

Ethics in Special Education Advocacy

prepared for Partners in Education Advocacy (PEA) Training Program
a project of the Oklahoma Disability Law Center, Inc.
a system of protection and advocacy

Introduction	2
Sources of Guidance on Ethics Codes	2
National Federation of Paralegal Associations (NFPA)	3
American Bar Association (ABA)	4
National Association of Legal Assistant’s (NALA)	4
American Association for Paralegal Education (AAfPE)	4
Proposed Model for Special Education Advocates Ethics Code	5
• A special education advocate shall achieve and maintain a high level of competence	5
• A special education advocate shall maintain a high level of personal and professional integrity	6
• A special education advocate shall maintain a high standard of professional conduct	6
• A special education advocate shall serve the public interest by contributing to the improvement of the special education system and delivery of special education services, including <i>pro bono publico</i> services	7
• A special education advocate shall preserve all confidential information provided by the client or acquired from other sources before, during and after the course of the professional relationship	8
• A special education advocate shall avoid conflicts of interest and shall disclose any possible conflict to the employer or client, as well as to the prospective employers or clients	9
• A special education advocate’s title shall be fully disclosed	10
• A special education advocate shall not engage in unauthorized practice of law	11
Approaches to Substantive Issues	11
Methods	14
Lawyers’ Ethical Rules	14
Unauthorized Practice of Law	15
Confidentiality	16
Competence	17
Conflict of Interest	17
Conclusion	17

INTRODUCTION

There are many dimensions to ethics in special education advocacy. Ethics is more complex than just the basic question of right versus wrong. Ethics is about standards of conduct and moral judgment. Both organizations and individuals must have values that guide the way they operate and do their work. Ethics is the most challenging part of decision making. The advocate must be able to identify key ethical issues, articulate guidelines for decision-making and develop a process he or she can apply to their activities. Ethics involves two key components – the approach to substantive issues (*e.g.* commitment to integration) and the method (*e.g.* giving a legal opinion) by which the advocate achieves an outcome.

The special education advocacy taught in this course could best be described as legally-based advocacy. The instructors in the course are primarily lawyers and the discussion will be primarily of “the law.” Even when other areas are added (educational testing, behavioral interventions, cultural competency, etc.), they are added because it is what “the law requires.” An advocacy course taught predominantly by psychologists, for example, might look quite different.

SOURCES OF GUIDANCE ON ETHICS CODES

What defines the type of ethical conduct that the public has a right to expect of special education advocates? There are no universally recognized ethical standards specifically tailored to special education advocates. As a result, one could argue that the public has no **right** to expect any ethical conduct from a special education advocate. This places special education advocates in an unenviable position in relation to the public. On the other hand, it is doubtful that special education advocates would describe themselves as people with no ethics. The

problem is identifying the ethics and obtaining a commitment to follow those ethical rules. Some rules may apply to special education advocates because of their relationship to other professions¹.

Legally-based advocates are most like the existing paralegal (or sometimes known as legal assistant) profession. It is not necessary to conduct a discussion of whether legally-based special education advocates are paralegals or not. The definitions of a paralegal contain enough functional similarity to a legally-based special education advocate to suggest that their ethics rules could be borrowed as guidance until such time as special education advocates become a profession with their own specifically identified professional code of conduct.. State bar paralegal/legal assistant definitions are numerous². Four national organizations define a paralegal as:

- (1) National Federation of Paralegal Associations (NFPA) defines paralegal in its bylaws as: “A paralegal is a person qualified through education, training or work experience to perform substantive legal work, that requires knowledge of legal concepts and is customarily, but not exclusively, performed by a lawyer. This person may be retained or employed by a lawyer, law office, governmental agency or other entity or may be authorized by administrative, statutory or court authority to perform this work. NFPA’s definition is not meant to exclude any member of the profession whose job duties fit the definition of paralegals but who is still called a legal assistant.

¹Social workers, psychologists, doctors, etc. If a special education advocate is working in conjunction with any other profession, the advocate should locate the applicable ethical rules for the particular profession. For online resources on non-legal ethics, go to: <http://www.legaethics.com/intra.law?law=Nonlegal>. The emphasis of this presentation is ethical rules that apply to the legal profession because lawyers are active teachers in this course and because the unauthorized practice of law rules apply to all non-lawyers, regardless of their professional status.

²For state definitions of paralegals, go to: <http://www.paralegals.org/displaycommon.cfm?an=1&subarticlenbr=384>

- (2) The 1986 American Bar Association (ABA) definition describes a legal assistant as, “. . . a person, qualified through education, training, or work experience, who is employed or retained by a lawyer, law office, governmental agency, or other entity in a capacity or function which involves the performance, under the ultimate direction and supervision of a lawyer, of specifically delegated substantive legal work, which work, for the most part, requires a sufficient knowledge of legal concepts that, absent such assistant, the lawyer would perform the task.” In 1996, the ABA amended its definition, “A legal assistant or paralegal is a person qualified by education, training or work experience who is employed or retained by a lawyer, law office, corporation, governmental agency or other entity who performs specifically designated substantive legal work for which a lawyer is responsible.”
- (3) The National Association of Legal Assistant’s (NALA) definition is, “Legal assistants (also known as paralegals) are a distinguishable group of persons who assist attorneys in the delivery of legal services. Through formal education, training and experience, legal assistants have knowledge and expertise regarding the legal system and substantive and procedural law which qualify them to do work of a legal nature under the supervision of an attorney.”
- (4) The definition of a paralegal adopted by the American Association for Paralegal Education (AAfPE) is, “Paralegals perform substantive and procedural legal work, as authorized by law, which work, in the absence of the paralegal, would be performed by an attorney. Paralegals have knowledge of the law gained through education, or education and work experience, which qualifies them to perform

legal work. Paralegals adhere to recognized ethical standards and rules of professional responsibility.”

The NFPA, for example, believes that paralegals should uphold a high level of ethical standards. After conducting extensive research and obtaining comments from paralegals, attorneys and individuals with expertise in the area of ethics, NFPA adopted a Model Code of Ethics and Professional Responsibility in 1993. This document received wide acceptance throughout the legal community. In 1997, NFPA adopted Model Disciplinary Rules and combined them with the Model Code of Ethics and Professional Responsibility to create the Model Code of Ethics and Professional Responsibility and Guidelines for Enforcement³. Many paralegal associations have endorsed the concept and content of NFPA’s Model Code through the adoption of their own ethical codes.

Utilizing the NFPA Model Code as a guide⁴, a special education advocate’s code might develop as:

- (1) A special education advocate shall achieve and maintain a high level of competence.
 - a. An advocate shall achieve competency through education, training and work experience.
 - b. An advocate shall aspire to participate in a minimum of twelve (12) hours of continuing education, to include at least one (1) hour of ethics education, every two (2) years in order to remain current on developments in the law.
 - c. An advocate shall perform all assignments promptly and efficiently

³Located online at <http://www.paralegals.org/displaycommon.cfm?an=1&subarticlenbr=133>.

⁴Portions related to client assets management and disciplinary sanctions have been deleted because they are not applicable to an emerging special education advocate profession. The disciplinary sections would be useful as a guide at a later point in time.

- (2) A special education advocate shall maintain a high level of personal and professional integrity.
- a. An advocate shall not engage in any ex parte communications involving the courts or any other adjudicatory body in an attempt to exert undue influence or to obtain advantage or the benefit of only one party.
 - b. An advocate shall not communicate, or cause another to communicate, with a party the advocate knows to be represented by a lawyer in a pending matter without the prior consent of the lawyer representing such other party.
 - c. An advocate shall ensure that all timekeeping and billing records prepared by the advocate are thorough, accurate, honest and complete.
 - d. An advocate shall not knowingly engage in fraudulent billing practices. Such practices may include, but are not limited to: inflation of hours billed to a client or employer; mis representation of the nature of tasks performed; and/or submission of fraudulent expense and disbursement documentation.
- (3) A special education advocate shall maintain a high standard of professional conduct.
- a. An advocate shall refrain from engaging in any conduct that offends the dignity and decorum of proceedings before a court or other adjudicatory body and shall be respectful of all rules and procedures.
 - b. An advocate shall avoid impropriety and the appearance of impropriety and shall not engage in any conduct that would adversely affect his/her fitness to practice. Such conduct may include, but is not limited to: violence, dishonesty, interference with the administration of justice, and/or abuse of a professional position or public office.

- c. An advocate shall advise the proper authority of non-confidential knowledge of any action of a legal professional that clearly demonstrates fraud, deceit, dishonesty or misrepresentation. The authority to whom the report is made shall depend on the nature and circumstances of the possible misconduct, (e.g. ethics committees of law firms, corporations and/or paralegal associations, local or state bar associations, local prosecutors, administrative agencies, etc.) Failure to report such knowledge is in itself misconduct and shall be treated as such under these rules.
 - d. An advocate shall not knowingly assist any individual with the commission of an act that is in direct violation of the Model Code/Model Rules and/or the rules and/or laws governing the jurisdiction in which the advocate practices.
 - e. If an advocate possesses knowledge of future criminal activity, that knowledge must be reported to the appropriate authority immediately.
- (4) A special education advocate shall serve the public interest by contributing to the improvement of the special education system and delivery of special education services, including *pro bono publico* services.
- a. An advocate shall be sensitive to the advocacy needs of the public and shall promote the development and implementation of programs that address those needs.
 - b. An advocate shall support efforts to improve the special education system and access thereto and shall assist in making changes.
 - c. An advocate shall support and participate in the delivery of *Pro Bono Publico* advocacy services directed toward implementing and improving access to special education services, advocacy services and other related professionals.

- d. An advocate should aspire annually to contribute twelve (12) hours of *Pro Bono Publico* services under the supervision of an attorney or as authorized by administrative, statutory or court authority to:
 - (1) persons of limited means; or
 - (2) charitable, religious, civic, community, governmental and educational organizations in matters that are designed primarily to address the advocacy needs of persons with limited means; and
 - (3) individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights.

- (5) A special education advocate shall preserve all confidential information provided by the client or acquired from other sources before, during and after the course of the professional relationship.
 - a. An advocate shall be aware of and abide by all legal authority governing confidential information in the jurisdiction in which the advocate practices.
 - b. An advocate shall not use confidential information to the disadvantage of the client.
 - c. An advocate shall not use confidential information to the advantage of the advocate or a third person.
 - d. An advocate may reveal confidential information only after full disclosure and with the client's consent; or, when required by law or court order; or, when necessary to prevent the client from committing an act that could result in death or serious bodily injury.

- e. An advocate shall keep those individuals responsible for the legal representation of a client fully informed of any confidential information the advocate may have pertaining to that client.
 - f. An advocate shall not engage in any indiscreet communications concerning clients.
- (6) A special education advocate shall avoid conflicts of interest and shall disclose any possible conflict to the employer or client, as well as to the prospective employers or clients.
- a. An advocate shall act within the bounds of the law, solely for the benefit of the client and shall be free of compromising influences and loyalties. Neither the advocate's personal or business interest, nor those of other clients or third persons, should compromise the advocate's professional judgment and loyalty to the client.
 - b. An advocate shall avoid conflicts of interest that may arise from previous clients or assignments, whether for a present or past employer.
 - c. An advocate shall avoid conflicts of interest that may arise from family relationships and from personal and business interests.
 - d. In order to be able to determine whether an actual or potential conflict of interest exists an advocate shall create and maintain an effective recordkeeping system that identifies client matters and parties with which the advocate has worked.
 - e. An advocate shall reveal sufficient non-confidential information about a client or former client to reasonably ascertain if an actual or potential conflict of interest exists.

- f. An advocate shall not participate in or conduct work on any matter where a conflict of interest has been identified.
 - g. In matters where a conflict of interest has been identified and the client consents to continued representation, an advocate shall comply fully with the implementation and maintenance of an “ethical wall.”
- (7) A special education advocate’s title shall be fully disclosed.
- a. An advocate’s title shall clearly indicate the individual’s status and shall be disclosed in all business and professional communications to avoid misunderstandings and misconceptions about the advocate’s role and responsibilities.
 - b. An advocate’s title shall be included if the advocate’s name appears on business cards, letterhead, brochures, directories and advertisements.
 - c. An advocate shall not use letterhead, business cards or other promotional materials to create a fraudulent impression of his/her status or ability to practice in the jurisdiction in which the advocate practices.
 - d. An advocate shall not practice under color of any record, diploma or certificate that has been illegally or fraudulently obtained or issued or which is misrepresentation in any way.
 - e. An advocate shall not participate in the creation, issuance or dissemination of fraudulent records, diplomas or certificates.

(8) a special education advocate shall not engage in the unauthorized practice of law.

- a. An advocate shall comply with the applicable legal authority governing the unauthorized practice of law in the jurisdiction in which the advocate practice.

APPROACHES TO SUBSTANTIVE ISSUES

Core beliefs influence the approaches of the special education advocate on substantive issues. Each advocate has core beliefs, whether they are identified or not. The advocate should strive to identify these core beliefs and then share them openly with families and students they assist. As the special education advocate profession develops, more formalized statements of core beliefs will emerge, both for advocates in private practice or for advocates in public service. The parent or student is entitled to know the perspective from which the advocate approaches substantive issues related to special education.

There are no model core belief statements for special education advocates. Published statements exist in other occupations⁵. For example, within the protection and advocacy system⁶, principles of legally based advocacy are based on the following core beliefs:

(1) Equality, Equity and Fairness - People with disabilities are full and equal citizens under the law. They are entitled to equal access to the same opportunities afforded all members of

⁵Although not published as such, they may be gleaned from values expressed in statutes which govern enforcement of education rights for children with disabilities, such as IDEA, § 504 of the Rehabilitation Act of 1973, McKinney-Vento, etc.

⁶The National Disability Rights Network (NDRN) is the nonprofit membership organization for the federally mandated Protection and Advocacy (P&A) Systems and Client Assistance Programs (CAP) for individuals with disabilities. Collectively, the P&A/CAP network is the largest provider of legally based advocacy services to people with disabilities in the United States. Their website is <http://www.ndrn.org>. P&A's in each state and territory may be located at: http://www.ndrn.org/aboutus/PA_CAP.htm. Their issue areas are identified online at: <http://www.ndrn.org/issues/default.htm>. The role of P&A's in special education is described by Diane Smith, former NDRN Disability Advocacy Specialist, at <http://www.ndrn.org/issues/edu/back%20to%20school.htm>.

society. People with disabilities are entitled to be free from abuse, neglect, exploitation, discrimination, and isolation, and to be treated with respect and dignity.

(2) Meaningful Choice and Empowerment - People, regardless of age, type and level of disability have the right to make choices both with respect to daily routines and major life events.

(3) Supports and Participation - Services and supports are shaped by the unique needs and preferences of each individual, and assure and enhance opportunities for integration in all aspects of life. Services are age-appropriate and premised on the fact that people with disabilities, continue to learn, change and develop throughout their lives. For children such growth is best accomplished within families, and for adults, within integrated communities, rather than institutions.

(4) Independence - Advocacy services are based on a philosophy of equal access, peer support and self-determination to be achieved through individual, professional and system advocacy. Services are delivered in a manner that maximizes leadership, independence, productivity and integration of individuals with disabilities.

(5) Cultural Competency - Advocacy services reflect, and are responsive to, the diverse cultural, ethnic and racial composition of society.

Core beliefs guide the advocate's approaches to substantive issues. For example, Diane Smith, formerly a Disability Advocacy Specialist from the National Disability Rights Network, described the advocate's role in special education as:

THE ADVOCATES ROLE

Advocates can correct individual cases, for example, by ensuring that a student is receiving the supports he or she requires to remain in the regular education classroom -- to prevent placement in a segregated setting. Advocates can also assist states and districts by pointing out policies that appear to result in the inappropriate identification, and/or placement of minority students with disabilities into segregated or less inclusive settings.

Advocates can also point out cases where gender seems to be a factor, e.g. female students with emotional impairments who are overlooked, or male students with behavior problems who have been wrongly identified as having learning disabilities. Often behavior problems can be solved successfully outside of special education with the right interventions. Advocates can also point out policies which appear to result in gender discrimination. All civil rights violations should be reported to the appropriate state and federal civil rights enforcement agencies⁷.

Additional sources of core beliefs and ethical guidance in the special education advocacy community include:

- (1) Council of Parent Advocates and Attorneys⁸
- (2) The ARC of the US⁹
- (3) Family & Advocates Partnership for Education (FAPE) of the PACER Center¹⁰
- (4) National Center for Youth Law¹¹
- (5) National Parent Network on Disabilities¹²
- (6) Rehabilitation Engineering and Assistive Technology Society of North America¹³
- (7) TASH¹⁴
- (8) United Cerebral Palsy Association¹⁵

⁷<http://www.ndrn.org/issues/edu/back%20to%20school.htm>

⁸<http://www.copaa.net>

⁹<http://www.thearc.org>

¹⁰<http://www.fape.org>

¹¹<http://www.youthlaw.org>

¹²<http://www.npnd.org>

¹³<http://www.resna.org>

¹⁴<http://www.tash.org>

¹⁵<http://www.ucpa.org>

METHODS

_____The special education advocate's selection of methods to achieve goals and outcomes is guided by ethical considerations. Because this course is taught by lawyers, it is important that the attorneys involved are not aiding advocates in unlawful conduct. One purpose of this course will be to identify legal issues and non-legal issues so that advocates, by selecting certain methods, learn to engage in advocacy activities that are not drifting unknowingly into the practice of law without a license to do so. At the end of the course, the advocate should feel confident that they can select methods in the future which will not be considered as the unauthorized practice of law or any other violation of law or ethics code.

Lawyer's Ethical Rules

Lawyers are governed by ethical codes in each state¹⁶, most of which are patterned after the Model Rules of Professional Conduct. The Model Rules of Professional Conduct were adopted by the American Bar Association (ABA) House of Delegates in 1983. Before the adoption of the Model Rules, the ABA model was the 1969 Model Code of Professional Responsibility¹⁷. The Model Rules require that lawyers be committed to high standards of ethical conduct and that the public is best served in legal matters by a regulated profession committed to such standards. By learning the key concepts in the lawyer's ethical code, the advocate will not be engaged in inappropriate activities and will not discourage attorneys from supporting the advocate during an internship program or later for employment in a law office or other organization where adherence to the ethical code is imperative.

¹⁶Ethical codes and resources for each state may be reached through the American Bar Association's (ABA) website at: <http://www.abanet.org/cpr/links.html>.

¹⁷ Located on the ABA website, http://www.abanet.org/cpr/mrpc/mrpc_toc.html. The former Model Rules of Professional Responsibility are located online at <http://www.abanet.org/cpr/ethics/mcpr.pdf>.

Unauthorized Practice of Law (UPL)

A lawyer usually may not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction or assist another in doing so¹⁸. The prohibition applies to unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer assisting another person. The word "unauthorized" is significant because a jurisdiction may authorize certain practices for non-lawyers, which then no longer fall within the unauthorized category¹⁹.

The definition of the practice of law is established by law and varies from one jurisdiction to another²⁰. It is generally not viewed as necessary or desirable to formulate a single, specific definition of what constitutes the practice of law. Functionally, the practice of law relates to the rendition of services for others that call for the professional judgment of a lawyer. The essence of the professional judgment of the lawyer is the educated ability to relate the general body and philosophy of law to a specific legal problem of a client. Where this professional judgment is not involved, non-lawyers may engage in occupations that require special knowledge of law in certain areas. For a special education advocate, completing an Individualized Education Program (IEP) form or an Accommodation Plan under §504 of the Rehabilitation Act of 1973 could constitute the practice of law in some jurisdictions, depending upon what issues are involved²¹.

¹⁸ Model Rules, Rule 5.5(a).

¹⁹ A non-lawyer is permitted in the State of New Jersey to represent parents at hearings to determine appropriateness of education being provided to children with disabilities. *Arons v. New Jersey State Board of Education*, 842 F.2d 58 (3rd Cir. 1988).

²⁰ Model Rules, Rule 5.5(a)(2). For example, in Oklahoma no person shall practice law in the State of Oklahoma who is not an active member of the Association, except as provided by statute. Rules Creating and Controlling the Oklahoma Bar Association, App. 1, Article II, Sec. 7. *See also* 7 AmJur 2d Attorneys at Law § 118; "What Constitutes Unauthorized Practice of Law by Paralegal," 109 ALR 5th 275.

²¹ When municipal bond marketers merely reproduced forms prepared by the Oklahoma Attorney General, furnished them to school districts and filled them out according to directions set out in the attorney general's handbook, and merely filled in the uniform forms prescribed, such activity did not call for determination of questions involving legal

Confidentiality

The ethics codes for lawyers uniformly contain confidentiality requirements, which are usually codified into state statutes addressing privileged communication.

Universal acceptance of the requirement that the advocate retain information in a confidential manner is reflective of education law, which contains confidentiality requirements for school districts under both Family Educational Rights and Privacy (FERPA) and the Individuals with Disabilities Education Improvement Act (IDEA).²²

The confidential privilege established by state law for privileged communication with an attorney which prevents forced disclosure of communication or work product under most circumstances is not the same as keeping school information and/or records confidential under FERPA and IDEA, or the access authority for a protection and advocacy system²³. A special education advocate who is not under the supervision of an attorney does not have the same confidential privilege assured to attorneys²⁴ nor the same access authority granted to a protection and advocacy system. An advocate should not give a parent or student an incorrect impression of confidential privilege unless one exists under applicable law.

skill and did not constitute the practice of law. *R. J. Edwards, Inc. v. Hert*, 504 P.2d 407 (Okla. 1972)

²²FERPA is codified at 20 U.S.C. § 1232g. The United States Department of Education's FERPA homepage is located at: <http://www.ed.gov/policy/gen/guid/fpco/ferpa/index.html>. Their Office of Special Education Programs (OSEP) homepage is located at: <http://www.ed.gov/about/offices/list/osers/osep/index.html>. IDEA2004 resources are located online at: <http://www.ed.gov/policy/speced/guid/idea/idea2004.html>. NICHCY's resources for IDEA2004 are located online at: <http://www.nichcy.org/resources/IDEA2004resources.asp>.

²³*Owasso Indep. School Dist. No. 1-011 v. Falvo*, 534 U.S. 426 (2002); *State of Conn. Office of Protection and Advocacy for People with Disabilities v. Hartford Bd. of Educ.*, 355 F.Supp.2d 649 (D. Conn. 2005). The federal district court was affirmed by the Second Circuit on September 15, 2006, in its opinion against the Hartford Board of Education, and the opinion may be located on the Second Circuit's website, <http://www.ca2.uscourts.gov/>.

²⁴The extent of confidentiality which can be maintained by an advocate who is not under the supervision of a licensed attorney would be determined by the law of the jurisdiction where the advocate practices and is beyond the scope of this paper.

Competence

The advocate should provide assistance in a competent manner. Competent assistance requires knowledge, skill, thoroughness and preparation reasonably necessary to assist the parent and student. The most fundamental advocacy skill consists of determining what kind of problems a situation may involve so that appropriate assistance can be rendered and unauthorized practice of law can be avoided. To maintain competence, the advocate should engage in continuing study and education.

Conflict of Interest

An advocate should not assist a parent or student if the assistance could be materially limited by the advocate's responsibilities to another parent or student or to a third person, or by the advocate's own interests.

If an impermissible conflict of interest exists before providing assistance, the advocate should decline to provide assistance. If a conflict arises after beginning to provide assistance, then the advocate should withdraw from providing assistance.

CONCLUSION

To summarize what she learned about ethics in advocacy, an advocate wrote a short "Advocate's Prayer"²⁵:

Guide and protect us as advocates as we go forth and create our own groups for support;
Give us the humility to admit we don't know;
Give us the confidence to know we can find the answers;
Give us the patience to guide parents;
Most of all, bless us as we help to improve the lives of children with disabilities.

²⁵April Bennett, Partners in Education Advocacy, 2002 Graduate