INDEPENDENT RESEARCH IN THE AGE OF GOOGLE, SMARTPHONES, AND VIRTUAL HOME ASSISTANTS

IDEA HEARING OFFICER TRAINING – NEW YORK STATE

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I. INTRODUCTION

A. In today's world, smartphones and tablets are common, and answers to most questions are one search away. Their ubiquitous presence not only makes information readily available but also retrievable within minutes whenever/wherever curiosity is piqued.

B. It is also not uncommon for judges, attorneys, and parties to have access to laptops, tablets, and smartphones during administrative hearings, allowing for real-time research of anything that can be "Googled," including answers to factual questions.

C. The sheer convenience of ready access, limitless information with the tap of a few keys / click of a mouse begs the question, "What is permissible internet research for today's judge?"

D. This outline discusses the ethical considerations a hearing officer should undertake when conducting internet research. A recent American Bar Association (ABA) Standing Committee on Ethics and Professional Responsibility (the "Committee") advisory opinion[1] on internet research by judges is instructive.[2] In short, the Committee advises that any "[i]ndependent investigation of adjudicative facts generally is prohibited unless the information is properly subject to judicial notice."[3]

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[1] *See* Formal Opinion 478 (Dec. 8, 2017).

[2] Reference to the ABA Model Code of Judicial Conduct (August 2010) ("Model Code") and the Committee's advisory opinion in this outline is not intended to suggest that either, in fact, is applicable to IDEA administrative law judges and hearing officers. Rather, their inclusion here is simply to provide a framework for the discussion.

[3] Formal Opinion 478 at 1.

II. EVIDENCE, GENERALLY

A. As a general matter, the technical rules of evidence do not apply in administrative hearings unless the enabling statute specifies otherwise.

B. The Individuals with Disabilities Education Act ("IDEA")[4] does not provide adequate guidance on the specific set of legal procedures, including evidentiary standards, that a hearing officer[5] must follow when conducting the hearing, suggesting that observance of the rules is not required. In fact, in the commentary to the regulations, the IDEA defers to commonly applied State evidentiary standards, such as whether the testimony is relevant, reliable, and based on sufficient facts and data.[6]

C. This said, under the IDEA, as hearing officers, we must possess the knowledge and ability to conduct hearings in accordance with appropriate, standard *legal* practice.[7] This requirement is sufficient to ensure that proper legal procedures are used, including as appropriate the use of the rules of evidence, even though we have the discretion to receive any relevant evidence that is offered consistent with the five-day disclosure requirement.[8]

D. It follows, therefore, that, like our legal system,[9] the IDEA recognizes the importance of an independent, fair and impartial due process hearing system.[10] The IDEA hearing officer is, therefore, expected to only consider evidence presented at the hearing and that had been made available to the

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[4] In 2004, Congress reauthorized the Individuals with Disabilities Education Act as the Individuals with Disabilities Education Improvement Act. *See* Pub. L. No. 108-446, 118 Stat. 2647 (Dec. 3, 2004), effective July 1, 2005. The amendments provide that the short title of the reauthorized and amended provisions remains the Individuals with Disabilities Education Act. *See* Pub. L. 108-446, § 101, 118 Stat. at 2647; 20 U.S.C. § 1400 (2006) ("This chapter may be cited as the 'Individuals with Disabilities Education Act.'").

[5] Because in the IDEA reference to a "hearing officer" is common nomenclature, this writer will use said term throughout this outline. No disrespect is intended towards those IDEA decisionmakers who are appointed to sit as administrative law judges.

[6] *See*, *e.g.*, *Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46691 (August 14, 2006).

[7] 34 C.F.R. § 300.511(c)(1)(B)(iii) (emphasis added).

[8] *See* 34 C.F.R. §§ 300.512(a)(3) and (b).

[9] The Preamble to the Model Code states, "An independent, fair and impartial judiciary is indispensable to our system of justice."

[10] For example, IDEA prohibits an employee of the State educational agency ("SEA") or the local educational agency ("LEA") involved in the education or care of the child, or a person having a personal or professional interest that conflicts with the person's objectivity in the hearing, from serving as a due process hearing officer. 20 U.S.C. § 1415(f)(3)(A)(i)(I) and (II).

parties during the course of the hearing.[11] Failure to only consider what is in the record undermines impartiality, compromises the integrity of the process, and erodes public confidence in the hearing system.[12]

III. *EX PARTE* COMMUNICATIONS

A. For the hearing process to be fair, the parties need to be given the opportunity to present evidence to a neutral decision-maker upon which the case will be decided. Should the decision-maker be permitted to independently investigate the facts through unauthorized contacts, the hearing process is undermined.[13]

B. An *ex parte* communication is any communication between a judge and a party of his/her attorney concerning a pending or impending matter that is outside the presence/awareness of the opposing party and/or his/her attorney.[14]

C. Just like any other individual authorized to perform judicial functions, a hearing officer must/should not initiate, permit, or consider *ex parte* communications, or consider other communications made to the hearing officer outside the presence/awareness of the parties or their representatives concerning a pending or impending matter.[15]

D. Communication for scheduling, administrative, or emergency purposes is permissible, provided (i) the hearing officer reasonably believes that no party, or their representative, will gain a procedural, substantive, or tactical advantage; and (ii) the hearing officer promptly notifies the other party of the communication and allows said party the opportunity to respond.[16]

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[11] *See* Model Code, Rule 2.9(C). *See also* 34 C.F.R. § 300.511(c)(1)(B)(iii) (requiring that the hearing officer "possess the knowledge and ability to conduct hearings in accordance with appropriate, standard legal practice….").

[12] *See* Model Code, Rule 1.2.

[13] *See*, *e.g.*, *Murphy v. Commonwealth of Pennsylvania, Dep't of Educ.*, 554 IDELR 527 (Pa. Cmwlth. 1983) (finding that the hearing officer's *ex parte* telephone conversation with the director of a private residential school prior to rendering his decision in a pending hearing violated the parents' due process rights).

[14] *See* Model Code, Rule 2.9 (A).

[15] *See*, *e.g.*, *id.* For an example on how an alleged *ex parte* conversation, in retrospect, should have been avoided because it created an issue for appeal, *see Falmouth Sch. Comm. v. B.*, 106 F. Supp. 2d 69, 32 IDELR 256 (D. Me. 2000).

[16] *See*, *e.g.*, Model Code, Rule 2.9 (A)(1). *But see Bd. of Educ. of the Williamsville Cent. Sch. Dist.*, 46 IDELR 294 (SEA NY 2006) (where the unrepresented parent sought recusal of the hearing officer for bias and prejudice because the hearing officer

E. The prohibition against *ex parte* communications, therefore, ensures that the opposing party to a matter is given an opportunity to respond to what is presented to the hearing officer and that the hearing officer decides each case based solely on the record that is before him/her.

IV. INDEPENDENT RESEARCH

A. An *ex parte* communication is broadly defined to include independent research of facts concerning a pending or impending matter.[17] Specifically, the Model Code provides:

> A judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed.[18]

B. The prohibition against independent research of facts extends to information that is available through a variety of sources, whether electronic or not, including the internet.[19] Interaction with written or digital research materials is, therefore, considered a communication outside the presence/awareness of the parties and their lawyers.[20]

C. Legal research, however, is permissible. The restriction against independent research is limited to "facts." Judges, therefore, continue to have the discretion to conduct independent legal research beyond what is cited to or provided by the parties.[21]

D. Information obtained from past knowledge or experience is not considered research.[22] A judge may also educate him/herself through reading law journals or the like, attending continuing legal education programs, and/or general reading. This, too, is generally not considered research.[23]

E. Only independent research of facts of consequence concerning the pending or impending matter is, therefore, improper except in limited circumstances.

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telephoned her on one occasion at 8:20 p.m. after failed attempts to contact her earlier in the day).

[17] *See* Model Code, Rule 2.9(C).

[18] *Id.*

[19] *See* Model Code, Rule 2.9(C), Comment 6.

[20] *Id. See also* Elizabeth G. Thornburg, *The Curious Appellate Judge: Ethical Limits on Independent Research*, 28 REV. LITIG. 131, 147 (2008) ("Thornburg").

[21] *See* Formal Opinion at 3, *citing*, Charles G. Geyh, James J. Alfini, Steven Lubet & Jeffrey M. Shaman, Judicial Conduct and Ethics, § 5.04 at 5-25 (5th ed. 2013).

[22] Thornburg at 144.

[23] *Id.*

F. The prohibition against independent research of facts extends as well to those who work for the judge (e.g. law clerk).[24] As such, any employee(s) or support staff of the judge must be held to Rule 2.9(C).[25]

V. ADJUDICATIVE VERSUS LEGISLATIVE FACTS

A. The distinction between permissible and impermissible independent research turns on whether the facts included in the information being researched are classified as adjudicative versus legislative.[26] Said distinction lacks clarity – it may be "improper to do independent research for information to be used in certain ways" but "proper for the same information to be used in other ways."[27] More specifically,

> [t]he problems with the distinctions that the rules try to apply—between basic everyday facts, case-specific adjudicative facts, and legislative facts—are far more fundamental. Because they assume that there is a meaningful and clear difference between fact, on the one hand, and law, on the other, they will never be truly workable no matter how hard codes and cases try to be clear about the situation at hand. As in other areas of the law in which courts distinguish between "law" and "fact," the line between adjudicative facts and legislative facts is an artificial one, based on policy considerations rather than observable reality.[28]

B. Nonetheless, generally, adjudicative facts are the facts of the particular case concerning the immediate parties (e.g., who, what, where, when, and how).[29] Adjudicative facts can only be proven during the course of a trial/hearing through the introduction of evidence and any independent research by the judge of same is strictly prohibited unless such facts meet the reliability requirements of judicial notice and the parties are given an opportunity to be heard.[30]

C. Legislative facts do not pertain to the immediate parties. Rather, legislative facts are "general facts which help the tribunal decide questions of law and policy and discretion."[31] And, unlike adjudicative facts, a judge

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[24] *See* Model Code, Rule 2.9(D)

[25] *Id.* ("A judge shall make reasonable efforts, including providing appropriate supervision, to ensure that this Rule is not violated by court staff, court officials, and other subject to the judge's direction and control.").

[26] *See* Fed. R. Evid. 201, Advisory Committee Notes; Thornburg at 149.

[27] Thornburg at 149.

[28] *Id.* at 174.

[29] *See* Fed. R. Evid. 201, Advisory Committee Notes; Thornburg at 149 – 150.

[30] Thornburg at 150.

[31] Formal Opinion at 5. An example of permissible legal research where the court relied on what it deemed legislative facts to determine the underlying issue can be found

can investigate legislative facts on his/her own without notice to the parties.[32]

VI. JUDICIAL NOTICE

A. As noted above, Rule 2.9(C) allows judges to consider facts "that may properly be judicially noticed...."[33]

B. Judicial notice occurs when the decision-maker takes note of a fact that is not subject to reasonable dispute because it is a matter of common knowledge (e.g., geographic locations, periods of time, historical events) or that can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned (e.g., location of streets, distances, calendar dates).[34] If notice is taken, the notice fact is conclusive and the party with the responsibility to prove such fact is relieved of having to prove such fact.[35]

C. Facts that are known only by personal observation of the decision-maker should not be judicially noticed.[36]

D. Only "adjudicative facts" are governed by Fed. R. Evid. 201.[37] The rule does not address "legislative facts."[38]

E. A party would be entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed.[39] The opportunity to be heard is upon request and such request can be made in advance of the judge actually taking the judicial notice (provided the party has notice of the contemplated notice) or after the notice has been taken.[40]

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in *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). In *Brown*, the Court relied on numerous, "modern authority" articles discussing the psychological effects of racial discrimination to distinguish psychological knowledge at the time of *Plessy v. Ferguson* (163 U.S. 537 (1896)). *See Brown*, 347 U.S. at 494, n.11.

[32] Thornburg at 153.

[33] Model Code, Rule 2.9(C).

[34] *See* Fed. R. Evid. 201(b).

[35] *See* Fed. R. Evid. 201(f). *See also* Thornburg at 157.

[36] *Town of Nantucket v. Beinecke*, 379 Mass. 345, 352 (1979).

[37] Fed. R. Evid. 201(a).

[38] *Id.*

[39] Fed. R. Evid. 201(e).

[40] *See id.* *See also* Fed. R. Evid. 201(e), Advisory Committee Notes.

VII. CONSIDERATIONS

A. Formal Opinion 478 warns against a judge conducting independent research to gather adjudicative facts from the internet unless the information is subject to proper judicial notice.[41] It further advocates for the parties or their attorneys to be afforded the opportunity to, in the first instance, provide the information to the judge before the judge does his/her own independent research.[42]

B. Given the blurred distinction between adjudicative and legislative facts, avoiding independent research has its advantages for various reasons.

1. It promotes a party-driven process,[43] which places the burden squarely on the parties to provide all of the information that the hearing officer requires and subjects it to the adversarial process.

2. It maintains the hearing officer's actual and apparent neutrality.[44]

3. It safeguards against "undisclosed biasing influences."[45] In conducting independent research, the hearing officer risks coming into contact with information whose reliability may be questioned or disputed (think Wikipedia[46]) and is not subject to the adversarial process.[47] Once seen, it cannot be un-seen, and can impact the hearing officer's views of the issues in the hearing.[48]

4. It eliminates the risk of the hearing officer seeking to corroborate subconscious beliefs by "gravita[ting] toward[s] sources that confirm the [hearing officer's] pre-existing biases because those sources will seem more believable."[49]

5. It avoids reliance on "technical" information uncovered during research that can be easily misunderstood.[50] There is considerable

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[41] Formal Opinion 478 at 11.
[42] *Id.*
[43] *See* Thornburg at 185.
[44] *Id.*
[45] Thornburg at 184.
[46] Wikipedia is an online encyclopedia which permits anonymous and collaborative editing. "Citing Wikipedia is as controversial as it is common." Jeffrey Bellin & Andrew Guthrie Ferguson, *Trial by Google: Judicial Notice in the Information Age*, 108 NW. U. L. REV. 1137 (2014) *citing Fire Ins. Exch. v. Oltmanns*, 285 P.3d 802, 807 (Utah Ct. App. 2012) (Voros, J., concurring).
[47] *See* Thornburg at 184.
[48] *Id.*
[49] Thornburg at 184.
[50] *See id* at 185.

support for the proposition that judges cannot properly evaluate "technical" information on their own "however intelligent and well-schooled in law"[51] the judge may be.

6. It promotes transparency because the hearing officer's decision would be solely limited to the record created by the parties.[52]

C. Nonetheless, despite these apparent advantages, avoiding research altogether is neither practical nor sensible. Parties to IDEA hearings are not on equal footing.[53] The disparity in resources can skew the presentation of evidence depriving the hearing officer of valuable information. Some research, therefore, may be necessary.

D. A middle ground may be the most appropriate, provided adequate precautions are taken, including –

1. mitigating against an incomplete record by adopting best practices to develop the hearing record.[54]

2. disclosing to the parties any independent research deemed necessary, even if the research was limited to legislative facts. "[L]egislative facts can be as outcome-determinative as adjudicative ones…."[55]

3. affording the parties an opportunity to challenge the information uncovered during the research prior to adopting any findings based

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[51] *Id.* at 185 – 186.

[52] *See id.* at 184.

[53] *See Schaffer v. Weast*, 546 U.S. 49, IDELR 150 (2005) (recognizing that "[s]chool districts have a 'natural advantage' in information and expertise…"). *See also Arlington Central Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 45 IDELR 267 (2006) (holding expert witness fees are not recoverable costs under the IDEA). And, despite IDEA including safeguards to help place parents on equal footing with school districts, parents continue to face challenges with securing representation in hearings. For example, though IDEA provides that parents must be notified of any free or low cost legal services (34 C.F.R. § 300.307(b)), in reality such services are either non-existent or the agencies providing them are overwhelmed by the demand. Second, since 1986 IDEA has provided that parents may be reimbursed for attorneys' fees if found to be a prevailing party. *See* 34 C.F.R. § 300.517. But, many attorneys require a substantial retainer to mitigate their risk and most parents just cannot afford it.

[54] For a discussion on best practices in developing the hearing record, *see Developing the Hearing Record: When and How*, attached.

[55] Thornburg at 194.

on said research.[56]

4. permitting the parties to supplement the record, as necessary and appropriate, to address any new information resulting from the research that the hearing officer seeks to consider in making his/her findings.

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[56] Given IDEA's abbreviated timeline, it may not be feasible for the hearing officer to provide the parties with an opportunity to respond to his/her independent research. This said, the lack of time is not a license to research with impunity. Though an extension of time (*see* 34 C.F.R. § 300.515(c)) may cure the potential prejudice to the parties, an extension is only permissible if requested by a party and granted for good cause. *See id.* These considerations mitigate against the hearing officer conducting independent research after the record has been submitted.