



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

Via email to Comments.Mailbox@njcourts.gov

Dear Committee Secretary Johnston:

I am writing to share the concerns of The Arc of the United States about Opinion 56 and to respond to select directed questions in your October 14, 2020 Notice regarding the use of educational consultants, lay advocates, or other non-lawyers. The Arc promotes and protects the human rights of people with intellectual and developmental disabilities (IDD) and actively supports their full inclusion and participation in the community throughout their lifetimes.

Background

The Arc, through its chapter network, has a long history of providing non-legal support to families of children and adults with IDD as they navigate the systems that support individuals with IDD. The Arc was founded in 1950 by a group of parents and by 1953 had issued an "Education Bill of Rights" proclaiming that every child with IDD has the right to an education appropriate for his/her needs. Less than twenty years later, The Arc's chapter in Pennsylvania won its groundbreaking case challenging the state's denial of education to those "who have not attained a mental age of 5 years" which resulted in a mandate for the state to provide a free public education to children with IDD as well as to establish certain due process procedural safeguards if families were denied these services. This case was the first of two court cases that laid the foundation for the Education for All Handicapped Children Act of 1975, now known as the Individuals with Disabilities Education Act (IDEA).

Today, special education advocacy continues to be one of the services provided by our network of more than 600 chapters across the country. Hundreds of The Arc's advocates participate in thousands of individualized education program (IEP) meetings and other dispute resolutions every year. They advise and support families who are overwhelmed by the complexities of federal and state laws and regulations, and who often cannot afford to hire an attorney. Most of their services are either provided for free or on a sliding scale in order to meet the needs of lower income families.

The Arc also operates a special education lay advocacy training program at the national level. Through The Arc@School, we provide training and resources to help families and other stakeholders to help navigate the special education system. The Arc@School's online advocacy curriculum provides the basic information that parents, educators, and other advocates need to support students and families in navigating the special education system, including understanding the IDEA and early intervention services, IEPs, Section 504, and more.

General Comment:

Due to the important role that non-legal special education advocates play for families of people with IDD, The Arc believes Opinion 56 should be withdrawn. By placing significant restrictions on lay advocates because of a single complaint about one lay advocate, there could be real harm done to other students with disabilities and their families. We believe the opinion is misguided and a classic example of the cure being worse than the disease. The far greater problem that families of children with IDD encounter in the special education system is not having to choose between a lawyer and lay advocate, but rather between a lay advocate or nothing. Of greatest concern is the position taken by Opinion 56 that, during the course of properly "assisting parents of a child with a disability in negotiations with the child's school," non-attorney advocates may not "represent" parents or "speak on their behalf" at IEP meetings or mediation conferences.

Responses to Directed Questions 1, 2, 3, 5, and 6

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?

It is not the typical practice of advocates in our network to attend an IEP meeting without the parent in attendance. They attend meetings WITH parents to support them in advocating for their child's needs.

The Arc's non-attorney advocates regularly attend IEP meetings to help families understand the information the school is giving them, help them understand what their options are, and then seek the services they believe their child needs, which is support that should be able to be provided by an attorney and non-attorney alike. Much of what the advocates say and do is about the details of education, such as what goals are appropriate for the student, what is recommended by the student's latest evaluation, and what services or therapies should be in the IEP. It is clearly not the practice of law.

There is a considerable power imbalance between parents and schools when there is a disagreement. While many advocates support parents to ask questions and request services on their own, some parents are too intimidated by the school professionals at the meeting and need the help of a knowledgeable advocate to express the concerns they don't feel comfortable expressing. Both an attorney and non-attorney alike should be able to support parents and speak on their behalf in this way. In addition, we are curious about what criteria could be used to determine whether parents or children had participated and who would make this determination.

IEP meetings are specifically meant to be non-legal in nature so that parents can fully participate. In the IDEA's 45-year history, no state has questioned the ability of families to bring a non-attorney advocate with them to their child's IEP meeting to support and collaborate with them.

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?

As with IEP meetings, for mediation proceedings concerning the IEP, The Arc's non-attorney advocates support and collaborate with families. The role of our lay advocates is even more important in these mediation proceedings as school districts have administrators who attend mediation proceedings who are very knowledgeable about special education law. This is often in contrast to parents, many of whom may lack a high school or college degree, but most certainly don't have a nuanced understanding of special education laws.

Using non-attorney advocates for IDEA mediation proceedings is simply good policy. These lay advocates significantly help to meet the vast unmet needs of families, few of whom have the resources to contract an attorney which often runs into tens of thousands of dollars. They fall between the very low income limits of many community legal services providers and the high income needed to hire a private attorney. If they do qualify for a legal services organization, most of these organizations have very limited capacity, especially in rural areas. And, of course, COVID-19 is only exacerbating this problem with more families needing assistance while their financial security is decreasing.

Lay advocates typically have a solid understanding of the various challenges faced by parents who have a child with a disability and many have firsthand experience in navigating various service systems for their own children with disabilities. They bring social-emotional skills to the table which often results in a less adversarial process, resolving many disagreements sooner and without the need for due process.

It is worth noting that New Jersey could be one of the states to most benefit from the use of lay advocates in mediation proceedings. In a recent analysis of due process hearing and written state complaint activity for COVID-19 issues, New Jersey was second only to New York for the highest activity levels for due process hearings.¹ And as the national data on IDEA complaints has long shown, mediation is a highly effective process for resolving complaints without the need to advance to a due process hearing.

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?

There are reasonable options to ensure that parents are aware of the limitations of using non-lawyer advocates. Many non-profit organizations have provided such guidance to their providers for many years.

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?

As noted previously, representing or speaking on behalf of families in IEP and mediation meetings is not the practice of law. While what constitutes the practice of law is very complicated, in very general terms, a person might be considered to be practicing law when he or she represents another person in a court, drafts a legal document that requires special knowledge of the law, or provides legal advice to

¹ Zirkel, P. and Jones, N. Due Process Hearing and Written State Complaint Activity for COVID-19 Issues: A Six-Month Snapshot. Center for Appropriate Dispute Resolution in Special Education. October 2020. Available at: <https://perryzirkel.files.wordpress.com/2020/10/cadre-briefing-paper.pdf>

someone else by applying the law to the facts of a specific case and advising the person on how to proceed.

For the reasons noted in our response to questions 1 and 2, it is in the public interest to allow non-attorney advocates to support families in IEP and mediation meetings, especially to resolve disputes sooner and avoid due process.

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 should start by putting the problem that Opinion 56 sought to address into proper context. As noted in the Opinion, it was issued in response to a single complaint, not a widespread problem. Any final opinion or guidance should address the actual scope of the problem.

Fortunately, several organizations that employ lay advocates provide training, supervision, and have grievance procedures. For instance, the following low cost training programs are available across the country for special education lay advocates:

- The Arc@School's online Advocacy Curriculum includes eight modules. Each module is about an hour long and includes a pre-test, a listening guide, narrated videos, a post-test, and additional resources.
- The Council of Parent Attorneys and Advocates (COPAA) offers a program that has more than 100 hours of training. Special Education Advocate Training (SEAT) 1.0 a ten-week course for beginners; SEAT 2.0 is a year-long Special Education Advocate Training.
- Wright's Law offers a broad array of customized training and materials.

We do not believe there is a need to require formal credentials for lay advocates. Few non-profits have the resources to do formal credentialing, and we have concerns about state departments of education undertaking such an endeavor. However, states could select and promote any high-quality special education advocacy training program, such as those listed above.

Parents often struggle to understand the special education system and advocate on their own for appropriate educational services. Many seek help to obtain the services they feel their child needs, and many cannot afford an attorney to provide that help. In addition, the involvement of attorneys can sometimes strain an already tense relationship between parents and schools. Lay advocates are an important resource for families and allowing non-attorney advocates helps resolve many disagreements sooner and without the need for due process. Lay advocates are an especially important resource for low-income families, families of color, and non-English-speaking families. Adding barriers to families seeking support at IEP meetings threatens to increase the already large equity gap between families of means and families in need.

Thank you for this opportunity to comment.

Sincerely,



Annie Acosta
Director of Fiscal and Family Support Policy