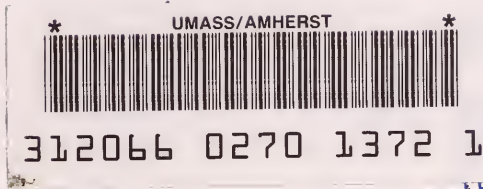


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**Parent's
Guide
to
Special
Education
Appeals**

The Massachusetts Department of Education
350 Main Street, Malden, Massachusetts 02148



The Commonwealth of Massachusetts
Department of Education

350 Main Street, Malden, Massachusetts 02148

May, 1997

Dear Parents,

This revised "*Parent's Guide to Special Education Appeals*" is designed to answer questions regarding mediation, the new advisory opinion option, and hearing. It reflects current federal and state laws and regulations. If the laws or regulations change, a revised Guide may be obtained by contacting Special Education Appeals.

As noted in the Guide, you and your school district remain in the best position to know your child's educational needs. I continue to urge both you and your school district to work together to resolve any issues you have.

If, however, you need to access Special Education Appeals, this Guide provides clear information in a question and answer format on mediation and hearings.

Sincerely,

A handwritten signature in blue ink that reads "Robert V. Antonucci".

Robert V. Antonucci
Commissioner of Education

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GLOSSARY OF SPECIAL EDUCATION TERMS

These definitions are intended to give you a working knowledge of terms commonly used in discussing the Special Education Process. These terms do not, in all cases, use the identical language found in the regulatory definitions which appear in the Chapter 766 Regulations. See Chapter 1 of the Chapter 766 Regulations for the legal definitions.

ADVISORY OPINION

A voluntary and confidential process where both parties agree to present their case to a Hearing Officer who will render a non-binding advisory opinion on the merits of the case. The process is voluntary. Both parties must agree to participate. Each party is allowed one hour to present their case through exhibits and through no more than two witnesses. Based upon the advisory opinion, the parties may agree to settle the case or may elect to proceed to hearing with a different Hearing Officer.

ADVOCATE

A person you may choose or hire to support and assist you through the evaluation and appeal process. This person is considered a private, independent advocate.

ASSESSMENT

Either a test or an observation which describes your child's ability in a specific area such as medical, educational, psychological, developmental, speech, hearing, vision, etc.

DIRECTOR OF SPECIAL EDUCATION

The person in charge of all special education programs and services in your public school system.

EDUCATIONAL OBJECTIVES

Specific, measurable, and observable skills toward which your child will be working, such as improving reading fluency and comprehension within a specific period of time.

EVALUATION

A group of tests, assessments, and other critical information about your child which determine whether your child has a special need and what are your child's strengths and areas of need. This evaluation forms the basis for determining whether your child is eligible for special education and, if so, for developing his or her Individualized Educational Plan (IEP).

EVALUATION TEAM (TEAM)

A group which includes the child's parent(s), teachers, and other specially trained people who will find out what your child can do, whether your child has a disability which is causing problems in school, what areas in which your child is having difficulties, and what services he or she needs in order to progress effectively in school.

EVALUATION TEAM CHAIRPERSON

The member of the evaluation TEAM who is responsible for coordinating all of the activities of the TEAM, conducting the actual TEAM meeting, organizing all forms and materials needed for your child's evaluation, and helping to choose and contact any needed specialist(s).

FREE APPROPRIATE PUBLIC EDUCATION (FAPE)

Every child is entitled to a free and appropriate public education according to federal and Massachusetts law. In the area of special education, free and appropriate public education (FAPE) refers to special education and related services which:

- ❖ are provided at public expense;
- ❖ meet state education standards;
- ❖ include preschool, elementary or secondary education;
- ❖ are provided in accordance with an IEP, and;
- ❖ assure maximum possible development in the least restrictive environment.

HEARING

A formal administrative procedure conducted by Special Education Appeals to resolve disputes between the parent and the school district over such things as the identification, evaluation, actual or proposed placement of a child, program implementation, etc.

INDEPENDENT EVALUATION

An evaluation, at your request, and at school committee expense that: (a) is similar to the school's original evaluation (although in certain circumstances, non-equivalent evaluations may be obtained - read special education regulation CMR 28.328.3) and (b) is performed by a person of your own choosing who is certified or otherwise qualified to perform the evaluation and who agrees to accept the rates established by the state agency responsible for setting such rates. This provides you with a second opinion if you disagree with the results from the initial evaluation. You may also choose to have an independent evaluation at your own expense. The TEAM will consider the independent evaluation in its planning process. The right to an independent evaluation continues for sixteen (16) months after the school district's evaluation with which the parent disagrees.

INDIVIDUALIZED EDUCATIONAL PLAN (IEP)

The plan prepared by the TEAM which describes any special needs your child has and outlines the educational programs and services which will be provided to meet those needs if you accept the IEP.

LEAST RESTRICTIVE ENVIRONMENT (LRE)

The program and placement which assures that your child is educated to the maximum extent appropriate with children who do not need special education, and that special classes or separate schooling are used only when your child cannot be educated in regular classes even with extra aids and services.

This least restrictive environment standard is balanced with the legal mandate of maximum feasible benefit.

MAXIMUM FEASIBLE BENEFIT

The Massachusetts special education statute, Chapter 766, and relevant court decisions state that special education programs must assure the maximum possible development of a child who is eligible for special education. This maximum feasible benefit standard is balanced with the legal mandate to educate children in the least restrictive environment.

MEDIATION

An informal, voluntary process conducted by Special Education Appeals Mediators to resolve disputes over such matters as the identification, evaluation or placement of a child. This process is strongly encouraged, but not required, before proceeding to a hearing.

PARENTS' RIGHTS BROCHURE

A brochure produced by the Massachusetts Department of Education which is designed to help you to understand your school's procedures, your rights and your child's rights in the special education evaluation and placement process.

PROTOTYPE

A measure of special education service referring to the location of services and/or the amount of time a child receives special services within or outside of the regular education classroom.

REFERRAL

A request to have your child evaluated to see if he or she has a special education need. This step begins the evaluation process for your child if you give your written consent.

RELATED SERVICES

Transportation, developmental, corrective, and supportive services which are required to assist a child in need of special education, including, but not limited to, the services described in paragraph 503.0 of the Chapter 766 Regulations.

SCHOOL WORKING DAYS

Days when school is in session.

SPECIAL EDUCATION

Specially designed instruction which meets the unique needs of a child who has been evaluated and found to be in need of special education. This instruction is provided at no cost to the parents or guardians.

SPECIALIST

A specially trained person, such as a psychologist, occupational therapist, speech therapist, or physician.

SURROGATE PARENT

The second type of advocate is a person who is assigned by the Department of Education to act on behalf of a child when the child's parents are unavailable or have no educational decision-making rights. This person is called a Surrogate Parent (sometimes referred to as an Educational Advocate). A Surrogate Parent cannot be an employee of any state agency which educates or cares for the child.

SPECIAL EDUCATION APPEALS

When you disagree with all or part of your child's Individualized Educational Plan (IEP), you must indicate that decision on the page of the IEP which requires your signature and return the plan to your school district. The last agreed upon IEP remains in effect (sometimes called "stay put") until negotiations or the appeals process resolves the dispute.

Within five days after the school district receives the notice that you have rejected all or part of an Individualized Educational Plan, your school district will send a copy of your rejection to Special Education Appeals. Special Education Appeals will then send you a letter explaining your options:

Mediation

You and your school district may settle differences voluntarily and informally with an impartial mediator. If you contact the mediator at Special Education Appeals to request a mediation, he or she will arrange the session with your school district. If the mediation does not result in agreement, you or your school district may continue to proceed to a hearing.

Advisory Opinion

You and your school district may agree to voluntarily present your case to a Hearing Officer for an advisory, non-binding opinion (in a 2 1/2 hour proceeding) on the merits of a case.

Hearing

You may immediately request a hearing to resolve differences. You must send a request, in writing with a copy sent to the school district, to Special Education Appeals; the hearing will then be scheduled for 20 calendar days from the receipt of the request. Even if you or your school district decide to go directly to a hearing, you may agree to postpone the hearing in order to try mediation or an advisory opinion.

Special Education Appeals will send you a list of free or low-cost attorneys and advocates who may be available to assist you with special education hearings. Please note that this list of possible resources does not guarantee that representation can be provided by any of these agencies.

MEDIATION

What is Mediation?

Mediation is a voluntary process in which you and the school agree to participate. It may not be used to delay your right to a timely hearing. Mediation provides an alternative method to resolve conflicts, clarify issues and promote problem-solving efforts between parents and school personnel. The goal is to work out a solution to a conflict which is acceptable to both parties and in the best interest of the child. The mediator will help to define and clarify the issues in dispute and may assist in identifying options that satisfy both parties. The mediator does not make decisions for the parties. In a majority of cases, mediation results in successful agreements between parents and public schools. If you choose to schedule a mediation session, or want more information about mediation, you can contact the BSEA.

How is a Mediation Session Scheduled?

If you and your school district agree to participate in mediation, the mediator will arrange a date, time and place agreeable to all.

What Happens at a Mediation Session?

Usually mediations are held at the offices of the public school district. The mediator will conduct the meeting and assist you and school personnel in discussing the necessary information. The mediator will ask you to discuss your child's special education needs and the components of the program you are seeking to meet those needs. The school representatives will have an opportunity to speak about their view of your child's special needs and also what services they are offering as of that date (this may or may not differ from the proposed IEP). The parties may also meet separately with the mediator (in caucus) to discuss their concerns confidentially. The mediator will ensure that each person is given a chance to talk, make and evaluate offers, and consider options without undue pressure. Parents and the school will have the opportunity to understand each other's perspective and feel that their own viewpoint is understood.

You may have an attorney or advocate with you at this meeting. The mediator is available before, during, and after the session to answer any questions about special education and the appeals process. The mediator will ask you and the school to limit the number of persons whom you ask to attend the mediation to two or three. The school will also be asked to be certain that at least one person at the mediation has the authority to reach an agreement on behalf of the school district. If you reach an agreement through mediation, the agreement will be written and signed by you and the school, and in most cases, go into effect immediately. Any discussions which occur during mediation are confidential and may not be used as evidence at a hearing.

How is Mediation Different from a Hearing?

There are several significant differences:

- ❖ Mediation is more informal;
- ❖ Mediation usually takes two to four hours; a hearing can take from one to three days, or more;

- ❖ Mediation is voluntary;
- ❖ Mediation does not usually involve lawyers (although you have the right to have one with you, if you choose); and
- ❖ Mediation allows you and the school to negotiate your own agreement rather than have a decision imposed by a hearing officer.

THE ADVISORY OPINION

What is an Advisory Opinion?

The Advisory Opinion Process allows parents and school districts one hour each to present their case via witnesses and documents to a Hearing Officer who will then issue a non-binding advisory opinion. Based upon this advisory opinion, the parties may assess their respective positions and elect to settle a case or proceed to full hearing with a different Hearing Officer.

The Advisory Opinion Process is voluntary and both parties must agree to participate. The parties may only request an Advisory Opinion after, or simultaneously with, a Hearing Request. Upon receipt of an Advisory Opinion Request, Special Education Appeals will assign a Hearing Officer for the Advisory Opinion and will also assign a full hearing date in the event the case does not resolve through the Advisory Opinion Process.

How is an Advisory Opinion different from a Mediation or a Hearing?

The Advisory Opinion Process is different than Mediation because in a Mediation Session the parties negotiate their own agreement with a Mediator's assistance. The Advisory Opinion Process is different from a Hearing because a Hearing is a more formal process using Special Education Appeals Hearing Rules, and the Hearing Officer issues a binding decision.

THE HEARING

What is a Special Education Appeals Hearing?

A special education appeals hearing is a formal, administrative hearing conducted by a Special Education Appeals hearing officer who is an attorney. The hearing officer is a different person than the mediator and is employed just to conduct special education hearings. The hearing officer will decide your case based on the evidence that you, your attorney or advocate, and the public school and its attorney present at the hearing. The hearing officer will only consider evidence submitted by you or the public school. Hearings are closed to the public and all evidence is kept confidential, unless you choose to open the hearing to the public.

The evidence at a hearing can be in the form of written documents and/or testimony from witnesses. This is called the hearing record. Usually both types of evidence are part of the record. After the testimony has been heard and the evidence has been reviewed, the hearing officer will issue a decision determining what special education program best meets your child's needs in accordance with Chapter 766 and the IDEA (the Federal Special Education Law).

What is a Prehearing Conference?

Usually hearing officers hold prehearing conferences prior to the actual hearing date to see if the case can be settled -- something that happens quite frequently. The prehearing conference is designed to help understand the positions of the parent and the public school; to clarify the issues in dispute; to explore settlement options; and to work on hearing mechanics (dates, times, witnesses, etc.) , if necessary.

A hearing officer may order a prehearing conference even if one, or both, parties do not request a prehearing. It is an important and recommended tool for both parties, and particularly for parents who lack an advocate or attorney.

How, Where, and When are Hearings Scheduled?

Special Education Appeals will schedule your hearing for twenty days from the date that a written request for a hearing is received from either you or the school. A hearing officer will be assigned to your case, and you will receive a notice from Special Education Appeals with the date of the hearing and the name of the hearing officer. Notice of the hearing will also go out to your public school district Director of Special Education.

Because of the information that must be in place and witnesses who must be available in order for the hearing to proceed, you or the public school may want to request postponement or rescheduling of the hearing. This request must be made in writing, with a copy sent to the school district, five days before the scheduled hearing date. It is up to the hearing officer to determine if the request for postponement is reasonable and to set a new date for the hearing.

Hearings are held either in the hearing rooms of Special Education Appeals or at another location that the hearing officer determines is reasonably convenient to the parties. Hearings are held during normal working hours.

What Happens at a Hearing?

Generally, a hearing unfolds in four basic phases. First, the hearing officer may offer each party the opportunity to make a brief opening statement which summarizes their position and what they intend to prove. Second, the party who requested the hearing, usually the parent, presents their case. A case is presented by calling (asking) each of your witnesses to testify. For example, a parent may call their evaluator as a witness and ask them questions (direct examination). After the parent finishes their questions of a witness, then the school district may ask the same witness questions (cross-examination). The hearing officer may also ask questions at any time if a point remains unclear. After presenting all of their evidence (witnesses and documents), the moving party then "rests" their case.

Third, the responding party who did not request the hearing, usually the school district, presents its case in the same format described above. During the course of each side's case, the other party may "object" to a question or the introduction of a written document. The hearing officer will then decide whether the party's objection is valid or not. Fourth and finally, the hearing officer may allow each party to provide a closing argument or summary of their case. Sometimes, the hearing officer may also allow parties additional time to file a written closing argument (brief) in the case.

What Must Each Party Prove at a Hearing?

Both the parent and the public school have to present a case at a hearing. Generally, the public school must show, through its witnesses and documents, that it has offered an appropriate special education program for your child; that it has provided the services called for in the current IEP; that the IEP meets the substance and procedures required in Chapter 766 and the IDEA and their regulations; and that its program will provide for your child's maximum educational development in the least restrictive environment.

If you are saying that the public school has not provided an appropriate program and you want a different program or services, then you must show through the documents and testimony of witnesses that the public school program does not meet your child's needs. You must also show how the program you are requesting provides for your child's maximum educational development. This is also true if you are asking the hearing officer to order reimbursement for a program or services for your child that you paid for after you rejected the public school's IEP or gave notice to the school that the program it was offering was not appropriate.

The heart of a case is generally, what are the child's educational needs and which program maximizes the child's educational opportunities in the least restrictive setting.

Although important, remember that generally it is not enough to simply state your beliefs and opinions as a parent. You need evidence: documents and qualified witnesses supporting your position. For example, if the dispute involves different programs, the witnesses should be able to comment on both your, and the school district's, proposed program.

How Long Does it Take to Complete a Hearing and Receive a Decision?

The hearing officer is required to hold a hearing and issue a decision in your case within 45 days of the date that Special Education Appeals receives your written hearing request; however, the hearing officer may grant reasonable extensions of time to you or to the public school. Hearings currently average three to five days in length because of the amount of documentary evidence and the number of witnesses who may need to testify. Due to conflicting schedules of the parties, hearing dates can occur over a period of weeks or months.

When you are requesting a hearing, you should take into account the time it may take you to obtain a lawyer (and his/her schedule); the importance of having a completed independent evaluation; and the need to have your witnesses available and prepared to testify. Therefore, you should factor in all of the above time elements as well as the 45 day decision issuance time frame, when you file your hearing request.

Do I Need an Attorney to Proceed to Hearing?

You have the right to be represented by an attorney or an advocate at a special education hearing or you may represent yourself. It is common for both the public school and the parents to have lawyers at hearings. Since the hearings may be complicated and the issues are often emotional, it is usually advisable to have either an attorney or an experienced advocate assist you at the hearing. Special Education Appeals will send you a list of free and low cost attorneys and advocacy services who may be able to help you. Under the IDEA, if you are represented by an attorney and you prevail in your case either in settlement or at hearing, the public school is required to pay your reasonable attorney's fees from the point the dispute arose, usually the rejection of the IEP. You should note that attorney fees are often a subject of negotiation within settlement agreements.

If you choose to represent yourself in the hearing, the hearing officer will attempt to assist you in presenting your case, but s/he is a neutral party and cannot serve as your advocate. Please note that a hearing officer cannot discuss the substance of a case without the presence of the other party.

Once the hearing officer is informed that you are represented by an attorney or an advocate, the hearing officer will communicate with that person regarding the scheduling or any other matters pertaining to the hearing, because s/he becomes your legal representative. Your attorney or advocate is then responsible ethically to keep you informed regarding the status of your case.

What Kind of Evidence Do You Need for a Special Education Hearing:

DOCUMENTS

Some of the documents that are likely to be submitted as evidence in a hearing are your child's IEP(s); reports from individuals who have evaluated your child, such as teachers, school psychologists, a pediatrician, or an independent evaluator or hospital; report cards, progress reports and other student records; information on the staffing and qualifications of teachers or service providers; and information about the program you are requesting, or the program that is being offered by the public school.

You or your attorney or advocate must give a copy of any documents that you want to submit as evidence at the hearing to the public school and the hearing officer at least five days before the date of the hearing. You must also state, in writing, who you will call as witnesses to testify. The public school must follow the same procedure and provide you with its documents and a list of witnesses five days before the hearing. The hearing officer may also ask the parties to provide written statements of their legal positions at the beginning or end of the hearing.

WITNESSES

Some of the people who usually testify at the hearing are: you, as the parent of the child; sometimes the child (you may have your child attend the hearing, if you wish); your child's teachers; the administrator of special education from the

public school; the individuals who evaluated your child; either at your request or at the request of the public school; and individuals who are familiar with the program(s) being offered by the public school or the programs that you are requesting. Anyone who testifies at the hearing will be testifying under oath. The witnesses that you present will be asked questions by you or your attorney or advocate (direct examination). The public school representative will then cross examine your witnesses. Sometimes the hearing officer will also ask questions. You or your attorney or advocate will also be able to cross examine the witnesses presented by the public school. If you or your attorney or advocate want to require a person to appear at the hearing to testify, you can request, in writing, that the BSEA subpoena that person (you must allow ten days for a subpoena to be issued). If you wish that person to bring any documents pertaining to the hearing, those documents may also be subpoenaed.

HEARING RECORD

The hearing officer will tape record the hearing. You may have a free copy of the tape, if you request it in writing, following the completion of the hearing.

Remember that current information is very important. In other words, what are the child's current educational needs and how can those needs be met to the maximum extent in the least restrictive setting.

What Will the Hearing Officer Decide?

Under Chapter 766 and the IDEA, the hearing officer must issue a decision which calls for the special education program which provides the maximum feasible development in the least restrictive educational setting for your child. The hearing officer has the authority to order the placement or services offered by the public school, or another placement or services, if s/he determines that is appropriate. The hearing officer is required to base the decision only on the evidence presented at the hearing and admitted into record.

After the hearing is completed and the parties have submitted any written statements, the hearing officer will issue a written decision which will be mailed to you, the public school, and your legal representatives, if any.

What if I am Unhappy With the Decision?

You have the right to appeal the decision to state or federal district court within 30 days from the date that you receive the written decision. If you appeal the decision, your child will remain in the last educational placement that was agreed to by you and the public school, unless you and the public school agree on a different temporary placement, while the court reviews the hearing decision. If you do not appeal the decision, the public school will implement the Special Education Appeals decision, unless you wish your child to be in regular education. If you so request, the public school must put your child in regular education unless the school obtains court enforcement of the Special Education Appeals decision.

What if the Public School Disagrees with or Refuses to Implement the Decision?

The public school must also abide by the hearing officer's decision, and must appeal the decision if there is a disagreement. If the school district appeals the decision, your child will stay in the last agreed upon educational placement. If the hearing officer orders a new placement for your child, and you agree with that new placement, then the public school must place your child in that new placement, even if it chooses to appeal the decision.

If you think that the school district is not implementing the hearing officer's decision, you may request a compliance hearing. At the compliance hearing, the hearing officer will determine if the school district is implementing the decision, and if necessary, will seek enforcement.

Where can I obtain further information about the Hearing Process?

If you require additional information regarding the Hearing Process or especially if you intend to not retain an attorney to represent you in the Hearing Process, please read the brochure, **Hearing Rules for Special Education Appeals** (June 1996).

Section 504 of the Rehabilitation Act of 1973

May Disputes involving Section 504 of the Rehabilitation Act of 1973 be resolved through Special Education Appeals?

Section 504 of the Rehabilitation Act is a federal civil rights statute that prohibits discrimination against persons with disabilities by recipients of federal funds. Disputes relating to services under Section 504 may be presented to Special Education Appeals for resolution through Mediation, Advisory Opinion, or Hearing.

