practice of law (UPL). Cf. Arons v. New Jersey State Board of Educ., 842 F. 2d 58 (3d Cir. 1988) (acknowledging lay advocates may “perform traditional representation functions during administrative hearings” under New Jersey rules). We have instead heard of many cases in which advocates have provided invaluable services to families.

As requested, we have focused on the Committee’s questions in preparing these comments, set forth below.

1. Whether non-lawyer advocates should be permitted to represent, and speak on behalf of, parents or children with disabilities in meetings with the school district concerning the individualized education program (IEP) without the presence and/or participation of the parents or children?

This question implies that non-lawyer advocates are permitted to represent, and speak on behalf of, parents or children with disabilities in IEP meetings when parents or children are present and/or participating in those meetings, but Opinion 56 states otherwise. While Opinion 56 permits non-lawyers with the requisite special knowledge or training to “assis[t] parents of a child with a disability in negotiations

¹ As of October 15, 2019, the New Jersey Department of Education (NJDOE) reported 246,677 or 17.93% of its total student population had been determined eligible for special education and related services. NJDOE, 2019 Statewide Classification Rate, Ages 3-21, available at https://www.nj.gov/education/specialed/data/2019/State_Classification.pdf.

² ELC has worked repeatedly over the years with non-attorney advocates on various stakeholder committees and on individual cases where a parent already has an advocate. Whenever possible and warranted, we refer parents to organizations that offer advocacy support to parents at IEP meetings.

with the child's school regarding the child's IEP" when the parents are present and "contributing to the effort," it explicitly says that, even under those circumstances, the non-lawyer may not "represent [parents] or speak on their behalf." Opinion 56 at 6, n.1. Thus, at issue in this question is the role of non-lawyer advocates in IEP meetings, whether or not the parents or children are present and/or participating.

Opinion 56 has invited controversy because its discussion about the role of non-lawyer advocates at IEP meetings seems to permit school district staff to limit the long-standing practice of advocates actively participating in IEP meetings on behalf of parents. It is notable that an initial request for clarification of the Committee's decision came from a school board attorney who stated that he and "most school district attorneys [he's] spoken with" were interpreting Opinion 56 as prohibiting advocates from "present[ing][the parent's] positions to the district on the parents' behalf or ...engag[ing] in direct negotiations over them." Email of David Rubin to Carol Johnston dated October 9, 2020. In other words, according to some school board attorneys, Opinion 56, had it not been stayed, permitted advocates to attend IEP meetings, but not to speak directly to school personnel at those meetings.

For all of the reasons set forth below, ELC urges the Committee to clarify that non-lawyer advocates are not engaging in the practice of law when they fully participate at IEP meetings (addressed in this Answer to Question 1) and mediation conferences (addressed in the Answer to Question 2, below) at the invitation of parents of children with disabilities.³ Alternatively, we ask the Committee to permanently withdraw Opinion 56 and issue no advisory opinion on the grievance presented in this case.

3 Non-attorney advocates do not "represent" or "speak on behalf of" parents at IEP meetings and mediation in any legal sense. Unlike attorneys, they do not stand in the shoes of the parents, nor can they bind parents in any way. However, their full participation must encompass the ability to communicate directly to school personnel, including any school district attorney involved in a particular child's IEP, and even speak for the parents if that is what the parents desire.

IDEA Permits the Unrestricted Participation of Non-Lawyer Advocates at IEP Meetings

The Individuals with Disabilities Education Act (IDEA) guarantees children with disabilities a "free appropriate public education" (FAPE), 20 U.S.C. §1412(1)(a), that is "appropriately ambitious in light of [the child's] circumstances," Endrew F. v. Douglas Cty. Sch. Dist., 137 S.Ct. 988, 1000 (2017), with the IEP serving as the "centerpiece" of IDEA's FAPE "delivery system," Honig v. Doe, 484 U.S. 305, 311 (1988). One of the key ways that Congress ensures the development of appropriate IEPs is to require compliance with procedures "giving parents and guardians a large measure of participation at every stage of the administrative process..." Board of Ed. Of Hendrick Hudson Central School Dist., Westchester Cty. v. Rowley, 102 S.Ct. 3034, 3050 (1982), including as required members of their child's IEP team, 20 U.S.C. §1414(d)(1)(B)(i).

To ensure their effective participation in IEP development, IDEA affords parents the right to include "individuals who have knowledge or special expertise regarding the child" as members of the IEP team, 20 U.S.C. §1414(d)(1)(B)(vi), and to decide which individuals have the requisite knowledge or expertise, 34 C.F.R. §300.321(c). It is unequivocal under IDEA that "[t]he determination of knowledge or special expertise of any individual ... must be made by the party (parents or public agency) who invited the individual to be a member of the IEP Team." Id.⁴ See *Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities; Final Rule*, 71 Fed. Reg. 46540, 46670 (Aug. 14, 2006) (noting but rejecting concerns about "lack of credentials for advocates").

⁴ This unequivocal right of parents applies to their choice of "non-lawyer advocates" as well as the broad range of "non-lawyer special education consultants" (see title of Opinion 56) that they choose to accompany them. In addition to advocates, parents have been known to bring a full range of individuals with knowledge and special expertise about their child to IEP meetings, such as evaluators, therapists, tutors, or even pastors, none of whom should be charged with UPL if they were to "speak on behalf of" the parents during the course of the meeting.

Any attempt by New Jersey to impose restrictions on the persons with "knowledge or special expertise" that parents can invite to IEP meetings would violate these explicit federal requirements and jeopardize New Jersey's receipt of federal funds under IDEA. To avoid this outcome, New Jersey regulations similarly protect the right of parents to determine which individuals have "special knowledge or expertise" regarding their child and to invite those individuals to their child's IEP meeting. N.J.A.C. 6A:14-2.3(k)(2)(vii).

Furthermore, the Supremacy Clause of the United States Constitution would preempt any state restrictions that conflict with IDEA's requirements. U.S. Const. art. VI, §2. Indeed, the United States Supreme Court has recognized that state laws restricting the unauthorized practice of law must yield when there is a conflict with federal law. Sperry v. Florida, 373 U.S. 379, 385 (1963) (ruling that Florida could not enforce its licensing requirements against non-lawyer registered to prepare and prosecute patent applications before federal Patent Office under federal law).

As required by IDEA and the Supremacy Clause, this Committee must protect the unrestricted right of New Jersey parents under federal law to select and include in their child's IEP team individuals with knowledge or special expertise regarding their child.

The Unrestricted Participation of Non-Lawyer Advocates as IEP Team Members Helps to Counter A Real Power Imbalance

The "'natural advantage' in information and expertise" that school districts have over parents has been recognized by the United States Supreme Court. Schaffer v. Weast, 546 U.S. 49, 60-61 (2005) (explaining that access to an expert provides parents with "firepower to match the opposition"). The New Jersey Supreme Court too has acknowledged that, while parents and school districts are equal partners in developing IEPs, they do not share the same resources:

The school board, with its recourse to the child-study team and other experts, has ready access to the expertise needed to formulate an IEP. Through the child-study team, the board generally has extensive records pertaining to a handicapped child. The board is also conversant with the federal and State laws dictating what the district must provide to

handicapped children in order to comply with the EAHCA. ... By contrast, parents may lack the expertise needed to formulate an appropriate education for their child.

Lascari v. Board of Educ. of Ramapo Indian Hills Reg. High School Dist., 116 N.J. 30, 45 (1989).

As further explained by the Colorado Department of Education in a decision involving non-lawyer advocates:

[a]lthough parents are equal members of the IEP team, the differences between parents and educators concerning access to information, expertise and familiarity with the special education process and language, as well as real and perceived differences in decision making authority, are common sources of a power imbalance that impacts the collaborative process contemplated by IDEA. ... To begin, most parents walk into an IEP meeting where almost every chair at the table is filled by school district personnel. ... Once the meeting starts, school district personnel facilitate or direct the conversation to ensure that the process for developing the IEP is followed, often utilizing a professional language and format unfamiliar to parents. Together, these features of the IEP meeting convey a strong message that the District is in control of the process, a message that can leave parents feeling alienated and disempowered.

State-Level Complaint 2018-535 at 7-8 (Dec. 2018) <https://www.cde.state.co.us/spedlaw/sc2018-535> (school districts may not reclassify meetings as other than IEP meetings in order to avoid the participation of non-lawyer advocates).

Given the reality of unequal power facing parents of students with disabilities, parents who invite a non-lawyer advocate to an IEP meeting expect that advocate to participate in an effort to obtain an appropriate special education program for their child; in other words, to serve as a member of their child's IEP team, as Congress intended. 20 U.S.C. §1414(d)(1)(B)(vi). Arguing in support of a parent's position does not equate to the unauthorized practice of law in this context. Indeed, the terms "represent" and speak "on behalf of" appear misplaced in the context of IEP meetings, which are by design collaborative efforts where all team members can participate in the discussion. Where the more formal matter of a

due process hearing is involved, New Jersey, by regulation and court rule, allows non-lawyer advocates to represent parents. N.J.A.C. 1:1-5.4; N.J.A.C. 1:6A-5.1; N.J. Ct. R. 1:21-1(f)(8); see also 34 CFR § 300.512(a)(1) ("whether parties have the right to be represented by non-attorneys at due process hearings is determined under State law). It is illogical to suggest that non-lawyer advocates may take on a full representative role in formal due process hearings before the OAL - but must "watch their words," fearing accusations of UPL, at meetings and sessions preceding or designed to avoid formal hearings.

Furthermore, a parent who lacks experience in public speaking and feels intimidated may ask a non-lawyer advocate to do the speaking to explain the parent's concerns and requests. To suggest that the non-lawyer advocate would risk UPL claims for doing so creates a limitation not contemplated by IDEA and restricts the ability of advocates to help parents most in need of assistance. The suggestion in Opinion 56, note 1, that a parent must be "contributing to the effort" at an IEP meeting to avoid having his or her advocate face UPL claims is unworkable and lacking in legal support.

The Absence of Parents/Students Does Not Preclude a Non-Lawyer Advocate's Participation at an IEP Meeting

In the rare case that a parent or student is not present at an IEP meeting, this absence does not preclude a non-lawyer advocate's participation. The federal Office of Special Education has indicated that the participation of an advocate is not dependent on the presence of the parent who invited the advocate. In Letter to Serwecki, the federal Office of Special Education Programs (OSEP) considered whether an advocate could participate in an IEP meeting even if the parent who invited the advocate would not be there. OSEP concluded that the advocate could participate, explaining that "[w]e find nothing in Part B [of IDEA] that would require that a parent be present at the IEP meeting in order to have a person that the parent determines has special knowledge or expertise regarding the child at the meeting as a member of the IEP team." 44 IDELR 8 (2005), <https://www2.ed.gov/policy/speced/guid/idea/letters/2005-1/serwecki022805ieplq2005.pdf>. New Jersey regulations provide rules that apply when a parent cannot attend an IEP meeting and do not suggest that parental absence precludes participation by non-lawyer advocates. N.J.A.C. 6A:14-2.3(k)(7).

It should be noted, however, that the absence of a parent is an unusual situation that the regulations attempt to avoid. See N.J.A.C. 6A:14-2.3(k) (3), (4), (6), (7). Certainly after a meeting not attended by a parent, the parent would need to be given the opportunity to review all documents requiring consent; a "safeguard" already in place is that school districts would not accept the signature of a non-lawyer advocate - or anyone else - as a substitute for parental consent. N.J.A.C. 6A:14-1.3 (establishing that consent "shall be obtained from the parent having legal responsibility for educational decision making" after the parent has been "fully informed of all information relevant to the activity for which consent is being sought, in his or her native language or other mode of communication"). See Answer to Question 3, below, for fuller discussion of safeguards.

Non-Lawyer Advocacy at IEP Meetings is Not the Practice of Law

As stated by the New Jersey Supreme Court in In re Opinion No. 24 of Comm. on Unauthorized Practice of Law, 128 N.J. 114, 122 (1992), "[n]o satisfactory, all-inclusive definition of what constitutes the practice of law has ever been devised... That has been left, and wisely so, to the courts when parties present them with concrete factual situations. ... Essentially, the Court decides what constitutes the practice of law on a case-by-case basis." See also Auerbacher v. Wood, 142 N.J. Eq. 484, 485, 59 A. 2d 863 (E.& A. 1948) ("What constitutes the practice of law does not lend itself to precise and all-inclusive definition"). Thus, examination of context is critical to make a UPL determination. While some activities, such as appearing in court or drafting legal pleadings may clearly constitute the practice of law, this cannot be said of speaking on someone's behalf, when the speaker has not claimed to be a lawyer. Nor can the use of legal knowledge, in and of itself, turn speech into the practice of law. As Auerbacher held, "Where the primary service is nonlegal, the purely incidental use of legal knowledge does not characterize the transaction as the wrongful practice of law." Id. At 485.

While the issues considered at IEP meetings involve underlying legal principles, this does not mean that a non-lawyer advocate is "practicing law" when he or she tries to convince a school district to create or improve an IEP any more than a school district administrator is "practicing law" when he

or she argues that the district's program is satisfactory. P.P. ex rel. Michael P. v. West Chester Area Sch. Dist., 585 F.3d 727, 735 (3d Cir. 2009) (the issue of whether an IEP is appropriate is a question of fact); Perkiomen Valley Sch. Dist. v. S.D. by & through J.D., 405 F. Supp. 3d 620, 630 (E.D. Pa. 2019), *appeal dismissed per agreement*, 2020 WL 6140396 (3d Cir. July 24, 2020) (same).

The topics of discussion at IEP meetings are "educational" rather than "legal": examples include educational evaluations and measures of student needs and progress, types of modifications, supports, and services needed for students with a particular disability, inclusion of students with disabilities in educational and extracurricular activities with peers who do not have disabilities, development of appropriate goals and objectives, and program and placement options that address a particular student's needs. Advocates share their knowledge about any and all of these topics, and they fulfill other important roles as well. For example, they help parents obtain necessary information to make informed decisions, assist them in communicating their concerns and in understanding what school personnel are saying, and model effective parental participation. In some cases, they serve as an essential bridge between parents and school personnel who have found themselves at loggerheads.⁵

As further confirmation that IEP meetings are not intended to be legal proceedings, "the attendance of attorneys at IEP

⁵ For a more complete discussion of the important roles played by advocates at IEP meetings, please see the Comments to this Committee submitted by the Council of Parent Attorneys and Advocates. In the event that this Committee remains inclined to limit a non-lawyer advocate's participation at IEP meetings and mediation conferences, any consideration of their appropriate role should be informed by detailed data about these proceedings, as indicated by the Supreme Court in In re Riverview Professional Services, Inc., 194 N.J. 438 (2008), *appeal dismissed per stipulation*, 196 N.J. 589, 960 A.2d 387 (2008) (in evaluating representation of insurance companies by nurses at arbitration sessions, Supreme Court would have required a Special Master to provide detailed additional information, including whether medical or legal issues predominate at this type of arbitration).

meetings" has long been "strongly discouraged" by the United States Department of Education (US ED). *Assistance to States for the Education of Children With Disabilities and the Early Intervention Program for Infants and Toddlers With Disabilities Final Rule*, 64 Fed. Reg. 12406, 12478 (Mar. 12, 1999). US ED reached this position for two reasons: because "an attorney's presence would have the potential for creating an adversarial atmosphere that would not necessarily be in the best interests of the child," *id.*; and because Congress has not authorized attorney's fees to be awarded for attorney participation in IEP meeting, unless required by a hearing officer, court, or, at the discretion of the State, by mediation. *Id.* citing 20 U.S.C. 1415(i)(3)(D)(ii).

Finally, Opinion 56 is contrary to New Jersey precedent in suggesting that a non-lawyer advocate may be treated as engaged in UPL even absent a belief by the parent that the advocate has the expertise of a licensed attorney and the parent's reliance on that perceived legal expertise. Compare, e.g., Matter of Margow's Estate, 77 N.J. 316 (1978) (finding legal secretary of 27 years engaged in UPL while acting as the "functional equivalent of [the decedent's] legal counsel" during will preparation) with In Matter of Estate of Dekis, 2011 WL 4529914 (Sup. Ct. App. Div. Oct. 3, 2011) (rejecting UPL claim where there was no evidence decedent was relying on his longtime companion for "legal expertise" in cutting and pasting from an internet template for his will). See also In re Application of New Jersey Society of Certified Public Accountants, 102 N.J. 231 (1986) (illustrating important role of reliance in UPL determinations where Supreme Court allowed CPAs to prepare and file New Jersey Inheritance Tax Returns "provided that the accountant notifies the client in writing before work is commenced that review of the return by a qualified attorney may be desirable because of the possible application of legal principles to the preparation of the tax return"); Baron v. Karmin Paralegal Services, 2019 WL 6211234 (Sup. Ct. App. Div. Nov. 21, 2019) (upholding UPL in case of paralegal who worked without supervising attorney and represented that he had "the expertise of an attorney").

2. Whether non-lawyer advocates should be permitted to represent, and speak on behalf of, parents or children with disabilities in mediation proceedings concerning the IEP?

IDEA affords parents a voluntary opportunity to engage in mediation to resolve disagreements about their child's special education eligibility or services. 20 U.S.C. 1415(e); N.J.A.C. 6A:14-2.6. This mediation must be "conducted by a qualified and impartial mediator who is trained in effective mediation techniques." 20 U.S.C. 1415(e)(2)(A)(iii). And, consistent with state regulation:

Either party may be accompanied and advised at mediation by legal counsel or other person(s) with special knowledge or training with respect to the needs of students with disabilities or with respect to the student who is the subject of the mediation.

N.J.A.C. 6A:14-2.6(c). NJDOE explicitly informs parents that "[y]ou may bring an advocate and/or lawyer with you to help you in the mediation conference." NJDOE, Parental Rights in Special Education (PRISE) (Revised August 2019) at 17, available at [https://www.nj.gov/education/specialed/fmr/RevisedParentalRights\(PRISE\).pdf](https://www.nj.gov/education/specialed/fmr/RevisedParentalRights(PRISE).pdf).

Non-lawyer advocates must be permitted to fully participate on behalf of parents or children with disabilities in special education mediation proceedings for several reasons.

First, NJDOE, through its regulation, its PRISE, and many years of practice, has authorized the unlimited participation of non-attorney advocates in mediation.

Second, contrary to the Committee's suggestion, mediation under IDEA is neither "formal" nor the "practice of law." See Opinion at 6. Instead, mediation is an informal means of resolving differences without litigation. NJDOE, PRISE at 16 (describing mediation as "a way to discuss and resolve disagreements between you and the school district with the help of a trained, impartial third person"). Advocates do not act in a legal capacity at mediation; instead, they support, assist, and advise parents based on their knowledge of special education and the child's needs.

Third, the power imbalance that exists at IEP meetings is equally present at mediation conferences, where the school district is represented by a special education administrator who

is knowledgeable about special education law and may also be represented by its lawyer. NJDOE, PRISE at 17 (“The school district may also bring a lawyer to the mediation conference even if you do not”).

Fourth, unless the lay advocate claims to have the expertise of an attorney and the parent relies on that claim, there has been no unauthorized practice of law (see cases discussed in Answer to Question 1 above).

Finally, as the record before the Committee will no doubt establish, there is a shortage of free and low cost attorneys available to represent parents at mediation. According to the latest reported data, there were 678 mediation conferences held in NJ during 2018-19. NJDOE Data available at <https://www.nj.gov/education/specialed/data/2019/DisputeResolution.html>. Although no data has been reported on representation, ELC’s understanding is that a significant number of parents participate in mediation without representation by an attorney or assistance by an advocate because that representation or assistance is not available or affordable to them.

3. What safeguards should be required when non-lawyer advocates represent, and speak on behalf of, parents or children with disabilities in meetings concerning the IEP or in mediation proceedings?

Both IEP meetings and mediation proceedings already have built-in safeguards to protect parents and their children with disabilities. Most significantly, IEP meetings are designed to produce collaborative team decisions by parties whose primary concern is ensuring a free appropriate public education to a student with a disability, see, e.g., Ridley Sch. Dist. v. M.R., 680 F.3d 260, 269 (3d Cir. 2012), so the participation of an untrained or unknowledgeable advocate - if it were to occur - is highly unlikely to sway school district personnel or be determinative of the outcome. By contrast, a knowledgeable and well-trained advocate has, in many cases, provided a persuasive voice to achieve a better outcome for the student. Even when an advocate is present, it is up to the parent to sign or refuse to sign the IEP that is developed; in no circumstances may an advocate or even an attorney, sign an IEP in the parent’s place. N.J.A.C. 6A:14-1.3 (requiring consent to be obtained from the parent). Notably, the signing of an IEP by a parent imposes no legal obligations on the parent. The parent also remains free to

revoke consent to the delivery of special education and related services at any time. N.J.A.C. 6A:14-2.3(e).

Although agreements reached in mediation are binding, the practice of mediation in New Jersey still affords safeguards to the parents. The trained, impartial mediator oversees all negotiations, generally removing the parties to separate rooms after opening positions are discussed and serving as the sole line of communication between the parties during negotiations. The mediator is responsible for drafting any agreement that is reached and for ensuring that it complies with federal and state laws. N.J.A.C. 6A:14-2.6(d)(4)(iii)-(iv). Once again, only the parent, not the advocate, is a valid signatory to a mediation agreement. 20 U.S.C. 1415(e)(2)(F)(ii); N.J.A.C. 6A:14-2.6(d)(6).

The existence of information on how to select an advocate, available through organizations such as the Council of Parent Attorneys & Advocates, <https://www.copaa.org/page/guidelinesadv>, and Autism New Jersey, <https://www.autismnj.org/article/how-to-find-a-special-education-advocate-thats-right-for-you/>, is a safeguard that inform parents, yet protects their freedom to choose whom they want to bring to an IEP meeting or mediation conference. ELC would strongly support an effort by NJDOE to disseminate such information to parents on a regular basis.

Even assuming that additional safeguards for non-lawyer advocates are advisable, the creation of such safeguards falls outside the province of the UPL Committee. See Connors v. Mills, 34 F. Supp. 2d 795 (N.D.N.Y. 1998) (opining "specific standards individuals had to meet in order to qualify as IDEA lay advocates" at administrative hearings are "the province of a legislature or an administrative agency and not of a court"). The Committee should consider the reasoning contained in Virginia UPL Opinion 187, <https://www.vsb.org/site/regulation/virginia-upl-opinion-187> (1996), involving the role of lay education advocates at due process hearings, in which the Virginia UPL Committee declined to decide the scope of activities a lay advocate may perform in "accompanying and advising" a parent, the impact of a parent not being present, whether a lay advocate may be compensated, and whether a lay advocate may represent a parent under the Rehabilitation Act. As to these matters, the Virginia Committee reasoned that the questions posed required interpretation of federal and state laws and regulations "beyond its purview,"

further noting that "if a non-lawyer is qualified to practice before an administrative agency or tribunal, it is exclusively within the province of that particular agency or tribunal to establish the parameters of the non-lawyer's practice before that agency." Id. Because Congress has left the determination of the knowledge and special expertise of individuals accompanying and advising a parent up to that parent, it is up to Congress or the United States Department of Education to impose additional safeguards.

4. What criteria must the non-lawyer advocate meet to be permitted to engage in activities that are considered, in Opinion 56, to be the practice of law?

As set forth above, ELC cannot stress enough that speaking for parents at IEP meetings and mediation is not the practice of law. And, as established by IDEA and state regulations, the only criteria that the non-lawyer advocate must meet to participate in IEP meetings and mediation is to be an individual who has been selected by the parent as having knowledge or special expertise. The imposition of any other criteria would deny parents their legal right to determine which individuals have knowledge and special expertise about their child and to bring those individuals to IEP meetings and mediation conferences.

Notably, the Committee has received Comments from Meghan Burke, Ph.D., BCBA-D, Associate Professor at the University of Illinois at Urbana-Champaign who describes the research she has conducted regarding the benefits conferred on families by special education advocates. She summarizes her research findings as follows:

Our research shows that advocates help families access needed services for their children with disabilities. Further, advocates are likely to improve the relationship between families and school personnel; to this end, it is likely that advocates may prevent conflict and, consequently, expensive conflict resolution procedures. Altogether, our research is overwhelmingly positive in documenting the benefits of advocates in the special education process.

Comments of Meghan Burke, Ph.D., BCBA-D to NJ Supreme Court Committee on Unauthorized Practice of Law (Nov. 9, 2020) at 4. Based on her research and that of her colleagues, Dr. Burke

"would caution against any formal training, licensing or education requirements for advocates" since they "may disproportionately, negatively impact families who face systemic barriers." Id. ELC concurs that the imposition of formal training, licensing or education requirements for advocates would likely reduce access to advocacy services for families who are the most vulnerable.

On a separate note, Opinion 56 creates confusion by ruling that a "lawyer must be retained separately by the parents," Opinion 56 at 6, and may not "partner" with non-lawyer educational consultants, id. at 7, without recognizing that law firms, attorneys, and non-profit organizations sometimes employ or contract with advocates to work with them on special education cases. For example, a lawyer may employ an advocate to accompany his or her parent-clients to IEP meetings. As long as that advocate works under the supervision of an attorney, the advocate, like a paralegal, is not engaged in the unauthorized practice of law and any superseding version of Opinion 56 must make that clear. See In re Opinion No. 24 of the Committee on the Unauthorized Practice of Law, 128 N.J. 114, 123 (1992).

5. Is it in the public interest to permit non-lawyer advocates to engage in these activities that are considered, in Opinion 56, to be the practice of law? If so, why?

We respectfully disagree that non-lawyer advocates engage in the practice of law when they participate in IEP meetings and mediations on behalf of parents. Participation in those proceedings by non-lawyers does not constitute the practice of law at all and, even if it did, it has been authorized by federal and state law, as set forth above.

If the Committee determines non-lawyer advocates are engaged in the practice of law, it must, as it recognizes, determine "**whether non-lawyers should be allowed, in the public interest, to engage in activities that may constitute the practice of law.**" In re Opinion No. 26 of Comm. on Unauthorized Practice of Law, 139 N.J. 323, 327 (1995) (emphasis added). That determination, according to the Court, requires "the balancing of the factors involved in the case, namely, the risks and benefits to the public of allowing or disallowing such activities." Id. Moreover, "in making that determination practical considerations and common sense will prevail." Id. at 343.

In the instant situation, the public interest strongly weighs in favor of allowing non-lawyer advocates to continue to fully participate at IEP meetings and mediation sessions without exposure to UPL claims.

First, in New Jersey such participation has been a longstanding practice of several decades that has resulted in benefit to many families. The comments that the Committee has received from parents and others likely provide some sense of how students with disabilities have benefitted from the full participation of lay advocates at IEP meetings and mediation conferences. Moreover, the research presented by Dr. Meghan Burke documents the overall benefits of advocate participation in special education.

Second, the assistance provided by advocates to families makes it more likely that the goals of IDEA will be achieved. IDEA's primary purpose is to ensure that children with disabilities are provided FAPE that will "prepare them for further education, employment, and independent living." 20 U.S.C. 1400(d)(1)(A). Another purpose is to ensure that "parents have the necessary tools to improve educational results for children with disabilities." 20 U.S.C. 1400(d)(3).

Third, many parents need support and assistance in navigating the special education process and obtaining appropriate services for their children, but do not want to bring lawyers to IEP meetings and mediation and risk developing an adversarial relationship with the school personnel who are educating their child. Those parents should be allowed to make that choice. See In re Opinion 26, supra.⁶

Fourth, the need for advocates to assist parents in special education matters is well known in New Jersey, and a variety of organizations receiving public funding provide or train advocates to support this need. These organizations include the Statewide Parent Advocacy Network (SPAN),

⁶ In In re Opinion No. 26, despite believing that parties should retain counsel in real estate transactions, the Court sanctioned the "South Jersey practice" of conducting real estate transactions with non-lawyers, subject to certain conditions, saying that the parties must "have the right to decide whether those savings [from not paying counsel fees] are worth the risks of not having lawyers to advise them..." Id. at 328.

<https://spanadvocacy.org/> , as well as the state's Family Support Organizations, <https://www.nj.gov/dcf/families/support/support/>, and Centers for Independent Living, <https://www.state.nj.us/humanservices/dds/resources/cntrindlivin dex.html>. State regulations allowing non-lawyer advocates to represent parents at due process hearings (so long as OAL permission is granted) provide further evidence of New Jersey's overall policy recognizing the need for non-lawyer advocates.

Finally, there is an inadequate supply of free or low cost attorneys to provide representation to parents in special education cases.⁷ As noted above, ELC turns away hundreds of special education parents each year who seek representation or advocacy assistance⁸ at their child's IEP meeting or mediation conference.

As did the Court in In re Opinion No. 26, this Committee must wonder "whether it is providing protection or imposing its will," id. at 357, if it restricts the ability of parents to use non-lawyers for assistance at IEP meetings and mediation conferences. Allowing Opinion 56 to stand would deny protection to parents and students with disabilities, instead relegating many of them to navigating the IEP process and mediation without the support and assistance they need.

6. How can the public be protected from non-lawyer advocates who do not have adequate knowledge or training with respect to children with disabilities and their educational needs?

Non-lawyer advocates have assisted parents in special education IEP meetings in New Jersey for more than 30 years. The Committee's question assumes that those holding themselves out as non-lawyer advocates "do not have adequate knowledge or training with respect to children with disabilities and their

⁷ Over one-third, or 37.2%, of New Jersey's student population qualified as economically disadvantaged in 2018-19. See NJDOE Demographic Data, available at https://rc.doe.state.nj.us/report.aspx?type=state&lang=english&schoolyear=2018-2019#Paafcbf0a4b17457fb360246b49809034_2_125iS0.

⁸ Some parents specifically request assistance from an advocate and must be told that ELC has no non-attorney advocates.

educational needs" and, in ELC's experience, that is not the case.⁹ Indeed, we have encountered some lawyers handling special education cases who have less knowledge or training in those areas than many advocates do.

The scope - and source - of protection needed pertaining to lay advocates with inadequate training or knowledge depends on the scope of the problem. Unfortunately, the problem that the Committee seeks to address is entirely unclear from the discussion in Opinion 56. We are merely informed that the Committee received an unspecified "grievance" about "a non-lawyer who represents parents and children in special education proceedings before the Office of Administrative Law" (OAL). Opinion 56 at 1.

However, because OAL's rules require non-lawyers to obtain approval to appear in due process hearings, protections are already in place. Approval must be based on an application that "certify[ies] how he or she has knowledge or training" with respect to children with disabilities and their educational needs and "describe[s] his or her relevant education, work experience or other qualifications." N.J.A.C. 1:1-5.4(b)(4)(iv); see also N.J.A.C. 1:6A-5.1. And, any non-lawyer receiving approval to appear in a special education case at OAL must conform to standards of conduct that are laid out in the OAL rules. N.J.A.C. 1:1-5.5; see also N.J.A.C. 1:6A-5.1(b). Both the imposition of sanctions and exclusion from a particular hearing are included among the consequences for failure to comply. N.J.A.C. 1:1-5.5(c). It is unclear from Opinion 56 how those protections covering due process hearings may have failed in the grievance before the Committee.

There was no indication in Opinion 56 that the grievance related to a non-lawyer's participation in an IEP meeting or mediation. ELC fully incorporates its responses to questions 3 and 4 above, related to any safeguards needed and the criteria to be met. Because of the existence of safeguards and the right of parents to determine the knowledge and expertise of those who accompany them to IEP meetings and mediation, no further protection is warranted, other than to recommend the greater

⁹ Note that there are many training opportunities available to lay advocates. See, e.g., Comments of the Council of Parent Attorneys and Advocates and those of SPAN Parent Advocacy Network.

dissemination of information to parents on selecting an advocate by NJDOE and advocacy organizations. Aside from any such recommendation, given that non-lawyers do not practice law by participating in IEP meetings and mediation (see answers to questions 1 and 2, above), ELC believes it is beyond the purview of this Committee to address the role of non-lawyers at IEP meetings and mediation.

CONCLUSION

For all the reasons set forth above, ELC requests that the Supreme Court Committee on the Unauthorized Practice of Law take one of the following two actions related to the now-stayed Opinion 56: 1) issue a superseding opinion advising that non-lawyer advocates are not engaging in the practice of law when they fully participate at IEP meetings and mediation conferences at the request of parents of children with disabilities; or 2) permanently withdraw Opinion 56 and issue no advisory opinion on the grievance presented in this case.

If I can answer any questions, please do not hesitate to contact me at eathos@edlawcenter.org. Should the Committee decide to schedule hearings in this matter, ELC requests the opportunity to participate. Thank you for your consideration of these comments.

Respectfully,



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