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ESA Appeals and Parent Voice:

Why States Should Consider a Formal Appeals Process for Their ESA Program

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If an ESA parent believes that an administrative decision that negatively impacts their child violates the law, they should have a formal process to appeal.

INTRODUCTION

Due process rights to appeal administrative decisions made by governmental agencies are foundational to the American form of government. These rights ensure fairness, accountability, and transparency in government actions. Administrative decisions can have significant consequences on individuals' lives, such as denying benefits, imposing penalties, or restricting rights. The ability to appeal these decisions provides citizens with a vital mechanism to challenge potential errors, injustices, or biases in the decision-making process. It also helps safeguard against arbitrary or discriminatory actions by state agencies, ensuring that decisions are made based on law, facts, and consistent procedures. Due process protections, including the right to appeal, foster public trust in government institutions by ensuring that citizens are treated equitably and their voices are heard before final decisions are made.

These foundational rights should extend to parents with children enrolled in Education Savings Accounts (ESA) programs. If an ESA parent believes that an administrative decision that negatively impacts their child violates the law, they should have a formal process to appeal. They should have the opportunity to raise legal concerns before a fair and impartial arbiter. Otherwise, families could be at the mercy of an individual bureaucrat's whims—an email or phone call would have the final say on a matter.

This paper examines the Arizona Empowerment Scholarship Account Program's appeals process as a case study, evaluating its strengths and weaknesses, and opportunities for improvement. The analysis will provide policy direction for other states with ESA programs as they implement appeals processes in their own programs.

ARIZONA'S ESA APPEALS PROCESS

Arizona's Empowerment Scholarship Account Program originated in 2011 for students with disabilities, allowing them to withdraw from their public school and use 90 percent of state funds allocated to them for a variety of educational expenses, including therapy, tutors, textbooks, curriculum, and tuition at private schools.[1] The Legislature has since expanded the program to include students in foster care; on Indian reservations; in failing or underperforming public schools; with parents on active military duty or who were killed in the line of duty; or who are legally blind, deaf, or hard of hearing.[2] The program grew to more than 12,000 students before the program became universal in 2022, which made it available to all K–12 students in the state. As of February 2025, the program serves more than 86,000 students.[3]

The Arizona Department of Education (ADE or Department) administers the ESA program, managing the daily operations of the program, determining eligibility and allowed expenses, and terminating ESA accounts. It issues administrative decisions related to these decisions.[4]

In 2020, the Arizona Legislature codified the right of ESA parents to appeal ADE administrative decisions, directed the State Board of Education (SBE or Board) to adopt rules for an appeals process, and established some requirements for the appeals process.

1 Arizona Revised Statutes (A.R.S.) §15-2402(C).
2 A.R.S. §15-2401(7).
3 Arizona Department of Education, Empowerment Scholarship Account, https://www.azed.gov/esa.
4 See A.R.S. §§15-2402(D); 15-2403.

Appeals Process in Statute

The process that ESA families use to appeal a decision is outlined in both Arizona statute and rules.

1. Right to appeal

Under A.R.S. § 15-2403(D), the Legislature gives ESA parents the right to "appeal to the state board of education any administrative decision the department makes, including determinations of allowable expenses, removal from the program or enrollment eligibility."

2. SBE establishes appeals process

Because the statute directs ESA parents to appeal to SBE, the statute requires SBE to establish a process to adjudicate appeals.[5] Similarly, the statute authorizes SBE to "adopt rules and policies necessary to administer" the ESA program, including "[f]or establishing an appeals process."[6]

3. Notification of right to appeal

To ensure ESA parents know of their right to appeal, the Legislature requires that when the Department of Education notifies a parent of an administrative decision it must at the same time "notify the parent in writing that the parent may appeal any administrative decision under [the ESA statutes] and the process by which the parent may appeal."[7] The Department is likewise required to post SBE's appeals process information on its website alongside its ESA policy handbook.[8]

4. Representation

The Legislature established that a "parent may represent himself or herself or designate a representative, not necessarily an attorney" in an appeals hearing.[9] However, "[a]ny designated representative who is not an attorney admitted to practice may not charge for any services rendered in connection with the hearing."[10] The Legislature further clarifies that "the fact that a representative participated in the hearing or assisted the account holder is not grounds for reversing any administrative decision or order if the evidence supporting the decision or order is substantial, reliable and probative."[11]

5. Stay

Finally, the Legislature also grants SBE the authority to issue a stay in response to an appeal of an administrative decision suspending an ESA account.[12] With a stay in place, the Department "may not withhold funding or contract renewal for the account holder because of the appealed administrative decision during the stay unless directed by the board to do so."[13]

5 A.R.S. § 15-2403(D).
6 A.R.S. § 15-2403(I)(1).
7 A.R.S. § 15-2403(D).
8 A.R.S. § 15-2403(D). ADE provides SBE appeals information here: https://www.azed.gov/esa/resources.

9 A.R.S. § 15-2403(E).
10 A.R.S. § 15-2403(E).
11 A.R.S. § 15-2403(E).
12 A.R.S. §15-2403(N).
13 A.R.S. § 15-2403(N).

As directed by the Legislature, SBE has adopted rules establishing an appeals process, which is where we turn next.

Appeals Process Arizona Administrative Code "Rules"

The Arizona State Board of Education has adopted appeals process rules found in Arizona Administrative Code (A.A.C.) R7-2-1511.[14] Additionally, the Board provides information about the appeals process on its website, including an appeals process flowchart, appeal FAQs, an explanation of the differences between a hearing and an informal settlement conference, Office of Administrative Hearings (OAH) FAQs, an appeals checklist, and the form to submit an appeal.[15]

1. Parents have the right to appeal administrative decisions by the Department.

The rule begins by restating the statutory right of ESA parents to appeal "any administrative decision" the department of education makes, "including determinations of allowable expenses, removal from the Program or enrollment eligibility."[16] The Board includes on its website an "appeals checklist" that states that pursuant to A.R.S. §§ 15-2403, 41-1092 et seq. (Uniform Administrative Hearing Procedures) and A.A.C. R7-2-1511(F), not all ADE administrative actions are appealable.[17] For example, later in the same document, the SBE includes a list of appealable and unappealable administrative decisions. On the one hand, parents may appeal an administratively complete ESA application being denied, an ESA contract being terminated, an expense being disallowed or denied, and a suspension being placed on an ESA account. On the other hand, an application deemed administratively incomplete, receiving a "15 Day Notice" to resolve an issue, or disputing the validity of an ADE policy or procedure are not appealable administrative decisions, according to SBE.

2. Parents may request a stay on account suspension.

In response to the statutory authorization to issue a stay pending the resolution of an appeal, the Board includes detailed rules relating to issuing a stay.[18] Under the rules, "'stay' means a parent may have access to a terminated ESA account pending the resolution of their appeal."[19] Pending the resolution of an appeal of an account suspension, a parent may request a stay on the account suspension. When filing for a hearing with the Board, the parent may at the same time file a request for the Board to issue a stay on the account suspension. The request must be in writing and must address the matters in the Department's notice of appealable action, which will be discussed below.

The Department may choose to file a response to the parent's request for a stay. The response must be filed within five days of receipt of the parent's request. The response must be in writing and must respond to the matters stated in the parent's request. Within 10 business days of receipt of the Department's response, the executive director of the Board or the executive director's designee must make a written determination to either keep in place the account suspension or stay all (or part) of the suspension "if there is a reasonable probability that the appeal will be upheld or that the stay is in the best interest of the State."

The Board must provide a written copy of the stay determination to the parent and to the Department with the basis for the determination. As required under A.R.S. § 15-2403(N), if the Board issues a stay,

14 A.A.C. R7-2-1511, https://apps.azsos.gov/public_services/Title_07/7-02.pdf.
15 Arizona State Board of Education, Empowerment Scholarship Account (ESA) Program, https://azsbe.az.gov/parents/empowerment-scholarship-account-esa-program.
16 A.A.C. R7-2-1511(A).
17 Arizona State Board of Education, "Appeal Checklist," https://azsbe.az.gov/sites/default/files/2023-08/01%2520-%2520Appeal%2520Checklist_3.pdf.
18 A.A.C. R7-2-1511(B).
19 A.A.C. R7-2-1501(14).

"the Department may not withhold funding or contract renewal for the account holder on account of the appealed administrative decision during the stay unless directed by the Board to do so."

3. The Department may informally resolve the dispute with the parent.

The rules provide that, notwithstanding any other section in the rules, the Department may informally resolve a disputed administrative action at any time with the agreement of the ESA account holder on the resolution.[20]

4. The Department must include appeals information on website and in handbook.

As required under A.R.S. § 15-2403(D), the Department must provide information about the Board's appeals process on its website and in the ESA parent handbook.[21]

5. The Department must provide notice of appealable action.

The rules require the Department to provide parents with written notice of an appealable action taken by the Department.[22] The written notice must inform the parent of his or her right to request a hearing and must include four items: 1) the statute or rule that is alleged to have been violated or on which the action is based; 2) the nature of any alleged violation or action; 3) a description of the parent's right to request a hearing on the appealable agency action; and 4) a description of the parent's right to request an informal settlement conference.

6. Parents may appeal the Department decision by requesting a hearing.

Parents have 30 days after receiving a notice of an appealable action by the Department to file a request for a hearing with the Board.[23] The request must be in writing and include seven items: 1) the identity of the party requesting the hearing, 2) the party's mailing address, 3) the agency rendering the decision related to the appealable action, 4) identification of the action being appealed, 5) a concise statement of the reasons for the request for hearing, 6) a copy of the administrative decision issued by the Department, and 7) any other information or documentation requested by the Board related to the appeal.

7. The Board may accept untimely requests.

Although parents only have 30 days to appeal after receiving a notice of appealable action, the rules provide that the Board may nonetheless accept a request for a hearing that misses the deadline provided "good cause is submitted."[24] Requests for a hearing made beyond the 30 days must be made in writing and must state the basis for not filing the request on time.

8. The Board must schedule a hearing for administratively sufficient requests.

Under the rules, the Board must schedule a hearing if a parent requests a hearing and includes all seven items required under A.A.C. R7-2-1511(F).[25]

20 A.A.C. R7-2-1511(C).
21 A.A.C. R7-2-1511(D).
22 A.A.C. R7-2-1511(E).
23 A.A.C. R7-2-1511(F).
24 A.A.C. R7-2-1511(G).
25 A.A.C. R7-2-1511(H).

9. The Board must provide notice of hearing.

The Board must provide all parties a written notice of the date set for the hearing at least 20 days prior.[26] The notice must include 1) a statement of the time, place, and nature of the hearing; 2) a statement of the legal authority and jurisdiction under which the hearing is to be held; 3) a reference to the statute or rule involved; and 4) "a short and plain statement of the matters asserted." If a party is unable to state the matters in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved. Thereafter upon application a more definite and detailed statement shall be furnished.

10. The method of notices must be calculated to effect actual notice.

The rules require notices to be served "via personal delivery or certified mail, return receipt requested or by any other method reasonably calculated to effect actual notice on the agency and all parties to the action at each party's last address of record."[27]

11. The hearing must be held after complete appeal is filed.

The rules require a hearing on the appealable action be held after a complete appeal is filed.[28] The hearing may be advanced or delayed on the agreement of the parties or on a showing of good cause.

12. Parents may request an informal settlement conference.

The rules allow parents to request an informal settlement conference with the Department.[29] An "'Informal Settlement Conference' means a meeting between the Department and the Parent in an attempt to settle the appeal prior to an appeal hearing. The Board and the Hearing Officer do not attend."[30] The parent must make the request in writing and file the request with the Department and provide a copy to the Board no later than 10 days after the Board provides notice that the appeal is complete.

After receiving the request, the Department has to hold the informal settlement conference within seven days. After the settlement conference, the Department has to inform the Board of the results within five days or before the hearing, whichever is first. The date of the hearing does not change because a request has been filed.

A representative of the Department is required to attend the informal settlement conference and must notify the parent in writing that "statements, either written or oral, made at the conference, including a written document, created or expressed solely for the purpose of settlement negotiations are inadmissible in any subsequent administrative hearing."[31]

13. Informal disposition may be made in various ways.

The rules allow informal disposition to be made by stipulation, agreed settlement, consent order, or default.[32]

26 A.A.C. R7-2-1511(I).
27 A.A.C. R7-2-1511(J).
28 A.A.C. R7-2-1511(K).
29 A.A.C. R7-2-1511(L)(1).
30 A.A.C. R7-2-1501(8).
31 A.A.C. R7-2-1511(L)(2).
32 A.A.C. R7-2-1511(M).

14. The hearing process:

Hearings before a hearing officer. All hearings must take place before a hearing officer.[33] A hearing officer is a "non-partial representative with either at least three years of verified experience in the practice of law or at least one year of verified experience in conducting hearings, who oversees hearings pursuant to this Article."[34]

Representation at hearing. Parents have the right to be represented by legal counsel or proceed without counsel. They have the right to submit evidence and cross-examine witnesses.[35] Pursuant to A.R.S. § 15-2403(E), the rule states that parents may also designate a representative (not necessarily an attorney), but if the representative is not an attorney admitted to practice, they may not charge for their services. The rule also restates the statutory language that "[t]he fact that a representative participated in the hearing or assisted the account holder is not grounds for reversing any administrative decision or order if the evidence supporting the decision or order is substantial, reliable and probative."[36]

Optional prehearing conference. The Board is required to schedule a prehearing conference if requested by a party in the case.[37] A prehearing conference can be held for the following purposes: "a. clarify or limit procedural, legal or factual issues; b. consider amendments to any pleading; c. identify and exchange lists of witnesses and exhibits intended to be introduced at the hearing; d. obtain stipulations or rulings regarding testimony, exhibits, facts or law; e. schedule deadlines, hearing dates and locations if not previously set; or f. allow the parties opportunity to discuss settlement."

The record in a case. The record in a case includes "a. all pleadings, motions and interlocutory rulings; b. evidence received or considered; c. a statement of matters officially noticed; d. objections and offers of proof and rulings thereon; e. proposed findings of fact and conclusions of law and exceptions thereto; f. any decision, opinion, recommendation, or report of the hearing officer; and g. all staff memoranda, other than privileged communications, or data submitted to the hearing officer in connection with its consideration of the case."[38]

Findings of fact. The rules require findings of fact to be based exclusively on the evidence and on matters officially noticed.[39]

Prohibited communications with hearing officer. As is the case with contested matters before a court, the rules prohibit "participants of record" to communicate directly or indirectly with the hearing officer "about any substantive issue in a pending matter" unless all "participants of record" are present or at a properly noticed scheduled proceeding or the communication is a written motion with copies sent to all "participants of record."[40]

Request for postponing, continuing, or canceling a hearing. The rules allow a "participant of record" to file in writing a request to postpone, continue, or cancel a hearing.[41] The hearing officer may grant the request for "good cause."

Continuances and extensions of time. The hearing officer may grant continuances and extensions of time for filing notices or other documents if good cause is shown.[42] The rules assume parties can make these kinds of requests.

Request for additional information. The rules allow a hearing officer to direct a party to submit additional memoranda or information within a reasonable time period.[43] The hearing must grant the opposing party a reasonable period of time to respond to the additional information.

33 A.A.C. R7-2-1511(N)(1).
34 A.A.C. R7-2-1501(7).
35 A.A.C. R7-2-1511(N)(2).
36 A.R.S. § 15-2403(E).
37 A.A.C. R7-2-1511(N)(3).
38 A.A.C. R7-2-1511(N)(4).
39 A.A.C. R7-2-1511(N)(5).
40 A.A.C. R7-2-1511(N)(6).
41 A.A.C. R7-2-1511(N)(7).
42 A.A.C. R7-2-1511(N)(8).
43 A.A.C. R7-2-1511(N)(9).

Request to compare document copy with original. The rules allow for "any party" to request in writing an opportunity to compare a document copy with the original.[44] The hearing officer may grant the request "if the record establishes good cause."

15. Conduct of hearing.

All hearings must be recorded. The Board is required to use a court reporter or an electronic means of producing a clear and accurate record of the proceeding.[45]

Hearing may be conducted in an informal manner. The rules allow the hearing to be conducted in an informal manner without following the rules of evidence. The informal manner of conducting the hearing cannot be grounds for reversing the administrative decision or order if the evidence supporting the decision or order is "substantial, reliable and probative."[46]

Proposed findings of fact and conclusions of law. The rules allow the parties to submit proposed findings of fact and conclusions of law before the hearing taking place. The hearing officer may require the parties to submit these before the hearing or at the close of evidence.[47]

Parties must arrange for the presence of their witnesses at the hearing and be ready to address all issues in the appeal. The rules require all parties to be ready and present with all their witnesses and documents at the hearing. Parties are required to be prepared to "dispose of all issues and questions involved in the appeal." Parties are therefore required to arrange for the presence of its witnesses at the hearing.[48]

Hearing may proceed even if a party fails to appear. The hearing officer may decide to proceed with the presentation of evidence by the parties that are present even if other parties do not appear at the hearing.[49]

Hearing officer may close the hearing to the public. The rules allow the hearing officer to close the hearing to the public and only allow "interested parties" to be present "to the extent necessary to protect the interests and rights of the interested parties," as allowed by Arizona's open meeting laws (A.R.S. §§ 38-431.01, and 38-431.03).[50]

Hearing may be telephonic or by other electronic means. The rules allow the hearing officer to conduct all or part of the hearing by telephone or other electronic means as long as each party has the opportunity to participate in the entire proceeding.[51]

Conduct at hearing. The hearing officer may exclude persons from further participation in the case if their conduct at any hearing is "disruptive or shows contempt for the proceeding."[52]

16. Evidence at hearing:

Testimony under oath. The rules require all witnesses to testify under oath or affirmation, which are administered by the hearing officer.[53]

Presentation of evidence and cross-examination. The rules require the hearing officer to provide the "interested parties" the opportunity to present oral and documentary evidence and to conduct cross-

44 A.A.C. R7-2-1511(N)(10).
45 A.A.C. R7-2-1511(O)(1).
46 A.A.C. R7-2-1511(O)(2).
47 A.A.C. R7-2-1511(O)(3).
48 A.A.C. R7-2-1511(O)(4).
49 A.A.C. R7-2-1511(O)(5).
50 A.A.C. R7-2-1511(O)(6).
51 A.A.C. R7-2-1511(O)(7).
52 A.A.C. R7-2-1511(O)(8).
53 A.A.C. R7-2-1511(P)(1).

examination "as may be required for a full and fair disclosure of the facts." The hearing officer may limit the time of oral argument.[54]

Admitting and evaluating the evidence. The rules allow the hearing officer to admit evidence and determine the evidentiary weight of all submitted evidence. Parties taking a witness' deposition or affidavit must pay for those costs. The rules allow the hearing officer to make rulings necessary to prevent "argumentative, repetitive, or irrelevant questioning," and to exclude evidence determined to be "irrelevant, immaterial or unduly repetitious." The hearing officer may also "expedite the examination to the extent consistent with the disclosure of all relevant testimony and information."[55]

17. Stipulations by the parties

The rules allow parties to stipulate in writing agreement upon any matter in the proceeding. If the hearing officer agrees to stipulated matters of procedure, the stipulation is binding upon the parties. No substantive matter stipulated by the parties is binding on the Board unless it is incorporated into the decision of the Board.[56]

18. Final administrative decision

Hearing officer recommendation. The rules require the hearing officer to issue a written recommendation within 20 days of the hearing that contains the reasons for the recommendation with findings of fact and conclusions of law.[57]

Recommendation sent to the Board. Hearing officers are to serve their recommendations to the Board and must transmit a record of the hearing to the Board if requested by the Board.[58]

The Board may review the recommendation. The Board may choose to review the recommendation at one of the following two regularly scheduled meetings of the Board.[59]

The Board may accept, reject, or modify the recommendation. At the regularly scheduled meeting, the Board may decide to accept, reject, or modify it.[60] If the Board decides to decline review of the recommendation, it must serve a copy of the recommendation to all parties.[61] If the Board rejects or modifies the recommendation at their regularly scheduled meeting, the Board is required to serve all parties a copy of the recommendation with the rejection or modification and a written justification explaining the reasons for the rejection or modification of each finding of fact or conclusions of law.[62]

Notice of public meeting considering the recommendation. The Board must provide all parties at least 20 days written notice of the public meeting at which the Board will consider the hearing officer's recommendation.[63]

19. Rehearing and review of decisions:

Ten days to appeal the decision. Within 10 days of being served the "final administrative decision," a party may file a motion with the Board for a rehearing or review of the decision. The motion must be in writing and explain the basis for the request. A copy of the motion must be provided to the opposing parties. If the request is based on new evidence, the new evidence must be included with the written motion.[64]

54 A.A.C. R7-2-1511(P)(2).
55 A.A.C. R7-2-1511(P)(3).
56 A.A.C. R7-2-1511(Q).
57 A.A.C. R7-2-1511(R)(1).
58 A.A.C. R7-2-1511(R)(2).
59 A.A.C. R7-2-1511(R)(3).
60 A.A.C. R7-2-1511(R)(3).
61 A.A.C. R7-2-1511(R)(3)(a).
62 A.A.C. R7-2-1511(R)(3)(b).
63 A.A.C. R7-2-1511(R)(4).
64 A.A.C. R7-2-1511(S)(1).

Opposing party may file response to motion. Within 15 days of the motion for rehearing being filed, opposing parties may file with the Board a response in writing to the motion. A copy of the motion must be provided to the moving party.[65]

The Board may grant the motion to rehear the decision for reasons materially affecting the moving party's rights. The Board may grant rehearing for three reasons that "materially affect the moving party's rights": 1) irregularities in the hearing, or abuse of discretion, whereby the moving party was deprived of a fair hearing, but not because of informality of the hearing or lack of adherence to rules of evidence as allowed in A.A.C. R7-2-1511(O)(2); 2) misconduct of the hearing officer; or 3) newly discovered materials which could not with reasonable diligence have been discovered and produced at the hearing.[66]

The Board must consider the motion at a public meeting. The rules require the Board to consider the motion at one of the following two regularly scheduled public meetings.[67]

Providing service. Providing service is complete on personal service or five days after the final administrative decision is mailed to the party's last known address.[68]

Exhausting administrative remedies. After a hearing has been held and a final administrative decision has been entered, a party does not have to file a motion with the Board for rehearing or review in order "to exhaust the party's administrative remedies."[69]

65 A.A.C. R7-2-1511(S)(2).
66 A.A.C. R7-2-1511(S)(3).
67 A.A.C. R7-2-1511(S)(4).
68 A.A.C. R7-2-1511(S)(5).
69 A.A.C. R7-2-1511(S)(6).

STRENGTHS OF ARIZONA'S ESA APPEALS PROCESS

The appeals process laid out in statute and rule for the Arizona ESA program has several strengths that help ensure fairness and transparency for parents seeking to challenge ADE administrative decisions.

Clearly established appeals process in statute and rules. First and foremost, the right to appeal is clearly established in statute and rule, emphasizing that this right to appeal applies to determinations of allowable expenses, removal from the program, or enrollment eligibility.[70] Before the appeals process existed, ESA parents who disagreed with ADE administrative decisions (whether communicated by phone, email, or letter) had no choice but to accept the decision or file a lawsuit in state court, a very unrealistic option. Parents were often frustrated by inconsistent decisions from ADE—especially related to allowable expenses—and felt there was no clear pathway to appeal decisions they believed violated the law.

Impartial hearing officer and independent agency. In addition, the appeals process not only allows parents to appeal ADE administrative decisions but allows them to appeal to an impartial hearing officer and ultimately to the SBE, a separate regulatory body that establishes the rules for the ESA program, including the appeals process. The ability to appeal to an independent agency rather than to ADE itself strengthens the appeals process. The appeals process even authorizes SBE to issue a stay to an appeal of an ESA account suspension.[71] This allows students to continue accessing educational funds pending a resolution of the appeal.[72]

Robust notice requirements. The statutes and rules also include extensive notification requirements so that parents are aware of their right to appeal and how to exercise it. When ADE notifies a parent of an administrative decision, it must "notify the parent in writing that the parent may appeal any administrative decision under [the ESA statutes] and the process by which the parent may appeal."[73] ADE is also required to post SBE's appeals process information on its website alongside its ESA policy handbook.[74] The rules add that the appeals process must be included *in* the ESA handbook.[75] In addition to these statutory and regulatory notice requirements, SBE's ESA page on its website prominently displays information about the appeals process, including an appeals process flowchart, appeal FAQs, an explanation of the differences between a hearing and an informal settlement conference, Office of Administrative Hearings (OAH) FAQs, an appeals checklist, and the form to submit an appeal.[76]

The hearing must be scheduled for an administratively complete appeal. Under the rules, SBE must schedule a hearing if a parent requests one. It must include all seven items required under

70 A.R.S. § 15-2403(D).
71 A.R.S. §15-2403(N).
72 A.R.S. § 15-2403(N).
73 A.R.S. § 15-2403(D).
74 A.R.S. § 15-2403(D).
75 A.A.C. R7-2-1511(D).
76 Arizona State Board of Education, Empowerment Scholarship Account (ESA) Program, https://azsbe.az.gov/parents/empowerment-scholarship-account-esa-program.

A.A.C. R7-2-1511(F).[77] This means that SBE lacks the discretion to deny the appeal. It must allow parents who properly request a hearing to make their case before the hearing officer if so desired.

Flexibility for ESA parents. Arizona's ESA appeals process also includes provisions that provide important flexibility in the process, recognizing that many ESA parents will be representing themselves and not hire an attorney. The statutes establish that a "parent may represent himself or herself or designate a representative, not necessarily an attorney" in an appeals hearing.[78] SBE may accept untimely filed appeals for "good cause."[79] Appeal hearings may be conducted in an informal manner without following rules of evidence and may not be reversed on these grounds if the order is "substantial, reliable and probative."[80] Further, the rules allow the hearing officer to conduct all or part of the hearing by telephone or other electronic means.[81] To "protect the interests and rights" of ESA parents—like privacy rights in the case of a child with a disability, for example—a hearing officer may close the hearing to the public.[82] The rules also allow the hearing officer to grant a parent's request for postponing or continuing a hearing for "good cause."[83] These flexible provisions remove significant barriers to parents being able to appeal ADE decisions, like the high cost of hiring an attorney, being unfamiliar with or intimidated by the legal process, and travel and scheduling difficulties.

Clarity for ESA parents. Although some of the rules could be further clarified, the rules overall are logically arranged, detailed, and easy for parents to understand. For example, the requirements for requesting a stay[84] and a hearing[85] lay out exactly what a parent needs to provide to the SBE. Further, the rules regarding the hearing process[86] and the conduct of a hearing[87] are detailed and clear, making them especially helpful for ESA parents who are likely unfamiliar with legal proceedings. Clarity in what parents need to file and what is expected of them during a hearing are critical so that parents are not deterred from the process out of fear or unfamiliarity.

Administrative efficiencies. The rules also contain several administrative efficiencies, saving time and resources for parents and the state. ADE may informally resolve the dispute with the parent.[88] ADE may decide to reverse its decision and not proceed with the hearing process. A parent may also request an informal settlement conference to try and resolve the dispute without going to hearing.[89] The rules also explain that the dispute may be informally resolved by stipulation, agreed settlement, or consent order.[90] The rules also make a prehearing conference optional.[91] The hearing may be conducted in an informal manner without following rules of evidence, or by telephone or other electronic means.[92] Parties may also stipulate to certain matters of the case, which adds efficiency to

77 A.A.C. R7-2-1511(H).
78 A.R.S. § 15-2403(E).
79 A.A.C. R7-2-1511(G).
80 A.A.C. R7-2-1511(O)(2).
81 A.A.C. R7-2-1511(O)(7).
82 A.A.C. R7-2-1511(O)(6).
83 A.A.C. R7-2-1511(N)(7).
84 A.A.C. R7-2-1511(B).
85 A.A.C. R7-2-1511(F).
86 A.A.C. R7-2-1511(O).
87 A.A.C. R7-2-1511(N).
88 A.A.C. R7-2-1511(C).
89 A.A.C. R7-2-1511(L).
90 A.A.C. R7-2-1511(M).
91 A.A.C. R7-2-1511(N).
92 A.A.C. R7-2-1511(O).

the hearing process.[93] Finally, the hearing officer is required to provide a written recommendation to SBE within 20 days of the hearing, and SBE must take action on the recommendation within its next two regularly scheduled meetings. [94]These provisions provide opportunities to save time and resources for all parties while safeguarding a parent's right to appeal and have a timely resolution.

Opportunities to appeal SBE's decision. The rules discuss additional opportunities for parents to appeal and request a rehearing or review if they are displeased with SBE's final decision.[95] SBE is required to consider the motion within the next two regularly scheduled meetings, giving the parent an additional opportunity to make their case. However, the rules clarify that after a hearing has been held and a final administrative decision has been entered, a parent is not required to file a motion for rehearing or review with SBE before it can file a case in superior court.[96]

Additional resources for ESA parents. In addition to providing ESA appeals rules, the Board also provides information about the appeals process on its website, including an appeals process flowchart, appeal FAQs, an explanation of the differences between a hearing and an informal settlement conference, Office of Administrative Hearings (OAH) FAQs, an appeals checklist, and the form to submit an appeal.[97] These are helpful resources for ESA parents to effectively navigate the process.

Creating an appeals process was a major improvement to Arizona's ESA program. Parents now have a clear process through which to appeal ADE administrative decisions that they believe violate the law. Although much in Arizona's appeals process is exemplary, there are some areas that could be improved.

93 A.A.C. R7-2-1511(Q).
94 A.A.C. R7-2-1511(R).
95 A.A.C. R7-2-1511(S).
96 A.A.C. R7-2-1511(S)(6).
97 Arizona State Board of Education, Empowerment Scholarship Account (ESA) Program, https://azsbe.az.gov/parents/empowerment-scholarship-account-esa-program

CHALLENGES OF ARIZONA'S ESA APPEALS PROCESS

While the Arizona ESA appeals process does have the benefit of being outlined in statute and rule and while many states have a less formal or no appeals process, there are still barriers faced by parents in appealing.

1. Lack of legal representation

Arizona ESA families are prohibited from having representation that charges a fee if they're not an attorney. This means that families either have to find some sort of volunteer to help them in their hearing or hire a licensed attorney. Many families report being blindsided at their hearing when the Department shows up with legal counsel and provides a more formal opposition to their appeal reasons.

2. Department using improper language when denying items, leaving families unable to appeal

One issue that has arisen in the last two years has been the Department using vague language, namely, calling denials an "administrative decision," in turn causing SBE staff to question whether an action by the Department was actually appealable. Many parents were told by SBE that the ADE decision was actually not appealable, and therefore final. The Goldwater Institute was able to weigh in on this issue, and attorney John Thorpe effectively summarized, "The answer is that parents do have a right of appeal to SBE, and SBE must hear any appeal of a final ADE decision under the ESA law if that decision affects a parent's or student's rights, duties, or privileges. This includes final decisions regarding funding levels, ESA contracts, and reimbursements." Additionally, Thorpe writes,

> **SBE has mandatory, not discretionary jurisdiction over any appeal, provided only that the appeal concerns an "administrative decision [ADE] makes pursuant to [Chapter 19 (Arizona Empowerment Scholarship Accounts), Article 1 (General Provisions)]." The term "administrative decision" has a well-established meaning in Arizona law. It means "any decision, order or determination of an administrative agency that is rendered in a case, that affects the legal rights, duties or privileges of persons and that terminates the proceeding before the administrative agency." A.R.S. § 12-901(2); see also, e.g., A.R.S. § 41-1092(6) (incorporating the same definition of "[f] inal administrative decision"). Thus, an action by ADE is an "administrative decision," and appealable as of right to SBE, if it satisfies two conditions: (1) it "affects the legal rights, duties, or privileges" of an ESA parent or student, and (2) "it terminates the proceeding" before ADE. See Bolser Enters., Inc., 213 Ariz. 110, 114 ¶ 19 (App. 2006) ("The definition of an administrative decision is not confined to orders and can consist of decisions and determinations, as long as they affect contractors' rights, duties, and privileges and terminate proceedings before the [agency].")**

SBE provided a helpful summary of the appeals in the last four years, and the chart below offers a snapshot of the various challenges families have faced since the appeals process was enacted. For example, the large number of appeals in 2021 was coordinated by Love Your School. ADE decided to prohibit families from applying for an ESA in the fourth quarter of the school year, which families argued violated state law. Appeal language was shared with families, resulting in all related appeals being dropped, families receiving Q4 funding, and ADE agreeing their practice violated the law. The

appeal language shared with families back in 2021 was as follows:

> **ADE's arbitrary application deadlines are causing students, like in our case, to miss out on an entire quarter of funding and needed therapy. In the case of students missing the February 1st Quarter 4 funding deadline, some are being illegally denied access to the program even though the legislature has deemed them eligible. In effect, the artificial deadline is removing 3 months (February 2 through end of school year) in which the families should be able to apply as they meet the 100-day requirement in the prior school year. Under the law, students should be allowed to apply year round and receive funding. Students applying between February 2 through the end of the school year should be admitted into the program if they meet the requirements established by the legislature. ADE lacks the authority to deny eligible students. In our case, we are appealing the ADE contract that indicates our daughter is not eligible for Quarter 1 funding, and is only eligible for Quarter 2 funding, starting next October.**[98]

	ELIGIBILITY	EXPENSES	OTHER	TERMINATED	GRAND TOTAL
2021	74	54	47	56	**231**
2022	5	7	2	3	**17**
2023	27	36	20	2	**85**
2024	60	247	23	37	**367**
2025		4	2	1	**7**
GRAND TOTAL	**166**	**348**	**94**	**99**	**707**

According to SBE, the large number of appeals in 2024 is related to the fact that ADE used to have a pre-approval phone line which parents could call to get approval for items. When that was removed, families had items denied, resulting in more appeals. The ESA program also went universal in 2022, and the influx in appeals in 2024 was also likely related to massive growth of the program.

98 2021 Appeal for Z. Clark to AZSBE, shared with permission.

IMPROVING ARIZONA'S ESA APPEALS PROCESS

The following policy suggestions would improve Arizona's ESA appeals process by making it more open and user friendly for ESA parents. The proposed changes can be addressed through SBE rulemaking or through statutory changes, if necessary.

Allow appeals without an ADE's administrative decision. SBE rules require ADE to provide parents with a written "notice of an appealable action" taken by the Department.[99] Within 30 days of being served the notice of an appealing action, ESA parents may file a request for hearing and must include among other things, "[a] copy of the administrative decision issued by the Department."[100]

However, what happens if ADE does not provide a "notice of an appealable action" to the parent? Should the parent be procedurally barred from appealing the action if ADE never provides such notice? If ADE withholds a written administrative decision, should parents be barred from exercising their statutory right to appeal? Or what if ADE does provide such notice but fails to include some of the required elements, including "[t]he statute or rule that is alleged to have been violated or on which the action is based" as required in A.A.C. R7-2-1511(E)(1)? Should ADE's legally incomplete notice prevent parents from being able to file a request for hearing? To avoid this procedural loophole that might prevent parents from being able to appeal, SBE should modify the rules to allow parents to appeal ADE administrative decisions whether or not ADE provides a legally complete notice of an appealable action.

Expand the legal basis for granting a stay. In determining whether to grant a stay on an account suspension, the rules require the Board to stay all (or part) of the suspension "if there is a reasonable probability that the appeal will be upheld or that the stay is in the best interest of the State."[101] Whether the stay is in the best interest of the state is the wrong basis for granting a stay. What about the interest of the student on the ESA program? What about the interest of the ESA parent seeking to educate their child with ESA funds? At the very least, SBE should update the rule to allow for a stay when it is in the public interest. This would provide more discretion for SBE to grant the stay depending on the specific facts of the case and take into account the educational interests of the ESA parent and student.

Clarify who has the burden of proof. The rules fail to establish who has the burden of proof in a hearing. According to Arizona's Office of Administrative Hearings (OAH), if a hearing involves the denial of an application for a license or denial of a benefit, the burden of proof is on the applicant.[102] However, according to OAH, if the hearing involves disciplinary action against a license, the burden is on the agency seeking the action. Consistent with this logic, in the ESA context, if an administratively complete application is denied or an expense is denied, the parent should have the burden of proof.

99 A.A.C. R7-2-1511(E).
100 A.A.C. R7-2-1511(F).
101 A.A.C. R7-2-1511(B)(1)(c)(ii).
102 Gregory L. Hanchett, "Oh, the Burden We Bear!," Arizona Office of Administrative Hearings, https://www.azoah.com/Vol24a.html#:~:text=Which%20party%20to%20an%20administrative,for%20the%20license%20or%20benefit.

In the situations where ADE terminated or placed a suspension on a child's ESA contract, ADE should have the burden. Clarifying who has the burden of proof not only provides clarity to the parent and ADE's legal representative, but would also assist hearing officers in making their decision.

Further clarify what a hearing officer's findings of fact and conclusions of law should include. Under A.A.C. R7-2-1511(R)(1), a hearing officer is required to issue a written recommendation within 20 days of the hearing that contains the reasons for the recommendation with findings of fact and conclusions of law. As part of the findings of fact and conclusions of law, the rules should require the hearing officer to state which party has the burden of proof and whether the burden was met. If the hearing officer recommends affirming ADE's administrative decision, the rules should require the hearing officer to clearly identify the statute or rule that was violated or on which ADE's action is based. This requirement is especially needed in the case of an expense being denied. The hearing officer should clearly establish that ADE has the legal authority to make the determination it made. ADE's discretion to deny expenses should not go beyond the statutory language regarding allowed expenses. The Legislature is the ultimate policymaker when it comes to allowable expenses in the ESA program, not ADE.

Change legal basis for granting rehearing. SBE should expand the legal basis for which it can grant a rehearing. Under the rules, the Board may grant a rehearing for three reasons that "materially affect the moving party's rights": 1) irregularities in the hearing, or abuse of discretion, whereby the moving party was deprived of a fair hearing, but not because of informality of the hearing or lack of adherence to rules of evidence as allowed in A.A.C. R7-2-1511(O)(2); 2) misconduct of the hearing officer; or 3) newly discovered materials which could not with reasonable diligence have been discovered and produced at the hearing.[103]

The Board should expand the rules to grant a rehearing on these additional legal grounds if they materially affect the ESA parent's rights: 1) misconduct on the part of ADE, its staff or its legal counsel; 2) accident or surprise which could not have been prevented by ordinary prudence; 3) error in the admission or rejection of evidence; 4) errors of law occurring at the hearing; or 5) a decision not justified by the evidence or contrary to law. These additional grounds for rehearing are similar to those found in other sections of Arizona's Administrative Code[104] and are reasonable protections for ESA parents as they seek to assert their statutory rights to appeal.

Reduce legal jargon in the rules. Administrative rules tend to be technical and therefore often confusing to those not regularly using them. ESA parents representing themselves or using a non-attorney representative are more likely to be unfamiliar with much of the legal jargon included in the rules. For example, the rules use "a parent" or "the parent" throughout, but at other times the rules use terms like "party," "parties of record," "interested parties," or "moving party," which could cause

103 A.A.C. R7-2-1511(S)(3).

104 A.A.C. R14-3-112. Rehearing in cases relating to the regulation of securities and corporations allows rehearing for any of the following causes materially affecting the moving party's rights: 1. Irregularity in the proceedings before the Commission or any order or abuse of discretion, whereby the moving party was deprived of a fair hearing; 2. Misconduct of the Commission, its staff or its hearing officer or the prevailing party; 3. Accident or surprise which could not have been prevented by ordinary prudence; 4. Newly discovered material evidence which could not with reasonable diligence have been discovered and produced at the original hearing; 5. Excessive or insufficient penalties; 6. Error in the admission or rejection of evidence or other errors of law occurring at the hearing; 7. That the decision is not justified by the evidence or is contrary to law.

confusion for parents. The "parties" in these ESA appeals cases are a parent and the department. Instead of using various legal terms to refer to the parent and the department, the rules could simply use "parent" and "department." At the very least, the rules could add clarifying language as to what the terms mean, for example, "moving party" (i.e., parent requesting a rehearing or review of the decision).

The rules also state, "Informal disposition may be made by stipulation, agreed settlement, consent order or default."[105] Without further clarification, parents may not know what an "informal disposition" is or what a "stipulation" or "consent order" might mean. For sure, parents could research these terms; however, the point is that the use of legal jargon makes the appeals process more intimidating and less accessible to parents. Administrative rules are technical and confusing enough. Removing unnecessary legal jargon or adding clarifying language would improve the rules by helping parents exercise their statutory right to appeal ADE's administrative decisions.

105 A.A.C. R7-2-1511(M).

CONCLUSION

The due process rights to appeal administrative decisions by governmental agencies should extend to parents with children enrolled in ESA programs. ESA parents should have the ability to appeal administrative decisions that negatively impact their child's education and that they believe violate the law. They should have the opportunity to raise legal concerns before a fair and impartial arbiter.

Arizona's universal ESA includes a robust appeals process that can serve as a model for other states. Arizona's ESA appeals process is clearly laid out in statute and rule, and helps ensure an overall fair and transparent process for ESA parents to challenge ADE administrative decisions. Parents appeal before an impartial hearing officer and the SBE, an independent agency. The appeals process also includes substantive notice requirements to ensure parents know of their statutory right to appeal and how to go through the process. The hearing officer is required to schedule a hearing if a parent's appeal is administratively complete. The appeals rules include important procedural flexibility for parents. The rules are detailed, logically arranged, and generally clear for parents. They also include several administrative efficiencies. Even after a final decision by the SBE, the rules allow parents to request a rehearing or review of the decision.

Although Arizona's ESA appeals process is exemplary in many ways, this paper includes some policy suggestions that would improve it. First, the rules should allow parents to appeal ADE decisions even if ADE fails to provide a complete notice of an appealable action. Second, the rules should expand the legal basis for the Board to grant a stay on an account suspension. Third, the rules should clearly specify who has the burden of proof in the appeals process. Fourth, the rules should further clarify what a hearing officer's findings of fact and conclusions of law should include. Fifth, the rules should change the legal basis for the Board to grant a rehearing. Finally, legal jargon throughout the rules should be reduced or at least explained in order to make the process less intimidating and more accessible to parents. Adopting these policy suggestions will assist ESA parents in exercising their statutory rights to appeal administrative decisions that negatively impact the education of their child.

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