

Writing An Authorative Decision

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I. GENERAL COMMENTS.

- A. Timeliness. From a legal and ethical standpoint, rendering a decision on a timely basis should be of the highest priority to a hearing officer.
- B. Reopening the record. If a hearing officer finds additional information is necessary to render a decision, the record can be reopened. But, the reason should be extraordinary and the hearing officer must ensure fairness to both parties by allowing them the opportunity to offer additional evidence by way of response if such is reasonable under the circumstances. The additional evidence needed should be obtained in the most expeditious, yet fair, manner possible. The hearing officer can't just go obtain it on his/her own.
- C. A party raises new issues/facts in brief. You can comment in your decision that although raised/provided the issue/fact was not addressed/considered because it was not presented as part of the record. Or, you can solicit the view of the opposite party (possibly suggesting an approach) which would allow you to fairly address the issue or consider the "fact(s)" now raised for the first time.
- D. Write for a lay reader. Remember that your decision is basically being written to be read and implemented by a parent and frontline district staff persons. Accordingly, it must be understandable to them and not overly legalistic.
- E. Acknowledge the parties' feelings/frustrations, etc. Often, as important as what is decided is how it is articulated. Consider taking a few words to note that you understood the feelings or frustrations of a party or acknowledge the positive actions they took, etc. On the other hand, it might be appropriate in some circumstances to admonish a party or give "strokes" to a party as appropriate with an eye toward improving the parties' relationship. Bottom line, attempt to make the decision more acceptable to the parties by the words that you use rather than trying to give everyone something by "splitting the baby" regarding programs/services/accommodations—which you should order to be what you really find appropriate.
- F. Other decisions. Most of us read decisions with regard to particular holdings and the reasoning underlying them. But, start also when reading decisions to take a look at them in terms of how the decision-maker actually wrote the decision. For example, how were the findings of fact set forth, particularly with regard to how a witness was called a liar or how the opinion of one expert was given greater weight than another. No doubt there will be good and bad examples, but you can pick up some great ideas

on how to better address various situations in the decisions you write.

II. THE DECISION ITSELF.

A. Format. Basically, a decision should contain the following parts:

1. Background and procedural information. Describe how the case came to hearing, prehearing events/ruling, the hearing dates, parties' representatives, witnesses called, and what constitutes the record (i.e., transcript, exhibits of hearing officer and the parties, etc.).
2. Statement of the issues. In addition to stating the issues, oftentimes it is helpful to state the position of each party concerning that issue. Make sure the issue is stated neutrally.
3. Findings of fact. Required by the regulations, basically those facts found relevant and relied upon to determine the issues should be set forth. This is not a summary of what each witness said. Rather, it is a determination of facts noting the evidence relied upon. Where evidence is conflicting, how you resolved the conflict should usually be noted.

Reviewing the record, organizing your notes, and selecting those fact findings necessary to support your decision can be most time consuming. Making notes by categories often helps (e.g., background, procedural information, evaluations, each issue, etc.). Consider whether to include references to exhibits and if a written transcript, its pages. Most hearing officers do not but it's the better practice. Plus it is a good check on yourself that the record really supports your decision. Do not rely on the citations of attorneys without checking them!

Ask if your findings of fact:

- Cover the basic facts necessary to apply the “criteria” (e.g., from a law, rule, or case) used to decide every issue?
- Explain the basis for credibility findings?
- Explain the basis for accepting one expert’s opinion over another?
- Explain why un rebutted testimony was not “accepted?”
- Explain why certain testimony was irrelevant and therefore not considered?
- Explain why certain testimony was given greater weight?
- Resolve factual disputes which are important to hopefully improve

the parties' relationship?

4. Rationale/conclusions of law. Basically, the hearing officer must apply the law to the facts. In doing so, usually the hearing officer will not address any issue which need not be reached due to the disposition of other issues. However, there may be circumstances where the hearing officer chooses to indicate how the issue would have been disposed of had it been reached. Such an indication may avoid a remand and, thus, expedite the matter should a reviewing tribunal reverse the hearing officer's ruling on the initial issue.

As for how we approach developing our conclusions, consider what Circuit Court of Appeals Judge Jerome Frank said:

The process of judging, so the psychologists tell us, seldom begins with a premise from which a solution is subsequently worked out. Judging begins rather the other way around with a conclusion more or less vaguely formed; a man ordinarily starts with such a conclusion and afterwards tries to find premises which will substantiate it. If he cannot, to his satisfaction, find proper arguments to link up his conclusion with premises which he finds acceptable, he will, unless he is arbitrary or mad, reject the conclusion and seek another. . . . Judicial judgments, like other judgments, doubtless, in most cases, are worked out backward from conclusions tentatively formed.

Once having the conclusion/rationale, the hearing officer should put it down for a day or over night, then reread it and ask if the rationale/conclusions of law:

- Address all of the issues?
- Set forth the criteria on which determination of the issues is based? (Do not quote IDEA or the regulations at length. Cite them and quote or highlight significant passages only. As for case law, make sure you explain the factors from the case and then apply them specifically to the situation at hand, e.g., regarding LRE.)
- Apply the criteria to the facts found?
- Distinguish or apply cases raised by the parties?
- Accept or reject, with explanation, significant arguments raised by the parties?

- Can a “reasoned path” for your decision be discerned?

Losing is always tough for any party but not knowing why you lost is particularly upsetting. Finally, even if a decision is solid substantively, it must be closely proofread and "presented" appropriately.

Can you discuss with anyone else, e.g., an attorney or friend, the case or a specific legal issue? Technically, no, although judges have been known on occasion to do it regarding “hypothetical” situations!

5. Decision/order. Remember to decide—not just recommend. The action the parties are to take must be very clear—the same specificity as would be necessary on an individualized education program (IEP).

- a. Broad authority to fashion appropriate relief. The U.S. Supreme Court in *Burlington v U.S. Dept of Ed*, EHLR 556:389 (US Sup Ct 1985), held that under IDEA a court has the broad authority to fashion appropriate relief, considering all equitable factors, which will effectuate the purposes of IDEA.

Since *Burlington*, both OSEP and various courts have stated that a hearing officer or state review officer has the authority to grant such “appropriate relief” as a court could under IDEA. The reasoning is that for exhaustion of the administrative remedy to be meaningful, the party must be able to gain from it any “appropriate relief” that it could obtain once it got to court. See for example, Letter to Kohn, 17 EHLR 522 (OSEP 1990), and *Cocares v Portsmouth Sch Dist*, 18 IDELR 461, 462, 463 (USDC NH 1991).

- b. Retain jurisdiction/specific directions. Some state departments of education and OSEP frown upon retaining jurisdiction, the latter because it believes it takes away from the “finality” of the decision for appeal. As with a court decision that might retain jurisdiction, our decisions should also be considered final for the purposes of appeal. But, if your state allows you to retain jurisdiction, specifically state in your decision that it is a “final decision,” that it is appealable and, if appealed, the retained jurisdiction is not in effect pending the appeal and is subject to the result on appeal.

Sometimes an appropriate decision might be to have the hearing officer retain jurisdiction while a new IEP meeting is conducted, an old IEP meeting is completed, goals and objectives are developed, a trial placement is implemented (with either party being able to request a modification of the decision upon showing a substantial change in circumstances), etc. In such situations, the hearing officer

must clearly and specifically outline the exact procedural steps the parties are to pursue. *See, e.g., Northville Pub Sch*, 16 EHLR 847, at 857 (SEA MI 1990). Do not retain jurisdiction just to enforce the decision for that is not a hearing officer's responsibility. Consider for what purposes/issues you are keeping jurisdiction (e.g., to maintain a stable relationship between the parties and avoid abuse of the IEP hearing processes).

- c. Reminders of things to do to be in a position to consider what relief is appropriate. Remember at the prehearing stage requesting of the party seeking the hearing (typically the parent) specifically what they wanted by way of relief, e.g., reimbursements for what, to whom and how much; with regard to compensatory education what, when and how much; with regard to objections to the IEP what would they propose as the alternative. Based upon these specifics, during the course of the hearing if you keep track, you can make sure a record is being made by both parties as to the relief requested (being sensitive so as not to appear to be advocating, but rather just making sure the record is there). Finally, suggest, or if necessary direct, that the parties in closing arguments or briefs address (assuming that a denial of FAPE is found) the appropriateness of various relief options that were requested or that you are possibly considering given the evidence.
6. Notice of appeal. The parties must be advised as how to exercise their right to appeal a decision.
- B. Authority to issue errata/clarification. Often used to correct typographical errors, e.g., dates but not matters of substance. There is authority to support such in similar proceedings, e.g., NLRB in Daniel Construction Co, 239 NLRB 1335, fn 2 (1979). Or, sometimes a clarification of your decision may be warranted. Richardson Indep Sch Dist, 21 IDELR 415 (SEA TX 1994).
 - C. Medium. Under the regs the parent has the option of receiving written or electronic findings of fact and decision (34 CFR 300.509(a)(5)). This should have been ascertained at the time of the prehearing conference.

