

A SUMMARY OF 1997 APA AMENDMENTS

Chapter 97-286, Laws of Florida, created §120.52(15)(c)4., Florida Statutes. This new subparagraph exempts memoranda issued by the Executive Office of the Governor relating to information resources management from the definition of “rule.”

Chapter 97-176, Laws of Florida, made numerous changes to the APA. Many of these amendments were minor changes made to correct cross-reference errors, timing inconsistencies, or other technical problems that had been identified after the passage of the major APA reform bill in 1996.

Several changes related to the new variance and waiver procedure created in 1996. These include: additional notice requirements; authorization for an agency to place durational limits and conditions on waivers or variances only to the extent necessary to achieve the purpose of the underlying statute; a determination that public employees are not persons subject to regulation for the purposes of petitioning for a variance or waiver; a provision that agencies do not have authority to grant waivers or variances to rules required by the federal government for that agency’s implementation or retention of a federally approved or delegated program, except as authorized by those programs or the Federal government; expedited time frames, limited notice, and a limitation on comments on petitions for emergency waiver or variance; a process to obtain additional information during review of a petition for waiver or variance; an exception of the Board of Trustees of the Internal Improvement Trust Fund from the default provisions of waiver and variance; and a provision that students are not persons subject to regulation for the purposes of petitioning for a variance or waiver to rules of educational units.

Other important changes include: clarification that educational units are “agencies” under the meaning of the Act; deletion of the requirement to provide a notice of rule development for repeal of a rule; deletion of the requirement that any preliminary text of proposed rules must be published as part of the rule development notice, provided that information on how any draft may be obtained without cost is included; a requirement that a determination to mediate must be made within 10 days after the time period stated in the announcement for election of an administrative remedy; clarification that agency heads and designees may be presiding officers who may not receive ex parte communications; restoration of language regarding judicial review and stays from the 1995 act that provides that the filing of a petition does not itself stay enforcement of the agency decision; and exemption of educational units and units of local government from the requirement to publish notices in the *Florida Administrative Weekly*.

All of the changes to the Act have not been mentioned in this summary. Please carefully examine these two new chapter laws amending the Administrative Procedure Act to determine the changes which may affect your agency's practice. If the Joint Administrative Procedures Committee can assist you, please give us a call.

LEGISLATIVE REPORT

1997 SESSION

CHANGES IN

CHAPTER 120

CHAPTER 97-176

Committee Substitute for Senate Bill No. 1066

An act relating to administrative procedures; amending s. 120.52, F.S.; adding educational units to the definition of the term “agency”; amending s. 120.54, F.S.; deleting the requirement for rule development for rule repeal; authorizing an alternative method by which a person may receive a copy of a preliminary draft of a rule; clarifying that an agency’s decision to use negotiated rulemaking is not final agency action; deleting references to the Department of Commerce; clarifying the time by which the small business ombudsman must provide regulatory alternatives to an agency; extending the period for filing a rule upon provision of regulatory alternatives to a rule; clarifying times for filing when a notice of change to a rule must be filed; extending the period for filing a rule; amending s. 120.541, F.S.; extending the period for filing a rule if a written alternative for a lower cost regulatory alternative to a rule is provided; amending s. 120.542, F.S.; providing that public employees are not persons subject to regulation for the purposes of waiver and variance; authorizing an agency to limit grants of variance or waiver only to the extent necessary to achieve the purpose of the underlying statute; clarifying that agencies may not grant a variance or waiver to rules required by the Federal Government; requiring uniform rules of procedures to contain certain procedures related to waiver and variance; clarifying the procedure by which an agency may request additional necessary information during the review of a petition for waiver or variance; amending s. 120.56, F.S.; providing that a proceeding to determine a violation of s. 120.54(1), F.S., may be consolidated with other proceedings; eliminating authority to bring such an action in conjunction with certain other proceedings; amending s. 120.569, F.S.; conforming references; amending s. 120.57, F.S.; clarifying provisions governing expedited hearings; adding a decision, opinion, order or report of the presiding officer to the record of hearings not involving disputed facts; requiring agencies to use uniform bid protest procedural rules; amending s. 120.573, F.S.; clarifying the time when mediation is authorized; amending s. 120.574, F.S.; providing that intervenors are governed by the decision of the original parties regarding the summary-hearing process; amending s. 120.595, F.S.; providing an exception to the award of attorney’s fees when an agency demonstrates that a statement is required by the Federal Government to implement or retain a delegated or approved program or to meet a condition to receipt of federal funds; amending s. 120.60, F.S.; requiring a notice of intent to deny a license to specify the grounds or basis; providing an exception; specifying criteria for procedures for agencies to take emergency action with respect to licenses; amending s. 120.65, F.S.; providing requirements for the director of the Division of Administrative Hearings; amending s. 120.66, F.S.; clarifying that a presiding officer may be an agency head or designee; amending s. 120.68, F.S.; providing for judicial review; amending s. 120.74, F.S.; specifying the frequency of rule reviews; amending s. 120.81, F.S.; providing that educational units and local units of government need not publish notices or the text of proposed rules in the Florida Administrative Weekly; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsection (1) of section 120.52, Florida Statutes, 1996 Supplement, is amended to read:

120.52 Definitions.—As used in this act:

(1) “Agency” means:

(a) The Governor in the exercise of all executive powers other than those derived from the constitution.

(b) Each state officer and state department, departmental unit described in s. 20.04, commission, regional planning agency, board, multicounty special district with a majority of its governing board comprised of nonelected persons, and authority, including, but not limited to, the Commission on Ethics and the Game and Fresh Water Fish Commission when acting pursuant to statutory authority derived from the Legislature, educational units, and those entities described in chapters 163, 298, 373, 380, and 582 and s. 186.504, except any legal entity or agency created in whole or in part pursuant to chapter 361, part II, an expressway authority pursuant to chapter 348, or any legal or administrative entity created by an interlocal agreement pursuant to s. 163.01(7), unless any party to such agreement is otherwise an agency as defined in this subsection.

(c) Each other unit of government in the state, including counties and municipalities, to the extent they are expressly made subject to this act by general or special law or existing judicial decisions.

Section 2. Section 120.53, Florida Statutes, 1996 Supplement, as amended by section 5 of chapter 96-159, Laws of Florida, and section 2 of chapter 96-423, Laws of Florida, is reenacted to read:

120.53 Maintenance of orders; indexing; listing; organizational information. —

(1)(a) Each agency shall maintain:

1. All agency final orders.

2.a. A current hierarchical subject-matter index, identifying for the public any rule or order as specified in this subparagraph.

b. In lieu of the requirement for making available for public inspection and copying a hierarchical subject-matter index of its orders, an agency may maintain and make available for public use an electronic database of its orders that allows users to research and retrieve the full texts of agency orders by devising an ad hoc indexing system employing any logical search terms in common usage which are composed by the user and which are contained in the orders of the agency or by descriptive information about

the order which may not be specifically contained in the order.

c. The agency orders that must be indexed, unless excluded under paragraph (c) or paragraph (d), include:

(I) Each final agency order resulting from a proceeding under s. 120.57 or s. 120.573.

(II) Each final agency order rendered pursuant to s. 120.57(4) which contains a statement of agency policy that may be the basis of future agency decisions or that may otherwise contain a statement of precedential value.

(III) Each declaratory statement issued by an agency.

(IV) Each final order resulting from a proceeding under s. 120.56 or s. 120.574.

3. A list of all final orders rendered pursuant to s. 120.57(4) which have been excluded from the indexing requirement of this section, with the approval of the Department of State, because they do not contain statements of agency policy or statements of precedential value. The list must include the name of the parties to the proceeding and the number assigned to the final order.

4. All final orders listed pursuant to subparagraph 3.

(b) An agency final order that must be indexed or listed pursuant to paragraph (a) must be indexed or listed within 120 days after the order is rendered. Each final order that must be indexed or listed pursuant to paragraph (a) must have attached a copy of the complete text of any materials incorporated by reference; however, if the quantity of the materials incorporated makes attachment of the complete text of the materials impractical, the order may contain a statement of the location of such materials and the manner in which the public may inspect or obtain copies of the materials incorporated by reference. The Department of State shall establish by rule procedures for indexing final orders, and procedures of agencies for indexing orders must be approved by the department.

(c) Each agency must receive approval in writing from the Department of State for:

1. The specific types and categories of agency final orders that may be excluded from the indexing and public inspection requirements, as determined by the department pursuant to paragraph (d).

2. The method for maintaining indexes, lists, and final orders that must be indexed or listed and made available to the public.

3. The method by which the public may inspect or obtain copies of indexes, lists, and final orders.

4. A sequential numbering system which numbers all final orders required to be indexed or listed pursuant to paragraph (a), in the order rendered.

5. Proposed rules for implementing the requirements of this section for indexing and making final orders available for public inspection.

(d) In determining which final orders may be excluded from the indexing and public inspection requirements, the Department of State may consider all factors specified by an agency, including precedential value, legal significance, and purpose. Only agency final orders that are of limited or no precedential value, that are of limited or no legal significance, or that are ministerial in nature may be excluded.

(e) Each agency shall specify the specific types or categories of agency final orders that are excluded from the indexing and public inspection requirements.

(f) Each agency shall specify the location or locations where agency indexes, lists, and final orders that are required to be indexed or listed are maintained and shall specify the method or procedure by which the public may inspect or obtain copies of indexes, lists, and final orders.

(g) Each agency shall specify all systems in use by the agency to search and locate agency final orders that are required to be indexed or listed, including, but not limited to, any automated system. An agency shall make the search capabilities employed by the agency available to the public subject to reasonable terms and conditions, including a reasonable charge, as provided by s. 119.07. The agency shall specify how assistance and information pertaining to final orders may be obtained.

(h) Each agency shall specify the numbering system used to identify agency final orders.

(2)(a) An agency may comply with subparagraphs (1)(a)1. and 2. by designating an official reporter to publish and index by subject matter each agency order that must be indexed and made available to the public. An agency is in compliance with subparagraph (1)(a)3. if it publishes in its designated reporter a list of each agency final order that must be listed and preserves each listed order and makes it available for public inspection and copying.

(b) An agency may publish its official reporter or may contract with a publishing firm to publish its official reporter; however, if an agency contracts with a publishing firm to publish its reporter, the agency is responsible for the quality, timeliness, and usefulness of the reporter. The Department of State may publish an official reporter for an agency or may contract with a publishing firm to publish the reporter for the agency; however, if the department contracts for publication of the reporter, the department is responsible for the quality, timeliness, and usefulness of the reporter. A reporter that is designated by an agency as its official reporter and approved by the Department of State constitutes the official compilation of the administrative final orders for that agency.

(c) A reporter that is published by the Department of State may be made available by annual subscription, and each agency that designates an official reporter published by the department may be charged a space rate payable to the department. The subscription rate and the space rate must be equitably apportioned to cover the costs of publishing the reporter.

(d) An agency that designates an official reporter need not publish the full text of an agency final order that is rendered pursuant to s. 120.57(4) and that must be indexed pursuant to paragraph (1)(a), if the final order is preserved by the agency and made available for public inspection and copying and the official reporter indexes the final order and includes a synopsis of the order. A synopsis must include the names of the parties to the order; any rule, statute, or constitutional provision pertinent to the order; a summary of the facts, if included in the order, which are pertinent to the final disposition; and a summary of the final disposition.

(3) Agency orders that must be indexed or listed are documents of continuing legal value and must be permanently preserved and made available to the public. Each agency to which this chapter applies shall provide, under the direction of the Department of State, for the preservation of orders as required by this chapter and for maintaining an index to those orders.

(4) Each agency must provide any person who makes a request with a written description of its organization and the general course of its operations.

Section 3. Paragraphs (a), (c), and (d) of subsection (2), paragraphs (a), (b), (d), and (e) of subsection (3), paragraph (a) of subsection (4), and paragraph (b) of subsection (7) of section 120.54, Florida Statutes, 1996 Supplement, as amended by section 10 of chapter 96-159, Laws of Florida, section 6 of chapter 96-320, Laws of Florida, and section 9 of chapter 96-370, Laws of Florida, are amended to read:

120.54 Rulemaking.—

(2) RULE DEVELOPMENT; WORKSHOPS; NEGOTIATED RULEMAKING.—

(a) Except when the intended action is the repeal of a rule, agencies shall provide notice of the development of proposed rules by publication of a notice of rule development in the Florida Administrative Weekly before providing notice of a proposed rule as required by paragraph (3)(a). The notice of rule development shall indicate the subject area to be addressed by rule development, provide a short, plain explanation of the purpose and effect of the proposed rule development, cite the specific legal authority for the proposed rule development, and include the preliminary text of the proposed rules, if available, or a statement of how a person may promptly obtain, without cost, a copy of any preliminary draft, if available.

(c) An agency may hold public workshops for purposes of rule development An

agency must hold public workshops, including workshops in various regions of the state or the agency's service area, for purposes of rule development if requested in writing by any affected person, unless the agency head explains in writing why a workshop is unnecessary. The explanation is not final agency action subject to review pursuant to ss. 120.569 and 120.57. The failure to provide the explanation when required may be a material error in procedure pursuant to s. 120.56(1)(c). When a workshop or public hearing is held, the agency must ensure that the persons responsible for preparing the proposed rule are available to explain the agency's proposal and to respond to questions or comments regarding the rule being developed. The workshop may be facilitated or mediated by a neutral third person, or the agency may employ other types of dispute resolution alternatives for the workshop that are appropriate for rule development. Notice of a rule development workshop shall be by publication in the Florida Administrative Weekly not less than 14 days prior to the date on which the workshop is scheduled to be held and shall indicate the subject area which will be addressed; the agency contact person; and the place, date, and time of the workshop.

(d)1. An agency may use negotiated rulemaking in developing and adoption rules. The agency should consider the use of negotiated rulemaking when complex rules are being drafted or strong opposition to the rules is anticipated. The agency should consider, but is not limited to considering, whether a balanced committee of interested persons who will negotiate in good faith can be assembled, whether the agency is willing to support the work of the negotiating committee, and whether the agency can use the group consensus as the basis for its proposed rule. Negotiated rulemaking uses a committee of designated representatives to draft a mutually acceptable proposed rule.

2. An agency that chooses to use the negotiated rulemaking process described in this paragraph shall publish in the Florida Administrative Weekly a notice of negotiated rulemaking that includes a listing of the representative groups that will be invited to participate in the negotiated rulemaking process. Any person who believes that his or her interest is not adequately represented may apply to participate within 30 days after publication of the notice. All meetings of the negotiating committee shall be noticed and open to the public pursuant to the provisions of this chapter. The negotiating committee shall be chaired by a neutral facilitator or mediator.

3. The agency's decision to use negotiated rulemaking, its selection of the representative groups, and approval or denial of an application to participate in the negotiated rulemaking process are not agency action. Nothing in this subparagraph is intended to affect the rights of an affected person to challenge a proposed rule developed under this paragraph in accordance with s. 120.56(2).

(3) ADOPTION PROCEDURES.—

(a) Notices.—

1. Prior to the adoption, amendment, or repeal of any rule other than an emergency rule, an agency, upon approval of the agency head, shall give notice of its intended

action, setting forth a short, plain explanation of the purpose and effect of the proposed action; the full text of the proposed rule or amendment and a summary thereof; a reference to the specific rulemaking authority pursuant to which the rule is adopted; and a reference to the section or subsection of the Florida Statutes or the Laws of Florida being implemented, interpreted, or made specific. The notice shall include a summary of the agency's statement of the estimated regulatory costs, if one has been prepared, based on the factors set forth in s. 120.541(2), and a statement that any person who wishes to provide the agency with information regarding the statement of estimated regulatory costs, or to provide a proposal for a lower cost regulatory alternative as provided by s. 120.541(1), must do so in writing within 21 days after publication of the notice. The notice must state the procedure for requesting a public hearing on the proposed rule. Except when the intended action is the repeal of a rule, the notice shall include a reference both to the date on which and to the place where the notice of rule development that is required by subsection (2) appeared.

2. The notice shall be published in the Florida Administrative Weekly not less than 28 days prior to the intended action. The proposed rule shall be available for inspection and copying by the public at the time of the publication of notice.

3. The notice shall be mailed to all persons named in the proposed rule and to all persons who, at least 14 days prior to such mailing, have made requests of the agency for advance notice of its proceedings. The agency shall also give such notice as is prescribed by rule to those particular classes of persons to whom the intended action is directed.

4. The adopting agency shall file with the committee, at least 21 days prior to the proposed adoption date, a copy of each rule it proposes to adopt; a detailed written statement of the facts and circumstances justifying the proposed rule; a copy of any statement of estimated regulatory costs that has been prepared pursuant to s. 120.541; a statement of the extent to which the proposed rule relates to federal standards or rules on the same subject; and the notice required by subparagraph 1.

(b) Special matters to be considered in rule adoption.—

1. Statement of estimated regulatory costs.—Prior to the adoption, amendment, or repeal of any rule other than an emergency rule, an agency is encouraged to prepare a statement of estimated regulatory costs of the proposed rule, as provided by s. 120.541.

2. Small businesses, small counties, and small cities.—

a. Each agency, before the adoption, amendment, or repeal of a rule, shall consider the impact of the rule on small businesses as defined by s. 288.703 and the impact of the rule on small counties or small cities as defined by s. 120.52. Whenever practicable, an agency shall tier its rules to reduce disproportionate impacts on small businesses, small counties, or small cities to avoid regulating small businesses, small counties, or small cities that do not contribute significantly to the problem the rule is designed to address. An agency may define "small business" to include businesses employing more than 100

persons, may define “small county” to include those with populations of more than 75,000, and may define “small city” to include those with populations of more than 10,000, if it finds that such a definition is necessary to adapt a rule to the needs and problems of small businesses, small counties, or small cities. The agency shall consider each of the following methods for reducing the impact of the proposed rule on small businesses, small counties, and small cities, or any combination of these entities:

- (I) Establishing less stringent compliance or reporting requirements in the rule.
- (II) Establishing less stringent schedules or deadlines in the rule for compliance or reporting requirements.
- (III) Consolidating or simplifying the rule’s compliance or reporting requirements.
- (IV) Establishing performance standards or best-management practices to replace design or operational standards in the rule.
- (V) Exempting small businesses, small counties, or small cities from any or all requirements of the rule.

b.(I) If the agency determines that the proposed action will affect small businesses as defined by the agency as provided in sub-subparagraph a., the agency shall send written notice of the rule to the small business ombudsman of the Office of Tourism, Trade, and Economic Development ~~Department of Commerce~~ not less than 28 ~~21~~ days prior to the intended action.

(II) Each agency shall adopt those regulatory alternatives offered by the small business ombudsman and provided to the agency no later than 21 days after the ombudsman’s receipt of the written notice of the rule which it finds are feasible and consistent with the stated objectives of the proposed rule and which would reduce the impact on small businesses. When regulatory alternatives are offered by the small business ombudsman, the 90-day period for filing the rule in s. 120.54(3)(e)2. is extended for a period of 21 days.

(III) If an agency does not adopt all alternatives offered pursuant to this sub-subparagraph, it shall, prior to rule adoption or amendment and pursuant to subparagraph (d)1., file a detailed written statement with the committee explaining the reasons for failure to adopt such alternatives. Within 3 working days of the filing of such notice, the agency shall send a copy of such notice to the small business ombudsman.

(d) Modification or withdrawal of proposed rules.—

1. After the final public hearing on the proposed rule, or after the time for requesting a hearing has expired, if the rule has not been changed from the rule as previously filed with the committee, or contains only technical changes, the adopting agency shall file a notice to that effect with the committee at least 7 days prior to filing the rule for adoption.

Any change, other than a technical change that does not affect the substance of the rule, must be supported by the record of public hearings held on the rule, must be in response to written material received on or before the date of the final public hearing, or must be in response to a proposed objection by the committee. In addition, when any change is made in a proposed rule, other than a technical change, the adopting agency shall provide a copy of a notice of change by certified mail or actual delivery to any person who requests it in writing no later than 21 days after the notice required in paragraph (a). The agency shall file the notice with the committee, along with the reasons for such change, and provide the notice to persons requesting it, at least 21 days prior to filing the rule for adoption. The notice shall be published in the Florida Administrative Weekly at least 21 days prior to filing the rule for adoption. This subparagraph does not apply to emergency rules adopted pursuant to subsection (4).

2. After the notice required by paragraph (a) and prior to adoption, the agency may withdraw the rule in whole or in part.

3. After adoption and before the effective date, a rule may be modified or withdrawn only in response to an objection by the committee or may be modified to extend the effective date by not more than 60 days when the committee has notified the agency that an objection to the rule is being considered.

4. The agency shall give notice of its decision to withdraw or modify a rule in the first available issue of the publication in which the original notice of rulemaking was published, shall notify those persons described in subparagraph (a)3. in accordance with the requirements of that subparagraph, and shall notify the Department of State if the rule is required to be filed with the Department of State.

5. After a rule has become effective, it may be repealed or amended only through the rulemaking procedures specified in this chapter.

(e) Filing for final adoption; effective date.—

1. If the adopting agency is required to publish its rules in the Florida Administrative Code, it shall file with the Department of State three certified copies of the rule it proposes to adopt, a summary of the rule, a summary of any hearings held on the rule, and a detailed written statement of the facts and circumstances justifying the rule. Agencies not required to publish their rules in the Florida Administrative Code shall file one certified copy of the proposed rule, and the other material required by this subparagraph, in the office of the agency head, and such rules shall be open to the public.

2. Filings shall be made no less than 28 days nor more than 90 days after the notice required by paragraph (a). When ~~If~~ a required notice of change is ~~required to be published~~ prior to the expiration of the time to file the rule for adoption, the ~~90-day~~ period during which a rule must be filed for adoption is extended to 45 ~~24~~ days after the date of publication. If notice of a public hearing is published prior to the expiration of the time to file the rule for adoption held, the period during which a rule must be filed for adoption

~~90-day~~ limit is extended to 45 ~~21~~ days after adjournment of the final hearing on the rule, 21 days after receipt of all material authorized to be submitted at the hearing, or 21 days after receipt of the transcript, if one is made, whichever is latest. The term ~~For purposes of this subparagraph,~~ “public hearing” includes any public meeting held by any agency at which the rule is considered. The filing of a petition for an administrative determination under the provisions of s. 120.56(2) shall toll the 90-day period during which a rule must be filed for adoption until the administrative law judge has filed the final order with the clerk.

3. At the time a rule is filed, the agency shall certify that the time limitations prescribed by this paragraph have been complied with, that all statutory rulemaking requirements have been met, and that there is no administrative determination pending on the rule.

4. At the time a rule is filed, the committee shall certify whether the agency has responded in writing to all material and timely written comments or written inquiries made on behalf of the committee. The department shall reject any rule not filed within the prescribed time limits; that does not satisfy all statutory rulemaking requirements; upon which an agency has not responded in writing to all material and timely written inquiries or written comments; upon which an administrative determination is pending; or which does not include a statement of estimated regulatory costs, if required.

5. If a rule has not been adopted within the time limits imposed by this paragraph or has not been adopted in compliance with all statutory rulemaking requirements, the agency proposing the rule shall withdraw the rule and give notice of its action in the next available issue of the Florida Administrative Weekly.

6. The proposed rule shall be adopted on being filed with the Department of State and become effective 20 days after being filed, on a later date specified in the rule, or on a date required by statute. Rules not required to be filed with the Department of State shall become effective when adopted by the agency head or on a later date specified by rule or statute. If the committee notifies an agency that an objection to a rule is being considered, the agency may postpone the adoption of the rule to accommodate review of the rule by the committee. When an agency postpones adoption of a rule to accommodate review by the committee, the 90-day period for filing the rule is tolled until the committee notifies the agency that it has completed its review of the rule.

(4) EMERGENCY RULES.—

(a) If an agency finds that an immediate danger to the public health, safety, or welfare requires emergency action, the agency may adopt any rule necessitated by the immediate danger. The agency may adopt a rule by any procedure which is fair under the circumstances if:

1. The procedure provides at least the procedural protection given by other statutes, the State Constitution, or the United States Constitution.

2. The agency takes only that action necessary to protect the public interest under the emergency procedure.

3. The agency publishes in writing at the time of, or prior to, its action the specific facts and reasons for finding an immediate danger to the public health, safety, or welfare and its reasons for concluding that the procedure used is fair under the circumstances. In any event, notice of emergency rules, other than those of educational units or units of government with jurisdiction in only one or a part of one county, including the full text of the rules, shall be published in the first available issue of the Florida Administrative Weekly and provided to the committee. The agency's findings of immediate danger, necessity, and procedural fairness shall be judicially reviewable.

(7) PETITION TO INITIATE RULEMAKING.—

(b) If the petition filed under this subsection is directed to an existing rule which the agency has not adopted by the rulemaking procedures or requirements set forth in this chapter, the agency shall, not later than 30 days following the date of filing a petition, initiate rulemaking, ~~otherwise comply with the requested action~~, or provide notice in the Florida Administrative Weekly that the agency will hold a public hearing on the petition within 30 days after publication of the notice. The purpose of the public hearing is to consider the comments of the public directed to the agency rule which has not been adopted by the rulemaking procedures or requirements of this chapter, its scope and application, and to consider whether the public interest is served adequately by the application of the rule on a case-by-case basis, as contrasted with its adoption by the rulemaking procedures or requirements set forth in this chapter.

Section 4. Paragraph (a) of subsection (1) of section 120.541, Florida Statutes, 1996 Supplement, is amended to read:

120.541 Statement of estimated regulatory costs.—

(1)(a) A substantially affected person, within 21 days after publication of the notice provided under s. 120.54(3)(a), may submit to an agency a good faith written proposal for a lower cost regulatory alternative to a proposed rule which substantially accomplishes the objectives of the law being implemented. The proposal may include the alternative of not adopting any rule, so long as the proposal explains how the lower costs and objectives of the law will be achieved by not adopting any rule. If such a proposal is submitted, the 90-day period for filing the rule is extended 21 days.

Section 5. Subsections (1), (3), (5), and (6) of section 120.542, Florida Statutes, 1996 Supplement, are amended, present subsection (7) of that section is renumbered as subsection (8) and amended, present subsection (8) of that section is renumbered as subsection (9), and a new subsection (7) is added to that section, to read:

120.542 Variances and waivers.—

(1) Strict application of uniformly applicable rule requirements can lead to unreasonable, unfair, and unintended results in particular instances. The Legislature finds that it is appropriate in such cases to adopt a procedure for agencies to provide relief to persons subject to regulation. A public employee is not a person subject to regulation under this section for the purpose of petitioning for a variance or waiver to a rule that affects that public employee in his or her capacity as a public employee. Agencies are authorized to grant variances and waivers to requirements of their rules consistent with this section and with rules adopted under the authority of this section. An agency may limit the duration of any grant of a variance or waiver or otherwise impose conditions on the grant only to the extent necessary for the purpose of the underlying statute to be achieved. This section does not authorize agencies to grant variances or waivers to statutes or to rules required by the Federal Government for the agency's implementation or retention of any federally approved or delegated program, except as allowed by the program or when the variance or waiver is also approved by the appropriate agency of the Federal Government. This section is supplemental to, and does not abrogate, the variance and waiver provisions in any other statute.

(3) The Governor and Cabinet, sitting as the Administration Commission, shall adopt uniform rules of procedure pursuant to the requirements of s. 120.54(5) establishing procedures for granting or denying petitions for variances and waivers. The uniform rules shall ~~may~~ include procedures for the granting, denying, or revoking or denial of emergency and temporary variances and waivers. Such provisions may provide for expedited timeframes, waiver of or limited public notice, and limitations on comments on the petition in the case of such temporary or emergency variances and waivers.

(5) A person who is subject to regulation by an agency rule may file a petition with that agency, with a copy to the committee, requesting a variance or waiver from the agency's rule. In addition to any requirements mandated by the uniform rules, each petition shall specify:

- (a) The rule from which a variance or waiver is requested.
- (b) The type of action requested.
- (c) The specific facts that would justify a waiver or variance for the petitioner.
- (d) The reason why the variance or the waiver requested would serve the purposes of the underlying statute.

(6) Within 15 days after receipt of a petition for variance or waiver, an agency shall provide notice of the petition to the Department of State, which shall publish notice of the petition in the first available issue of the Florida Administrative Weekly. The notice shall contain the name of the petitioner, the date the petition was filed, the rule number and nature of the rule from which variance or waiver is sought, and an explanation of how a copy of the petition can be obtained. The uniform rules shall provide a means for

interested persons to provide comments on the petition.

(7) Except for requests for emergency variances or waivers, within 30 days after receipt of a petition for a variance or waiver, an agency shall review the petition and request submittal of all additional information that the agency is permitted by this section to require. Within 30 days after receipt of such additional information, the agency shall review it and may request only that information needed to clarify the additional information or to answer new questions raised by or directly related to the additional information. If the petitioner asserts that any request for additional information is not authorized by law or by rule of the affected agency, the agency shall proceed, at the petitioner's written request, to process the petition.

~~(8)(7)~~ An agency shall grant or deny a petition for variance or waiver within 90 days ~~after of its receipt of the original petition, the last item of timely requested additional material, or the petitioner's written request to finish processing the petition.~~ A. If such petition is not granted or denied within 90 days after of receipt of a completed, the petition is shall be deemed approved. A copy of the An order granting or denying the petition shall be filed with the committee in writing and shall contain a statement of the relevant facts and reasons supporting the agency's action. The agency shall provide notice of the disposition of the petition to the Department of State, which shall publish the notice in the next available issue of the Florida Administrative Weekly. The notice shall contain the name of the petitioner, the date the petition was filed, the rule number and nature of the rule from which the waiver or variance is sought, a reference to the place and date of publication of the notice of the petition, the date of the order denying or approving the variance or waiver, the general basis for the agency decision, and an explanation of how a copy of the order can be obtained. The agency's decision to grant or deny the petition shall be supported by competent substantial evidence and is subject to ss. 120.569 and 120.57. Any proceeding pursuant to ss. 120.569 and 120.57 in regard to a variance or waiver shall be limited to the agency action on the request for the variance or waiver, except that a proceeding in regard to a variance or waiver may be consolidated with any other proceeding authorized by this chapter.

~~(9)(8)~~ Each agency shall maintain a record of the type and disposition of each petition, including temporary or emergency variances and waivers, filed pursuant to this section. On October 1 of each year, each agency shall file a report with the Governor, the President of the Senate, and the Speaker of the House of Representatives listing the number of petitions filed requesting variances to each agency rule, the number of petitions filed requesting waivers to each agency rule, and the disposition of all petitions. Temporary or emergency variances and waivers, and the reasons for granting or denying temporary or emergency variances and waivers, shall be identified separately from other waivers and variances.

Section 6. Paragraph (f) of subsection (4) of section 120.56, Florida Statutes, 1996 Supplement, is amended to read:

120.56 Challenges to rules.—

(4) CHALLENGING AGENCY STATEMENTS DEFINED AS RULES; SPECIAL PROVISIONS.—

(f) All proceedings to determine a violation of s. 120.54(1)(a) shall be brought pursuant to this subsection. A proceeding pursuant to this subsection may be consolidated ~~brought in conjunction~~ with a proceeding under any other section of this chapter ~~or consolidated with such a proceeding~~. Nothing in this paragraph shall be construed to prevent a party whose substantial interests have been determined by an agency action from bringing a proceeding pursuant to s. 120.57(1)(e).

Section 7. Subsection (1) and paragraph (a) of subsection (2) of section 120.569, Florida Statutes, 1996 Supplement, are amended to read:

120.569 Decisions which affect substantial interests.—

(1) The provisions of this section apply in all proceedings in which the substantial interests of a party are determined by an agency, unless the parties are proceeding under s. 120.573 or s. 120.574. Unless waived by all parties, s. 120.57(1) applies whenever the proceeding involves a disputed issue of material fact. Unless otherwise agreed, s. 120.57(2) applies in all other cases. Parties shall be notified of any order, including a final order. Unless waived, a copy of the order shall be delivered or mailed to each party or the party's attorney of record at the address of record. Each notice shall inform the recipient of any administrative hearing or judicial review that is available under this section, s. 120.57, or s. 120.68; shall indicate the procedure which must be followed to obtain the hearing or judicial review; and shall state the time limits which apply.

(2)(a) Except for any proceeding conducted as prescribed in s. 120.56, a petition or request for a hearing under this section shall be filed with the agency. If the agency requests an administrative law judge from the division, it shall so notify the division within 15 days after receipt of the petition or request. A request for a hearing shall be granted or denied within 15 days after receipt. On the request of any agency, the division shall assign an administrative law judge with due regard to the expertise required for the particular matter. The referring agency shall take no further action with respect to a the formal proceeding under s. 120.57(1), except as a party litigant, as long as the division has jurisdiction over the ~~formal proceeding under s. 120.57(1)~~. Any party may request the disqualification of the administrative law judge by filing an affidavit with the division prior to the taking of evidence at a hearing, stating the grounds with particularity.

Section 8. Section 120.57, Florida Statutes, 1996 Supplement, as amended by section 19 of chapter 96-159, Laws of Florida, and section 1 of chapter 96-423, Laws of Florida, is amended to read:

120.57 Additional procedures for particular cases.—

(1) ADDITIONAL PROCEDURES APPLICABLE TO HEARINGS INVOLVING

DISPUTED ISSUES OF MATERIAL FACT.—

(a) Except as provided in ss. 120.80 and 120.81, an administrative law judge assigned by the division shall conduct all hearings under this subsection, except for hearings before agency heads or a member thereof. If the administrative law judge assigned to a hearing becomes unavailable, the division shall assign another administrative law judge who shall use any existing record and receive any additional evidence or argument, if any, which the new administrative law judge finds necessary.

(b) All parties shall have an opportunity to respond, to present evidence and argument on all issues involved, to conduct cross-examination and submit rebuttal evidence, to submit proposed findings of facts and orders, to file exceptions to the presiding officer's recommended order, and to be represented by counsel or other qualified representative. When appropriate, the general public may be given an opportunity to present oral or written communications. If the agency proposes to consider such material, then all parties shall be given an opportunity to cross-examine or challenge or rebut the material.

(c) Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.

(d) Notwithstanding s. 120.569(2)(e), similar fact evidence of other violations, wrongs, or acts is admissible when relevant to prove a material fact in issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity. When the state in an administrative proceeding intends to offer evidence of other acts or offenses under this paragraph, the state shall furnish to the party whose substantial interests are being determined and whose other acts or offenses will be the subject of such evidence, no fewer than 10 days before commencement of the proceeding, a written statement of the acts or offenses it intends to offer, describing them and the evidence the state intends to offer with particularity. Notice is not required for evidence of acts or offenses which is used for impeachment or on rebuttal.

(e)1. Any agency action that determines the substantial interests of a party and that is based on an unadopted rule is subject to de novo review by an administrative law judge.

2. The agency action shall not be presumed valid or invalid. The agency must demonstrate that the unadopted rule:

a. Is within the powers, functions, and duties delegated by the Legislature or, if the agency is operating pursuant to authority derived from the State Constitution, is within that authority;

b. Does not enlarge, modify, or contravene the specific provisions of law implemented;

- c. Is not vague, establishes adequate standards for agency decisions, or does not vest unbridled discretion in the agency;
- d. Is not arbitrary or capricious;
- e. Is not being applied to the substantially affected party without due notice;
- f. Is supported by competent and substantial evidence; and
- g. Does not impose excessive regulatory costs on the regulated person, county, or city.

3. The recommended and final orders in any proceeding shall be governed by the provisions of paragraphs (i) and (j), except that the administrative law judge's determination regarding the unadopted rule shall not be rejected by the agency unless the agency first determines from a review of the complete record, and states with particularity in the order, that such determination is clearly erroneous or does not comply with essential requirements of law. In any proceeding for review under s. 120.68, if the court finds that the agency's rejection of the determination regarding the unadopted rule does not comport with the provisions of this subparagraph, the agency action shall be set aside and the court shall award to the prevailing party the reasonable costs and a reasonable attorney's fee for the initial proceeding and the proceeding for review.

(f) The record in a case governed by this subsection shall consist only of:

1. All notices, pleadings, motions, and intermediate rulings.
2. Evidence admitted.
3. Those matters officially recognized.
4. Proffers of proof and objections and rulings thereon.
5. Proposed findings and exceptions.
6. Any decision, opinion, order, or report by the presiding officer.
7. All staff memoranda or data submitted to the presiding officer during the hearing or prior to its disposition, after notice of the submission to all parties, except communications by advisory staff as permitted under s.120.66(1), if such communications are public records.
8. All matters placed on the record after an ex parte communication.
9. The official transcript.

(g) The agency shall accurately and completely preserve all testimony in the proceeding, and, on the request of any party, it shall make a full or partial transcript available at no more than actual cost.

(h) Findings of fact shall be based upon a preponderance of the evidence, except in penal or licensure disciplinary proceedings or except as otherwise provided by statute, and shall be based exclusively on the evidence of record and on matters officially recognized.

(i) The presiding officer shall complete and submit to the agency and all parties a recommended order consisting of findings of fact, conclusions of law, and recommended disposition or penalty, if applicable, and any other information required by law to be contained in the final order. All proceedings conducted pursuant to this subsection shall be de novo. The agency shall allow each party 15 days in which to submit written exceptions to the recommended order.

(j) The agency may adopt the recommended order as the final order of the agency. The agency in its final order may reject or modify the conclusions of law and interpretation of administrative rules over which it has substantive jurisdiction. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law. The agency may accept the recommended penalty in a recommended order, but may not reduce or increase it without a review of the complete record and without stating with particularity its reasons therefore in the order, by citing to the record in justifying the action.

(k) If a recommended order is submitted to an agency, the agency shall provide a copy of its final order to the division within 15 days after the order is filed with the agency clerk.

(l) Notwithstanding any law to the contrary, when statutes or rules impose conflicting time requirements for the scheduling ~~issuance~~ of expedited hearings or issuance of recommended or final orders, the director of the division shall have the authority to set the proceedings for the orderly operation of this chapter.

(2) ADDITIONAL PROCEDURES APPLICABLE TO HEARINGS NOT INVOLVING DISPUTED ISSUES OF MATERIAL FACT.—In any case to which subsection (1) does not apply:

(a) The agency shall:

1. Give reasonable notice to affected persons of the action of the agency, whether proposed or already taken, or of its decision to refuse action, together with a summary of

the factual, legal, and policy grounds therefor.

2. Give parties or their counsel the option ~~an opportunity~~, at a convenient time and place, to present to the agency or hearing officer written or oral evidence in opposition to the action of the agency or to its refusal to act, or a written statement challenging the grounds upon which the agency has chosen to justify its action or inaction.

3. If the objections of the parties are overruled, provide a written explanation within 7 days.

(b) The record shall only consist of:

1. The notice and summary of grounds.
2. Evidence received.
3. All written statements submitted.
4. Any decision overruling objections.
5. All matters placed on the record after an ex parte communication.
6. The official transcript.
7. Any decision, opinion, order, or report by the presiding officer.

(3) ADDITIONAL PROCEDURES APPLICABLE TO PROTESTS TO CONTRACT BIDDING OR AWARD.—Agencies subject to this chapter shall utilize the uniform rules of procedure, which provide ~~An agency which enters into a contract pursuant to the provisions of ss. 282.303–282.313, chapter 255, chapter 287, or chapters 334–349 shall adopt rules specifying~~ procedures for the resolution of protests arising from the contract bidding process. Such rules shall at least provide that:

(a) The agency shall provide notice of its decision or intended decision concerning a bid solicitation or a contract award as follows:

1. For a bid solicitation, notice of a decision or intended decision shall be given by United States mail or by hand delivery.
2. For any decision of the Division of Purchasing of the Department of Management Services concerning a request by an agency for approval of an exceptional purchase under part I of chapter 287 and the rules of the Division of Purchasing, notice of a decision or intended decision shall be given by posting such notice in the office of the Division of Purchasing.
3. For any other agency decision, notice of a decision or intended decision shall be

given either by posting the bid tabulation at the location where the bids were opened or by certified United States mail or other express delivery service, return receipt requested.

The notice required by this paragraph shall contain the following statement: "Failure to file a protest within the time prescribed in s. 120.57(3), Florida Statutes, shall constitute a waiver of proceedings under chapter 120, Florida Statutes."

(b) Any person who is adversely affected by the agency decision or intended decision shall file with the agency a notice of protest in writing within 72 hours after the posting of the bid tabulation or after receipt of the notice of the agency decision or intended decision and shall file a formal written protest within 10 days after filing the notice of protest. With respect to a protest of the specifications contained in an invitation to bid or in a request for proposals, the notice of protest shall be filed in writing within 72 hours after the receipt of notice of the project plans and specifications or intended project plans and specifications in an invitation to bid or request for proposals, and the formal written protest shall be filed within 10 days after the date the notice of protest is filed. Failure to file a notice of protest or failure to file a formal written protest shall constitute a waiver of proceedings under this chapter. The formal written protest shall state with particularity the facts and law upon which the protest is based. Saturdays, Sundays, and legal holidays shall be excluded in the computation of the 72-hour time periods provided by this paragraph.

(c) Upon receipt of the formal written protest which has been timely filed, the agency shall stop the bid solicitation process or the contract award process until the subject of the protest is resolved by final agency action, unless the agency head sets forth in writing particular facts and circumstances which require the continuance of the bid solicitation process or the contract award process without delay in order to avoid an immediate and serious danger to the public health, safety, or welfare.

(d)1. The agency shall provide an opportunity to resolve the protest by mutual agreement between the parties within 7 days, excluding Saturdays, Sundays, and legal holidays, after receipt of a formal written protest.

2. If the subject of a protest is not resolved by mutual agreement within 7 days, excluding Saturdays, Sundays, and legal holidays, after receipt of the formal written protest, and if there is no disputed issue of material fact, an informal proceeding shall be conducted pursuant to subsection (2) and applicable agency rules before a person whose qualifications have been prescribed by rules of the agency.

3. If the subject of a protest is not resolved by mutual agreement within 7 days, excluding Saturdays, Sundays, and legal holidays, after receipt of the formal written protest, and if there is a disputed issue of material fact, the agency shall refer the protest to the division for proceedings under subsection (1).

(e) Upon receipt of a formal written protest referred pursuant to this subsection, the director of the division shall expedite the hearing and assign an administrative law judge

who shall commence a hearing within 30 days after the receipt of the formal written protest by the division and enter a recommended order within 30 days after the hearing or within 30 days after receipt of the hearing transcript by the administrative law judge, whichever is later. Each party shall be allowed 10 days in which to submit written exceptions to the recommended order. A final order shall be entered by the agency within 30 days of the entry of a recommended order. The provisions of this paragraph may be waived upon stipulation by all parties.

(f) In a competitive-procurement protest, no submissions made after the bid or proposal opening amending or supplementing the bid or proposal shall be considered. Unless otherwise provided by statute, the burden of proof shall rest with the party protesting the proposed agency action. In a competitive-procurement protest, other than a rejection of all bids, the administrative law judge shall conduct a de novo proceeding to determine whether the agency's proposed action is contrary to the agency's governing statutes, the agency's rules or policies, or the bid or proposal specifications. The standard of proof for such proceedings shall be whether the proposed agency action was clearly erroneous, contrary to competition, arbitrary, or capricious. In any bid-protest proceeding contesting an intended agency action to reject all bids, the standard of review by an administrative law judge shall be whether the agency's intended action is illegal, arbitrary, dishonest, or fraudulent.

(4) INFORMAL DISPOSITION.—Unless precluded by law, informal disposition may be made of any proceeding by stipulation, agreed settlement, or consent order.

(5) APPLICABILITY.—This section does not apply to agency investigations preliminary to agency action.

Section 9. Section 120.573, Florida Statutes, 1996 Supplement, is amended to read:

120.573 Mediation of disputes.—Each announcement of an agency action that affects substantial interests shall advise whether mediation of the administrative dispute for the type of agency action announced is available and that choosing mediation does not affect the right to an administrative hearing. If the agency and all parties to the administrative action agree to mediation, in writing, within 10 days after the time period stated in the announcement for election of an administrative remedy under ss. 120.569 and 120.57, the time limitations imposed by ss. 120.569 and 120.57 shall be tolled to allow the agency and parties to mediate the administrative dispute. The mediation shall be concluded within 60 days of such agreement unless otherwise agreed by the parties. The mediation agreement shall include provisions for mediator selection, the allocation of costs and fees associated with mediation, and the mediating parties' understanding regarding the confidentiality of discussions and documents introduced during mediation. If mediation results in settlement of the administrative dispute, the agency shall enter a final order incorporating the agreement of the parties. If mediation terminates without settlement of the dispute, the agency shall notify the parties in writing that the administrative hearing processes under ss. 120.569 and 120.57 are resumed ~~remain available for disposition of the dispute and the notice shall state with particularity the deadlines for challenging the~~

~~agency action and electing remedies under ss. 120.569 and 120.57.~~

Section 10. Paragraph (c) of subsection (1) of section 120.574, Florida Statutes, 1996 Supplement, is amended to read:

120.574 Summary hearing.—

(1)

(c) Intervenors in the proceeding shall be governed by the decision of the original parties ~~administrative law judge~~ regarding whether the case will proceed in accordance with the summary hearing process and shall not have standing to challenge that decision.

Section 11. Paragraph (a) of subsection (4) of section 120.595, Florida Statutes, 1996 Supplement, is amended to read:

120.595 Attorney's fees.—

(4) CHALLENGES TO AGENCY ACTION PURSUANT TO SECTION 120.56(4).—

(a) Upon entry of a final order that all or part of an agency statement violates s. 120.54(1)(a), the administrative law judge shall award reasonable costs and reasonable attorney's fees to the petitioner, unless the agency demonstrates that the statement is required by the Federal Government to implement or retain a delegated or approved program or to meet a condition to receipt of federal funds.

Section 12. Subsections (3) and (6) of section 120.60, Florida Statutes, 1996 Supplement, are amended to read:

120.60 Licensing.—

(3) Each applicant shall be given written notice either personally or by mail that the agency intends to grant or deny, or has granted or denied, the application for license. The notice must state with particularity the grounds or basis for the issuance or denial of the license, except when issuance is a ministerial act. Unless waived, a copy of the notice shall be delivered or mailed to each party's attorney of record and to each person who has requested notice of agency action. Each notice shall inform the recipient of the basis for the agency decision, shall inform the recipient of any administrative hearing pursuant to ss. 120.569 and 120.57 or judicial review pursuant to s. 120.68 which may be available, shall indicate the procedure which must be followed, and shall state the applicable time limits. The issuing agency shall certify the date the notice was mailed or delivered, and the notice and the certification shall be filed with the agency clerk.

(6) If the agency finds that immediate serious danger to the public health, safety, or welfare requires emergency suspension, restriction, or limitation of a license, the agency

may take such action by any procedure that is fair under the circumstances if:

(a) The procedure provides at least the same procedural protection as is given by other statutes, the State Constitution, or the United States Constitution;

(b) The agency takes only that action necessary to protect the public interest under the emergency procedure; and

(c) The agency states in writing at the time of, or prior to, its action the specific facts and reasons for finding an immediate danger to the public health, safety, or welfare and its reasons for concluding that the procedure used is fair under the circumstances. The agency's findings of immediate danger, necessity, and procedural fairness are judicially reviewable. ~~it shall show compliance in its order with the requirements imposed by s. 120.54(4) on agencies making emergency rules.~~ Summary suspension, restriction, or limitation may be ordered, but a suspension or revocation proceeding pursuant to ss. 120.569 and 120.57 shall also be promptly instituted and acted upon.

Section 13. Subsection (1) of section 120.65, Florida Statutes, 1996 Supplement, is amended to read:

120.65 Administrative law judges.—

(1) The Division of Administrative Hearings within the Department of Management Services shall be headed by a director who shall be appointed by the Administration Commission and confirmed by the Senate. The director, who shall also serve as the chief administrative law judge, and any deputy chief administrative law judge must possess the same minimum qualifications as the administrative law judges employed by the division. The division shall be a separate budget entity, and the director shall be its agency head for all purposes. The Department of Management Services shall provide administrative support and service to the division to the extent requested by the director. The division shall not be subject to control, supervision, or direction by the Department of Management Services in any manner, including, but not limited to, personnel, purchasing, transactions involving real or personal property, and budgetary matters.

Section 14. Subsections (2) and (3) of section 120.66, Florida Statutes, 1996 Supplement, are amended to read:

120.66 Ex parte communications.—

(2) A presiding officer, including an agency head or designee, who is involved in the decisional process and who receives an ex parte communication in violation of subsection (1) shall place on the record of the pending matter all written communications received, all written responses to such communications, and a memorandum stating the substance of all oral communications received and all oral responses made, and shall also advise all parties that such matters have been placed on the record. Any party desiring to rebut the ex parte communication shall be allowed to do so, if such party requests the opportunity

for rebuttal within 10 days after notice of such communication. The presiding officer may, if necessary to eliminate the effect of an ex parte communication, withdraw from the proceeding, in which case the entity that appointed the presiding officer ~~division~~ shall assign a successor.

(3) Any person who makes an ex parte communication prohibited by subsection (1), and any presiding officer, including an agency head or designee, who fails to place in the record any such communication, is in violation of this act and may be assessed a civil penalty not to exceed \$500 or be subjected to other disciplinary action.

Section 15. Subsection (3) of section 120.68, Florida Statutes, 1996 Supplement, is amended to read:

120.68 Judicial review.—

(3) The filing of the petition does not itself stay enforcement of the agency decision, but if the agency decision has the effect of suspending or revoking a license, supersedeas shall be granted as a matter of right upon such conditions as are reasonable, unless the court, upon petition of the agency, determines that a supersedeas would constitute a probable danger to the health, safety, or welfare of the state. The agency also may grant a stay upon appropriate terms, but, whether or not the action has the effect of suspending or revoking a license, a petition to the agency for a stay is not a prerequisite to a petition to the court for supersedeas. In any event the court shall specify the conditions, if any, upon which the stay or supersedeas is granted. ~~a notice or petition does not stay enforcement of the agency decision. The agency may grant a stay upon appropriate terms, but a petition to the agency for a stay is not a prerequisite to a petition to the court for supersedeas. Subject to the Florida Rules of Appellate Procedure, no stay or supersedeas shall be in effect until the party seeking relief files a petition for stay and the agency or court enters an order granting such relief. The order shall specify the conditions, if any, upon which the stay or supersedeas is granted. Where the agency decision has the effect of suspending or revoking a license, a stay shall be granted as a matter of right upon such conditions as are reasonable, unless the agency demonstrates that a stay would constitute a probable danger to the public health, safety, or welfare.~~

Section 16. Subsection (1) of section 120.74, Florida Statutes, 1996 Supplement, is amended to read:

120.74 Agency review, revision, and report.—

(1) Each agency shall review and revise its rules as often as necessary to ensure that its rules are correct and comply with statutory requirements. Additionally, each agency shall perform a formal review of its rules every 2 years. In the ~~annual~~ review, each agency must:

- (a) Identify and correct deficiencies in its rules;

- (b) Clarify and simplify its rules;
- (c) Delete obsolete or unnecessary rules;
- (d) Delete rules that are redundant of statutes;
- (e) Seek to improve efficiency, reduce paperwork, or decrease costs to government and the private sector; and
- (f) Contact agencies that have concurrent or overlapping jurisdiction to determine whether their rules can be coordinated to promote efficiency, reduce paperwork, or decrease costs to government and the private sector.

Section 17. Subsections (1) and (2) of section 120.81, Florida Statutes, 1996 Supplement, are amended to read:

120.81 Exceptions and special requirements; general areas.—

(1) EDUCATIONAL UNITS.—

(a) The preparation or modification of curricula by an educational unit is not a rule as defined by this chapter.

(b) Notwithstanding s. 120.52(15), any tests, test scoring criteria, or testing procedures relating to student assessment which are developed or administered by the Department of Education pursuant to s. 229.57, s. 232.245, s. 232.246, or s. 232.247, or any other statewide educational tests required by law, are not rules.

(c) Notwithstanding any other provision of this chapter, educational units shall not be required to include the full text of the rule or rule amendment in notices relating to rules and need not publish these or other notices in the Florida Administrative Weekly, but notice shall be made~~s. 120.54(3)(a), notice of intent by an educational unit to adopt, amend, or repeal a rule or notice by an educational unit of a petition for a declaratory statement need not be published in the Florida Administrative Weekly or transmitted to the committee; however, the notice, for other than an emergency rule, shall be made at least 21 days prior to the intended action:~~

1. By publication in a newspaper of general circulation in the affected area;
2. By mail to all persons who have made requests of the educational unit for advance notice of its proceedings and to organizations representing persons affected by the proposed rule; and
3. By posting in appropriate places so that those particular classes of persons to whom the intended action is directed may be duly notified.

(d) ~~Notwithstanding s. 120.54(3)(a)4.,~~ Educational units, other than units of the State University System and the Florida School for the Deaf and the Blind, shall not be required to make filings with the committee of the documents required to be filed by s. 120.54 or s. 120.55(1)(a)4. ~~that subparagraph.~~

(e) Notwithstanding s. 120.57(1)(a), hearings which involve student disciplinary suspensions or expulsions may be conducted by educational units.

(f) Sections 120.569 and 120.57 do not apply to any proceeding in which the substantial interests of a student are determined by the State University System or a community college district. The Board of Regents shall establish a committee, at least half of whom shall be appointed by the Council of Student Body Presidents, which shall establish rules and guidelines ensuring fairness and due process in judicial proceedings involving students in the State University System.

(g) Notwithstanding ss. 120.569 and 120.57, in a hearing involving a student disciplinary suspension or expulsion conducted by an educational unit, the 14-day notice of hearing requirement may be waived by the agency head or the hearing officer without the consent of parties.

(h) For purposes of s. 120.68, a district school board whose decision is reviewed under the provisions of s. 231.36 and whose final action is modified by a superior administrative decision shall be a party entitled to judicial review of the final action.

(i) Notwithstanding s. 120.525(2), the agenda for a special meeting of a district school board under authority of s. 230.16 shall be prepared upon the calling of the meeting, but not less than 48 hours prior to the meeting.

(j) Students are not persons subject to regulation for the purposes of petitioning for a variance or waiver to rules of educational units under s. 120.542.

(2) LOCAL UNITS OF GOVERNMENT.—

(a) ~~Notwithstanding s. 120.54(3)(a)4.,~~ Local units of government with jurisdiction in only one county or part thereof shall not be required to make filings with the committee of the documents required to be filed by s. 120.54 ~~that subparagraph.~~

(b) Notwithstanding any other provision of this chapter, units of government with jurisdiction in only one county or part thereof need not publish required notices in the Florida Administrative Weekly, but shall publish these notices in the manner required by their enabling acts for notice of rulemaking or notice of meeting. Notices relating to rules are not required to include the full text of the rule or rule amendment s. 120.54(3)(a), notice of intent by a unit of government with jurisdiction in only one county to adopt, amend, or repeal a rule need not be published in the Florida Administrative Weekly or transmitted to the committee.

Section 18. This act shall take effect upon becoming a law.

Became a law without the Governor's approval May 30, 1997.

Filed in Office Secretary of State May 29, 1997.

CHAPTER 97-286, LAWS OF FLORIDA

Committee Substitute for Senate Bill No. 940

Section 2. Paragraph (c) of subsection (15) of section 120.52, Florida Statutes, 1996 Supplement, is amended to read:

120.52 Definitions.-As used in this act:

(15) "Rule" means each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule. The term also includes the amendment or repeal of a rule. The term does not include:

(c) The preparation or modification of:

- 1 .Agency budgets.
2. Statements, memoranda, or instructions to state agencies issued by the Comptroller as chief fiscal officer of the state and relating or pertaining to claims for payment submitted by state agencies to the Comptroller.
3. Contractual provisions reached as a result of collective bargaining.
4. Memoranda issued by the Executive Office of the Governor relating to information resources management.