



ARIZONA BOARD OF FINGERPRINTING

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Final Minutes for Public Meeting

Held July 6, 2012, at 9:15 a.m.
4205 North 7th Avenue, Suite 206
Phoenix, Arizona

Board Members

Charles Easaw, Department of Education, Chairperson
Matthew A. Scheller, Department of Juvenile Corrections, Vice Chairperson
Chad Campbell, Administrative Office of the Courts
Dale Doucet, Department of Economic Security
Kim Pipersburgh, Department of Health Services

Executive Director

Dennis Seavers

CALL TO ORDER AND ROLL CALL

Mr. Scheller called the meeting to order at 9:22 a.m. The following Board members were present: Matthew A. Scheller, Dale Doucet, and Kim Pipersburgh. The following Board members were absent: Charles Easaw and Chad Campbell.

Also in attendance was Dennis Seavers, Executive Director.

CALL TO THE PUBLIC

Mr. Scheller made a call to the public. There were no members of the public who wished to speak.

APPROVAL OF MINUTES

Ms. Pipersburgh made a motion to approve the draft minutes from June 8, 2012, and Mr. Doucet seconded. The motion passed, 3–0.

SENATE BILL 1136 IMPLEMENTATION

Mr. Scheller referred the Board members to Mr. Seavers's July 3, 2012 memo proposing a plan for implementing Senate Bill 1136, which created central-registry exceptions (see Attachment 1).

Ms. Pipersburgh supported the proposed policies and procedures.

Mr. Scheller wanted to make sure that 21 days would be enough time to solicit public comments on the proposed rules. He emphasized the importance of giving the public opportunity to comment on the proposed rules, even if the time frame for implementation was limited. He supported the idea of allowing individuals to submit comments even after the July 27, 2012 deadline and revising the adopted rules if necessary.

Mr. Scheller supported the proposed process and recommended extending the policy on reconsiderations under expedited reviews to applications for central-registry exceptions (as part of the same pilot program adopted at the June 8, 2012 meeting). For the proposed process, Mr. Seavers noted that the draft rules would not reflect all of the steps listed in his July 3 memo because some of the procedures are already in statute.

Mr. Scheller and Mr. Doucet indicated that they'd like to get input from the Attorney General's Office on the draft rules and on some of the issues raised in the memo (such as getting case plans from applicants).

Ms. Pipersburgh made a motion to adopt the proposed policies and procedures, as reflected in the Board's discussion, and Mr. Doucet seconded. The motion passed, 3–0.

Ms. Pipersburgh made a motion to approve the requested expenditure of \$9,480 for database programming, and Mr. Doucet seconded. The motion passed, 3–0.

ADJOURNMENT

Ms. Pipersburgh made a motion to adjourn, and Mr. Doucet seconded. The motion passed, 3–0. Mr. Scheller adjourned the meeting at 9:55 a.m.

Minutes approved on August 3, 2012

Dennis Seavers, Executive Director



Arizona Board of Fingerprinting Memo

TO: Board members
FROM: Dennis Seavers
C:
Date: July 3, 2012
SUBJECT Senate Bill 1136 implementation plan

In previous meetings, the Board has discussed Senate Bill (SB) 1136, which creates a new function for the Board of Fingerprinting by requiring the agency to begin issuing central-registry exceptions (CREs). The bill goes into effect on August 2, 2012, so the Board will need to spend the next month establishing application requirements and an approval process.

This memo describes the relevant provisions of SB 1136 and outlines the steps the Board will need to take at upcoming meetings to implement the bill. The memo also identifies options for the Board to consider for CRE application requirements.

BACKGROUND

In Arizona, child-care facilities are regulated by the Department of Economic Security (DES) and the Department of Health Services (DHS). Under current law, anyone who works with children in facilities that receive funding from DES must clear a check on the central registry, which is a confidential database maintained by DES that contains information about allegations of child abuse or neglect. Anyone who has a substantiated allegation of child abuse or neglect is ineligible to work in the DES-funded facilities. However, there are facilities that are regulated by DES but don't receive DES funding or that are regulated by DHS, and these facilities aren't required under current law to have the central-registry check. SB 1136 expanded the requirement for central-registry checks to cover all facilities (and not just DES-funded facilities). This expansion goes into effect next year (August 1, 2013).

SB 1136 also established CREs, which allow individuals who don't clear the central-registry check to apply to demonstrate to the Board that they are rehabilitated from the incidents that led to the substantiated allegations of abuse or neglect. Anyone who doesn't clear a check on or after August 2, 2012 (this year's general-effective date) will

be eligible to request a CRE. Since some of the checks won't start until next year, there will be separate dates for the two populations that have central-registry checks.

- *August 2, 2012 (this year)*. Applies to personnel at DES-funded child-care facilities.
- *August 1, 2013 (next year)*. Applies to the expanded population that has to have central-registry checks (i.e., DES-regulated facilities that don't receive DES funding and DHS-regulated facilities).

IMPLEMENTATION PLAN

Since individuals will be eligible to request a central-registry exception beginning August 2, 2012, the Board should have a process in place as close to that date as possible. Below is a schedule for establishing the CRE process. (All meeting dates are on Fridays when the Board has regularly scheduled meetings.)

- July 6, 2012: open meeting to consider a draft proposal (contained in this memo) from the executive director on a possible CRE process. I realize that the Board will not have received training on the child-welfare system (see next bullet). However, given the short time period for implementing the bill, I think the Board should adopt a draft process as soon as possible to give stakeholders an opportunity to comment.
- July 20, 2012: open meeting in which the Board will receive an overview on the child-welfare system and the process by which DES substantiates and categorizes allegations of child abuse and neglect.
- August 3, 2012: open meeting to adopt a final proposal. The Board may need to alter the draft proposal from July 6, 2012, based on what the Board learned in training and what feedback any stakeholders provide to the draft proposal.

RELEVANT PROVISIONS OF THE BILL

The bill has various provisions, including portions that don't affect the Board. Below, I summarize the significant parts that are relevant to the Board.

Overall process and time frames

The process described by the bill closely matches the process for good-cause exceptions.

- After receiving an application (defined in rule to mean a complete application), the Board must hold an expedited review within 20 days.
- If the Board refers the applicant to a hearing rather than approving the application under an expedited review, the hearing must take place within 45 days.
- The Board must make a final decision within 80 days of the hearing.

Criteria for granting CREs

A.R.S. § 41–619.57(E) (as created by SB 1136) allows the Board to grant a CRE “if the person shows to the Board’s satisfaction that the person is successfully rehabilitated and is not a recidivist.” This fundamental point of consideration matches a similar provision for good-cause exceptions and therefore should be familiar to the Board. The statute also allows the Board to consider a person’s criminal record when deciding whether the person is rehabilitated. The Board may deny an application if the person fails to appear at a hearing without good cause.

The statute also establishes criteria that the Board must consider before granting a CRE. These criteria, listed below, are similar to the criteria for good-cause exceptions. Although the Board may consider other factors if they’re relevant to rehabilitation, in most instances the Board’s determination will focus on these criteria.

- The extent of the person’s central-registry records;
- The length of time that has elapsed since the abuse or neglect occurred;
- The nature of the abuse or neglect;
- Any applicable mitigating circumstances;
- The degree to which the person participated in the abuse or neglect;
- The extent of the person’s rehabilitated, including:
 - Evidence of positive action to change the person’s behavior, such as completion of counseling or a drug-treatment, domestic-violence, or parenting program;
 - Personal references attesting to the person’s rehabilitation.

Voting requirement

As with good-cause exceptions, a majority plus one of the Board members present must vote to approve in order to grant a CRE. This supermajority requirement only applies to approvals and not to other Board actions, such as adoption of findings of fact and conclusions of law or denials.

Article 6 hearings

As with the good-cause-exception hearings, the CRE hearings are exempt from Article 10 of the APA. Therefore, hearings must be conducted in accordance with Article 6 of the APA. (Article 10 would involve the Office of Administrative Hearings and have more detailed requirements for the conduct of hearings.)

Funding

The bill provided no funding for this new function. Instead, the Board will have to cover the costs with funds from the Board of Fingerprinting Fund.

RULEMAKING

A rule is “an agency statement of general applicability that implements, interprets or prescribes law or policy, or describes the procedure or practice requirements of an agency.”¹ To implement SB 1136, the Board should adopt rules that identify application requirements and describe general procedures for considering applications. (Later in this memo, there is a draft proposal for a CRE process; I’ll draft proposed rules based on the actions the Board takes on July 6.) The Legislature has authorized the Board to adopt rules under A.R.S. § 41–619.53(A)(2).

Also under A.R.S. § 41–619.53(A)(2), the Legislature has exempted the Board from the rulemaking requirements of the Administrative Procedures Act (APA). Arizona Session Laws 2012 (Second Regular Session), Chapter 188 (SB 1136), § 5, extends this rulemaking exemption to cover CREs.² The rulemaking exemption doesn’t relieve the Board of the obligation to adopt rules to implement the new CRE statutes. However, the exemption allows the Board to avoid the normal rulemaking process, which is time consuming and burdensome. Specifically, the Board doesn’t need to hold hearings to receive public input or get approval from the Attorney General’s Office or the Governor’s Regulatory Review Council.³

Although the Board is exempt from the APA’s rulemaking requirements, the Board should make its rulemaking process as open to public input as possible, within the time constraints for implementing the bill. There are two reasons for acting in as open a manner as possible.

- The public policy that the Legislature has adopted in the APA suggests that legislative activity by executive-branch agencies should be done in as open and transparent a manner as possible, with opportunity for public comment. Since rules place burdens on individuals and businesses, there should be an opportunity for the public to comment on the proposed rules. Although the Board is exempt from the rulemaking requirements of the APA, it is good public policy to adopt rules in a manner that demonstrates some of the values of openness and transparency that are reflected in the APA.
- During sunset hearings, one of the factors that a committee of reference will consider when deciding whether to recommend continuing an agency is the “extent to which the agency has encouraged input from the public before adopting its rules and the extent to which it has informed the public as to its actions and their expected impact on the public.”⁴ The Legislature will therefore consider how open the rulemaking process has been, even if the agency is exempt from the APA’s rulemaking requirements. (The Board should note that it has a hearing before a committee of reference later this year.)

¹ A.R.S. § 41–1001(18).

² Laws 2012, Chapter 188, § 9(A) also gives an rulemaking exemption for one year after the effective date of SB 1136 (i.e., until August 2, 2013). The exemptions in statute and session law both serve the same basic purpose—allowing the Board to adopt rules quickly—but the statutory exemption doesn’t expire.

³ Executive Order 2012-03 extends a rulemaking moratorium that the governor previously established, but the Board is exempt from the moratorium under paragraph 4(c) of the order.

⁴ A.R.S. § 41–2954(D)(5).

In the past, the Board's rulemaking process has reflected elements of the APA requirements. The Board has followed the basic process below.

- Adopt draft rules in an open meeting.
- Publish the draft rules in the *Arizona Administrative Register*.
- Allow for a 30-day comment period, in some instances including a public hearing.⁵
- Adopt final rules, reflecting any necessary changes based on public comments.
- Publish the final rules in the *Register*.

Unfortunately, there is not enough time to implement the bill to follow the Board's normal rulemaking process. (Simply publishing proposed rules in the *Register* takes several weeks, only after which the public-comment period would begin.) In order to meet the Board's limited time frame for implementing bill while maximizing public input, I recommend that the Board adopt the following process for this rulemaking.

- The Board would adopt draft rules at the July 6, 2012 open meeting.
- The executive director would solicit comments from the public, especially stakeholders (such as DES, DHS, and child-care groups). This public-comment period would last from July 6 to July 27 (21 days).⁶
- The Board would adopt final rules at the August 3, 2012 open meeting.
- Although the formal period for public comments would end on July 27, the public would be invited to submit comments at any time, and the Board could revisit its rules as necessary.

APPLICATION PROCESS

The Board should adopt a process that essentially duplicates the existing process for good-cause exceptions, especially since the new law intentionally copied provisions from the good-cause-exception statutes.

The proposed process would include the following steps.

- The applicant submits a CRE application.
- The staff orders criminal-history records from the Department of Public Safety. As with good-cause exceptions, the rule would define "application" to mean a complete application, including the criminal-history records. (Otherwise, the Board might have to review a case under the 20-day time frame before the application is complete.)
- An investigator reviews the application to make sure it meets all the requirements of the Board's rule on CRE applications.

⁵ The Board used to hold public hearings, but the hearings were poorly attended or had no attendance. Rather than hold the hearings, the Board encouraged people to submit written comments and only held hearings if requested.

⁶ The Board could extend or shorten this 21-day period. I recommended this period because it allows a reasonably long period for public comments while giving the Board sufficient time to review the comments and consider changes to the draft rules.

- If the application is complete, the investigator prepares a summary for the Board to review at its meetings every other week.
- If the application is incomplete, the investigator sends the applicant a letter explaining what's missing.⁷
- The Board conducts an expedited review within 20 days of receiving a complete application.
 - If the application was complete on submission, the 20-day period starts on receipt of the criminal-history records.
 - If the application was incomplete on submission, the 20-day period starts when the last missing item is received.
- If the applicant is approved under an expedited review, the Board notifies DES or DHS (as appropriate), and the process ends. If the applicant is not approved under an expedited review, the case is referred to a hearing.
- The Board would have the option of reconsidering cases under expedited review if the Board extends the policy to cover CREs.
- The staff schedules a hearing within 45 days of the expedited review. The hearing would be conducted by a hearing officer. (On a case-by-case basis, the Board could choose to conduct the hearing itself.)
- The hearing officer conducts the hearing and submits proposed findings of fact and conclusions of law and a recommended decision.
- Within 80 days of the hearing, the Board holds a hearing to adopt, modify, or reject the hearing officer's recommendation.
- If the applicant is approved, the Board notifies DES or DHS (as appropriate), and the process ends. If the applicant is not approved, he or she may request a rehearing or review or file a complaint in Maricopa County Superior Court.
- If the applicant requests the rehearing or review, the staff would schedule a Board hearing to consider the request, and the procedures would match the Board's existing procedures for similar requests after a good-cause-exception application has been denied.

APPLICATION REQUIREMENTS

The application requirements may be the area in which the Board will need to have the most discussion, since the Board will have flexibility in what it asks from applicants. At the same time, there may be significant limitations on what information the Board or the applicant can access; unlike most records related to criminal proceedings, many CPS-related records are confidential and are prohibited from being disseminated.

Below are some records the Board could include among its application requirements. This list is intended to identify options for the Board to consider rather than to recommend specific requirements. The draft rules would reflect whatever decisions the Board makes at its July 6 meeting. The Board should keep in mind that the July 20

⁷ Since central-registry exceptions, like good-cause exceptions, are not licenses (as defined by the APA), the Board doesn't have to establish rules for substantive and administrative completeness. Notifying the applicant is a courtesy rather than a legal requirement and therefore isn't reflected in the rules.

training and additional communications with DES may give a better sense of what application requirements the Board should establish.

1. The good cause exception application form (notarized)
2. Letters of reference on Board-prescribed forms. If the Board wishes to duplicate its requirement for good-cause-exception applications, then the rule would require two letters that meet the following requirements:
 - a. Both letters of reference must be from individuals who have known the applicant at least one year;
 - b. At least one letter must be from the applicant's current or former employer or from an individual who has known the applicant for at least three years.
3. The CPS investigative report. This report provides summary information about the alleged abuse or neglect and whether the allegation was substantiated.
4. A statement from the applicant that explains each incident involving abuse or neglect.
5. A copy of the case plan from the applicant. The Board cannot get the case plan directly from CPS, since the plan may include information about other CPS-related incidences. However, the Board may be able to require the plan from the applicant. If the Board is prohibited from requiring the case plan (something that I'll be researching with DES and the Attorney General's Office), then the Board may be able to encourage the applicant to submit it.
6. The Board could require criminal-history-related documents, such as court documents and police reports. However, the Board should note that most incidences of abuse or neglect, even when substantiated, are not criminally prosecuted, primarily because the standard of proof for criminal convictions is much higher than for CPS investigations. In addition, the Board is only permitted to consider criminal charges if they relate to the question of whether the applicant is rehabilitated from the abuse or neglect.
7. For good-cause-exception applications, the Board requires the applicant to disclose whether he or she has had a professional license revoked or suspended. The Board could ask for this information, as long as the information is only used if it is related to the question of whether the applicant is rehabilitated from the abuse or neglect. The Board should keep in mind that CPS-related matters usually would not lead to the suspension or revocation of a professional license or certificate.
8. Any other relevant information the applicant wishes to submit, including additional reference letters, proof of treatment, psychological evaluations, etc.

DATABASE

The Board will need to have a tracking database and thus will need to approve funds for the necessary programming. Since there is such a short amount of time before the bill goes into effect, I would request that the Board approve the expenditure at its July 6 meeting.

In fiscal year 2012, the Board approved funds for a database upgrade. As I've previously reported to the Board, I placed the upgrade on hold because SB 1136 was pending and I wanted to coordinate any IT projects. In order to get the programming finished on time, I've already approved the project with an IT vendor by applying the funds for the upgrade to the SB 1136 database project and other unused funds authorized in the fiscal year 2012 budget. However, this approval will only cover a portion of the project, which I request the Board to fully authorize. (Naturally, the Board may choose not to authorize the funding, in which case I'll cancel the project. However, a database is a vital tool for an agency business process.)

The maximum estimate for the project is \$9,480. The actual cost may be lower, but there are a number of unresolved questions (such as application requirements) that make a more precise estimate possible; therefore, the vendor has made a high estimate.