

MEMORANDUM

TO: Patricia Roberts, PELE Clinic Director
FROM: Jeff Martin, Law Student, PELE Special Education Advocacy Clinic
RE: Attendance of a School Attorney at IEP Meetings
DATE: October 23, 2009

QUESTION PRESENTED

Whether an attorney for the school can legally attend an IEP Team Meeting?

STATEMENT OF FACTS

PELE Clinic students have observed attorneys representing the school district at some IEP meetings. Sometimes the attorney was helpful; other times, the attorney was adversarial.

DISCUSSION

A. Attorneys not expressly forbidden from IEP meetings

Many times, the presence of an attorney creates an adversarial atmosphere. This can compound the feeling that the special education “deck is stacked” against parents since school representatives already outnumber the parents—not uncommonly by three or four to one. The United States Code (Individuals with Disabilities Act) does not expressly forbid school district attorneys from attending IEP meetings. Yet, the Code does exclude school district attorneys from Resolution Meetings unless the parents have an attorney present:

(f) Impartial due process hearing

(1) In general

(A) Hearing

...

(B) Resolution session

(i) Preliminary meeting Prior to the opportunity for an impartial due process hearing under subparagraph (A), the local educational agency shall convene a meeting with the parents and the relevant member or members of the IEP Team who have specific knowledge of the facts identified in the complaint—

- (I) within 15 days of receiving notice of the parents' complaint;
- (II) which shall include a representative of the agency who has decisionmaking authority on behalf of such agency;
- (III) which may not include an attorney of the local educational agency unless the parent is accompanied by an attorney;** and

...

20 U.S.C. § 1415(f) (2008) (emphasis added).

B. School district attorneys strongly discouraged

While school attorneys are not expressly forbidden from attending IEP meetings, they are strongly discouraged. Question 29 in Appendix A to the IDEA '97 regulations at 34 C.F.R. Part 300 states:

The presence of the agency's attorney could contribute to a potentially adversarial atmosphere at the meeting . . . Even if the attorney possessed knowledge or special expertise regarding the child (Sec. 300.344(a)(6)), 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.

Therefore, the attendance of attorneys at IEP meetings **should be strongly discouraged.**

34 C.F.R. Part 300, Appendix A, Question 29 (emphasis added); *see also* Letter from Patricia J. Guard, Acting Director of the Office of Special Education Programs, to Hillary Rodham Clinton, U.S. Senate (July 21, 2001) [hereinafter { *HYPERLINK* "<http://www.ed.gov/policy/speced/guid/idea/letters/2001-3/clinton072301iep.doc>" }] available at <http://www.ed.gov/policy/speced/guid/idea/letters/2001-3/clinton072301iep.doc>

The answer to Question 29 in Appendix A raises several points. First, the subject of the answer is the “agency’s attorney” and not the parent’s attorney. This may be an acknowledgment of the typical imbalance of power and sophistication that exists in most IEP meetings between the school and parents. Second, the answer relies upon the “best interest of the child” standard. This standard is often interpreted to mean that the “best interest of the child” can supersede others’ rights. *See Fennelly v. Norton*, 103 Conn. App. 125, 143-144 (2007). Thus, even if the school district has a right to invite their

attorney to attend an IEP meeting, the best interest of the child may trump this right. Finally, the answer indicates that school attorneys are strongly discouraged “even if” the school attorney meets the threshold of possessing “knowledge or special expertise regarding the child.” 34 C.F.R. Part 300, Appendix A, Question 29. The implication is that if the district attorney does not meet the threshold of child knowledge or expertise the attorney cannot attend.

C. Do school district attorneys have knowledge and expertise about the child?

Pete and Pam Wright, in their book, *Wrighslaw: All About IEPs*, assert that “[i]n most cases, an attorney will not meet” the requirements of 20 U.S.C. 1414.

Section 1414(d)(1)(B) defines and limits who can be on the IEP team:

(B) Individualized education program team

The term “individualized education program team” or “IEP Team” means a group of individuals composed of—

- (i) the parents of a child with a disability;
- (ii) not less than 1 regular education teacher of such child (if the child is, or may be, participating in the regular education environment);
- (iii) not less than 1 special education teacher, or where appropriate, not less than 1 special education provider of such child;
- (iv) a representative of the local educational agency who—
 - (I) is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities;
 - (II) is knowledgeable about the general education curriculum; and
 - (III) is knowledgeable about the availability of resources of the local educational agency;
- (v) an individual who can interpret the instructional implications of evaluation results, who may be a member of the team described in clauses (ii) through (vi);
- (vi) at the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and**
- (vii) whenever appropriate, the child with a disability.

20 U.S.C. § 1414(d)(1)(B) (2008) (emphasis added).

Subsection B enumerates seven categories of people that can be on an IEP team. The most likely place for a school attorney to fit would be under subsection vi. However, this

subsection requires the attorney to have “knowledge or special expertise regarding the child” as a threshold to even attend an IEP meeting. *Id.* Knowledge about the law is not enough.

When Senator Hillary Clinton asked the Department of Education whether a school district attorney could attend IEP meetings, the Department of Education repeated the threshold standard, but noted that the determination as to whether the threshold is met must be determined by the inviting party:

Under this statutory provision, the parent's and public agency's right to bring other individuals to the IEP meeting at their discretion must be exercised in a manner that ensures that **all members of the IEP team have the knowledge or special expertise regarding the child to contribute meaningfully to the IEP.**

Paragraph (c) of §300.344 provides that **the determination** of the knowledge or special expertise of any individual described in paragraph (a)(6) **shall be made by the party (parents or public agency) who invited the individual** to be a member of the IEP team.

Senator Clinton Letter (emphasis added).

While it is true that paragraph (c) of § 300.344 permits the inviting party to determine whether the invitee meets the threshold, the principles of statutory interpretation should still apply. For example, the school could not invite a “man off the street” with no knowledge or expertise to attend the IEP meeting.

D. Case law and the question of agency attorneys

There are very few published cases that address the issue of whether school district attorneys can attend IEP meetings. However, in one of the most prominent cases, the parties in *Medford v. District of Columbia*, 691 F. Supp. 1473 (D.D.C. 1988), were disputing whether attorney fees could be awarded for attending IEP meetings. *Id.* at 1481. The court stated:

The regulations neither require nor prohibit the attendance of counsel at the IEPs. Rather, consistent with the statute, the regulations provide that participants in IEPs *shall* include a representative of the public agency; the child's teacher; one or both of the child's parents; and where appropriate, the child. *See* {HYPERLINK "http://web2.westlaw.com/find/default.wl?tf=-1&rs=WLW9.08&ifm=NotSet&fn=_top&sv=Split&tc=-1&docname=34CFRS300.344&ordoc=1988104071&findtype=L&db=1000547&

vr=2.0&rp=%2ffind%2fdefault.wl&pb=6C353F3B" \t "_top"}. The regulations therefore neither require nor prohibit the presence of counsel. **However, the regulations provide that IEPs may also include other participants, including “[o]ther individuals at the discretion of the parent or agency.”** {HYPERLINK "http://web2.westlaw.com/find/default.wl?tf=-1&rs=WLW9.08&ifm=NotSet&fn=_top&sv=Split&tc=-1&docname=34CFRS300.344&ordoc=1988104071&findtype=L&db=1000547&vr=2.0&rp=%2ffind%2fdefault.wl&pb=6C353F3B" \t "_top"}. **Counsel may attend.**

Id. (emphasis added) (footnotes omitted). In this case from 1988, the court correctly quoted and interpreted the existing Code:

(a) *General.* The public agency shall insure that each meeting includes the following participants:

(1) A representative of the public agency, other than the child's teacher, who is qualified to provide, or supervise the provision of, special education.

(2) The child's teacher.

(3) One or both of the child's parents, subject to § 300.345.

(4) The child, where appropriate.

(5) Other individuals at the discretion of the parent or agency.

34 C.F.R. § 300.344 (1988) (removed 2006) (emphasis added). However, this section of the Code was rewritten and now states: “At the discretion of the parent or the agency, other individuals **who have knowledge or special expertise regarding the child**, including related services personnel as appropriate; . . .” *Id.* at § 300.321 (2009) (emphasis added). Now, the discretionary invitee is required to have knowledge or expertise concerning the child as discussed above. As a result, decisions like the *Medford* case must be closely examined to see if they rely upon the previous Code that has since been revised.

E. An action plan for the PELE clinic

The parents of children represented by the PELE Clinic should receive advance notice of who will attend an IEP meeting. It should be standard operating procedure for PELE Clinic students to request a copy of the notice from parents. PELE Clinic students should then check with the PELE Clinic Director to determine whether the agency attorney was helpful, neutral, adversarial, or is unknown to the PELE Clinic. When an

attorney was either helpful or neutral at an IEP meeting in the past, probably nothing should be done.

However, when the agency attorney has been adversarial or is unknown, as the Wrights suggest in *All About IEPs*, the parents should draft a letter to the IEP team discussing their concerns. Because of the prominence of Senator Hillary Clinton, the concise legal analysis of the Department of Education, and the public nature of the document, parents should include a copy of the letter to Senator Clinton (at the end of this Memorandum). As a first step, a legal memo requesting unilateral attorney disarmament may not be as persuasive as the Senator Clinton letter.

Where parental or Clinic concern is high, the parents can also request that the IEP meeting be rescheduled. The school would then be able to consider whether it is their desire to create an adversarial IEP meeting which is not be in the best interest of the child.¹

Appendix A: Letter to Senator Clinton

The two pages that follow contain the letter to Senator Hillary Clinton in the original format that can be duplicated.

Appendix B: 34 C.F.R. Part 300, Appendix A, Question 29

29. Can parents or public agencies bring their attorneys to IEP meetings, and, if so under what circumstances? Are attorney's fees available for parents' attorneys if the parents are prevailing parties in actions or proceedings brought under Part B?

Section 300.344(a)(6) authorizes the addition to the IEP team of other individuals at the discretion of the parent or the public agency only if those other individuals have knowledge or special expertise regarding the child. The determination of whether an attorney possesses knowledge or special expertise regarding the child would have to be made on a case-by-case basis by the parent or public agency inviting the attorney to be a member of the team.

The presence of the agency's attorney could contribute to a potentially adversarial atmosphere at the meeting. The same is true with regard to the presence of an attorney accompanying the parents at the IEP meeting. Even if the attorney possessed knowledge or special expertise

¹ Courts are starting to take notice of the "attitude" that some school attorneys bring to a case. In *JP v. County School Board of Hanover County*, 2009 U.S. Dist. LEXIS 68792, 11, n.3 (E.D. Va. 2009), the court noted that, "the contentious approach to this litigation taken by HCPS has increased the cost of the litigation. Of course, HCPS is free to take a contentious approach to defending the case, but it must be prepared to pay the cost of doing so." *Id.* In that case, the cost to the school was \$307,150.20 for attorney's fees to the parents' attorney.

regarding the child (§300.344(a)(6)), 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.

Therefore, the attendance of attorneys at IEP meetings should be strongly discouraged. Further, as specified in Section 615(i)(3)(D)(ii) of the Act and §300.513(c)(2)(ii), Attorneys' fees may not be awarded relating to any meeting of the IEP team unless the meeting is convened as a result of an administrative proceeding or judicial action, or, at the discretion of the State, for a mediation conducted prior to the request for a due process hearing.

Appendix A. Letter to Senator Clinton

Dated July 23, 2001

Honorable Hillary Rodham Clinton
United States Senator
780 Third Avenue, Suite 2601
New York, NY 10017-2024

Dear Senator Clinton:

This letter is in response to an inquiry from your constituent, x, who contacted you regarding the attendees at the individualized education program (IEP) meetings held to determine special education and related services. Specifically, x believes that the local school district is inappropriately inviting the district's attorney to the IEP meetings, which in New York are called Committee on Preschool Special Education (CPSE) meetings. He has requested your assistance regarding his rights under the Individuals with Disabilities Education Act (IDEA).

The regulations implementing the Individuals with Disabilities Education Act (IDEA) are found at 34 CFR Part 300 (March 12, 1999). Section 300.344 addresses the membership of the IEP team. X has highlighted §300.344(a)(6) which allows attendance at the IEP meeting, "at the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate."

The language at §300.344(a)(6) adopts verbatim the statutory language at section 614(d)(1)(B)(vi) of the IDEA. Under this section, parents and public agencies have the discretion to bring to IEP meetings as IEP team members other individuals who have knowledge or special expertise regarding the child. Under this statutory provision, the parent's and public agency's right to bring other individuals to the IEP meeting at their discretion must be exercised in a manner that ensures that all members of the IEP team have the knowledge or special expertise regarding the child to contribute meaningfully to the IEP. Paragraph (c) of §300.344 provides that the determination of the knowledge or special expertise of any individual described in paragraph (a)(6) shall be made by the party (parents or public agency) who invited the individual to be a member of the IEP team. The Federal rules pertaining to this situation do not disallow the school district from inviting the district's attorney to the IEP meeting.

Letter to Senator Clinton, page 2

However, as the answer to question 29 to Attachment A to the IDEA '97 regulations at 34 C.F.R. Part 300 explains:

The presence of an attorney could contribute to a potentially adversarial atmosphere at the meeting. The same is true with regard to the presence of an attorney accompanying the parents at the IEP meeting. Even if the attorney possessed knowledge or special expertise regarding the child (§ 300.344(a)(6)), 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.

Therefore, the attendance of attorneys at IEP meetings should be strongly discouraged.

64 Fed. Reg. 12478.

Further information or assistance can be obtained from the New York State Department of Education by contacting the State Director of Special Education:

Mr. Lawrence Gloeckler
Deputy Commissioner for Vocational and
Educational Services for Individuals with
Disabilities
State Education Department
1 Commerce Plaza
Albany, NY 12234
Telephone: (518) 474-2714

Please contact this Office if we can be of further assistance.

Sincerely,

/signed Patricia J. Guard/

Patricia J. Guard

Acting Director

Office of Special Education Programs