THE DECISION

HEARING OFFICER ORIENTATION – D.C.
Monday, September 19, 2011 – Wednesday, September 21, 2011

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I. THE DECISION – GENERALLY

A. The decision encompasses all that has happened prior to its issuance and all that should happen after it is issued. The decision often serves as the starting point for judicial review, when a case is appealed. However, it may also have a secondary effect – providing guidance to the local educational agency ("LEA") related to policy.

B. Care should be given to the preparation and presentation of the decision. A case should be decided solely on the merits, and on the evidence presented on the record. Attorney [mis]conduct, or annoyances brought out by the hearing process, should not influence the decision, and the evidence must be weighed fairly and impartially.

II. HEARING RIGHTS

A. IDEA mandates that any party to a hearing has the right to obtain a written or, at the option of the parents, an electronic findings of fact and decisions.[1] Parents must also be given the right to have the record of the hearing and the findings of fact and decisions provided at no cost.[2]

B. The findings of fact and decisions must be made available to the public after deleting any personally identifiable information.[3]

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[1] 34 C.F.R. § 300.512(a)(5).
[2] 34 C.F.R. § 300.512(c)(3).
[3] 34 C.F.R. § 300.513(d). The term "personally identifiable information" is defined in the Regulations to the Family Educational Rights and Privacy Act at 34 C.F.R. Part 99.3 (2009).

III. CONTENT OF DECISION

A. Writing Well and Good Writing. Understanding the difference between writing well (i.e., correct grammar and usage) and good writing (i.e., a combination of writing well and writing style) is critical to the decision writing process. There are some basic rules to keep in mind that sets apart writing well from good writing.

1. Understand the audience to whom the decision is addressed. Keep in mind that the intended readers are not necessarily the lawyers that represented the parties but rather the parents and school district personnel.

a. Extensive use of legal terminology or complex terms should be limited

b. Balance the interest between clear, concise, and efficient communication with understandable terms and phrases

2. Write concisely. Wordy sentences can make it more difficult to understand meaning.

a. Eliminate unnecessary words or phrases to achieve simpler sentences

b. Eliminate sheer repetition

3. Be Candid. The hearing officer should be candid, but not necessarily outspoken. Limit criticism of the parties and/or their representatives, unless it is essential to the resolution.

a. Credibility findings should be factual, citing to the record for support

b. Do not embellish events or testimony to support a conclusion

c. Demonstrate judicial temperament by being respectful to the parties and how they are presented in the decision

d. Avoid condescending, insulting, or otherwise inappropriate adjectives

B. Format. Other than the admonishment found in 34 C.F.R. § 300.513 (cautioning that a hearing officer's determination of whether a child received a free and appropriate public education be based on substantive grounds, unless an exception applies), IDEA does not prescribe the content and/or format of the decision. Nonetheless, there are key components that should be included in the decision. Consideration should be given to include the following parts in the decision.

1. Introduction and Procedural History. This section includes all pertinent information starting from the date of the filing of the due process complaint leading up to issuance of the decision, including:

a. Identifying the parties and, to the extent applicable, their representatives

b. Summarizing all pre-hearing conferences, motions, and/or rulings;

c. Summarizing resolution meeting timeline and information, hearing dates and extensions to the 45-day timeline, if any; and

d. Indentifying the witnesses called and the exhibits introduced during the hearing

2. Jurisdiction. This section outlines the various statutes, regulations and/or rules pursuant to which the due process hearing was held, and a decision in the matter was rendered.

3. Background. A brief statement as to what prompted the due process hearing provides the reader a synopsis of what the matter is all about.

4. Issues and Relief Sought. The issue(s) listed in the due process complaint, and as modified, if at all, during the pre-hearing conference, should be identified. Also, to the extent that the complaining party included a proposed resolution in the due process complaint or made it known during the pre-hearing conference, the relief sought should also be identified in this section.

Other factors to consider include:

a. The issue(s) should be stated succinctly and in question format;

b. Multiple issues should be presented in logical sequence; and

c. In addition to stating the issue(s), the hearing office might state each party's position concerning the issue(s)

5. Findings of Fact. In this section, the hearing officer should set forth only those facts determined to be relevant and relied upon to decide the identified issue(s). A summary of all documentary evidence and testimony is not necessary.

Credibility findings can also be included under this section.[4]

[4] There is a split amongst hearing officers on whether credibility findings should be included under findings of fact or conclusions of law. Either way, to the extent that

The hearing officer should resolve disputes related to alleged facts. Simply restating various facts does not equate to making specific findings about the facts, and courts will accord "little deference" to the decision.[5] For example, if the issue is eligibility as a child with an Emotional Disturbance, simply stating, "The examiner determined that the student meets the criteria for Emotionally Disturbed," is not a specific finding of fact to decide the eligibility issue, unless the factual dispute is whether the examiner made determinations as to what classification would be appropriate for the child. The more appropriate, critical findings of fact on the question of eligibility as a child with an emotional disturbance might include: the student has not maintained satisfactory relationships with classmates or his teachers since starting in the school two years ago; and/or the student is sullen, withdrawn and despondent throughout the school day and has exhibited said behaviors for the past six months. The hearing officer would then cite to the examiner's evaluation or witness testimony to support his finding(s).

Other good practices include:

a. Setting the facts in chronological order (with dates spelled out);

b. Citing to exhibits and, should a transcript be available, the transcript pages. Should a transcript not be available, then the hearing officer should cite to the testimony (e.g., Testimony of School Psychologist);

c. Incorporate stipulated facts, to the extent relevant; and

d. Include the basic, critical facts necessary to apply the criteria to decide an issue. For example, if the issue is whether the student is emotionally disturbed, in addition to facts that speak to one of the five characteristics, the hearing officer should include facts relating to the degree in which the student has exhibited one or more of the five characteristics, the period of time for which the student has experienced one or more of the behaviors, and how the child's educational performance has been adversely affected

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credibility findings are made, said findings should be included in the decision under one of these sections.

[5] *Kerkam v. District of Columbia*, 931 F.2d 84, 17 IDELR 808 (D.C. Cir. 1991). *See also County Sch. Bd. v. Z.P.*, 42 IDELR 229 (4th Cir. 2005) (finding that the district court should have given due weight to the hearing officer's findings of fact because his decision was thorough and supported by numerous citations and references to the record evidence).

6. Conclusions of Law/Discussion. The hearing officer must set out the applicable legal standard for each disputed issue and apply the law to the facts. Also, in this section, the hearing officer should explain the basis for accepting one expert's opinion over another and giving greater weight to certain testimony.

Consideration should also be given to whether issues that need not be determined per se, because the disposition of other issues does not require the additional issues to be reached, should, nonetheless, be addressed. For example, in a tuition reimbursement dispute, the hearing officer might want to indicate how he would have disposed of the second and third prongs of the *Burlington/Carter* tri-partite test despite his finding that the school district offered the child a free and appropriate public education. Such indication might avoid a remand from a reviewing court, should the hearing officer be reversed on the initial issue.

Additional tips to keep in mind:

a. Use subheadings for each issue;

b. Cite to the relevant federal and state laws, regulations, and/or case law but only quote or highlight significant passages;

c. Distinguish or apply case law offered by the parties; and

d. Tell a "story." The reader should be able to discern how the hearing officer arrived at his conclusions. Stated differently, thought should be given to the organization and/or flow of the discussion.

7. Decision/Order. In this section, the hearing officer must decide the disputed issue(s) and determine the remedy being ordered. The order should be in clear, specific, and mandatory (e.g., "School District shall…") language, as well as enforceable. Where necessary and appropriate, timelines should be imposed and discernable (e.g., "Within 15 calendar days from the date on this Order…"; "By no later than 5 p.m. on Friday, January 12, 2011…").

The hearing officer must determine the remedy and should not delegate his authority to an IEP Team. For example, if the hearing officer determined that compensatory education is warranted, the hearing officer must determine what services will be provided to the child and not ask the IEP Team to determine the compensatory education plan.[6]

The actions the parties are to take must be clear. In this regard, to aide the hearing officer, and to the extent feasible, the hearing officer should seek from the complaining party with great specificity the relief sought during the prehearing conference. However, the inquiry should also extend to the non-complaining

[6] *See, e.g., Reid v. District of Columbia*, 43 IDELR 32 (D.C. Cir. 2005).

party. Although it might be difficult for the non-complaining party to come up with any relief, especially when the party denies any wrongdoing, the non-moving party should be given the opportunity to consider putting forth its own recommendations on what relief it deems appropriate should the hearing officer determine that the complaining party should prevail.

8. Notice of Appeal. The parties should be advised on how to appeal the decision of the hearing officer.

C. Transcript. Determining which facts are germane to support the decision can be time consuming. Compounding this pressure is that in this jurisdiction hearing officers are not provided with transcripts of the proceedings, resulting in an over-reliance on hearing notes and, possibly, faulty memories.[7] Following are a few tips that might prove helpful.

1. When sorting through the record, making notes by categories (e.g., background, procedural matters, each issue) will help to outline the decision and frame the format with logical progression. As the record evidence is reviewed, the hearing officer jots down notes (with specific citations) under each category. For example, if the category is "issue – eligibility", the notes might look as follows:

a. The independent psychologist determined that the student meets the criteria for Emotionally Disturbed. P 1-5.

b. School psychologist testified on cross-examination that he has no reason to dispute findings of the independent psychologist. Tr. 456, line 11.[8]

c. General education teacher testified that the student seemed depressed for the past few months and unkempt. Tr. 490, line 19.

d. Parent testified on direct that the student has suffered numerous loses in the past two years, including a grandparent, uncle and childhood friend. Tr. 200, lines 4, 12; Tr. 215, lines 5-7.

[7] Any party to the hearing may request a copy of the hearing audiotape or a verbatim written transcript of the hearing by submitting a request in writing to the Student Hearing Office. The parent has a right to a written or electronic copy of the record at no cost. 34 C.F.R. §§ 300.512(a)(4), 300.512(c)(3).

[8] Citation to the transcript is preferable, when a transcript is available. Otherwise, citation to the witness who provided the testimony is recommended (e.g., "Testimony of School Pyschologist").

2. Hearing officers might consider the use of a portable digital mini recording device during hearings to supplement hearing notes.[9] When relevant testimony is being offered, the hearing officer can note the time stamp for later retrieval and review.

[9] Said practice is not a substitute for the requirement that there be a verbatim record of the hearing, and the parties should be made aware of the recording and given an opportunity to object to its use or request a copy of the recording.