**Wyoming Department of Education**
Dr. Jim McBride, Superintendent of Public Instruction
Hathaway Building, 2nd Floor, 2300 Capitol Avenue
Cheyenne, WY 82002-0050
Phone 307-777-7673 Fax 307-777-6234 Website www.k12.wy.us

**MEMORANDUM 2007 – 15**

**TO:** School District Superintendents

**FROM:** Mary Kay Hill, Director
Administration Unit

**DATE:** January 5, 2007

**SUBJECT:** Chapter 3 Rules of Practice and Procedure for Contested Case Proceedings

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**PLEASE READ AND RESPOND AS NECESSARY**

Please find enclosed Notice of Intent to Adopt Rules for Chapter 3 Rules of Practice and Procedure for Contested Case Proceedings. The public comment period runs from December 11, 2006 through January 26, 2007.

If you have any questions or need further information, please contact Jennifer Duncan at (307) 777-6213.

Thank you.

MKH: jd

Enclosures

## NOTICE OF INTENT TO ADOPT RULES

1. Agency: Wyoming Department of Education
   Address: Hathaway Bldg., 2nd Fl., 2300 Capitol Ave., Cheyenne, Wyoming 82002-0050
   Agency Contact Person for these Rules: Fred Hansen
   Work Phone: 307-777-7804

2. Statement of the terms and substance of the proposed rule or a description of the subjects and issues involved: These permanent rules are being promulgated pursuant to Wyo. Stat. §§ 21-2-202(a)(i), 16-3-102(a)(i) and 21-2-402(d). Chapter 3 provides the process by which an aggrieved party can request a contested case hearing in front of the State Superintendent of Public Instruction and the Wyoming Department of Education. It outlines the nature of the proceeding and the timeline associated with conducting a contested case hearing.

3. Citation to each agency rule being **amended** or repealed:_____.

4. If the proposed rules amend existing rules, a copy of the proposed rules in a format that clearly indicates additions to and deletions from existing language may be obtained at: Copies of the proposed rules can be obtained at the Wyoming Department of Education, c/o Fred Hansen, Hathaway Building, 2nd Floor, 2300 Capitol Avenue, Cheyenne, Wyoming 82002-0050.

5. Statement of the time when, the place where, and the manner in which interested persons may present their views on the intended action: Please submit comments to Fred Hansen, Hathaway Building, 2nd Floor, 2300 Capitol Avenue, Cheyenne, Wyoming 82002-0050. The public comment period on these rules runs from December 11, 2006 through January 26, 2007.

6. A public hearing will be held if requested by 25 persons, a governmental subdivision or by an association having not less than 25 members. Requests for a public hearing may be addressed to: Fred Hansen, Hathaway Building, 2nd Floor, 2300 Capitol Avenue, Cheyenne, Wyoming 82002-0050.

7. Yes __ No _X_ A public hearing on the proposed rules has been scheduled. If Yes: Date, time and place of scheduled hearing:_____

8. Any person may urge the agency not to adopt the rules and also request the agency to state its reasons for overruling the consideration urged against adoption. Requests for an agency response under this item must be made prior to, or within (thirty) 30 days after adoption of the rule, addressed to: Fred Hansen, Hathaway Building, 2nd Floor, 2300 Capitol Avenue, Cheyenne, Wyoming 82002-0050.

9. Yes _X_ No ____ These are New Rules (i.e., these are the first set of rules to be promulgated by the agency after the Legislature's adoption of a new statutory provision or an act significantly amending an existing statute. A new rule is one that is promulgated in direct response to, or that is mandated by, the enacted statute and may involve creation of an entirely new provision in the agency's rules or the repeal or amendment of an existing rule.)

If Yes: Citation to the specific legislation resulting in promulgation of these rules: Wyo. Stat. §§ 21-2-202(a)(i), 16-3-102(a)(i) and 21-2-402(d)

10. Yes ___ No _X_ These rules are adopted, amended or repealed to comply with federal law or regulatory requirements.

If Yes:

(a) Citation to applicable federal law or regulation:

_____

(b) Indicate one:

___ The proposed rules meet but do not exceed minimum federal requirements;

or

___ The proposed rules exceed minimum federal requirements;

(c) Any person wishing to object to the accuracy of any information provided by the agency under this Item 10 should submit their objections prior to final adoption to: _____

If timely objections are submitted the agency will provide the objecting person with a written response explaining and substantiating the agency's position by reference to federal law or regulations.

11. Indicate one: (Required by W.S. 16-3-103(a)(i)(G))

_____X_ The proposed rule change meets minimum substantive state statutory requirements.

_____ The proposed rule change exceeds the minimum substantive state statutory requirements.

If the rule change exceeds the minimum substantive state statutory requirements, the agency shall include a statement explaining the reason the rule exceeds minimum substantive statutory requirements.

STATEMENT OF REASONS

RULES OF PRACTICE AND PROCEDURE FOR CONTESTED CASE PROCEEDINGS

These permanent rules are being promulgated pursuant to Wyo. Stat. §§ 21-2-202(a)(i), 16-3-102(a)(i) and 21-2-402(d). Chapter 3 provides the process by which an aggrieved party can request a contested case hearing in front of the State Superintendent of Public Instruction and the Wyoming Department of Education. It outlines the nature of the proceeding and the timeline associated with conducting a contested case hearing.

These rules are "new" rules. Although there have been no recent changes in the law, Wyo. Stat. § 16-3-102(a)(i) requires that each agency promulgate rules setting forth the nature and requirements of all formal and informal procedures available in connection with contested cases. Wyoming Statute § 21-2-202(d) provides that "any school district aggrieved by an act of the state superintendent may seek review in accordance with the Wyoming Administrative Procedure Act." In light of these two statutory sections, the Department is moving forward with promulgation of rules which provide the process by which an aggrieved person can request a contested case proceeding in accordance with the statutes.

In addition to the above noted statutory sections, during the legislative session of 2006, the private school licensing and registration requirements (Wyo. Stat. §§ 21-2-401 et seq.) were revised and these rules provide the process by which the Department will conduct a challenge to the suspension, revocation or non-renewal of a license or registration. Furthermore, these rules and regulations specifically address the ability of a school district to contest the finding of the Department of Audit in accordance with Wyo. Stat. § 9-1-513.

Chapter 3 meets the minimum substantive statutory requirements.

CHAPTER 3

RULES OF PRACTICE AND PROCEDURE FOR CONTESTED CASE PROCEEDINGS

**Section 1. Authority.**

These rules are promulgated by the Wyoming Department of Education under the authority of Wyo. Stat. §§ 21-2-202(d), 21-2-402(d), 16-3-102(a)(i) and 16-3-113.

**Section 2. Purpose of Rules.**

These rules are intended to provide a uniform and understandable process for contested case proceedings held before or on the behalf of the State Superintendent of Public Instruction and/or the Wyoming Department of Education.

**Section 3. Application of Rules.**

This Chapter shall apply to contested case proceedings authorized by Wyoming Statute and brought before the State Superintendent of Public Instruction and/or the Wyoming Department of Education by a properly aggrieved party. These rules shall not apply to proceeding held in accordance with or as a result of Federal law and when alternative rules and regulations govern such proceedings, such as those proceeding and matters contained in Chapter 7 of the Wyoming Department of Education's Rules and Regulations.

**Section 4. Definitions.**

For purposes of contested cases brought before the State Superintendent of Public Instruction under these rules, the following definitions shall apply:

(a) "Aggrieved party" means a person, institution or school district whose legal rights, duties or privileges have been harmed by an act of the State Superintendent and/or the Department and who is entitled to a contested case proceeding as provided by the law.

(b) "Contested Case" means a proceeding before the State Superintendent in which the legal rights, duties or privileges of a party are required by law to be determined by an opportunity for a hearing, in accordance with the Wyoming Administrative Procedures Act.

(c) "Department" means the Wyoming Department of Education.

(d) "Notice" means the document served upon all parties by the State Superintendent, or the designee, stating the time, place and other pertinent material for the contested case proceeding as required by Wyo. Stat. § 16-3-107(a) and (b).

(e) "Petition" means the formal written document filed with the State Superintendent which initiates the contested case proceeding.

(f) "Petitioner" means an aggrieved party, who is entitled by law to a contested case hearing and who requests such a hearing in accordance with these rules and regulations.

(g) "Presiding Officer" means the State Superintendent or a person designated pursuant to Wyo. Stat. § 16-3-112(a) and the provisions contained in this Chapter.

(h) "State Superintendent" means the State Superintendent of Public Instruction as set forth in Wyo. Stat. §§ 21-2-201, 21-2-202.

(i) "Wyoming Administrative Procedures Act" means Wyo. Stat. §§ 16-3-101 through 16-3-115.

**Section 5. <u>Service and Timing of Petition.</u>**

(a) A properly aggrieved party may file a petition with the State Superintendent requesting a contested case proceeding. The petition shall be in accordance with the provisions contained in this Chapter.

(b) The petition shall be served on the State Superintendent and other necessary parties. Service shall be made to the Wyoming Department of Education, c/o State Superintendent of Public Instruction, 2300 Capitol Avenue, Hathaway Building, 2nd Floor Cheyenne, Wyoming 82002-0050. Service can be made in person, by mail or received by facsimile, 307-777-6234, during regular business hours. Any facsimile received after regular business hours will be treated as received during the regular business hours of the next working day.

(c) The petition shall be filed with the State Superintendent within forty-five (45) days of the date of the administrative decision at issue or of the date of mailing of the final administrative decision as evidenced by a postmark, whichever is later. The State Superintendent may grant an exception in circumstances where good cause is shown.

**Section 6. <u>Petition Contents and Requirements.</u>**

(a) To initiate a contested case proceeding the petitioner shall prepare and file with the State Superintendent a petition which includes the following:

(i) The name, telephone number, fax number, if available, and mailing address of the petitioner and the same information for the representing attorney if applicable;

(ii) A statement, in ordinary and concise language, of the facts and of the errors alleged to have been committed and issues upon which the petition is based, including particular reference to statutory sections, contract provisions and/or rules, regulations and orders involved;

(iii) A copy of the decision and/or relevant material which relates to the decision at issue;

(iv) The specific relief sought; and,

(v) The signature of the petitioner and the representing attorney, if applicable.

**Section 7. <u>Notice of Hearing.</u>**

(a) In all contested case proceedings, the petitioner shall be afforded an opportunity for a hearing after notice served by the State Superintendent personally or by mail.

(b) The notice shall be in accordance with Wyo. Stat. § 16-3-107 and shall contain the following:

(i) The time, place, and nature of the hearing;

(ii) The legal authority and jurisdiction under which the hearing is to be held;

(iii) The particular sections of the statutes and rules involved; and,

(iv) A short and plain statement of the matters asserted.

(c) The notice shall be served upon each petitioner at least thirty (30) days prior to the date set for the hearing.

**Section 8. <u>General Procedure.</u>**

(a) The State Superintendent or the presiding officer shall:

(i) Examine the petition, notify the petitioner of any apparent errors or omissions, and request any additional information deemed necessary;

(ii) Dismiss any petition not timely filed, except in instances where the State Superintendent determines good cause has been shown and an exception is necessary;

(iii) Assign the contested case a docket number and schedule the commencement of contested case proceedings in accordance with the Wyoming Administrative Procedures Act;

(iv) Establish a separate file for each docketed contested case in which all papers, pleadings, documents, transcripts, evidence and exhibits pertaining thereto shall be filed. All items contained in this file shall contain the assigned docket number.

(v) Upon docketing, take appropriate action towards the ultimate decision, which may include, but is not limited to, scheduling informal conferences, pretrial hearings, motions hearings, settlement conferences and a contested case evidentiary hearing.

(b) Each party may be ordered to file with the presiding officer and serve upon the other parties a preliminary statement or joint preliminary statement. The parties shall be afforded at least thirty (30) days for the preparation and filing of any preliminary statement. Unless otherwise ordered, the statement shall set forth:

(i) A brief summary of the contentions of the party;

(ii) Significant facts about which there is no genuine issue (these may be admissions by stipulation);

(iii) Contested issues of fact remaining for decision;

(iv) Contested issues of law to be determined at the hearing. The parties may include memorandums of law on significant legal issues the parties wish to call to the attention of the presiding officer;

(v) The names, addresses, and a brief description of the testimony of each witness the party intends to present at the hearing;

(vi) A list and copies of all exhibits to be introduced. This does not foreclose the ability to introduce exhibits which become available at a later date; and,

(vii) Estimated time required for the hearing.

(c) The taking of depositions and discovery shall be available to the parties in accordance with the provisions of Rules 26 and 28 through 37 (excepting 37(b)(1) and (2)(D) there from) of the Wyoming Rule of Civil Procedure.

(d) Upon application the presiding officer shall issue a subpoena requiring the appearance of witnesses for the purpose of taking evidence or requiring the production of any books, papers or other documents relevant or material to inquiry in accordance with WYO.STAT. § 16-3-107(d).

(e) Motions shall be in writing and state the grounds and the relief sought. Prior to filing a motion for dismissal, default, or compliance with discovery procedures the moving party shall make reasonable good faith efforts to discuss the content and purpose of the motion, such efforts should be documented in writing and attached to the motion. Response to a motion shall be made within fifteen (15) days of service of the motion. All motions and responses shall be filed with the State Superintendent and the presiding officer, is applicable, and served upon all parties.

(f) All parties shall be permitted to file a brief with the presiding officer.

(g) Oral argument shall be allowed at the discretion of the presiding officer.

(h) Except to the extent authorized by law, a party or that party's attorney shall not communicate, directly or indirectly, in connection with any issue of fact or law with the presiding officer concerning any pending case, except upon notice and opportunity for all parties to participate. Should ex parte communications occur, the presiding officer shall advise all parties of the communication as soon as possible thereafter, and if requested, allow any party an opportunity to respond.

(i) The record of the contested case shall include:

(i) All formal and informal notices, pleadings, motions and intermediate rulings;

(ii) Evidence received or considered including matters officially noticed;

(iii) Questions and offers of proof, objections and rulings thereon;

(iv) Any proposed findings and exceptions thereto;

(v) Any opinion, findings, decision or order of the State Superintendent and any report by the presiding officer of the hearing.

(j) Proceedings, including all testimony, shall be reported verbatim stenographically or by any other appropriate means determined by the Agency or the officer presiding at the hearing.

(k) The losing party shall be responsible for all reasonable costs associated with conducting the contested case hearing, excluding any attorneys' fees.

**Section 9. Decisions and Final Agency Action.**

(a) The State Superintendent shall make and enter a written decision and order containing findings of fact and conclusions of law stated separately.

(b) The findings of fact shall be based exclusively on the evidence and matters officially noticed. Technical or scientific facts within the State Superintendent's specialized knowledge may be considered in making a final determination.

(c) Findings of fact shall be made on all material issues and ultimate facts.

(d) The written decision shall be filed with the State Superintendent and will, without further action, become the decision and order as a result of the hearing.

(e) All written decisions and orders shall be served upon all parties upon formal filing of the State Superintendent with the Department.

(f) If the State Superintendent acts as the presiding officer over the contested case proceeding, he/she shall have sixty (60) days from the end of the hearing to issue a written decision and order. If a presiding officer is appointed by the State Superintendent, the State Superintendent shall have thirty (30) days from receipt of the recommended decision and proposed order to enter a final decision in accordance with this Section.

(g) In the event a recommended decision is rendered by a designee, all parties shall be afforded a reasonable opportunity to file exceptions thereto which shall be deemed a part of the record.

(h) The decision rendered in accordance with this Section shall serve as the final decision of the State Superintendent and shall be subject to judicial review in accordance with Wyo. Stat. § 16-3-114.

**Section 10. <u>Designation and Authority of a Presiding Officer.</u>**

(a) The State Superintendent may designate a presiding officer by assigning a contested case proceeding to an employee of the Department or an employee of another agency designated by the State Superintendent to act as presiding officer in accordance with WYO.STAT. § 16-3-112.

(b) The functions of all those presiding over contested cases shall be conducted in an impartial manner and in accordance with the Rules and Regulations of the Department of Education.

(c) Presiding officers shall have the full authority to administer oaths and affirmations; issue subpoenas; rule upon offers of proof and receive relevant evidence; take or cause depositions to be taken in accordance with the provisions of the Wyoming Administrative Procedures Act and the rules of the Department; regulate the course of the hearing; hold conferences for the settlement or simplification of the issues; make recommended decision when directed to do so by the State Superintendent; and take any other action authorized by this Chapter, which are consistent with the Wyoming Administrative Procedures Act.

(d) The presiding officer may, at any time while a contested case is pending, recuse himself / herself from presiding over the contested case by filing written notice of recusal with the State Superintendent and serving an all parties. From and after the date the written notice of recusal is entered, that presiding officer shall not participate in resolution of the contested case.

(e) If a presiding officer is appointed, he/she shall submit a written recommended decision and order containing proposed findings of fact and conclusions of law.

(f) The recommended decision and proposed order shall be submitted to the State Superintendent no later than thirty (30) days after the end of the contested case hearing.

**Section 11. Appeal of Audit Findings.**

(a) A district aggrieved by the Department of Education's implementation or enforcement of findings made by the Department of Audit in accordance with Wyo. Stat. § 9-1-513 may request a hearing in accordance with this Chapter.

(b) The following provisions shall apply to such proceedings:

(i) In accordance with Section 5(c) of this Chapter, petitioner shall request a hearing no later than forty-five (45) days after receipt of notification by the Department of Education of audit findings. Upon good cause being shown, the State Superintendent may extend this period or grant an exception to this limitation.

(ii) All petitions, pleading and motions shall be served upon the Department of Audit in addition to all other necessary parties.

(iii) Within thirty (30) days after a petition is filed with the State Superintendent and served upon the Department of Audit, the Department of Audit shall transmit a certified copy of the complete record, including but not limited to, the report which contains the findings and any proposed solutions in relation to the aggrieved district, any and all correspondence between the Department of Audit and the district which relates to the findings at issue, documentation of all efforts taken by the Department of Audit to ensure the Department of Education and the district resolve any problems identified within the audit and documentation which establishes the determination of the materiality levels for findings as required by Wyo. Stat. § 9-1-513(b)(vii).

(iv) The Department of Audit shall include a general index of the record, which identifies the documents and instruments in the record with reasonable certainty. The index shall be served upon all parties.

(v) No adjustment or remittance of funds shall take place until a final decision is rendered by the State Superintendent in accordance with the provisions of this Chapter.

(vi) The decision rendered by the State Superintendent in accordance with Section 9 of this Chapter, and the adjustment of future entitlements or remittance by the district of funds in accordance with this decision, shall be a final agency action and subject to judicial review in accordance with the provisions of Wyo. Stat. § 16-3-114.