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BUREAU OF SPECIAL EDUCATION APPEALS

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Hearing Rules for Special Education Appeals

These Rules replace and supersede the Hearing Rules for Special Education Appeals issued in February 2008

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CONTENTS

SCOPE OF RULES 1

HOW TO BEGIN AN ADMINISTRATIVE DUE PROCESS HEARING

Rule I: Hearing Request 2

A. Who May File a Hearing Request
B. Hearing Request Content
C. Timeline for Requesting a Hearing
D. Response to Hearing Request
E. Sufficiency Challenge
F. Resolution Session
G. Amending the Hearing Request
H. Representation – Attorney or Advocate Notice of Appearance
I. Intervention
J. Joinder

HOW A HEARING DATE IS SCHEDULED

Rule II: Hearing Schedule 6

A. Hearing Date
B. Notice of Hearing
C. Expedited Hearings
D. Accelerated Hearing Requests
E. Conference Call

REQUESTING A POSTPONEMENT OR ADVANCEMENT

Rule III: Postponement/Advancement 10

A. Postponement
B. Advancement

THE PREHEARING CONFERENCE

Rule IV: Prehearing Conference 11

A. Hearing Request Prerequisite
B. Purpose of Prehearing Conference
C. Both Parties Requesting
D. One or Neither Party Requesting
E. Telephonic Prehearing Conference

EXCHANGE OF INFORMATION: INFORMAL/DISCOVERY/ SUBPOENAS/EXHIBITS 12

Rule V: Informal/Formal Exchange of Information

A. Exchange of Information by Agreement
B. Discovery
C. Objections/Protective Orders

MOTIONS

Rule VI: Motions **14**

A. Motion Defined
B. Filing a Motion
C. Notice of the Motion to Other Party
D. Hearings and Rulings on a Motion
E. Evidence Relating to a Motion

Rule VII: Subpoenas **15**

A. Subpoena Defined
B. Issuance
C. When a Person Contests a Subpoena
D. Enforcement

Rule VIII: Exhibits; Witness List **15**

A. Five Day Rule
B. Exhibit Preparation

HOW A HEARING IS CONDUCTED

Rule IX: Conduct of Hearing **16**

A. Generally
B. Hearing Officer Duties and Powers
C. Evidence
D. Evidentiary Standard
E. Close of the Hearing
F. Failure to Prosecute or Defend

Rule X: Rights of Parties **19**

A. Rights of All Parties
B. Parent Rights

HEARING DECISION

Rule XI: Decision Without a Hearing **20**

Rule XII: Decision and Implementation of Decision **20**

A. Decision
B. Finality of Decision
C. Immediate Implementation

Rule XIII: Rights of Appeal; Placement of Student During Appeal; Stay of Decision **21**

A. Rights of Appeal
B. Placement of Student During Judicial Appeal of BSEA Decision
C. Stay of Decision

Rule XIV: Compliance with Decision **21**

Rule XV: Record **21**

DISMISSAL/CASE CLOSURE

Rule XVI: Dismissal and Closure of Case **22**

A. Dismissal With and Without Prejudice Defined
B. By Request of a Party
C. By Order to Show Cause
D. Inactive Cases
E. Withdrawal

LEA ASSIGNMENT APPEALS

Rule XVII: Appeals of Massachusetts Department of Elementary and Secondary Education Assignments of School District Responsibility **23**

A. Hearing Request
B. Applicable BSEA Rules
C. Right of Appeal

Scope of Rules

The Department of Elementary and Secondary Education created the Bureau of Special Education Appeals (BSEA) to ensure due process rights of students with disabilities, parents, and public schools when a dispute arises concerning a student's educational program that cannot be resolved locally. The BSEA has jurisdiction over disputes among parents, school districts, private schools, and state agencies involving any matter concerning the provision of a free appropriate public education to a student with special needs.

The BSEA has the authority to resolve educational disputes pursuant to Massachusetts state law M.G.L. c. 71B (popularly known as Chapter 766), and its implementing regulations, 603 CMR 28.00. The BSEA has jurisdiction to resolve educational disputes under federal law as well, in accordance with 20 U.S.C. 1401 *et seq*. (the Individuals with Disabilities Education Act, "IDEA"), 29 U.S.C. 794 (Section 504 of the Rehabilitation Act of 1973) and the regulations promulgated thereunder, 34 C.F.R. Part 300 and 34 C.F.R. Part 104 respectively.

These hearing rules are governed by 603 CMR 28.00, federal due process procedures and the Massachusetts Administrative Procedure Act, M.G.L. c. 30A. Unless modified explicitly by these Rules, hearings are conducted under the Formal Standard Adjudicatory Rules of Practice and Procedure, 801 CMR 1.01 *et seq*. These provisions require the BSEA to conduct fair and impartial hearings and to render written decisions that are based upon findings of fact and supported by substantial evidence.

How to Begin an Administrative Due Process Hearing

RULE I: *Hearing Request*

A. Who May File a Hearing Request

A hearing before the Bureau of Special Education Appeals (BSEA) may be requested by:

1. The student, if age 18 or over;
2. The parent(s);
3. The legal guardian, individual with court-appointed educational decision-making authority or duly appointed educational surrogate parent;[1]
4. The programmatically and /or fiscally responsible school district, state educational agency or other public agency;
5. An individual with whom the child lives and who is acting in place of the parent; or
6. An attorney or advocate for any of the above.

B. Hearing Request Content

To begin the hearing process, the party requesting the hearing (i.e., moving party) must send a written hearing request to the opposing party.[2] At the same time, the moving party must send a copy of the hearing request to the BSEA. The date that the opposing party receives the hearing request is the operative date for calculating due process timelines.

The hearing request must contain the following information:

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,

[1] A copy of the appointment must accompany the hearing request for all individuals enumerated in this category.
[2] Sending the hearing request to the office of a school administrator, or to counsel for a party shall be deemed sufficient service.

f. Individual with whom the child lives and who is acting in the place of the parent;

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.

The party requesting a hearing shall not be allowed to raise issues at the hearing that were not raised in the hearing request unless the other party agrees or the hearing request is amended in accordance with state and federal law.

The hearing request must be signed and dated by the person who is requesting the hearing. The person requesting the hearing must submit a signed statement that he/she has sent the hearing request to the opposing party. The signed statement must indicate the method (e.g., fax, mail, hand-delivery) by which the request was sent.

C. Timeline for Requesting a Hearing

A parent or agency shall request an impartial due process hearing within two (2) years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint. This timeline does not apply if a parent was prevented from requesting a hearing due to either specific misrepresentations by the school district that it had resolved the problem forming the basis of the hearing request or the school district's withholding of information from the parent that was required to be provided under federal law.

D. Response to Hearing Request

Within ten (10) calendar days of receipt of the moving party's hearing request, the opposing party must send to the other party and the Hearing Officer a response that specifically addresses the issues raised in the hearing request. However, if the school district sent a prior written notice to the parent regarding the issues raised in the parent's

hearing request in accordance with 34 C.F.R. § 300.503, the school district need not send an additional response.

E. Sufficiency Challenge

If the non-moving party believes that the hearing request does not contain the elements set out in Rule IB, that party may file a written challenge to the sufficiency of the hearing request with the Hearing Officer and the other party (ies) within fifteen (15) calendar days of receipt of the hearing request.

The Hearing Officer shall rule as to the sufficiency of the hearing request within five (5) calendar days.

If the hearing request is found to be sufficient, the original timelines remain unchanged.

If the Hearing Officer finds the hearing request to be insufficient, the moving party may file an amended hearing request with the Hearing Officer and the other party, provided the moving party does so within fourteen (14) calendar days from the date of the insufficiency ruling. Failure to file the amended hearing request within 14 calendar days (or such other time as ordered by the Hearing Officer) may result in the dismissal of the case without prejudice.

F. Resolution Session

Under the IDEA, a hearing cannot be held in response to a parent's hearing request until

1. the school district has convened a resolution meeting;[3] within fifteen (15) calendar days[4] of the date of receipt of the hearing request; or

2. the parties have agreed to participate in mediation in lieu of the resolution meeting; or

3. the parties have notified the BSEA in writing that they have both waived the resolution session.

If the school district has not resolved the complaint to the satisfaction of the parent within thirty (30) calendar days of the receipt of the hearing request, the hearing may occur, and all of the applicable timelines for a due process hearing shall commence. If the parent does not participate in the resolution meeting or participate in mediation in lieu of the resolution meeting, the hearing will be delayed until the meeting is held.

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[3] The resolution meeting must include parent, relevant members of student's IEP team with knowledge of the facts identified in the hearing request, and a school representative with decision-making authority, to attempt to resolve the issue(s) in the hearing request. If the parent does not participate in the resolution meeting or in mediation in lieu of the meeting, the hearing will be delayed.

4 If, for reasons other than a parent's failure to participate, the school district fails to convene a resolution meeting within fifteen calendar days of receipt of the hearing request, it shall be deemed to have waived the resolution session, and the hearing may occur.

G. Amending the Hearing Request

The moving party may amend the hearing request under two circumstances:

1. In response to a Hearing Officer's determination that a hearing request is insufficient, as described in E, above, the moving party may file an amended hearing request within fourteen (14) calendar days of the date of the Hearing Officer's determination.

2. If the other party consents in writing, or the Hearing Officer grants permission. (The Hearing Officer may not grant such permission later than five (5) calendar days before the start of the hearing.)

Whenever a hearing request is amended, the entire process starts over for the purpose of timelines, as if the amended hearing request were a new request. However, to the extent the amendment merely clarifies issues raised in the initial hearing request, the date of the initial hearing request shall be controlling for statute of limitations purposes. For issues not included in the original hearing request, the date of the amended hearing request shall be controlling for statute of limitations purposes.

H. Representation - Attorney or Advocate Notice of Appearance

Representation. Individuals may appear on their own behalf and present their case without attorney or advocate assistance if desired. A school district or state agency may designate an individual to act on its behalf. Any party has the right to be accompanied, represented, and advised by an attorney or advocate. Attorneys or advocates must file a written notice of appearance. The filing of any pleading, motion, or other paper is deemed to constitute the filing of an appearance unless the paper states otherwise.

Withdrawal From Representation. An attorney or advocate may withdraw from a case by filing written notice of withdrawal, together with a statement indicating that notice of the withdrawal has been provided to the client and all other parties.

I. Intervention

Upon written request, a Hearing Officer may allow any person or entity that may be substantially and specifically affected by the proceeding to intervene or participate in the entire proceeding or any part of it.

J. Joinder

Upon written request of a party, a Hearing Officer may allow for the joinder of a party in cases where complete relief cannot be granted among those who are already parties, or if the party being joined has an interest relating to the subject matter of the case and is so situated that the case cannot be disposed of in its absence. Factors considered in determination of joinder are: the risk of prejudice to the present parties in the absence of the proposed party; the range of alternatives for fashioning relief; the inadequacy of a

judgment entered in the proposed party's absence; and the existence of an alternative forum to resolve the issues.

How a Hearing Date is Scheduled

RULE II: ***Hearing Schedule***

A. Hearing Date

In order to comply with the federal timeline requiring that in non-expedited cases no more than 45 days after the expiration of the 30-day resolution period a final decision is reached and mailed to the parties, the BSEA shall schedule a hearing date that is:

1. thirty-five (35) calendar days after receipt by the opposing party of a hearing request filed by a parent/student or filed on behalf of a parent/student (as stated in Rule I A); or

2. twenty (20) calendar days after receipt by the opposing party of a hearing request filed by a school district; or

3. twenty (20) calendar days after receipt of a hearing request involving an appeal of assignment of school district responsibility.

To the extent possible, the Hearing Officer shall ensure that hearings requiring multiple days are held on dates close to one another.

B. **Notice of Hearing**

The hearing notice shall include the following:

1. time, date, location of hearing;

2. name of initial Hearing Officer;

3. deadline to file response to hearing request;

4. deadline to challenge sufficiency of hearing request;

5. deadline for convening the resolution meeting;

6. date for issuance of decision; and

7. the BSEA's phone number (if technical assistance is needed).

C. Expedited Hearings

1. Student Discipline: Hearings involving discipline are scheduled on an expedited timeline consistent with federal IDEA regulations. Expedited status will be granted:

   a. when a parent disagrees with a school district's determination that the behavior leading to discipline was not a manifestation of the student's disability; or

   b. when a parent disagrees with a school district's decision regarding a student's placement in the discipline context; or

   c. when a school district asserts that maintaining the current placement of the student during the pendency of due process proceedings is substantially likely to result in injury to the student or others.

2. Form of Expedited Hearing Request

   Requests for expedited hearings must be in writing, and must conform to the requirements of Rule I. No specific form is required in order to request an expedited hearing. Failure to specifically request expedited status shall not preclude assignment of such status by a Hearing Officer as long as the hearing request sets forth grounds that meet the IDEA's expedited criteria.

3. Expedited Hearing Schedule

   a. A hearing on an expedited request will be held no later than fifteen (15) calendar days after the request is received by the opposing party.

   b. The resolution meeting must occur within seven (7) calendar days of receipt of the hearing request. If the school district has not resolved the complaint to the satisfaction of the parent within twelve (12) calendar days of receipt of the hearing request, the hearing may occur.

   c. A conference call may be scheduled at the request of a party or at the discretion of the Hearing Officer.

   d. Copies of all documents to be introduced as evidence and a list of the witnesses to be called at the hearing must be exchanged by the parties and received by the Hearing Officer two (2) business days prior to the expedited hearing date unless a different schedule is allowed by the Hearing Officer.

   e. A decision on the expedited hearing will be issued no later than ten (10) calendar days after the hearing.

   f. When expedited status is requested, a Hearing Officer will consider which issues, if any, meet the criteria above, and will schedule only those issues on

an expedited track. The remaining issues, if any, will be processed separately on a non-expedited track. Whenever possible, both cases will be heard by the same Hearing Officer.

g. If the parties agree to have the expedited hearing decided on documents only, they must inform the Hearing Officer, in writing, of their agreement.

4. Postponements/Advancements

a. An expedited hearing may not be postponed.

b. A request to advance the hearing date will be granted only if the rescheduled date conforms to federal IDEA requirements with respect to the resolution session.

D. **Accelerated Hearing Requests**

1. Hearings may be assigned accelerated status in the following situations:

a. When the health or safety of the student or others would be endangered by the delay; or

b. When the special education services the student is currently receiving are sufficiently inadequate such that harm to the student is likely; or

c. When the student is currently without an available educational program or the student's program will be terminated or interrupted immediately.

2. Form of Accelerated Hearing Requests

Requests for accelerated hearings must be in writing and must conform to the requirements of Rule I. No specific form is required in order to request an accelerated hearing. Failure to specifically request accelerated status will not preclude assignment of such status by a Hearing Officer when the hearing request sets forth grounds that meet accelerated criteria.

3. Accelerated Hearing Schedule

a. A hearing assigned accelerated status will be held no later than thirty (30) calendar days after the request is received by the opposing party. When accelerated status is requested, a Hearing Officer will consider which issues, if any, meet the criteria above, and will schedule only those issues on an accelerated track. The remaining issues, if any, will proceed separately on a non-accelerated track. Whenever possible, both cases will be heard by the same Hearing Officer.

b. A response to the hearing request must be filed no later than ten (10) calendar days after receipt of the hearing request.

c. When parent(s) request the hearing, the resolution meeting must occur within fifteen (15) calendar days of receipt of the hearing request. The parties shall inform the Hearing Officer in writing within ten (10) calendar days of receipt of the hearing request whether they will convene or waive the resolution session.

d. The responding party may file a challenge to the sufficiency of the hearing request no later than fifteen (15) calendar days after receipt of the hearing request.

e. The BSEA will schedule a telephone conference call to occur nineteen (19) calendar days after a hearing request has been received by the opposing party.

f. Copies of all documents to be introduced as evidence and the list of witnesses to be called at the hearing must be exchanged by the parties and received by the Hearing Officer five (5) business days prior to the accelerated hearing date unless a different schedule is allowed by the Hearing Officer.

g. A decision on the accelerated issue(s) will be issued no later than fifteen (15) calendar days after the close of the record.

4. Postponements/Advancements of Accelerated Status Matters

a. For matters assigned accelerated status, no postponements will be granted.

b. At the written request of the party(ies), or upon the Hearing Officer's determination, an accelerated matter may be removed from the accelerated calendar, and shall proceed in accordance with the timelines set forth in federal and state law.

E. Conference Call

In all non-expedited cases, the BSEA will schedule a telephone conference call to occur nineteen (19) calendar days after a hearing request has been received by the opposing party. In general, the call should last no more than ten (10) minutes and will address scheduling of future events, timelines for exchange of information (discovery), and any other scheduling issues. The Hearing Officer may entertain discussion of substantive matters if no further resolution meetings are anticipated during the thirty (30) day resolution session period.

Requesting a Postponement Or Advancement

RULE III: ***Postponement /Advancement***

A. Postponement

1. All requests for postponement of a hearing must be submitted in writing to the Hearing Officer and the opposing party. Except in extraordinary circumstances, a postponement request must be received at least six (6) business days before the scheduled hearing date. The request must set out the specific length of the extension requested, the reasons for the request, proposed alternate dates for the hearing, and indicate that all parties have been notified.

2. A party may agree to or oppose a request to postpone a hearing in writing. Opposition to a request for postponement will be given serious consideration by the Hearing Officer.

3. A Hearing Officer may grant an extension of the 45-day timeline at the written request of a party and only for good cause. The Hearing Officer will issue a written ruling on the request, documenting the length of the extension or the new date by which the Hearing Officer will mail the decision to the parties and the basis for the ruling. 34 C.F.R. § 300.515(c).

B. Advancement

1. A hearing may be held earlier than the initially assigned date when the parties jointly request advancement and notify the Hearing Officer in writing that the resolution meeting either has been waived or has been completed without resolution before expiration of the thirty (30) day time line for the resolution session.

2. If the initial hearing date has already been postponed and a new date assigned, the hearing may be advanced at the request of a party for good cause. The Hearing Officer may grant the advancement request and assign a new hearing date and decision issuance date, or deny the request for good cause.

The Prehearing Conference

RULE IV: ***Prehearing Conference***

A. Hearing Request Prerequisite

A prehearing conference may be conducted only after a request for hearing has been filed with the BSEA and the parties have either completed or waived the resolution session.

Absent extraordinary circumstances, a prehearing conference shall not delay the hearing date unless a party requests or assents to a postponement for the purpose of scheduling a prehearing conference.

B. Purpose of Prehearing Conference

The prehearing conference shall clarify or simplify the issues as well as review the possibility of settlement of the case. At the prehearing conference, the parties shall be prepared to discuss their respective positions and the relief each seeks through the hearing. Not every case will require a prehearing conference. If the issues are clear, a case may proceed directly to hearing.

A prehearing conference may address:

- clarification of issues;
- remedies;
- identification of areas of agreement and disagreement;
- discovery;
- date for exchange of exhibits;
- length of hearing;
- need for an interpreter and/or stenographer;
- settlement;
- prehearing conference orders; and/or
- organization of the proceedings.

Participants in a prehearing conference must have full authority to settle the case or have immediate access to such authorization.

C. When Both Parties Request a Prehearing Conference

A Hearing Officer shall conduct such a prehearing conference upon joint request of the parties once the parties have either completed or waived the resolution session.

D. When One Party or Neither Party Requests a Prehearing Conference

When one party or neither party requests a prehearing conference, a Hearing Officer shall determine whether a prehearing conference is necessary.

If the Hearing Officer determines that a prehearing conference is necessary, the conference may be scheduled, but shall not delay the hearing date.

If neither party requests a prehearing conference, the Hearing Officer may not unilaterally convert a hearing into a prehearing conference.

A prehearing conference may also be held immediately prior to convening the hearing.

E. Telephonic Prehearing Conference

A party may request that a prehearing conference be conducted by telephone.

Exchange of Information, Motions, Subpoenas, Exhibits

RULE V: ***Informal/Formal Exchange of Information***

A. Exchange of Information by Agreement

The parties are encouraged to exchange information cooperatively and by agreement prior to the hearing. The parents are entitled to receive copies of the student's school records. (*See Massachusetts Student Record Regulations, 603 CMR 23.00.)*

B. Discovery

The term "discovery" refers to formal requests for, and exchanges of, information. Unless the case has been granted expedited status, formal requests for information may be made at any time after a request for hearing is filed and the resolution meeting, when required, has been held or waived. Discovery may occur in the form of written questions (interrogatories), written requests for records (production of documents), or testimony under oath taken outside of a hearing (deposition).

The party upon whom the request is served shall respond within a period of thirty (30) calendar days unless a shorter or longer period of time is established by the Hearing Officer.

1. *Requests for Documents.* Any party may request any other party to produce or make available for inspection or copying any documents or tangible things not privileged, not supplied previously, and which are in the possession, custody, or control of the party upon whom the request is made. (A party may request

documents from a non-party through a subpoena duces tecum duly issued by the Bureau of Special Education Appeals, and those documents may be delivered to the office of the party requesting the documents prior to the hearing date. See Rule VIII B.)

2. *Interrogatories.* A party may serve on any other party written interrogatories for the purpose of discovering relevant, not privileged, information not supplied previously through a voluntary exchange of information. Hearing Officer approval is not required for twenty-five (25) or fewer interrogatories. No party, without Hearing Officer approval, shall serve more than twenty-five (25) interrogatories on another party. For purposes of determining the number of interrogatories, subparts of a basic interrogatory that are logical extensions of the basic interrogatory and seek only to obtain specified additional particularized information with respect to the basic interrogatory shall not be counted separately from the basic interrogatory. Each interrogatory shall be separately and fully answered under the penalties of perjury unless it is objected to, in which event, the reasons for the objection must be stated in lieu of an answer.

3. *Depositions.* In order to take the testimony of any witness by deposition, a party must file a written motion seeking approval from the Hearing Officer.

   a. Time & Content. There shall be at least ten (10) calendar days notice to the parties of the motion to take a deposition. A motion requesting a deposition shall state the name and address of the witness to be deposed, the subject matter concerning which the witness is expected to testify, the time and place of taking the deposition, the name and address of the person before whom the deposition will take place, and the reason why such deposition should be taken.

   b. Authorization. The Hearing Officer shall allow the motion only upon a showing that the parties have agreed to submit the deposition in lieu of testimony by the witness or the witness to be deposed cannot appear before the Hearing Officer without substantial hardship, and that the testimony being sought is relevant and material, not privileged, and not discoverable by an alternate means.

   c. Scope and Conduct of the Deposition. Depositions shall be taken orally before a person having power to administer oaths. Every witness testifying upon deposition shall be duly sworn, and the adverse party (ies) shall have the right to cross-examine. Objections to questions must set out the grounds relied upon. The testimony shall be reduced to writing and shall, unless waived, be signed by the witness, and certified by the officer before whom the deposition is taken. After the deposition has been subscribed and certified, it shall be forwarded to the Hearing Officer. Subject to appropriate rulings on objections, and the parties' agreement regarding its use, the deposition shall be received in evidence as if the testimony contained therein had been given by the witness in the proceeding.

C. Objections/Protective Orders

The party upon whom a request for discovery is served may, within ten (10) calendar days of service of the request, file with the Hearing Officer objections to the request or move for a protective order. Disputes regarding discovery shall be resolved whenever possible by conference call. Protective orders may be issued to protect a party from undue burden, expense, delay, or as otherwise deemed appropriate by the Hearing Officer. Orders of the Hearing Officer may include limitations on the scope, method, time and place for discovery or provisions protecting confidential information.

RULE VI: *Motions*

A. Motion Defined

A party may request that a Hearing Officer issue an order or take any action consistent with relevant statutes or regulations. Such a request shall be called a motion.

B. Filing a Motion

After a party files a hearing request, motions may be filed in writing with the Hearing Officer. Each motion shall set forth the reasons for the desired order or action and shall also state whether a hearing on the motion is requested.

C. Notice of the Motion to the Other Party

Written motions must be served on all parties and the Hearing Officer simultaneously. The party(ies) filing the motion must submit a signed statement that he/she has sent a copy of the motion to the opposing party(ies). The statement must indicate the method (e.g., fax, mail, hand-delivery) by which the copy was sent. Any party may file written objections to the allowance of the motion and may request a hearing on the motion within seven (7) calendar days after a written motion is filed with the Hearing Officer and the opposing party, unless the Hearing Officer determines that a shorter or longer time is warranted.

D. Hearings and Rulings on a Motion

If a hearing on a motion is warranted, a Hearing Officer shall give all parties at least three (3) calendar days notice of the time and place for hearing. A Hearing Officer may rule on a motion without holding a hearing if: delay would seriously injure a party; testimony or oral argument would not advance the Hearing Officer's understanding of the issues involved; or a ruling without a hearing would best serve the public interest.

E. Evidence Relating to a Motion

In support of, or opposition to, a motion, a party may offer only evidence relevant to the particular motion. This evidence may consist of facts that are supported by affidavit (a sworn, written statement under oath), appear in records, files, depositions, or answers to interrogatories, or presented by sworn testimony.

RULE VII: *Subpoenas*

A. Subpoena Defined

A subpoena is a written command to appear at a certain time and place to give testimony in the case. A subpoena may also require the production of documents. This is called a subpoena *duces tecum*.

B. Issuance

Upon the written request of a party, the BSEA shall issue a subpoena to require a person to appear and testify and, if requested, to produce documents at the hearing. A party may also request that the subpoena *duces tecum* direct that documents subpoenaed from a non-party be delivered to the office of the party requesting the documents prior to the hearing date.

The request, which must be simultaneously sent to the opposing party and the Hearing Officer, must be received by the Hearing Officer at least ten (10*)* calendar days prior to the hearing; shall specify the name and address of the person to be subpoenaed; and shall describe any documents to be produced. Subpoenas may be issued independent of the BSEA and shall be governed by the Standard Adjudicatory Rules of Practice and Procedure, 801 CMR 1.01(10)(g). The BSEA may also issue a subpoena *sua sponte*, that is, on its own initiative without a formal request from a party.

C. When a Person Contests a Subpoena

A person receiving a subpoena may request that a Hearing Officer vacate or modify the subpoena. A Hearing Officer may so do upon a finding that the testimony or documents sought are not relevant to any matter in question or that the time or place specified for compliance or the breadth of the material sought imposes an undue burden on the person subpoenaed.

D. Enforcement

If any person fails to comply with a properly issued subpoena, the party requesting the issuance of the subpoena may petition the Superior Court for an order requiring compliance with the terms of the subpoena.

RULE VIII: *Exhibits, Witness List*

A. Five Day Rule

Copies of all documents to be introduced (exhibits) and a list of the witnesses to be called at the hearing must be received by the opposing party (ies) and the Hearing Officer at least five (5) business days prior to the hearing unless otherwise allowed by the Hearing

Officer.

B. Exhibit Preparation

All exhibits shall be numbered in the upper right hand corner, divided by tabs, and submitted to the Hearing Officer along with a numbered index. Use of loose leaf or other binders is encouraged.

How a Hearing Is Conducted

RULE IX: ***Conduct of Hearing***

A. Generally

To the extent possible, hearings shall be scheduled at a time and place convenient to the parties. Hearings shall be as informal as is reasonable and appropriate under the circumstances. The Hearing Officer has the authority and obligation to ensure that appropriate standards of conduct are observed and that the hearing is conducted in a fair and orderly manner. Unless the parents request otherwise, the hearing is closed to the public, and all evidence taken at hearing shall remain confidential.

B. Hearing Officer Duties and Powers

The Hearing Officer shall have the duty to conduct a fair hearing; administer the oath or affirmation to witnesses testifying at the hearing; to ensure that the rights of all parties are protected; to define issues; to receive and consider all relevant and reliable evidence; to ensure an orderly presentation of the evidence and issues; to ensure a record is made of the proceedings; and to reach a fair, independent, and impartial decision based on the issues and evidence presented at the hearing and in accordance with the law. In furtherance of these duties, the Hearing Officer may:

1. Authorize the BSEA to issue subpoenas *sua sponte* or upon the request of any party to secure the presentation of evidence or testimony;

2. Request a statement of the issues and define the issues;

3. Rule on any requests or motions that may be made during the course of the due process proceedings;

4. After consultation with the parties and consideration of the proposed evidence, place reasonable limits on the presentation of evidence to prevent undue delay, waste of time, or needless presentation of cumulative evidence;

5. Assist all those present in making a full statement of the facts in order to bring out all the information necessary to decide the issues involved and to ascertain the rights of the parties;

6. Ensure that each party has a full opportunity to present its case orally, or in writing, and to secure witnesses and evidence to establish its claims;

7. Regulate the presentation of the evidence and the participation of the parties for the purpose of ensuring an adequate and comprehensible record of the proceedings;

8. Examine witnesses and ensure that relevant evidence is secured and introduced;

9. Receive, rule on, or exclude evidence;

10. Introduce into the record any regulations, statutes, memoranda, or other materials relevant to the issues at the hearing;

11. Continue the hearing to a subsequent date to permit either party to produce additional evidence, witnesses, and other information;

12. Order additional evaluations at public expense;

13. Order written briefs to be submitted by the parties, establish the issues to be addressed by the briefs, and set the deadline for their submission;

14. Reconvene the hearing at any time prior to the issuance of a decision for any purpose or pursuant to a post-hearing motion; and

15. Censure, reprimand, or otherwise ensure that all participants conduct themselves in an appropriate manner.

C. Evidence

The Hearing Officer shall not be bound by the rules of evidence applicable to courts, but shall observe the rules of privilege recognized by law. Evidence shall be admitted only if it is the kind of evidence upon which reasonable persons are accustomed to rely in the conduct of serious affairs.

1. *Documents.* The parties may offer as evidence documents that they have exchanged prior to the hearing in accordance with these rules. At the hearing, the Hearing Officer may permit or request the introduction of additional documentary evidence where no prejudice would result to either party.

2. *Oral Testimony.* Oral testimony shall be given under oath or affirmation, subject to the pains and penalties of perjury. Witnesses shall be available for examination and cross-examination.

3. *Regulations and Statutes.* Regulations and statutes may be put into evidence by reference to the citation or by submitting a copy of the pertinent regulation or statute.

4. *Stipulations.* Stipulations of fact, or stipulations as to the testimony that would have been given by an absent witness, may be used as evidence at the hearing. The Hearing Officer may require evidence in addition to the stipulations offered by the parties.

5. *Administrative Notice.* The Hearing Officer may take administrative notice of any fact of which judicial notice could be taken, and in addition may take administrative notice of statutes, regulations, and general, technical or scientific facts within the specialized knowledge of the Hearing Officer. Parties shall be notified of the facts so noticed and they shall be afforded an opportunity to contest the substance or materiality of the facts noticed. Facts officially noticed shall be included and indicated as such in the record.

6. *Additional Evidence.* The Hearing Officer may require any party to submit additional evidence on any relevant matter.

D. Evidentiary Standard

In reaching a decision, a Hearing Officer will assess the weight, credibility, and probative value of the evidence admitted into the record. Hearing Officers may use their experience, technical competence, and specialized knowledge in evaluating the evidence. The Hearing Officer's decision will be based upon a preponderance of the evidence presented.

E. Close of the Hearing

At the conclusion of all testimony, the Hearing Officer has the discretion to permit or require the parties to make oral or written closing arguments. A request to submit written closing arguments shall constitute a postponement request which must be documented and acted upon in accordance with Rule III above. If the Hearing Officer allows the submission of written closing arguments, they shall be submitted no later than seven (7) business days after the last day of hearing unless the parties jointly request, and the Hearing Officer allows, a different time period provided, however, that in no case shall written closing arguments be filed more than thirty (30) calendar days after the last day of hearing. The Hearing Officer has the discretion to limit the number of pages and font size of the written arguments.

The record is formally closed when additional submissions permitted by the Hearing Officer, (i.e. documents; written closing arguments), if any, are received by the Hearing Officer, or upon the date such documents or arguments are due, whichever comes first. A decision will be issued within twenty-five (25) calendar days after the close of the record.

F. Failure to Prosecute or Defend

If a party fails to file documents required by statute or regulation, to respond to notices or correspondence, to comply with orders of the Hearing Officer, to appear at the scheduled hearing or otherwise indicates an intention not to continue with prosecution of the claim, the Hearing Officer may dismiss the case with or without prejudice through a ten (10) day Order to Show Cause, or may take evidence and issue such orders as may be necessary including, but not limited to, ordering an educational program or placement for the student.

RULE X: *Rights of Parties*

A. Rights of All Parties

Under the provisions governing BSEA hearings, all parties shall have the right:

1. To receive from the BSEA, upon request, a list of its impartial Hearing Officers with their qualifications;

2. To be accompanied and advised by legal counsel and /or an advocate;

3. To present written documents;

4. To compel the attendance of witnesses pursuant to a subpoena;

5. To examine and cross-examine witnesses;

6. To request that the Hearing Officer prohibit the introduction of any evidence at the hearing that has not been disclosed to the parties at least five (5) business days before the hearing;

7. To obtain a certified written transcription of the entire proceeding by a certified court reporter and/or an electronic verbatim record of the hearing, free of charge, upon written request to the BSEA. Either may only be used in a manner consistent with these Rules and otherwise shall be kept confidential except with the parent's consent;

8. To receive a written or, at the option of the parents, an electronic decision setting forth the Hearing Officer's findings of fact and order, within the federally and state mandated timeline, provided that the Hearing Officer may grant reasonable extensions of time at the request of either party.

B. Parent Rights

Under the provisions governing the BSEA hearings, parents have the following additional rights:

1. To have the student, who is the subject of the hearing, present at the hearing;

2. To open the hearing to the public;

3. Pursuant to the Massachusetts Student Records Regulations, to inspect and to receive a copy of all student records pertaining to the student, including school records and papers related to the identification, evaluation, placement, or provision of a free appropriate public education to the student.

Hearing Decision

RULE XI: ***Decision Without A Hearing***

A party may request a decision without a hearing

All parties must agree to a decision based solely on written material. The decision will have the same force and effect as any other BSEA decision.

RULE XII: ***Decision and Implementation of Decision***

A. Decision

The written findings of fact and decision of the Hearing Officer, along with the notification of the procedures to be followed with respect to appeal and enforcement of the decision, shall be sent to the parties and their representatives, if any.

B. Finality of Decision

The Hearing Officer's decision is the final decision of the BSEA and is not subject to further agency review. Motions to reconsider or to re-open a hearing once a decision has been issued are not permitted.

C. Immediate Implementation

Except as provided below in Rule XIV, the Hearing Officer's decision shall be implemented immediately.

RULE XIII: *Rights of Appeal; Placement of Student During Appeal; Stay of Decision*

A. Rights of Appeal

Any party aggrieved by the decision of the Hearing Officer may file a complaint for review of the decision in the state Superior Court or in Federal District Court no later than ninety (90) calendar days from the date of the decision of the Hearing Officer.

B. Placement of Student During Judicial Appeal of BSEA Decision

If the BSEA decision calls for a change of placement with which parent agrees, that placement must be implemented immediately. In all other situations, the student must remain in his or her current educational placement unless the school district and parents agree otherwise.

C. Stay of Decision

A party seeking to stay the Hearing Officer's decision must seek and obtain a stay from the court having jurisdiction over the party's appeal.

RULE XIV: *Compliance with Decision*

A party contending that the Hearing Officer's decision is not being implemented may file a motion requesting the BSEA to order compliance with the decision.

The motion shall set out the specific areas of alleged non-compliance. The Hearing Officer may convene a hearing on the motion at which the scope of inquiry will be limited to facts bearing on the issue of compliance, facts of such nature to excuse performance, and facts bearing on a remedy. Upon a finding of non-compliance, the Hearing Officer may fashion appropriate relief and/or refer the matter to the Legal Office of the Commonwealth of Massachusetts Department of Elementary and Secondary Education for enforcement.

RULE XV: *Record*

Upon receipt of a written request from any party, the BSEA will arrange for and provide free of charge: 1) a certified written transcription of the entire proceedings by a certified court reporter or 2) an electronic verbatim record.

Dismissal/ Case Closure

RULE XVI: ***Dismissal and Closure of Case***

A. Dismissal With and Without Prejudice Defined

A Hearing Officer may dismiss a case with prejudice or without prejudice. Dismissal with prejudice means that the issues litigated and/or raised in the hearing request are closed and cannot be reopened/relitigated in subsequent cases before the BSEA. Dismissal without prejudice means that the same issues may be litigated at a later date by the filing of a new request for hearing within the statutory time period.

B. By Request of a Party

Any party may file a motion or request to dismiss a case for:

1. lack of jurisdiction;
2. failure of the opposing party to prosecute or proceed with the case;
3. failure of the opposing party to follow or comply with the Rules or any Hearing Officer order;
4. failure to state a claim upon which relief may be granted; or,
5. the clear failure of the opposing party to establish a viable claim for relief after presentation of its evidence.

The Hearing Officer may allow a motion or request to dismiss with or without prejudice.

C. By Order to Show Cause

A Hearing Officer may issue an order requiring that party to show cause why the case should not be dismissed if it is inactive or in the process of settlement. If that party fails to show such cause within the time period established by the Hearing Officer, not to exceed thirty (30) calendar days, the case may be dismissed with or without prejudice.

D. Inactive Cases

A case that has not been re-scheduled, withdrawn, or requested to be scheduled by either party for a period of one year from the original request for hearing, shall be dismissed with prejudice.

E. Withdrawal

The moving party may withdraw a request for hearing by filing a written withdrawal with the Hearing Officer and the opposing party. When received by the BSEA prior to the commencement of the hearing, the withdrawal automatically closes the case without prejudice, unless the parties and the Hearing Officer agree otherwise.

LEA Assignment Appeals

RULE XVII: *Appeals of Massachusetts Department of Elementary and Secondary Education Assignments of School District Responsibility*

A. Hearing Request

In order to request a hearing before the BSEA appealing a Massachusetts Department of Elementary and Secondary Education assignment of school district responsibility, it is required that Mandated Form 28 M/8 be used.

B. Applicable BSEA Rules

Hearings conducted by the BSEA involving appeals of Massachusetts Department of Elementary and Secondary Education assignments of school district responsibility are governed by 603 CMR 28.10(9) and are not subject to the following BSEA Hearing Rules: I A-G; II C; XIII A.

C. Right of Appeal

A party aggrieved by a Hearing Officer's decision regarding an appeal of a Massachusetts Department of Elementary and Secondary Education assignment of school district responsibility may file a complaint for review of the decision in state Superior Court pursuant to M.G.L. c. 30A.