

NOTICES OF EXEMPT RULEMAKING

The Administrative Procedure Act requires the *Register* publication of the rules adopted by the state's agencies under an exemption from all or part of the Administrative Procedure Act. Some of these rules are exempted by A.R.S. §§ 41-1005 or 41-1057; other rules are exempted by other statutes; rules of the Corporation Commission are exempt from Attorney General review pursuant to a court decision as determined by the Corporation Commission.

NOTICE OF EXEMPT RULEMAKING

TITLE 7. EDUCATION

CHAPTER 2. STATE BOARD OF EDUCATION

Editor's Note: The following Notice of Exempt Rulemaking is exempt from the Governor's Regulatory Review Plan memorandum, January 22, 2009 and its continuations on April 30 and June 30, 2009 per A.R.S. § 41-1005. (See a copy of the memorandum on pages 1759 through 1761.)

[R09-94]

PREAMBLE

- 1. Sections Affected**
R7-2-405
- Rulemaking Action**
Amend
- 2. The statutory authority for the rulemaking, including both the authorizing statute (general) and the statutes the rules are implementing (specific):**
Authorizing statute: A.R.S. § 15-203(A)(1)
Implementing statute: Not applicable
- 3. The effective date of the rules:**
January 26, 2006
- 4. A list of all previous notices appearing in the *Register* addressing the exempt rules:**
Not applicable
- 5. The name and address of agency personnel with whom persons may communicate regarding the rulemaking:**

Name:	Vince Yanez, Executive Director State Board of Education
Address:	1535 W. Jefferson St. Phoenix, AZ 85007
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- 6. An explanation of the rule, including the agency's reasons for initiating the rule, including the statutory citation to the exemption from the regular rulemaking procedures:**

In the 2005 legislative session the due process hearing procedures were revised to become a one-tier system. The rule change conforms Board policy to the new due process statutes.

Pursuant to A.R.S. § 41-1005(F) the State Board of Education is exempt from standard rulemaking procedures.
- 7. A reference to any study relevant to the rule that the agency reviewed and either relied on or did not rely on in its evaluation of or justification for the rule, where the public may obtain or review each study, all data underlying each study, and any analysis of each study and other supporting material:**
Not applicable
- 8. A showing of good cause why the rule is necessary to promote a statewide interest if the rule will diminish a previous grant of authority of a political subdivision of this state:**
Not applicable
- 9. The summary of the economic, small business and consumer impact:**
The rules are not expected to have any economic impact on small businesses nor any impact upon school districts and charter schools.

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10. A description of the changes between the proposed rules, including supplemental notices and final rules (if applicable):

Not applicable

11. A summary of the comments made regarding the rule and the agency response to them:

A public hearing was held regarding these proposed rules on November 1, 2005. No comment was received.

12. Any other matters prescribed by statute that are applicable to the specific agency or to any specific rule or class of rules:

Not applicable

13. Incorporations by reference and their location in the rules:

Not applicable

14. Was this rule previously made as an emergency rule? If so, please indicate the Register citation:

Not applicable

15. The full text of the rule follows:

TITLE 7. EDUCATION

CHAPTER 2. STATE BOARD OF EDUCATION

ARTICLE 4. SPECIAL EDUCATION

Section

R7-2-405. Due Process Standards Relating to Special Education

ARTICLE 4. SPECIAL EDUCATION

R7-2-405. Due Process Standards Relating to Special Education

A. Definitions. The following definitions are applicable to this rule:

1. A “due process hearing” means a fair and impartial administrative hearing conducted by the State Education Agency by an impartial hearing officer through the Arizona Office of Administrative Hearings.

~~1-2. “Impartial hearing officer” or “hearing officer” means a person or tribunal assigned to preside at a due process hearing whose duty it is to assure that proper procedures are followed and that rights of the parties are protected an Administrative Law Judge (“ALJ”) of the Arizona Office of Administrative Hearings (“OAH”) and who is knowledgeable in the laws governing special education and administrative hearings.~~

~~2. “Parent has the meaning found in A.R.S. Title 15, Chapter 7, Article 4, and includes a surrogate parent. Appointment of a surrogate parent shall be made only by a court of competent jurisdiction.~~

~~3. “Public agency” means the school district, charter school, or state or county agency responsible for providing educational service to a child (“PEA”) has the same definition as provided in R7-2-401.~~

4. “State Education Agency” (“SEA”) means the Department of Education, Exceptional Student Services Section.

B. The due process procedures specified in this rule apply to all public agencies dealing with the identification, evaluation, special educational placement of, and the provision of a free appropriate public education (“FAPE”) for children with disabilities.

C. The SEA shall establish procedures concerning:

1. Impartial due process hearings; and
2. Confidentiality and access to student records.

D. An impartial hearing officer shall be:

1. Unbiased – not prejudiced for or against any party in the hearing;
2. Disinterested – not having any personal or professional interest that would conflict with objectivity in the hearing;
3. Independent – may not be an officer, employee, or agent of a public agency involved in the education or care of the child or the SEA. A person who otherwise qualifies to conduct a hearing is not an employee of the public agency or the SEA solely because the person is paid by the public agency to serve as a hearing officer;
4. Trained and evaluated by the SEA as to the state and federal laws pertaining to the identification, evaluation, placement of, and the provision of FAPE for children with disabilities.

E. Hearing officer qualifications and training.

1. All hearing officers shall participate in all required training and evaluation conducted by the SEA as to the state and federal laws pertaining to the identification, evaluation, educational placement of, and the provision of FAPE for children with disabilities.
- ~~2. All hearing officers shall demonstrate competency by achieving a minimum score of 80% on a criterion referenced test selected by the SEA.~~

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- 3- ~~A hearing officer shall be an attorney licensed in the United States, or an attorney on inactive status whose withdrawal from active practice is not premised upon adverse disciplinary action from any state or federal bar association. A hearing officer shall not have represented a parent in a special education matter during the preceding calendar year and shall not have represented a school district in any matter during the preceding calendar year.~~
 - 4- ~~An individual shall be removed from the list of eligible hearing officers, if, at any time, the individual no longer meets the requirements specified in subsections (D)(1) through (4) and subsections (E)(1) through (3).~~
 2. A hearing officer shall meet the requirements set forth by OAH regarding ALJs. A hearing officer shall not have represented a parent in a special education matter during the preceding 12 months, and shall not have represented a school district in any matter during the preceding 12 months.
- F. Selection of hearing officers.
1. The SEA shall prepare and maintain a list of individuals who meet the qualifications specified in subsection (E) to serve as hearing officers. This list shall also include the qualifications of each hearing officer.
 - 2- ~~Three hearing officers shall be selected randomly by the SEA and shall be screened to determine availability and possible bias. Once the SEA has selected three hearing officers who are available and show no evidence of bias, the three names shall be provided to the public agency and the parent. The public agency and the parent will each have the opportunity to strike one name from the list provided. The remaining individual shall be named as the hearing officer unless either party objects for cause and provides such reason in writing to the SEA. Objections for cause shall require specific evidence that the individual does not meet the criteria specified in subsections (D) and (E)(1) through (3). The SEA shall review the evidence submitted and determine the qualifications of the individual. If the SEA determines that the individual is not qualified to serve as the hearing officer, the SEA shall repeat the process and select three additional hearing officers to be provided to the parties.~~
 2. A hearing officer shall be assigned in accordance with the procedures of the Office of Administrative Hearings.
- G. Request for Due Process Hearing.
- 1- ~~A parent shall submit a written request for a due process hearing to the public education agency and the SEA. The SEA shall provide a model form that a parent may use in requesting a due process hearing. Upon receipt of a written request, there shall be no change in the educational placement of the child until the hearing officer renders a decision, unless the public agency and the parent agree. except under the applicable provisions of IDEA, unless the PEA and parents agree. If a parent requests a due process hearing, the public education agency shall advise the parents of any free or low-cost legal services available, and provide a copy of the procedural safeguards notice. All correspondence to the parent shall be provided in English and the primary language of the home. If the written request involves an application for initial admission, the child, with the consent of the parent, shall be placed in a program for which the child is eligible until the completion of all proceedings.~~
 2. If the public education agency requests a due process hearing, such request may be made on a model form, as noted in subsection (G)(1), and a copy shall be provided to the parent and the SEA. Upon receipt of a written request, there shall be no change in the educational placement of the child except under the applicable provisions of IDEA, unless the PEA and the parents agree. In conjunction with its request for due process hearing, the public education agency shall advise the parents of any free or low-cost legal services available and provide a copy of the procedural safeguards notice. All correspondence to the parent, including the due process request, shall be provided in English and the primary language of the home. If the written request involves an application for initial admission, the child, with the consent of the parent, shall be placed in a program for which the child is eligible until the completion of all proceedings.
- H. An impartial due process hearing shall be conducted in accordance with the following procedures:
1. The hearing officer shall hold a ~~preconference meeting~~ pre-hearing conference, either telephonically or at a location that is reasonably convenient to the parents and the child involved, to determine if the complaint is a legitimate due process complaint, to ensure that all matters are clearly defined, to establish the proceedings that will be used for the hearing, to determine who will represent and/or advise each party, and to set the time and dates for the hearing.
 2. The hearing officer shall conduct the hearing at a location that is reasonably convenient to the parents and the child involved.
 - 2-3. ~~The hearing officer shall preside at the hearing and shall conduct the proceedings in a fair and impartial manner, to the end and shall ensure~~ that all parties involved have an opportunity to:
 - a. Present their evidence and confront, cross-examine, and compel the attendance of witnesses;
 - b. Object to the introduction of any evidence at the hearing that has not been disclosed to all parties at least five business days before the hearing;
 - c. Produce outside expert witnesses;
 - d. ~~Be represented by legal counsel or~~ accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities.
 - 3-4. The parent involved in the hearing shall be given the right to:
 - a. Have the child who is the subject of the hearing present;
 - b. Have the hearing conducted in public;

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c. Have an interpreter provided by the public agency.

~~4.5.~~ The hearing officer shall review all relevant facts concerning the identification, evaluation, the educational placement, and the provision of FAPE. This shall include any Independent Education Evaluation secured by the parent.

a. The hearing officer shall determine whether the public agency has met all requirements of federal and state law, rules, and regulations.

b. The hearing officer shall render findings of fact and a decision, which shall be binding on all parties unless appealed pursuant to this rule, ~~as to whether:~~

~~i. The evaluation procedures utilized in determining the child's needs have been appropriate in nature and degree;~~

~~ii. The diagnostic profile of the child on which the placement was based is substantially verified;~~

~~iii. The child's rights have been fully observed;~~

~~iv. The placement has been determined to be appropriate to the needs of the child;~~

~~v. The placement of the child in the special education program is with the written consent of the parent.~~

~~5-6.~~ The hearing officer's findings of fact and decision shall be in writing and shall be provided to the parent, the public education agency, the SEA, and their respective representatives. The parent may choose to receive an electronic verbatim record of the hearing and electronic findings of fact and decision relative to the hearing in addition to the written findings of fact and decision. The hearing officer's findings of fact and decision shall be delivered by certified mail or by hand within 45 calendar days after the receipt of the request for the hearing. ~~The notification of the hearing officer's decision shall include a statement that either party may appeal the decision to the Office of Administrative Hearings and that such appeal must be filed within 35 calendar days after receipt of the decision. notification to the hearing officer that the parties have been unable to resolve the matter in accordance with 20 U.S.C. 1415(f)(1)(B). A hearing officer may grant specific extensions of time beyond the 45 calendar days for good cause shown at the request of either party.~~

~~7. The findings of fact and decision of the hearing officer shall be final at the administrative level. The notification of the findings of fact and decision shall contain notice to the parties that they have a right to judicial review.~~

~~8. Any party to the proceeding has the right to appeal a final administrative decision to a court of competent jurisdiction within 35 calendar days after receipt of the decision.~~

~~6-9.~~ The SEA, after deleting any personally identifiable information, shall make such written findings of fact and decision available to the public.

I. Expedited hearing.

1. An expedited hearing regarding disciplinary matters may be requested ~~concerning long-term suspension or expulsion: in accordance with federal law as set forth in 20 U.S.C. 1415(k).~~

a. ~~By the parent if the parent disagrees with the determination that the child's behavior was not a manifestation of the child's disability; or~~

b. ~~By the parent if the parent disagrees with any decision regarding placement; or~~

e. ~~By the public agency if the public agency maintains that it is dangerous for the child to be in the current placement during the pendency of the due process hearings.~~

2. Hearing officers for an expedited hearing shall be assigned by the SEA ~~after review to determine that the hearing officer meets the standards specified in subsections (D)(1) through (4). The strike provisions specified in subsection (F) are not applicable.~~ Office of Administrative Hearings.

3. ~~The expedited hearing shall be conducted and the findings of fact and decision shall be issued within 10 calendar days. within 20 school days of the date the hearing is requested and shall result in a determination within 10 school days after the hearing.~~

J. Administrative appeal.

1. A final administrative appeal may be obtained through the Office of Administrative Hearings. Requests for appeal shall be submitted in writing through the SEA.

a. Such an appeal shall be accepted only if it is initiated within 35 days after the decision of the hearing officer has been received by the party appealing.

b. The official conducting the review shall:

i. Examine the entire hearing record;

ii. Ensure that the procedures at the hearing were consistent with the requirements of due process;

iii. Seek additional evidence if necessary;

iv. Afford the parties an opportunity for oral or written argument, or both, at the discretion of the reviewing official;

v. Make findings of fact and a decision on completion of the review;

vi. Give a copy of the written findings of fact and the decision to the parties.

2. The findings of fact and decision of the administrative law judge shall be delivered by certified mail or by hand to all parties within 30 calendar days of the receipt of the request for appeal. The SEA, after deleting any personally identifiable information, shall make such written findings of fact and decision available to the public.

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3. ~~The findings of fact and decision of the administrative law judge shall be final at the administrative level. The notification of the findings of fact and decision shall contain notice to the parties that they have a right to judicial review.~~