Induction of Administrative Law Judges — 2004

A Position and Training Paper

Presented by

The College of Family and Consumer Sciences

in conjunction with the

Iowa Department of Education
Dee Ann Wilson, Consultant
July 2004

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Department of Education
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Des Moines, Iowa 50319-0146

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Contents

Orientation to Complaint/Due Process/Appeals Process 1

Preparation for a Hearing 5

Handling and Reviewing Educational Material and Other Evidence 11

Conduct of Hearing 15

Writing the Decision 21

Seeking Assistance 25

Appendix A — ALJ Timeline for Conducting a Hearing 35

Appendix B — Alleged ALJ Bias 39

Appendix C — Model Letter Regaring Prehearing Conference 45

Appendix D — Letter Regarding Security Issues from Iowa Department of Education 49

Appendix E — Draft Letter About Student Records to Send to LEAs and AEAs 53

Appendix F — Elements of Administrative Law Judge Rulings 57

Appendix G — Support Resources and/or References 65

Appendix H — Contacts at the Iowa Department of Education 69

Orientation to Complaint/ Due Process/Appeals Process

Orientation to Complaint/Due Process/Appeals Process

Currently, the Iowa Department of Education has put in place five methods to resolve differences about a student's special education services:

(1) preappeal conference;

(2) complaint;

(3) mediation;

(4) due process hearing, or

(5) use of a Resolution Facilitator.

The first four of these procedures are defined and procedures for implementing these procedures are delineated in The Iowa Administrative Rules of Special Education. Use of a Resolution Facilitator is the most informal type of method available to resolve disputes; this procedure is the most recent means of dispute resolution implemented and efforts to encourage use of this method are ongoing.

These methods combine informal and formal procedures to resolve differences, and processes to utilize any of these procedures are supported by the Iowa Department of Education, the Area Education Agencies, and the local education agencies. The Iowa Department of Education has provided support and training for implementation of dispute resolution procedures, especially the more informal procedures. This support has included widespread mediation training, information campaigns, provision of materials, support for development of procedures for AEAs to share expertise and personnel for purposes of resolving disputes. Support for some of the more formal dispute resolution procedures has includes appointment of Administrative Law Judges and mediators, ongoing training for these individuals, and support of an annual Conference on Special Education Law.

The Special Education Appeals Process is outlined in the Iowa Administrative Rules of Special Education (IARSE, Iowa Department of Education, 2000) – (Education [281], Title VII, Chapter 41, Divisions X and XI, Sections 41.102 – 41.111 and 41.112 – 41.127). Federal laws and regulations regarding this process are presented in the Individuals with Disabilities Education Act, (IDEA, Part 300, Subpart E).

The following methods to resolve differences are described in the Iowa Administrative Rules of Special Education at the following sections:

Preappeal conference. IARSE Section 218 – 41.106;

Complaint. Section 218 – 41.105;

Mediation conference. Section 218 – 41.113(10), IDEA Section 300.506;

Due process hearing. Section 281 – 41.113(1), IDEA Sections 300.507 – 300.514.

Preparation for a Hearing

Involvement of ALJ in Due Process Hearing

Preparation for a Hearing

Assignment to appeal by the Director of the Iowa Department of Education

NOTE: ***ALJ is responsible for seeing that all timelines are met. Keep this in mind as the prehearing conference call, any prehearing conferences, and the hearing are scheduled. See ALJ Tracking Sheet (Attachment/Appendix A) to facilitate planning.***

NOTE: ***Mediation can be used to resolve a conflict at any time! If at any time during a hearing, it appears that the parties would be favorable to entering into a mediation process, the ALJ can suggest that be done and facilitate that process. The ALJ would be able to step into the role of mediator immediately or the ALJ could facilitate the process by contacting the Department to request that a mediator to handle the case be identified.***

Department will arrange a prehearing conference telephone call

The ALJ, Appellants, Appellees, and Department staff will be involved in the call. First, this conference call provides an opportunity to clarify that the ALJ appointed to handle the case does not have any conflict of interest and/or is not biased toward or against any individual involved. (See notes regarding Alleged ALJ Bias – appendix B).

An important purpose of the conference call is to clarify issues to be heard, as well as to clarify materials/evidence to be presented. Clarification/discussion of what will constitute the educational records for the individual student should be addressed at this time. This conference call also provides an opportunity to schedule hearing dates, arrange a location for the hearing, and discuss the possibility of mediation. If the parties agree to mediate, the ALJ will not participate in, or listen to discussions regarding mediation.

ALJ will send a letter to all parties

(See model letter on prehearing conference — Attachment/Appendix C) to all parties informing them of the date and time of the conference call, the purpose/s of the call, and topics to be discussed. Generally, this telephone conference is sufficient for clarifying all issues stated in the previous paragraph. During any pre-hearing conference, specific factual discussions should be discouraged

(parties not under oath; no official record is being kept).

ALJ will send a letter summarizing the conference call to all parties.

Prehearing Conference

If issues are unclear or complicated, or issues of evidence are a problem, an additional pre-hearing conference should be arranged by the Department at the request of the ALJ, Appellant or Appellee. Telephone conferencing can be used when agreed to by the parties. Some prehearing motions may need a prehearing conference for oral argument (e.g., current placement determination, mootness, lack of residency motion to dismiss). If facts are involved, affidavits, stipulated sets of facts, or existing education records, a court reporter will be desirable for the recording of testimony received at any prehearing conferences.

If matters are straightforward, a prehearing conference may be held immediately prior to the hearing. Ask at the prehearing conference whether the parties are in agreement as to the issue(s) involved, and whether there are any evidentiary or other concerns to discuss before going on the record. Ask whether there is any possibility of settlement and how this might best be achieved. Advise the parties that a mediator is available (when one is available) should they desire such services.

Security Concerns

Occasionally when planning for and scheduling a hearing, the issue of security becomes a concern as district and AEA personnel contemplate attending a special education hearing before an Administrative Law Judge. If the agencies believe the best interests of all parties will be served by having security in attendance, they should advise the Department of Education before the hearing so arrangements can be made. If security needs to be provided, the Department will assume the cost of the expenditure.

Capitol Security will provide personnel at no cost to the state if the hearings are held on the capitol complex and the officers know in advance their services will be needed. Because hearings typically are held in a district where the parents reside you will need to advise the Department that you prefer the hearing to be held at the Grimes State Office Building (or some other site on the complex). The Department will also make arrangements to have security provided at a location closer to the District if that is appropriate for a specific hearing. (See letter from Iowa Department of Education — Appendix D).

Continuances/Cancellation

During the 45 day time period during which a case is being processed, there should be no lapses in time that are not covered by a continuance. The ALJ must take responsibility for reminding all parties about time lines.

If a case is cancelled prior to a hearing (e.g., the parties agree to mediate), the ALJ must take responsibility for officially dismissing the case.

NOTE: ***When continuances have been previously granted, the ALJ must remember to remind parties so that time-lines are met. It is the ALJ's responsibility to remind Department staff well in advance of the exhaustion of time agreements.***

NOTE: ***If the hearing is cancelled or postponed, the ALJ should be responsible for notifying the court reporter when the Department staff has not already done so.***

Induction of Administrative Law Judges — 2004

Handling and Reviewing Educational Materials and Other Evidence

Handling and Reviewing Educational Materials and Other Evidence

Materials generally included in the educational record presented by the LEA and/or AEA

A variety of materials are generally included in a child's educational record, and these materials are sometimes in a variety of locations. What should and should not be included for a specific case may often need to be a point of inquiry during the prehearing telephone conference call; the ALJ should make a point of clarifying what constitutes the educational record during this conference call. In all instances, the ALJ should ask if there are objections to any pieces of information to be included in the student's educational record. When objections arise, these should be clarified and resolved before educational records are shared between parties.

Materials to be included in the student's educational record should include all pieces of information relevant to the case at issue (e.g., generally, this includes all referral/s for special education services, assessment reports, IEPs and attendant progress reports, etc.). In some cases, reports and/or records related to specific instances and/or a history of educational policies (e.g., discipline practices) with a particular student and/or the school building/district may be relevant to the student's case. Agreements reached in past instances of mediation could be included in a student's file; these may or may not be appropriate for inclusion in the student's educational record to be reviewed for a specific case. If one party offers and/or refers to a mediation agreement, the ALJ should ensure that no one objects to that being included in the student's educational record.

Organizing Materials in the Student's Educational Record

The ALJ will ask the LEA and AEA personnel preparing materials for the educational record to arrange materials in chronological order and number each page consecutively. This should be done prior to the records being copied and/or sent to any party to facilitate consistent communication between all parties. (See Letter from the Iowa Department of Education – Appendix E).

Induction of Administrative Law Judges — 2004

Conduct of Hearing
(see IARSE 281—41.117 - 281-41.122)

Arrival
Opening Statement by ALJ at the Hearing
Conduct Hearing as Per the Outline of Procedures for Each Type of Hearing
Complete Hearing
Conclusion

Stipulated Record Hearing (See IARSE 281—41.116)

Evidentiary Hearing
Note Regarding Rebuttal Evidence
Witness under Oath

Mixed Evidentiary and Stipulated Record Hearing

Conduct of Hearing
(see IARSE 281-41.117 – 281-41.122)

Arrival

Greet all parties, introduce yourself, and thank participants for being present. A court reporter must be present before the ALJ begins the hearing. A court reporter should be present, and the Department has also requested that the court reporter tape hearings.

Opening statement by ALJ at the Hearing

- Advise all present that the hearing is "going on the record;"
- Introduce self;
- State time, place, name and nature of hearing [(See IARSE 281-41.115(1)];
- State appointment as ALJ by Director of Education under the authority of Iowa Code section 256-B.6 and rules of the State Board of Education found at Chapter 281-41 Iowa Administrative Code;
- Inquire as to presence of parties and their representatives, if any (get responses in the record);
- If a party is not present and not expected, determine for the record whether proper notice has been achieved. If notice has not been received by absent party , hearing may have to be postponed. [(See IARSE 281-41.115(2)]. Place evidence of timely notice, if any, into the record. Examples would include registered mail receipts, subsequent communications by the absent party, secretarial testimony;
- When an appellant or appellee is not represented, and several persons from that party are at the hearing, identify for the record who the designated spokesperson will be. Multiple persons acting as spokespersons will be contacted;
- Determine whether parent wants hearing to be open or closed to the public;
- Determine type of hearing desired by the parties [(three options—evidentiary, stipulated record, mixed; IARSE 281-41.115(3)];

- Determine for the record whether there are any objections or additions to the education record submitted by the school. If time for review by parties becomes a factor, you may desire to go off the record while it is reviewed and discussed.

Conduct hearing as per the outline of procedures for each type of hearing (See following sections)

- Evidentiary;
- Stipulated record;
- Mixed.

Complete hearing

Ask about briefing. Ask whether time for briefing should be considered a continuance in the appeal for the purpose of the 45-day decision requirement. If parties want briefing, but neither party requests a continuance for briefing, a problem in meeting the 45-day requirement may exist.

Conclusion

Thank all parties and participants for their demeanor and effort to bring the facts to the record.

Hearing Procedures

STIPULATED RECORD HEARING (See IARSE 281—41.116)

- Record hearing is nonevidentiary – ALJ should remind parties that no witnesses will be heard or evidence received. The controversy shall be decided on the basis of the record and arguments presented on behalf of the respective parties;
- Materials to illustrate an argument;
- One spokesperson per party;
- Arguments and rebuttal;
  - * Appellant presents first argument;
  - * Appellee presents second argument and rebuttal;

* Third party may present remarks (at discretion of ALJ);

* Appellant rebuts preceding arguments;

- Time to present argument – Parties shall have equal amounts of time to present their arguments and rebuttals;

- Written briefs – Parties may submit written briefs.

EVIDENTIARY HEARING

- Testimony and other evidence;

- Appellant statement – Short opening statement of a general nature;

- Appellee statement — Short opening statement of a general nature;

- Third party statement — Short opening statement of a general nature (with permission of ALJ);

- Witness testimony and other evidence – Appellant calls witnesses and present evidence;

- Cross-examination by appellee – Appellee cross-examines all witnesses and examines and questions other evidence evidence;

- Witness testimony and other evidence – Appellant calls witnesses and present evidence;

- Questions and other requests by administrative law judge – ALJ may address questions to witnesses andor may requests to hear other witnesses and receive other evidence;

- Rebuttal witnesses and additional evidence – Either party may be permitted to present rebuttal witnesses and additional evidence;

- Appellant final argument – Appellant presents final argument. Time limit established by the ALJ;

- Appellee final argument – Appellee makes final argument. Time to do this may not exceed time allowed appellant;

- Third party final argument – Third party involved in the original proceeding may make final argument;

- Rebuttal of final argument – Either party may be given the opportunity to rebut the other's final argument, at the discretion of the ALJ

- Written briefs – Parties may submit written briefs.

Note regarding rebuttal evidence

Occasionally, the party presenting evidence first will hear evidence presented by a later party that was not addressed in the earlier testimony, or which may conflict with earlier evidence presented. The concerned party may request the opportunity to present additional evidence, even though their presentation of evidence had concluded, for the purpose of "rebutting" the new, and often unanticipated, evidence offered by later testimony. While the use of rebuttal evidence is largely discretionary with the ALJ, it is normally desirable to allow, at least limited, rebuttal evidence out of fairness to the parties.

Witness under oath

Each witness shall be administered an oath by the administrative law judge. The oath may be in the following form:

> ***"I do solemnly swear or affirm that the testimony or evidence which I am about to give in the proceeding now in hearing shall be the truth, the whole truth and nothing but the truth."***

MIXED EVIDENTIARY AND STIPULATED RECORD HEARING

- Written evidence of portions of record may be used;

- Conducted as evidentiary hearing.

Writing the Decision

Writing the decision

Complete written decision

See Elements of Decision – Appendix F, page 57.

Mail decision to each party

ALJ will take responsibility for mailing the decision to all parties to whom notice was originally sent as soon as possible after being rendered. Finality of decision is based on postmark (See IARSE 281-41.124). Certified or registered mail must be used for this purpose.

Seeking Assistance

ALJs Consulting with Each Other on Specific Cases
Common Motions and Objections
Subpoenas
Terms Frequently Found in Legal Contests

ALJs Consulting With Each Other on Specific Cases

When an ALJ is officially assigned a special education case following a request for a hearing and the ALJ finds the need to consult with one or more ALJs about a given situation, the assigned ALJ has the discretion to do so.

In such a situation described above, the responsibility of the assigned ALJ is unchanged; this is the person responsible for making and writing decisions needed before the hearing, and the person responsible for making and writing the final decision following a hearing. The nonassigned ALJ merely serves in a consultative role and has no decision-making authority. Note that when an ALJ has served in a consultative role on a specific case, that ALJ may not serve as a mediator in that specific case. The ALJ should not consult on a case for which he/she previously served as a mediator; neither can he/she be assigned later to serve as a mediator with that specific case.

The nonassigned ALJ will document the time spent consulting with the assigned ALJ and will bill the Department of Education at the same hourly rate specified in the contract as when serving as an assigned ALJ.

The assigned ALJ continues to bill as has been done in the past.

Common Motions and Objections

Pre-hearing Motions

Dismiss- motion to. Seeks to end the action or appeal without further consideration or hearing. Affirmative ALJ decision on this motion is terminal. In litigation it is very common, almost 100 percent, to file dismissal motions. It is also common in litigation for the appellee to move for dismissal at the end of introduction of the appellant's evidence. In special education hearings, it is unusual that dismissal would be granted unless the request is filed by the appellant. When faced with a motion to dismiss, the ALJ needs to review the grounds argued. When there is potential merit to the alleged ground (e.g., student has moved from the district; student is 21 years-of-age), the AU should schedule a timely pre-hearing conference of the parties to discuss the motion to dismiss and its merits. It would be extremely rare that a dismissal request not agreed to by all parties would be granted without hearing arguments from all sides first. The non-moving party should usually be given an opportunity to rebut the alleged facts or law presented by the moving party. Telephone conference calls or written arguments may substitute for face-to-face hearings on such motions. Important! Whenever in doubt, direct both sides to present their varying perspectives for fair consideration. See Iowa Rule 281-41.113(12).

Discovery -motion to participate in. Acquisition of knowledge of existing facts. Section 17 A.13 , the Code of Iowa, allows parties to hearings to discover facts related to the issues presented in the appeal. Normally, the parties work out

the details under the rules of civil procedure. In the event one of the parties does not cooperate, such as may happen when a parent is not represented by legal counsel, the ALl may have to order discovery .It is not clear what sanctions may be imposed for failure to comply with such an order. The moving party may want to get a court order enforcing an order to discover, or sanctions may theoretically be imposed by the ALJ. Sanctions, if any, should be handled carefully. The goal should be to not prejudice either party. For example, if one party refuses to turn over evidence to the other party through discovery, the refusing party should not be allowed at hearing to use the “secret” evidence to the detriment of the other. Federal regulations parallel this where they do not allow introduction of evidence not made known to the other party in advance of the hearing. It is not clear whether the federal regulations apply only to documents or to all forms of evidence. See Iowa Court Rule Civil Procedure, # 121-134.

Accelerate Discovery -motion to. Force other party to respond to discovery prior to time allowed under law. In normal litigation, parties are allowed a great deal of time in which to engage in discovery. Because special education appeals are to be concluded within forty- five days, time may be of the essence. On a motion to speed up discovery, fairness must be a guideline. Those things that can easily be given over in a short period of time can probably be so directed. If it would not be fair to a party to order accelerated discovery on a specific item in the request, (e.g., takes a great deal of time to compile) it might be desirable to deny accelerated discovery .In such a situation, one party or the other may have to request a continuance in order to allow completion of discovery. There is an Iowa Supreme Court decision involving another type of education hearing that ruled that discovery under Chapter 17A does not apply when short time frames for hearing are involved. If this issue is raised, it is probably best to make a ruling allowing discovery, and recommend that the parties seek clarity in the court. Be watchful of the time-line for issuing a decision. While a request for continuance may be requested and granted, extensions of the statutory time for completion of a decision are not automatically extended through discovery requests.

Discovery Access to Buildings -motion for. Allow entry upon property under control of a party. See Iowa Rules of Civil Procedure #129.

In Limine-motion. On or at the threshold, or beginning, preliminarily. Motion by which exclusion of evidence is sought. This is usually a motion to have argument and clarification on a point of law prior to the beginning of a hearing. Often, it is used to clarify whether specific evidence will be admissible. For instance, if a parent wants a school counselor to testify about some things regarding communications with his or her child, but not other things which might be confidential under state statute, the parent might request a prehearing conference of attorneys and the ALl in closed session to determine what can be introduced on the record and what cannot.

Definitive Statement of Allegations -motion for. Make clear the specific matters at issue. A request for due process hearing may be general and vague (e.g. “Tommy Smith is not receiving a free appropriate public education.”) The appellee school has the right to know, at least generally, the issues it must produce

evidence on in order to defend itself. The school may ask for general clarification or a more specific statement of allegations. Fairness dictates the ruling. Parties are entitled to be reasonably aware of the issues at stake prior to the hearing. Witnesses and documents must be prepared for the hearing. While Iowa and federal regulations require a statement describing the disputed problem, there is no penalty for noncompliance (34 C.F.R. § 300.407(c). The elements of that notice are good models on which to make judgments of clarity of allegations.

Motions and Objections During Hearing

Voir Dire -To speak the truth. The examination and interrogation of potential witnesses. It is used primarily in two contexts. First, to determine whether an administrative law judge is objective. An attorney may ask to examine the administrative law judge to determine whether he or she has prior knowledge of the facts or a relationship with the parties that would result in an unfair decision. For instance, if the Bureau of special Education were a party, and a contractor with the Department was the ALJ, an attorney might want to ask questions about the Department's role in funding the contractor. The goal of voir dire is to learn facts upon which to raise objection as to partiality .The best view is that the administrative law judge should not allow himself or herself to be subjected to voir dire. Have the attorney state his or her concern for the record. The administrative law judge can either state on the record that he or she will step aside because of an actual conflict, or state facts which refute the concerns. See 281-41.114(1), and Appendix B.

A second use of voir dire is to determine the competency, expertise, special interest, or conflict of interest of a witness in order to raise objection. For instance, Attorney A calls a witness to testify about the school behavior of a student. Attorney B may request vior dire to see whether the witness has observed the student in a school setting, or has personal knowledge about the student's conduct, so that Attorney B may object to the competency of the witness. Oftentimes, these questions are left for cross-examination, but if it is desired to not let the witness testify at all, Attorney B will raise the issue at the beginning of the testimony through voir dire.

Sequester witness -motion to set apart, separate. It is usually used in the context of one party not wanting witnesses to hear each other's testimony. In order to prevent witnesses from altering their testimony after hearing someone else testify, attorneys will request that witnesses for the other side be removed from the hearing room until their testimony is concluded. This should normally be granted. If the chief representative from the other side is to be a witness, he or she should be allowed to remain in the hearing room. The right to legal representation is thus protected by allowing the representative of the side (e.g., superintendent or special education director) to remain seated next to the attorney.

Refreshing memory from notes. Occasionally, a witness will bring personal notes about a case from which they can better recall facts. In order to prevent "fixed" testimony, the side not calling the witness should be given the opportunity, upon request, to examine the witness about when and by whom the notes

were made. The opportunity by opposing counsel to review the notes and make copies should be granted upon request.

Evidentiary Objections. With few exceptions, evidentiary offerings which are subject to objection rest in the discretion of the administrative law judge. Even if something is hearsay or not the "best evidence," the administrative law judge can rule to allow the evidence in the record as long as it is "reliably probative and relevant." "Irrelevant, immaterial or unduly repetitious evidence should be excluded." Still, those determinations are discretionary with the administrative law judge.

Before ruling on an objection to evidence, if in doubt or uncertain, allow both sides to explain their position. If still in doubt, allow the evidence in the record subject to later ruling (take under advisement). If you do this, be sure that you make a ruling at the end of the hearing or in the written decision. E.g., "Appellant's objection to introduction of the private psychologist's report (Ex. 21) for inadequate foundation is hereby sustained. No consideration was given to that report in this ruling." In one hearing, a document was allowed into evidence, subject to later foundation being presented. No foundation was laid and the ALJ mentioned in the ruling that the foundation was not laid, the document was not considered as part of the record, and was not used in rendering the decision.

> **Exception #1**: Documentary (and perhaps testimonial) evidence not disclosed at least five days in advance of hearing.
>
> **Exception #2**: rules of legal privilege, e.g., Section 622.10, Iowa Code Ann.
>
> **Exception #3**: Mediation conference proceedings and offers of compromise at mediation conferences. Mediation agreement entered into by the parties may be entered into evidence. See Departmental Rules 281-41.120.

Motions Following Hearing

Rehearing - Application for. The Iowa Administrative Procedures Act provides that a party to a hearing may file an application for "rehearing" within twenty days following the issuance of a decision. The difficulty for the party is that the person (agency) issuing the ruling has twenty days in which to respond. This may put the length of time near forty days and the party may conclude that only thirty days exists in which to file an appeal in court.

> … any party may file an application for rehearing stating the specific grounds for the rehearing and the relief sought, within twenty days of the issuance of any final decision by the agency in a contested case. A copy of the application for rehearing shall be timely mailed by the presiding agency to all parties of record not joining in the application. An application for rehearing shall be deemed to have been denied unless the agency grants the application within twenty days after its filing. 17A.16, Iowa Code.

The statutory provisions for rehearing are mirrored in the Iowa Department of Education rules found at 281-6.20 I.A.C. That rule provides the criteria for determining whether an application for rehearing should be granted.

A rehearing shall not be granted unless it is necessary to correct a mistake of law or fact, or for other good cause.

The Administrative Procedures Act, in Section 17A.19 (3), extends the time for a party to file a petition in court when a request for rehearing is filed. It provided that a petition for court review of the decision hearing may be filed up to thirty days after the application for rehearing has been denied, or is deemed denied because the agency did not respond within the twenty days it had to act on the rehearing request.

Summary of Court Decisions:

Kash v. Iowa Dept. of Employment Services, 476 N.W.2d 82 (1991). Once the time period for rehearing requests has passed (twenty days), the ALJ (agency) cannot reopen the hearing decision, even when a request for rehearing is filed by a party.

Fee v. Employment Appeal Board, 463 N.W.2d 20 (1990). A request for rehearing filed by any party to an administrative hearing decision extends the time for court review to all parties (thirty days after agency denial,or running of twenty day time period for action).

Ford Motor Company v. Iowa Dept. of Transp., 282 N.W.2d 701 (1979). The thirty-day time period for filing a request for court review of an administrative decision begins to run when either an agency denies a rehearing request or when, after the passage of twenty days, the request for rehearing is deemed denied.

Subpoenas

From time to time, a party to a due process hearing may request a subpoena for the purpose of obtaining access to books, papers, records, and other real evidence, or to require the attendance of potential witnesses at the hearing.

All parties requesting subpoenas should be referred to 281-41.119(1) *Iowa Administrative Code* and the Office of the Director of Education.

Explanation:

Section 17A.13, Iowa Code, provides for the availability of subpoenas from agencies having the power to decide "contested cases," such as due process hearings.

"Agency subpoenas shall be issued to a party on request."

A person seeking to challenge an issued subpoena must do so in district court.

Because it is the State Board of Education, and/or the Department of Education which have (has) the "power to decide contested cases," it is the Department of Education, through its director, which has the authority and duty to issue subpoenas, not individual ALJs.

281-41.113(2) (2000) Conducting a Hearing. The hearing shall be conducted by the Department.

281-41.119(1)(2000) Subpoenas. The director of education shall have the power to issue (but not serve) subpoenas for witnesses, to compel the attendance of those thus served and the giving of evidence by them. The subpoenas shall be given to the requesting parties whose responsibility it is to serve to the designated witnesses. Requests for subpoenas may be denied or delayed if not submitted to the Department at least five business days prior to the hearing date.

281-41.119(2). Attendance of witness compelled. Any party may compel by subpoena the attendance of witnesses, subject to limitations imposed by state law.

NOTE: ***34 CFR § 300.509 (9)(2) provides that any party to a special education hearing "has the right to …compel the attendance of witnesses."***

TERMS FREQUENTLY FOUND IN LEGAL CONTEXTS:

inter alia - among other things.

remand - a higher court finds that the lower court made a mistake or overlooked something and the case is sent back (remanded) to the lower court for further consideration.

vacated - a higher court "wipes out" the ruling in a particular case. The parties may go back and pick up the process and start over again. Different than a dismissal or reversal which ends the case subject to further appeal, if any.

writ denied or ***writ of certiorari*** denied or cert. denied - appeal not granted.

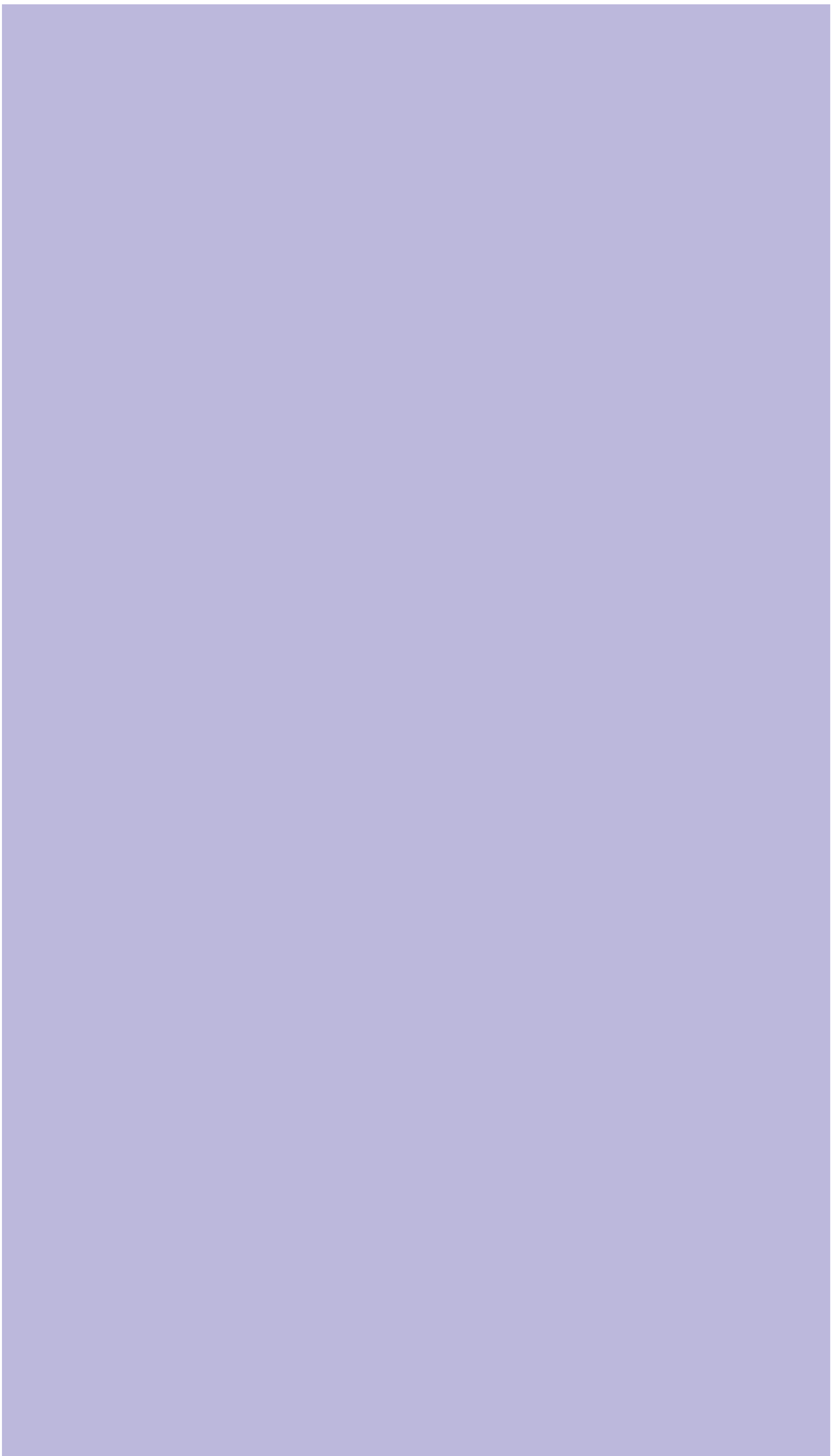
supra- used in footnotes to refer to previous citation. Often used incorrectly. E.g., S-l, Supra. might incorrectly refer to an earlier footnote reference to S-l v. Tarlington, 635 F .2d 342 (5th Cir. 1981) or H. Smith, Supra. might properly refer to a previously cited book or article.

Induction of Administrative Law Judges — 2004

Appendix A

ALJ Timeline for Conducting a Hearing

Induction of Administrative Law Judges — 2004



ALJ Timeline for Conducting a Hearing

NOTE: ***The administrative law judge's decision shall be reached and mailed to the parties within 45 calendar days after the department receives the original request for a hearing, unless a continuance has been granted by the administrative law judge for a good cause (ALJ is assigned (IARSE Section 218 – 41.123(3)).***

NOTE: ***There are not to be any lapses in time that are not covered by a continuance.***

NOTE: ***Date _________________________ 45 day time limit is exhausted.***

Date ______________________ Department receives request for a hearing.

Date ______________________ Department assigns ALJ.

Date ______________________ Prehearing telephone conference call is scheduled by the Iowa Department of Education.

Date ______________________ ALJ sends letter to all parties.

Date ______________________ Prehearing telephone conference call is held.

Date ______________________ ALJ sends summary letter to all parties.

Date ______________________ Hearing date is scheduled.

Date ______________________ Department makes arrangements for educational records and/or other evidence to be sent to all parties.

Date ______________________ Department makes arrangements for the hearing to be held and informs all parties of time, location, directions, etc.

Date ______________________ Department makes arrangements for a court recorder to be present.

Date ______________________ Hearing is held.

Date ______________________ ALJ writes decision.

Date ______________________ ALJ mails decision (certified mail) to all parties.

NOTE: ***A continuance may be granted for good cause at any point during the process of scheduling and/or conducting a hearing. When a continuance is granted, note the date that is done and the new date for a decision to be completed. Continue with the process according to this new time line.***

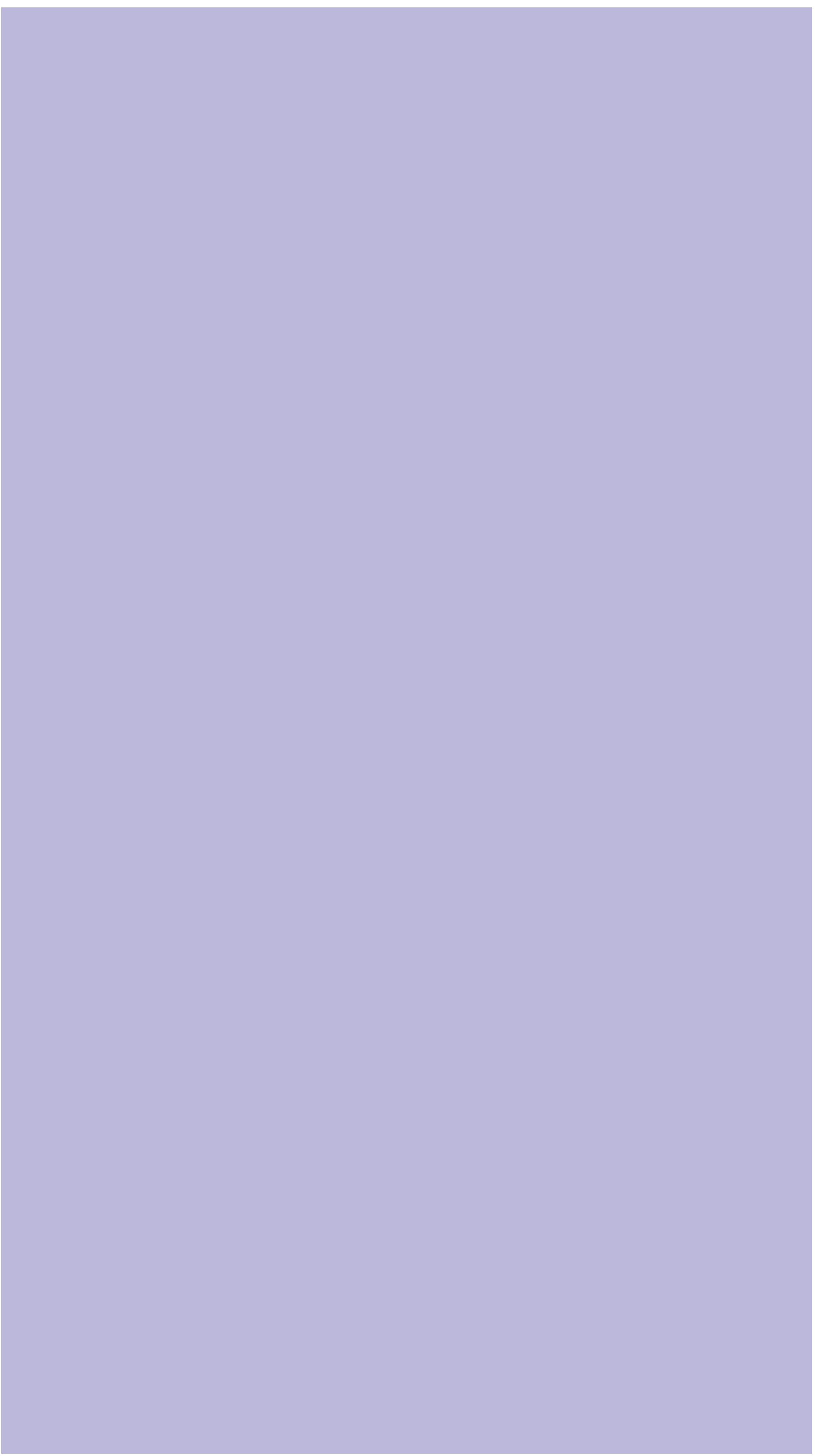
Date ______________________ Continuance is granted.

NOTE: ***New Date*** **______________________** ***When time limit is exhausted (Established via continuance)***

Date ______________________ ALJ informs all parties of the continuance.

Appendix B

Alleged ALJ Bias



Alleged ALJ Bias

I. Special Education Appeals 281 – 41.112 defines “administrative law judge.” The definition for ALJs provides that the director for the Department of Education shall contract with “qualified personnel to serve as administrative law judges who are not personally or professionally involved so as to conflict with objectivity and are not employees or board members of either state, intermediate, or local education agencies involved in the education or care of the individual.”

Provision in the present Special Education rules for the disqualification of an ALJ because of “bias” or “lack of impartiality” are found at 281-41.114(1).

II. *Iowa Code* Chapter 17A provides a “minimum procedural code for the operation of all state agencies when they take action effecting the rights and duties of the public.” §17A.1(2).

The provisions for disqualification of an ALJ under the *Iowa Administrative Code* can be found in §17A.17 and state as follows:

> (3) No individual who participates in the making of any proposed or final decision in a contested case shall have prosecuted or advocated in connection with that case, the specific controversy underlying that case, or another pending factually related controversy that may culminate in a contested case, or pending factually related controversy that may culminate in a contested case, or pending factually related contesting case, or pending factually related controversy that may culminate in a contested case, involving the same parties. Nor shall any such individual be subject to the authority, direction or discretion of any person who has prosecuted or advocated in connection with that contested case, the specific controversy underlying that contested case, or a pending factually related contested case or controversy, involving the same parties.
>
> (4) A party to a contested case proceeding may file a timely and sufficient affidavit asserting disqualification according to the provisions of subsection 3, or asserting personal bias of an individual participating in the making of any proposed or final decision in that case. The agency shall determine the matter as part of the record in the case. When an agency in these circumstances makes such a determination with respect to an agency member, the determination shall be subject to de novo judicial review in any subsequent review proceeding of the case.

III. Case Law interpreting §17A.17

a. The Iowa Supreme Court has expressly made the *Iowa Code* of judicial conduct available both to judges and administrative officials exercising a judicial function. Anstey v. Iowa State Commerce Comm., 292N.W.2d 380 (Iowa 1980). Anstey involved an appeal from a Commerce Commission order granting a utility a franchise to erect a power line. The party appealing from the Commission's order alleged that the Commission was tainted by bias due in part to certain statements attributed to the agency's chairman. In citing Canon 2 of the *Code of Judicial Conduct* which provides that: "[a] judge should avoid impropriety and the appearance of impropriety in all his activities," the Court expressly stated that:

> *We believe that agency personnel charged with making decisions of great import, as in this case, should be guided by the rationale of that Canon.*

Anstey at 390. The Court went on to find that since the chairman's remarks expressed a general view regarding the desirability of extending electrical transmission lines and were not directed toward the particular issue in controversy, there was no basis for disqualifying the Commission on grounds of bias. Anstey, 292 N.W.2d at 391. (See pages 389-391 of Anstey v. Iowa Commerce Comm. Attached hereto.)

b. **Kholeif v. Bd. of Medical Examiners,** 497 N.W.2d 804 (Iowa 1993). This case describes the proper presentation of bias claims under §17A.17(4)'s affidavit requirement. The case reaffirms the fact that the only way issues of bias can be presented through an agency or ALJ, is by affidavit. "The requirement is not a mere formality…[A]ny challenge grounded in agency bias must be presented by written affidavit ; oral objection like the one made here is statutorily insufficient." Id. At 806-807. (See Xeroxed case attached hereto.)

c. **Iowa Employment Security Comm. V. Iowa Merit Employment Comm.**, 231 N.W.2d 854 (Iowa 1975). The Employment Security Commission claimed that it was denied a fair hearing before the Merit Employment Commission because of the "alleged bias of one of the members of the Commission." The claim of bias against the Commission member is based on various remarks made by him during the hearing. However, most of his remarks were allegedly made when the tape recorded used to record the proceedings was turned off. The affidavits attached to the Motion for Summary Judgment characterized and described these remarks. The Commissioner filed a counter-affidavit in which he asserted the transcript of the hearing was complete and denied any bias.

Although the Court found that some of the remarks by the commissioner were "not entirely judicious," the Court held that the appointing authority did not establish its claim of bias because:

> No objection was made by counsel for the appointing authority to commission procedure at the time of the hearing. No tenable reason is advanced for failure to request that the tape recorder be left running to include [the commissioner's] alleged remarks or for not noting and objecting to those remarks on the record. The appointing authority was obliged to make its record before the Commission. (Citations omitted.) We agree with the trial court that in these circumstances the record at the hearing could not be supplemented by latter affidavits.

Id. At

Induction of Administrative Law Judges — 2004

Appendix C

Model Letter Regarding Prehearing Conference

Model Letter Regarding Prehearing Conference

Date: ____________________________

To: ____ , Parent's Attorney

_____________ , Superintendent, ______________ Community Schools

___________ , Special Education Director, _______ Community Schools

__________________________ , Administrator, AEA _______________

__________________ , Special Education Director, AEA ____________

Dear Interested Parties:

Re: ____, on behalf of,

____

________________ v. ________________AEA _________________ and

____ Community Schools.

Iowa Department of Education staff have scheduled a prehearing telephone

conference call for ____ (date). I am sending this letter in advance to outline the purpose and topics of that call.

The purpose of the prehearing conference call will be to discuss the following matters:

1. Possible concerns/objections to my serving as the Administrative Law Judge in this matter, if any.

2. Specific identification of each and every issue placed before me for decision.

3. How and when information will be exchanged pursuant to Rule 281-41.120(3) regarding documentary evidence. I will be requesting that you prepare and forward a list of exhibits for me as well as a copy of lists of anticipated witnesses. I will need a packet marked exhibits at the commencement of the hearing.

4. A discussion of the official school record to be disseminated.

5. Verification of the date, location or time scheduled for the hearing. We will try to estimate the length of the hearing and discuss whether the parent desires the hearing to be public or private.

6. Procedures we will follow for the hearing (e.g., opening statements, presentation of evidence, examination of witnesses, etc.).

7. Filing dates for briefs, if so desired.

8. Any other problems, issues or matters you feel merit discussion.

9. Parties will also be given an opportunity to consider the possibility of using mediation to resolve the issues in question. If everyone agrees to this course of action, I will hang up and all parties will be given the opportunity to participate in planning this with the assigned mediator.

Following the telephone conference, I will prepare in letter form a summary of what has been discussed and determined. I will give you an opportunity to correct, supplement or object to the summary prior to placing it on the record at the commencement of the hearing.

If you should have questions concerning the prehearing conference call, please

contact me at ____________________________________.

Sincerely,

Appendix D

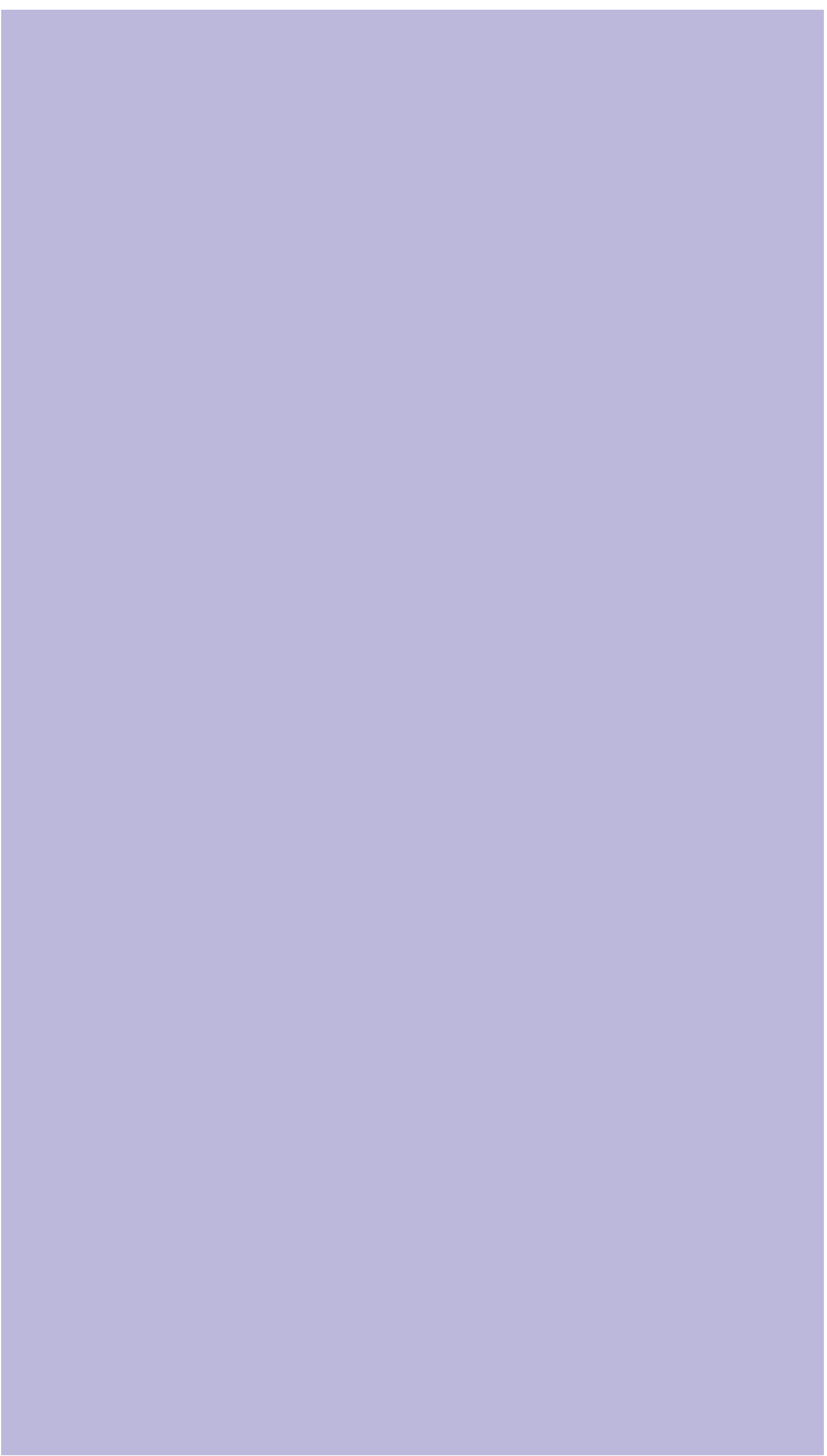
Letter Regarding Security Issues from
Iowa Department of Eduication

There was NO Letter!

Induction of Administrative Law Judges — 2004

Appendix E

Draft Letter About Student Records
to Send to LEAs and AEAs



Name, degree
Administrative Law Judge

About Student Records

Dear ___________________________:

Please find enclosed a photocopy of the above captioned appeal. Please forward to this office and to the parent all records relevant to the decision appealed. The records need to be sent within 10 business days of receipt of this notice, as provided by *Iowa Administrative Code* 281—41.113(7).

If the records contain a settlement agreement as the result of a preappeal conference or mediation, do not send the agreement.

Please put all records in chronological order and place a page number on each page of what is submitted. It is helpful if the district and AEA records are sent together, in chronological order, to reduce receiving duplicate records.

Appellant requests a hearing regarding (issue).

If you have any questions, do not hesitate to contact me at:

(515)281-5766 or e-mail
DeeAnn.Wilson@iowa.gov

Sincerely,

Dee Ann L. Wilson, Consultant
Special Education Consumer Relations

dlw

Enclosure(s)

cc:

Induction of Administrative Law Judges — 2004

Appendix F

Elements of Administrative Law Judge Rulings

Elements of Administrative Law Judge Rulings

The required elements of an ALJ ruling in special education appeals are found in combinations of state and federal legal requirements and past practice of the Iowa Department of Education.

The decision heading should read:

IOWA DEPARTMENT OF EDUCATION
(centered)

(Rule 281-41.113(2) provides that the hearing will be conducted by the Department.)

Title of Hearing (from record) (usually placed left of center)	Purpose of Document (e.g., Decision on Motion for Continuance; Decision) (usually placed right of center)

Sample heading:

IOWA DEP ARTMENT OF EDUCATION
In re Jake S.

	)	
Renee S.;	)	
Appellant	)	
	)	Ruling on
vs.	)	Motion to
	)	Dismiss
Des Moines Independent Community	)	
School District and Area Education	)	
Agency 11; Appellees	)	
	)	Admin. Doc. #SE-999

The body of the decision should be divided into four parts: Introduction, Findings of Fact, Conclusions of Law, and Decision.

INTRODUCTION

Introduction should include:

The name of the ALJ (past practice); date and place of hearing (past practice); presence of the parties and representative, if represented (past practice); legal authority for the hearing, usually Iowa Code Section 256 B.6 (past practice) (and/or 20 U.S.C. Section 1415, and rules of the United States Department of Education found at 34 C.F.R. Part 300); a statement that the hearing was conducted under the rules of the Iowa Department of Education found at Chapter

281-41 I.A.C.
The introduction should also include the type of hearing (evidentiary, stipulated, or mixed) and unusual procedures, such as sequestering witnesses. A procedural history, including the date the request for due process hearing was originally filed, amendments, continuances (281-41.113(11)), and extensions of time for briefs. This may be the only complete record of the procedural history of the appeal. When an extensive procedural history appears in earlier rulings in the same request for due process hearing, an abbreviated history may be used in the subsequent ruling, and a reference made to previous history statements.

A statement should be made as to whether the hearing was open to the public or closed at the request of the parent (17A.12(7); 281-41.122(1); 300.509(c)(I)(ii).

The introduction should conclude with a brief statement of the issue or issues to be resolved in the hearing (past practice). This provides the reader a clear understanding of the issues involved.

Sample Introduction:

"The above entitled matter was heard before Larry Bartlett, Administrative Law Judge (ALJ), on July 5, 6, and 7, 2001, and the hearing was concluded July 7, 2001. The hearing was held in the Board Room of the Des Moines Independent Community School District (District) in Des Moines, Iowa. The Appellant, Mary Jane S., was present and was represented by Attorney Curt Sytsma, of Iowa Protection and Advocacy. The District was represented by Attorney Drew Bracken; and Area Education Agency 11 (AEA) was represented by Attorney Sue Seitz. Also present, on behalf of the District, was Superintendent Erik Witherspoon, and present on behalf of the AEA was Administrator Wayne Rand. The legal authority for this hearing is found in *Iowa Code* Section 256B.6 and 20 U.S.C. Section 1415 and rules found at Chapter 281-41 *Iowa Administrative Code* and 34 C.F.R. Part 300. The hearing was conducted pursuant to rules of the Iowa Department of Education (Department) found at Chapter 281-41 I.A.C. The hearing was evidentiary and witnesses were sequestered upon motion of the Appellant. The hearing was open to the public at the request of the Appellant.

This appeal was filed with the Department on April 16, 2001. On May 1, 2001, upon a proper request and for good cause, a continuance was granted the Appellant until June 15, 2001. A second continuance was granted upon proper request for good cause filed by the District until July 15, 2001. At the conclusion of the hearing, the parties jointly agreed to file simultaneous briefs to be postmarked not later than July 21, 2001, and to consider the time extended for briefing and decision as an additional continuance in this appeal. This matter has, therefore, been continued at the joint request of the parties until July 30, 2001.

In this request for hearing, the Appellant has challenged the District's refusal on April 1, 2001, to provide her son, Jake S., with transportation to and from school during the 2001-02 school year."

FINDINGS OF FACT

<u>Findings of Fact</u> should begin with a statement of jurisdiction over the parties (proper notice if absent, or presence) and subject matter (a special education matter subject to ALJ jurisdiction).

Sample Finding of Fact Beginning Paragraph:

> "The ALJ finds that he and the Department have jurisdiction over the parties and subject matter involved in this appeal. A question arose as to whether the Appellant received written notice more than ten days prior to the hearing as required by Department rules. The issue was waived by the Appellant's Attorney and through actual presence of the Appellant, who did not personally object to proceeding to hearing."
>
> When a finding of fact is set forth in "statutory language," it must be accompanied by a "concise and explicit statement of underlying facts supporting the finding" (17 A.16(1)). Example: "This ALJ hereby finds that the District did not provide an "appropriate" special education program to meet the needs of Jake as required by *Iowa Code* Sections 280.8, 256B.2(3) and 256.11(7). While Jake's January, 1995, IEP did provide for appropriate goals and objectives for his reading and writing deficits, there were no goals or objectives created to address his identified behavior needs."

Do <u>NOT</u> use full names or other references which will personally identify parents or students. Decisions must be reviewed and personally identifiable information deleted before decisions may be released to the public 34 C.F.R. (300.509(d)).

<u>Official Notice</u>: If official notice of facts is to be included in a decision, either the parties must be so informed ahead of time and given a chance to object, or the ALJ must make an express finding of fact that fairness does not require an opportunity to contest such facts (17A.14(4)).

<u>Sample Official Notice</u>: "This ALJ hereby finds that staff development appropriate for regular education teachers in the skills and knowledge of how to serve and accommodate students with disabilities in the regular class is of fundamental importance in the success or failure of inclusion efforts for a particular child. The educational literature is replete with best practice articles and research results, such as _______ and ________, which so state. Due to the pervasive nature of this literature, educational best practice, and the weight of common sense, it was

not necessary to advise the parties of this official finding or to provide an opportunity to contest it in advance."

Important! While the "Finding of Facts" section may include numerous facts which provide readers a background in the issues, it must contain express findings on crucial facts on which the conclusions of law are based.

CONCLUSIONS OF LAW

Conclusions of Law (17A.16(1))

The conclusion of law section integrates the factual finding from the Findings of Facts section with the legal requirements of statutes or rules. "Each conclusion of law shall be supported by cited authority or by a reasoned opinion" (17A.16(1)). The ALJ should, as a concluding activity, determine that the factual basis for each conclusion of law is stated in the Findings of Fact section.

Sample Conclusion of Law: "The interpretations of courts are unanimous in stating that a child with disabilities should be educated in the regular classroom so long as the likelihood of educational benefit, including that from peer role modeling, is greater in the regular classroom than in the special classroom. Because the hearing record is clear that Jake S. is in need of role modeling of behaviors by nondisabled students, and because he cannot obtain that role modeling in a special education class consisting of only BD students, it is hereby found that Jake will receive substantially greater benefit in the regular fourth grade class, and he should remain in the regular class as an inclusion student."

Rulings on Motions and Objections: Motions and objections made by the parties may arise before and during a hearing. They may involve important points of procedure, evidence, or law. They may arise in the form of a written motion or objection, sometimes accompanied by legal arguments, or they may be oral. Each motion and ojection must be responded to in some fashion in the record by the ALJ. Thus, the ALJ's response may be placed orally into the transcript of the hearing, or a more detailed written ruling may be desirable. The latter is more likely when a motion to dismiss on an unsettled or unclear point of law is involved.

It is sometimes desirable to delay rulings on motions and objections by taking the issue "under advisement," proceeding with the hearing and ruling on the issue at a later time, maybe even in the written decision. This provides the ALJ time to collect thoughts, place the situation in context, or research the issue.

Example: "During the testimony of Dr. Jones, the District objected to his answering a question regarding what Jake S. had told him regarding his personal relationship with his father. The objection was based on the lack of relevance to this proceeding and being in violation of the counselor confidentiality provisions of Iowa law. Iowa confidentiality law allows the subject of the counselor confidentiality privilege to waive the privilege, which Jake S. had done here. Jake's

personal relationship with his father is directly relevant to this father's exercise of parental refusal to allow Jake to be enrolled in the VITAL Program. For these reasons, the District's objection to Dr. Jones' response being included in the record is overruled."

Unless there is certainty that all motions have been dealt with on the record, closure must be achieved. Normally, important motions and objections are dealt with as they arise. Sometimes, however, less important motions are overlooked in the heat of hearing. Closure is needed for the purpose of allowing the parties to appeal the ruling into court in a form that a judge can review. One way of doing this is to end the conclusion of law section with a sentence similar to the following:

"All motions and objections not previously ruled upon, if any, are hereby overruled."

DECISION

Decision: Reiterate and highlight the final, overall conclusion and any specific directions to the parties.

Example: "The decision of staff members of the Des Moines Independent Community School District made on April 1, 2001, which refused the request of Jake's mother that he be provided with extended school year programming, is hereby overruled. It is clear from the record that Jake S. is entitled to, and should receive, as part of an appropriate program, extended year programming in the areas of communication and physical therapy. The parties are hereby directed to consider and make a determination of Jake's eligibility for extended school year programming for the summer of 2002 no later than February 15, 2002."

Prevailing party statements can be placed in the decision or conclusion of law section and can be worded clearly or obtusely.

Example 1: "It is clear from the record that the Appellant has prevailed on items one and three of her appeal, but did not prevail on the other six issues."

Example 2: "This ALJ hereby determines that the Appellant has prevailed on only two of the eight issues she has appealed. However, those two issues, appropriate programming and adequate inclusion efforts, comprise nearly ninety percent of the substance of the entire matter in dispute."

It is desirable, to remind parties of their appeal rights. Since the exact amount of time for appeal may not always be clear, citation to appropriate statutes is desirable.

Example (either cover letter or Decision statement): "Any party wishing to seek judicial review of this decision may file a petition in an appropriate state or federal district court within the time permitted by law following the issuance of this decision. See *Iowa Code* Section 17A.19(3), 281-41.124(2) *Iowa Administrative Code*, 20 U.S.C. Section 1415(i), and 34 C.F.R. 300.512 for details."

Appendix G

Support Resources and/or References

References

Turnbull, H.R., & Turnbull, A. P. (1998). *Free appropriate public education: The law and children with disabilities*. Denver: Love Publishing.

Yell, M. L. (1998). *The law and special education*. Upper Saddle river, NJ: Merrill/Prentice Hall.

NOTE: ***Everyone, please contribute suggestions to this section. A suggestion was made that there may be a videotape/s that would be relevant and/or useful? The LRP web-page reference could be here. Do we want to include access information or keep that "out of print"?***

Induction of Administrative Law Judges — 2004

Appendix H

Contacts at the Iowa Department of Education

BUREAU OF CHILDREN, FAMILY & COMMUNITY SERVICES

PHONE NO .... NAME .... E-MAIL ADDRESS

515/281-3176 .... Main Phone & Fax .... FAX 515/242-6019
281-3940 .... **Center Conference Room - Speaker Phone**
281-5735 .... **Lana Michelson, Bureau Chief** .... **Lana.Michelson@iowa.gov**
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.... gfrolekclark@aea11.k12.ia.us
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281-4705 .... Linda **Miller**, Consultant, Strategic System Design .... Linda.Miller@iowa.gov
281-0345 .... Eric **Neessen**, Consultant School Psychologist .... Eric.Neessen@iowa.gov
319/356-1172* .... Sue **Pearson**, Consultant, Students with Head Injuries .... s-pearson@uiowa.
242-6024 .... Thomas **Rendon**, Coordinator Head Start Collaboration Office .... Tom.Rendon@iowa.gov
242-5295 .... Deb **Samson**, Parent Coord., Parent-Educator Connection Proj. ....Deb.Samson@iowa.gov
281-5433 .... Mary **Schertz**, Consultant, ECSE .... Mary.Schertz@iowa.gov
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281-8514 .... Jane **Today**, Consultant, Character Education ....Jane.Todey@iowa.gov
242-6241 .... Toni **Van Cleve**, Consultant, Instructional Technology .... Toni.VanCleve@iowa.gov
281-5766 .... Dee Ann **Wilson,** Consultant, Special Ed. Consumer Relations .... DeeAnn.Wilson@iowa.gov

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281-4030 .... Susan **White**, Secretary 2 .... Susan.White@iowa.gov
281-5494 .... Toni **Blair**, Secretary 1 .... Toni.Blair@iowa.gov
281-3177 .... Nancy **Brees**, Administrative Assistant, Fiscal and Data Services ...... Nancy.Brees@iowa.gov
281-7144 .... Julie **Carmer**, Information Technology Support Worker 3 .... Julie.Carmer@iowa.gov
281-7143 .... Beth **Buehler**, Secretary 1 ....Beth.Buehler@iowa.gov

281-3021 .... Linnie **Hanrahan**, Secretary 1 .... Linnie.Hanrahan@iowa.gov
281-5614 .... Tana **Mullen**, Administrative Assistant, Fiscal & Data Services .... Tana.Mullen@iowa.gov
281-3900 .... Joan **Twedt**, Secretary 1 .... Joan.Twedt@iowa.gov
281-3176 .... Shirley **Van Deventer**, Secretary 1 .... Shirley.VanDeventer@iowa.gov
281-7146 .... Sharon Kay **Willis**, Graphic Artist/Communications .... Sharon.Willis@iowa.gov

Addresses for staff not located at the Grimes Bldg. or with a second office location:

Sue Baker
Consultant, Autism Services
Child Health Specialty Clinics
239 Hospital School
Iowa City, IA 52242-1011

Kathy David
Consultant, Physical Therapy
AEA 11
511 S. 17th
Ames, IA 50010

Carrie Carlson
Consultant, Occupational Therapy
AEA 7
3706 Cedar Heights Drive
Cedar Falls, IA 50613

Gloria Frolek Clark
Consultant, Occupational Therapy
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608 Greene
Adel, IA 50003

Marsha Gunderson, Consultant
Hearing Impaired Education/Instruction Services
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Penny Milburn, Consultant, Special Education
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Urbandale, IA 50322-2042
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Sue Pearson, Consultant
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Marian Kresse
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Resource Center Location:
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Mary Bartlow 271-4560
Anna Conradt 271-3936