

**CRITICAL ATTRIBUTES**

**OF**

**GOOD DUE PROCESS**

**DECISIONS**

**A Guide for the Reflective Special Education Hearing Officer**

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## **Introduction**

Writing a due process decision poses two fundamental challenges to a special education hearing officer. The first concerns a hearing officer's principal responsibility as a duly authorized adjudicator of legal controversies in the American judicial system to render legal justice to the best of his or her abilities. The second challenge relates to a collateral, but no less important responsibility – to explain and justify the grounds for a decision in ways that, to the greatest extent feasible, foster a justified perception that legal justice was rendered. A good due process decision exemplifies critical attributes for meeting both challenges.

### **What attributes are critical to good special education due process decisions?**

Any first attempt at answering the above question is bound to seem inadequate. Good due process decisions (of course) must be well grounded in both statutory and case law of special education. On brief reflection, however, it becomes apparent that other factors necessarily enter into a good due process decision, the most important of which concern sound judgment in addressing the kinds of challenges listed immediately below:

- Justification of factual findings in cases with an extensive case record, containing numerous complexities, ambiguities, information gaps, and conflicting testimony;
- Justification of conclusions of law when neither regulatory, statutory, nor case law provide clear guidance concerning appropriate legal standards to apply in the case;
- Framing of rulings and orders in cases where, owing to diverse complex factors, the appropriate rulings and orders aren't readily apparent in light of the hearing officer's factual findings and legal conclusions;
- Effective communication even when different readers of a decision have vastly divergent communicational interests and needs – e.g. unrepresented parents, with limited legal knowledge, and legal professionals, such as school district attorneys.

Further reflection upon critical attributes of good due process decisions, that address successfully the above listed kinds of challenges, raise issues that take one rapidly to the core of what it means to do a good job, not only as a special education due process hearing officer, but also in any other judicial capacity. Good due process decisions should rest upon *reasonable* findings of fact and *appropriate* legal standards. What, or whose standards, should a hearing officer adopt concerning reasonableness of factual findings and appropriateness of legal standards? For what reasons should she adopt them? Assuming plausible answers to the above questions can be given, are there guidelines to which a hearing officer may look in attempting to meet the standards? What are the critical attributes a hearing officer's rulings and orders in a due process case should exemplify, and why? Special education due process decisions have multiple audiences – parents, often with limited educational backgrounds, school district staff, attorneys, (potentially) reviewing courts, and sometimes the general public. Is it always possible for hearing officers to write in a manner adequate for meeting the communicational interests and needs of each audience? If so, then how? If not, then what choices should hearing officers make when writing due process decisions in terms of style, tone, rhetoric, vocabulary, and organizational structure? Under what circumstances should they make them? And, again, why?

Given the complexity and depth of issues beneath the surface, efforts to answer the above questions require sustained, careful consideration, taking into account the intellectually demanding nature of a hearing officer's work, which brings into play a wide array of abilities relating both to analysis and synthesis, and calling for continuous exercise of individual judgment. Since neither federal nor state law provides, even implicitly, evaluation criteria for written decisions of a hearing officer, the need to exercise individual judgment arises with respect to the fundamental issue, concerning any given attribute, of whether or not it is critical to a good due process decision. Furthermore, although highly qualified and respected hearing officers may agree in their judgments that a particular attribute is critical, they often, nonetheless, follow different approaches concerning how best to incorporate it into a written decision. In the words of Judge

Richard A. Posner, “there are no fixed incontestable criteria of judicial excellence.” (2008, p. 12) The topic of good special education due process decisions is complex, deeply interpretive, and highly subject to individual judgment. It calls for continuous self assessment and reflection, even on the part of experienced hearing officers.

### **Format and Purpose:**

**Format:** The analysis and discussion that follows concerning critical attributes of good due process decisions contains four sections addressing respectively each of the topics indicated below:

- Summary and explanation of factual findings;
- Justification of legal conclusions;
- Framing and determination of rulings and orders;
- writing choices in a special education due process opinion as to word selection, organizational structure, style, rhetoric, and tone.

Each of the four sections includes:

- a list of critical attributes of good due process decisions relating specifically to the section topic;
- a discussion of important points concerning the attributes identified in the section as to why they’re critical to a good due process decision;
- Suggestions for hearing officers to consider as guidelines for incorporating the critical attributes identified in the section into their own due process decisions.

**Purpose:** My chosen subtitle for this work, *A Guide for the Reflective Hearing Officer*, I will acknowledge, is intended to evoke an association in the readers’ minds with the title of Moses Maimonides’ (1135-1204) seminal treatise on the philosophical and theological foundations of Judaism, *The Guide for the Perplexed*. Maimonides intended for his *Guide* to be read by students with strong intellect and keen desire to understand, whose perplexity results from recognizing the inadequacy of much that passes for answers to fundamental questions of philosophy and theology. At the same time, however, Maimonides says, the students he wants to address realize also that they don’t themselves

know the answers, and thus gladly welcome an offer of guidance. Correspondingly, I view my Guide as addressed to reflective hearing officers who realize that complex and deep, yet insufficiently explored issues lie at the core of what it means to write a good due process decision, and therefore would value an opportunity to identify the issues in a structured way, and to consider them in depth.

Unlike Maimonides' monumental work, however, my (small) Guide in no way purports to set out final answers to the questions it considers. It aims instead to provide a different kind of guidance – by modeling methods similar in general respects to those utilized often by experienced hearing officers in their approaches to specific cases, but focused more broadly upon *processes* of decision making and writing. The discussions and suggested guidelines in each of the four sections that follow are set forth for hearing officers to compare and contrast with their own considered judgments. They aim to develop ideas for further reflection rather than to settle the key issues concerning critical attributes of good due process decisions.

*Critical Attributes of Good Due Process Decisions: A Guide for the Reflective Hearing Officer* is not intended to replace, but instead to supplement, the use of comprehensive summaries of substantive and procedural special education law. It aims to address an essential, yet presently, unmet need – for an educational approach that helps special education due process hearing officers to focus critical reflection upon processes involved both in thinking through issues in a case and finding words to express the conclusions arrived at in a written decision. I hope that both experienced and new hearing officers will find what I've written valuable for reflecting upon their current practices and generating new ideas to improve the quality of their important work.

**Suggestion:**

Given the purposes, explained above, I think special education due process hearing officers will gain the greatest benefit if, after reading each section, they take a little time to consider the following questions:

- Upon reflection, do the critical attributes of good due process decisions (with respect to the section just read) correspond to your own views about the characteristics a good due process decision exemplifies?
- If so, do the presented discussions of critical attributes and the guidelines set forth suggest to you ideas you could incorporate into your own approach to preparing and writing due process decisions?
- If not, then, upon reflection, in what ways do they differ from your own views, and for what reasons?
- What additions, revisions, modifications, or deletions, if any, would you recommend with respect to the critical attributes of good due process decisions and guidelines set forth?

(If you have the time and inclination to write out responses to the above questions, I'd appreciate it greatly to hear from you.)

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## **Findings of Fact**

### **Critical Attributes:**

- 1. Reasonableness of factual findings;**
- 2. Relevance to the legal issues the Hearing Officer must decide.**

### **Discussion:**

#### **1. Reasonableness of factual findings:**

The discussion immediately below concerns how to understand the critical attribute of reasonableness in regard to factual findings. The points developed and issues raised are specific respectively to the following four kinds of factual judgments commonly made by hearing officers: (i) credibility judgments; (ii) judgments regarding inferences from established facts; (iii) evidential insufficiency judgments; (iv) judgments when factual representations are uncontested.

#### **Credibility judgments:**

An important kind of factual judgment for a due process hearing officer concerns whether or not to accept as credible factual claims advanced by parties in a case. A good credibility judgment by a hearing officer is a plausible conclusion about a contested matter in a case, justifiable in terms of the case record, given reasonable assumptions concerning the evaluation of testimony and documentary evidence.

Credibility judgments lie on a continuum in terms of the difficulties they pose for hearing officers. The greatest difficulties arise when witnesses for the opposed parties offer directly conflicting testimony on matters crucial to key issues in a case.

Assessing credibility in such a situation presents many problems. Four of the most difficult are: (1) limited options for checking accuracy of the witnesses' recollections; (2) inherent unreliability of inferences from observations concerning witnesses' demeanor while testifying; (3) uncertainty concerning whether, and, if so, to what extent a witness's testimony is colored by his or her relationship to the matter in controversy; and (4) distorting effects of hearing officer preconceptions, which Judge Posner characterizes as "ubiquitous and uneliminable" for anyone making factual judgments. (2008, p. 69)

Although substantial, the problem of assessing credibility in the above kinds of circumstances must be stated with care to avoid exaggeration. The relevant standard for good credibility judgments does not require that a hearing officer pursue the hopeless goal of achieving certainty, or near certainty, about contested factual matters in a due process case through examination of a case record, often, in crucial respects, incomplete, vague, obscure, selective, and/or confusing. Instead, a good credibility determination is a plausible conclusion, justifiable on the basis of the case record in light of reasonable assumptions concerning evaluation of testimony and evidence. Such a justification may focus upon matters such as the following;

- internal consistency or inconsistency of a witness's testimony at the due process hearing;
- extent of, and expressed reasons for, modifications or qualifications of a witness's direct testimony on cross or redirect examination;
- consistency or inconsistency of a witness's testimony with his or her prior statements, and/or prior behavior, as indicated in the case record;



- corroboration (or lack thereof) of testimony by a witness at the due process hearing in terms of testimony by other witnesses or documentary evidence in the case record.
- In regard to factual judgments (contrasted with direct sensory reports), experience and/or knowledge of a witness concerning the subject of testimony;
- Common sense plausibility, or implausibility, of the testimony a witness presents;
- Possible effects of conflicts of interest, indicated in the case record, upon the content of a witness's testimony.

The above factors all concern matters clearly relevant to credibility, and are objective, at least in the sense that one can document the extent and nature of their presence in terms of the case record, in contrast to considerations such as a witness's tone of voice, nervousness, "body language," etc. The preceding kinds of demeanor evidence raise especially troubling issues from the standpoint of possible distorting effects of the hearing officer's own preconceptions, emphasized by Judge Posner. (In this regard, the philosopher Thomas Hobbes (1588-1679) includes among the qualities of a good judge that he or she is able in judging to "divest [himself or herself] of all fear, anger, hatred, love, and compassion." (1962, p. 210)

Credibility determinations in terms of the above kinds of factors, nonetheless, often present difficult issues necessitating close calls. In most instances the issue is not whether one of the witnesses lied, but rather, which witness's testimony provides a more reliable basis for the hearing officer to reach a decision. In this regard, hearing officers need to keep in mind that interests color perceptions, and the general reliability of memory varies widely among individuals. Furthermore, at times even completely disinterested witnesses, whose ability to remember is not deficient, simply make mistakes of recollection

Judgments concerning inferences from undisputed facts in the case record:

Another kind of important issue for a due process hearing officer in connection with findings of fact arises when opposing parties draw different inferences from undisputed facts in the case record. Such issues come into play frequently when considering whether a particular statutory definition (e.g. of a disability category under IDEA) applies in light of the factual circumstances in a case. This kind of issue often calls for a judgment as to the presence of characteristics stated in the statutory definition that are not legally defined, but which have numerous differences of degree and/or can be manifested in many different ways. Here is an example in this regard:

- (i) The sole issue in a due process hearing concerns refusal of consent by the parents to have the student evaluated for eligibility to receive special education and related services.
- (ii) The school district introduces uncontradicted testimonial and documentary evidence of behavioral episodes involving the student, followed by attempted interventions, each without lasting effect, throughout the first six months of the school year.
- (iii) The parents insist such behavioral episodes are insufficient reason to evaluate the student for the purpose of determining whether the IDEA 2004 definition of emotional disturbance applies in his case. They say, instead, that the behavioral episodes reflect the student's anger and frustration resulting from a school district decision at the end of the previous school year not to promote the student to second grade.

A good due process decision concerning the above case would include a thorough, careful analysis that addresses the following issue. Do established facts, in the case record, reveal a pattern providing reasonable support for the school district's inference

that the student's behavioral episodes may exemplify an emotional disturbance condition, as defined in IDEA 2004? Such an analysis would require comprehensive review of the entire case record. A crucial issue in this regard would concern whether behavioral episodes occurred also during the prior school year, and, if so, how they compare in relevant respects, such as frequency, seriousness, and triggering circumstances, to those in the current school year, prompting the school district's recommendation to evaluate the student. The kind of pattern analysis described above is pertinent in due process cases with respect to a wide array of questions concerning cause and effect.

Evidential insufficiency judgments:

A good due process decision not only makes apparent why the hearing officer credited factual claims of a party, but also explains his reasons when he decides not to do so. Such reasons should identify precisely the divergence between the factual claims the hearing officer declines to credit and statements reasonably supported by evidence in the case record.

As an example, in an unusual case school district staff concluded that a student was afflicted with Marfan's Syndrome, a severe cardiac ailment, and thus should not be allowed to take physical education. The staff arrived at these conclusions through reading pamphlets about Marfan's Syndrome, seeking advice from student health specialists of the special education cooperative to which the school district belonged, and reviewing the student's health records, which did not contain a physician's examination report for whether the student had Marfan's Syndrome. The hearing officer summarized his findings on key factual issues in the case with the following words:

Based upon his review of the evidence and testimony presented in this case, there are grounds for believing the student may have Marfan's Syndrome. The Hearing Officer, however, is not prepared to conclude that the student, in fact, has it. ....

Such a conclusion would only be warranted on the basis of

a full examination by qualified medical personnel. The case record, however, indicates that such an examination has yet to be undertaken.

(*M.H. v. Bremen CUSD* 228 (1998))

#### Judgments when factual representations are uncontested:

Hearing officers often note expressly in their decisions that a given item of testimonial or documentary evidence a party presented went unchallenged by the opposing party. In good due process decisions, however, the hearing officer makes clear that such an express indication is not tantamount to his crediting the evidentiary item entirely by default. Instead the hearing officer (a) states her reasons for regarding the evidence presented as plausible in a *prima facie* sense, that is, in the absence of any evidence or testimony to the contrary, and (b) notes that the responding party offered no such evidence or testimony. The hearing officer's statement of reasons for considering the presented evidence as *prima facie* plausible may consist simply of specifying the evidentiary items presented and indicating that, in her judgment, they support the presenting party's claim, given that the opposing party provided neither evidence nor testimony in response.

#### **2. Relevance to legal issues the Hearing Officer must decide:**

Hearing officers must take care to keep the crucial issues of law in a case closely in mind when reviewing the case record to determine factual findings. In this regard, after a hearing officer reaches a definite conclusion about the appropriate legal standard in a case often she can clarify and make more precise her judgments as to which parts of the case record have the greatest potential significance, and thus hone in on reviewing them in her deliberations. (In my personal experience, the above point applied with special force when I was called upon to analyze extensive expert testimony presented at a due process hearing on complicated and/or subtle topics – e.g. educational methodology, assistive technology, etc.)

As a separate point, there are two principal reasons for a hearing officer to avoid inclusion of findings of fact in a due process decision irrelevant to the legal issues the hearing officer must decide. First, irrelevant factual findings invite confusion, misunderstanding, and unneeded controversy. Second, paying close attention to the relationship between findings of fact and legal issues can simplify the hearing officer's task by obviating the need to render factual findings on matters raised by a party that call for difficult credibility judgments. If such a difficult factual matter lacks relevance to legal issues in a case, a clear explanation of why this is so provides adequate justification to leave it unaddressed

### **Guidelines for Findings of Fact:**

#### **Credibility Judgments:**

- Cite the factors taken into consideration.
- Explain the reasons for placing greater emphasis on some factors rather than others.
- Limit cited factors on which judgments are based to objective established considerations, in the case record (as contrasted with subjective factors, such as the demeanor of a witness when testifying).
- **Suggestion:** Before expressing a credibility judgment in a decision, include a brief preamble sentence which expresses acknowledgment of the general problems such judgments pose. Here is an example: *The Hearing Officer thus is called upon in this instance to assess the relative credibility of the testimony presented by witnesses X and Y. Such a judgment, the Hearing Officer realizes, can never be certain. Nonetheless, based upon his consideration of the following factors in this case, the Hearing Officer regards the testimony of witness X as more credible than that of witness Y. ....*

Judgments concerning inferences from undisputed facts, in the case record:

- State fully all pertinent established facts.
- Describe clearly the pattern they form, and the inference which you believe the pattern supports.

Evidential insufficiency judgments:

- State clearly the rejected factual claim, and contrast it expressly with the findings of fact which, in your judgment, the case record supports.

Uncontested factual representations:

- Make apparent your reasons for considering the representations sufficiently plausible to credit them in the absence of evidence or testimony presented to the contrary.

Relevance to legal issues in case:

- Keep the critical legal issues in a case closely in mind when analyzing the case record to determine factual findings.
- Pay careful attention to whether difficult factual matters raised by the parties are relevant to the legal issues in the case.
- If not, then explain clearly why this is so, and decline to address them.

## **Conclusions of Law:**

### **Critical Attributes:**

- 1. Requisite legal knowledge;**
- 2. Reasonable interpretive analysis to identify and justify the hearing officer's conclusions regarding appropriate legal standards in the case:**

### **Discussion:**

#### **1. Requisite legal knowledge:**

A hearing officer's conclusions of law must not be flawed in virtue of reflecting inadequate legal knowledge – e.g. unawareness of statutory provisions, regulations, or judicial decisions with evident pertinence to the case. A hearing officer as well should try hard to avoid making mistakes, even minor ones, not affecting his ultimate legal conclusions, in regard to statements in a decision concerning legal matters, and to assure both accuracy and proper form of legal citations.

#### **2. Reasonable interpretive analysis to justify the hearing officer's conclusions regarding appropriate legal standards in the case:**

What is it that I do when I decide a case? To what sources of information do I appeal for guidance? In what proportions do I permit them to contribute? .... If no precedent is applicable, how do I reach a precedent for the future?  
(Benjamin Cardozo, *The Nature of the Judicial Process*)

A hearing officer's conclusions regarding appropriate legal standards for a case require interpretive legal analysis. Such an analysis is straightforward when factual circumstances in a case make the appropriate standard (e.g. a statutory provision, regulation, or judicial decision) readily apparent, and when most qualified interpreters of the law agree upon how to understand the language in which the standard is phrased.

Frequently, however, the appropriate legal standard for a case is not readily apparent in light of the factual circumstances of the case, and/or crucial questions concerning how to interpret the standard are unsettled. Elucidating what a reasonable interpretive analysis amounts to in the aforementioned circumstances is not easy, giving rise, either explicitly or implicitly, to questions that implicate Justice Cardozo's deep queries in the above quotation that go to the core of what a good job of legal interpretation means.

### **The Two-Step Procedure:**

All laws, written or unwritten, have need of interpretation.  
(Thomas Hobbes, *Leviathan*)

How should a hearing officer address the task of trying to determine which legal standards to adopt in cases that require interpreting crucial statutory provisions, regulations, and judicial decisions relating to the law of special education? Adapting an approach developed by moral philosopher Bernard Gert, the following two-step procedure provides a framework to help hearing officers identify relevant factors and focus upon key issues to consider when trying to determine which legal standards to adopt for a case (2005, 236-37) <sup>1</sup>

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<sup>1</sup> Gert sets forth his two step procedure to analyze the nature of moral reasoning, rather than legal reasoning with respect to conclusions of law.



## **Step-one of the Two-Step Procedure:**

*Identify the relevant justification factors.*

Even when important matters of legal interpretation are unsettled, qualified interpreters of the law agree upon a number of justification factors, that is, factors relevant to a justification for adopting a given legal standard for a case. Examples of such factors are:

- authoritative precedent
- *Stare decisis*
- plain meaning
- statutory purpose
- interpretive coherence
- standard judicial procedure
- policy considerations and fairness
- legislative intent
- non-binding precedent
- judicial philosophy

The discussion below describes briefly how each of the preceding important justification factors is understood by qualified interpreters of law.<sup>2</sup>

### **1. Authoritative Precedent:**

In cases where the meaning of critical statutory or regulatory text is not apparent, a court decision interpreting the language at issue may have authoritative precedential force. The

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<sup>2</sup> Although the ten factors listed above are recognized as relevant by all qualified interpreters of the law for reaching a conclusion about an appropriate legal standard to adopt in considering a legal issue, the question of what accounts for this widespread recognition raises large, and deep, questions of jurisprudential philosophy. To treat them adequately would require an extensive in-depth analysis far beyond anything I'm capable of setting forth at this time. In the Appendix to this Guide to Critical Attributes of Good Due Process Decisions, however, I've developed briefly a line of philosophical thought that, I believe, must play an important part in any adequate account.

following points concerning the authoritative precedential force of decisions issued by courts in the federal judicial system are well known by special education due process hearing officers.

- The decisions of the U.S. Supreme Court have paramount authoritative precedential force, relative to cases within the Court's jurisdiction, as specified in article III of the U.S. Constitution.
- The decisions of a U.S. Court of Appeals have paramount authoritative precedential force relative to the cases within the court's subject matter and territorial jurisdiction, absent a decision to the contrary by the U.S. Supreme Court.
- The decisions of a U.S. District Court have paramount authoritative precedential force, absent a decision to the contrary by the U.S. Supreme Court or the U.S. Circuit Court of Appeals of the circuit within which the district court is located, relative to cases within the district court's subject matter and territorial jurisdiction.

When the issues in a due process case fall clearly and directly within the scope of a precedent emanating from any of the above mentioned courts, the hearing officer must treat the precedent as source of the appropriate legal standard in the case. No other justification factors may come into play. In most instances a hearing officer can decide by classifying issues into salient categories whether a rule from a prior case, with potentially authoritative precedential force in virtue of jurisdictional criteria, is an appropriate legal standard to apply in deciding an issue before her. (Prime examples of salient categories are: free appropriate public education (FAPE), Least Restrictive Environment (LRE), unilateral out of district placement by parent, discipline of a child with a disability, etc) If no authoritative precedent is applicable then the hearing officer must determine an appropriate legal standard by way of other considerations (e.g. see relevant justification factors 2 through 8 below). On the other hand if there is an

applicable authoritative precedent then the hearing officer needs to consider how the rule enunciated in the case with authoritative precedential force applies to the issue in the case before her.

At times the hearing officer can arrive at a conclusion on the above matter through relatively straightforward comparison of factual circumstances in the two cases. Often, however, a due process case presents the following set of circumstances to a hearing officer:

- A rule adopted in a prior case has clear relevance to an issue before the hearing officer.
- The rule has authoritative precedential force.
- Nonetheless, precisely how the rule should be interpreted as applicable to the principal issue in the due process hearing is not apparent.

A prime example of a kind of issue in which the above set of circumstances comes into play for a hearing officer is whether a school district has provided an appropriate educational program for a child with severe or profound cognitive disabilities. As all hearing officers know, in the case of *Board of Education of the Hendrik Hudson School District v. Rowley* the United States Supreme Court adopted a two part test for whether a school district has met its obligation under the IDEA to provide a student a free appropriate public education 20 U.S.C. Sec. 1412 (a)(1). In this regard the Supreme Court declared that:

A court's inquiry in suits brought under ... [the IDEA] is twofold. First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefit? If these requirements are met, the State has complied with the obligations imposed by Congress and the Congress and courts can require no more. (207)

The Court also indicated in *Rowley* that if the student is educated in the regular education classroom then to satisfy the second part of the test the school district must provide a program reasonably calculated to enable her to receive passing marks and advance from grade to grade. (204) The Court's opinion in *Rowley*, however, left unaddressed the question of what the phrase "reasonably calculated to enable the child to receive educational benefit" means for a student with severe or profound cognitive disabilities, in whose case an appropriate educational program necessarily would have a vastly different content and educational approach than for regular education students.

Addressing the above issue calls for a hearing officer to develop a mediating analysis that relates the "reasonably calculated to enable the child to receive educational benefit" standard of *Rowley* to the specific circumstances of a case before her involving a child with severe or profound cognitive disabilities. Such an analysis calls for careful consideration of the following three issues:

- (i) What were the considerations that the court in the case with authoritative precedential force viewed as most important in applying the rule it enunciated to the facts of the case?
- (ii) In the case the hearing officer must decide what considerations are analogous to those that loomed large in the case with authoritative precedential force?
- (iii) Given such analogously important considerations, how does the rule enunciated in the case with authoritative precedential force apply to the facts in the case before the hearing officer?

For example, the case of *Beth B. v. Van Clay* posed the issue of what "reasonably calculated to enable a child to receive educational benefit" means with respect to a child with Rett Syndrome, a condition on the autism spectrum involving severe to profound disabilities in the areas of cognition, communication, and motor functioning. In *Beth B.* the court concurred with the following analysis presented by the hearing officer in his due process opinion. (*Beth B. v. Lake Bluff School District 65* (2000)) The U.S. Supreme Court in *Rowley* placed special emphasis upon consideration of the following two issues

when it applied the two parts of the *Rowley* test for educational appropriateness to the specific circumstances presented in the case: (a) Were the goals and objectives identified for the student (i.e. Amy Rowley) in her individualized educational plan (IEP) reasonable?; (b) Were the educational services provided for Amy Rowley reasonable means of realizing her identified goals and objectives? Apropos the factual circumstances in *Beth B. v. Van Clay*, the parents and the school district agreed upon the reasonableness of Beth B.'s educational goals and objectives, which concerned primarily communication and socialization. The dispute at the heart of the case was about whether to implement a full inclusion educational program for Beth, which the parents favored and the school district opposed. Undisputed evidence presented at the due process hearing indicated that Rett Syndrome has such a low incidence rate that few, if any, school districts have acquired significant experience developing educational programs to address it. The hearing officer concluded accordingly that a program reasonably calculated to benefit Beth B. must include the following: (i) reasonable efforts to research the disability of Rett Syndrome by reviewing the relevant literature, and/or consulting with knowledgeable individuals, and (ii) an individualized educational program provided for Beth B. that reasonably reflect such research efforts.

## 2. *Stare Decisis*

*Stare decisis* comes into play as a relevant justification factor under the following circumstance:

- (i) The judges of a given court within a legal system set forth a rule of decision in a case.
- (ii) At a later time, judges belonging to the same court conclude that a case before them is relevantly similar to the earlier case. (The judges in the later case may or may not be the same individuals as the judges in the earlier case.)
- (iii) The earlier decision at no time has been overruled by a decision of a higher court in the judicial system.

The underlying idea of *stare decisis*<sup>3</sup> is that of a strong presumption against judges in the later case reconsidering the rule of decision set forth in the earlier case. The reason for this presumption is apparent – to assure reasonable predictability as to the standards applied in settling disputes, which, in turn, has a significant effect prospectively upon limiting the number of disputes that arise.

The presumption of *stare decisis*, however, though strong, is not absolute. At times judges conclude that, despite the above mentioned important concerns supporting the presumption, other considerations figure in the circumstances of a case with such great moral force that they justify reconsidering a previously enunciated rule.<sup>4</sup> A well known example in this regard is the historic decision of the U.S. Supreme Court in *Brown v. Board of Education* (1954) which reconsidered, and rejected, the long standing “separate but equal” interpretation of the 14<sup>th</sup> amendment equal protection clause apropos cases involving racial segregation in K-12 public schools set forth in *Plessy v. Ferguson* (1896)

*Stare decisis* may become relevant for a special education due process hearing officer in diverse situations such as the following: In a post-hearing brief an attorney cites as precedent to support his party’s position a due process decision issued by the hearing officer herself (This happened to me once). Under this circumstance, the aforementioned consideration providing the basic rationale for the principle of *stare decisis* – predictability apropos the standards applied for resolution of disputes – applies with no less force than in other judicial contexts. For this reason, if the hearing officer declines to follow the rule in the cited due process case he owes the parties a plausible justification why.

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<sup>3</sup> The phrase stems from the Latin maxim *Stare decisis et non quieter movere*: to stand by decisions and not disturb the undisturbed.

<sup>4</sup> The tenth relevant justification factor, judicial philosophy, can play an important role in thoughtful judgments of judges concerning such a conclusion. See pp. 15-17.

### 3. Plain Meaning

The process of judicial interpretation, like all other forms of linguistic communication, assumes that, in the words of jurisprudential philosopher H.L.A. Hart:

.....[there are] plain cases constantly recurring in similar contexts to which general ....[words or phrases] are clearly applicable. ... General [linguistic] terms would be useless to us as a medium of communication unless there were such familiar unchallenged cases.  
(1994, 126)

Accordingly, at times courts will reject an interpretation of a statutory word or phrase set forth by a contending party in a case because the interpretation conflicts with the clearly ascertainable plain meaning of the word or phrase at issue. (For example, in a special education due process case I adjudicated as a hearing officer many years ago, the attorney for the school district attempted to persuade me that an eleven year old student's hurling a chair at his teacher qualified as "possessing a weapon at school," under the provisions of the *Individuals With Disabilities Education Act (IDEA)* concerning school discipline of children with disabilities.

Circumstances can arise, however, where a statutory provision appears to have a clearly ascertainable plain meaning, but, so interpreted, the provision is logically inconsistent with other more important provisions of the statute, or with the statute's clearly apparent overall purpose. Under such circumstances courts are prepared to depart from plain meaning in favor of a "saving interpretation" which renders the statute intelligible, considered as a whole.

### 4. Statutory purposes of the IDEA:

Conclusions about the purposes of the IDEA often play a major role in analyses of judges and hearing officers with respect to unsettled matters of legal interpretation. In this regard, broad statements about the purposes of the IDEA, that not only are inferable

readily from statutory text, but also indispensable assumptions for any reasonable interpretation of the statute, unavoidably often figure in the reasoning of judges and experienced hearing officers to justify their conclusions of law.<sup>5</sup>

For example in *Florence County School District Four v. Carter*, a case in which the parents unilaterally placed their child in a private school, the following conclusions had been established by the time the case reached the Supreme Court for review. First, the School District's proposed IEP clearly was inappropriate. Second, the private school at which the parent's had placed the student (Trident) did not meet the IDEA's requirements in virtue of not satisfying a number of provisions contained in the State requirements of South Carolina for special education placements. Third, despite not meeting State requirements, Trident provided an education in which the student made significant progress. Given the preceding circumstances, the Court endorsed the opinion of the court of appeals that "it hardly seems consistent with the [IDEA's] goals to forbid parents from educating their child at a school that provides an appropriate education simply because the school lacks the stamp of approval of the same public school system that failed to meet the child's needs in the first place." (14)

##### 5. Interpretive coherence:

Matters of legal interpretation call at times for an analysis of relationships between two or more statutory provisions that clarifies how to understand each provision in such a way as to avoid conflict with the others. A noteworthy example in this regard is the analysis in *Beth B. v. Van Clay* concerning the relationship between the IDEA's "free appropriate public education" (FAPE) requirement and its "least restrictive environment" (LRE) mandate. The court's analysis began by characterizing the FAPE requirement and the LRE mandate as "two sides of the same IEP coin." (497) The FAPE requirement, said the court, "is absolute," while the LRE mandate "is relative and concentrates on other

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<sup>5</sup> Statutory purpose, however, considered as a relevant justification factor, needs to be distinguished from the concept of legislative intent with respect to specific statutory words and phrases, which raises significant problems from both practical and theoretical standpoints, widely discussed among jurists and legal scholars. (See discussion at pp. 24-26)



placement options.” (497) The LRE mandate, the court continued, “shows Congress’s strong preference in favor of mainstreaming, but does not require, or even suggest doing so when the regular class setting provides an unsatisfactory education.”

The above example illustrates as well that analyses put forth to achieve interpretive coherence often rest upon judgment concerning statutory purpose. In this regard, the court’s characterization of the FAPE requirement as “absolute,” in contrast to the LRE mandate’s relativity to placement options, would seem (most plausibly) grounded in the apparent fundamental purpose of the IDEA – to assure a free appropriate public education for every child with a disability.<sup>6</sup>

#### 6. Standard Judicial Procedure:

If a procedural issue in a case is unsettled because the pertinent statutory or regulatory sources of law leave it unaddressed completely, judges often look to standard judicial procedure. Such involves adopting as an exemplar a procedural approach courts use in cases over a wide array of legal subject matter areas with respect to the kind of issue in the case before the judge.

The Supreme Court’s decision in *Schaffer v. Weast* 546 U.S. 49 (2005) exemplifies such an approach. Writing for the majority Justice O’Connor noted that since the IDEA is silent about allocating the burden of persuasion in a due process case, the Court’s analysis would begin by citing the widely adopted general approach of courts that the burden of persuasion lies with the party seeking relief. Absent persuasive reasons to the contrary, said Justice O’Connor, the Court would conclude “that the burden of persuasion [in a due process case] lies where it usually falls ....” (58-59) Justice O’Connor then proceeded to consider arguments presented to the contrary by the petitioner (the parents) – that is, that the burden of persuasion should lie always with the school district. Finding all the petitioner’s arguments unpersuasive, she concluded, on behalf of the Court, that

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<sup>6</sup> In this regard see *Timothy W. v. Rochester New Hampshire School District*, an influential case in which the court averred that “[t]he language of the [IDEA] in its entirety makes clear that a zero reject policy is at the core of the Act.” (960)

“[the] burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief.” (62)

#### 7. Policy considerations and fairness:

In *Schaffer v. Weast* Justice Ginsburg voiced a strongly worded dissent in which she argued that school districts should be held always to bear the burden of persuasion in due process hearings for reasons both of policy and fairness. (63) An immense body of jurisprudential and philosophical writings concerns efforts to identify and understand the underlying concepts presupposed by each of the above two kinds of reasons. (Dworkin, 1967, 1986) (Hart, 1994: 155-84) In due process cases, however, reasons of policy and of fairness are not distinguished sharply. Both concern generally issues calling for interpretive judgments about whether adoption of a given legal standard would (1) advance or would hinder realization of the IDEA’s key purposes, or (2) interfere with the effective exercise of important legal rights under the IDEA. Reasons of policy and fairness were at the center of the Supreme Court’s decision in *School Committee of the Town of Burlington Mass. v. Dept. of Education of Massachusetts*. 471 U.S. 359 (1984), authorizing reimbursement of parents, in appropriate circumstances, for their tuition expenses in connection with unilateral placement of their child with a disability. In this regard, the Court’s unanimous decision underscored the following consideration of public policy and fairness, as characterized above.

A final judicial decision on the merits of an IEP will in most instances come a year or more after the school term covered by that IEP has passed. In the meantime, the parents who disagree with the proposed IEP are faced with a choice: go along with the IEP to the detriment of their child if it turns out to be inappropriate or pay for what they consider to be the appropriate placement. If they choose the latter course, which conscientious parents who have adequate means and who are reasonably confident of their assessment normally would, it would be an empty victory to have a court tell them years later that they were right but that these expenditures could not

in a proper case be reimbursed by the school officials. If that were the case, the child's right to a *free* appropriate public education would be less than complete. (370)

## 8. Legislative Intent

The concept of legislative intent plays a crucial role in the foundational U.S. Supreme Court case for American special education law, *Board of Education of the Hendrik Hudson School District v. Rowley*. In this regard, the Court's authoritative interpretation of the right to a free appropriate public education (FAPE) of every child with a disability under the IDEA is justified in the *Rowley* majority opinion by an analysis of how Congress intended that the right be understood. (191-97) Despite its centrality to the reasoning that underlies the Supreme Court's key legal conclusion in *Rowley*, the concept of legislative intent is an on-going source of controversy among jurists and legal scholars. Some have questioned, or even denied expressly, that the concept has any meaningful application in cases where significant disagreement exists about how to understand specific statutory words or phrases. (MacCallum, 1966, Scalia, 1997)) The following discussion tries to describe concisely the major problems giving rise to such skepticism.

Intentions primarily are ascribed to individual natural persons (i.e. human beings). Applying the words 'intention' or 'intent' to a collective body, such as a legislature, calls for decisions about how to extend their uses. An initially plausible extension identifies the legislative intent underlying specific statutory language with the way typical legislators would have understood the language at the time the statute of which it is part was enacted. This approach raises problems, however. When statutory language consists of common words or phrases, applied in familiar kinds of situations, no difficulties present themselves. A phrase such as 'free appropriate public education,' however, about which deep disagreements exist concerning how it applies to different children, requires further guidance about what the phrase means for legal purposes.

The legislative history of a statute – e.g. conference reports, speeches by the statute’s legislative sponsors and supporters, etc, is the source appealed to most often for the above mentioned kinds of guidance. Unfortunately, legislative histories include invariably vast numbers of statements, put forward at different times during the legislative process, which provide ample resources to support significantly different, yet, more or less, equally plausible accounts of the legislative intent underlying specific statutory language. For example, in *Rowley* itself, Justice White wrote a dissenting opinion, joined by Justices Brennan and Marshall, that developed a plausible direct challenge to the majority’s interpretation of the FAPE requirement.(212-18) Justice White’s interpretation, like the one set forth in the majority opinion, was based upon the legislative history of the IDEA.

Another approach frames the critical questions concerning legislative intent, not as how typical legislators would have understood specific statutory language at the time of enactment, but instead as how (hypothetical) reasonable legislators would understand it, taking into account both the statute’s overall purposes and relevant facts regarding the necessary means for realizing them. This approach raises different questions, however, depending upon how much one packs into characterizing a (hypothetical) legislator as reasonable. Does such a characterization include, for example, fair mindedness and conscientious concern for the duties attending legislative office? If so, then it seems (to me) the approach transforms a question of legislative intent into an issue on a different conceptual axis. It becomes essentially a moral issue – how members of the legislature *should have* intended the given statutory language to be construed – in contrast to the empirical (albeit counterfactual) question of how typical legislators, at the time of enactment, would have understood it.<sup>7</sup>

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<sup>7</sup> The shift of conceptual axis noted immediately above is exemplified in *Riggs v. Palmer* 115 NY 506, 22 N.E. 188 (1889), a case included almost always on reading list in courses in college and university philosophy of law course.

#### 9. Non-binding precedent: persuasive authority:

To support her legal conclusions a hearing officer may cite non-binding precedents – that is, decisions issued by courts to whose authority the hearing officer has no duty of deference (e.g. none owed in virtue of the court’s territorial jurisdiction boundaries). Non-binding precedent qualifies as a relevant justification factor, I believe, only when all of the following three conditions are met:

- (i) The hearing officer cites a decision issued by a court that lacks authority to which she has a duty of deference;
- (ii) She indicates, however, that she regards the court’s reasoning as persuasive;
- (iii) She then summarizes the court’s reasoning, and also explains why she considers it persuasive, from the standpoint of relevant justification factors.

Sometimes attorneys refer to citation of non-binding precedent as reliance upon “persuasive authority.” The persuasive element of “persuasive authority,” however, has two aspects, in my opinion, one primary and the other secondary in the strict sense that it may not come into play unless the primary aspect of persuasiveness, to be explained immediately below, is present. In its primary aspect, a decision a hearing officer cites as “persuasive authority” contains an analysis of crucial issues in the case from the standpoint of relevant justification factors, set out by the court in its opinion, which the hearing officer finds persuasive. The secondary aspect is the fact that other qualified interpreters of the law besides the hearing officer – i.e. the members of the court that issued the decision – likewise (obviously) consider the analysis persuasive, which fact then adds additional support for the hearing officer to cite the decision as “persuasive authority.” Given that the hearing officer has no duty of deference to the court’s decision, however, the fact that other qualified legal interpreters consider the decision as persuasive becomes relevant, I would say, only if, on the basis of his or her individual judgment, the hearing officer so regards it

Reliance upon persuasive authority as a relevant justification factor is illustrated well by the opinion of Judge Flaum in *Board of Education of CUHSD No. 218 v. Illinois State Board of Education* 103 F.3d 545 (7<sup>th</sup> Cir., 1996), a case calling for the court to interpret the IDEA's "stay-put" provision which requires that throughout a due process matter, unless the parties otherwise agree, the student shall remain in his present educational placement. 20 U.S.C. sec. 1415(j) (Supp.2004). Judge Flaum noted in his opinion that the phrase 'educational placement' is not defined in the IDEA, so that, in his words, identifying a change of placement "is something of an inexact science." (548) He declined, however, to "definitively establish" the meaning of 'educational placement'.<sup>8</sup> Instead he chose to follow a "fact driven" approach adopted by several other federal judicial circuit courts. (549) Having done so, Judge Flaum proceeded to summarize a set of complex factual circumstances presented by the case. In light of the circumstances, he concluded it was reasonable to identify the student's current educational placement with the one program that both was available to the student, who had just been expelled from his residential school, and which could implement his IEP.

#### 10. Judicial Philosophy

With the sole exception of the rules for determining strength of authoritative precedential force in the American judicial system (see pp. 17-18) there are no precise criteria or formulae available to a hearing officer for application of the preceding kinds of relevant factors to specific issues of legal interpretation. A hearing officer thus must rely upon his or her individual judgment. Such judgment, when sound, incorporates his or her relevant experience, legal knowledge, and intellectual background. It reflects also a hearing officer's judicial temperament, understood, in terms of the personal attributes Thomas Hobbes identifies that make one "a good judge or interpreter of laws."<sup>9</sup> Finally, sound

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<sup>8</sup> Had Judge Flaum done so, his definition of 'educational placement' in the case would have had authoritative precedential force for U.S. District Courts in the seventh federal judicial circuit.

<sup>9</sup> According to Thomas Hobbes, such attributes include not only the ability to consider legal arguments of the opposing parties without preconceptions but also "patience to hear, diligent attention in hearing, and memory to retain, digest, and apply what he [or she] hath heard." (210)

judgment for a hearing officer is grounded inherently in reflection upon what it means to do a good job of interpreting law.

Suppose though that after thorough and careful analysis in terms of the preceding seven relevant justification factors, a judge considers arguments for directly opposed conclusions on a crucial matter of law in a case to have equal justifying force. Here the judge's philosophical views concerning fundamental questions of judicial philosophy may come into play as an eighth justification factor. The following questions lie at the core of judicial philosophy, specifically as it relates to legal interpretation in a judicial context.

- Are moral issues – e.g. relating to human rights, justice, freedom, and responsibility – an intrinsic element of the kinds of questions involving matters of legal interpretation that special education hearing officers must decide?
- If so, then why? Under what circumstances, and to what extent?
- If not, why not?

As indicated above, in order for a judge's views upon the above questions to qualify as a relevant justification factor with respect to a given conclusion of law, such views must be *philosophical*. By this I mean that the judge justifies his views in terms of reasons he believes have the following characteristic. Any rational person, adequately familiar with the legal system in which the judge plays a judicial role, would find the reasons at least plausible, if she considered them impartially in terms of standards of both logical and factual inference shared by all rational persons. The preceding characteristic differentiates philosophical views from other kinds of views, such as legal, political, religious, scientific or ideological.<sup>10</sup>

Apropos the above questions about the relationship between moral judgment and judicial decision making, the issue developed immediately below has special importance to

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<sup>10</sup> I use the term 'ideological' here in Bernard Gert's sense, which encompasses disputes 'about human nature or the nature of society that cannot be resolved and that result in disagreement on public policy.' *Morality* (p. 238)

judicial philosophy. Strongly worded objection to a particular judicial decision often includes complaint that the court's opinion amounts to a *rewriting*, rather than an interpretation, of relevant law. Such a complaint logically presupposes a distinction between respective appropriate spheres of judicial and legislative authority, which, in turn, gives rise, at a deeper level of analysis, to the following question. What moral principles are central to differentiating between morally legitimate decision making authority of a judge, as contrasted with a legislator? That is to say, in disputes about whether a court in a specific case has gone beyond its legitimate function of interpreting law, and encroached upon the sphere of the legislator's legitimate decision making authority, philosophical disagreement over the role of moral judgment in judicial decision making is often, at bottom, the crux of the matter.

### **Step Two of the Two-Step Procedure:**

*Consider the key questions to ask (indicated below) concerning whether to adopt a particular legal standard in the case at issue.*

After a hearing officer has completed Step-One, and identified all justification factors, that, in his judgment, are relevant in the case before him then Step-Two comes into play, which involves considering the key questions below:

**(a) Is there a plausible legal justification for adopting this legal standard to apply in this case, given the identified relevant justification factors?**

**(b) (For cases where there are two or more such plausible justifications for different legal standards)**

**Is there a more plausible legal justification for adopting this legal standard to apply in this case, rather than adopting the other legal standards under consideration, given the identified relevant justification factors?**



The following three closely related points are crucial to note with regard to the above key questions.

First, no formula exists that hearing officers can utilize for answering the key questions. Instead, they must rely upon exercising their individual judgment which, as noted previously, brings into play a judge's relevant experience, legal knowledge, intellectual background, judicial temperament, and reflection upon what it means to do a good job of interpreting law.

Second, often there will be a number of plausible answers to the key questions that a well qualified and able hearing officer could adopt.

Third, the eight justification factors identified and discussed above are not meant to comprise an exhaustive list. Undoubtedly, experienced and able hearing officers can think of others as well, and, I hope, will be stimulated to do so by this discussion.

The two-step procedure sets out a framework, which, modifying slightly the words in Justice Cardozo's meditation quoted at the outset of this discussion, tries to model what experienced, able hearing officers do when they decide cases. If the framework accomplishes its purpose it will help to enhance the clarity, focus, and insight of hearing officers' reflections on this topic.

### **Guidelines for Conclusions of Law:**

#### **Requisite Legal Knowledge:**

- When doing legal research in connection with a case, review thoroughly and carefully all pertinent statutory provisions, regulations, and judicial decisions.

- When writing the decision, reread carefully the text of all cited sources of legal authority.

Reasonable Interpretive analyses to justify the hearing officer's conclusions regarding applicable legal standards in the case:

- Utilize the two-step procedure developed in this section as a framework of analysis to arrive at conclusions regarding appropriate legal standards to adopt in a case.

## **Rulings and Orders**

### **Critical Attributes:**

1. **Clarity;**
2. **Completeness (Rulings);**
3. **Specificity (Orders);**
4. **Reasonableness in light of factual findings and conclusions of law;**
5. **Legal authorization.**

### **Discussion:**

Rulings in a due process decision indicate whether or not the hearing officer has granted relief to the party whose complaint initiated the proceeding. If so granted, the decision contains orders as well that require specific actions of the responding party. The critical attributes discussed below all concern the above two essential functions served respectively by ruling and orders.

#### 1. Clarity:

Rulings and orders communicate to parties the meaning of a due process decision in concrete practical terms the claims each can make upon the other that the law will uphold with regard to matters at issue in the case. For this reason, no matter how detailed and complex the factual findings, or how intricate the legal analysis in a case, **a hearing**

**officer must express her rulings and orders in the most clear, precise, and straightforwardly understandable language possible for the parties.**

2. Completeness (Rulings):

A hearing officer's rulings must address every request for relief of either party, indicating that either the request is granted in its entirety, partially granted, denied, or moot in light of reasons previously specified in the due process decision.

3. Specificity (Orders):

Hearing officer should frame the orders they issue to give their rulings effect with specificity. Specificity, however, admits of degrees, so a question arises of how specific a hearing officer's orders must be in a good due process decision. This question has no satisfactory simple answer. To say, for example, that a hearing officer's orders must be specific enough to avoid vagueness, or to afford appropriate relief to the requesting party, simply replaces one characteristic requiring elucidation (specificity) with others (vagueness and/or appropriateness) that raise similar, or related, questions, likewise calling for further analysis.

A hearing officer's choices concerning how specific to frame particular orders in a due process decision require exercising his or her personal judgment to find a reasonable balance between the following two important considerations that can pull in opposed directions.

- (i) Finality: Orders in a good decision are written to reflect careful consideration paid to anticipating, and prospectively forestalling, contentious issues that could arise in the course of their implementation, thereby leading to renewed due process requests. Here are some examples of such potentially contentious kinds of issues: time frame within an order shall be carried out; location where an ordered action shall be done; particular person(s) responsible for providing

an ordered service; frequency with which the service shall be provided;  
provisions for communication with parents apropos provision of the service.

- (ii) Respectful appreciation of the IEP process: Under any reasonable interpretation, the IDEA establishes a framework under which the principal means of addressing the kinds of matters enumerated immediately above is not the orders of hearing officers, but instead the IEP process through which school districts, with significant participation of parents, determine appropriate programs for individual students.

How a hearing officer balances the above two kinds of considerations, to arrive at a good resolution calls for exercise of judgment attuned carefully to situational factors that vary from case to case.

#### 4. Reasonableness in light of factual findings and conclusions of law:

Rulings and orders must satisfy the requirement of reasonableness in light of the hearing officer's factual findings and conclusions of law. Often a hearing officer can discern readily the appropriate rulings and orders to issue after having resolved to his satisfaction the factual and legal issues in a case. Such immediate discernment is not always possible, however. To the contrary, at times the major challenge a hearing officer faces in a case is to frame reasonable rulings and orders in light of his findings of fact and conclusions of law.

Virtually any case involving a request for relief of compensatory education provides a prime example in this regard. A typical compensatory education case poses the following issues:

- Did the school district fail to provide a free appropriate public education (FAPE) for the student?
- If so, then over what period of time did the student not receive a FAPE?

- In what specific ways was the student affected adversely in educational terms?
- Given the specific ways in which the student was adversely affected, what components now are critical to an appropriate educational program for her, provided in what manner, and in what amounts?

The last of the above issues, which ordinarily is the ultimate focus of a hearing officer's orders in a case involving a request for compensatory education, raises difficult questions both of fact and law. The factual questions require close analysis of testimony and evidence offered by the parties. The primary legal question is the following. What does the standard of appropriateness for an educational program, set forth by the U.S. Supreme Court in *Rowley* – i.e. “reasonably calculated to provide educational benefit” – mean in the context of a compensatory education case under the kinds of circumstances present in the case before the hearing officer.?

A decision in which a hearing officer issues orders directing a school district to provide a student compensatory education must explain clearly the relationship between the orders issued and the hearing officer's conclusions in regard to the above listed questions. It can be immensely helpful to the parties in this regard for the hearing officer to provide such explanations in a separate section as an immediate prelude to the issuance of rulings and orders at the end of the decision.

##### 5. Legal Authorization:

In some cases a party's lack of legal knowledge, or (occasionally) an attorney's overly impassioned advocacy, results in requests for relief that the IDEA precludes a hearing officer from considering. Some examples are:

- a ruling that the school discriminated against a student in violation of the 1964 Civil Rights Act (precluded by 20 U.S.C. sec. 1415 (b)(6)(A) (Supp. 2004), which limits the contents of due process complaints expressly to matters involving

“identification, evaluation, or educational placement of the child or provision of a free appropriate public education to such child.”)

- A ruling that the school district’s general procedures and practices in a particular area fail to comply with the IDEA (also precluded by the above cited provision of the IDEA, which limits the subject of a due process complaint to child-specific matters – i.e. matters concerning the education of a specifically identified child.)
- An order directing the school district to expunge statements appearing in the student’s educational records (precluded by 34 CFR Sec. 300.619 (2007) specifying that educational records disputes under the IDEA shall be addressed through procedures set forth in the Family Educational Records Privacy Act (FERPA).)

When a hearing officer concludes that the IDEA bars her from considering one or more of a party’s requests for relief, her decision should contain a full explanation of her reasons for so concluding, that includes reference to pertinent statutory and regulatory provisions. From the standpoint of organizational format, the explanation can appear in a separate section of the kind described immediately above in the discussion of the critical attribute of reasonable relationship to findings of fact and conclusions of law.

### **Guidelines for Rulings and Orders:**

- It is imperative that a hearing officer state rulings and orders in the most clear, precise, and straightforwardly understandable language possible for the benefit of the parties.
- Rulings must address every request for relief of either party.

- Orders must be framed with a degree of specificity that reflects a careful balance between the need for finality and respectful appreciation for the IEP process through which school district staff, with significant participation of parents determine appropriate educational programs for individual children.
- To explain the rationale for her rulings and/or orders, if needed, a hearing officer should include a separate section in the decision clarifying relationships between her rulings and/or orders, on the one hand, and her factual findings and conclusions of law, on the other hand.
- If the hearing officer concludes that the IDEA bars him from considering a party's request for relief he should include in the decision a full explanation of his reasons for so concluding.



## **Writing Quality:**

### **Critical Attributes:**

1. clear writing;
2. well organized presentation format;
3. avoidance of irrelevant and/or extraneous words;
4. thorough development of matters introduced for analysis and discussion.
5. *ideal attribute*: “*Gets the point across.*”

### **Discussion:**

The fundamental purposes of a due process decision are to provide legally authoritative determinations concerning the rights and duties of the parties on matters at issue in a due process hearing, and to communicate such determinations in writing. Each of the above listed critical attributes of a well written due process decision has an essential connection to these fundamental purposes.

#### 1. Clear writing:

Writing is clear when the intended readers understand it clearly. This correct and uncontroversial general statement requires clarification when applied to due process decisions. How can a hearing officer communicate effectively in the same written text with a diverse intended readership that includes parents (often with limited education), school district staff, attorneys, (possibly) reviewing courts, and (occasionally) members of the general public? Clear writing in a due process decision calls upon the hearing

officer to make careful choices concerning vocabulary and sentence structure. In this regard, however, the following three considerations have special importance.

- (i) Hearing officers must make special effort to avoid in their writing the kinds of deficiencies that generally impede comprehension – e.g. vagueness, ambiguity, awkward phrasing, repetitiousness, excessively complex syntax, or overly long sentences.
- (ii) The following point, stressed in the preceding section, bears repeating. No matter how detailed and complex the factual findings, or how intricate the legal analysis in a case, a hearing officer must express her rulings and orders in the most clear, precise and straightforwardly understandable language possible for the benefit of the parties.
- (iii) Hearing officers should try to express their conclusions of law in words a non-attorney can understand readily. Such, however, can pose formidable challenges in striking a successful balance between considerations tending to pull in opposed directions – e.g. conciseness v. providing a lay person adequate background and context to convey understanding. In some instances a hearing officer must exercise special care to avoid misunderstandings on all sides that could result from oversimplification – e.g. when addressing legal arguments of attorneys for the parties involving deeply embedded, conceptually interrelated legal words and phrases. If a hearing officer believes her legal conclusions concern debatable issues on which a party might appeal, her highest priority is to provide a clear and full statement of her legal conclusions, for the benefit of the parties’ attorneys and the reviewing court. Attempting to do so, however, may require the hearing officer to subordinate (though seldom, if ever, completely) the goal of communicating in terms readily understandable to the parents and school district staff, for the sake of assuring full and fair consideration of the parties’ legal rights on appeal.

## 2. Well organized presentation format:

The presentation format of a due process decision may consist of numerous sections and subsections, each with a title directing the reader's attention explicitly to the matters discussed. In contrast, a presentation format may guide the reader implicitly by way of the arranged sequence in which matters are introduced and considered. Presentation formats as well may contain both explicit and implicit aspects in varying combinations. Whatever approach a hearing officer adopts, a well organized presentation format facilitates overall understanding by helping readers comprehend crucial interrelationships among the central topics and issues in a due process decision.

A well organized presentation of factual findings enables readers to understand important matters of background and context relative to the legal issues in the case. When the facts are complicated hearing officers must pay especially close attention to detail, precision, and narrative coherence. A well organized legal analysis assists readers to understand the reasoning upon which a hearing officer relied to justify her conclusions of law. When such reasoning involves lengthy inferential chains or the drawing of subtle distinctions, a well organized presentation format helps readers identify, and avoid losing sight of, critical aspects of the hearing officer's analysis.

## 3. Avoidance of irrelevant and/or extraneous words and sentences:

Irrelevant and/or extraneous words and sentences cannot serve the fundamental purpose of a due process decision – to provide legally authoritative determinations concerning the rights and duties of parties on matters at issue in a due process hearing. It is important especially for hearing officers to avoid expressing *obiter dicta*, that is opinions on questions of fact or law that a hearing officer need not consider in addressing the legal issues in the case before him. Expressing such opinions goes beyond the scope of a hearing officer's responsibilities, and can generate significant misunderstandings.

Hearing officers should avoid assiduously any words that could be understood, even implicitly, to express ridicule or personal condemnation of anyone with a significant relationship to the case – e.g. parties, witnesses, state agencies, etc.<sup>11</sup> Even if a hearing officer has good reason to believe a witness lied under oath, in my opinion, the above point applies as well, with equal force. The experience of receiving testimony she considers perjured, especially in a case with much at stake that also touches deep emotions, can provoke a hearing officer’s strong feelings of indignation. Whether a witness committed perjury concerns a different kind of issue, however, than any that involves the mandatory subjects of a due process complaint under the IDEA – “identification, evaluation, or educational placement of the child or provision of a free appropriate public education to such child.”<sup>12</sup> 20 U.S.C. sec. 1415 (b)(6)(A) (Supp. 2004) When a hearing officer has good reason to consider the testimony of a witness perjured (which, fortunately for me, occurred only once in my experience), the situation is best addressed, I believe, by meticulous and thorough specification of all evidence in the case record discrediting the testimony. Such an approach, in my opinion, allows the record to speak for itself.

#### 4. Thorough development of matters introduced for analysis and discussion:

A well written decision contains thorough analysis and discussion of all matters that need to be considered. Such thoroughness encompasses topics and issues a hearing officer deems relevant for arriving at a decision. It addresses as well, however, points the parties raise in presenting their respective cases, even if, in a given instance, only to explain why the hearing officer regards a particular point as weak or irrelevant to the critical issues in the case. Thorough treatment of topics and issues is required of hearing officers by their (moral) duty to dispense justice to the best of their abilities, and also by their no less

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<sup>11</sup> Personal condemnation needs to be distinguished, however, from *legal* condemnation of a party’s actions apropos a central matter in the case e.g. a judicial finding of unreasonableness, authorizing reduction or denial of reimbursement to parents for unilateral placement of their child with a disability. 20 U.S.C. 1412 (a)(10)(C)(iii)(III) or a determination under 20 U.S.C. 1414(a)(1)(B) that a school district “had knowledge” that a disciplined student was a child with a disability.

<sup>12</sup> Insofar as indignation is a specific mode of anger, it counts as an emotion of which, according to Thomas Hobbes, a good judge can divest himself or herself when judging. (see p 9)

important (moral) duty to do so in ways that foster the perception of fairness.<sup>13</sup> In regard to the latter duty, addressing evidence and arguments a party presents that the hearing officer considers weak or irrelevant can present a problem of finding the right tone to adopt for expressing such judgments, which requires carefully chosen words, exemplifying both candor and civility. Under circumstances where an unrepresented parent raises irrelevant issues out of unawareness or misunderstandings in regard to basic points of pertinent law, the hearing officer should attempt in his discussion to educate and inform the unrepresented parent. The effort in this regard calls for use of a presentational format and vocabulary reasonably calculated to get the point across to the parent, conveyed in writing that reflects respect, tact and patience.

##### 5. Ideal Attribute: “Getting the point across”:

“Getting the point across,” in the sense of communicating successfully the point one wants to express, presents the greatest challenge for any writer. The challenge is especially formidable with respect to the kinds of writing, such as due process decisions, that, by their nature, preclude follow-up communication between the writer and the intended reader to assure mutual comprehension. In a good due process decision the hearing officer not only identifies the considerations that loomed large in her thinking, but also explains why. Getting the point across has special importance for the “Why?” question. In this regard it requires making assumptions about beliefs and attitudes of the intended readers – i.e. parents, school district staff, attorneys, and (possibly) reviewing courts – which, in turn, necessitate careful, nuanced judgments to strike an appropriate balance among considerations tending to pull in opposed directions.

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<sup>13</sup> The Illinois School Code allows parties to request clarification of a due process decision within five days after receiving it. A party, however, is not permitted, and a hearing officer is not authorized, to entertain “reconsideration of the decision itself.” 105 ILCS 5/14-8.02a(h) (2006) From 1997, when the Illinois School Code was revised to allow requests for clarification, to 2007, my last year as a due process hearing officer, I ruled with respect to every request for clarification I received that, in my judgment, the request actually sought reconsideration of the decision. In doing so, however, I also summarized concisely the prime factors, indicated in my opinion, upon which I had based the decision, noting that I provided such a summary “as a courtesy to the requesting party.” Such an approach, it seemed to me, was needed to foster the perception of fairness.

The eminent jurist Learned Hand wrote in a tribute to Justice Benjamin Cardozo that “at times to those of us who knew him the anguish which had preceded decision was apparent for again and again, like Jacob he had to wrestle with the angel all through the night.” (Hand, 1952) A large part of Justice Cardozo’s struggle undoubtedly concerned trying to find the right words to get his point across.

### **Guidelines and Ideal for Writing Quality:**

When reviewing a due process decision prior to issuing it a hearing officer should pay special attention to the following:

- avoidance of deficiencies in writing that make it difficult, in general for readers to understand written text: e.g. vagueness, ambiguity, awkward phrasing, repetitiousness, excessively complex syntax, or overly long sentences;
- rulings and orders in the most clear, precise, and straightforwardly understandable language possible for the benefit of the parties.
- Conclusions of law expressed in vocabulary accessible to non-lawyers, but in a way that avoids over-simplification; **On legal issues which the hearing officer believes could be the subject of an appeal by the losing party his highest priority is to assure full and fair consideration of the parties’ legal rights on appeal by expressing his legal conclusions in the clearest form possible for the benefit of the parties’ attorneys and the reviewing court.**
- Development of well organized presentation format reasonably calculated to facilitate overall understanding of the decision;
- Rigorous editing to eliminate irrelevant and/or extraneous text;

- Avoidance of *obiter dicta* – i.e. opinions expressed on issues of fact and law that the hearing officer need not address to decide the issues in the case before her.
- Avoidance of any words, explicit or implicit, of ridicule or personal condemnation;
- Thorough treatment of relevant matters, including topics and issues raised by the parties in presenting their respective cases.

**Ideal:**

**The highest ideal of writing quality, for which a hearing officer can strive, is to find the right words for *getting his or her point across*.**

## **Appendix**

### **Moral Grounding of the Relevant Justification Factors in Step One of the Two Step Procedure:**

The ten factors listed in Step one of the Two Step procedure developed in the section of this Guide to Critical Attributes of Good Due Process Decisions concerning conclusions If law are recognized as relevant by all qualified interpreters of the law for reaching a legal conclusion in a case. The question of what accounts for this widespread recognition, however, raises large and deep issues of jurisprudential philosophy. Treating them adequately would require an extensive, in-depth, analysis far beyond anything I'm capable of setting forth at this time. In my opinion, however the following consideration must play an important part in any adequate account.

By way of background, jurisprudential philosophy has two predominant approaches – Natural Law Theory and Legal Positivism – each of which concentrates upon a different idea as central to the concept of law. Natural Law Theory, expressed in its classic form by Saint Thomas Aquinas in his *Summa Theologia*, Questions 90 – 97 (1265-74), regards the central idea as justice. Aquinas, and other Natural Law theorists, identify justice with precepts of morality that are: (a) paramount in the sense of taking precedence over any other considerations when making a moral decision or judgment, and; (b) universal in the sense that every human being, with normally functioning cognitive capabilities is aware of, and understands, them. In contrast, Legal Positivism, exemplified paradigmatically by John Austin's *Lectures on Jurisprudence Determined*, Lectures I and VI (1832) considers the essential idea to be that of order. Specifically, the kind of order Legal Positivists consider essential to the concept of law is realized in a systematic and complete procedure, recognized within a given society as authoritative for settling a vast array, if not all, disputes within the society that concern human conduct.



Setting forth an adequate account of how the ideas of justice and order relate to one another in the concept of law is extremely difficult. Both Natural Law Theory and Legal Positivism have been developed rigorously and in great depth by diverse jurisprudential philosophers. The debate between the two schools of thought, in all likelihood, will continue for a long time. Nonetheless, I think it's safe to say that everyone, upon reflection, would recognize both justice and order as considerations central to the idea of a good judicial decision. *All ten relevant factors discussed in the section of this Guide to Good Due Process Decisions concerns either justice, or order, or both of these considerations.*

At a deeper level of analysis, here is the principal reason for the centrality of both justice and order to a good judicial decision. Legal systems can be analyzed from many different standpoints – e.g. sociology, political science, economics, psychology, history, etc. The purpose a legal system serves of providing formal procedures for settling moral disputes within a society, however, is morally fundamental for the following reason. This purpose alone justifies the rule ‘Obey the law’ as a basic moral rule. Here, in summary form, is the reasoning on this point set forth by Bernard Gert (2004, p. 137-39) that I consider persuasive.

Disputes over moral issues occur often, and, under Gert's account, their outcomes relate to matters concerning the most fundamental of human interests, the ones that in Michael Walzer's apt phrase, lie most “close to the bone” (1992, 6). For Gert these interests are, specifically, avoidance, or prevention, of harm, which Gert defines as: death, pain, disability, loss of freedom, and/or loss of pleasure (2005, 91). For this reason, society would break down if there were not a way to settle disputes over moral issues. Morality thus requires supplementation by a formal system - namely law. Law, unlike morality contains formal procedures for settling, at least temporarily, the myriad disputes that arise among moral agents in a society concerning moral questions. Law cannot serve its indispensable function of preventing social breakdown, over moral disputes, however, unless individuals in society act in accordance with its requirements. For this reason,

Gert argues that all rational impartial individuals would agree that the rule ‘Obey the law’ should be included in morality, considered as a public system applying to all rational persons.<sup>14</sup>

Gert’s account, summarized in the immediately preceding paragraph, of why ‘Obey the law’ is a basic moral rule helps one understand, with enhanced clarity, the principal reasons why both the Natural Law theory conception of justice and the Legal Positivist understanding of order are central to the idea of a good judicial decision. Apropos the Natural Law theory conception of justice, the process of interpreting a law in the judicial context presupposes that the law is morally justifiable, at least in the weak sense that rational disagreement, in good faith is possible concerning its moral justifiability.<sup>15</sup> In this regard, Gert’s account of why ‘Obey the law’ is a moral rule makes clear that the morally fundamental purpose of law is to provide formal procedures for settling disputes within society over moral issues. Accomplishing this purpose could not be served in a particular case by reliance upon a rule as the standard of judgment if no rational person, in good faith, considers the rule morally justifiable.

As for the Legal Positivist understanding of order, settling moral disputes in such a way as to prevent social breakdown requires that the legal system of a society have all three characteristics of order stressed by Legal Positivism. First its rules must be recognized as authoritative. Members of society must acknowledge a strong duty of obedience with respect to them. Second, the rules must be systematically coherent in the sense of seldom

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<sup>14</sup> Gert defines a public system as “a guide to conduct that has the following two features: (1) All persons to whom it applies, all those whose behavior is to be guided and judged by the system understand it, and know what kind of behavior the system prohibits, requires, discourages, encourages, and allows; (2) It is not irrational for any of these persons to accept being guided and judged by that system.” (2005, 11)

<sup>15</sup> On the distinction between “weak” and “strong” moral justification, see Gert (2004, 57) It should be noted also, in this connection that Gert defines morality as an “informal public system applying to all rational persons, governing conduct that affects others, and includes what are commonly known as the moral rules, ideals, and virtues, and has the lessening of harm, or evil, as its goal.” (2005, 14) The above definition incorporates the central elements of the conception of justice, as understood from the standpoint of natural law theory – i.e. (a) precedence over any other considerations when making a moral decision or judgment, and; (b) universality in the sense that every human being, with normally functioning cognitive capabilities is aware of, and understands, them.

conflicting with one another, and, in the event such a conflict is discovered, the system contains procedures for resolving it. Third the system must be complete in the sense of providing procedures adequate for settling any moral dispute that arises.

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### **Statutes and Regulations**

*Individuals with Disabilities Education Act* (IDEA)  
**20 U.S. C. sec. 1400 et. seq. (2004)** (United State Code)  
 12, 15  
*Assistance to States for the Education of Children with Disabilities*  
**34 C.F.R. sec. 300 et. seq. (2007)** (Code of Federal Regulations)  
*Children with Disabilities* **105 ILCS 5/14-8.02a(h)** (Illinois Compiled Statutes)

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