NATIONAL DISABILITY RIGHTS NETWORK

Protection & Advocacy for Individuals with Disabilities

November 16, 2020

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

Dear Ms. Johnston:

On behalf of the National Disability Rights Network (NDRN), thank you for the opportunity to comment on The Supreme Court Committee on the Unauthorized Practice of Law Opinion 56 ("Non-Lawyer Special Education Consultants and the Unauthorized Practice of Law").

NDRN is the non-profit membership association of Protection and Advocacy (P&A) and Client Assistance Programs (CAP) agencies that are located in all 50 States, the District of Columbia, Puerto Rico, and the United States Territories. In addition, there is a P&A / CAP affiliated with the Native American Consortium which includes the Hopi, Navajo and San Juan Southern Paiute Nations in the Four Corners region of the Southwest. P&A /CAP agencies are authorized under various federal statutes to provide legal representation and related advocacy services, and to investigate abuse and neglect of individuals with disabilities in a variety of settings. The P&A / CAP agencies comprise the nation's largest provider of legally-based advocacy services for persons with disabilities. As a network, the P&As and CAPs provided free assistance to close to 14,000 individuals and families in 2016, and engaged in hundreds of systemic cases, involving the Individuals with Disabilities Education Act (IDEA) and Section 504 of the Rehabilitation Act of 1973.

The experiences of our network in education cases put the P&A agencies in a relatively unique role to comment on the needs parents have for access to good advocacy services to assist them in their efforts to secure appropriate services for their children with disabilities at Individual Education Program (IEP) meetings pursuant to the IDEA. Additionally, our managing attorney for education and employment, Mr. Ron Hager, offers an unparalleled perspective on the issues with which the Committee is grappling. As his attached resume indicates, he began practicing education law in 1979, one year after the IDEA's implementation date. He was a clinical instructor/assistant professor at the University of Buffalo Law School for nine years, supervising the special education clinic and co-teaching one of the Law School's first year courses on Professional Responsibility for several years. He also served on the board of directors of a federally funded parent training and information center for several years and as the co-chair of the New York State Bar Association's Committee on Disability for four years.

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NDRN is not addressing with that part of the Opinion addressing the appearance by non-lawyers at administrative due process hearings. However, NDRN is very concerned with the part of the Opinion regarding non-lawyers advocating on behalf of parents at IEP meetings and mediation proceedings. We believe, as drafted, that the Opinion will have a significant negative impact on parents and their ability to ensure their children with disabilities receive the services they need under the IDEA.

As a preliminary matter, NDRN requests the Opinion be clarified to make clear that it does not apply to those non-lawyers who appear at IEP meetings or mediations who are under the supervision of a licensed attorney, even if that attorney is not present with the non-lawyer. As currently written, the Opinion does not make that distinction. P&A programs function as non-profit law offices and frequently employ non-lawyers as paralegals or advocates to perform a large range of activities, including advocating for parents at IEP meetings and mediations. Most of the time a licensed attorney does not attend with them but all of their work is under the supervision of the attorney. This is not uncommon with for-profit law firms either and we assume nothing in the Opinion was meant to apply to this practice, but clarification is necessary.

We will now address each of the Committee's questions.

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?

To begin, we believe it is a misnomer to characterize the appearance and advocacy on behalf of parents at IEP meetings to be considered "representation." Advocates typically make it very clear to parents they are not attorneys and are not "representing" them, nor are they providing legal advice. In fact, many advocates use written agreements which stress these principles.

To answer the question, we believe it is critical that non-lawyer advocates be available to appear at and speak on behalf of parents at IEP meetings, whether or not the parents also speak. This is so even if the parents are not present, even though in the normal course it is preferred that the parents be present. We believe it is best for the parents working with the advocate to determine what will work best for them as they seek to ensure the children receive the services to which they are entitled.

This is true for several reasons:

First, although parents are members of the IEP Team and are intended to be equal participants with the school staff when developing the IEP, most parents feel ill equipped to be able to handle this responsibility. Parents don't understand educational testing or education jargon and don't know their rights. Over the years Mr. Hager has represented school staff including a superintendent, as well as attorneys. These experienced, highly educated individuals found that self-advocacy was insufficient to

obtain a free appropriate public education for their children. Less skilled parents, especially low-income parents are even in greater need.

Second, even though the meeting is supposed to be collaborative, most parents feel intimidated at the IEP meetings. Frequently, there are four or more members of the school staff present, sometimes even ten or more, while the parents attend alone. School districts will take subtle or not so subtle steps to make the parents feel inadequate or intimidated. Two of the most egregious examples Mr. Hager has seen are making the parents sit in child-sized chairs while everyone else sat in regular chairs, and having the parents sit in the audience section of the board meeting room while the school staff sat on the raised dais. Many times, beyond counting, parents told Mr. Hager after the meeting they had never been treated as well as when he was present.

Coupled with the need for parents to have someone assist them at IEP meetings is the lack of resources to assist parents. The P&A agencies are charged with the obligation to protect and advocate for the rights of all people with disabilities. Although the P&As handle a large number of education cases, they receive no dedicated funding for this work and are called to assist people with disabilities in a broad range of issues and settings. In fact, one of their primary functions is to advocate for people in institutions. Because of this, P&As are required to establish priorities for the types of cases they will handle. Many P&As limit their education work to only a handful of types of cases, such as discipline, least restrictive environment or transition. The P&As are unable to meet the needs even of all the students who meet these priorities and all families whose cases do not meet these priorities must look elsewhere.

Across the country the other available resources are also inadequate to meet the need. Various non-profit agencies may hire non-lawyer advocates to assist families at IEP meetings, but pursuant to the proposed Opinion, they would be barred from speaking for the parents at these meetings. Given the parents' lack of ability to advocate for themselves, this would be devastating.

Non-profit agencies (P&A agencies or other organizations) are not able to meet the need, so the availability of independent advocates, both paid and unpaid is critical. Since many non-profit agencies give priority to low income families, paid advocates are often the only option available to other families.

Finally, given the experiences of many families, parents and their advocates should decide what role the advocate should play at the meeting. Some parents may feel comfortable speaking when they have an advocate with them so they may want to take the lead in speaking with the advocate available to chime in when needed. Other families may feel so inadequate or emotional that they don't want to speak at all and want the advocate to speak for them. Although not preferred, there are some parents for whom the IEP meetings have become so toxic that they would not even want to go. With time, the goal will be for the parent to begin to feel comfortable attending the meeting and taking a greater and greater role in speaking. This position is consistent with the position of the U.S. Department's Office of Special Education Programs

(OSEP), which is responsible for enforcing the IDEA. *See, Letter to Serwecki*, 44 IDELR 8 (OSEP 2005) (clarifying that nothing in the IDEA regulations prohibits a parent's advocate from attending an IEP meeting regardless of whether the parent attended as well).

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?

Everything said above about the need for non-lawyer advocates to appear and speak on behalf of parents at IEP meetings applies equally to mediation proceedings. Although there is a mediator present, the mediator is to be impartial. 34 C.F.R. § 300.506(c). Additionally, the mediators' knowledge of education law and education practices varies widely. Districts will always have at least one representative present during mediation who will be well versed in educational issues and in the law. So, parents again find themselves in an unequal bargaining position during mediation unless they have an advocate to speak on their behalf, when needed.

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?

NDRN believes that IEP meetings and mediation proceedings already have built-in safeguards to protect parents and their children with disabilities. Both IEP meetings and mediation proceedings are informal in nature, far less formal and complicated than due process hearings.

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, 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.

The regulations governing IEP meetings specifically authorize the parents to bring a person with them with "special knowledge or expertise." 34 C.F.R. § 300.344(c). Such attendees become members of the IEP Team, and are therefore fully authorized to speak. It is the parent (or district) who decides who shall attend in this capacity:

> Under § 300.344(c), the determination as to whether an individual has knowledge or special expertise, within the meaning of § 300.344(a)(6), shall be made by the parent or public agency who has invited the individual to be a member of the IEP team.

Comments to 2009 Regulations, Appendix A, Question 28, 64 Fed.Reg. 12406, 12478 (March 12, 1999).

Additionally, if an agreement is reached at an IEP meeting, the parents' signature does not constitute consent to the items in the IEP, merely their attendance. The IEP itself, although committing the district to provide the services listed in the IEP, is not a contract. So, having an advocate assist the parent and speak on their behalf concerning the types of services needed is not the practice of law. Likewise, if an agreement is reached at a mediation session, it is the mediator, not the parties, who would typically draft the mediation agreement, even though the mediation agreement is legally binding.

Finally, there are resources in place to assist parents in selecting an advocate. These options would provide a safeguard to inform parents of their options yet give them the freedom to select whom they want to bring to an IEP meeting or mediation session. For example, 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-tofind-a-special-education-advocate-thats-right-for-you/.

Finally, there are training programs available to become a non-lawyer education advocate. NDRN provides various training programs to its members on education law and advocacy. There are other programs offered around the country

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?

NDRN agrees with the comments of others, such as the Education Law Center that speaking for parents at IEP meetings and mediation sessions is not the practice of law. And, pursuant to the IDEA, the only criteria that the non-lawyer advocate must meet to participate is to be an individual who has been selected by the parent as having knowledge or special expertise. Imposing any other criteria would deny parents their right to determine which individuals have knowledge and special expertise about their child and to bring those individuals to IEP meetings and mediation conferences.

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?

For the reasons stated in response to questions one and two, above, NDRN believes it is absolutely in the public interest to have non-lawyer advocates engage in these activities.

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?

We believe there is no risk to the general public, as this Opinion only covers a narrow, special group of parents. Obviously, if an advocate holds themselves out as an attorney

or as practicing law that should be dealt with as with any allegation of the unauthorized practice of law. Otherwise, non-lawyer advocates have been appearing at IEP meetings and speaking for parents all over the country since the IDEA went into effect in 1978 and have helped countless students in every state and territory receive the services which they needed.

We appreciate the opportunity to share NDRN's views on Opinion 56, Non-Lawyer Special Education Consultants and the Unauthorized Practice of Law. Should you have any questions, please do not hesitate to contact Ron Hager, Managing Attorney for Education and Employment, at Ron.Hager@ndrn.org.

Sincerely,

Curtis L. Decker
Executive Director