

SPECIAL EDUCATION PREAPPEAL PROCEDURES

All documents relating to a preappeal conference need to be date stamped by the department. The original is kept in the bureau. Copies are made for the mediator and other parties.

1. **Preappeal request arrives.** Date stamp and check for required information under Education [281]—41.106 (1)IAC. Check to see if it is one of these appropriate issues:
 - a. Identification
 - b. Evaluation
 - c. Educational placement
 - d. Provision of free, appropriate public education

If it appears that the issue/s identified does not fit within the above requirement, request the attorney for the Department of Education to render a decision and the attorney will write the letter to the requesting party providing rationale for the denial. The communication will also remind the requesting party about the AEA Resolution Facilitator process or any other information that may be helpful in addressing the issue, e.g., other resources that could be used.

Required information:

- a. Name of child
- b. Address of residence of the child (in the case of a homeless child or youth available contact information)
- c. The name of the school the child is attending
- d. Identify the resident district and AEA
- e. The facts
- f. Identified issues of concern or the reasons for the conference
- g. A proposed resolution of the problem to the extent known and available to the party at the time

2. **If the request for the preappeal is complete, create a new file in the data base, assigning a new docket number (e.g., "PRE-000").** The database should contain the following information:

- a. Parent's name, address and phone. *Find out if another parent should be invited to be a part of the process.*
- b. Name, address and phone for parent's attorney/advocate, if applicable.
- c. District name of residence, address and phone, and names of superintendent, and LEA special education director if there is one (refer to list of Urban Education Network Directors and Mid-Size District Directors, making certain list is kept current).
- d. AEA name, address and phone, names of Sp. Ed. Director

- e. Name, address and phone for AEA/LEA attorneys, if applicable.
- f. If Department of Education is named, include Christie J. Scase, Asst. Attorney Generals Office.
- g. If Department of Human Services is named include, Thomas H. Miller, Attorney General, and Insert current name, Director of DHS.

3. **If the student is tuitioned to another school district, the district of residence is named as the party in the preappeal and the receiving district is invited.** If the receiving district wishes to become a party, then add address/phone and names of superintendent, and LEA Special Ed. Director to this filing information.

All the non-advocates listed in #2 and #3 make up the "parties" to the preappeal. Any information sent to parties is to include everyone on this list as well as all attorneys and other non-legal advocates listed.

4. **For the Bureau use a file for each case using letter-size expandable pocket folders.** Type label (blue) with child's name, school district, AEA, and PRE #. Also make a copy of the information sheet (this paper has all information such as phone numbers and address of all parties) on bright colored paper for this folder. The white goes to the mediator.
5. **Within five business days after receipt of a request for a valid preappeal, send letter to AEA and LEA of notification of preappeal request and inform superintendent (or designee) that pertinent records relevant to the preappeal and the checklist must be sent to the department and to all other parties named (e.g., the parents, AEA, Department of Education, and/or Department of DHS). A copy of the letter is sent to all parties.** Attach copy of request for preappeal for all but appellant.

The checklist will inform the AEA and LEA that the most recently developed IEP (that includes any evaluation or progress monitoring data recorded on IEP) must be sent within 10 business days after the district/AEA's receipt of the notice. The letter from the DE will state that the student's complete school record shall be made available for review by the parent prior to the conference, if requested in writing by the parent at least ten calendar days before the preappeal. The individual's complete school record shall be available to the participants at the preappeal conference.

Enclosures to LEA: Special Education Preappeal Conference Checklist, Copy of Request for Preappeal (LEA and AEA), When Things Go Wrong (Brochure)

6. **Send parents a letter that provides free or low cost attorney fee list.**

Enclosures: *Procedural Safeguards Manual for Parents*, October 2005
Working Things Out When Things Go Wrong

Once the new procedural safeguards booklet is updated, this will be included on the back of the form: *Timeline Expectations When Preappeal Conference Request Is Filed with Department*. In meantime it will be included in parent packet and provided when parent files for preappeal.

The DE secretary or consultant will contact the AEA Special Education Director to remind the director that the AEA Resolution Facilitator Process offer may be made to the parent by the AEA or LEA, assuming a discussion has been held with the LEA, about offering this option. The benefits of the AEA RF process--as opposed to the preappeal-- will be discussed. The purpose of the contact with the parent by the AEA or LEA would be to determine whether the parent would be willing to use the AEA RF Process instead of the preappeal. During the conversation the secretary or consultant will address paperwork materials that may be available from the DE or will remind the director of materials the AEA RF Coordinators may also have.

7. Assign mediators as soon as possible.

- a. Within 5 business days of receiving preappeal request, contact mediator in line for assignment, using rotation system (and availability), to see if he or she is available and if so, when mediator will be available for teleconference call (and who should be involved) to set up dates, location and time for preappeal. If that mediator is unable to take the case, so indicate on list, noting date called, have that mediator's name go to the back of the line and go to the next mediator on the list.

Reassignment of mediator when party voices need

- Any person serving or designated to serve as a mediator is subject to disqualification for bias, prejudice, interest, or any other cause for which a mediator is or may be disqualified.
- Any party may, within three calendar days, request the disqualification of a mediator after learning who has been assigned as mediator or upon discovering facts establishing grounds for disqualification whichever is later. Such a request must be made to DE in writing.
- A person whose disqualification is requested shall determine whether to grant the request, stating facts and reasons for the determination.
- If a substitute is required for a person who is disqualified or becomes unavailable for any other reason, the substitute must be appointed by the department from the list of other qualified mediators.

Contact parties to arrange teleconference call with mediator on mutually agreed date and time. As soon as conference call date and time are known, send e-mail. If no e-mail available DE make phone call. U.S. mail to be used only if person doesn't have e-mail or phone.

8. Conduct the conference call.

At the beginning of the conference call the mediator should ask whether the participants are aware of the AEA Resolution Facilitator process and have still chosen to proceed with the preappeal?

Objectives of a Preappeal Conference Call:

- a. Disclosures of prior associations with any of the parties if necessary.
- b. Say a few words about mediator's special education mediation experience and that the mediator is under contract with DE to provide mediation services.
- c. Check on possible objections to the assigned mediator in this matter. If there are objections provide guidance about needing to put something in writing to the department within three calendar days and that based on the request, the mediator will be making a decision whether to remove himself/herself.
- d. Check understanding of mediation and role of the mediator.
- e. Discuss IDEA 2004 federal law that makes explicit the legally binding nature of agreements.
- f. Clarify issues – or check to see that district and AEA have the request for preappeal. “These are the issues. Is that correct?”
- g. Check to see if there is information that needs to be exchanged prior to the preappeal.
- h. Schedule the preappeal. During the conference call, the dates, times, and location for preappeal are determined. The mediator is required to provide the option of meeting in a neutral site. However, it is not a requirement the preappeal/mediation be in a site outside of the LEA/AEA. Check with all parties during the conference call. Request the district (or AEA when appropriate) to find the location, making certain there is an awareness about the size of the room/s, indicating there will be a need for a smaller location for caucusing. Inform the responsible person for finding the location to bill the Iowa Department of Education if there is a charge for use of the facility.
- i. During the conference call the mediator will mention the option of parents having legal representation at a preappeal (if attorney not involved with parents) and also reference the assistance that may be available from the PEC. Include reminders about representation to unrepresented parties (not just parents).
- j. It should be made clear to unrepresented parents that they can bring support persons with them to a mediation session if they desire and if they inform the mediator and the LEA/AEA in advance.
- k. During the group conference call the mediator will indicate that all parties will be contacted by the mediator by phone prior to the preappeal conference so that the mediator can explain the process that will be followed and answer any questions that parties have about mediation. The mediator then will inquire as to whether anyone on the

conference call does not wish to receive such a pre-session call. When calls are made explaining about preparing for the preappeal, discussion of the issues identified in the request for preappeal or mediation is to be avoided.

- l. As appropriate, ask parent if student will be attending preappeal conference.
- m. In order to support the mediator in his/her role as facilitator, mediator may check with the school district or AEA to arrange for a typist from one or the other to type any agreement reached on a computer connected to a projector and projected for all to see during the preappeal/mediation. This is so that the mediator can continue to facilitate without being distracted by doing the typing. Projection of a draft would also ensure that all participants have the opportunity to assist with crafting the language of the agreement. Additionally, the draft could then be printed so all could have a copy to review.
- n. The mediator will ask that parties contact the DE secretary if additional people plan to attend preappeal/mediation other than those already designated. The DE wants all parties to know who will be attending in advance of the meeting and the DE wants to make certain all people attending the preappeal/mediation will have the materials (*Agreement to Mediate for all participants and Legally Binding Mediation Agreement Form for one designated person at both AEA and LEA*) before the meeting.

9. Pre-session phone calls from the mediator. Reasons for speaking individually with persons before the mediation/facilitation session:

- a. To explain what mediation is and is not and clarify the roles of those who will participate in the session.
- b. To answer questions, clear up misconceptions, or allay fears that persons may have about participating in mediation.
- c. To reinforce and/or clarify written preparation materials that all participants receive.
- d. To give the mediator the opportunity to check with participants as to whether they might want another person to be present at the session as support.

Suggested points or questions to include in mediator's conversation with a party:

- a. Explanation of mediation and roles of participants.
- b. "Have you had a chance to look at the material that was sent to you? Do you have any questions about that?"
- c. "Do you have any other questions about mediation or my role?"
- d. Discuss legally binding document, the concept of a "shepherd", and how the shepherd is chosen.

- e. Discuss people who have to sign according to IDEA 2004 in order to have a legally binding document.
- f. Ask, "Is the student going to be attending?"

10. Once DE receives the most recently developed IEP (that includes any evaluation or progress monitoring data recorded on IEP) and checklist, place in the folder and mail a copy of the information to the mediator immediately.

11. If preappeal is scheduled, send notice to persons involved and file copy in Bureau file. Send notice of preappeal with date, time and location. In the letter denote the specific enclosures that are included for documentation.

Attachments: Agreement to Mediate
Preparing for Preappeal or Mediation (brochure)
Checklist for Legally Binding Mediation Agreement

The secretary will e-mail the template for a legally binding agreement to a person in the AEA and LEA (as well as to the attorney for each). The secretary will choose each person because this is the one from each agency having the most "hands on" responsibilities for following through with the preappeal request.

12. If any party desires a delay once a preappeal date is set, an oral or written request (stating the reason and time frame) must be submitted to the department. The other party must be provided information about the request and an opportunity to either agree or contest the request.

13. At the beginning of the preappeal, the mediator will assume responsibility for obtaining signatures and other required information from all attendees on the Agreement to Mediate form. (Note the space on the form for listing the starting and ending times of the session)The mediator will mail the completed form to the Department secretary who will record in the database the number of people in attendance, as well as maintain the form in the bureau folder for that case for documentation purposes.

14. Toward the end of the preappeal, the mediator will assume the responsibility for providing the department evaluation instrument to all participants at the preappeal. Say: "Take a minute, complete before you leave, put into an envelope, and designate someone to mail." (Help facilitate the discussion so someone assumes the responsibility for mailing to the department.) The mediator will promote the importance of all participants returning the evaluation to the department. Explain that the instrument is a department form and the DE, along with the mediators, closely scrutinize the aggregate results quarterly in an effort to refine or improve the process. Also, you may want to share the DE actually enters the number of people attending the

preappeal into its data system, then counts the number of evaluations received, and provides the % of evaluations returned for each individual preappeal held and puts that into a report back to the mediators.

15. At the end of the preappeal, make certain the mediator asks, “Are there any other things you want to discuss?”

16. If an agreement is reached, a legally binding preappeal agreement form must be prepared. The mediator will help the parties craft the agreement, using the words of the parties. As was noted above, an LEA/AEA person could capture the agreement on the computer, using the template provided by the department or using a format provided by the mediator that will provide the same information.

Even if a next steps agreement is reached, it is by definition an agreement and the mediator should encourage the parties to put it in writing and sign it (with advice of counsel). The mediator could point out that even though the parties and counsel may need to meet in mediation again, an agreement has been reached for today and to avoid confusion about what is to happen next it should be reduced to writing and signed.

Mediators make it standard practice to inform those who have agreed on a next steps meeting (including an IEP meeting) that the mediator would be available to facilitate that meeting if so desired.

Where at all possible, and when appropriate to the situation at hand, mediators will encourage parties to sign agreements at the preappeal or mediation.

When signing that day is neither possible nor appropriate, the following steps will be followed:

- a) If at all possible, a draft agreement ought to be distributed to all participants by the mediator within 48 hours of the preappeal or mediation. The parties will be given three calendar days to respond with suggested changes.
- b) When a final agreement becomes available, the mediator will send or e-mail the written agreement to all parties, including the required signature page titled *Mandated Signatures for Legally Binding Written Agreement*.
- c) The mediator will request that the parent/s and a representative of the LEA and AEA (who has the authority to bind such agency) sign the final agreement and fax (first preference) or mail (if fax machine not available to party) the signature sheet to the mediator within three business days of receipt of the final agreement. (In other words, all three signatures do not necessarily need to be included on the same signature page.) The party/ies should be provided with a stamped return envelope for those not having easy access to a fax machine.

- d) The mediator will copy the final agreement and signature pages and send copies to all parties attending the mediation and to the Department of Education.

When an agreement has been finalized and sent to the parties with a request that the signature page be signed and returned to the mediator by a certain date, the mediator should make it a regular practice to follow up when it is not returned (allowing for a grace period of a week at most).

Four mandatory components of Preappeal/Mediation are included on the legally binding mediation agreement form that will need discussion:

- a. A designated "shepherd" to oversee the agreement. To help encourage implementation of the agreement and to foster constructive communication between parties following a preappeal/mediation, ask the group who should be the "shepherd" of the agreement. This would be the person with overall responsibility for coordinating the entire agreement and to serve as the point of contact for all parties should there be questions or concerns. Stress the importance of the shepherd doing a follow-up periodically of all involved parties to determine whether the agreement is on course.
- b. There is a Job Description for the Shepherd. There are two versions: (1) one to hand out to the shepherd and (2) one listing job qualifications (which will be for mediators and DE only). The mediators will "play it by ear" as to whether to provide the handout to others in addition to the shepherd, and as to when in the course of a given preappeal/mediation we would do that.
- c. A contingency plan. There will need to be a discussion regarding whether any part of the agreement needs a contingency plan. An example would be agreeing to have an independent educational evaluation conducted but not knowing the availability of the evaluator. Will that make a difference to the agreement? There is an opportunity to mark "no" or "yes." If yes, it will need to be described.
- d. Dismissing the preappeal request. At the end of the preappeal conference, the mediator will ask: "What do you want to do with the preappeal request relative to closure by the Iowa Department of Education?" Identify a specific withdrawal date *and include it in the agreement*, e.g., the date the signed agreement is received in the department. If the preappeal agreement does not indicate a dismissal date or the agreement does not get sent to the department with all required signatures, the department may automatically close the preappeal 45 calendar days after the preappeal conference is held unless the filing party contacts the department before that time, providing valid reasons for keeping the file open. (Alert them that Iowa special education rules allow automatic closures 281—41.1002(3) IAC. Refer to #25 below.)

17. At the preappeal conference, the mediator will announce that there will be an automatic three-month follow-up by the department. The DE will be contacting the parent/s and the district to determine whether both parties believe the settlement agreement was implemented as written. This contact will be done by sending a short survey. A copy of the agreement will be included. The department will provide a follow-up call for nonrespondents.

18. After the preappeal conference is held, regardless of whether a settlement is reached, the mediator will need to fill out the form entitled "Preappeal Issues" and answer the question: "What were the issues addressed?" This completed form needs to be forwarded to the department. Also, indicate the status of the preappeal conference.

19. After the agreement has been finalized and signed, if differing perceptions about the agreement emerge and the department is contacted, the department will inquire whether it should arrange a conference call with the parties in an attempt to establish next steps. If the next step desired by the parties is a reconvening of a preappeal, one of the parties will need to put in writing this request and the routine procedures will be implemented. The mediator originally assigned to the case will be asked whether he/she wants to continue acting as the mediator for the next preappeal.

20. If agreement is not reached at the special education preappeal conference, all parties should attempt to brainstorm all options that may be available, such as attempting the preappeal process again after a designated period of time, the AEA Resolution Facilitator Process, or using the due process hearing process, as a last resort. Other contacts are in the front of the parental rights brochure.

In the event some parts of the agreement were reached, discuss the possibility of considering those parts as legally binding and obtain required signatures on the written agreement.

21. Assurances. The special education preappeal process shall in no way deny or delay a party's right to a full due process hearing if the party wishes to utilize the formal process. In addition, special education preappeal conference proceedings and offers of agreement during the conference shall not be entered as arguments or evidence in a hearing. However, the parties may stipulate to agreements reached in the special education preappeal conference. (281—41.106(2) IAC)

22. Placement during proceedings. Unless the parties agree otherwise, the student involved in the preappeal must remain in the student's present educational placement during the pendency of the proceedings. 281-41.106(3) IAC

23. Withdrawals or automatic closures. According to 281-41.1002(3) IAC, the initiating party may request a withdrawal of the preappeal prior to the conference.

Automatic closure of the department file will occur if any of the following circumstances apply:

- a. One of the parties refuses to participate in the voluntary process.
- b. The preappeal conference is held but parties are not able to reach an agreement. There will be a ten-calendar-day waiting period after the preappeal to continue the placement as described in subrule 41.1002(2) in the event a party wishes to pursue a hearing.
- c. The preappeal conference is held and parties are able to reach an agreement and the agreement does not specify a withdrawal date. If a withdrawal date is part of the agreement, an agency withdrawal will occur on the designated date.

Assorted Issues related to preappeal discussed at Mediator Inservice

➤ *Issue: Do schools need attorneys at preappeals?*

Some superintendents are asking, "Are we required to have an attorney?" No. However, there are some district/AEA attorneys who will say that if the parent has an attorney they will be in attendance. When superintendents feel threatened by the process, suggest they contact AEA special education director for name of other superintendents who have been through the process successfully.

➤ *Issue: Attorney fees*

Parent attorneys sometimes request attorney fees as part of agreement. Sometimes the district must go back to board for attorney fee approval. Can the attorney fee decisions be included in the agreement? Yes (either the set fee or timeline for follow-up).

➤ *Issue: Discussing firing personnel at preappeal.*

When parents state that they want somebody fired, mediators should note the concern but indicate that this is not the forum to discuss that issue. You may want to advise them that the Board of Educational Examiners is the appropriate resource to pursue if they believe a person's license should be revoked.

➤ *Rotational System for Mediators*

The list of people who are only designated as mediators are to be asked first to serve as mediators, on a rotational basis. If none is available, the ALJs will be asked, using a rotational system. In using a rotation system, if a mediator on the list can't, for some reason, handle a case, does that mediator stay at the head of the line for the next case, or go to the back of the line? Go to the back of the line.

➤ *Role of Mandatory Reporter While Serving as Mediator or Resolution Facilitator*

During introductory statements the mediator or Resolution Facilitator will say something to the effect that the discussions that occur during the mediation/preappeal/ Resolution Facilitator process must be confidential, except as may be required under law (but don't go into the law). It is believed that if the exceptions were listed, it would put a "chill" on the mediation process.

The exceptions are in section 679C.106.

Are social workers or teachers who officially act as Resolution Facilitators mandatory reporters? If they are not acting in the scope of employee, no, although if they act as mediator to another AEA, Carol Greta suggested err on the side of reporting it. What if person ethically feels he/she must report it, even if he/she doesn't have to? Carol's response: I'd err on the side of reporting it. It should be noted that there would be several other mandatory reporters at the conference so one of them could report it.

➤ *Reconvening preappeal conference after first session*

If there is a decision to reconvene, using the same mediator, contact the secretary responsible for arranging preappeals. The DE wants to know what is happening.