Bureau of Special Education Appeals

REFERENCE MANUAL

A Resource for Parents and School Representatives
Who Appear Before the BSEA

November 2009

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I. PURPOSE AND SUMMARY

This Reference Manual has been written to help laypersons understand and access the Bureau of Special Education Appeals (BSEA) dispute resolution processes. The Manual may also be useful for advocates and attorneys who have not practiced before the BSEA.[*]

The BSEA has two dispute resolution processes—mediation and due process hearings. Mediation is easily accessed without an attorney or advocate. Due process hearings are more complex and formal, and they are governed by detailed hearing rules. However, with the assistance of this Manual and by asking the BSEA staff your questions, you should be able to participate fully in a BSEA due process hearing.

This Manual explains the BSEA dispute resolution processes, but it does not discuss the *substantive* law that provides a student's right to special education services and a school district's responsibility to provide those services. Substantive special education law is important because any decision by a BSEA Hearing Officer after a due process hearing will be made in accordance with these legal standards. A resolution through mediation may also be guided by these legal standards. In addition, this Manual does not offer legal advice, nor can any member of the BSEA give you legal advice on the merits of your case. For these reasons, this Manual should not be seen as a substitute for legal counsel or legal representation.

What follows in this section of the Manual is a summary of BSEA mediation and due process hearing proceedings. The remainder of the Manual will elaborate on what is described in the summary. At the end of the Manual, there is a Glossary to define the technical terms used in this Manual, and there is also an Index to help you find information regarding a particular topic.

If you read nothing else, read the summary below

Mediation: Mediation is an informal, voluntary, and confidential alternative for dispute resolution. In order for mediation to occur, both parties must agree to participate in the process. The BSEA Mediators are neutral and experienced third parties who facilitate negotiation between the parties. The Mediator makes no decisions or judgments regarding the dispute. Rather, the parties have an opportunity to craft their own agreement, with the help of the Mediator.

You can request mediation at any time by calling the BSEA at 781-338-6400. It is not necessary to participate in mediation prior to or as a prerequisite to having a due process hearing. Mediations are generally held within the school district of the student. Mediation does not usually involve attorneys.

Mediations have been successful in a very high percentage of disputes that have come to the BSEA. If mediation results in an agreement, the agreement can be written and signed at the mediation session and then becomes binding on the parties. In those cases that cannot be settled through mediation, a due process hearing may be necessary to resolve the dispute.

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[*] The BSEA notes, with appreciation, the assistance of Legal Intern Tami Fay in the preparation of this Manual.

For more information about mediation and the difference between mediation and due process hearings, see parts II and III of this Manual (pages 6-13).

Hearing Request: In order to have a due process hearing at the BSEA, you must first file a written Hearing Request. You may download the Hearing Request form from the BSEA website, http://www.doe.mass.edu/bsea/. The form requires you to describe the disputed issues regarding the student's special education services. You must also specify the "remedy" you are seeking—that is, what resolution you would like the BSEA to provide. Note: you must clearly and completely describe the issues that are in dispute and your proposed remedy.

To file a Hearing Request, it must be submitted to both the BSEA and the opposing party *at the same time.* Within five business days of receiving the Hearing Request, the BSEA will process it and issue you a Notice of Hearing, which includes the name of your assigned Hearing Officer, the time and date of any initial conference call with the Hearing Officer, the date and location of your hearing, and important information on other procedural deadlines.

For more information about filing a Hearing Request, see part IV of this Manual (pages 13-20).

Resolution Session: Within 15 calendar days of a parent's filing a Hearing Request, the parties must meet for a Resolution Session, unless both parties have agreed to mediation instead or have agreed to waive the Resolution Session.

The school district has the responsibility to convene the Resolution Session. Resolution Sessions include the parents, relevant IEP Team members, and a representative of the school district who has authority to make binding decisions. These people meet to address the specific complaints described in the Hearing Request. An attorney for the school district may participate only if the parents have their own attorney present. If a parent refuses or neglects to participate in a resolution session, the due process hearing may be delayed.

If the parties reach an agreement at the resolution session, each party has a three-day grace period in which to back out of the agreement. If the agreement stands, you should send a letter to your Hearing Officer withdrawing the Hearing Request so that the BSEA can close your case. If the parties are unable to come to agreement, then the BSEA hearing schedule proceeds, usually first with a conference call with the Hearing Officer and both parties.

For more information about Resolution Sessions, see part V of this Manual (pages 20-22).

19-Day Conference Call: When the BSEA receives a Hearing Request from a parent or student, a conference call between both parties and the assigned Hearing Officer is automatically scheduled for 19 days later. The 19-day call is important because it marks the point at which the BSEA Hearing Officer first becomes involved with the parties.

During the conference call, the Hearing Officer will have an informal discussion with the parties about their dispute. The Hearing Officer will likely ask what steps have been taken to try to resolve the dispute informally. You may request that a pre-hearing conference be scheduled and may discuss any request to postpone the hearing date. If you have questions about how to proceed in preparing for hearing or if you are unclear regarding the expectations of the Hearing

Officer, the conference call is an excellent opportunity to ask the Hearing Officer for more information or clarification. For more information about conference calls with the Hearing Officer, see part VI of this Manual (pages 22-23).

Pre-Hearing Conference: At any time, you may request a pre-hearing conference with your Hearing Officer and opposing party—for example, you can request this during a conference call with your Hearing Officer. The pre-hearing conference, which can occur any time before your hearing date, provides an opportunity for the parties to meet with the Hearing Officer and informally discuss the dispute. The principal purposes of a pre-hearing conference are to clarify the issues in dispute and to review the possibility of settling the case without the necessity of a due process hearing.

Additionally, the pre-hearing conference may be used to resolve discovery disputes, work out the schedule for days of hearing, review potential witnesses and exhibits, and discuss other preliminary matters. The pre-hearing conference also is an excellent opportunity for a parent or school representative to ask questions about the due process hearing and the expectations of the Hearing Officer. What is said during the pre-hearing conference will not be considered when the Hearing Officer writes his or her Decision. For more information about a pre-hearing conference, see part VII of this Manual (pages 23-26).

Preparation for Hearing: If the resolution session, mediation, pre-hearing conference, or your own negotiations do not resolve the dispute, the parties will need to prepare for a formal evidentiary hearing before the Hearing Officer. Preparation includes formal and informal discovery, assembling your exhibits, deciding on your witnesses, and making any preliminary requests (or motions) to the Hearing Officer.

- Discovery: Discovery refers to the process of opposing parties sharing information prior to hearing. Each party has the right to obtain documents that may be relevant to the dispute and to ask questions in writing ("interrogatories") of the other party. If you wish to call an unwilling witness (or one who requires documentation to miss work), you may request a "subpoena" from the Hearing Officer, which is an order compelling the witness to testify. For more information about discovery, see part XIII of this Manual (pages 32-34).

- Exhibits and witnesses: You have the responsibility to provide a copy of your "exhibits" (documents that you intend to use as evidence) and a list of your proposed witnesses to both the opposing party and the Hearing Officer at least five business days before the hearing. You may also request that a distant or unavailable witness give testimony via telephone or that a court stenographer or translator be present at the hearing. For more information about exhibits and witnesses, see part XIV of this Manual (pages 35-39).

- Motions and postponements: Prior to the due process hearing, you may need to make requests to the Hearing Officer, sometimes referred to as "motions." This may include, for example, a postponement request, a request to add a party to the dispute, a request to amend the Hearing Request, or a request to change the location of the hearing. At the same time that you send a motion (or any other written information) to the Hearing Officer, you must also send a copy to the opposing party.

You must respond to any motions or requests filed by the other party. Failure to respond in a timely manner may result in the Hearing Officer granting (or allowing) the motion or request simply because it is uncontested. You have seven calendar days to respond unless the Hearing Officer sets a different timeframe for response. For more information about motions and postponements, see parts VIII and IX of this Manual (pages 26-29).

Due Process Hearing: If the dispute has not been resolved informally, parties meet for a formal evidentiary hearing. The hearing includes the following steps in the following order:

- Once the parties have arrived, the Hearing Officer explains the day's schedule, responds to any questions or concerns of the parties, rules on any outstanding motions, and makes a preliminary statement.
- The Hearing Officer formally enters the exhibits into evidence after considering any objections of the parties.
- Each party is permitted to make an opening statement, briefly explaining the main arguments of his or her case.
- The party who filed the Hearing Request presents his or her witnesses first. The Hearing Officer administers an oath that the witness swears that his or her testimony will be the truth. After questions from the party who called the witness, the other party has an opportunity to ask the witness questions, and the Hearing Officer may ask questions.
- After the party who filed the Hearing Request finishes with all of his or her witnesses, the other party calls its witnesses.
- If a parent wishes to testify on his or her own behalf, s/he may do so. If the parent testifies, s/he will be required to respond to questions from the other party, as well as questions from the Hearing Officer.
- After the testimony of the final witness, there will be an opportunity for closing arguments, which can be oral or written.
- The Hearing Officer issues a written Decision resolving the dispute.

For more information about due process hearings, see part XV of this Manual (pages 40-48).

Settlement Conference: The BSEA Assistant Director (or, occasionally, a BSEA Hearing Officer) sits down with both parties, separately and together, to facilitate negotiation of a comprehensive settlement of the dispute in lieu of going to hearing. Settlement conferences are only available in cases where a Hearing Request has been filed and both parties are represented by attorneys. For more information about a settlement conference, see part X of this Manual (pages 29-30).

SpedEx: This is another resource to assist with informal resolution of disputes. After a Hearing Request has been filed, the parties can jointly request that the BSEA assist them in selecting a consultant who will conduct a thorough review of the case and write a report stating whether the school district has proposed appropriate services and placement. The consultant's fee is paid by the Massachusetts Department of Elementary and Secondary Education. For more information about SpedEx, see part XII of this Manual (pages 31-32).

Costs: All BSEA proceedings (including mediations and due process hearings) are available at no cost to the parties. There are no filing or processing costs. However, you may incur your own costs, including the costs of copying and delivering a substantial number of documents to both the BSEA and the opposing party if you proceed to a due process hearing. You may also incur costs for the time of an expert whom you call to testify at the hearing.

Appeal: Once a Hearing Officer has issued a decision on the merits of the dispute, it is a final agency decision that cannot be re-considered by the BSEA. A party may appeal the decision by filing a complaint in a Massachusetts Superior Court or a federal District Court within 90 calendar days of the date of the Hearing Officer's decision. For more information about an appeal and other post-hearing issues, see part XVI of this Manual (pages 48-49).

Accommodations: If anyone needs an accommodation to a disability in order to access and fully participate in any of the BSEA's dispute resolution processes, please advise the BSEA as soon as possible, and explain the accommodation needed as well as the reason for needing the accommodation. You may call the BSEA at (781) 338-6400.

Additional Resources: The BSEA's website (http://www.doe.mass.edu/bsea/) provides forms, links to special education laws and regulations, and full descriptions of the procedures for due process hearings and mediations.

Note: the BSEA has formal **Hearing Rules** for its due process hearings, and these rules can be accessed on the BSEA's website: http://www.doe.mass.edu/bsea/forms/hearing_rules.pdf This Manual explains many of these rules in layperson language and how the rules might apply to your dispute. But, you should also consult the Hearing Rules yourself.

For more information about obtaining assistance, as well as finding special education laws and regulations, see parts XVII and XVIII of this Manual (pages 49-51).

II. MEDIATION

Topics discussed in this section:

- Introduction to mediation
- Success rate of mediation
- When to request mediation
- Role of the Mediator
- Requesting and scheduling mediation
- When other party is unwilling to mediate
- Confidentiality of mediation discussions
- Preparation for mediation
- What happens at mediation
- Binding effect of mediation agreement
- Failure to comply with mediation agreement

What is mediation?

Mediation offers an easily-accessible, user-friendly, relatively quick, and informal process to resolve disputes. Mediation can be highly successful in resolving special education disputes. Mediation is easily used without an attorney or advocate, and can be requested at any time by telephone.

How often is mediation successful?

In fiscal year 2009, the eight BSEA Mediators conducted 846 mediations, and approximately 84% resulted in written agreements between the parties.

When is it appropriate to request mediation?

You can request Mediation at any time. You may request it before, at the same time as, or after you file a Hearing Request. Some parties choose to mediate in place of the Resolution Session that is scheduled after a parent files a Hearing Request. (For more information about a Resolution Session, see part V of this Manual.)

What is the role of the Mediator? How does s/he help?

The Mediator is a neutral party—that is, the Mediator does not represent or advocate the interests of either side of the dispute. The Mediator does not make any decisions or judgments regarding the merits of the dispute.

The Mediator's role is to be a resource to <u>both</u> parties by helping them to

- understand each other's perspectives more fully,
- maintain calm, courteous, and on-topic conversations,
- consider and develop possible solutions to the dispute, and
- reach a final resolution that they are both comfortable with.

How do I request mediation?

You can request mediation at any time by calling the BSEA at (781) 338-6400. Tell the BSEA staff member on the phone that you would like to schedule mediation and the name of the school district. The BSEA staff member will provide the name and telephone number of the Mediator assigned to your region.

You then initiate the process by calling the Mediator directly. If you prefer that a different Mediator (other than the one assigned to your region) be randomly assigned to handle your case, you may contact the BSEA Coordinator of Mediation at (781) 338-6443.

Do I have to know beforehand that the other party is willing to mediate?

No. Your assigned Mediator will contact the other party and will find out whether the other party is willing to participate in mediation.

How is mediation scheduled?

Once you have contacted the Mediator and if the other party is willing to mediate, the Mediator will schedule mediation at the earliest date that is convenient to the parties and the Mediator. Mediation is usually scheduled within 30 calendar days of the parties agreeing to mediate.

What if the other party is unwilling to mediate?

If the other party is unwilling to mediate, mediation cannot occur because it is voluntary. But, the Mediator can discuss other options with you.

Will the mediation affect a later hearing?

If a Hearing Request has already been filed with the BSEA, mediation may (but will not always) result in a temporary postponement of the due process hearing while the mediation is occurring. If mediation does not resolve the dispute, you can always proceed to a due process hearing.

Are discussions during mediation confidential?

All mediation discussions are strictly confidential. Nothing that is said or proposed at the mediation can be submitted as evidence at a hearing. The Mediator will not have any communication with the Hearing Officer regarding your case, other than to explain to the Hearing Officer whether mediation resolved the dispute.

However, if an agreement is reached and the dispute later proceeds to hearing, the written mediation agreement becomes part of the student's records and can be shared with the Hearing Officer.

How should I prepare for mediation?

The Mediator may begin the mediation session by asking: "what brings you here and what result would you like to see come out of mediation?"

BSEA Mediators have composed the following list of tips to help parties come to mediation in the most productive frame of mind:

- Be prepared to explain to the Mediator and the other party what issues you would like to address during mediation.

- Make an outline of your viewpoint of the dispute: What's involved? What do you agree/disagree with?
- Decide what you optimally want for the student, but also what you would be willing to accept.
- Think about short- and long-term solutions.
- Remember that mediation requires a give-and-take of ideas and offers before an agreement is reached. Mediation can be creative, spontaneous, and dynamic.
- Always keep the focus on the student's current and future needs. The goal of mediation is to collaborate about the future rather than to make accusations about the past.

Although not required, you may wish to consult an attorney, advocate, or other advisor in preparation for the mediation. You may bring anyone to the mediation to help represent your interests, and you should always tell the Mediator, in advance, if you will be bringing an attorney. As a general rule, parties participate in mediation without attorneys.

What will happen at mediation?

Mediators have differing styles, and the mediation session often responds to the needs of the parties. However, you can expect the mediation to proceed through the following three general stages:

<u>Stage 1: Preliminaries</u>

→ The Mediator will have both parties sign an "Agreement to Mediate Form" which outlines the confidentiality requirement.
→ The Mediator will go over ground rules for how the mediation is to proceed.
→The Mediator will ensure both parties understand that the Mediator's role is to listen, question, and facilitate discussions aimed at reaching an agreement.
→ The Mediator's introductory remarks will make it clear that while information from the past can be helpful, the focus of the discussion should be on the student's current and future needs in order to resolve the dispute.

<u>Stage 2: Discussion</u>

→ The majority of the mediation will be spent summarizing, clarifying, and exploring alternatives. Each party will have plenty of time to speak and express his or her point of view, but the Mediator may limit repetitive or off-topic remarks.
→ The Mediator may choose to speak to each party privately (a caucus). A private caucus allows parties to speak more freely with the Mediator about their interests, concerns and feelings, knowing that no information that you provide will be shared without your

permission. At any time, you may request a caucus with the Mediator.
→ The discussion may help each party understand the position of the other party. The Mediator may steer the parties towards discussing alternatives and potential agreements that respond to each side's concerns.

Stage 3: Closure

→ If the parties reach an agreement during mediation, the agreement will be written by the Mediator and signed by the parties.
→ The agreement will explain clearly what each party must do, and when it must be done. All parties receive a written copy of the agreement.
→ If either party has filed a Hearing Request with the BSEA, and mediation has resolved the entire dispute, the party who filed the request should send a letter to the Hearing Officer withdrawing the Hearing Request.
→ Mediation usually lasts between two and four hours, but sometimes longer. If the parties agree that another mediation session would be helpful, they may arrange one with the Mediator.
→If the parties do not reach an agreement, either party may proceed to a hearing with the BSEA. Mediation may have helped to clarify the issues in dispute so that each party can be better prepared for hearing.

Is a mediation agreement binding on the parties?

Once both parties sign a mediation agreement, it is binding upon the parties, similar to any other contract.

What if the opposing party does not fulfill its side of the mediation agreement?

If this occurs, it is best to call the Mediator as soon as possible. The Mediator will work with both parties to try to resolve the matter.

III. DIFFERENCES: MEDIATION AND A DUE PROCESS HEARING

Mediations and due process hearings are both aimed at resolving disputes between parents and school districts in order to provide an appropriate education for the special needs student. Both are provided free of charge by the BSEA.

However, there are several important differences.

- **Mediation does not result in a Decision**

  The most important difference between mediation and a due process hearing is the result. While a Mediator may guide the discussion, s/he will never make a decision or judgment that resolves the dispute—that power remains with the parties themselves at all times during mediation.

  A due process hearing will result in a Decision by the Hearing Officer that resolves the dispute. Some disputes cannot be resolved through mediation, negotiation, or other informal resolution process. A Decision by the Hearing Officer may be the only way to resolve these disputes.

- **Mediation allows YOU to craft the resolution**

  Mediation gives you and the other party the opportunity to try to work out the final resolution yourselves, with the assistance of the Mediator.

  The Hearing Officer's Decision resolves the dispute by determining the special education services that must be provided by the school district.

- **Mediation is voluntary**

  In mediation, both parties come to the table voluntarily. You cannot compel the other party to participate. When two parties agree to mediation, it may therefore reflect a willingness to negotiate and to discuss the dispute in a collaborative manner.

  If either party files a Hearing Request, the other party's participation in a due process hearing is mandatory.

- **Mediation is informal**

  Mediation is an unrecorded, informal discussion. A mediation session may be spontaneous, with give and take between the parties. Parties are free to speak openly.

  A hearing is a formal evidentiary proceeding because

  - everything that is said at the hearing is tape-recorded or transcribed by a stenographer;
  - the hearing follows written procedural rules (the BSEA Hearing Rules);
  - all witnesses testify under oath;
  - the Hearing Officer's Decision is based only upon the evidence (the testimony of the witnesses and the documents admitted into evidence during the hearing) and the legal standards governing the rights of special education students.

- **Mediation allows you to speak with the neutral party *privately***

  In mediation, the Mediator may call a "caucus" where s/he speaks to one side or the other individually. This is an opportunity for you and the Mediator to discuss your case candidly, without the other party listening. In a private session, the Mediator may be able to help you to more clearly define your most important interests and may also be able to help you develop options for reaching an agreement.

  At a hearing, you will not be able to talk to the Hearing Officer if the other party is not present (private conversations, known as "ex parte" communications, are prohibited).

- **Mediation may be less adversarial**

  Hearings sometimes are more adversarial than mediation. Relationships between the parties may possibly suffer if the process becomes adversarial.

  In special education disputes, the student/family and the school district are likely to have to work with each other in the future no matter how the immediate issue resolves, and an adversarial proceeding may possibly make future collaboration more difficult.

- **Mediation has a shorter timeframe**

  Mediation may take several hours and usually is completed within a day. If mediation is successful, the parties leave with a signed, final agreement in hand.

  The average hearing lasts two or three days. After the hearing ends, the Hearing Officer may take several weeks to issue his or her written decision. Either party can then appeal this decision to court.

- **Mediation does not usually involve lawyers**

  Because mediation is less formal than hearings, parties generally mediate without representation. Either party may *choose* to bring a lawyer, and then the party should notify the Mediator in advance that a lawyer will be present.

  School districts almost always are represented by attorneys during the hearing process. Many parents also choose to be represented by an attorney at this time.

- **Mediation generally takes place in the student's school district**

  Mediation usually occurs in the student's school district. Hearings usually take place at the BSEA offices in Malden, or in rented space in Worcester or Springfield.

- **Mediation may generate fewer costs**

  Both mediation and due process hearings are provided free of charge by the BSEA. Parties who go to hearings may incur their own costs of printing and delivery of documents, expert witness fees, any attorney fees, etc.

IV. REQUESTING A DUE PROCESS HEARING

Topics discussed in this section:

- Introduction
- How to request a hearing
- When to request a hearing
- Including sufficient information on the Hearing Request
- Filing the Hearing Request
- Scheduling the hearing
- Expedited hearings
- Amending the Hearing Request
- Assignment of BSEA Hearing Officers
- Filing a response to a Hearing Request
- Sufficiency challenge to a Hearing Request

What is a due process hearing?

A due process hearing is a formal, evidentiary proceeding for the purpose of resolving a dispute between parents and a school district regarding a student's special education eligibility or services. A BSEA due process hearing may also be used to determine a student's right to be free from discrimination on the basis of his or her disability (under Section 504 of the Rehabilitation Act).

How do I request a due process hearing?

You must file a Hearing Request with the BSEA and the opposing party.

What is a Hearing Request?

A Hearing Request is a written request for a due process hearing. Filing a Hearing Request starts the process by having your case assigned to a Hearing Officer and being scheduled for a due process hearing.

How soon after the dispute must I file a Hearing Request?

You can file a Hearing Request at any time after the dispute occurs.

However, the IDEA (the federal special education law) has a two-year "statute of limitations"—that means that, as a general rule, the Hearing Officer can only address violations of the student's education rights that occurred within two years of the filing. The two-year period is a general rule, to which there are several, specific exceptions listed within the IDEA and implementing regulations. In some cases, the Hearing Officer may allow parties to present evidence from more than two years ago, but only as background information.

This two-year statute of limitations may become important to consider if your case is withdrawn or dismissed; you may not be able to bring all of the same claims if you "start over" by later filing a new Hearing Request.

How do I file a Hearing Request? Is there a special form?

The Hearing Request form is available for download from the BSEA website, http://www.doe.mass.edu/bsea/forms.html (along with many other useful documents).

Do I have to use the BSEA Hearing Request form?

No, but it's easier. The form helps ensure that you include all of the required information. However, you may choose to submit your own written request, so long as it includes all of the following:

1. Name and address of student;
2. Name, address, and telephone number of:
   a) Person requesting hearing;
   b) Parent(s);
   c) Legal Guardian, if any;
   d) Individual given court-appointed educational decision-making authority, if any;
   e) Duly appointed educational surrogate parent, if any; and,
   f) Individual with whom the child lives and who is acting in the place of the parent, if any;
3. Relationship to student of person requesting hearing;
4. Name of programmatically and fiscally responsible school district(s) and / or name of state educational agency or other state agency(ies);
5. Name of the school the child is attending;
6. In the case of a homeless child or youth, within the meaning of the McKinney-Vento Homeless Assistance Act (42 U.S.C. Sec. 11434a(2)), available contact information for the child and the name of the school the child is attending;

7. If applicable, the name, address, phone number, and fax number of the attorney or advocate representing the party who is requesting a hearing;
8. The nature of the disagreement, including facts relating to such disagreement;
9. A proposed resolution of the disagreement to the extent known and available to the party at the time.

How do I make sure my Hearing Request includes sufficient information?

In order to avoid a "Sufficiency Challenge," pay particular attention to the parts of the Hearing Request that are identified immediately above in subparagraphs 8 and 9. (See below for more on Sufficiency Challenges.)

Subparagraph 8 (above): you must provide information about the special education services the student is currently receiving, what is being proposed, and why you disagree with what is happening or proposed by the other party. You need to explain enough facts so that the reader will understand what you are concerned about and why you are concerned. You also need to be sure to include all of the disputed issues that you would like addressed by the BSEA—the Hearing Officer will address only the issues described in your Hearing Request.

Subparagraph 9 (above): you must explain your proposed resolution (that is, the "remedy" that you are seeking from the BSEA)—for example, what services, accommodations, or placement you want the student to receive. In other words, what do you want the BSEA to order? Be as specific as you can about exact services being sought, the dates they should be implemented, and by whom. If you don't know all the specifics when you file, that's okay, but include as much as you can.

I've completed the Hearing Request form. Now what?

Mail or fax (and then also mail) your Hearing Request to both the BSEA (at 75 Pleasant Street, Malden, MA 02148-4906) and to the opposing party. All of the timelines involved in the hearing process are based on the date that the opposing party receives your Hearing Request, so nothing can move forward if you send a copy only to the BSEA. And, remember that anything else that you send to the BSEA must also be sent, at the same time, to the opposing party.

Tip: If your opposing party is a large school district, it may be a good idea to obtain a dated proof of receipt. In large districts, it may take extra time for the Hearing Request to reach the correct person or department. The school district may believe that it did not receive the request until a week or so after you filed it—that may push your hearing date back a week as well. To avoid such delays, ask where the Hearing Request should be delivered and ask for proof of receipt.

What if I am also filing a complaint with the Department of Elementary and Secondary Education's Program Quality Assurance (PQA)?

PQA is required to set aside temporarily any complaint currently in dispute at the BSEA. So if there is essentially the same complaint in both places, the BSEA proceeding takes precedence and the PQA complaint process will not move forward until the BSEA process has been completed.

How soon will the BSEA get back to me?

Within five business days of submitting your Hearing Request, the BSEA will process it and issue you (and the opposing party) a Notice of Hearing. The Notice of Hearing will include the name of your assigned Hearing Officer, the time and date of any conference call with the Hearing Officer, the date and location of your hearing, and procedural deadlines for completing the next steps in the process.

When will my hearing be scheduled?

If the party filing the Hearing Request is a *school district*, then the hearing will be scheduled for 20 calendar days after the opposing party (the parents/student) receives the Hearing Request.

If the party filing the Hearing Request is the *parents/student*, then the hearing will be scheduled for 35 calendar days after the school district receives the Hearing Request.

What if I want a hearing sooner than that?

You can request that the BSEA schedule an "expedited" hearing. The BSEA will expedite a case only for one or more of the following reasons described in BSEA Hearing Rule II(C):

1) Cases involving Student Discipline:
   a. when a parent disagrees with either a school district's determination that the student's behavior was not a manifestation of the student's disability, or any decision regarding placement in the discipline context; or
   b. when a school district asserts that maintaining the current placement of the student during the hearing process is likely to result in injury to the student or others.

2) When the person requesting the hearing asserts that:
   a. the health or safety of the student or others would be endangered by delay; or

b. the special education services the student is currently receiving are so inadequate that the student is likely to be harmed by waiting for a regular hearing; or
c. the student is currently without an available educational program or the student's program will be terminated or interrupted.

If your case has multiple issues, only those issues that qualify will be expedited. Other, non-urgent aspects of the case will proceed to a regular hearing, and you would generally have the same Hearing Officer for both the expedited and regular Hearings.

Tip**:** If you feel that your case is urgent, you might want to submit a request for expedited hearing even if you are not sure your case qualifies. The worst that can happen is that the BSEA will not agree that your case falls into one of the above categories and it will proceed along the time-line of a regular hearing. By submitting an expedited request, you can voice your opinion of why the case needs to proceed quickly, which may possibly affect the Hearing Officer's future decisions on scheduling and granting postponements.

If my case qualifies, how do I request an expedited hearing?

When you file your Hearing Request, include a letter requesting expedited status. Be sure to include the specific reasons (see above) why expedited status should be granted.

How quickly do expedited hearings get resolved?

A hearing on an expedited Hearing Request will be scheduled to occur no later than 15 calendar days after the Hearing Request is received by the opposing party (as opposed to 20 or 35 calendar days). The timelines for sufficiency challenge, resolution meetings, document submission, and other procedural steps in the hearing schedule will also be shortened; all such deadlines will be indicated on your Notice of Hearing from the BSEA.

With most expedited cases, the Hearing Officer will schedule a conference call with the parties as quickly as possible to discuss the dispute and whether settlement might be possible, and to address any scheduling concerns.

Can I amend the Hearing Request?

You can file an amended Hearing Request with permission of the Hearing Officer or with consent of the opposing party. The Hearing Officer can only give permission if the request is made more than five days before the hearing.

You may use the same BSEA form used to file the original Hearing Request, but check the box indicating "Amended Hearing Request."

When would I want to amend the Hearing Request?

Amended hearing requests are usually filed either to:

- add one or more issues that are in dispute (the Hearing Officer can only address an issue that is included in the Hearing Request or opposing party's response to the Hearing Request; and
- respond to an order by the Hearing Officer that the Hearing Request is not sufficient (see Sufficiency Challenges, discussed below).

Are there any negative consequences to filing an amended Hearing Request?

Whenever an amended Hearing Request is filed, the entire BSEA process starts over for the purpose of the timelines contained within the Notice of Hearing.

How are Hearing Officers assigned to cases?

BSEA Hearing Officers are assigned randomly to cases as Hearing Requests are received. The only exception to random assignment involves avoiding conflicts of interest—for example, Hearing Officers do not hear cases involving the school district in which they reside, or any school district for which they have previously worked as attorneys.

Also, illness, administrative scheduling conflicts, or emergencies could cause your case to be reassigned to a different Hearing Officer before it reaches hearing. In that case, you would be notified in writing of the change. The new Hearing Officer will be up to date on all the information pertaining to your case.

What is a "response" to a Hearing Request? Do I have to respond?

The Notice of Hearing sent out by the BSEA gives the date by which a response must be filed. <u>If you were the party who filed the Hearing Request, you do not have to respond</u>. Only the party who did not file the Hearing Request must submit a response.

The response should address all of the issues raised in the Hearing Request. The response should be concise and straightforward; often a denial of the moving party's assertions is sufficient but more detail is often helpful.

The response does not need to be supported by documentary evidence, nor is the response an appropriate place to fully argue your case. It serves as an opportunity to notify the Hearing Officer and the other party of your position regarding issues described in the Hearing Request. The response may help the parties understand what issues are actually in dispute, making any further discussions between the parties (including the Resolution Session, discussed below) more productive.

You can also request an extension of the ten-day deadline if you are unavailable or unable to file your response within that time. Such a request should be submitted in writing to your Hearing Officer, with a copy to the opposing party. (For more information regarding postponements, see part IX of this Manual.)

The response must be sent to both the Hearing Officer and the moving party, and must be received within ten calendar days of receiving the Hearing Request.

What is a Sufficiency Challenge?

If the Hearing Request does not include needed information, the party who did not file the Hearing Request can challenge the sufficiency of the Hearing Request. Sufficiency challenges must be filed, in writing, within 15 calendar days of receipt of the Hearing Request.

Sufficiency challenges are generally appropriate when one cannot understand from the Hearing Request why the Hearing Request was filed or what relief is requested. A sufficiency challenge should *not* be used to contest or dispute the validity of claims raised in the Hearing Request

What happens if a party files a Sufficiency Challenge?

The Hearing Officer will rule on the sufficiency of the Hearing Request within five calendar days of receiving a sufficiency challenge. If the Hearing Officer finds that the Hearing Request was sufficient, then the hearing moves forward as scheduled.

What happens if the Hearing Request is insufficient?

If the Hearing Officer determines that a Hearing Request is insufficient, the party filing the Hearing Request must file a new, amended Hearing Request within 14 calendar days. The Hearing Officer's ruling will explain what was insufficient and what needs further clarification or amplification in the amended Hearing Request. In most cases, what is needed is to be more specific about the nature of the complaint or proposed remedy.

Tip**:** BSEA Hearing Officers are well aware of the challenges facing parties who represent themselves. As long as you have presented sufficient facts and other information to give fair notice to the opposing party of your complaint and proposed remedy, you will most likely be allowed to proceed. If your Hearing Request is found to be insufficient, you should carefully read and comply with the Hearing Officer's order so that you will be able to successfully amend your Hearing Request. There are no penalties at the due process hearing for having had to amend your Hearing Request; however, the BSEA timelines start over.

What if my Hearing Request is found insufficient but I don't amend it within 14 days?

If you don't act in a timely manner to amend the Hearing Request appropriately, the case may be dismissed "without prejudice," which means that you may start the process over by filing another Hearing Request on the same issue(s), and the BSEA will not hold the dismissal of this first case against you. However, be aware of the two-year "statute of limitations", referenced earlier in this section.

V. RESOLUTION SESSION

Topics discussed in this section:

- Purpose of a Resolution Session
- Participation is required
- Scheduling a Resolution Session
- Waiving the Resolution Session
- Persons attending a Resolution Session
- Agreements reached during a Resolution Session
- Resolution Session's effect on hearing

What is a Resolution Session?

A Resolution Session is an opportunity, after a Hearing Request has been filed by parents/student, for the parties to sit down and attempt to negotiate a resolution to the dispute. Resolution Sessions may be helpful when the non-moving party did not realize that a dispute existed or was not aware of the details of the dispute.

Even if both parties were previously aware of the dispute, the prospect of a Hearing, together with a comprehensive Hearing Request, may help the parties to reach agreement during a Resolution Session.

Finally, although you might continue to disagree and proceed to Hearing, the Resolution Session may help each party to have a better idea of the opposing party's position.

Are Resolution Sessions mandatory?

If a parent refuses to participate in the Resolution Session, the hearing will be delayed.

There are also alternatives. The parties may jointly agree to mediation in place of the Resolution Session (for a discussion of mediation, see part II of this Manual). The parties may also jointly agree to waive the Resolution Session, in which case they must each notify the BSEA in writing.

Note: if the school district filed the Hearing Request, the IDEA does not require a Resolution Session.

When must a Resolution Session take place?

The school district is responsible for arranging a Resolution Session within 15 calendar days of receiving a parent's Hearing Request. As soon as the Resolution Session occurs, regardless of its outcome, the hearing timeline can immediately move forward. So if you are trying to get through the process as quickly as possible, it is best to have the Resolution Session (or waive it or mediate) as soon as possible.

However, if the school district and the parent have participated in a resolution session but not resolved their dispute within 30 calendar days of receipt of the Hearing Request, then the hearing proceeds. Note: you should meet within 15 calendar days, but you have until the 30-day mark so that if you wish to meet a second time, or check facts and get back to each other, you have ample time to work out a resolution.

If, through no fault of the parent (and the parent has not agreed to extend the timeline), the school district fails to convene the Resolution Session within 15 calendar days of receiving the parent's Hearing Request, the Resolution Session is considered to be waived and the parties can proceed to hearing.

Can I waive the Resolution Session by myself?

The Resolution Session can be waived only with the agreement of <u>both</u> parties. Similarly, mediation can be used in lieu of a Resolution Session, but only with the agreement of both parties (for a discussion of mediation, see part II of this Manual).

Who needs to be present at a Resolution Session?

The Parent, relevant IEP Team members, and a school representative with the authority to make decisions must be present.

Will there be attorneys at the Resolution Session?

Probably not. The school district is not allowed to have a lawyer present unless the parent or student does as well.

The parent/student may choose to bring a lawyer. If a parent/student will be bringing a lawyer, it is best to notify the school district in advance so that the school district will have an opportunity to invite its own lawyer—otherwise, the school district may ask for a postponement of the Resolution Session.

Part of the value of a Resolution Session is that it gives the parties the chance to resolve some or all of the issues *before* lawyers become involved.

Are agreements reached during the Resolution Session binding?

If the parties write up an agreement and sign it, either side has a three-day grace period in which to rescind. After three days, the Resolution agreement is considered binding, which means it can be enforced as any other contract.

If you resolve all the issues in dispute, the party who filed the Hearing Request should write a letter to the Hearing Officer withdrawing the Hearing Request (a withdrawal automatically closes the BSEA case). Note that it is also possible to reach an agreement on some issues, but proceed to a Hearing on others.

How does the Resolution Session affect my hearing?

Other than speeding or delaying the hearing schedule, the Resolution Session does not impact any later hearing. For example, if the Resolution Session has been waived or completed promptly, the parties may jointly request an advancement of the hearing date.

The Hearing Officer will probably ask whether you have had a Resolution Session and whether any agreement was reached, but what happened at the Resolution Session is not considered by the Hearing Officer at a due process hearing.

VI. CONFERENCE CALL WITH HEARING OFFICER

Topics discussed in this section:

- Purpose of the 19-day conference call
- What will be discussed
- Other conference calls with the Hearing Officer

What is the 19-day conference call with the Hearing Officer?

When the BSEA receives a Hearing Request from a parent or student, a conference call between both parties and the assigned Hearing Officer is automatically scheduled for 19 calendar days later. The 19-day call is important because it marks the point at which the BSEA Hearing Officer first becomes involved with the parties.

The 19 days (prior to the Hearing Officer's involvement) provide the two parties with time to discuss the dispute with each other, often through a Resolution Session or mediation, and possibly reach agreement.

The proposed date and time of the 19-day call appear on the Notice of Hearing. If you are not able to participate on the day and time indicated on the Notice of Hearing, you should write the Hearing Officer to request a postponement and new date, and be sure to send a copy of your letter to the opposing party. For more information regarding postponement requests, see part IX of this Manual.

What will be discussed during that call?

During the conference call, the Hearing Officer will inquire about the Resolution Session and any other informal discussions between the parties and any potential agreement of the dispute. You will also be discussing possible dates and scheduling for a pre-hearing conference and any request to postpone the hearing date. The Hearing Officer may also address any pending motions or discovery disputes at this time. For more information regarding postponements and discovery, see parts IX and XIII of this Manual.

If you have questions about how to proceed in preparing for hearing or if you are unclear regarding the expectations of the Hearing Officer, the conference call is an excellent opportunity to ask the Hearing Officer for more information or clarification.

May I have a conference call with the Hearing Officer at any time?

Either party may, at any time, request that the Hearing Officer schedule additional conference calls with both parties. The Hearing Officer may arrange for a conference call in order to discuss or resolve procedural problems that arise before the case comes to Hearing. It is important that you make time to participate in these calls. Also, remember that you are not allowed to have "ex parte communication"—that is, communication between the Hearing Officer and one of the parties when the other party is not present.

VII. PRE-HEARING CONFERENCE

Topics discussed in this section:

- Introduction to the pre-hearing conference
- What happens during the pre-hearing conference
- Advantages of a pre-hearing conference
- Scheduling a pre-hearing conference
- Location of the pre-hearing conference
- Preparation for the pre-hearing conference
- Witnesses at the pre-hearing conference
- Decorum at a pre-hearing conference
- Failure to appear for a pre-hearing conference

Why should we have a pre-hearing conference? Is it mandatory?

In many cases, the pre-hearing conference provides a useful opportunity to meet with your Hearing Officer face-to-face before you begin the much more formal Hearing itself. Pre-hearing conferences are scheduled at the discretion of the Hearing Officer.

What happens during the pre-hearing conference?

During the pre-hearing conference, the Hearing Officer will

- help the parties to clarify the issues in dispute, and
- explore the possibility of an informal settlement.

A pre-hearing conference may also serve as a forum to resolve discovery issues, determine the hearing schedule, or resolve other issues relevant to the hearing (for example, whether a witness may testify by telephone).

The pre-hearing conference can also provide an excellent opportunity for a party who does not have an attorney to learn more about the hearing process and the expectations of the particular Hearing Officer.

Are there any other advantages to a pre-hearing conference?

Pre-hearing conferences are somewhat adaptable to the Hearing Officer involved and to the particular case. For example, some Hearing Officers may use the pre-hearing to encourage the parties to settle.

A pre-hearing conference can also be helpful in that you may be able to decipher your Hearing Officer's initial reaction to the case. For example, the questions a Hearing Officer asks at pre-hearing may indicate what s/he believes the most pertinent facts will be at Hearing or what he or she believes to be the most important areas for the parties to address at hearing. Pre-hearings also give you an opportunity to assess the opposing party's case and re-evaluate the strengths and weaknesses of your own case.

During a pre-hearing, you can also ask the Hearing Officer to explain, in layperson's language, the general legal standards that he or she anticipates using to resolve your dispute.

So even if the dispute does not settle during the pre-hearing, the process may be useful.

What if the opposing party requests a pre-hearing conference, but I don't want one?

The other party is not automatically entitled to a pre-hearing conference. If one party seeks a pre-hearing conference, and the other party opposes it, the Hearing

Officer will review each side's position (usually during a conference call) and decide whether a pre-hearing conference would be useful. If the Hearing Officer *orders* a pre-hearing conference, you need to be there.

When can a pre-hearing conference be scheduled? How do I request one?

A pre-hearing conference may be scheduled anytime after the Resolution Session (see part V of this Manual) and before the hearing. Pre-hearing conferences usually do not delay your hearing date; they are merely an optional step along the way.

If you know you want to have a pre-hearing conference, you can bring it up during the 19-day conference call or during any other conference call (see part VI of this Manual). Also, you can fax or mail a written request to your Hearing Officer and the opposing party. Don't forget to include some dates, prior to the Hearing, when you are available for the pre-hearing.

Does the pre-hearing conference have to be at the BSEA in Malden?

No. Similar to a hearing, you can request to have the pre-hearing held in a different location that is more convenient to you. Pre-hearings are generally held in Malden, Worcester, or Springfield.

Also, you can request to conduct the pre-hearing on the telephone (similar to a conference call). However, a telephonic pre-hearing may be significantly less useful than an in-person pre-hearing conference.

Do I need to have all my evidence and witness lists for the pre-hearing?

No, but it may be an advantage if you have prepared these things in advance because any roadblocks or questions you've encountered in the process would be best discussed and resolved at the pre-hearing conference.

Also, for purposes of scheduling hearing dates, it is best to know the availability of your witnesses and how many days you will need to present them. You do not need to bring your exhibits to the pre-hearing conference.

Do I need to bring witnesses to the pre-hearing conference?

No. However, if you feel you have a witness who is very articulate and pivotal to your case, it may be helpful to bring that person along.

Typically, the Hearing Officer will allow that person to make a very short presentation at the pre-hearing conference or to respond to questions so that the Hearing Officer can understand your position better.

What tone or decorum is appropriate at a pre-hearing conference?

A pre-hearing conference is informal, as opposed to the more formal evidentiary hearing. You do not need to prepare a statement, but be prepared to speak openly about the student, what your concerns are, and what you hope to achieve.

This may sound like common sense, but the rules of courtesy apply. You should be deferential to your Hearing Officer, who will be running the pre-hearing. You should also be respectful to the opposing party at all times; do not interrupt others. You should arrive on time, and let the Hearing Officer know at the outset if you have any time constraints. You should turn off your cell phone and pager.

The pre-hearing conference will not be recorded without permission from the Hearing Officer, although people may be taking notes.

What if I do not appear for my pre-hearing?

It doesn't look good if you fail to appear for a scheduled pre-hearing conference unless for sufficient reason, you were not able to attend. If you filed the Hearing Request, the Hearing Officer might issue an Order to Show Cause (i.e., an order requiring you to explain why the case should not be dismissed) that may result in dismissal of your case because of your lack of responsiveness.

If it becomes impossible for you to attend a scheduled pre-hearing conference, you should as quickly as possible write (or call the BSEA if there is not time to write) the Hearing Officer (with a copy to the opposing party) and request a postponement. For more information regarding postponements, see part IX of this Manual.

VIII. MOTIONS AND WITHDRAWALS

Topics discussed in this section:

- Introduction to a "motion"
- Examples of motions
- Filing a motion
- Objecting to a motion
- Hearing on a motion
- Withdrawal
- Notifying the other party

What is a "motion"?

The term "motion" means "request." A motion is any formal request for a Hearing Officer to issue an order. Hearing Officers issue "orders" to instruct the

parties what they should do or what will occur, or to resolve any disagreement regarding issues that come up before or during the due process proceeding.

What are some typical examples of motions filed in BSEA proceedings?

- Motion to postpone any scheduled event or deadline (see more about postponements in part IX of this Manual).
- Motion to compel or motion for protective order regarding discovery (see more about discovery in part XI of this Manual).
- Motion to amend (if you wish to change or add to the issues described in the Hearing Request).
- Motion to dismiss the case (if you believe that as a matter of law, there is no merit to the Hearing Request or that the issue has been resolved).
- Motion for summary decision (if you believe that a decision can be made on the basis of the documents, without a hearing)
- Motion for joinder (if you want to add a third party, who would then be bound by the Hearing Officer's decision).
- Motion to consolidate (if you have another, similar case pending at the BSEA that should be combined with this case).
- Motion for recusal (if you believe that your Hearing Officer has a conflict of interest or is so biased that he or she cannot make a fair and impartial decision in your case and therefore should remove him/herself from the case).
- Motion to change venue (if you want to have the hearing moved to a location other than Malden).

How do I file a motion?

A motion should always be in writing and sent to the Hearing Officer and the opposing party simultaneously. Along with any motion you file, you must submit a signed statement that you have sent a copy to the other party and what method you used to send it (e.g., email, fax, mail, or hand-delivery).

How do I object if the opposing party files a motion? Must I respond?

The BSEA Hearing Rules provide that a party has seven calendar days to file objections or otherwise respond to a motion or to request a hearing on the motion. The Hearing Officer may choose to extend the response period at the other party's request (i.e., grant an extension of the date for filing a response to the motion).

If you fail to file a timely response to a motion, the Hearing Officer may grant the motion as unopposed.

What does it mean to have a hearing on a motion?

If the Hearing Officer feels that s/he needs oral argument (or, very occasionally, testimony) in order to decide on the issue raised in the motion, then s/he will schedule a hearing on that issue exclusively. Motion hearings are typically conducted by telephone but also may be conducted in person. A motion hearing allows the parties to make oral arguments that supplement the written motion and any opposition. If possible, all parties are to receive at least three calendar days notice of a motion hearing. The motion hearing will be limited to the specific issue of the motion.

What is a withdrawal and when should it be filed?

At any time, the party who filed the Hearing Request may withdraw it, thereby ending the dispute. A withdrawal is accomplished by sending a letter to the Hearing Officer (with a copy to the opposing party) simply stating that the party is withdrawing the Hearing Request—no reasons for a withdrawal need be given. Only the moving party (i.e., the party who filed the Hearing Request) can withdraw the Hearing Request.

Once the withdrawal is filed, it goes into effect automatically, thereby administratively closing the BSEA case. A withdrawal does not require the approval of the Hearing Officer or the issuance of an order. A withdrawal should be filed when the parties have informally resolved all aspects of the dispute before the BSEA or when, for other reasons, the moving party wants to close the BSEA case.

Notifying the other party when a document is sent to the Hearing Officer.

Every time you send anything to the Hearing Officer, you must not only send a copy simultaneously to the other party but you must also indicate, in writing, that you have done so. If you send something to the other party, you do not necessarily have to send a copy to the Hearing Officer. However, anything sent to the other party must always be sent to the Hearing Officer at the same time. The general rule is that the Hearing Officer should have no correspondence or documents in his/her file that both parties do not also possess.

IX. POSTPONEMENT REQUESTS

Topics discussed in this section:

- Introduction to postponements
- Requesting a postponement
- What can be postponed
- Failure to file a response

I need more time to prepare for hearing, or I need to change a date that was set by the BSEA or the Hearing Officer—what should I do?

Request a postponement.

Tip: whenever possible, prior to asking the Hearing Officer for a postponement, contact the other party and ask for his/her agreement to your postponement request. Then, when you request the postponement, you can tell the Hearing Officer that both parties agree. This will make it more likely that the Hearing Officer will grant your postponement request. Also, if possible, when requesting a postponement, give the Hearing Officer mutually-acceptable new dates.

How do I request a postponement?

All postponement requests must be in writing and must be sent to both the Hearing Officer and opposing party. The request should explain why you need the postponement. If you are requesting a postponement of the due process hearing, you must request the postponement at least five business days before the scheduled hearing date. Your request should also include alternate dates that you are available for hearing. Parties may also jointly request a postponement.

Can I request to postpone events and deadlines other than the Hearing? For example, responses to motions or discovery deadlines?

Yes. It is always best to notify your Hearing Officer and opposing party that you cannot make a deadline by requesting an extension. The same rules apply for any postponement request: send it to both the Hearing Officer and opposing party simultaneously, include an explanation, and propose a new deadline.

What if instead of postponing, I just don't appear or file a response?

If you do not appear or file a response, you risk losing the opportunity to act. For example, if you fail to appear at hearing without requesting a postponement, the hearing may proceed without you. Similarly, if you fail to submit a response or request by the deadline, a Hearing Officer may refuse to allow you to submit it later. It is always better to at least request a postponement or extension, even if your request is denied, because at the least it shows a good faith effort on your part.

X. SETTLEMENT CONFERENCE

Topics presented in this section:

- Introduction to a Settlement Conference
- Requesting a Settlement Conference

What is a Settlement Conference?

A Settlement Conference is another opportunity, provided by the BSEA, for parties to reach a settlement before going to hearing. All Settlement Conferences have the following four requirements:

1) A Hearing Request has been filed.
2) The Hearing Officer assigned agrees that a Settlement Conference would be useful.
3) Both parties voluntarily agree to participate in the Settlement Conference.
4) Each party must be represented by a licensed attorney.

Can I request a Settlement Conference?

You may not request a Settlement Conference if you are a pro se party. Pro se parties do not meet the fourth requirement listed above.

Settlement Conferences aim to produce a settlement contract that can be signed on the spot. These settlement agreements often contain complex legal language and may entail releases/waivers of rights. For this reason, they are currently only offered for cases in which both parties are represented by a licensed attorney. However, you can try to reach a settlement with the opposing party through mediation or negotiations at any time.

XI. ADVISORY OPINIONS

Topics discussed in this section:

- Introduction to an Advisory Opinion
- When to request an Advisory Opinion
- Effect of an Advisory Opinion on the due process hearing
- How to request an Advisory Opinion

What is an Advisory Opinion? How is it different from a regular decision?

An Advisory Opinion is a stream-lined alternative to the full due process hearing and must be voluntarily entered into by both parties. Once a Hearing Request has been filed and both parties have requested/agreed to an Advisory, an abbreviated proceeding is held. The proceeding is conducted by a Hearing Officer other than your assigned Hearing Officer.

The parties are limited to two witnesses each and one hour to present their case, unless the Hearing Officer allows otherwise. The parties are also encouraged to submit only a limited number of essential documents. The Advisory hearing is not recorded and witness presentations are not under oath.

The Hearing Officer then issues a brief opinion which is not binding. The parties can agree at the outset, however, to make the Advisory Opinion binding.

When is an Advisory Opinion a good idea?

Advisory Opinions are best-suited to very narrow, simple legal issues. They are useful if the parties are not hostile but honestly need to know where the law stands. In theory, Advisory Opinions are less burdensome to pursue than a full due process decision, but once issued, you cannot appeal or enforce an Opinion.

After an Advisory Opinion, can I still go to a full due process hearing?

Yes. When you request an Advisory Opinion, you are automatically given a Hearing date for 30 calendar days after the Advisory process with a different Hearing Officer. An Advisory Opinion is confidential in that the Hearing Officer presiding over a subsequent due process hearing would not have knowledge of the Advisory Opinion. You can also withdraw the Hearing Request and cancel the due process hearing after the Advisory Opinion is issued.

How do I request an Advisory Opinion?

At the same time or after filing a request for hearing, submit a written request for an advisory opinion. Once the BSEA receives consent from the other party, your Advisory Opinion proceeding will be scheduled and you will receive a notice detailing the Hearing Officer assigned, the rules for the Advisory, the date for the Advisory Opinion, and the date for the due process hearing automatically scheduled 30 days afterwards.

XII. SPEDEX

Topics discussed in this section:

- Introduction to SpedEx
- Status of the SpedEx program
- Recommendations of the SpedEx consultant are not binding

What is SpedEx?

SpedEx is another alternative option for voluntary dispute resolution. After a Hearing Request has been filed, at the joint request of the parties, the BSEA will refer the case to the SpedEx Administrator Dr. Alec Peck, Professor of Special Education at Boston College, who will assist the parties in selecting a consultant from a list of pre-approved consultants compiled by the BSEA.

Once a consultant is jointly agreed upon by the parents and the school district, the consultant will conduct a thorough review of the case; reading the proposed IEP, reviewing all relevant documents, interviewing all relevant persons, observing placements and programs proposed by school and the parent, and will then write a report recommending whether the proposed IEP offers the student a free appropriate pubic education (FAPE).

If the parties agree with the consultant's report, the report and recommendations will be incorporated into the IEP and the Request for Hearing is withdrawn. If either party does not agree, the issue may proceed to a Hearing and the consultant's report will be included in the student's school record. The consultant's fee is paid by the MA Department of Elementary and Secondary Education.

What is the status of the SpedEx program?

SpedEx is currently in a three-year pilot program. SpedEx will accept eight cases per year, on a first-come first-served basis.

Are the recommendations of the SpedEx consultant binding?

No. Either party may disagree with the consultant's report and recommendations and proceed to a hearing.

XIII. DISCOVERY

Topics discussed in this section:

- Introduction to discovery
- When discovery occurs
- Responding to a discovery request
- Failure of a party to respond to discovery
- Objecting to a discovery request

What is "discovery"?

The term "discovery" refers to the process of the parties requesting and exchanging information prior to hearing. The parties are always encouraged and expected to exchange information *voluntarily* whenever possible. However, when this is not possible, the following forms of formal discovery are available to the parties:

1. Interrogatories: a list of written questions sent to and answered by the other party. Hearing Officer authorization for interrogatories is needed only when a party is requesting more than 25 interrogatories. Interrogatories must be answered fully and

truthfully under penalty of perjury (unless objected to—see below).

2. Requests for documents: a request that the other party produce any unprivileged documents. (Privileged documents are those whose confidentiality is protected by statute—for example, the attorney-client privilege or the doctor-patient privilege. In some cases, if requested, a Hearing Officer may require specific, privileged documents to be disclosed to the other party. This would be addressed through a motion to the Hearing Officer.)

   Parents are entitled to copies of a student's school records pursuant to the Massachusetts Student Records regulations, 603 C.M.R 23.00. Tip: Parents should review their child's record at the start of the case. Much of the information that a parent could request through discovery may already be in this record.

   If you need documents from someone other than the opposing party, you may request a subpoena *duces tecum* (for more information regarding subpoenas, see part XII of this Manual).

3. Depositions: testimony under oath taken prior to hearing. You must obtain authorization from your Hearing Officer in order to depose a witness, and authorization will only be granted if the witness' testimony cannot be obtained in any other way. Depositions are rare in BSEA proceedings. Depositions can be very costly.

When does the discovery period take place?

Parties are strongly encouraged to share information by agreement prior to the Hearing. The formal discovery period, however, begins anytime after the Resolution Session has been held/waived and continues until the hearing date.

How long do I have to respond to a discovery request?

You need to respond to a discovery request within 30 calendar days unless the case is expedited or your Hearing Officer has established a longer or shorter period of time. In the interest of speeding your path towards hearing, it is best to respond to discovery requests promptly.

Why is it important to cooperate with discovery requests?

A lengthy discovery period delays your hearing. Responding to discovery requests quickly and completely increases your chances of getting to hearing on time since discovery delays may result in a postponement of the hearing

What if the opposing party is not responding to my discovery requests?

If you have not received a response after 30 calendar days, the first thing you should do is contact the opposing party directly. Hearing Officers do not look favorably on resolving minor discovery disputes, so parties should attempt to resolve such disputes among themselves whenever possible. Notify the opposing party that the 30 day deadline is near or past, and that if you do not receive a response soon, you will file with the Hearing Officer. This notification is a courtesy to the opposing party, which may be sufficient to elicit the requested information.

If you continue to receive no response or if the opposing party declines to provide the requested discovery, you may submit a written "motion to compel" to your Hearing Officer. In the motion, you should outline what information you are seeking, when it was requested, when you last contacted the opposing party, and why you need the information (for more information regarding motions, see part VIII of this Manual).

How do I object to a discovery request, and when might I want to do so?

Again, it is a good idea to communicate with the opposing party directly first. It may be that you misunderstand what the other party is seeking, or that the other party is willing to withdraw or change a request in order to avoid bringing the discovery dispute before the Hearing Officer. However, you have the right to file objections with your Hearing Officer within ten calendar days of receiving the request. You may object to the entire request or to specific parts of the discovery—for example, questions 3 and 11 of a set of interrogatories. The most common reasons for objecting are that the discovery request causes undue burden, expense, or unjustified delay. As with any objection, you should be sure to explain clearly your reasons.

In addition, if you want the Hearing Officer to issue an order protecting you from having to respond to some or all of the other party's discovery, you should file a motion requesting a "protective order" (see below). Your Hearing Officer may convene a conference call or schedule a motion hearing to address any discovery objections or delays.

Tip: the great majority of discovery disputes can be resolved through good faith discussions and compromises between the parties. Also, a little courtesy goes a long way towards resolving these kinds of issues.

What if the Hearing Officer agrees with my objections (or the opposing party's)?

The Hearing Officer has the authority to issue a "protective order"—that is, the information you object to sharing is protected from discovery in this case. The Hearing Officer may also limit the scope, time, or method of discovery.

XIV. PREPARATION FOR HEARING: EXHIBITS AND WITNESSES

Topics presented in this section:

- Introduction
- Exhibits
- Arranging and presenting exhibits for hearing
- Witnesses
- Disclosing exhibits and witnesses, in advance, to other party
- Testimony of experts
- Written report of experts
- Testimony by telephone
- Subpoenas to require witnesses to attend the hearing
- Subpoenas to obtain documents
- Stenographer
- Interpreters and translators

What will the Hearing Officer rely upon in making his or her Decision?

In reaching his or her Decision, the Hearing Officer will rely only upon three things—the exhibits of the parties, the testimony of witnesses at the hearing, and the opening and closing arguments of the parties. It is essential to prepare sufficiently in each of these three areas.

What are "exhibits" and how do I know what to submit?

An exhibit is any document you want the Hearing Officer to consider as evidence in your case. To be considered, the exhibit must be admitted into evidence by the Hearing Officer during the hearing.

Some examples of common exhibits are the following: current and previous IEPs, evaluations, written communication between school and parent, progress reports, brochures describing potential placements, and behavioral reports.

Should I write my own statement to submit as an exhibit?

No. Since you will be at the hearing, you can testify directly as to your own experience and beliefs. You can bring notes or prepared remarks, but you do not need to submit them as a written exhibit.

How do I arrange and present my exhibits for hearing?

Each exhibit should be numbered in the upper right hand corner of the document. Exhibits that are multiple pages should be labeled with an exhibit number on the first page, but also with regular page numbers at the bottom of each page. This makes it easier to refer to the exhibits during Hearing.

The exhibits should be separated by divider tabs (also labeled by exhibit number). At the front of your exhibits, you should have a numbered table of contents. Exhibits are commonly submitted in three-ring or loose-leaf binders.

You will need three copies of your exhibits binder: one for yourself, one for the Hearing Officer, and one for the opposing party.

Tip**:** Dates are important. Within the Table of Contents, it is useful to include the date that each exhibit was written whenever possible. And, it is usually best to arrange your documents in reverse chronological order, beginning with the most recent documents.

What is my responsibility to disclose my exhibits and witnesses?

You are obligated to provide the Hearing Officer and the opposing party with a copy of all your exhibits and a list of all of the witnesses (including yourself if you will be testifying) whom you intend to have testify at the Hearing.

The documents and witness list must be received by the Hearing Officer and opposing party at least five business days before the hearing starts. Note: it is your responsibility to choose a method of delivery that will result in the documents and witness list actually being received by the Hearing Officer and opposing party on time.

If you fail to comply with this requirement, the other party may object to your exhibits being admitted at hearing and may object to your being allowed to call your witnesses. The Hearing Officer may agree with the opposing party and decline to admit some or all of your documents into the record and may preclude you from calling some or all of your witnesses, particularly if to do otherwise would be prejudicial to the other party. This is because the opposing party must have received your documents and witness list sufficiently in advance in order to prepare for hearing.

Tip**:** If you are not certain of your witnesses' availability, err on the side of including all potential witnesses on your list. Your witness list must include all those you *may* call as witnesses, but you are *not required* to call all or any of the people on your list. Remember to include your own name, if you intend to testify. Also, you may reserve the right to call additional witnesses in order to rebut the other party's case by including language to that effect at the bottom of your witness list.

Tip: If you anticipate obtaining a document, such as an evaluation, too late to comply with the five-day deadline, inform the Hearing Officer and other party as soon as possible, and request permission to file the document late. Also, be sure to provide the other party with a copy of the document as soon as you receive it.

Who are likely to be my most important witnesses?

Often the most important witnesses are parents, educators, therapists, other experts who have worked with or evaluated the student, and any other experts who understand the student's educational needs and how they should be met.

Keep in mind that a significant majority of BSEA disputes that go to hearing are resolved on the basis of the persuasiveness of live, expert testimony.

If I have an expert's written report, do I also need the expert to testify at hearing?

As a general rule, live testimony from one or more expert witnesses is essential to making a persuasive case in a BSEA evidentiary hearing. Live expert testimony is almost always given significantly more weight than written evaluations or reports alone because the expert can explain and clarify anything in the written document and answer questions from the Hearing Officer and opposing party.

Expert testimony also helps the Hearing Officer understand how qualified he or she is to testify regarding the student's educational needs. The expert's testimony explaining his or her observations of the student and his or her previous experience with similar students may be important.

Doctors and other experts usually charge an hourly rate for their time. If you cannot afford their coming to the hearing or if they do not have time to travel to the hearing, you might request that they be allowed to testify by speaker telephone (see question below regarding testimony by telephone).

What should I do if the expert cannot testify on the scheduled hearing dates?

You may request a postponement of the hearing or request an additional hearing day if this would be necessary for your expert witness to testify. In general, Hearing Officers try to accommodate the schedule of an expert who will be an important witness for either party.

If testimony from an expert is not possible under any circumstances, a written report may nevertheless be useful and will likely be considered by the Hearing Officer.

How long will my witnesses need to be at the hearing?

Witnesses are not scheduled precisely. No one knows how long it will take to examine each witness, so we cannot predict exactly when and how long each witness will testify.

If you have an important witness with a major time constraint, you can request the Hearing Officer to accommodate the witness' other commitments. Also, once a witness has finished testifying, s/he is usually free to leave.

The witness I want to call is unwilling to testify or cannot leave work– what do I do?

You can request that the BSEA issue a "subpoena" to your witness. Subpoenas are orders to appear at a certain time and place in order to give testimony. Remember that even if you obtain a subpoena for an expert to attend the hearing and testify, the expert may expect that you will pay his/her hourly rate for his/her time.

A "subpoena *duces tecum"* orders the recipient to testify and also to bring documents to the hearing. A "subpoena *duces tecum*" may also be requested to direct a non-party to deliver documents to a specified location prior to the hearing date. If the documents are held by a party, they may be obtained only through a request for production of documents, discussed above at page 33.

In some cases, subpoenas may be necessary for a parent to ensure that an employee of the school district appears at the hearing to testify. When the witness receives a subpoena, he can use it to excuse himself from work for the purpose of attending the hearing.

Do I need to list a witness (and possibly subpoena the witness) even though the other party said they were planning to have this witness testify?

Yes. If the other party lists a witness, this does not necessarily mean that the other party will have that witness testify. Parties sometimes list more witnesses on their witness list than they actually have testify at the Hearing.

How do I get a subpoena?

Write a request to your Hearing Officer and send a copy to the opposing party. Your request should include the name of the case, the date and time when you want the witness to appear, the name and address of the person being subpoenaed, and a description of any documents you are seeking. You should submit such a request at least ten calendar days prior to the hearing date. Subpoenas have to be issued for a certain date, so your Hearing Officer will want to be sure that the Hearing is going forward as scheduled before issuing one.

If the Hearing gets postponed or delayed for any reason, you must re-request the subpoenas for different dates. It is your responsibility to inform the people you have subpoenaed of any postponement /cancellation of a hearing date for which they have been subpoenaed. Subpoenas are issued promptly by the BSEA upon its receipt of a request.

What if the opposing party, or the potential witness himself, objects to a subpoena?

A subpoena is commonly issued automatically as soon as the BSEA receives a subpoena request, but there may then be an objection, also known as a "motion to quash." A Hearing Officer may modify or revoke the subpoena if the person or

opposing party successfully demonstrates that the testimony/document sought is irrelevant, or that it imposes an undue burden on the person being subpoenaed. For example, if the person being subpoenaed is on vacation out of state on the day of hearing, that could be an undue burden.

What if I obtain a subpoena and the witness doesn't appear, or the documents are not sent?

You can go to a state court for an order requiring compliance. The BSEA does not enforce subpoenas.

I have an important witness who cannot come to the Hearing—what are my other options?

You may submit a written request to your Hearing Officer (and a copy to the opposing party) to have your witness testify via telephone. If granted, you should arrange for your witness to be in a quiet, private place at a certain time on the day of hearing and to have with him or her any documents needed during the testimony.

When it is time for the witness to testify, the Hearing Officer places the call, and the witness will testify via speakerphone. A witness testifying on the phone is still under oath, still on the record, and still subject to cross examination. Telephonic testimony is useful for witnesses who are physically incapacitated, prohibitively far away, or unable to leave the office, but still willing to make accommodations to help your case.

Tip**:** It is sometimes expensive to pay experts for the time it takes them to come to hearing and testify. If your witness is amenable, telephone testimony reduces the expense by cutting out travel time, although it may be less persuasive than in-person testimony.

What is a stenographer and how do I request one?

If for any reason you need a written, verbatim transcript of the hearing (as opposed to a copy of the tapes), you should submit a written request to your Hearing Officer for a stenographer (a person who sits through the hearing and transcribes everything that is said). Stenographers (and the transcripts they produce) are provided free of charge, but stenographers must be requested in advance.

How do I get an interpreter/ translator?

As soon as you know that you will need an interpreter or translator (including a sign language interpreter), you should request one and specify the language sought. For some languages, it requires significant time to find an interpreter. Therefore, the sooner the BSEA knows, the better. Interpreter/translators can be provided for conference calls, mediations, pre-hearing conferences, and hearings as necessary.

XV. DUE PROCESS HEARING

Topics discussed in this section:

- What to do if you cannot attend a scheduled hearing
- Introduction to the due process hearing
- Three most important rules
- Length of hearing days
- "On the record"
- What happens at the hearing
- Objecting to an exhibit
- Opening statement
- Questioning a witness
- A party's own testimony
- Hearsay
- Objecting to a question during testimony
- Closing arguments
- The Hearing Officer's decision
- Failure to come to the hearing
- If I think the Hearing Officer is unfair or biased
- Hearing tapes and stenographer's transcript

What if I am not able to attend the Hearing on the scheduled date?

If you have a conflict with the Hearing date, or a conflict arises suddenly, you need to file a motion for postponement as soon as possible. If you have decided you do not wish to proceed with the Hearing Request that you filed, you need to officially withdraw your request for Hearing. If an emergency arises, or if you are late or lost trying to get to the hearing, you need to call the BSEA and notify the Hearing Officer.

What should I expect at the hearing? Is it like a trial?

Hearings are not court trials, but they are formal evidentiary hearings. The BSEA is an administrative agency, and its hearings are usually held in conference rooms. There will be a large table with many chairs. If you will need anything else (e.g., a TV, DVD player, VCR, interpreter, stenographer, etc) be sure to submit a written request to your Hearing Officer in advance.

The Hearing Officer will sit at one end of the table and will probably reserve a chair next to him/her as the witness chair (in order for the testifying witness to be near the tape-recorder). The parties and their witnesses will sit along each side of the table, usually with any lawyers, advocates, or pro se parties sitting nearest the Hearing Officer. People dress professionally.

The Hearing Officer will outline his or her own particular rules about breaks, food, beverages, and decorum. There will probably be files and exhibit binders on the table as people will be referring to the evidence during the proceeding.

Tip: You do not need to address the Hearing Officer as "your honor." "Mr. or Ms. _____" is appropriate.

What are the three most important rules of due process hearing decorum?

First, always listen to your Hearing Officer.

The Hearing Officer will set out the rules of procedure for the day. If the Hearing Officer advises you to do something differently, or to move on to a different topic, you should do so immediately. The Hearing Officer's priority is to gather all pertinent information from both sides and establish a clear record of the evidence.

Second, always be civil and courteous. Parties may need to aggressively represent their interests during the hearing, but it is never appropriate to be rude, hostile, or threatening.

Third, if you have a question or if you are not sure of something regarding the hearing process or expectations of the Hearing Officer, do not hesitate to ask questions of the Hearing Officer at any time. A central role of the Hearing Officer is to help all parties fully access and participate in the hearing proceeding.

How long are the days of Hearing? Are there breaks?

Length of the Hearing day depends of the availability of witnesses, the cooperation of the parties, and the Hearing Officer's preferences. Hearings usually start at 9:30 or 10 o'clock in the morning.

Introductions, signing in, and introductory remarks/explanations from the Hearing Officer may take a half-hour to an hour. Then exhibits are considered and admitted into evidence; the parties present their opening statements; the moving party goes first in presenting witnesses; the responding party then presents its witnesses; and finally parties have the option to make oral or written closing arguments.

The length of each stage of the process depends on the complexity of the issues and the efficiency of the parties. Some Hearing Officers will break for lunch, others prefer to work straight through until the hearing is finished. If you have dietary concerns or time constraints which require you to eat at a certain time or leave by a certain time, let your Hearing Officer know at the beginning of the day. People can leave or request a break to use the facilities as needed. Once a witness has testified, he is usually not required to stay for the remainder of the hearing.

Some Hearing Officers are unable to remain past 4 or 5 o'clock, while others are willing to push through until 7 or 8 o'clock in order to get the Hearing finished in the prescribed number of days.

What should I know about "being on the record"?

All Hearings are recorded on a tape-recorder which the Hearing Officer will manage throughout the Hearing. As a general rule, at all times when the hearing is being tape recorded, you are "on the record." When requested, some Hearings may also have a stenographer recording what everyone says.

In order to make the recording clear, people must be careful to verbally respond "yes" and "no" to questions (as opposed to nodding) and it is important that people do not interrupt or speak over one another.

The Hearing Officer may occasionally announce that "we are going off the record" and stop the tape, as when the parties need a moment to organize their thoughts or witnesses are switching seats in preparation to testify. Parties also may request to go off the record while they have an informal discussion with the Hearing Officer.

Be prepared that approximately every 45 minutes the tape recorder will beep, and the Hearing Officer will need to pause to turn over the tape or select a new tape. In general, don't worry about the tape recorder. The Hearing Officers are adept at managing them.

The record is for the Hearing Officer's reference in writing the decision and to create a record in case of appeal. You can request a copy of the tapes, and they will be provided to you free of charge.

What is the outline of procedure at hearing? What happens first, etc?

Typically, the Hearing Officer will arrive at the hearing room once both parties are present. A sign-in sheet will go around the table. The Hearing Officer will probably give some explanation of the hearing process and introductory remarks before starting the tape recorder. Tip**:** this is a good time to ask questions.

Once the formal part of the hearing begins, the Hearing Officer will recite some prepared remarks that pertain to all hearings. Then exhibits are considered, objections to exhibits can be raised, and the Hearing Officer decides what to admit into evidence.

Next, the moving party presents his or her opening statement. The other party can make his or her own opening statement immediately afterward or wait until after the moving party has finished presenting all his witnesses and evidence.

The moving party goes first in presenting witnesses—the moving party asks the witness questions and then the opposing party has an opportunity to ask questions. When the moving party has finished, the other party presents his/her own witnesses. With the Hearing Officer's permission, a witness can testify out of order if necessary.

Finally, the parties have the option to make oral or written closing arguments. The Hearing Officer will conclude the hearing by announcing the timeline for the Decision.

Why and how should I object to an exhibit?

The Hearing Officer will ask if you object to any of the opposing party's exhibits before admitting them into evidence. You should be prepared with a list of the number of the exhibits you object to and why. After listening to your reasons for the objection, the Hearing Officer will allow the opposing party to argue in response as to why the exhibit should be admitted. The Hearing Officer will then decide whether or not to admit the exhibit in question.

You may object to exhibits on the basis of irrelevancy. An objection may also be made if the document does not indicate its author. You may also object to any exhibit that was not sent to you at least five business days before the Hearing because that is a violation of federal law and the BSEA Hearing rules.

What should I say in my opening statement?

Your opening statement should be a brief summary of your position—that is, why you are at hearing, what resolution you are seeking, and why the facts are in your favor. Opening statements are also often used to provide the Hearing Officer with a roadmap of the case you are about to present. You may want to mention your most important witnesses and what evidence you expect each of them to demonstrate.

You do not need to directly respond to each point made in the opposing party's opening statement. You are also not required to make an opening statement. You may choose to skip it and proceed directly to the presentation of witnesses.

How do I question a witness?

When you bring a witness to testify on your behalf, you question that witness first ("direct examination"). First, the Hearing Officer will swear in the witness, ask him or her to spell his/her name for the record, and then will turn the witness over to you for questioning. It is a good idea to start your direct examination by asking the witness to explain his or her experience and expertise that are relevant to the dispute.

For example: "What is your profession/position?" "How long have you worked in this field?" "Do you have any advanced degrees or education-related licenses?" "How do you know the student?" "For how long have you known the student?" "Have you worked with similar students?" "If so, how many?"

Tip: you can save time by submitting the person's CV or resume as an exhibit, but then be sure to ask the witness if the CV or resume is current and accurate.

Then you can ask questions designed to explore the witness' opinion of the student's educational needs, how those needs should be met, and whether the educational program in question would satisfactorily meet the student's needs.

When you are finished, tell the Hearing Officer that you have no further questions. The opposing party will then ask questions ("cross-examination"). At any time, the Hearing Officer may ask his/her own questions.

Then, the Hearing Officer will ask if you have any further questions ("re-direct examination"). Re-direct is an opportunity to ask questions that respond to what the witness was asked on cross-examination or by the Hearing Officer. After re-direct, the opposing party gets another chance to ask questions ("re-cross examination") and the Hearing Officer may also ask any new questions. As a general rule, re-cross, like re-direct, should only consist of questions clarifying previous testimony. When everyone is done questioning, the Hearing Officer will dismiss the witness.

How do I testify myself?

If you do not have a representative to ask you questions as a witness, the Hearing Officer may choose to swear you in at the very beginning of the Hearing, so that your opening argument is made under oath. Alternatively, the Hearing Officer may swear you in when you begin your testimony.

Since you cannot question yourself, your "direct examination" will be a monologue. You may bring a prepared written statement to read or you can speak naturally. Some Hearing Officers may assume the role of direct examiner and become more involved in asking questions when pro se litigants testify.

Like any other witness, you may be asked questions by the opposing party and by the Hearing Officer. Remember that this is not an opportunity to debate with the opposing party. The opposing party can ask you questions, which you must answer, but you may not ask questions in return, other than to ask for clarification of the question.

Can I take notes? Should I prepare written questions to ask the witness?

It is a good idea to have a list of important questions or key points written out in advance so that you can be sure to cover them during the testimony (whether or not it is your witness). If you become nervous or flustered by an unexpected response, you can return to your list and make sure you haven't forgotten anything. For the same reason, parties usually take notes during direct examination in preparation for what they want to address on cross (or vice versa).

Do-s and Don't-s of witness examination:

Do:

- Be polite and introduce yourself before cross-examining the opposing party's witnesses.
- Allow your witnesses to answer in their own words. If the witness is on your side, it may be useful to ask open-ended questions. Remember that the witness' testimony is more persuasive to the Hearing Officer than statements or summaries that you make while questioning.
- Ask to go off the record for a moment if you need to collect your thoughts before asking more questions.
- Clarify with a quick yes-or-no question if you believe the witness' answer was unclear.
- If the witness does not remember a fact or a date, you may ask the witness to look at an exhibit which contains that information. You may also stir their memory with a clarification question, such as "Are you referring to the meeting of July 12?" or "Was it Dr. Smith?"
- On cross-examination, you are likely to be confronting a witness favorable to the opposing party. Therefore, your questions should be more narrow and careful than when examining your own witnesses.

Don't:

- Do not coach the witness. A Hearing Officer will give less weight to testimony that seems as though the witness was being led through a script.
- Do not argue with what the witness says, even if it is an answer you were not expecting or that you do not agree with.
- Do not raise your voice or become emotional with the witness.
- Do not interrupt or talk over the witness.

What is "hearsay" and can I object to it?

In a court, lawyers may object to a witness' testimony as "hearsay," which means that the witness is testifying to the truth of something which the witness did not hear, observe, or participate in, but which someone else told him or her about.

At the BSEA, the standard for evidence is relevancy and reliability, a lower and more informal standard than is used by courts. Hearsay evidence is admissible in a BSEA proceeding although it is less persuasive than direct evidence and it must have sufficient relevance and reliability to be considered by the Hearing Officer.

Why and how should I object during testimony?

The most common objections at hearing are for *foundation* (the witness has not demonstrated sufficient basis, experience or knowledge—that is, "foundation"—in order to answer the question), *asked and answered* (the witness has already been asked the same question and given an answer), and *relevancy* (the question does not pertain to the issues at hearing).

If you say "objection" clearly during the opposing party's questioning, the witness should immediately stop speaking, and you will be given a chance to explain the basis for your objection. The Hearing Officer may then allow the opposing party to respond to your argument to explain why the question is not objectionable. The Hearing Officer will then make a decision whether to allow the question to be asked. The Hearing Officer may also suggest re-phrasing the question or may suggest asking a preliminary question to establish sufficient foundation.

Hearing Officers often err on the side of letting in information and then giving less weight to the evidence—for example, where the evidence appears to have little relevance or little reliability.

Tip: Be careful not to object unnecessarily. If you frequently argue frivolous objections, you may do more to hurt than help your case.

What are closing arguments and what is the difference between oral and written closing arguments?

After both sides have finished presenting witnesses, the parties must decide whether to make oral or written closing arguments. Oral closing arguments are usually made immediately after (or within several days after) the close of the testimony, and they follow much the same pattern as opening statements.

Written closing arguments are submitted a number of days after the Hearing concludes. The Hearing Officer decides when written closing arguments are due, usually after consulting with the parties. Written closing arguments must be filed within seven business days after the hearing, unless both parties and the Hearing Officer agree to a later deadline. The Hearing Officer may impose a page limit on the written closing arguments.

Tip: If you or the opposing party chooses to write your closing arguments, it will likely delay the Hearing Officer's decision. Since it typically takes longer to submit written arguments than it does to make oral arguments, this tends to delay

the close of the hearing record, and therefore would likely delay the Hearing Officer's decision.

After the hearing, how long do I have to wait for the Hearing Officer to issue a decision?

Usually, decisions are usually sent to the parties within 25 calendar days of the close of the record of the Hearing.

How will I receive the decision?

A hard copy of the Hearing Officer's decision will be sent to you by certified mail.

What if I don't come to the hearing?

If you are unable to attend the Hearing or notify the Hearing Officer by phone, and you completely miss the hearing, you should nevertheless submit an explanation for your absence as soon as possible. If you had a legitimate emergency, the explanation may save you from dismissal with prejudice or a decision issued without your participation.

What are the consequences of not attending the hearing?

The Hearing Officer has discretion on how to proceed. On the day of the hearing if you do not appear, the Hearing Officer will likely first try to reach you by phone. The Hearing Officer will most likely (but does not have to) delay the start of the hearing while attempting to contact you.

The Hearing Officer may decide to proceed with the hearing in your absence, in which case the opposing party will make their arguments and present their witnesses and you will not be able to object or cross-examine. The Hearing Officer may, but is not required to, send you a copy of a tape of what occurred and invite you to submit something in writing. The Hearing Officer would then issue a decision on the basis of this evidence and argument. Obviously, this may badly impact your case if you did not have a full opportunity to present your appeal to the Hearing Officer.

Alternatively, the Hearing Officer may simply dismiss your case either "without prejudice" or "with prejudice" (if the latter, the issues raised in your case cannot be re-litigated in subsequent cases at the BSEA).

What do I do if I think the Hearing Officer is being unfair or biased?

Prior to the Hearing, you can file a motion requesting that the Hearing Officer recuse (i.e., remove) him/herself if you believe that the Hearing Officer would not be able to decide your case fairly and objectively.

Once the Hearing begins, at all times remain respectful. You can ask to make a statement on the record as to your objections to the Hearing Officer's actions or conduct.

After the hearing, wait for the decision. If the Hearing Officer found against you, you have 90 calendar days from the issuance of the decision to appeal. You can then submit your evidence of bias to a state or federal court judge as part of your appeal.

How do I get a copy of the hearing tapes or stenographer's transcript?

Submit a written request for a copy of the tapes or transcript to the BSEA. Be sure to include your BSEA case number in the request. These copies of the record are provided free of charge. Some parties request these copies in order to refer and quote the record when writing closing arguments.

XVI. APPEAL/ POST-HEARING

Topics discussed in this section:

- Finality of the Hearing Officer's decision
- Appealing the decision
- Implementation of the decision
- Compliance with the decision

How final is the Hearing Officer's decision? Can I move for reconsideration?

The Hearing Officer's decision is not subject to further agency review, which means once the final decision is issued, the BSEA will not re-open or reconsider the case. If you disagree with the decision, you must appeal it to state or federal court.

How do I appeal?

You have 90 calendar days from the date of issuance (not the receipt) of the decision to appeal. You appeal by filing a complaint in Massachusetts Superior Court or in federal District Court. A court appeal is beyond the scope of this manual, but if you intend to appeal, you should seek legal advice because there are complex procedural rules and expenses associated with that process.

When will the Hearing Officer's decision be implemented?

If the Hearing Officer decides in favor of the parent, the decision/order goes into immediate effect, even pending the school district's appeal. If the Hearing Officer decides in favor of the school district, and the parent appeals, then the student stays in the last agreed educational placement until the appeal is resolved.

What if the Hearing Officer decided in my favor, but the opposing party is refusing to comply?

You can file a motion requesting your Hearing Officer to order compliance with his or her Decision. The motion must include the specific details of alleged non-compliance, and the opposing party will have an opportunity to respond. In some circumstances, a Hearing Officer may even convene a new hearing solely on the compliance issue.

Note that the new hearing will be strictly limited–it is not a re-opening of the original case. Rather, each party may present evidence on the narrow question of whether the order is being complied with.

The Hearing Officer will then issue a Decision, determining whether there has been non-compliance. If there is a finding of non-compliance, the Hearing Officer may refer the matter to the Legal Office of the Department of Elementary and Secondary Education for enforcement.

XVII. ASSISTANCE

Topics discussed in this section:

- Resources
- Contacting the BSEA
- Talking to people at the BSEA

What resources can help me?

The first place you should look for more information is the BSEA website, http://www.doe.mass.edu/bsea/. Much of the information in this manual is repeated or explained on the website. The website also allows you to read previous BSEA Hearing decisions.

Note that those decisions have been "redacted"(personally identifiable information has been removed), so you will not be able to search them by the student's name, but you can search for decisions from a particular date, topic, school district, or Hearing Officer. The website also has links to state and federal special education laws, so that you can more easily browse through and search these documents. See also part XVIII, below, for links to state and federal special education laws and regulations.

The Massachusetts Trial Court Law Libraries not only provide links to state special education law, but also related resources, such as a Parent's Guide to Mental Health Services in Massachusetts; the list of Massachusetts approved private special education schools; and articles from the federal and state departments of education pertaining to special education services: http://www.lawlib.state.ma.us/subject/about/specialed.html

How do I contact the BSEA?

Phone: You can call the BSEA at (781) 338-6400. The "contact the BSEA" link on the Bureau's website, http://www.doe.mass.edu/bsea/, also lists the extensions of individuals. Remember, however, that you cannot speak directly with your Hearing Officer unless the other party is present on the phone line. (Ex Parte Communication).

Fax: The BSEA fax number is (781) 338-3398. Remember that if faxing official documents related to your case, you should always follow with the originals by mail. However, the effective date of receipt is the date of the fax.

Mail: Bureau of Special Education Appeals
75 Pleasant Street
Malden, MA 02148-4906

Whom can I talk to at the BSEA?

Due to "ex parte communication" rules, you will have the opportunity to ask questions of the Hearing Officer only during conference calls, any pre-hearing conference, the evidentiary hearing, and any other situations in which the opposing party is present. In addition, you may call the BSEA and speak with another Hearing Officer, or with the BSEA Director or Assistant Director.

At all times, it is important for you to remember that the people who work at the BSEA cannot represent you. The BSEA will help you understand the *procedural* details of the BSEA processes, but the BSEA cannot give you legal advice on the *substantive* issues of your case.

XVIII. SPECIAL EDUCATION LAW AND REGULATIONS

Topics discussed in this section:

- Federal special education laws and regulations
- Massachusetts special education laws and regulations
- BSEA Hearing Rules

Federal (Nation-wide) special education laws and regulations:

- The Individuals with Disabilities Education Act (IDEA), which was last amended in 2004, and the regulations under the IDEA: http://idea.ed.gov/explore/home
- The Rehabilitation Act of 1973, specifically what is known as Section 504: http://www.ed.gov/policy/rights/reg/ocr/edlite-34cfr104.html
- Select sections of the Americans with Disabilities Act (ADA)

- See also the BSEA's website relevant to laws, regulations and rules: http://www.doe.mass.edu/bsea/laws.html

Massachusetts state special education laws and regulations:

- MA state regulations (603 CMR:28.00) relevant to special education: http://www.doe.mass.edu/lawsregs/603cmr28.html
- MA statute (MGL c. 71B) relevant to special education: http://www.mass.gov/legis/laws/mgl/gl-71b-toc.htm
- Formal rules of adjudicatory procedure (801 CMR 1.01) which govern hearings at the BSEA: http://www.lawlib.state.ma.us/source/mass/cmr/cmrtext/801CMR1.pdf
- See also the BSEA's website relevant to laws, regulations and rules: http://www.doe.mass.edu/bsea/laws.html

BSEA Hearing Rules for Special Education Appeals:

A full version of the BSEA Hearing Rules can be found at: http://www.doe.mass.edu/bsea/forms/hearing_rules.pdf

It is these *procedural* rules, and not the above cited *substantive* laws and regulations, which this Reference Manual is meant to explain more fully.

GLOSSARY OF TERMS

Burden of Proof: The moving party in a dispute has the *burden of proof*, which means that it is that party's responsibility to prove its case. The non-moving party need only show that the moving party has failed to meet its burden. For example, if you, as the moving party, fail to meet your burden of proof, the opposing party wins, as if by default.

Caucus: When in a mediation or negotiation, a *caucus* is when the neutral facilitator speaks to one of the parties separately and apart from the other. The facilitator may then return and *caucus* with the other party.

Discovery: The period before a Hearing or trial when parties request and exchange information with one another. Interrogatories, Requests for Documents, and Depositions are all different means of *discovery*.

Dismissed with or without Prejudice: When a case is involuntarily dismissed (that is, the Hearing Officer dismisses it without the consent of one or both parties), it can be dismissed *with prejudice* or *without prejudice*. If dismissed without prejudice, a party can file a new request for Hearing on the same issues and begin the BSEA Hearing process all over again. If dismissed with prejudice, although no decision has been issued finding for one party or another, the same issues cannot be filed again with the BSEA.

Duty to Disclose: The procedural obligation of each party to provide the opposing party and the Hearing Officer with a copy of its exhibits and a list of witnesses at least five business days prior to Hearing.

Evidence: The documents and testimony that the Hearing officer will consider when making his or her Decision.

Ex Parte Communication: Communication between the Hearing Officer and one of the parties when the other party is not present. Ex Parte Communication is not permissible; therefore, the opposing party must always be present, either physically or on the line in a conference call, when you speak with your Hearing Officer. Similarly, written ex party communication is not permissible so all correspondence from a party to the Hearing Officer must be copied to the opposing party.

Expedited Hearing: A Hearing that is scheduled more quickly due to extraordinary circumstances.

Free and Appropriate Public Education (FAPE): The education standard to which all eligible children with disabilities are entitled, according to state and federal law.

Individuals with Disabilities Education Act (IDEA): The most important federal act concerning special education law.

Joinder: The act of making another interested person/organization a third party to your case, so that they will also be bound by the decision.

Least Restrictive Environment (LRE): A student must be educated in the *least restrictive environment* (that is, the educational environment that includes other students who do not have a disability) to the maximum extent appropriate for that particular student.

Moving/ Non-Moving Party: The *moving* party is the one who files the hearing request (also known as the Petitioner). The *non-moving* party is the party that responds (also known as the Respondent). These terms apply to both the original Request for Hearing and to any motion made during the Hearing process.

Pro Se: Latin, "for oneself." A *Pro Se* litigant is one who represents him/herself at Hearing, as opposed to being represented by an attorney or advocate.

Pull-out: Educational programming for which the Student is temporarily removed from the mainstream classroom.

Recess: A break or pause in the proceedings. A *recess* may be called during mediation or hearing to allow parties to reflect on the situation.

Show Cause: An Order to Show Cause asks the parties to state in writing why the case should stay active. If the parties do not respond, or do not provide convincing reasons for the Hearing Officer to keep the case open, the hearing request will usually be dismissed.

Stay-Put: This refers to the services and placement which the school district must provide in the event the parents reject a subsequently proposed IEP or file a Hearing Request with the BSEA. The student's "stay put" services and placements are generally what are reflected within the student's last agreed-upon IEP.

Sua Sponte: Latin, "on one's own." Legal phrase for when a court/Hearing Officer decides to take a legal action, not because either party requested it, but because the Hearing Officer on his/her own initiative believes it to be necessary.

Subpoena: An order commanding a person to appear at a certain date and time, in a certain location, in order to give testimony in a legal proceeding. Related to *Subpoena Duces Tecum*, an order requiring that specified documents be turned over for use in a legal proceeding.

Venue: Location.

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