



Commonwealth of Massachusetts
Office of the State Auditor
Suzanne M. Bump

Making government work better

Official Audit Report – Issued April 7, 2021

Division of Administrative Law Appeals

For the period July 1, 2017 through December 31, 2019





Commonwealth of Massachusetts
Office of the State Auditor
Suzanne M. Bump

Making government work better

April 7, 2021

Mr. Edward B. McGrath, Chief Administrative Magistrate
Division of Administrative Law Appeals
14 Summer Street, Fourth Floor
Malden, MA 02148

Dear Mr. McGrath:

I am pleased to provide this performance audit of the Division of Administrative Law Appeals. This report details the audit objectives, scope, methodology, findings, and recommendations for the audit period, July 1, 2017 through December 31, 2019. My audit staff discussed the contents of this report with management of the agency, whose comments are reflected in this report.

I would also like to express my appreciation to the Division of Administrative Law Appeals for the cooperation and assistance provided to my staff during the audit.

Sincerely,

A handwritten signature in blue ink, appearing to read "SMB", written over a light blue horizontal line.

Suzanne M. Bump
Auditor of the Commonwealth

cc: Michael J. Heffernan, Secretary of the Executive Office for Administration and Finance

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LIST OF ABBREVIATIONS

BSEA	Bureau of Special Education Appeals
CFR	Code of Federal Regulations
CR	Contributory Retirement Appeal Board
CTR	Office of the Comptroller of the Commonwealth
DALA	Division of Administrative Law Appeals
DESE	Department of Elementary and Secondary Education
EOAF	Executive Office for Administration and Finance
GJU	General Jurisdiction Unit
ICP	internal control plan
IDEA	Individuals with Disabilities Education Act
LB	Office of the Attorney General—Fair Labor Division
MS	Miscellaneous
OC	Department of Early Education and Care
OSA	Office of the State Auditor
OSEP	US Department of Education—Office of Special Education Programs
PH	Department of Public Health
PHET	Department of Public Health—Emergency Technicians
PHNA	Department of Public Health—Nursing Aides
RM	Board of Registration in Medicine
RS	Executive Office of Health and Human Services—Rate Setting
VS	Department of Veterans' Services

EXECUTIVE SUMMARY

In accordance with Section 12 of Chapter 11 of the Massachusetts General Laws, the Office of the State Auditor has conducted a performance audit of certain activities of the Division of Administrative Law Appeals (DALA) for the period July 1, 2017 through December 31, 2019. In this performance audit, we followed up on issues identified in our Audit Report No. 2014-0345-7S, which covered the period June 1, 2009 through September 30, 2013 and was issued September 23, 2015. In the prior audit, we found that DALA did not establish formal written policies and procedures for case-management activities; meet statutory reporting requirements for filing an annual report; develop a risk assessment or complete a compliant internal control plan (ICP); adopt internal controls to address case management; have a system to use feedback to improve itself; or conduct a review to assess the potential necessity, costs, and benefits of conducting hearings at other venues.

During our current audit, we found that DALA had developed a system for obtaining feedback on its performance and conducted hearings at alternative sites. The issues that still need improvement are developing written procedures and implementing controls for case management, completing a compliant ICP, and submitting a compliant annual report to the Legislature.

We also reviewed a February 2, 2018 audit report from the US Department of Education's Office of Special Education Programs to determine what measures DALA's management had taken to address the issues cited in that audit report. In addition, we determined whether DALA's Bureau of Special Education Appeals (BSEA) administered its hearings in compliance with all applicable federal and state requirements for hearing timelines, including Section 615(c)(2) of the Individuals with Disabilities Education Act, Section 300.515 of Title 34 of the Code of Federal Regulations, BSEA's Hearing Rules for Special Education Appeals, and Section 28 of Title 603 of the Code of Massachusetts Regulations.

Below is a summary of our findings and recommendations, with links to each page listed.

Finding 1 Page <u>11</u>	DALA does not have written policies and procedures for case-management activities.
Recommendation Page <u>11</u>	DALA should develop written policies and procedures for all of its case-management activities.

Finding 2 Page <u>12</u>	DALA does not have a compliant ICP.
Recommendations Page <u>13</u>	<ol style="list-style-type: none">1. The chief administrative magistrate should prioritize the completion of a compliant ICP by properly documenting the internal environment and a risk response that includes all aspects of DALA's business operations.2. After completing the ICP, DALA should review and update it whenever significant changes occur in objectives, risks, management structure, or program scope, but at least annually.
Finding 3 Page <u>13</u>	DALA does not include all the required elements in its annual reports.
Recommendations Page <u>15</u>	<ol style="list-style-type: none">1. DALA should record all the listed parties in Time Matters when there is more than one petitioner and/or respondent and include them in the annual report.2. DALA should specify in the report how cases were disposed of (decision, settlement, withdrawal, or dismissal).3. DALA should report the total number of simplified hearings in its annual report.4. DALA should report the length of time it takes to process each case.5. DALA should include in the report an explanation for all cases that require more than six months to resolve.
Finding 4 Page <u>16</u>	BSEA hearing officers did not consistently document case postponements.
Recommendations Page <u>17</u>	<ol style="list-style-type: none">1. BSEA should ensure that hearing officers are properly trained on documentation requirements.2. BSEA management should monitor case progress to ensure that hearing officers document all postponements.
Finding 5 Page <u>17</u>	BSEA hearing officers did not consistently document requests and orders to add days to hearing schedules.
Recommendations Page <u>18</u>	<ol style="list-style-type: none">1. BSEA hearing officers should consistently use the Postponement Order Form for requesting and granting additional hearing days.2. BSEA should revise its Hearing Rules for Special Education Appeals to provide a process for requesting and granting additional days for a hearing once the hearing has already begun.3. BSEA should provide training to the hearing officers on the process for requesting and granting additional days for a hearing, including the use of the Postponement Order Form.

OVERVIEW OF AUDITED ENTITY

The Division of Administrative Law Appeals (DALA) was established in 1974 under Section 4H of Chapter 7 of the Massachusetts General Laws. DALA is under the purview of the Executive Office for Administration and Finance (EOAF) and operates under the direction of a chief administrative magistrate, who was appointed on April 1, 2015 by the Secretary of EOAF with the approval of the Governor.

Currently, DALA consists of two units: the General Jurisdiction Unit (GJU) and the Bureau of Special Education Appeals (BSEA). According to DALA's internal control plan,

DALA is an independent agency that provides due process adjudications and other dispute resolution services for . . . Massachusetts state administrative agencies.

With regard to the GJU, [DALA's] services are limited to providing due process adjudications. Cases come to GJU in two ways: (1) by legislation mandating that certain types of cases be heard at DALA; and (2) upon request of an agency, subject to the approval of the DALA Chief Administrative Magistrate and the Secretary of Administration and Finance (A&F). Currently, DALA conducts adjudications for approximately 20 state agencies, including, the Contributory Retirement Appeal Board, the Board of Registration in Medicine, the Department of Public Health and the Fair Labor Division of the Office of the Attorney General.

[BSEA], an independent bureau within DALA, provides a broad range of dispute resolution services concerning eligibility, evaluation, placement, individualized education programs (IEPs), special education services and procedural protections for students with disabilities. [BSEA's] dispute resolution services include providing mediations, hearings and advisory opinions. Within the last five years, BSEA has also provided facilitators for school districts' IEP meetings.

Parties to these proceedings may include parents, school districts, private schools, the Department of Education and other state agencies.

The BSEA is primarily federally funded through a grant managed by the Department of Elementary and Secondary Education ("DESE"). The Bureau was transferred from DESE to DALA by Chapter 131 of the Acts of 2010 to ensure independence from any educational agency that could be a party to or interested in the proceedings before the Bureau.

GJU hears the following types of cases, each coded in its file system with a two-, three-, or four-letter code:

BR	State Boards
CP	Division of Capital Asset Management and Maintenance
CR	Contributory Retirement Appeal Board
CS	Civil Services
DEP	Department of Environmental Protection
EA	Executive Office of Elder Affairs
FA	Department of Agricultural Resources
DCR	Department of Conservation and Recreation
DET	Department of Unemployment Assistance
LB	Office of the Attorney General—Fair Labor Division
MCAD	Commission against Discrimination
MS	Miscellaneous
OC	Department of Early Education and Care
PH	Department of Public Health (PH)
PHAC	PH—Ambulance Companies
PHET	PH—Emergency Technicians
PHFD	PH—Food and Drug
PHNA	PH—Nursing Aides
PHNH	PH—Nursing Homes
RM	Board of Registration in Medicine
RS	Executive Office of Health and Human Services—Rate Setting
VS	Department of Veterans' Services

BSEA uses software known as Time Matters to manage and track cases from initial acknowledgment to the final decision phase. In 2016, GJU had replaced its previous Access computer application with Time Matters.

DALA's funding for fiscal years 2018 through 2020 was as follows:

	Direct Appropriations	Federal Grant*	Total Budget
Fiscal Year 2018	\$1,147,356	\$3,073,174	\$4,220,530
Fiscal Year 2019	\$1,168,894	\$3,217,941	\$4,386,835
Fiscal Year 2020	\$1,220,257	\$3,288,787	\$4,509,044

* BSEA is primarily funded through federal grants issued to the Department of Elementary and Secondary Education (DESE), and DESE provides funding to BSEA through an interagency agreement. The amounts shown correspond to the federal fiscal year beginning October 1.

As of December 31, 2019, DALA had 10 GJU employees and 20 BSEA employees, including magistrates, hearing officers, mediators, and administrative assistants. Its headquarters are on the fourth floor of 14 Summer Street in Malden.

AUDIT OBJECTIVES, SCOPE, AND METHODOLOGY

In accordance with Section 12 of Chapter 11 of the Massachusetts General Laws, the Office of the State Auditor (OSA) has conducted a performance audit of certain activities of the Division of Administrative Law Appeals (DALA) for the period July 1, 2017 through December 31, 2019.

We conducted this performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Below is a list of our audit objectives, indicating each question we intended our audit to answer; the conclusion we reached regarding each objective; and, if applicable, where each objective is discussed in the audit findings.

Objective	Conclusion
1. Did DALA's General Jurisdiction Unit (GJU) take the necessary measures to address the issues identified in our previous audit report (No. 2014-0345-7S)?	No; see Findings <u>1</u> , <u>2</u> , <u>3</u> , and <u>4</u>
2. Did DALA's Bureau of Special Education Appeals (BSEA) take the necessary measures to address the issues identified in the audit report dated February 2, 2018 from the US Department of Education's Office of Special Education Programs (OSEP)?	Yes
3. Does BSEA administer its hearings in compliance with all applicable federal and state requirements for timelines of hearings: Section 615(c)(2) of the Individuals with Disabilities Education Act (IDEA); Section 300.515 of Title 34 of the Code of Federal Regulations (CFR); Section 28 of Title 603 of the Code of Massachusetts Regulations; and Rules III, IX.E, and XVI of the BSEA Hearing Rules for Special Education Appeals?	No; see Findings <u>4</u> and <u>5</u>

We gained an understanding of the internal control environment we deemed significant to our audit objective through interviews; observations; and review of applicable policies and procedures, the internal control plan (ICP), and actual case files. We conducted inquiries with the chief administrative magistrate and the BSEA director.

Our first objective, related to the findings in OSA Report No. 2014-0345-7S, included the following issues:

- DALA does not have written policies and procedures for case-management activities.
- DALA had not developed an ICP or conducted periodic risk assessments.
- DALA had not complied with statutory reporting requirements.
- DALA had not adopted internal controls to address its case-management problems, which included the following:
 - The number of open cases was overstated.
 - DALA did not send acknowledgment letters promptly.
 - The backlog of open cases was increasing.
 - The average case duration was increasing.
 - DALA did not maintain copies of draft decisions.

For this objective, we performed the following procedures:

- We requested case-management policies and procedures from DALA officials to determine whether DALA had developed policies and procedures.
- We obtained and reviewed all annual reports filed and submitted by GJU to the Legislature since the previous audits (for the years 2014 through 2019) to determine whether DALA had filed the reports and included all the required elements.
- We reviewed and evaluated the 2019 ICP based on the criteria established by the Office of the Comptroller of the Commonwealth's 2015 *Internal Control Guide*, which includes the following eight elements: internal environment, objective setting, event identification, risk assessment, risk response, control activities, information and communication, and monitoring.
- To test whether the open-case list remained overstated as the previous audit had found, we tested a statistical random sample of 60 of the 3,161 open cases from the audit period and examined whether they were closed but remained on the list. The sample comprised 19 Contributory Retirement Appeal Board (CR) cases, 1 Office of the Attorney General—Fair Labor Division (LB) case, 2 Department of Early Education and Care (OC) cases, and 38 Executive Office of Health and Human Services—Rate Setting (RS) cases.
- To determine whether DALA sent letters of acknowledgment to the parties involved in each case within five days of receiving appeals, we selected a statistical random sample of 60 of the 1,720 cases opened during the audit period and reviewed the case files for the sample. The sample comprised 43 CR cases, 5 LB cases, 1 miscellaneous (MS) case, 1 OC case, 2 Department of Public Health (PH)—Emergency Technicians (PHET) cases, 4 Board of Registration in Medicine (RM) cases, 3 RS cases, and 1 Department of Veterans' Services (VS) case.

- We analyzed the open-case list from DALA's 2019 annual report to determine whether open cases were increasing or decreasing.
- To determine whether the average duration of cases had increased or decreased since the previous audit, we selected a nonstatistical sample of 60 of the 722 cases opened and closed during the audit period and calculated the length of time between appeal receipt and disposition. The sample comprised 34 CR cases, 10 LB cases, 2 MS cases, 4 OC cases, 1 PH case, 2 PHET cases, 2 PH—Nursing Aides (PHNA) cases, 2 RM cases, and 3 VS cases.
- To determine whether DALA documented decisions, we selected a nonstatistical random sample of 40 of the 357 cases for which DALA issued a final decision during the audit period, and we examined the case files for evidence that decisions had been issued with management approval. The sample comprised 37 CR cases, 1 LB case, 1 MS case, and 1 VS case.

Our second objective concerned the seven findings from OSEP's 2017 report. These included four findings regarding BSEA's Hearing Rules:

- BSEA did not have procedures in place to ensure that hearing officers granted extensions of the 45-day timeline for issuing final decisions in due process hearings.
- BSEA's Hearing Rule IV, which allows parties to a hearing to move the hearing off calendar (i.e., remove it from the hearing schedule calendar and work offline), permitted parties to delay scheduling of a hearing for up to six months in the absence of a specific extension of the 45-day timeline.
- BSEA did not ensure that due process complaints filed pursuant to Section 615(k)(3) of IDEA and 34 CFR 300.532(a) were expedited.
- BSEA's Hearing Rule III.C operated as an automatic 30-day postponement of any previously scheduled date. Specifically, it allowed hearing officers to grant 30-day postponements of some previously scheduled dates in the absence of a party's request for a specific extension of the 45-day timeline for issuing a final decision in the hearing.

The findings also included three findings regarding the policies and procedures of the Department of Elementary and Secondary Education (DESE):

- DESE did not ensure that the public agencies involved in due process hearings implemented hearing officers' decisions in a timely manner.
- Once the state set aside issues in state complaints that were also the subjects of due process complaints, DESE did not have a mechanism for resolving those issues when the hearing officer dismissed, or did not rule on the substance of, the due process complaints.
- The state had procedures that set aside state complaints when the parties were engaged in mediation under 34 CFR 300.506, regardless of whether the parties had agreed to extend the 60-day complaint resolution timeline to engage in mediation. Further, once DESE had set aside

state complaints to allow the parties to engage in mediation, the state did not have a process to ensure that if mediation was not successful in resolving the disputes, the complaints were resolved within 60 days after they were filed.

To achieve our objective, we performed the following procedures:

- For the four BSEA findings in the OSEP report, we reviewed the BSEA Revised Hearing Rules issued in March 2019 to determine the following:
 - Had BSEA modified Hearing Rule III to ensure that extensions complied with 34 CFR 300.515?
 - Had BSEA removed the off-calendar hearing rule?
 - Had BSEA modified its Hearing Rules regarding expedited hearings to comply with 34 CFR 300.532?
 - Had BSEA removed Hearing Rule III.C regarding unilateral postponements?
- For the three DESE findings in the OSEP report, we reviewed DESE's policies and procedures to determine the following:
 - Did DESE have procedures to ensure that it implemented hearing officers' decisions in a timely manner?
 - Had DESE developed a mechanism for resolving state complaint issues that were also the subjects of due-process complaints?
 - Did DESE have procedures addressing the resolution of state complaints to ensure that they were resolved within the 60-day period when mediation was not successful?

We also obtained and reviewed the letter from DESE's commissioner to OSEP responding to the audit findings in the OSEP report, and we contacted the director of DESE's Problem Resolution Department to determine whether BSEA and DESE jointly shared information to avoid duplication of caseloads.

To achieve our objective related to BSEA administering its hearings in compliance with all applicable federal and state requirements for hearing timelines (Section 615[c][2] of IDEA; 34 CFR 300.515; and Rules III, IX.E, and XVI of the BSEA Hearing Rules for Special Education Appeals), we performed the following procedures:

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- We selected a nonstatistical judgmental sample of 40 of the 293 cases opened during the period March 1, 2019 through December 31, 2019¹ and reviewed the case files to determine the following:
 - Did the files contain response filings by the opposing parties before the 10-day deadline required by Sections 615(c)(2)(B)(i)(I) and (ii) of IDEA and Rule I.D of the revised BSEA Hearing Rules for Special Education Appeals?
 - Did the files contain case postponements issued in compliance with 34 CFR 300.515 and Rule III of the revised BSEA Hearing Rules for Special Education Appeals (i.e., requested and granted in writing with specific lengths of extensions)?

We used a combination of nonstatistical and statistical sampling methods for our audit objectives and did not project the results from the samples to the populations.

Data Reliability

We assessed the reliability of the case data from Time Matters by the following means:

- We performed basic reasonableness checks on the data by checking for duplicate and missing entries and data entry errors in the following populations: BSEA hearing requests from March 1, 2019 through December 31, 2019; GJU cases opened from July 1, 2017 through December 31, 2019; and GJU open cases as of December 31, 2019.
- We reviewed existing information about the data and the system that produced them and interviewed agency officials who were knowledgeable about the data.
- We reconciled agency-generated reports of the populations against reports we generated to ensure that the totals were accurate. For both BSEA and GJU, from the list of open cases from our audit period, we selected a random sample of 20 cases and traced them to the hardcopy files, and we also selected 20 hardcopy files and traced them to entries on the list of opened cases.
- We obtained and reviewed the actual case files' source documents for our testing.

Based on the work performed, we determined that the information obtained for our audit period was sufficiently reliable for the purposes of our audit work.

1. This period was after the Hearing Rules were revised, effective March 1, 2019, to incorporate the OSEP audit recommendations.

DETAILED AUDIT FINDINGS WITH AUDITEE'S RESPONSE

1. The Division of Administrative Law Appeals does not have written policies and procedures for case-management activities.

In our prior audit, we found that the Division of Administrative Law Appeals (DALA) had not established formal written policies and procedures for certain case-management activities: addressing the backlog of open cases, prioritizing cases, closing cases, sending out acknowledgment letters, issuing decisions, meeting annual reporting requirements, holding hearings at alternative sites, and retaining documentation for draft (preliminary) decisions.

During our current audit, the chief administrative magistrate stated that DALA did not have any written policies and procedures that addressed case management. Without formal written case-management policies and procedures, DALA does not have documented controls to ensure that case-management activities are performed consistently, effectively, efficiently, and in compliance with applicable laws and regulations.

Authoritative Guidance

The Office of the Comptroller of the Commonwealth's (CTR's) *Internal Control Guide* requires agencies to develop "policies, procedures, techniques, and mechanisms that enforce management's directives to achieve the entity's objectives."

Reasons for Issue

According to the chief administrative magistrate, DALA has not had sufficient personnel and time to document the policies and procedures that support its case-management policy.

Recommendation

DALA should develop written policies and procedures for all of its case-management activities.

Auditee's Response

DALA's GJU is working toward developing formal written policies and procedures and has made progress toward that objective. Because of the significant number of older Retirement Cases and Rate Setting Cases in DALA's inventory, implementing a set of written policies and procedures for the processing of its cases is a challenge. Recognizing the value of written policies and procedures outlining our best practices, DALA has developed tools to help address the issue.

The case docket system adopted by the GJU in 2017 contains a case progression tab which provides an outline of the process used to handle cases. In addition, the case docket system allows for the tracking of a case's progress. Staff will receive additional training concerning the tools available in the case tracking system and we will develop a more consistent approach to its use. We believe that these measures constitute important progress toward written policies and procedures pertaining to each case category that the GJU handles.

We will continue to address this aspect of DALA's operation. Our efforts will include drafting written policies and procedures outlining the GJU case handling procedures which will incorporate the most useful tools developed during the COVID-19 pandemic, such as electronic filing and virtual hearings.

Auditor's Reply

Based on its response, DALA is taking measures to address our concerns on this matter.

2. DALA does not have a compliant internal control plan.

In our prior audit, we determined that DALA had not developed an internal control plan (ICP) during the audit period. Instead, it had developed an *Internal Control Procedures* document that included objectives, activities, and responsibilities for activities including payroll, contracts, purchases, cash receipts, and inventory.

In our current audit, we found that DALA had created an ICP in fiscal year 2017 and updated it in fiscal year 2019, but in both years, the ICP did not comply with CTR guidelines. Two of the required components—internal environment and risk response—were not addressed. Moreover, DALA did not create new ICPs or update existing ones in fiscal years 2018 and 2020.

The lack of a compliant ICP impedes DALA from identifying vulnerabilities that could prevent it from achieving organizational goals and objectives and expose it to heightened risks in its operations. Not reviewing and updating its ICP as conditions warrant (but at least annually) hampers agency response to changes in its control environment.

Authoritative Guidance

CTR's 2015 *Internal Control Guide* states,

Internal Control Plans are based on comprehensive assessments of risks, especially those related to the prevention of fraud, waste and abuse. An effective ICP requires the involvement of everyone in an organization. . . . Accordingly, departments are obligated to revise their ICPs

whenever significant changes occur in objectives, risks, management structure, program scope, etc. At the very least, the ICP must be reviewed and updated annually.

To be considered compliant, a department's Internal Control Plan must contain the [following] components: Internal Environment [and] Risk Response.

Reasons for Issues

According to the chief administrative magistrate, a lack of available time and personnel caused the agency to prioritize the case backlog and the maintaining of operations over developing a compliant ICP.

Recommendations

1. The chief administrative magistrate should prioritize the completion of a compliant ICP by properly documenting the internal environment and a risk response that includes all aspects of DALA's business operations.
2. After completing the ICP, DALA should review and update it whenever significant changes occur in objectives, risks, management structure, or program scope, but at least annually.

Auditee's Response

DALA seeks to meet all its reporting requirements in a timely manner and we are addressing the inadequacies of our Internal Control Plan (ICP). We completed the 2018 ICP on January 23, 2019. The 2020 ICP was completed on December 29, 2020. It incorporates some of the changes to the Risk Assessment suggested by [Office of the State Auditor, or OSA] staff during the audit and we will address the remaining issues and those in the Internal Environment Component in future ICPs.

Auditor's Reply

Based on its response, DALA is taking measures to address our concerns on this matter.

3. DALA does not include all the required elements in its annual reports.

In our previous audit, we determined that DALA did not file all of the annual reports required by Section 4H of Chapter 7 of the Massachusetts General Laws. In addition, the reports it did file did not contain some of the required information, such as the length of time from when an appeal was received to when a written recommended summary decision² or other interlocutory ruling³ was issued, or the basis for any case at DALA for longer than six months.

2. DALA provides recommended decisions to certain agencies instead of final decisions. A summary decision is a decision issued without an evidentiary hearing.

In our current audit, we found that although DALA submitted its annual reports to the Legislature, the reports did not include all the required information. Specifically,

1. In some cases where there were multiple parties to appeals, the reports did not list all parties.
2. The reports did not list the disposition of closed cases (decision, settlement, withdrawal, or dismissal).
3. The reports did not include the total number of simplified hearings.
4. The reports did not provide the length of time it took to process each case.
5. The reports did not list all appeals that took more than six months to resolve and the reason for that duration.

Without sufficient information, the Legislature cannot develop a complete assessment of DALA's case-management process.

Authoritative Guidance

Section 4H of Chapter 7 of the General Laws states,

The division of administrative law appeals shall prepare annually a report concerning all appeals filed with the division during the preceding calendar year. It shall be the responsibility of the chief administrative magistrate to cause a statistical list to be maintained of all matters assigned to each administrative magistrate as relating to any appeals required by law. The report shall contain, at a minimum, the following information: . . . the names of all parties to each appeal; . . . its disposition, whether by decision, withdrawal, settlement or dismissal, . . . the total number of simplified hearings; and the length of time from receipt of the appeal by the division of administrative law appeal until a written recommended final decision, summary decision, or other interlocutory ruling is issued, including the basis for any case at the division for longer than 6 months. Each calendar year the original of the report shall be submitted to the office of the house and senate clerk and to the house and senate committee on ways and means as well as to the director of the Massachusetts permit regulatory office.

Reasons for Issues

Time Matters does not record all listed parties when there is more than one petitioner and/or respondent. Moreover, although Section 4H of Chapter 7 of the General Laws requires DALA to list the disposition of each case in its annual reports, DALA believes that reporting aggregate cases is sufficient to meet the legislative requirements. Additionally, DALA does not track simplified hearings in Time

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3. An interlocutory ruling is a ruling that does not conclude a matter (for example, a ruling rejecting a motion for summary decision).
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Matters. Nor does DALA specify the length of time from receipt of appeals until the cases are closed; instead, DALA believes that listing the opening and closing dates in the report for each individual case will enable reviewers to determine the duration of each case. Finally, DALA believes that including a general statement in the report about why cases have taken more than six months is sufficient to meet the legislative requirements, although Section 4H of Chapter 7 of the General Laws requires that DALA provide an explanation for such cases.

Recommendations

1. DALA should record all the listed parties in Time Matters when there is more than one petitioner and/or respondent and include them in the annual report.
2. DALA should specify in the report how cases were disposed of (decision, settlement, withdrawal, or dismissal).
3. DALA should report the total number of simplified hearings in its annual report.
4. DALA should report the length of time it takes to process each case.
5. DALA should include in the report an explanation for all cases that require more than six months to resolve.

Auditee's Response

DALA prepared its annual reports and provided information that was intended to comply with the Legislature's requirements. For example, in most DALA cases there is one Petitioner and one Respondent. The name of the case field provided with the annual reports includes the names of each of the parties in most cases. Due to the way the docketing system data is exported, additional parties were not listed. The data provided with the annual reports includes the date each open case was filed and the date each closed case was closed.

After discussing the annual reports with [OSA] staff, DALA began to develop the tools necessary to obtain the data from its case tracking system in order to provide the names of all the parties participating in each case. In addition, DALA will provide the information concerning the type of disposition of each closed case, how long it took to close each case, and the age of each open case. DALA does not have a simplified hearing process, but it will provide the number of cases resolved through Summary Decision pursuant to [Section 1.01(7)(h) of Title 801 of the Code of Massachusetts Regulations]. Because of the number of interlocutory rulings made in each case as a matter of routine, we are unable to provide an accurate number of interlocutory rulings made by DALA each year. We will continue to obtain and provide the most accurate information in future reports.

Auditor's Reply

Based on its response, DALA is taking measures to address our concerns on this matter.

4. Hearing officers in the Bureau of Special Education Appeals did not consistently document case postponements.

Hearing officers in the Bureau of Special Education Appeals (BSEA) did not consistently document case postponements. Without proper documentation related to postponements, BSEA cannot ensure that they have been issued for good cause.

We selected a sample of 40 cases from a population of 293 cases that began after BSEA revised its Hearing Rules for Special Education Appeals, effective March 1, 2019, in response to findings reported by the US Department of Education's Office of Special Education Programs (OSEP), and determined the following:

- Five case files had unexplained gaps in the record arising from a lack of written rulings on postponement requests.
- In seven cases, hearing officers did not issue written rulings in response to written requests for postponement. In three of these cases, the officers issued new notices of hearing⁴ instead; in the other four cases, they did not issue any response.
- In three cases, hearing officers did not document requests to file written closing arguments.

Authoritative Guidance

Rule III.A.3 of the revised BSEA Hearing Rules for Special Education Appeals states,

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.

Rule IX.E states, "A request to submit written closing arguments shall constitute a postponement request which must be documented and acted upon in accordance with Rule III."

Reasons for Issues

The revised BSEA Hearing Rules for Special Education Appeals were issued in a memorandum; however, BSEA did not provide training on documentation requirements. These instances went undetected because of a lack of agency monitoring of case files.

4. A notice of hearing is a simple document BSEA sends out after a party requests a hearing, indicating the date of the hearing and the dates of certain pre-hearing deadlines, such as that of a pre-hearing conference. An updated notice of hearing sent after a postponement request does not address the basis for the change of hearing date. In contrast, written postponement rulings are typically paragraph-long orders discussing why a party requested a postponement, whether the other party consents or objects, and the hearing officer's decision on the merits of the request, along with a statement that both parties understand that this will delay the issuance of the decision.

Recommendations

1. BSEA should ensure that hearing officers are properly trained on documentation requirements.
2. BSEA management should monitor case progress to ensure that hearing officers document all postponements.

Auditee's Response

The BSEA does its best to meet all OSEP directives and will develop a more consistent approach to the supervision and monitoring of form usage for postponement requests and responsive orders.

Auditor's Reply

Based on its response, DALA is taking measures to address our concerns on this matter.

5. BSEA hearing officers did not consistently document requests and orders to add days to hearing schedules.

BSEA's hearing officers did not consistently document requests and orders to grant additional days to hearing schedules. Without proper documentation of the extension process, BSEA cannot ensure that extensions are properly authorized and justified.

From our judgmental sample of 40 cases that started after BSEA had revised its BSEA Hearing Rules for Special Education Appeals (effective March 1, 2019) in response to OSEP's findings, 2 cases had days added to the hearings without documentation after the hearings were scheduled. In both cases, the final hearing day occurred at least a month after the hearing opened. BSEA's Postponement Order Form, which is meant to be used for requesting and granting additional days for a hearing, was not used consistently to document some of the additional dates in these 2 cases.

One hearing was originally scheduled for September 18, 19, and 20, 2019. However, the case files indicate that the hearing was actually conducted on six days: September 18 and 20 and October 2, 3, 7, and 18. There is some evidence in the hearing transcript that the parties discussed adding October 3 and 7, and the case file contains the request and grant of an additional day of hearing for October 2, but there is no evidence of a request or grant for the final day of hearing, October 18. There is also no formal request or grant for October 3 or 7 that specifies when the final case decision will be issued.

The second hearing was originally scheduled for November 13, 15, and 18, 2019. However, the case files indicate that the hearing was actually conducted on November 13 and 15, 2019, and January 24 and February 14, 2020. There is no record in the case files of a party's request to add these two days.

Authoritative Guidance

According to Section 300.515(c) of Title 34 of the Code of Federal Regulations, a hearing officer "may grant specific extensions of time beyond the period set out in paragraphs (a) and (b) of this section [i.e., 45 days after the expiration of the 30-day resolution period] at the request of either party."

To address the above regulation, Rule III.A.3 of the revised BSEA Hearing Rules for Special Education Appeals states,

A Hearing Officer may grant an extension of the 45-day timeline at the written request of a party. . . . 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.

On March 4, 2019, the BSEA director sent the Postponement Order Form to the hearing officers in an email stating,

*Just another reminder that the attached form (or a reasonable facsimile thereof, containing all the information on the form) **must** be used in all cases where postponements are requested. (It's ok if you add more info to the form, e.g., due date for exhibits, just don't omit anything!)*

Reasons for Issues

Although the above rule requires that written rulings be issued for extensions of a hearing, it does not provide a process for doing so once a hearing has already begun.

On January 1, 2021, the BSEA Director told us in an email that if an additional hearing day was mentioned in a hearing transcript, that was sufficient documentation. However, in at least these two instances, the date of decision was not in the transcript.

When informed of this finding, the BSEA director stated that more training was needed in this area.

Recommendations

1. BSEA hearing officers should consistently use the Postponement Order Form for requesting and granting additional hearing days.

2. BSEA should revise its Hearing Rules for Special Education Appeals to provide a process for requesting and granting additional days for a hearing once the hearing has already begun.
3. BSEA should provide training to the hearing officers on the process for requesting and granting additional days for a hearing, including the use of the Postponement Order Form.

Auditee's Response

It is necessary to address two matters with respect to Finding # 5: (1) the substance of the Director's email, which sets out the basis for BSEA's position with reference to this finding, was only cursorily cited in the draft report and must be fully considered; and (2) what appears to be an error regarding a regulatory requirement should be clarified.

1. *The audit report reads, in relevant part: "On January 1, 2021, the BSEA Director told us in an email **that if an additional hearing day was mentioned in a hearing transcript, that was sufficient documentation.**" (Emphasis added.)*

This statement oversimplifies the substantive content of the January 1, 2021 Director's email response, which states, in pertinent part:

I am writing in response to your email inquiry of December 23, 2020, regarding documentation of requests to add hearing date(s) in the situation where the originally scheduled dates prove insufficient for completion of the taking of testimony.

The OSEP finding regarding documentation of any request for/allowance of an action that would extend the 45 day timeline is grounded in the notion that such request must be for good cause and not be done . . . by a hearing officer [of the officer's own accord] motivated by administrative or personal convenience. The necessity of scheduling additional day(s) for hearing, when it becomes clear during the course of a proceeding that the completion of taking of testimony cannot be accomplished in the originally allocated time, would extend the overall timeline for good cause—thus, documentation in the record of such event would be proper.

While we do have a form which can be used to document such scheduling event . . ., given that said event typically transpires during the course of a hearing, the transcript of the proceeding, which in fact is the official record of the hearing, may often be the vehicle used to memorialize the request/granting of same in the record. Pursuant to my conversations with the hearing officers who presided over the cases you cite in your email, this is what in fact transpired in those cases.

Given the substantive explanation set forth in the above email, it is certainly arguable (and consistent with the purpose and intent of the OSEP directive) that the requirement for documentation of a request for/allowance of a specific extension for good cause may be seen as fulfilled when the official transcript of the hearing reflects these elements.

With the foregoing as context, it should be noted that BSEA hearing officers have been made aware on multiple occasions, both verbally and in writing, that, per OSEP, the gold standard for documenting any request that results in an extension should be a written document reflecting the

request and a written order reflecting the "good cause" basis for allowance thereof, including the length of the extension (or revised date of decision issuance). As reflected in the January 1, 2021 email set out above, a model form had been prepared subsequent to the OSEP site visit for potential use in the situation where additional day(s) of hearing were needed to complete the taking of testimony.

2. *In addition, the audit report states: "On January 1, 2021, the BSEA Director told us in an email that if an additional hearing day was mentioned in a hearing transcript, that was sufficient documentation. However, in at least these two instances, **the date of decision was not in the transcript.**" (emphasis added)*

There is nothing in the Hearing Rules for Special Education Appeals that requires a ruling allowing a postponement to specify the date when the final case decision will be issued. Rather, Rule III A. 3., which addresses the granting of postponements for good cause, requires either that the length of the extension be specified or that the new date by which the Decision will be issued be specified. In the instant situation, once the date certain for the additional day(s) of hearing is specified on the record, the mandate of this Rule has been fulfilled.

The requirement for completion of written forms, memorializing (or re-memorializing what may already appear in the formal record of the proceeding) the scheduling of additional dates for hearing will be reinforced with hearing officers and monitored going forward.

Auditor's Reply

The postponement order form is intended to be used for all cases to ensure consistency and clarity in hearing proceedings. It requires that the decision due date be documented. Although we agree that BSEA's Hearing Rules do not address how this stage of the process affects the 45-day timeline, the form is required by BSEA's defined process and should be added to the Hearing Rules.

We also agree with the plan to reinforce and monitor the scheduling of additional days for hearings by the hearing officers.

Based on its response, DALA is taking measures to address our concerns on this matter.