

NOTICE TO THE BAR

COMMITTEE ON THE UNAUTHORIZED PRACTICE OF LAW OPINION 56 STAYED PENDING ISSUANCE OF A SUPERSEDING OPINION; REQUESTING COMMENTS

The Supreme Court Committee on the Unauthorized Practice of Law hereby stays Opinion 56 (“Non-Lawyer Special Education Consultants and the Unauthorized Practice of Law”), issued September 30, 2020, pending submission of comments from interested persons and issuance of a superseding Opinion. Opinion 56 is attached.

The Committee seeks comments from interested persons on the issues raised in Opinion 56. Specifically, the Committee asks commenters to focus on these 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?
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?
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?

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?
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?
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?

Comments should be sent by November 16, 2020 to:

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

Comments may also be submitted via Internet e-mail to the following address:

Comments.Mailbox@njcourts.gov.

The Committee will not consider comments submitted anonymously. Thus, those submitting comments by mail should include their name and address and those submitting comments by e-mail should include their name and e-mail address.

/s/ Adrienne C. Rogove

Adrienne C. Rogove, Esq.
Chair, Committee on the Unauthorized
Practice of Law

Dated: October 14, 2020

COMMITTEE ON THE UNAUTHORIZED PRACTICE OF LAW

Appointed by the Supreme Court of New Jersey

OPINION 56

**Non-Lawyer Special
Education Consultants and
the Unauthorized Practice
of Law**

The Committee received a grievance regarding a non-lawyer who represents parents and children in special education proceedings before the Office of Administrative Law. The Committee issues this Opinion to provide guidance to non-lawyers who consult with parents of children with special needs and/or represent them or their children in administrative hearings. The Opinion specifies what activities are permissible and what activities are the unauthorized practice of law. The Opinion also cautions lawyers who partner with non-lawyer consultants that certain arrangements may be viewed as assisting in the unauthorized practice of law, and also may violate ethics rules prohibiting improper fee-sharing.

The Individuals with Disabilities Education Act, 20 U.S.C. § 1400 et seq. (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 et seq.; 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. § 1414(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 otherwise would 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.

Accordingly, 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, supra, 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. While non-lawyers may charge fees for their expert advice or expert testimony, they may not charge fees for representing the parents in an administrative hearing in the Office of Administrative Law.

Non-lawyers may also charge fees for accompanying parents at meetings with the child’s school to develop the child’s IEP. In such meetings, however, the non-lawyer may not “represent” the parents or speak on their behalf, but may attend and consult with the parents regarding the development of the program and assist in the negotiations between the parents and the school.¹ Non-lawyers may accompany and consult with parents in mediation conferences with the child’s school regarding the child’s IEP but,

¹ Ordinarily, negotiating a legal agreement on behalf of another person is the practice of law, and negotiations with a school on an IEP may, arguably, fall into that category. 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). The Committee finds that assisting parents of a child with a disability in negotiations with the child’s school regarding the child’s IEP may be done by non-lawyers who have the requisite special knowledge or training with respect to children with disabilities and their educational needs, provided the parents are present and contributing to the effort and the non-lawyer does not represent them or speak on their behalf.

again, may not “represent” the parents or speak on their behalf in such proceedings; representing a party in formal mediation is the practice of law and may be done only by a lawyer. Non-lawyers who do not represent the party may charge fees for attending administrative hearings in the Office of Administrative Law as a consultant about educational needs and not to speak on behalf of the parents or to advise or coach the parents regarding evidence, arguments, or direct and cross examination questions.

Lawyers who work with non-lawyer educational consultants and represent parents in mediation sessions or administrative hearings in the Office of Administrative Law may not share legal fees with the non-lawyer. The lawyer must be retained separately by the parents. If the lawyer is retained not by the parents but by the consultant, the lawyer is assisting in the unauthorized practice of law and may be impermissibly sharing legal fees. See Committee on the Committee on the Unauthorized Practice of Law Joint Opinion 45 / ACPE Joint Opinion 716 (June 26, 2009) (lawyers who perform mortgage loan modification services in conjunction with a for-profit loan modification company risk charges of impermissible fee sharing and assisting the unauthorized practice of law); Committee on the Unauthorized Practice of Law Opinion 25 (1992) (a company that solicited homeowners to file property tax appeals, gathered necessary paperwork, conducted comparative appraisals, and then arranged with an attorney to handle the appeal before the County Tax Board was engaging in the unauthorized practice of law).

Accordingly, if an educational consultant is hired by the client, and the consultant then retains the lawyer to handle the mediation or hearing, and the lawyer is paid out of fees received by the consultant from the client, the consultant is engaged in the unauthorized practice of law and the lawyer is assisting in unauthorized practice and also

improperly sharing fees. The client should separately choose legal counsel and may not be required to use counsel that is secured by, or has a “partnering” arrangement with, the educational consultant.

In sum, non-lawyers with knowledge or training with respect to children with disabilities and their educational needs may charge fees for consulting activities but may not charge fees for representing the parents or children in formal mediation or administrative proceedings. They may, however, charge fees for advising parents regarding educational problems, evaluating such problems, the proper educational placement for children with disabilities, producing technical reports, and serving as an expert witness. Lawyers may work with such non-lawyer educational consultants but may not “partner” with the consultant or share legal fees with the consultant; the lawyer must be hired by the parents separately from the consultant.