

HYPOTHETICALS

1. ALJ Wendell Holmes was assigned to a due process hearing. ALJ Holmes was quite familiar with the bar both on the school district and parent's side. However, in this last assignment, the parent was being represented by an attorney who was unfamiliar to ALJ Holmes. Though the complaint left a lot to be desired, ALJ Holmes did not put too much thought into it until he found himself in what he described as a "tortured prehearing conference." The attorney evidenced a poor understanding of the IDEA. As soon as he concluded the call, he was plugging the parent's attorney's name into Google. As he scrolled through the results, he learned that the attorney had practice in a neighboring state but had been disciplined for failure to provide competent or responsible representation to his clients. The attorney maintained his license.

Permissible research? Does ALJ Holmes have any responsibility to disclose what he learned to the parties?

2. While writing his decision on a tuition reimbursement case, Hearing Officer Louis Brandeis' curiosity got the best of him and he visited the school website and quickly "flipped" through its pages. He marveled at the beautiful architecture of the school buildings and then return to writing his decision. Any concerns?

What if he visited the website to confirm what he had gleaned from the record regarding the general program? Satisfied that his notes were consistent with what he learned from the website, he wrote his decision and published it.

What if neither party during the course of the hearing raised a concern about what disability category the school served but, while satisfying his curiosity, Hearing Officer Brandeis learns that the school serves only students with autism spectrum disorders (ASD). The student who is the subject of the hearing is learning disabled and the parties stipulated that the student's disability category is not in dispute. Hearing Officer Brandeis denies reimbursement because the school would not be appropriate for the student as it only serves students with ASD. Proper?

3. Hearing Officer William Brennan presided over a hearing in which the parent sought, through her attorney, that the school district be required to directly fund a private placement for her child. The parent sought direct funding because she claimed, through her attorney, that she is unable to pay the private school's tuition as she is financially strapped for cash. The student remains in the public school.

Hearing Officer Brennan drafted a decision in favor of the parent, which included an order for the school district to pay the tuition directly to the private school. However, as he reviewed the decision and riffled through the record to confirm a finding of fact, he came across an email from the parent to the school district which was sent from the parent's work email account. The parent's work email

account made clear that she worked for the most prestigious law firm in the city. Curious, Hearing Officer Brennan Googled the firm and learned that the parent is the managing partner of the firm's mergers and acquisition division and has a long list of wins under her belt. Feeling duped, Hearing Officer Brennan changes his order to say that the school district is to reimburse the parent for tuition costs upon submission of adequate proof of payment by the parent to the private school.

4. Hearing Officer Thurgood Marshall lives in a small town. His children no longer attend the local schools and have not done so in years. As a result, Hearing Officer Marshall has no problem taking cases involving his local school district. In one such case, the parent sued the school district seeking a costly program for his severely disabled child. At hearing, the school district argued that the program was too restrictive and that it could meet the student's needs in town. The parent argued that the student's IEP was predetermined because the school district is facing budgetary constraints and the town is not willing to raise taxes to cover the costs, leaving the school district high and dry. The parent offered his own testimony recounting what the school district's Director of Special Education said during the IEP meeting, to wit: "You know we are having a hard time paying our bills, work with me and I promise you we'll do our best with what we have to offer." Hearing Officer Marshall's impression of the parent is that he is generally credible but that this aspect of the testimony seems flimsy because of lack of corroboration.

One Sunday morning, while the case is still pending, Hearing Officer Marshall comes across an article in the town's local newspaper, which he reads online. The article confirms that the school district is facing financial difficulties and that its Board of Education voted to cut programs in order to "stay within budget and be able to pay for potential special education liabilities that are looming." Does Hearing Officer Marshall have an obligation to disclose that he read the article, which corroborates the parent's testimony?

5. ALJ Wendell Holmes is the life of the party. He gets invited to many parties. At one cocktail party, he meets an expert on ASD and they hit it off over drinks given their work in special education. As the evening progresses, ALJ Holmes strikes up a conversation regarding an issue that is pending before him in a hearing. He does not share any specific facts with the expert but seeks to better understand the various methodologies at issue in the hearing. Is this an *ex parte* communication? What if the expert just refers ALJ Holmes to an online academic article he wrote on ASD methodologies? Any concerns?
6. Hearing Officer Louis Brandeis is struggling with his decision and calls the State Education Department's hearing officer technical assistance (TA) provider, who is not an employee of the Department. In reviewing the facts with the TA provider, he learns from the TA provider that an "asserted fact" is actually inaccurate. However, it was not contested at the hearing. As asserted, the fact is outcome determinative. What options does Hearing Officer Brandeis have at this

point?

7. ALJ Thurgood Marshall is struggling to come up with a compensatory education plan. Frustrated, he dials his good friend, the special education director of a school district in another state and seeks guidance. The friend asks for the facts in the case, which ALJ Marshall provides. The friend comes up with what ALJ Marshall considers a sensible plan based on the record that is before him and orders it. Any concerns?
8. ALJ William Brennan is conducting research on SpecialEd Connection. In his case, the parent is seeking reimbursement for dolphin therapy her child received. ALJ Brennan was persuaded by the highly respectable experts the parent offered in support of her claim and he plans on finding for the parent. However, while reviewing case law on the reimbursement standard, he came across an IHO decision from a colleague he has known for many years from attending the ALJ/IHO Academy. The colleague is a highly respected ALJ who frequently speaks at the Academy. The colleague decided that dolphin therapy is not worth a can of sardine and methodically debunks the science behind it. It is the same science that the parent's experts offered at hearing. Convinced that he was duped, he writes a decision denying reimbursement. Permissible?

What if the decision is from a federal district court in ALJ Brennan's jurisdiction?

9. In a transportation dispute, before Hearing Officer Wendell Holmes closes the record, the parties agree to allow him to "Google the distance and time it takes for the student to arrive to school in another town from his home." While working on his findings of facts, Hearing Officer Holmes uses his iPhone to determine the distance and time. He uses the iPhone's Map app rather than Google Maps. The distance and time are different to what he would have found on Google Maps. This has now become an issue on appeal.
10. ALJ Louis Brandeis is presiding over a hearing in which each side has retained highly respected experts. The parent's expert has offered testimony that the specific methodology sought by the parent would result in "significant gains for the student that will never be seen in the school district's preferred method." The expert cites to empirical studies and provides ALJ Brandeis with citations to them.

That night, ALJ Brandeis finds the studies online and reads them to confirm the testimony. Permissible?

What if ALJ Brandeis learned of the studies prior to the testimony and reviewed them ahead of the testimony to be able to follow along and ask informed questions of the experts?

What if, in searching for the cited studies, ALJ Brandeis finds other studies not cited by the expert which contradict the findings in the cited studies, leading ALJ

Brandeis to doubt the appropriateness of the proposed methodology?

11. ALJ Thurgood Marshall has access to research staff. He is struggling with a thorny fact dependent legal standard. He asks one of the research assistants to help him find relevant case law. What other instructions, if any, must ALJ Marshall give the research assistant?
12. Hearing Officer William Brennan is attempting to schedule hearing dates. The attorney for the school district represents that his schedule is quite full and finding mutually convenient dates is becoming very difficult. With some nudging, the attorney agrees to some mutual dates. A few days later, however, the attorney contacts Hearing Officer Brennan and opposing counsel and informs them that he has a big federal court trial before Judge Louis Brandeis that his assistant did not put into his calendar prior to agreeing to the hearing dates. Suspect, Hearing Officer Brennan looks at Judge Brandeis's trial calendar that is posted on the court's website. He learns that Judge Brandeis does not have any trials with the attorney for the dates the attorney represented he would be on trial. Hearing Officer Brennan is considering sanctioning the attorney. Any issues with Hearing Officer Brennan relying on the court calendar as a basis to finding that the attorney committed sanctionable misconduct?
13. The complaint before ALJ Thurgood Marshall involves the appeal of a manifestation determination. Given many of IDEA's timelines in disciplinary hearings are expressed in "school days," ALJ Marshall, in preparation for the prehearing conference (PHC), goes online to check the school district's calendar. During the PHC, ALJ Marshall, without comment, uses the school district calendar he found online to manage and schedule events in the hearing process. Permissible?