

ARKANSAS REGISTER

Proposed Rule Cover Sheet



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SUMMARY OF PROPOSED RULES
DESE RULES GOVERNING SPECIAL EDUCATION,
SEC. 10.00 MEDIATION AND HEARINGS

This section of the Rules Governing Special Education governs mediation and due process hearings; two of the ways that parents and school districts can resolve disputes regarding the provision of special education to a student.

This section is being amended as a result of a federal monitoring by the U.S. Department of Education, Office of Special Education Programs (OSEP). During its monitoring, OSEP noted that 10.01.20.1 is not permitted by IDEA and must be removed from the state's rules. In addition to the aforementioned section, DESE is proposing to remove other language not specifically provided for in IDEA.

The proposed revision to 10.01.20 is necessary to comply with OSEP's directive and not be found in violation of IDEA. The section specifically noted allowed for an extension of time to complete an expedite due process hearing that is not permitted by IDEA. Pursuant to IDEA, an expedited due process hearing must occur within 20 school days of the date the complaint requesting the hearing is filed and the hearing officer must make a determination within 10 school days after the hearing; no extension of either timeframe is permitted.

In addition to the required change, DESE is proposing to remove other language not specifically provided for in IDEA a result of a comprehensive review of this section of the rules. These proposed changes do not substantially affect the rights of any party to participate in mediation or a due process hearing. Some of the language being removed is addressed in other rules or provisions of law or is standard legal practice. These changes include:

- Correcting references to the "Office of Special Education"
- Removing references to outdated forms
- Replacing "regulations" with "rules"
- Requiring written verification of the resolution meeting
- Removing the requirement for a separate "meeting to encourage mediation", which is typically done through communication and not a formal meeting
- Removing the unenforceable and potentially misinterpreted statement that "in general, a hearing should last no longer than three (3) days".

ARKANSAS DEPARTMENT OF EDUCATION
SPECIAL EDUCATION AND RELATED SERVICES

10.0 MEDIATION AND HEARINGS

~~July 2008~~ October 2022

10.1 IMPARTIAL DUE PROCESS HEARING PROCEDURES

10.1.1 Purpose.

The purpose of these procedures is to ensure that an impartial due process hearing is conducted in the manner prescribed by the IDEA, (20 U.S.C. 1400 - 1487) and the corresponding federal regulations at 34 CFR part 300.

10.1.2 Definitions.

10.1.2.1 “Day” means a calendar day unless otherwise indicated as business day or school day.

10.1.2.2 “Business day” means Monday through Friday, except for federal and state holidays, unless holidays are specifically included in the designation of business day, as in 34 CFR 300.148 (d) (1) (ii).

10.1.2.3 “School day” means any day, including a partial day that children are in attendance at school for instructional purposes. School day has the same meaning for all children in school, including children with and without disabilities.

10.1.2.4 “Department” means the Arkansas Department of Education.

10.1.2.5 “He” or “his” means both the male and female gender.

10.1.2.6 “Joint Exhibit” means an exhibit that the parties agree should be admitted into evidence.

10.1.2.7 “Party” means a parent or a public agency responsible for the provision of a free appropriate public education to children with disabilities.

10.1.3 Hearings Generally - Subject Matter.

10.1.3.1 A parent or public agency may file a due process complaint on any of the matters described in 34 CFR 300.503(a)(1) and (2) and §9.04.1 of these regulations relating to the identification, evaluation or educational placement of a child with a disability, or the provision of a free appropriate public education to the child.

10.1.3.2 The due process complaint must allege a violation that occurred not more than two years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the due process complaint.

10.1.3.3 The party requesting the due process hearing may not raise issues at the due process hearing that were not raised in the due process complaint filed under 34 CFR 508(b) and §10.01.7 unless the other party agrees otherwise.

10.1.4 Hearings Generally - subject matter for expedited hearings; timelines for request.

10.1.4.1 If a parent disagrees with a determination that a child's behavior was not a manifestation of the child's disability or with any decision regarding placement of the child during disciplinary removals, the parent may appeal the decision by filing a complaint requesting an expedited due process hearing pursuant to 34 CFR 300.507 and 300.508(a) and (b).

10.1.4.2 A school district may appeal the decision by requesting an expedited hearing when school personnel have reason to believe that maintaining the current placement of the child is substantially likely to result in injury to the child or to others.

10.1.4.3 Whenever a hearing is requested under this section, the parents or the LEA involved in the dispute must have an opportunity for an impartial due process hearing consistent with the requirements of 34 CFR 300.507 and 34 CFR 300.508 (a) through (c) and 34

CFR 300.510 through 34 CFR 300.514
except as provided in 34 CFR 300.532 (c)
(2) through (4).

10.1.4.4 The SEA or LEA is responsible for arranging the expedited due process hearing, which must occur within 20 school days of the date the complaint requesting the hearing is filed. The hearing officer must make a determination within 10 school days after the hearing.

10.1.4.5 Unless the parents and LEA agree in writing to waive the resolution meeting described in 34 CFR 300.532(c)(3)(i) and these regulations rules, or agree to use the mediation process described in 34 CFR 300.506-

- A. A resolution meeting must occur within seven days of receiving notice of the due process complaint; and
- B. The due process hearing may proceed unless the matter has been resolved to the satisfaction of both parties within 15 days of the receipt of the due process complaint.

10.1.4.6 Timeline for requesting a hearing.

- A. A parent or agency must request an impartial hearing on their due process complaint within two years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the due process complaint.
- B. Exceptions to timeline. The timeline described in paragraph A of this section does not apply to a parent if the parent was prevented from filing a due process complaint due to -
 - 1. Specific misrepresentations by the LEA that it had resolved the problem by forming this basis of the due process complaint; or

2. The LEA's withholding of information from the parent that was required under this part to be provided to the parent.

10.1.5 Hearings Generally - notification procedures.

10.1.5.1 The following are the procedures to be followed when the parents or public agency officials make it known that they wish to initiate a due process hearing -

A. The hearing request is placed in writing by the requesting party. The party, or attorney representing the party, filing a due process complaint must provide to the other party a due process complaint, which must remain confidential. The party filing a due process complaint must forward a copy of the due process complaint to the SEA. (See forms for request for hearing/expedited hearing.)

B. The public agency official completes the Due Process Hearing Information form and notifies the Associate Director, Special Education Unit, or SEA. (See Notification Letter to SEA.)

C. The public agency notifies the parent in writing that the request for hearing has been filed with the SEA. (See Notice of Filing a Request For Hearing/Expedited Hearing form.)

The letter will include a copy of "Your Rights Under the IDEA," due process hearing procedures, and a completed copy of the Due Process Hearing Information form. (See Notice of Filing a Request for Hearing/Expedited Hearing form.)

D. The ~~Associate Director, Office of Special Education Unit, or designee~~ will make arrangements for the hearing and inform parties of their hearing rights.

10.1.6 Hearings Generally- parent notice of legal services.

When the parent or public agency initiates a hearing under these procedures, or when a parent requests information regarding representation, the public agency shall inform the parent of any free or low-cost legal and other relevant services available in the area.

10.1.7 Hearings Generally - content of complaint.

10.1.7.1 The party filing a due process hearing request must provide the following information:

~~A. Assist in completion of the Due Process Hearing Information form.~~

~~B. Complete the hearing request form established by the Department, and must provide the following information-~~

1. The name of the child;
2. The residential address of the child;
3. The name of the school the child is attending;
4. A description of the nature of the problem of the child relating to the proposed or refused initiation or change, including facts relating to the problem;
5. A proposed resolution of the problem to the extent known and available to the parent(s) at the time; and
6. In the case of a homeless child or youth (within the meaning of section 725(2) of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11434a(2)), available contact information of the child, and the name of the school the child is attending.

~~10.1.8~~ ~~Hearings Generally~~ ~~parent responsibilities.~~

~~10.1.8.1~~ ~~The parents as a party to a due process hearing must-~~

- ~~A. Not be denied or delayed receipt of any hearing where the hearing request form is not completed or does not contain the information required by § 10.01.7.1 of these procedures.~~
- ~~B. Comply with any directive by an assigned impartial due process hearing officer for the provision and disclosure of requested information, materials, documents, etc., in a timely manner.~~
- ~~C. Continue sending the child to his current placement unless other arrangements are agreed to by both the public agency and the parent.~~
- ~~D. Continue to send the child to school in compliance with State compulsory school attendance laws.~~

10.1.9 Hearings Generally - public agency responsibilities.

10.1.9.1 The public agency as a party to a due process hearing must -

- ~~A. Complete the Due Process Hearing Information form.~~
- B. Provide access to all education records, reports and files regarding the child to parents and their representative for review and inspection.
- C. Provide the parents with an opportunity to inspect and copy these records at a reasonable cost.
- D. Make the arrangements for an independent educational evaluation for the child by an outside evaluator when deemed necessary

by agreement with the parents or by order of the hearing officer.

- E. Compel appropriate educational personnel to provide testimony at the hearing as determined by the public agency and/or as requested by the parents.
- F. Provide a meeting room for the due process hearing.
- G. Provide evidence and testimony at the hearing to show that the proposed course of action is necessary and appropriate.
- H. Inform parents of any free or low-cost legal and other relevant services available in the area if the parent requests the information; or if the parent or the public agency initiates a hearing.
- I. Supply information to the hearing officer and the Office of Special Education Unit concerning the assignment and appointment of the child's surrogate parent, if applicable. (See §15.00 for ~~regulations relative to rules regarding~~ the appointment of surrogate parents.)

10.1.10 Hearings Generally - state education agency responsibilities.

10.1.10.1 It shall be the responsibility of the State education agency to -

- A. Arrange for the date, time and location of the hearing and assign a hearing officer to conduct the hearing. The hearing shall be conducted at a time and place which is reasonably convenient to the parents and child involved.
- B. Provide upon request interpreters for the deaf or interpreters fluent in the primary language spoken in the child's home.

10.1.11 Sufficiency of complaint.

10.1.11.1 The due process complaint required by this section must be deemed sufficient unless the party receiving the due process complaint notifies the hearing officer and the other party in writing, within 15 days of receipt of the due process complaint, that the receiving party believes the due process complaint does not meet the requirements in §10.01.7 of this part.

10.1.11.2 Within five days of receipt of notification under §10.01.11.1, the hearing officer must make a determination on the face of the due process complaint whether the due process complaint meets the requirements of §10.01.7 of this part and must immediately notify the parties in writing of that determination.

10.1.11.3 A party may amend its due process complaint only if the party consents in writing to the amendment and is given the opportunity to resolve the due process complaint through a meeting pursuant to 34 CFR 300.510 and §10.01.12.1; or the hearing officer grants permission, except that the hearing officer may only grant permission to amend at any time not later than five days before the due process hearing begins.

10.1.11.4 If a party files an amended due process complaint, the timelines for the resolution meeting in 34 CFR 300.510(a) and §10.01.12.1 and the time period to resolve in 34 CFR 300.510(b) and §10.01.12.2 begin again with the filing of the amended due process complaint.

10.1.11.5 LEA response to a due process complaint.

- A. If the LEA has not sent a prior written notice under 34 CFR 300.503 and §9.04 to the parent regarding the subject matter contained in the parent's due process complaint, the LEA must, within 10 days of receiving the due process complaint, send to the parent a response that includes -

1. An explanation of why the agency proposed or refused to take the action raised in the due process complaint;
2. A description of other options the IEP Team considered and the reasons why those options were rejected;
3. A description of each evaluation procedure, assessment, record, or report the agency used as the basis for the proposed or refused action; and
4. A description of the other factors that are relevant to the agency's proposed or refused action.

B. A response by an LEA under this section shall not be construed to preclude the LEA from asserting that the parent's due process complaint was insufficient, where appropriate.

10.1.11.6 Other party response to a due process complaint.

A. Except as provided in 10.01.11.5 of this section, the party receiving a due process complaint must, within 10 days of receiving the due process complaint, send to the other party a response that specifically addresses the issues raised in the due process complaint.

10.1.12 Resolution process.

10.1.12.1 Resolution meeting.

A. Within 15 days of receiving notice of the parent's due process complaint, and prior to the initiation of a due process hearing under 34 CFR 300.511 and §10.01.4.3, the LEA must convene a meeting with the parent and the relevant member or members of the IEP

Team who have specific knowledge of the facts identified in the due process complaint that -

1. Includes a representative of the public agency who has decision making authority on behalf of that agency; and
 2. May not include an attorney of the LEA unless the parent is accompanied by an attorney.
- B. The purpose of the meeting is for the parent of the child to discuss the due process complaint, and the facts that form the basis of the due process complaint, so that the LEA has the opportunity to resolve the dispute that is the basis for the due process complaint.
- C. The meeting described in 10.01.12.1 of this section need not be held if -
1. The parent and the LEA agree in writing to waive the meeting; or
 2. The parent and the LEA agree to use the mediation process described in 34 CFR 300.506 and §10.01.13.
- D. The parent and the LEA determine the relevant members of the IEP Team to attend the meeting.

10.1.12.2 Resolution period.

- A. If the LEA has not resolved the due process complaint to the satisfaction of the parent within 30 days of the receipt of the due process complaint, the due process hearing may occur.
- B. Except as provided in 10.01.12.3 of this section, the timeline for issuing a final decision under 34 CFR 300.515 and

§10.01.17 begins with the expiration of this 30-day period.

- C. Except where the parties have jointly agreed to waive the resolution process or to use mediation, notwithstanding paragraphs A and B of this section, the failure of the parent filing a due process complaint to participate in the resolution meeting will delay the timelines for the resolution process and due process hearing until the meeting is held.
- D. If the LEA is unable to obtain the participation of the parent in the resolution meeting after reasonable efforts have been made (and documented using the procedures in 34 CFR 300.322(d)), the LEA may, at the conclusion of the 30-day period, request that a hearing officer dismiss the parent's due process complaint.
- E. If the LEA fails to hold the resolution meeting specified in §10.01.12.1 within 15 days of receiving notice of a parent's due process complaint or fails to participate in the resolution meeting, the parent may seek the intervention of a hearing officer to begin the due process hearing timeline.
- F. The LEA shall provide written verification to the state agency that it has met the meeting requirement.

10.1.12.3

Adjustments to 30-day resolution period.

- A. The 45-day timeline for the due process hearing in 34 CFR 300.515(a) and §10.01.17 starts the day after one of the following events:
 - 1. Both parties agree in writing to waive the resolution meeting;
 - 2. After either the mediation or resolution meeting starts but before the end of the 30-day period, the

parties agree in writing that no
agreement is possible;

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3. If both parties agree in writing to continue the mediation at the end of the 30-day resolution period, but later, the parent or public agency withdraws from the mediation process.

10.1.12.4 Written settlement agreement.

- A. If a resolution to the dispute is reached at the meeting described in 10.01.12.2 A and B of this section, the parties must execute a legally binding agreement that is -
 1. Signed by both the parent and representative of the agency who has the authority to bind the agency; and
 2. Enforceable in any State court of competent jurisdiction or in a district court of the United States.

10.1.12.5 Agreement review period.

- A. If the parties execute an agreement pursuant to §10.01.12.3, a party may void the agreement within 3 business days of the agreement's execution.

10.1.13 Hearings Generally - notification of availability of mediation; mediation consultation.

10.1.13.1 General. The State education agency has established and implements the following procedures to allow parties to disputes involving any matter under this part to resolve the disputes through a mediation process, including matters arising prior to the filing of a due process complaint, (hereafter referred to as the “pre-hearing mediation conference”).

10.1.13.2 When a hearing request is initiated pursuant to these procedures, the public agency must inform the parent of the availability of mediation described in 34 CFR 300.506 and these ~~regulations~~ rules.

- A. The purposes of the pre-hearing mediation conference are -
1. To resolve, if possible, all disagreement, thus eliminating the need for a due process hearing;
 2. To narrow the range of disagreement to a specific issue or issues in the event that total resolution of the disagreement is not accomplished;
 3. To provide an atmosphere, through the introduction of a mediator, which is conducive to relevant discussions and mutual agreement; and
 4. To acquaint the parties to the dispute with the due process hearing procedures.

10.1.13.3 Requirements. The procedures for a pre-hearing mediation conference shall meet the following requirements -

- A. The procedures ensure that the mediation process -
1. Is voluntary on the part of the parties; and
 2. Is not used to deny or delay a parent's right to a due process hearing , or to deny any other rights afforded under Part B of the IDEA.
 3. Is conducted by a qualified and impartial mediator who is trained in effective mediation techniques.
- B. The State must maintain a list of individuals who are qualified mediators and knowledgeable in laws and ~~regulations~~ rules relating to the provision of special education and related services. The SEA must select

mediators on a random, rotational, or other impartial basis.

- C. Each session in the mediation process is scheduled in a timely manner and is held in a location that is convenient to the parties to the dispute.
- D. The State must bear the cost of the mediation process, ~~including the cost of meetings described in §10.01.13.4 of this part.~~
- E. If parties to a dispute elect to participate in a pre-hearing mediation conference, whenever possible the conference will be scheduled within seven (7) calendar days after the written request for a due process hearing has been received by the ~~Associate Director, Office of Special Education Unit.~~
- F. Attorneys for parties to the dispute are not permitted to attend the pre-hearing mediation session(s), as the presence of attorneys at the pre-hearing mediation session would have the potential for creating an adversarial atmosphere not conducive to mediation of the dispute. This does not, however, preclude either party from communicating with its attorney to seek advice regarding the terms of a settlement proposal.
- G. An agreement reached by the parties to the dispute participating in the mediation process must be set forth in a written mediation agreement that is legally binding and that sets forth that resolution and that -
 - 1. States that all discussions that occur during the mediation process will remain confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding; and

2. Is signed by both the parent and a representative of the agency who has the authority to bind such agency.

~~H. The SEA requires parties to the mediation process to sign a confidentiality pledge prior to the commencement of the process.~~

- I. A written, signed mediation agreement under this part is enforceable in any State court of competent jurisdiction or in a district court of the United States. Discussions that occur during the mediation process must be confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding of any Federal court or State court of a State receiving assistance under this part.

~~10.1.13.4 Meeting to encourage mediation.~~

~~A. The SEA has established procedures to encourage parents who elect not to use the mediation process to meet, at a time and location convenient to the parents, with a disinterested party who will explain the benefits of the mediation process and will encourage the parents to use the process. The parent's participation in the meeting can be satisfied by a telephone conference call if it is inconvenient for the parent to meet.~~

~~B. The disinterested party must be under contract with an appropriate alternative dispute resolution entity, or a parent training and information center or community parent resource center in the State and who would explain the benefits of, and encourage the use of, the mediation process to parents.~~

~~C. These procedures may not be used by the public agency to deny or delay a parent's right to a due process hearing under 34 CFR 300.507 and these regulations if the parent fails to participate in mediation or in a mediation consultation meeting.~~

10.1.13.5 Impartiality of mediator.

- A. An individual who serves as a mediator under this part -
 - 1. May not be an employee of the SEA or the LEA that is involved in the education or care of the child; and
- B. Must not have a personal or professional interest that conflicts with the person's objectivity.
- C. A person who otherwise qualifies as a mediator is not an employee of an LEA or State agency described in 34 CFR 300.228 solely because he or she is paid by the agency to serve as a mediator.

10.1.14 Hearings Generally - hearing rights.

10.1.14.1 Any party to a hearing under these procedures has the right to -

- A. Be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities;
- B. Present evidence and confront, cross-examine, and compel the attendance of witnesses;
- C. Prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least five (5) business days before the hearing;
- D. Obtain a written, or, at the option of the parents, electronic, verbatim record of the hearing; and
- E. Obtain written, or, at the option of the parents, electronic findings of fact and decisions.

10.1.14.2 At least five (5) business days prior to a scheduled hearing conducted under these procedures, and at least two (2) business days prior to a scheduled expedited hearing conducted under these regulations, each party must disclose to all other parties all evaluations completed by that date and recommendations based on the offering party's evaluations that the party intends to use at the hearing.

10.1.14.3 A hearing officer may prohibit any party that fails to properly disclose an evaluation and corresponding recommendations from introducing the relevant evaluation or recommendations at the hearing without the consent of the other party.

10.1.15 Hearings Generally- parental rights at hearings.

10.1.15.1 Parents involved in hearings must be given the right to -

- A. Have the child who is the subject of the hearing present; and
- B. Open the hearing to the public.

10.1.15.2 The record of the hearing, findings of fact, and decisions described in 10.01.14.1 D and E of this section, shall be provided at no cost to parents.

10.1.16 Hearings Generally - publication of findings.

10.1.16.1 The Department, after deleting any personally identifiable information, must -

- A. Transmit the findings and decisions of the hearing officer to the State Advisory Council for the Education of Children with Disabilities; and
- B. Make those findings and decisions available to the public.

- 10.1.17 Time lines of hearing.
- 10.1.17.1 The Department shall ensure that not later than 45 days after the expiration of the 30 day period under 34 CFR 300.510(b) and § 10.01.12.2, or the adjusted time periods described under 34 CFR 300.510(c) and § 10.01.12.3, -
- A. A final decision is reached in the hearing (unless the hearing officer has extended the time line); and
- B. A copy of the decision is mailed to each of the parties.
- 10.1.17.2 Each hearing must be conducted at a time and place that is reasonably convenient to the parents and child involved.
- 10.1.18 Extension of time lines.
- 10.1.18.1 In general, a hearing officer may grant specific extensions of time beyond forty-five (45) days at the request of either party to the hearing. Extensions of time may be granted for good cause shown.
- 10.1.18.2 No extension of time shall be granted by a hearing officer to any party to the hearing requesting the extension unless accompanied by a written request detailing the specific need for the extension.
- 10.1.18.3 Any extension of time granted by the hearing officer shall be noted in a written order, detailing the specific need for the extension, and forwarded by the hearing officer to the Department within two (2) days of the date of the decision to grant an extension of the time lines.
- 10.1.18.4 Under no circumstance shall a hearing officer permit any party to waive the application of the forty-five (45) day time line.

10.1.19 Time lines for expedited hearings.

10.1.19.1 The SEA is responsible for arranging the expedited due process hearing, which must occur within 20 school days of the date the complaint requesting the hearing is filed. The hearing officer must make a determination within 10 school days after the hearing.

- 10.1.19.2 Unless the parents and the LEA agree in writing to waive the resolution meeting described in 34 CFR 300.510 or agree to use the mediation process described in 34 CFR 300.506 -
- A. A resolution meeting must occur within seven days of receiving notice of the due process complaint; and
 - B. The due process hearing may proceed unless the matter has been resolved to the satisfaction of both parties within 15 days of the receipt of the due process complaint.

~~10.1.20 Extension of time lines for expedited hearings.~~

~~10.1.20.1 A hearing officer may grant a specific extension of time beyond twenty (20) school days at the request of either party to the hearing. However, specific extensions shall not extend the date of the hearing decision beyond thirty five (35) school days from the original date of receipt of the request for an expedited hearing.~~

~~10.1.20.2 No extension of time shall be granted by the hearing officer to either party to the hearing requesting an extension unless accompanied by a written request detailing the specific need for the extension.~~

~~10.1.20.3 Any extension of time granted by the hearing officer in an expedited hearing shall be noted in a written order, detailing the specific need for the extension, and forwarded to the Department within two (2) days of the decision to grant an extension of the time lines.~~

~~10.1.20.4 — Under no circumstance shall a hearing officer permit either party to waive the application of the twenty(20) school day time line in an expedited hearing.~~

10.1.21 Impartial hearing officer.

~~10.1.21.1 — The term “hearing officer” shall refer to an impartial, trained individual assigned by the Department, Special Education Unit, for the purpose of presiding at a due process hearing or expedited due process hearing.~~

10.1.21.2 A hearing must not be conducted -

- A. By a person who is an employee of the State education agency or of the local education agency that is involved in the education or care of the child; or
- B. By any person having a personal or professional interest that would conflict with his objectivity in the hearing.

10.1.21.3 A hearing officer must possess -

- A. The knowledge of, and the ability to understand, the provisions of the Act, Federal and State regulations and rules pertaining to the Act, and legal interpretations of the Act by Federal and State courts;
- B. The knowledge and ability to conduct hearings in accordance with appropriate, standard legal practice; and
- C. The knowledge and ability to render and write decisions in accordance with appropriate, standard legal practice.

10.1.21.4 A person who otherwise qualifies to conduct a hearing under this part is not an employee of the agency solely because he or she is paid by the agency to serve as a hearing officer.

10.01. 21.5 Each public agency must keep a list of the persons who serve as hearing officers. The list must include a statement of the qualifications of each hearing officer.

10.1.22 Authority of hearing officer.

10.1.22.1 A hearing officer has jurisdiction to rule on any matter that pertains to the identification, evaluation or educational placement of a child with a disability, and the provision of a free appropriate public education to the child within the meaning of the IDEA and Ark. Code Ann. 6-41-202, et seq.

10.1.22.2 The hearing officer shall dismiss a hearing if-

A. During the opening remarks, the hearing officer determines that a hearing has been initiated for reasons other than those under the hearing officer's jurisdiction or authority relative to the IDEA. The hearing officer must adjourn the proceeding and dismiss the hearing. It shall be the hearing officer's responsibility, within five (5) days following the adjournment, to issue an Order of Dismissal, noting the reason for the adjournment and dismissal of the hearing.

B. During the course of the hearing, the hearing officer determines that issues being put forth are not under the jurisdiction or authority of the hearing officer relative to the IDEA. The hearing officer must adjourn the proceeding and dismiss the hearing. The hearing officer must inform the State education agency during the five (5) day period, in the manner noted in §10.01.22.2A.

C. The parties inform the hearing officer that the case has been settled or that the parties request an extension of time in order to reach a settlement agreement. The hearing officer shall not continue a case for the purpose of allowing the parties additional time to reach a negotiated settlement. The

hearing officer shall forthwith dismiss the case without prejudice to the rights of the parties to file a new request for a hearing. A written Order of Dismissal shall be rendered within five (5) days following the dismissal of the hearing.

10.1.22.3 In the event that a party to a hearing becomes disruptive, disorderly, abusive, or disrespectful to the hearing officer or to any other party to the hearing, the hearing officer shall use reasonable means available, including dismissal, to maintain order in the conduct of the hearing.

10.1.22.4 In the event that the child is represented by a surrogate parent, the hearing officer shall require that information concerning the surrogate parent's assignment and training shall be introduced into the record following the opening remarks. It shall not be the responsibility of the hearing officer to determine the fitness of a surrogate parent during the hearing.

10.1.22.5 In a hearing conducted pursuant to these procedures, a hearing officer may -

- A. Order a change in the placement of a child with a disability to an appropriate interim alternative educational setting for not more than forty-five (45) days if the hearing officer, in an expedited due process hearing, determines that maintaining the current placement of the child is substantially likely to result in injury to the child or others; or
- B. Return the child with a disability to the placement from which the child was removed if the hearing officer determines that the removal was a violation of 34 CFR 300.530 or that the child's behavior was a manifestation of the child's disability.
- C. Determines that the interim alternative educational setting that is proposed by LEA/ public agency personnel will-

1. Enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP, and
 2. Receive, as appropriate, a functional behavioral assessment, and behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur.
- D. The procedures under paragraphs A and B of this section may be repeated, if the LEA believes that returning the child to the original placement is substantially likely to result in injury to the child or to others.

10.1.22.6

The hearing officer shall have the power under Ark. Code Ann. 6-41-216 to issue subpoenas and to bring before him as a witness any person in this state.

- A. The hearing officer shall issue a subpoena upon the request of a party to a pending proceeding over which the hearing officer is assigned and actually presiding.
- B. The subpoena shall be directed to the sheriff of the county where the witness resides or may be found.
- C. The subpoena may require the witness to bring with him any book, writing, or other thing under his control which he is required by law to produce.
- D. Service of the subpoena shall be in the manner provided for the service of subpoenas in civil cases under the Arkansas Rules of Civil Procedure.

E. The hearing officer shall have jurisdiction to issue a subpoena to compel the attendance of witnesses only in hearings over which he is actually presiding.

F. In the event a witness shall have been served with a subpoena as herein provided for and fails to attend the hearing in obedience to the subpoena or otherwise comply with it, the hearing officer may apply to the circuit court of the county wherein the hearing officer is holding the hearing for an order commanding the arrest of the witness and directing that the witness be brought before the court.

10.1.22.7 The hearing officer shall have the authority to sequester witnesses on his own motion or on that of any party to the proceeding.

10.1.22.8 The hearing officer shall have the authority to restrict the number of witnesses and limit the length of their testimony.

10.1.22.9 The hearing officer shall be without authority to retain jurisdiction over a case once a final order is entered and shall not attempt to reopen a case once the final order is entered.

10.1.23 Disclosure by the hearing officer.

10.1.23.1 The hearing officer shall disclose all personal or professional activities or relationships involving any party to the hearing. The hearing officer also shall disclose personal or professional activities or relationships with the public agency, the officer's representation of students of the local educational agency not the subject of the hearing or representation of the local education agency or other business related thereto.

10.1.23.2 If any party to the hearing objects to the assigned hearing officer, the objection shall be presented to the hearing officer in writing not less than five (5) days prior to the date of the hearing.

- 10.1.23.3 If any party to the hearing objects to the participation of the assigned hearing officer after disclosure, the hearing officer shall use discretion in determining whether to disqualify himself from the proceedings.
- 10.1.23.4 Not later than two (2) days prior to the date of the hearing, the hearing officer shall issue a written ruling on any objection to the hearing officer's participation.
- 10.1.23.5 The written objection of any party to the participation of the hearing officer and the subsequent written ruling by the hearing officer shall preserve the issue for appellate review. No objection to the participation of a hearing officer shall be raised at the hearing itself.

10.1.24 Conflict of interest.

The hearing officer shall disqualify himself from presiding over any case in which he has a personal or professional interest and which might conflict with the hearing officer's objectivity in the hearing. The Department shall appoint a replacement hearing officer pursuant to the IDEA and these procedures.

10.1.25 Disqualification of hearing officer - impartiality at issue.

10.1.25.1 It shall be the responsibility of the State education agency to ensure that the hearing officer assigned to a particular hearing is unbiased. The public agency, the parent(s), or their respective counsel/representative may challenge the assignment of a particular hearing officer only on the basis of alleged bias. Such a challenge must be stated in writing and must be accompanied by written evidence to support the allegation that the hearing officer is biased and, therefore, is not impartial. In the event that the allegation of bias is substantiated, it shall be the responsibility of the State education agency to assign a different hearing officer to the case.

10.1.25.2 Any challenge to the impartiality of an assigned hearing officer must occur within seven (7) days

after notification to the parties to the hearing of the assignment of a hearing officer.

10.1.26 Impartiality; Ex parte communications.

10.1.26.1 The hearing officer shall conduct the hearing in a manner that demonstrates fairness to all parties.

10.1.26.2 No hearing officer shall engage in ex parte communications with any party during any stage of the hearing process.

10.1.27 Discovery.

Pre-hearing discovery shall be limited to the production of documentary evidence and the disclosure of the names, addresses and telephone numbers of witnesses. The hearing officer shall not grant any request for depositions or interrogatories by the parties.

10.1.28 Pre-hearing conference.

10.1.28.1 The hearing officer may order a pre-hearing conference to determine the relevant issues to the hearing and to address evidentiary matters including, but not limited to -

- A. The relevance of documentary evidence;
- B. The relevance of testimonial evidence; or
- C. The limitation of repetitive evidence, including the testimony of witnesses.

10.1.28.2 The hearing officer may, at his discretion, limit the number of witnesses, the length of direct and cross-examination, and the number and type of documents used as evidence in the hearing.

10.1.28.3 Within five (5) days of the date a request for hearing is filed, any party to a hearing may request a pre-hearing conference to determine the relevant issues and to address evidentiary matters.

10.1.28.4 The hearing officer shall inform the parties of their responsibility to provide notice to the hearing officer at least 24 hours before the case is set for

hearing as to the status of the case. Failure to contact the hearing officer as required may result in dismissal of the case without prejudice. In the event a change of status occurs thereafter, the parties shall forthwith notify the hearing officer of the change.

10.1.29 Pre-hearing briefs.

The hearing officer may require the parties to a hearing to submit pre-hearing briefs stating the issues to be addressed and the arguments to be presented in the hearing. Pre-hearing briefs shall be submitted to the hearing officer not less than three (3) days prior to the date of the hearing.

10.1.30 Conduct of the hearing - issues to be addressed.

10.1.30.1 Whenever a due process complaint is received, under 34 CFR 300.507 or 300.532 the parents or the LEA involved in the dispute must have an opportunity for an impartial due process hearing.

~~10.1.30.2 Agency responsible for conducting the due process hearing. The hearing described in § 10.01.30.1 must be conducted by the SEA.~~

10.1.30.3 Pursuant to the information contained in the hearing request and obtained from the parties at a pre-hearing conference and from pre-hearing briefs, the hearing officer may narrow the scope of the hearing at the outset of the hearing. If it is determined by the hearing officer that there are no issues that may be addressed through an impartial due process hearing pursuant to the IDEA, the hearing officer shall dismiss the hearing.

~~10.1.30.4 If it is determined by the hearing officer that an issue raised by a party is not subject to the jurisdiction of the hearing officer, the party raising the issue may preserve the issue for appeal by presenting a written objection and proffer of evidence to the hearing officer prior to the issuance of the hearing officer's final written order.~~

- 10.1.31 Conduct of the hearing - burden of proof; opening statements.
- 10.1.31.1 At the beginning of the hearing, the hearing officer shall determine which party bears the burden of proof in regard to the particular issues raised.
- ~~10.1.31.2 The party bearing the burden of proof (hereinafter called the petitioner) may be allowed to present a succinct opening statement, no more than twenty (20) minutes in length, outlining the issues to be addressed in the hearing and the party's arguments.~~
- ~~10.1.31.3 At the conclusion of the opening statement of the petitioner, the other party (hereinafter called the respondent) shall be allowed to present a succinct opening statement, no more than twenty (20) minutes in length, outlining the issues to be addressed in the hearing and the party's arguments.~~
- 10.1.31.4 The decision to allow opening statements is at the discretion of the hearing officer.
- 10.1.32 Conduct of the hearing - length of presentation.
- A hearing officer may limit the length of any presentation in order to proceed with the hearing in an expeditious manner. ~~In general, a hearing should last no longer than three (3) days.~~
- 10.1.33 Conduct of the hearing - closing arguments; post-hearing
- 10.1.33.1 At the conclusion of the presentation of the evidence, the hearing officer may allow each party to the hearing to present closing arguments. Closing arguments by any party shall not exceed thirty (30) minutes in length.
- 10.1.33.2 In lieu of closing arguments or in addition thereto, at the discretion of the hearing officer, the hearing officer may require each party to simultaneously submit a post-hearing brief, summarizing the party's arguments. In the event that a post-hearing brief is required, the brief shall be submitted to the hearing officer not more than seven (7) days following the adjournment of the hearing.

~~10.1.34 Conduct of the hearing – recipient of transcripts.~~

~~The hearing officer shall require each party to designate on the record at the close of the hearing the recipient of that party's hearing transcript.~~

10.1.35 Conduct of the hearing - evidence generally.

10.1.35.1 The Arkansas Rules of Evidence shall not be strictly applied to impartial due process hearings except as otherwise noted herein.

10.1.35.2 Evidence and testimony shall be excluded if -

- A. It is documentary evidence and it has not been included in the documentary evidence volume;
- B. It is documentary evidence and it has not been disclosed to the opposing party at least five (5) business days before the hearing or two (2) business days prior to an expedited hearing;
- C. It is cumulative or not relevant;
- D. It represents the legal conclusion of a witness; or
- E. It is speculation on the part of the witness.

10.1.35.3 The hearing officer shall exclude cumulative, irrelevant or unnecessary testimony or evidence, even in the absence of an objection by any party to the hearing.

10.1.35.4 The hearing officer may exclude, at his discretion, other evidence given a proper basis for exclusion.

10.1.36 Conduct of the hearing - documentary evidence.

10.1.36.1 Prior to the date of the hearing, the parties to the hearing shall meet for the purpose of reviewing the documentary evidence to be submitted by each party at the hearing. The documentary evidence

should be assembled for the purpose of the hearing in the following order -

- A. Joint exhibits or exhibits to which there is no objection;
- B. Petitioner's exhibits to which the Respondent objects;
- C. Respondent's exhibits to which the Petitioner objects;
- D. Petitioner's evidence introduced through a sworn affidavit; and
- E. Respondent's evidence introduced through a sworn affidavit.

10.1.36.2 Documentary evidence should be assembled in chronological order with each separate document tabbed and numbered consecutively.

10.1.36.3 Separate and complete volumes of the documentary evidence shall be assembled and placed in a three-ring binder(s) and distributed to all parties to the hearing.

10.1.36.4 Documents not contained in the documentary evidence volume shall be excluded from the hearing by the hearing officer, unless their admission is agreed to by all parties.

10.1.36.5 Documentary evidence shall be provided to the hearing officer in the required format no later than the beginning of the hearing, unless directed otherwise by the hearing officer.

- A. Joint exhibits and testimony presented through a sworn affidavit shall be admitted as evidence when the hearing officer acknowledges receipt of the documentary evidence volume on the record.
- B. Objections by any party to documentary evidence pursuant to § 10.01.35.2B of these procedures shall be considered and ruled on

at the time the documentary evidence is received by the hearing officer.

- C. Objections by any party to documentary evidence pursuant to § 10.01.36.1B and C of these ~~procedures~~rules shall be considered and ruled on at any appropriate stage in the hearing.

10.1.37 Conduct of the hearing - use of sworn affidavits.

10.1.37.1 If no party to the hearing objects, the testimony of witnesses, including expert witnesses, may be presented through the use of sworn affidavits.

10.1.37.2 A witness, including an expert witness, who has testified by sworn affidavit can be subpoenaed by any party for the purpose of direct or cross-examination.

10.1.38 Conduct of the hearing - proffer of evidence.

10.1.38.1 Any party to a hearing may submit a written proffer of evidence for the purpose of preserving any issue for appeal. A proffer of evidence shall contain -

- A. A statement of the evidence and testimony that would have been presented had the hearing officer allowed its admission; and
- B. A statement signed by the party or the party's representative asserting that the contents of the proffer are truthful and that the evidence was offered in good faith.

10.1.38.2 Any proffer of evidence must be received by the hearing officer prior to the issuance of the final order in the hearing. Any proffer of evidence not received prior to the issuance of the final order in the hearing will not be made part of the hearing record.

10.1.39 Hearing decisions.

10.1.39.1 After the presentation of the evidence and, if allowed, closing arguments of the parties, the

hearing officer shall rule orally on issues, if any, for which the hearing officer has reached a decision.

10.1.39.2 Within the time line for regular and expedited hearings (~~unless extensions have been granted~~), and after the conclusion of the hearing, the hearing officer shall issue a written judgment containing -

- A. Findings of fact;
- B. The decision(s); and
- C. Any orders resulting from the hearing decision.

10.1.39.3 The findings of fact shall be limited to the facts -

- A. That were supported by the evidence; and
- B. Upon which the hearing officer based any portion of the decision.

10.1.39.4 Any orders resulting from the hearing decision shall-

- A. Be issued in concise language;
- B. Address any violations noted in the hearing decision; and
- C. Mandate definite action to remedy any violations.

10.1.39.5 In no event shall a hearing officer retain jurisdiction over the parties to the hearing after the hearing decision has been issued.

10.1.39.6 Decision of hearing officer on the provision of FAPE

- A. Subject to paragraph B of this section, a hearing officer's determination of whether a child received FAPE must be based on substantive grounds.
- B. In matters alleging a procedural violation, a hearing officer may find that a child did not

receive a FAPE only if the procedural inadequacies -

1. Impeded the child's right to a FAPE;
2. Significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or
3. Caused a deprivation of educational benefit.

C. Nothing in this section shall be construed to preclude a hearing officer from ordering an LEA to comply with procedural requirements under 34 CFR 300.500 through 300.536.

10.1.39.7 Separate request for a due process hearing. Nothing in 34 CFR 300.500 through 300.536 shall be construed to preclude a parent from filing a separate due process complaint on an issue separate from a due process complaint already filed.

10.1.40 Hearing decisions - expedited hearings.

~~10.1.40.1 After the closing arguments of the parties, the hearing officer shall rule orally on all issues properly presented in the expedited hearing.~~

10.1.40.2 Within ten (10) school days after the conclusion of the expedited hearing, the hearing officer shall issue a written decision ~~outlining and supporting the oral decision rendered at the conclusion of the hearing.~~

10.1.41 Hearing decisions - finality of decision.

10.1.41.1 Any party aggrieved by the findings and decision made under 34 CFR 300.507 through 300.513 or 300.530 through 300.534 who does not have the right to an appeal under 34 CFR 300.514(b), and any party aggrieved by the findings and decision under 34 CFR 300.514(b), has the right to bring a civil action with respect to the due process

complaint notice requesting a due process hearing under 34 CFR 300.507 or 34 CFR 300.530 through 300.532. The action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy.

10.1.42 Time limitation.

10.1.42.1 The party bringing the action shall have 90 days from the date of the decision of the hearing officer to file a civil action.

10.1.43 Additional requirements.

10.1.43.1 In any action brought under this section the court -

- A. Receives the records of the administrative proceedings;
- B. Hears additional evidence at the request of a party; and
- C. Basing its decision on the preponderance of the evidence, grants the relief that the court determines to be appropriate.

10.1.44 Jurisdiction of district courts.

10.1.44.1 The district courts of the United States have jurisdiction of actions brought under section 615 of the Act without regard to the amount in controversy.

10.1.45 Rule of construction.

10.1.45.1 Nothing in this part restricts or limits the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973, or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under these laws seeking relief that is also available under section 615 of the Act, the procedures under 34 CFR 300.507 and 300.514 must be exhausted to the same extent as would be

required had the action been brought under section 615 of the Act.

10.1.46 Child's status during proceedings.

10.1.46.1 Status during hearings on any of the matters relating to the identification, evaluation or educational placement of a child with a disability, or the provision of FAPE to the child -

- A. Except as provided for in 34 CFR 300.533 and § 11.06, during the pendency of any administrative or judicial proceeding regarding a due process complaint notice requesting a due process hearing under 34 CFR 300.507 and these regulations, unless the State or local agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his current educational placement.
- B. If the complaint involves an application for initial admission to public school, the child, with the consent of the parents, must be placed in the public school until the completion of all the proceedings.
- C. If the decision of a hearing officer in a due process hearing agrees with the child's parents that a change of placement is appropriate, that placement must be treated as an agreement between the State or local agency and the parents for purposes of §10.01.46.1A of this part.
- D. If the complaint involves an application for initial services under this part from a child who is transitioning from Part C of the Act to Part B and is no longer eligible for Part C services because the child has turned three, the public agency is not required to provide the Part C services that the child had been receiving. If the child is found eligible for special education and related services under Part B and the parent consents to the initial provision of special education and related

services under 34 CFR 300.300(b), then the public agency must provide those special education and related services that are not in dispute between the parent and the public agency.

10.1.46.2 Status during expedited hearings or appeals related to matters of discipline, including parent challenge to the interim alternative educational setting or manifestation determination decision, or an LEA that believes that maintaining the current placement of the child is substantially likely to result in injury to the child or others or continuing it in the interim alternative education setting -

- A. When an appeal under 34 CFR 300.532 has been made by either the parent or LEA, the child must remain in the interim alternative educational setting pending the decision of the hearing officer or until the expiration of the time period specified in 300.530(c) or (g), whichever occurs first, unless the parent and the SEA or LEA agree otherwise.

Subject: Re: Notice of Rulemaking - ADE Division of Elementary and Secondary Education
Date: Wednesday, October 26, 2022 at 7:02:48 AM Central Daylight Time
From: legalads@arkansasonline.com
To: Courtney Salas-Ford (ADE)
Attachments: image001.jpg

Caution: This is an external email and may contain a suspicious subject or content. Please take care when clicking links or opening attachments. When in doubt, contact [ADE IT Services](#).

Will run Fri 10/28, Sat 10/29. and Sun 10/30. Thank you.

Gregg Sterne, Legal Advertising
Arkansas Democrat-Gazette
legalads@arkansasonline.com

From: "Courtney Salas-Ford, ADE" <Courtney.Salas-Ford@ade.arkansas.gov>
To: legalads@arkansasonline.com
Sent: Monday, October 24, 2022 4:42:34 PM
Subject: Notice of Rulemaking - ADE Division of Elementary and Secondary Education

Good afternoon,

Please run the attached Notice of Rulemaking for three consecutive days at the next date possible and let me know the dates the Notice will run.

Thank you,



Courtney Salas-Ford
Chief Legal Counsel
Arkansas Department of Education
Four Capitol Mall, Rm. 301-A
Little Rock, AR 72201
(501) 682-4752

Notice of Rulemaking

Pursuant to Arkansas Code Annotated § 25-15-201 et seq., notice is hereby given that the Arkansas State Board of Education and the Division of Elementary and Secondary Education are considering revisions to the following DESE Rules and are releasing them for public comment: Special Education and Related Services, Sec. 10.00 Mediation and Hearings.

A public hearing regarding these amended rules will be held on November 15, 2022, at 1:30 p.m. at the Arkansas Department of Education, Four Capitol Mall, Little Rock, AR 72201.

Written comments regarding these proposed rules may be mailed to the Office of Legal Services at Four Capitol Mall, Room 301A, Little Rock, AR 72201. Comments also may be emailed to ADE.RulesComments@ade.arkansas.gov. A copy of the proposed rules can be found at the Department's website at: <http://www.arkansased.org/divisions/legal/rules/pending>. Copies also may be obtained by contacting ADE's Office of Legal Services at the above address or via phone at (501) 682-4227.