

NOV 28 2011

FILE # ML-46885-11
I.D. # 46885

1701 North Congress Ave. • Austin, Texas 78701-1494 • 512 463-9734 • 512 463-9838 FAX • www.tea.state.tx.us

Robert Scott
Commissioner

November 21, 2011

RQ-1021-BA

Honorable Greg Abbott
Attorney General of Texas
Post Office Box 12548
Austin, Texas 78711-2548

Re: Representation by Non-Attorneys at Special Education Due Process Hearings

Dear General Abbott:

I request your opinion on whether non-attorneys may represent parties at special education due process hearings. The Texas Education Agency (TEA) is charged with conducting due process hearings involving claims brought by parents of students with disabilities or school districts under the Individuals with Disabilities Education Act (IDEA).¹ In 2008, language was added to the IDEA regulations to clarify that the parties to due process hearings have a 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, except that whether parties have the right to be represented by non-attorneys at due process hearings is determined under state law.²

As explained in the comments to the federal regulations, "[g]iven that [IDEA] is silent regarding the representational role of non-attorneys in IDEA due process hearings, the issues of whether non-attorneys may 'represent' parties to a due process hearing is a matter that is left, by the statute, to each state."³ Therefore, because the matter of representation by non-attorneys asks a question of state law, I seek your opinion regarding whether such representation is allowed in Texas.

As you know, the Texas Government Code defines the "practice of law" as

the preparation of a pleading or other document incident to an action or special proceeding or the management of the action or proceeding on behalf of a client before a judge in court as well as a service rendered out of court, including the giving of advice or the rendering of any service requiring the use

¹ 34 C.F.R. § 300.511(b). General information about due process hearings can be found in the agency's Dispute Resolution Handbook (at http://ritter.tea.state.tx.us/legal/SE-Docs/DR_Handbook.pdf). Existing Commissioner's Rules covering dispute resolution are available at <http://ritter.tea.state.tx.us/rules/tac/chapter089/ch089aa.html> (see "Division 7. Resolution of Disputes Between Parents and School Districts").

² 34 C.F.R. § 300.512(a)(1).

³ 73 Fed. Reg. 73017 (12-1-2008).

of legal skill or knowledge, such as preparing a will, contract, or other instrument, the legal effect of which under the facts and conclusions involved must be carefully determined.⁴

Furthermore, a person cannot practice law in Texas without membership to the state bar.⁵ However, whether a non-attorney can represent a party in a state administrative hearing has been the subject of debate, and the law is generally silent on the subject.

In Attorney General Opinion No. H-974, issued in 1977, the attorney general opined that “any decision concerning the definition of the practice of law should be based upon an analysis of the dangers and benefits to the public,” which will differ depending on the type of administrative hearing at issue. Accordingly, the attorney general determined that the question must be addressed on an agency by agency basis.

In deciding that non-lawyers may represent parties before the Industrial Accident Board and the State Board of Insurance, the attorney general considered, among other things, the informality of the proceedings, the need for prompt resolution, and that the practice of non-attorney representation in those hearings had been tacitly sanctioned for some time. The attorney general cautioned that “this is not to say, of course, that a non-lawyer is required or entitled to represent an individual in the same manner as an attorney is or that he may charge a fee for such representation.”

Although TEA has not implemented a rule regarding the parameters of non-attorney representation, non-attorney advocates are currently involved in all aspects of special education due process hearings, typically representing parents of students with disabilities. They draft and sign pleadings, file and respond to motions, make oral arguments, attend prehearing conferences, and present evidence and examine witnesses. It is our understanding that some of these non-attorney advocates charge a fee for their services.

On occasion, opposing counsel asks the hearing officer to declare that the non-attorney’s activities constitute the unauthorized practice of law. Rulings on these motions have varied. For instance, one hearing officer, relying in part on the aforementioned attorney general opinion, concluded that a non-attorney may represent a party in a special education due process hearing.⁶ The following year, however, a different hearing officer ruled that non-attorney representation at special education due process hearings amounts to the unauthorized practice of law, and granted a motion to disqualify the same advocate whose representation was allowed the year before.⁷ Other hearing officers have also ruled that non-attorneys cannot represent parties in due process hearings.⁸ But in the most recent decision on the issue, the hearing officer determined that she lacked the jurisdiction or legal authority to rule on whether a non-attorney is engaged in the unauthorized practice of law.⁹

⁴ Tex. Gov’t Code § 81.101.

⁵ *Id.* at § 81.102.

⁶ *Student v. Cedar Hill Independent School District*, TEA Docket No. 170-SE-0104 (2004), attached.

⁷ *Student v. Lancaster Independent School District*, TEA Docket No. 172-SE-0205 (2005), attached.

⁸ See *Student v. Huffman Independent School District*, TEA Docket No. 245-SE-0609 (2009) and *Student v. Lewisville Independent School District*, TEA Docket No. 060-SE-1110 (2010), attached.

⁹ *Student v. Lewisville Independent School District*, TEA Docket No. 268-SE-0811 (2011), attached.

TEA contracts with private practice attorneys to conduct special education due process hearings. The decisions of these impartial hearing officers are final and are not subject to review by TEA. Therefore, TEA cannot resolve conflicting decisions, and an aggrieved party must appeal a decision to state or federal court.¹⁰

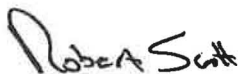
Even when a hearing officer prohibits a non-attorney advocate from representing a party in a special education due process hearing, the advocate may, in some cases, continue to be involved by drafting questions for the party to ask witnesses, preparing exhibits, writing opening statements and closing arguments for the party, and whispering advice in the party's ear during the hearing. As a result, parties do not always know from the outset whether and to what degree an advocate may be allowed to represent a party in a hearing. Consequently, advocates and attorneys alike have asked that TEA address the issue to provide needed consistency and predictability.

My questions are:

1. Whether non-attorney representation at special education due process hearings constitutes the unauthorized practice of law?
2. Whether your answer to question number 1 would change if TEA had a specific rule allowing non-attorney representation at special education due process hearings?
3. Whether TEA has the authority to adopt a rule¹¹ allowing or prohibiting non-attorney representation at special education due process hearings?

Thank you for your consideration of this matter. Should you need any additional information, please feel free to contact me or David Anderson, TEA General Counsel, at (512) 463-9720.

Sincerely,



Robert Scott
Commissioner of Education

RS/da/ds

¹⁰ 34 C.F.R. § 300.516.

¹¹ TEA is authorized under Section 29.001 of the Texas Education Code to make rules "for the administration ... of the special education program." In addition, as the state education agency for purposes of the federal grant, TEA is obligated under 34 C.F.R. § 300.121 "to have procedural safeguards in effect to ensure that each public agency in the State meets the requirements of §§ 300-500 through 300.536," which include the requirements for due process hearings.