1982

A History of the Due Process Procedure in Special Education

Nancy Hablutzel
Loyola University Chicago

A HISTORY OF THE DUE PROCESS PROCEDURE IN SPECIAL EDUCATION

by

Nancy Hablutzel

A Dissertation Submitted to the Faculty of the Graduate School of Loyola University of Chicago in Partial Fulfillment of the Requirements for the Degree of Doctor of Philosophy

November

1982

ACKNOWLEDGMENTS

I am indebted to Dr. Samuel T. Mayo, the Chairman of my committee, and to the other committee members, Dr. Joy Rogers, Dr. Allan Shoenberger, Dr. Ronald Morgan, and Dr. Jack A. Kavanagh for giving me time, advice and materials. A special kind of thanks are due to Margo and Bob Hablutzel for being so patient and understanding with their mother, and to Philip Hablutzel, who has given me support in every sense of the word.

VITA

The author, Nancy Hablutzel, was born in Chicago, Illinois on March 16, 1940. She is married to Philip Hablutzel, and the mother of Margo Lynn and Robert Paul.

Her elementary education was obtained in four grammar schools, and she graduated from Central School in Glencoe, Illinois in 1953. She received her diploma from New Trier Township High School, Winnetka, Illinois, in 1957.

In 1957 she entered Northwestern University in Evanston, Illinois, and received the degree of Bachelor of Science in Speech Pathology from the School of Speech in August, 1960. She received the degree of Master of Science in Education (Teaching Children with Learning Disabilities) from Northeastern Illinois University, Chicago, Illinois, in May, 1972. She also received the degree of Juris Doctor from Illinois Institute of Technology Chicago-Kent College of Law in January, 1980 and is a member of the Illinois and Federal Bars.

She has been a teacher in public schools in Illinois and Missouri and has worked as a speech therapist in hospitals in those states as well as in Texas. She was an instructor in the Special Education Department at Chicago State University from 1972 until 1976, and has been a Visiting Assistant Professor at Loyola University of Chicago, where she is now a member of the faculty in the School of Education.

TABLE OF CONTENTS

ACKNOWLEDGMENTS ii

VITA iii

Chapter

I. INTRODUCTION 1

II. THE HISTORY OF "DUE PROCESS" IN EDUCATION IN GENERAL 6

III. THE EARLY CASES INVOLVING THE RIGHT OF DUE PROCESS FOR CHILDREN IN SPECIAL EDUCATION CLASSES 18

IV. THE LEGISLATIVE RESPONSE: P.L. 93-112, SECTION 504, and P.L. 94-142 27

V. SELECTED CASES SINCE THE PASSAGE OF THE STATUTES RELATING TO THE EDUCATION OF THE HANDICAPPED 40

VI. THE ILLINOIS IMPLEMENTATION OF THE LAW 47

VII. CONCLUSIONS 53

BIBLIOGRAPHY 57

TABLE OF CASES 58

APPENDIX A 60

APPENDIX B 115

APPENDIX C 176

APPENDIX D 180

APPENDIX E 184

CHAPTER I

INTRODUCTION

The changes in special education in the United States in the last quarter century are significant, both in their scope and in their nature. Theories of special education, types of classrooms in use, methods for teaching children with special needs, have all changed dramatically. Among the most important changes is the importance of special education itself. Some of this new importance comes from the fact that there are so many more people involved in the field, and so many more children receiving the services. Another part of this difference, if not most of this difference, stems from developments in the law related to special education. The evolution of this law has come about over the last century, gradually at first, and then over the last quarter-century, slowly at first, and then extremely rapidly.

Initially in this country, only those with considerable means were able to educate their children, always at great expense to the family, and frequently at great distances from home. It was at the end of the eighteenth century that schools began to be available locally for children to attend, paid for with public funds. Beginning in 1817 with the founding of the American School for the Deaf (Nazzaro), schools were opened for the first time for people with handicaps, previously excluded from any form of schooling. In the beginning, these schools were residential schools, each teaching children with a

single handicap. Children from all over the country would travel great distances to enroll in these schools, and since they were few in number, only a very few lucky children could be served by them. Some schools like this survive to this day, such as the Central Institute for the Deaf in St. Louis, the Gallaudet College for deaf undergraduates, and the Hadley School for the Blind. Each school of this type serves one segment of the handicapped population, and, while the education is excellent, there is an unfortunate lack of reality in the isolated circumstances in which the children are trained. It took a long time for educators to realize that there was something to be gained, both for the handicapped and the "normal" children in the school, when children with handicaps are placed in the same school as those without.

This was certainly not the case a century ago. In 1893, the Wisconsin Supreme Court (Beattie, 1893) allowed a school system to expel a handicapped child based solely on the testimony that her appearance was upsetting to the other children and to the teacher! The change from this position to the present one did not come about directly in the area of special education (Children's Defense Fund, pp.3-4.) True, there has been a gradual increase in the numbers of school systems offering special education facilities and classes for handicapped children (Cottle, pp.51 ff), with a marked increase since World War II(Silberman, p.159), but the great changes came about as a result of the civil rights laws which extended the rights of children to receive an education. The first major cases were those based on the race of the child(Brown,1954). Once the racial cases had been decided,

and it was clear that the courts would support a finding that children were entitled to an education as a right, handicapped children and their parents began to insist that they had the same rights, and the courts agreed with them (PARC, 1971; Mills, 1971).

After several court cases decided in the favor of the handicapped children and their parents, the right to education of handicapped children was codified by the U.S. Congress (see Chapters II, III, and IV). The earlier acts which provided education and training of handicapped individuals, such as the Vocational Education Amendments of 1968, the Economic Opportunities Act of 1972 (Headstart), the Higher Education Amendments of 1972, The Rehabilitation Act of 1973, and the Developmental Disabilities Assistance and Bill of Rights Act of 1974, all have been superseded in one way or another by two major acts, The Rehabilitation Act of 1974 (particularly Section 504) and The Education of All Handicapped Children Act (P.L. 94-142).

Section 504 of the Rehabilitation Act of 1974 is broader in scope that P.L. 94-142. It prohibits discrimination against an "otherwise qualified individual" on the basis of handicap in a number of areas, of which education is only one. P.L. 94-142, on the other hand, is a bill limited to education, and provides that funding shall be limited to school districts which comply with the Act. For those districts which choose to forego funds and not comply, if they are part of the state school system which receives funds, then that state system has the responsibility for monitoring compliance within the district. If the district is not providing services to its handicapped children, then the state must provide it or lose its funding.

All this is based on an idea of constitutional due process. The due process clause of the fifth and fourteenth amendments to the Constitution of the United States provide that no one may be deprived of "property" without due process of law and courts have held that children have a "property" right to education (see Chapter II). Additionally, the courts have held that children are entitled to the "equal protection of the laws" guaranteed by the Fourteenth Amendment when it comes to applying to school or being placed in a classroom in which they are able to learn.

The due process to which children are entitled varies by the situation involved. Due process is not a constant "thing" (Bartholomew) but varies greatly according to the situation. There are two "kinds" of due process, substantive and procedural. Substantive due process refers to a situation in which a person is deprived of something to which he has a right, in this case, a "free appropriate public education." Procedural due process refers to the acceptable procedure used in any given situation to provide an individual with notice of an action to be taken and a hearing in which he can contest it. If procedural due process is fairly given, then a person can be deprived of something in which he has a property right, and it is not a violation of his rights. All of the cases which have arisen in special education involve, in one form or another, these issues:

1. Was the child given the "equal protection of the laws", i.e., was he given the same chance to receive a free, appropriate public education as every other child in his district?
2. Was he deprived of his (property)right by being denied either

a free education or one appropriate for him?

3. If he was deprived of something, was it done in such a way as to protect his rights?

This paper is a history of the evolution of the rules above and the procedures for following them which have been established by case law and by statute. The cases which led to these rules were a fascinating mix of discipline and racial segregation cases, and not until recently did handicapped children appear in the courtroom. Since they have, however, the changes in the law have been dramatic. Parents, teachers, administrators, and other school personnel need to understand the evolution of the law which led to the current "due process" rules, because only by understanding how the laws got to be the way they are is it possible to understand the laws themselves well enough to assure compliance within a school district. For this reason, this paper examines the first cases involving due process in schools, the early cases involving handicapped children, and then the current laws providing due process procedural protections for handicapped children.

CHAPTER II

THE HISTORY OF "DUE PROCESS" IN EDUCATION IN GENERAL

The term "due process of law" is defined by Black's Law Dictionary as:

> Law in its regular course of administration through courts of justice. 3 Story, Const. 264, 66. 'Due process of law in each particular case means such an exercise of the powers of the government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs.' Cooley, Const. Lim. 44.

It is clear from this that the exact form which "due process" may take will vary according to the circumstances.

"Due process of law" did not originate with the American colonies, but came to us from the English Magna Carta. It was originally termed the "law of the land" in the Magna Carta, referring to the common law and the statues then existing in England, and was incorporated along with the rest of the body of English common law into our Constitution, and into our common law. It is well-settled that the term is difficult to define precisely (12 Am. Jur., Constitutional Law, Sections 567-575) but is generally held to include all the steps essential to deprive a person of life, liberty or property...(Jenkins, 689).

The elements essential to due process are notice, a hearing, and an opportunity to defend (Snyder). It has also been held that a requirement of due process is that the law operates equally to all persons affected by it (Off). It was originally a protection from

arbitrary action by the Crown (12 Am. Jur.,Constitutional Law, Section 568), and continues to be a protection from arbitrary action by a governmental agency (Nebbia), and it is in this sense that it is applied to the cases involving children in schools. It is the evolution of this protection for children, first from racial discrimination and then from discrimination on the basis of handicap, that has brought the educational laws of this country to where they are now.

The cases which led to the establishment of requirements for "due process" safeguards in special education are based on earlier cases which were concerned with other areas of children's rights. The first of these are the cases which established education as a constitutionally protected civil right. These cases were primarily concerned with racial segregation in the schools. The second group of cases were those concerned with discipline of students, and the standards to be met by the school before a student could be suspended or expelled. As these two groups of cases developed, the courts set very clear standards which had to be met before a student could be deprived of the right to attend classes. As the rules evolved, it became clear that what had been a privilege a century earlier had become a right, and that the courts would not allow that right to be abridged.

The changes came about rapidly, largely the result of changes in the society as well as in the makeup of the legislatures and courts. As recently as 1919, courts had actually gone on record as supporting the exclusion of a handicapped youngster from the local public school, on the theory that the child's presence would be disturbing to both the

teacher and the other students (Beattie, 1919). At that time, there was absolutely no thought that the child involved was being deprived of the right to an education, nor was there any suggestion made that there should be a provision for any form of alternative placement. By 1974, it was estimated that two million children in the United States were excluded from school for various reasons (Cottle, 1974). The most common reasons for exclusion were handicapping conditions and discipline problems. As the courts began to look at education as a right rather than as a privilege, they began to require that the schools observe "due process" before students could be excluded.

The most famous of all the civil rights cases was one involving segregated schools, Brown v. Board of Education of Topeka, Kansas. Brown was actually a consolidation of four cases, all heard in Federal District Courts in different parts of the United States, and all appealed to the Supreme Court as involving a matter of Constitutional rights. The plaintiffs were school children ("minors of the Negro race") who were attending segregated schools in their home school districts. Until the time of Brown, segregated schools were not considered to be illegal so long as the facilities were judged to be "equal". This was based on the "separate but equal" doctrine which had been adopted by the Supreme Court in 1896 in the case of Plessy v. Ferguson (Plessy, 1896) which involved not education, but transportation.

Between Plessy and Brown, the Court had had several cases before it in which it was asked to decide whether segregated schools were constitutional, but the other cases had been settled without so

squarely addressing the issue as was done in Brown. In the first of the several cases along this line, a Negro citizen of Missouri was rejected by the state's law school when he applied for admission, but was offered tuition so that he could attend law school in another state. This was done in accord with the state law at the time. He sued in state courts to be allowed to be admitted to the state school. The state courts refused to rule in his favor, and he appealed to the Supreme Court. In that case, the Court ordered that he be admitted, saying that the issue was not that he could be educated by other states, but that he should be educated by his own state on a basis equal to white students within that state (Missouri ex.rel. Gaines v.Canada, 1938). In the case next brought before the Supreme Court, the justices once again failed to address the issue of the constitutionality of applying Plessy to education, while still deciding the case in favor of the plaintiff (Sipuel,1948).

In 1950, the Court was presented with two cases which presented different aspects of the same issue. That issue was the limitation of the state's power to discriminate on a racial basis as a result of the Equal Protection Clause of the Fourteenth Amendment to the Constitution,Sweatt v. Painter (Sweatt, 1950) and McLaurin v. Oklahoma State Regents (McLaurin, 1950). In the first of these two cases, Sweatt, the plaintiff had applied for admission to the Law School of the University of Texas and his application had been denied because he was a Negro. The Court did not deal directly with the applicability of the Plessy "separate but equal" doctrine to public education, but

instead, skirted the issue by deciding that the plaintiff had not in fact been offered "equal" facilities.

In Sweatt, the Negro plaintiff had been offered admission to the law school at the Texas State University for Negroes. The law school there was in the process of being started at that time. Almost none of the books had arrived for the library. The faculty consisted of four members of the faculty from the University of Texas Law School who were essentially "on loan" to the new law school. The new school was not accredited. By contrast, the law school at the University of Texas was fully accredited, had a library with over 65,000 volumes, and a full-time faculty of sixteen, plus some part-time faculty. The Court commented quite properly that it was considered among the nation's ranking law schools.

In addition, the Court considered the intangibles that were involved such as the reputation of the faculty and administration, the prestige of the alumni, and the fact that many of the contacts which are so necessary to the practice of law originate during the law school years. Given all these factors, the Court held that the opportunity to attend the Negro law school did not constitute an equal educational opportunity for the plaintiff. Thus, while holding that the Fourteenth Amendment Equal Protection Clause required that the plaintiff be admitted to the University of Texas Law School, the Court did not yet go so far as to re-examine Plessy in terms of the Fourteenth Amendment and racial segregation in the schools, which the plaintiff had urged, but the Court was moving in that direction. In McLaurin, a Negro doctoral student in Education was allowed by Oklahoma statute to take

courses in the white institutions whenever there was not a comparable class available to him at the Negro institution but, (also by statute) the instruction could only be offered on a "segregated basis". This meant that the plaintiff had to sit at a "Negroes only" table in the cafeteria, and had a seat in a row of desks reserved, also, only for Negroes. There had also been a restriction on his library privileges, in that he had been forbidden to use a desk in the library, but that restriction had been removed after he had filed the suit, but prior to the hearing by the Supreme Court. The Court, which considered this case at the same time as it considered Sweatt, held that it was not an equal education to separate a doctoral student in this manner, and that not only he but also his future students would be adversely affected if this were allowed to continue. Again, they had succeeded in finding that the education being offered was not equal, but had not gone so far as to determine that "separate but equal" could not apply to education. That point was finally reached in Brown.

In Brown, all the school districts involved had gone to great lengths to be sure that all the facilities had been equalized. Salaries of teachers, buildings, textbooks, curricula, and credentials of teachers had been carefully considered and were well-balanced between the Negro and white schools in each district. Thus, as the Court observed, the "tangibles" were equal (Brown, 1954, at 485).

For the first time, the Court was forced to address the issue of the extension of Plessy to public education squarely. The Court first took note of the fact that by that time, education had become "perhaps

the most important function of state and local governments." The court stated:

> Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, must be made available to all on equal terms.

Then, relying heavily on psychological and sociological evidence presented at trial, the Court held that education had become a right and not a privilege, and that it therefore was a requirement of the Fourteenth Amendment Equal Protection Clause that children be given equal educational opportunity. This was the first time that it had been made clear that the Supreme Court viewed education as constitutionally protected.

In a companion decision rendered on the same day, the Court held that the Due Process Clause of the Fifth Amendment applied to education (Bolling, 1954). Given these two cases, the way was beginning to be established for parents of handicapped youngsters to demand that their children, too, had a right to education.

The other group of cases that laid the way for the present requirements for due process for children requiring special education was the group of cases involving discipline of students. The most often-cited of these, and the one that continues to have an impact even in special education, is Goss v. Lopez (1975). In this case, several

high school students in Columbus, Ohio had been suspended from their schools as a disciplinary measure. They sued the school district, charging that they had been deprived of their Fourteenth Amendment rights by being suspended without a hearing either prior to the suspension, or immediately following the suspension. The district court agreed with the students and ordered the school district to reinstate each of them and to expunge their records of any mention of the incidents.

The Ohio School Code at the time allowed a principal to expel a student or to suspend him for up to ten days for disciplinary reasons. The student's parents had to be notified within twenty-four hours of the action taken and the reasons for it. For a student who was expelled, the Code provided for a hearing at the request of either the child or his parents. They could appeal the school's decision to the Board of Education, and were entitled to a hearing at a board meeting. The Board could reinstate the child after the hearing, if the members of the Board felt that was the appropriate action.

For the children who were suspended, there was no right to either a hearing or an appeal provided by the Code. The Columbus School District had not published any regulations providing procedures for either a hearing or an appeal in the cases of students who were suspended for disciplinary reasons. The nine named plaintiffs who brought the class action suit in Goss were all children who had been suspended, most of them for a ten-day period as the result of their participation in a protest or other demonstration.

The District Court held that the school district had an obligation to provide students with written procedures to be followed for disciplinary actions, which procedures should provide notice and a hearing to all students. The court held that case law at the time would:

1. allow immediate removal of a student whose conduct disrupts the academic atmosphere of the school, endangers fellow students, teachers, or school officials, or damage property.
2. require notice of suspension proceedings to be sent to the student's parents within 24 hours of the decision to conduct the them.
3. require a hearing to be held, with the student present, within 72 hours of his removal.

The court also held that the students, at the time of the hearing, could hear the statements in support of the charges, make any statements they might wish in mitigation, speak in their own defense, and the school did not have an obligation to allow the student to be represented at the hearing by counsel.

In reviewing the decision of the lower court, the Supreme Court gave a thorough discussion of the principle of due process in education in general. First, they answered the claim by the school district that there was no need for due process to suspend students, because they did not have a constitutional right to receive an education. The Court said that the right to a public education did not have to be given in the Constitution in order to be a constitutionally protected right. Once the right to a free public education was given by an outside

source, in this case by state statute, then the right to that education was protected for all school children by the Constitution, and they could not be deprived of that right. The Court pointed out that constitutionally protected interests are normally "'not created by the Constitution. Rather they are created and their dimensions defined' by an independent source such a state statutes or rules entitling the citizen to certain benefits." (Roth, 1972 as quoted in Goss). The Court also relied on their prior decision in Brown to reiterate that the deprivation of the right to schooling was a serious event in the life of a child, even if it was only for a period of ten days or less. The Court also noted that the "good name and reputation" of the child were involved and to allow the school to make permanent entries on the record of a child without due process could permanently "damage the students' standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment."

The Court did not go as far as the students would have liked, however. They did not give the students the right to counsel at a suspension hearing. They specifically said that this would be entirely too cumbersome, time-consuming and expensive, given the "countless" brief disciplinary suspensions nationwide. What they did require, however, was that the child and his parents be given immediate notice of the charges against him, and that if he denies the charges, he is entitled to an explanation of the evidence against him, as well as a chance to present his own side of the story. They said also that they did not give the suspended student the right to rebuttal witnesses,

cross-examination, etc., for the same reasons that they did not require the presence of counsel. They also said that to make the procedure longer and more formal might, in fact, make it a less effective part of the school discipline process.

The Supreme Court made it clear that it was limiting the due process requirements for suspensions of ten days or less because they were so common and, even though they deprived the students of the right to attend school for a period of time, not permanent.

In the cases involving the expulsion of students as disciplinary measures, the Court has taken a similarly generous stance. It is clear that, where the student has been guilty of a form of misconduct, the Court wants the school to bear the burden of proving the charges and of allowing both notice and a hearing, but does not want to impose a very strict standard, recognizing the duty of the student to assist in his own education by observing certain minimum standards of behavior, and also recognizing the burden to the schools of having to cope with unruly and uncooperative students.

In the case of students expelled from a state university for misconduct (Dixon, 1961) the Court held that the students should be given notice, which notice should include a specific statement of the charges and the grounds which would justify expulsion if proven. The Court said that in different cases, the nature of the hearing would vary "depending upon the circumstances of the case" and in the case at bar, the charges would require a hearing at which the administrative body or Board of the university could hear both sides of the dispute in detail. This is contrasted with the case of a student being dismissed

for academic reasons, in which case such hearing would not be necessary (Horowitz, 1978). The Court felt that while it was not necessary in an expulsion to have a full judicial hearing with cross-examination of witnesses, it was necessary to inform the student of the witnesses against him and to allow him a chance to present some witnesses on his own behalf. This seems to reiterate the general feelings of courts in suspension and expulsion cases that what really matters is that the notice and hearing requirements be fundamentally fair, and commensurate with the severity of the penalty sought (Due, 1963). The courts have dealt with the basic issues of disciplinary suspensions and expulsions on many occasions, and each time have decided the cases in such a way that indicates that the "due process" necessary was to be determined by balancing the severity of the sanctions sought against the procedural safeguards provided by the school (Tinker, 1969 and Tibbs, 1971).

As the problem of "due process" for students became more of an issue nationwide, and particularly as the litigation in this area increased, school administrators, school boards, and teachers became increasingly concerned with setting standards which could be followed, and which would provide written guidelines for dealing with discipline of students. Several groups drafted "model" discipline codes (Appendix C). It remained for the courts and then the Congress to establish specific written requirements for "due process" procedures for one group of students, the "exceptional" children.

CHAPTER III

THE EARLY CASES INVOLVING THE RIGHT TO DUE PROCESS FOR CHILDREN IN SPECIAL EDUCATION CLASSES

In 1971 and 1972, there were two major cases in which children in special education were found to be entitled to education as a civil right, and to be entitled therefore to "due process" procedural safeguards before being excluded from school, or placed in a special class. These two cases, known as Mills (1972) and PARC (1971, 1972) were the first in which the courts had set out elaborate procedures to be followed by the schools for identifying and correctly placing special education students.

PARC was a case brought by the Pennsylvania Association for Retarded Children (PARC) and the parents of several retarded children against the Commonwealth of Pennsylvania. At that time, the Pennsylvania statutes provided for compulsory education of all children from eight years of age until seventeen years of age, but had several other provisions which had, in fact been used to keep retarded children out of the schools. First, the compulsory school ages had been used to postpone admitting retarded children to school until they were eight, or to expel them as soon as they reached seventeen. In addition, there were provisions in the law that relieved the Board of Education of the responsibility for educating any child who was certified by a psychologist to be uneducable and untrainable (which then shifted the burden of care for that child to the Department of Welfare, which had

no provisions for educating or training such children) or to indefinitely postpone the admission to school of any child who had not attained the mental age of five years (which many retarded children would never attain) or to excuse from compulsory attendance any child whom a psychologist found could not profit from schooling (PARC, at 282). Those provisions had been used to exclude retarded children from the schools, At the time the suit was filed, all the named plaintiffs were excluded from the public schools. The contentions of the plaintiffs were:

1. that these statutes offend due process because they lack any provision for notice and a hearing before a retarded person is either excluded from a public education or a change is made in his educational assignment within the public system.
2. the two provisions violate equal protection because of the premise of the statute which necessarily assumes that certain retarded children are uneducable and untrainable lacks a rational basis in fact.
3. because the Constitution and laws of Pennsylvania guarantee an education to all children, these two sections violate due process in that they arbitrarily and capriciously deny that given right to retarded children.

The plaintiffs did not argue that the provisions of the School Code (Section 1330, excusal from attendance, and Section 1326, definition of compulsory attendance age) were on their face unconstitutional, but rather that they violated "due process" and

"equal protection" as they were being applied to exclude retarded children. The parties signed a consent agreement in 1971 which dealt with the above issues. It was stipulated that the section referring to the compulsory school attendance age was designed to forgive parents for not sending children to school if they were not yet eight or were more than seventeen, and was not meant to excuse school authorities for excluding children. It was also agreed that children who were certified to the care of the Welfare Department would be provided with training "appropriate to the capacities of that child." The Commonwealth and the parents agreed that, since the Commonwealth had undertaken to provide education to all children between the ages of six and twenty-one, it would have a duty to place "each mentally retarded child in a free, public program of education and training appropriate to the child's capacity."

Additionally, the Section 1330 provision that had been used to exclude children who had not yet attained a mental age of five years, was agreed by the parties to mean only that the school authorities could refuse to admit such children to a regular school in the lowest primary grade (as opposed to a special school). There was also a provision in the statute that had been used to deny tuition for private schools to retarded children who did not also suffer from another disability (the section was worded in such a way that it only provided tuition to private schools for children with certain named physical handicaps) and it was agreed that that provision would no longer be applied in that manner. The defendants also agreed not to deny homebound instruction for retarded children simply because they did not

also have a physical impairment or because their condition was not temporary.

The case was not settled without considerable objection, particularly from local school districts. Ultimately, however, the Court amended the settlement and entered an order settling the case. The order had the following provisions:

1. The schools could not apply the above-mentioned statutory provisions in such a way as to deny any mentally retarded child access to a free public program of education and training.
2. The schools could not deny tuition (and maintenance where necessary) to any mentally retarded child on any basis other than the terms used for other exceptional children.
3. The schools could not deny homebound education to retarded children merely because they lacked a physical disability or because their condition was not temporary.
4. The schools would provide every retarded person between six and twenty-one years of age with access to a free public program of education and training appropriate to his learning capacities, as soon as possible, but in no event later than September 1,1972 (this order was entered on May 5, 1972).
5. In any school district which had a free public program of pre-school education, every mentally retarded child of the same age was to be provided access to a free public program of education and training appropriate to his learning

capacities, not later than September 1, 1972.

6. Each district would provide notice and an opportunity for a hearing to any child who is, or is thought to be, mentally retarded.
7. Each district would re-evaluate the educational assignment of every mentally retarded child at least every two years, annually if the parents requested it, and each time would provide notice and the opportunity for a hearing.

The Amended Stipulation which was entered into on February 14, 1972, includes much of the terminology and many of the notice and hearing provisions that were adopted by the Congress in P.L. 94-142 (Appendix B).

The court, in deciding some of the issues in PARC, relied heavily on the Brown argument that education was a constitutionally protected right, granted by the states, and that all the children in the states were entitled therefore to an equal educational opportunity, and that they could not be deprived of this opportunity except by due process of law.

The difference between the very lenient due process procedures prescribed in the disciplinary cases and the very stringent procedures in PARC and also in Mills, and later in the Statute, appears to be based on the different balance between the rights to be protected and the reasons for abridging the rights. In the instances of the disciplinary cases, the students had done something affirmative which caused action to be taken against them. In the matter of handicapped

children, the schools had not, in many cases, even afforded the children an opportunity to begin attending school, and in no cases had an action by the child been responsible for his exclusion from school. The decisions are written in such a way that it becomes clear from reading them that the courts were clearly offended at the callous treatment given to defenseless children who already bore the burden of a severe handicap, and therefore set far more stringent rules for their protection than they did for children who, although still allowed the benefit of rebuttal, were disruptive and had caused some form of turmoil in the schools of their own volition.

The second major case in special education in the early seventies was Mills v. Board of Education, (1972), another class action suit brought against a school district (Washington, D.C.) for excluding children who were handicapped. In this case, all the children were not retarded, but some were emotionally disturbed, behavioral problems, or hyperactive. The class was to include, in addition, children who were speech impaired, learning disabled, blind, and deaf and who were not receiving an education at that time. It was estimated by the plaintiffs that there were 22,000 such children at that time in the school district, and that 18,000 of them were not receiving a program of special education. These figures were based on estimates made by the school district itself to the Department of Health, Education and Welfare (1971). All seven named plaintiffs were residents of the school district and were denied free appropriate public education by the district. Some of the children had been able to be accepted by a private school but were unable to afford the tuition. All the

plaintiffs were black, but that was not an issue and the class represented was not limited to blacks. Many of the children had been in school and had been expelled or reassigned without any hearing or without notice.

The defense in this case was one that has been thought of many times since by school boards and taxpayers alike in this country, but one which has not as yet convinced a court, that special education was simply too expensive. The school district said it could not afford to educate the children involved in the manner they were asking without taking a significant amount of money from the educational resources then being used for the "normal" children in the district, thereby causing the education of more able children to suffer greatly. In fact, in Mills, the argument was made that to divert funds in that manner would be contrary to the intent of the Congress when it provided the funds to the district, and therefore illegal.

The Court noted that it had already held that constitutional protections could not be denied citizens on the basis of the expense involved (Goldberg, 1969).

The Court then rendered its decision, which in many ways resembled the agreement in PARC, particularly in the requirements for notice and a hearing, which were carefully specified. It also gave the district an affirmative duty to identify all children in the district who were exceptional (members of the plaintiff class) within thirty days of the order. The district was ordered to advertise widely the availability of placement for special students, so that children and their parents who had previously been unaware of the possibility of

receiving special education at the expense of the school district, or children who had previously been denied education at the expense of the district, would know that the services would now be available.

The district was required to report within forty-five days the names and placements of the class members so identified, the programs which they had been given, and the numbers of hearings that had been requested, and the determinations which had been made from those hearings.

The hearing procedures were spelled out very specifically, and as in PARC, they provided for notice, a hearing before an impartial hearing officer, and for the hearing to take place before a child could be moved into a new educational placement. The parents were given the right to see records, to present evidence at the hearing, and to cross-examine school personnel. These requirements were in many ways the same as those set out in the settlement in PARC, and are again, in many ways the same as those that were codified in P.L.94-142.

Both PARC and Mills established very clearly the rights of the handicapped to an education, suitable to their abilities, and at public expense. The requirements for the due process to be given to a child and his parents prior to placing him in a special education setting were extremely stringent. It was clear in both cases that the courts were unhappy with what they felt was the unfair and unequal treatment given to the handicapped children by the school districts. The requirements for due process were far more strict than those set out in the disciplinary cases, where the courts were not so clearly sympathetic to the students.

In both Mills and PARC it is clear that the courts feel it is necessary to have strict, written procedures to be followed in the matter of placement of handicapped children. It is also clear that they have established standards for the education of the handicapped children of the United States. These standards are specified in both cases: the child is to receive a free, appropriate public education. That terminology, first used in PARC and Mills, became a part of P.L. 94-142, and is the standard by which education for the handicapped children of this country is now measured.

CHAPTER IV

THE LEGISLATIVE RESPONSE: P.L. 93-112, SECTION 504, and P.L. 94-142

Immediately after the decisions in Mills and PARC, as well as some other scattered suits throughout the United States (MARC,1974) the members of the U.S. Congress began to receive considerable pressure from the various parent groups representing parents of handicapped children, and from groups representing the handicapped themselves. It became clear that there were two ways this problem of schooling for the handicapped could be resolved. The first would be for the lobbyist groups to file lawsuits similar to Mills and PARC in every jurisdiction, in order to establish case law in each place that had a slightly different school code or method of dealing with handicapped children. The second would be for the Congress to pass a federal statute mandating requirements for special education on a nationwide basis that would follow the guidelines set out in Mills and PARC. It was clear that the second was by far the more expeditious and financially conservative method.

The initial response to the decisions in PARC and Mills had been a flurry of filings of lawsuits nationwide, as groups supporting expanded educational opportunities for the handicapped began to realize that the climate among the members of the federal judiciary supported their cause. Now, these same groups began to pressure legislators to

introduce measures that would establish uniform requirements for special education in the various parts of the country. This move was considered a faster and less expensive means to the same end, and would also circumvent the difficult problems that might have been faced by groups pursuing lawsuits in states where there were few or no requirements for special education, and where the courts might have taken a very different view of what was required. This would have resulted in even wider differences in education provided for these children from state to state than there already were, or else numerous cases which would have had to be pursued all the way to the Supreme Court. Even then, with the varying state statutes, it was quite likely that they could have been interpreted so that there would still be large differences from state to state. Looking at the great variations existing then, the groups representing the handicapped and their parents decided that the most useful route for them to take was to pursue the possibility of uniform federal legislation for special education (Hearings, pp.227 ff).

The results that the various groups were seeking came slowly, and in pieces. The first major piece of legislation to be enacted which was directly supportive of handicapped education was the Rehabilitation Act of 1973, P.L. 93-112. This was the law that required that all programs receiving money from the federal government refrain from practicing any form of discrimination against the handicapped. The law has several parts. One prohibits discrimination against the handicapped by those contracting with the federal

government (Sec. 501), another by federal agencies themselves (Sec. 503) and a third by agencies receiving federal funds to assist in their operation. It is the last of these, Section 504, which has been used to force the states to provide special education for all of the children who are in need of it.

This Act was first introduced in the House of Representatives by Carl Vanik of Ohio as an amendment to the Civil Rights Act of 1964 (42 USC 2000 et seq.) (117 Cong. Record 45974-5). It was introduced in nearly identical form in the Senate by Senator Hubert H. Humphrey (118 Cong. Record 106-7). These two measures were made part of the then-pending Rehabilitation Act of 1973 (P.L. 93-112, 29 USC 794). The Section reads, in pertinent part:

> No otherwise qualified handicapped individual in the United States, ...shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance...

After the bill was enacted, many of the groups which had lobbied so long and hard for its passage were disappointed by the response of the schools. They had expected that the combined effect of the previous court decisions and the new legislation would be to open all kinds of programs for handicapped youngsters in the United States (Cottle, 1976). Instead, there was little response. A few forward-looking states, and in some cases only certain school districts within states, began to respond with programs which, while not necessarily exactly like those described in Mills and PARC, were certainly more within the

spirit that they intended (Hearings, pp. 203 ff) but by and large, there was very little response to encourage the parents and the handicapped adults who had worked so long and hard to win the right to an education for America's handicapped children. (Hearings, pp. 243 ff). There was considerable confusion about whether handicapped children and their right to an education were in fact intended to fall within the scope of the Rehabilitation Act. In 1974, Congress amended the Rehabilitation Act, and in so doing clarified their definition of handicapped to include "physically or mentally handicapped children who may be denied admission to federally supported school systems on the basis of their handicap." (S. Rep., pp. 6388-9). After more waiting time, and no further improvement in the educational programs offered, or the appearance of the regulations which should have been forthcoming from H.E.W. for the implementation of the Act, and even a lawsuit against the Secretary of Health, Education and Welfare (Cherry, 1976) the concerned groups decided to demonstrate the need more graphically. A series of sit-ins, involving large numbers of wheelchair patients as well as other handicapped individuals, were staged in Washington, D.C. The proposed regulations, which were opposed vehemently by most school districts, who feared extensive and expensive overhauls to their special education programs, were finally signed in 1977 (42 Fed. Reg. 22676, May 4, 1977). This finally gave effect to Section 504, which has been held to extend the right to education to handicapped children, just as Brown extended it to black children (Hairston, 1976, Mattie T.,1977, and Tatro, 1980). This meant that children who were handicapped could not be excluded from schools without being given "due

process of law" before they were removed. It was the Education for All Handicapped Children Act, P.L. 94-142, which spelled out clearly just what those due process rights would be.

P.L. 94-142 began working its way through the Congress in 1972, at which time the Senate Subcommittee on the Handicapped began what was to be several years of extensive hearings in major cities nationwide. The transcript of the hearings totals several thousand pages (Hearings, pp. 1972 ff). In the course of the hearings, the senators heard testimony by parents, parent organizations, teachers, administrators, handicapped individuals themselves, and representatives of state educational agencies where programs were already being provided who thought that their experiences would be useful to others. The Bill eventually evolved into S.6 and after its passage in 1975 was known as P.L. 94-142. The full effect of the Act, requiring total compliance by all school districts receiving federal funds of any sort, was to require that every child identified as handicapped was to receive a "free appropriate public education." The act's implementation was delayed until September 1, 1978 so that school districts would have time to hire teachers, locate children in need, and develop programs. The school districts were given the responsibility for locating all children who were handicapped, and for educating them from the age of three years until the age of twenty-one years (42 Fed. Reg 42474, August 23, 1977). The regulations identified and described the children who were included in the definition of "handicapped", and also specified the procedures necessary to locate and serve these children.

It was these regulations which first set out clearly the procedures which were to be followed by the school districts in order to protect the "due process rights" of handicapped children. The procedures are very similar in all respects to the procedures outlined in the settlements of PARC and Mills, as well as several "smaller" cases which had arisen during the time between the first two major cases and the issuance of the regulations. In those cases, the settlements had been based in great measure on the Mills and PARC settlements (MARC).

Two essential ingredients of "due process" in any type of case, regardless of what the right is that is involved, are notice and a hearing. In order for the rights of an individual to be preserved, it is essential that regardless of what it is that he is to be deprived of, he must be given notice that he is to lose something, and a chance to challenge the loss at a hearing (Nebbia). The type of notice which must be given as well as the kind of hearing which must be held vary according to the severity of the proposed deprivation. In the case of handicapped children in the schools, they are being deprived of what is seen as their right to an education. Therefore, the Congress attempted to spell out the procedures which it felt were necessary for the schools to follow before removing a child from a regular setting and placing him in special education, before changing his special education placement, or before removing him from the public school altogether. Some of these procedures are based on the earlier cases involving suspensions and expulsions, and some on Mills and PARC. Some are

refinements which occurred during the process of the extensive hearings which were held.

One provision which surfaced during the Senate hearings (Hearings, pp.203 ff) and which many people expected to see implemented was a requirement that the child be represented at a hearing by a guardian ad litem. The theory was that, in many cases, neither the parent nor the school would adequately represent the actual best interest of the child when it came to discussing placement. An example used was that of the fairly severely retarded child who was becoming difficult for his parents to manage. The parents in such a situation often push to have the child placed in a residential treatment center (otherwise know as an "institution") while the school district, aware that under P.L. 94-142 it would be paying the entire cost of this placement, would push strongly to keep the child living at home and attending school in the regular public school, perhaps in a special classroom. In the early discussions of P.L. 94-142, it was expected that it would be required that in such situations a guardian ad litem would be appointed to represent the child's position, which would very likely be someplace in the middle (i.e.,a special school placement but living at home). After the passage of the Act, but before the publication of the final regulations, the American Association on Mental Deficiency held a workshop to explain the new law to advocates and attorneys, and at that time it was presented with the guardian ad litem provision (AAMD Workshop, 1975). By the time the regulations were published, however, that provision did not appear, and it is assumed under the current regulations that the parents represent

the best interests of the child as long as the child is a minor or incompetent, and a guardian ad litem is only provided in the event the parents are unwilling or unable to act. In that case, it is usually a person from a state agency, in Illinois the Division of Children and Family Services.

With the exception of that provision, the regulations were much as expected. They provide that, in order to receive funding for the schools, the school districts must prove that they are in compliance with the requirements of P.L. 94-142. It was the financial "teeth" in the Act which finally forced the school districts to alter existing programs or to provide new ones where little or no education had been provided for these children in the past.

The regulations specify the steps that a school district must follow in order to provide "due process" on making placements, or in changing placements. They also provide a detailed procedure to be followed in the case of a disagreement over a placement. This is what is known as the "due process hearing" procedure. (20 U.S.C. 1415)

The basic elements of the requirements of due process procedures are as follows:

1. The parent must be given written notice prior to identification, placement, or change of placement of a child by the local education agency (LEA).
2. The parent must give written consent before the child can be evaluated for placement in special education, or before the child can be placed.
3. The notice to the parents must contain:

a. complete notice of the parents' rights under the Act.
b. an explanation of the procedural safeguards available to the parents under the Act.
c. a complete description of what action the LEA is proposing to take, and the reasons for it as well as any other proposed courses of action the LEA may have considered and their reasons for rejecting them.
d. descriptions of any and all tests, procedures, forms, records or reports which are used by the LEA in making its decisions.
e. any other factors which the LEA has considered in making this decision.

4. This notice to the parents must be in their language, or one they understand completely, and must be written in terminology which the general public could understand (this provision has been interpreted by many to mean that these parents must understand it).

Once a parent has received notice of the proposed placement for the child, and has consented to the evaluation, he does not forfeit his continuing rights to procedural safeguards. After the evaluation is complete, the Act requires that a multi-disciplinary staffing be convened to discuss the results and to plan the educational future of the child. The parents must be given the opportunity to be present at the staffing, and all the procedures, tests, etc., must be explained to them. In case a child is already in a special education placement and is being moved to another placement, the parents must have the same

notice (Doe, 1976). It is at the multi-disciplinary staffing that the individualized educational program (IEP) is written, and both the parents and the school representatives must sign it. It has been suggested that this document is a "contract" of a legal nature between the schools and the parents, but it is quite clear from the Congressional History of the Act that this is not so (Cong. Hist., pp. 3 ff). The parent also is given the right to an independent evaluation of the child at public expense under certain circumstances. If the parent disagrees with the evaluation provided by the LEA, then he may have an independent outside evaluation at public expense. The LEA has the right, however, to initiate due process procedures under the Act, and if they are able to show that their evaluation is correct, then the parent still has the right to an independent outside evaluation, but not at public expense. (20 U.S.C. 1415 (b)(1)(A).

The procedure for appealing any decision which is not agreeable to both sides is carefully detailed in the regulations (20 U.S.C. 1415 et seq.) This procedure is what has come to be known as the "Due Process Hearing" procedure.

Either the parent or the LEA may initiate a hearing procedure. The hearing must be held within forty-five days of the request (although there are certain provisions for an extension of this time by the hearing officer), and the decision must be rendered and mailed to the parties within that period of time. The place of the hearing must be reasonably convenient for all parties. If the parents are not fluent in English, then an interpreter must be provided for them. If they are deaf, a sign language interpreter must be used.

Each party in a hearing has the right to counsel and to advice of experts in special education or the other aspects of care of the handicapped that may be involved. Each party may present evidence, cross-examine and confront witnesses, and compel the attendance of witnesses (by subpoena). Either party may prevent the introduction at the hearing of any evidence of which they were not given notice at least five days in advance of the hearing. This provision allows both sides time to answer evidence presented. There is a right to a written or electronic verbatim record of the hearing (a tape or a court reporter's transcript) and to written findings of fact. After the written findings of fact are obtained, the LEA must submit them for review to the state advisory panel after removing names, addresses, and any other personally identifying information. It the parents wish, the child may be present at the hearing, and the hearing may be open to the public. (20 U.S.C. 1415 (d)). The hearing officer is to be an impartial person, and the specific procedure for the selection of a hearing officer has varied from state to state (See Chapter VI). A person who works for or closely with the LEA is not qualified to act as a hearing officer (Compochiaro, 1978).

If the parties do not contest the decision of the hearing officer within thirty days, then that decision is final. If one party does not agree with the findings of the hearing officer, that party may ask the State education agency (SEA) to review the findings, and the SEA must review all the findings and mail their decision to the parties within thirty days. Under certain circumstances an appeal may not be available to the state agency (the regulations do not say under what

circumstances, but it would appear most likely in the case of a state agency that has elected to forego P.L. 94-142 funds in order to avoid some of these procedures. In that case, the action would be proceeding under Section 504 of the Rehabilitation Act, and some of these procedures would not be available). If that should occur, or if the school or the parents disagree with the findings of the SEA on review, then either party may appeal by filing a civil action in state or federal court. For the purposes of the filing in a federal district court, the matter is considered to be a federal cause of action, so that there is no dollar amount requirement for the court to have jurisdiction (20 U.S.C. 1415 Sec. 615 (e) (2)). The court has access to all the records and transcripts, as well as the ability to hear additional evidence if needed. It renders a decision based on the preponderance of the evidence. As in other civil proceedings, there is a right to appeal to a higher court.

During the time the placement, diagnosis, or other issue disagreed about is being resolved, the child stays in the placement he previously had unless both the parents and the SEA can agree to another interim placement. If he is applying for initial admission to school, he is placed in the public school until the dispute can be settled. The exception is that for children who pose a danger to themselves or to others, the school may follow its usual emergency procedures. It is necessary, of course, that these procedures follow the guidelines set forth by the earlier cases involving suspension and expulsion of students for disciplinary reasons. In short, then, the due process procedures outlined by the regulations implementing P.L. 94-142 are

meant to safeguard the procedural due process rights of the child. The complaints that a child has been wrongly excluded, diagnosed, or placed which are the subject of a due process hearing, appeal, or court proceeding are to protect the substantive due process rights of that child (Cong. Rec., Nov. 19, 1975, pp.S 20432 ff).

CHAPTER V

SELECTED CASES SINCE THE PASSAGE OF THE STATUTES RELATING TO THE EDUCATION OF THE HANDICAPPED

Since the passage of Section 504 of the Rehabilitation Act (Section 504) and P.L.94-142 there have been numerous cases in the courts in this country filed on behalf of handicapped children, all asking the courts to clarify certain provisions of the statutes. In most cases, the issue involved has been the "related services" provision of P.L. 94-142. This provision requires that the schools provide the children with "related services" necessary in order for them to be able to profit from the education they are being offered. The act lists specifically such items as transportation, speech pathology and audiology, psychological services, physical and occupational therapy, recreation, early identification and assessment, counseling services, medical services necessary for diagnosis and evaluation, school health services, social work services within the school, and parent counseling and training (34 C.F.R.300.13). Also, the act requires the schools to provide any other developmental, corrective, or supportive service necessary for the child to benefit from special education (34 C.F.R. 300.13 and Comment). The lack of clarity of this last provision is what has led to so much litigation. Obviously, the parents have been asking the schools to fund as much in the way of related services as possible, and school districts are reluctant to do

so. Some of these services may clearly be those which would benefit the child in other situations as well, and the schools have said they were not therefore primarily educational in nature, but the courts have held that that did not matter and that the intent of the act was not to limit related services to those which were only school related (Tokarcik, 1981). The argument of the courts has been that to deny these related services is in effect a denial of the due process rights of the child because it prevents him, without notice and a hearing, from being able to profit from his educational experience (Tatro, 1981).

Schools have become increasingly worried over the possibility of the expansion of the rights of children, and therefore the expenses of school districts as these cases have developed, and the courts have liberally interpreted related services. In a recent case, the United State Supreme Court was first called upon to rule on this issue. The case involved a young girl, Amy Rowley (Rowley, 1982) who is deaf but has a minimal amount of residual hearing. Her parents insisted she be provided with a sign-language interpreter for all her classes, even though she was receiving other help and doing extremely well in the classroom. The lower courts had supported the parents' position, but the Supreme Court reversed, holding that since she was doing better academically than the average child in her grade, and progressing easily from grade to grade, it was clear that Amy was benefitting from the education she was receiving, and the school was providing adequate personalized services for her. They went on to say that the P.L. 94-142 did not require that each student be educated to the maximum

potential of his ability, but only that they receive adequate educational opportunities, and Amy was clearly receiving an adequate education.This decision was viewed with great relief by school districts, especially after some of the other very liberal interpretations that the P.L. 94-142 had been receiving in other courts.

One other related service against which the school districts had fought, and on which they have apparently lost, is clean intermittent catheterization (CIC). Children with spina bifida, who do not have bladder control because of injury to nerves below a certain level in the spine, must be catheterized every few hours on a regular schedule to prevent the buildup of urine and a resulting urinary tract infection. The school had claimed that this was clearly a medical service and could not be performed by school personnel. The parents said that unless the child was catheterized every four hours, she could not attend school, and would therefore be denied the free appropriate public education to which she was entitled. The district court in Texas (Tatro, 1981) agreed with the school, but the Fifth Circuit reversed, holding that without CIC the child could not attend school, and that made it a related service to be provided by the district. At least one other court has reached the same conclusion, but with slightly different reasoning (Tokarcik), holding that CIC was "occupational therapy" necessary to provide the child with an educational opportunity equivalent to that provided to her non-handicapped peers.

Another related service issue which is even more expensive to the districts, and also less easy to define as a service, is psycho-

therapy. In P.L. 94-142, the definition of related services lists "psychological services" but does not specifically mention psychotherapy, and it mentions psychological services in the context of differentiating between it and medical services, so that it is not at all clear what was intended in the way of psychological services. The regulations are more explicit, but still exclude the term "psychotherapy" so this has continued to be a source of disagreement between parents and schools. In several cases, the courts have held that psychotherapy is a related service, as it is often necessary in order for a child to be able to profit from the special education he or she is receiving (In the Matter of the "A" Family, Gary B., Papacoda). In a recent Illinois case, a child was placed in a residential setting in which he received an integrated program encompassing both his psychological and educational needs (Walker). The Appellate Court upheld the lower court's finding that the educational and psychological services were inextricably integrated.

In a recent and extremely important Illinois case, the Illinois Supreme Court had before it a case involving a seventeen-year-old girl who was in a mental hospital for treatment of a suicidal depression. The parents and her psychiatrist together petitioned the school district to pay the entire cost of her medical care, saying that she could not possibly be well enough to benefit from an education until she had recovered from her illness. In her case, there were complicating facts. She had dropped out of school at sixteen, and her mother had re-enrolled her just prior to asking the school to pay for her hospitalization. The school said that they would be happy to provide

an education for her, and would supply a private tutor for her just as soon as she was well enough to see one. The parents and the psychiatrist argued that this was not sufficient, as she needed the psychiatric care in order to get to the point where she could begin to learn. A further complicating factor was that she would soon reach her eighteenth birthday, which would terminate her right to a free public education if she were not in special education, but that right would continue until she was twenty-one if she could convince the court that she was in fact eligible for special education. The decision disappointed many who had hoped that the Court would find in favor of the school district, rather than setting a precedent which could have cost this district approximately $120,000.00 per year for this child alone, but which would also allow this kind of care for others like her, placing an intolerable financial burden on the schools of Illinois. The Court chose not to address the issue of whether this hospitalization was a necessary related service, but remanded the case to the circuit court for a further determination based on its (the Supreme Court's) finding that the hospital to which the girl had been admitted was not on the approved list of providers of the Governor's Purchased Care Review Board, and therefore could not serve as a provider of medical care (Claudia K, 1982). This issue is not, therefore resolved yet in Illinois.

A similar issue, and one often litigated is the provision of residential care to severely handicapped children. Obviously, this is much more expensive than providing classes within the regular school

system, even if they are special classes, or in a self-contained school for special children (Update, 1982). The problem is in determining whether the residential placement is required for educational or non-educational reasons. The Congressional History of P.L. 94-142 is quite clear in stating that there are some needs which are clearly non-educational in nature and that these need not be provided by the LEA (S.Rep., 1975 at 22). Unfortunately it is not always clear on the facts of which services are for which purpose and the courts have decided many similar cases in attempts to clarify this issue. In the first major case addressing this issue (North) the court held that the child's multiple disorders requiring residential placement made it impossible to separate out the physical and emotional needs from the educational needs and ordered the school district to pay the entire cost of residential placement for the child, rather than just place him in a self-contained classroom in the public school system as the school district had wanted to do.

In several other cases, the courts have followed the North reasoning that one cannot separate adequately the parts of a child, and that if it is necessary to meet the physical and emotional needs of the child in order to teach him, then that burden must be borne by the school district (Kruelle, Erdman). This would appear to be a judicial expansion of the original provisions of P.L. 94-142, which state specifically that if the child would need the placement regardless of his educational needs, then it is not an educational placement and should not be provided at school district expense. P.L. 94-142 clearly states that school districts are responsible only for those

placements necessary for the education of a child (34 C.F.R. Sec. 300 and 302, 20 U.S.C. Sec. 1413 (a)(4)(B)).

In summary, the cases which have been heard since the passage of the legislation providing education for handicapped children have been focused largely on the matter of those "related services" which must be provided under the Act to handicapped children so that schools do not deprive the children of their right to a free appropriate education, without their due process rights being preserved. There has been a consistent trend in the courts to find that many extensive and costly services are necessary to children in order for them to benefit from education, and that these must be provided at school district expense if the rights of the children are to be preserved. This has not been expanded to include provision for an absolute maximum education in accord with the potential of the child.

CHAPTER VI

THE ILLINOIS IMPLEMENTATION OF THE LAW

The law in Illinois implementing P.L. 94-142 has followed very, very closely the federal regulations, the cases, and the Congressional history of the Act. The rules for the administration of Special Education (Rules, 1979) give the specific procedures for initiating the due process hearing procedure in Illinois.

First, the schools are charged with all the responsibility for notifying parents of all pending actions and for conferring with them in compliance with P.L. 94-142 and its regulations. The specific procedure for initiating the due process hearing procedure under the regulations on Illinois are as follows:

1. The request for a hearing is made to the local school district in writing, including the reasons for the hearing and all other pertinent information.
2. Hearing requests are limited to one a year, and within 10 days of notification of a proposed placement, if the purpose is to disagree with a placement.
3. The school district must notify the Illinois Office of Education (IOE) by certified mail within five school days of the request, and request the appointment of a hearing officer. There are specific requirements as to what must be in this notice (see Appendix A) and a copy of this letter must be sent to the person who requested the hearing.

4. If the district does not honor the request for a hearing, it must so notify the parents within five days, in writing, stating reasons for the denial.
5. The parent may appeal directly to the IOE, and the State Superintendent may order a hearing or other appropriate measures.
6. If the request is sent to IOE, a list must be provided within five working days of five trained impartial hearing officers, one of whom will be selected to conduct the local hearing. The requirements for these officers are contained in the Rules, Title Ten, Section 6 (see Appendix A).

The selection of the hearing officer is made in the following way (in Illinois):

1. The parents receive the list of five prospective hearing officers and strike one name.
2. The school strikes a second name.
3. This process continues until one person is left. He or she then becomes the hearing officer.

The hearing officers in Illinois are trained by IOE for the job of conducting hearings. They are also required to attend re-training and updating meetings on a regular basis. Most of the hearing officers in Illinois are not attorneys, although some are. The requirements for this position are one of the larger areas in which specific state regulations have varied.

Within five days of the selection of the hearing officer, he or she sets the time and place for the hearing. It is to be at a time and

place mutually convenient to the parties but in no event more than fifteen days after the selection of the hearing officer. This time may be extended up to another fifteen days if the hearing officer wishes, and longer if both parties agree.

IOE is responsible for informing the parents of their rights during the hearing (counsel, evidence, etc.) not less than five days prior to the hearing. The regulations in Illinois (Title Ten, Section 7, Appendix A) follow exactly those in the federal regulations.

The hearing is not to be considered an adversary proceeding, and the rules of evidence do not apply. It appears from some of the available synopses of the hearings held under the first two years of P.L. 94-142 that some of the attorneys did not abide by this understanding. It seems that some of the hearings have resulted in adversary-type proceedings, especially in the aggressive cross-examination of witnesses. The Congress was wise in its discussion of this issue, holding the opinion that whatever went on at the hearing, there was still a child involved who would be attending school in the district in the future, and that the aim was for the parents and the school to work together, and not against each other (Cong. Rep.,pp. 227 ff). One reason for the requirement that the rule of evidence need not apply was that the Congress realized that in such a situation there might be many people useful to the decisions to be made, and especially with what might be "soft" information about a child, but which certainly might be excluded as either irrelevant or hearsay if the rules were used, but which could be extremely useful in the type of determination to be made in a due process hearing.

The hearing officer must render a written decision within ten days of the hearing, and it is binding unless appealed.

The decision may be appealed to the ISBE with a completed ISBE appeal form and five copies of the transcript of the hearing. The child's placement may not be changed pending either a hearing or an appeal. The exceptions are those previously mentioned.

For a state-level appeal, a hearing panel is convened. This panel consists of attorneys and trained educational personnel of the IOE. The panel will review the record, the procedures, and may compel the appearance of witnesses and require additional information. Further regulations for this review are detailed in the Rules (Ill. Rev.Stats., Ch. 122, Sec. 2-3.38).

All hearings are reported to the ISBE in summary form, and the brief summaries are distributed to hearing officers, directors of special education, and some other concerned agencies. Other than this, there is no report made of the proceedings at due process hearings. It is not possible, for instance, for most school districts, parents, or other concerned persons to know either what the reasoning has been of hearing officers throughout the state, what the trends are in providing services, etc., for children in special education, or the other trends in special education decisions in the state unless these trends are passed along by word of mouth. The problem is obviously two-fold. It would be extremely useful for those involved in any way with special education in Illinois, whether it be as parent, teacher, student, litigator, advocate, or hearing officer, to know what the trends are in the state, and the rationale for the decisions that are being made. On

the other hand, there is great need to protect the anonymity of the minor children involved, and in many cases the families involved. It would seem, however, that the greatest lack in the implementation in the law in Illinois is the lack of a reporting mechanism which could quite possibly prevent some of the questions from being heard again and again. It is the express intent of P.L. 94-142 that the hearings do not set precedent.

Of the cases which were "reported" they followed the same basic lines as the cases discussed in Chapter V. The earliest cases included several in which the parents had apparently not been fully advised of their rights by the LEA. As time went on, and the school districts became more aware of their duties, and probably also more aware that they would be held accountable, these cases diminished radically in number. Subsequent cases have involved related services in more than fifty percent of the cases. The majority of the other cases involved a disagreement over the nature of the evaluation provided by the district, or the placement the child was offered. It would appear that a clear-cut procedure for ensuring that due process procedural rights are protected are in place, and that they are working to the definite advantage of both the children involved and the school districts. It is not so clear what the substantive rights of each child are, and in fact it may not be possible to determine this except on a case by case basis, but it would appear that the next due process assurances for children will be in the form of some further definition of their substantive rights.

Summary data available from ISBE shows a marked decrease in the number of due process hearings held in Illinois over a two-year span since the institution of the regulations for due process procedures. In the first six months of 1980, 333 hearings were held in Illinois, while in the same period of 1982, only 143 hearings were held. One reason for this decline would be that the backlog of complaints from parents who had been at odds with their child's school for a long period of time would have been heard in the initial period after enactment of the rules. Another reason, and probably the one that would account for most of the decline, is that, with procedures carefully specified, both the school districts and the parents would be able to determine in advance their rights and duties, and the very fact that the rules are available as guidelines may be eliminating many of the previously indifferent or disorganized procedures that had been followed in the administration of special education in some districts. (For summary data, see Appendix D)

CHAPTER VII

CONCLUSIONS

The changes in special education law in the last quarter century have been extremely significant. Children who were either excluded from school completely or provided with severely inadequate placements in the past are now provided with legal safeguards which allow them to be in school settings appropriate to their disability at the expense of their local education agency.

Some of these changes have resulted from changes in the law by which children were found to have a "property right" in their education. To deprive them of that right would require all of the safeguards provided by the Fifth and Fourteenth Amendments to the Constitution.

The Congress, following the trends set by the courts in this area, has mandated very carefully considered procedures to be followed for the placement of children in special education. Some of the terminology still needs clarification, and it is likely that court cases will continue in the areas not clearly enough defined in the statutes or regulations. While it is clear that there are certain very explicit procedures which can be followed to guarantee that children are protected as to their rights to procedural due process, it is not nearly so clear as to what services must be provided, and under what circumstances if a child is not to have his substantive due process rights violated.

It would be to the advantage of everyone concerned with special education if the meaning of "related services" could be more clearly defined. The courts have expanded this term's meaning so greatly, that the only logical consequence is an untenable financial burden to the school districts which are paying for these services. What has not yet been addressed is the issue of whether the appropriate state agency is being asked to pay for these services, or whether perhaps, the burden belongs with some agency other than the school district.

It is precisely for this reason that eight agencies of the State of Illinois were forced to attempt to agree on procedures for funding the care of children in the state. Since the agencies had not agreed, and had not formulated a plan which met with the approval of the U.S. Office of Civil Rights, charges had been instituted and funds withheld. In order to secure the release of the federal funds for the state, and to be released from the charges of violating both Section 504 and P.L. 94-142, the agencies issued a temporary "Memorandum of Understanding" (Appendix E) in which they agreed to make certain changes in their procedures on a temporary basis, and to continue to attempt to negotiate an agreement among themselves. This agreement is currently in effect, but the agencies are attempting to reach a permanent settlement. The matter will be referred to the legislature for a statutory resolution in the event that administrative and regulatory changes cannot be made to the satisfaction of the agencies involved.

It may be that services for children will be more limited in the future. Schools are losing funds at a rapid rate now, and voters are

consistently refusing to vote increases in the tax rate. If this should occur, the Supreme Court may have to re-examine the idea that funds should be merely re-allocated in providing funds for children in special education.

It is clear that the rules are basically good as they stand in terms of their ability to protect children's rights to procedural due process in special education. However, it also is becoming apparent that the rules are sometimes not followed. Walker was just such a case. If the school district and the mother had followed the procedures they should have, the case might well have ended long before it went to court. In that case the mother requested a due process hearing and the school did not grant it. There might still have been a disagreement on the facts of the case, but adherence by the district to proper procedure might have saved time and money for both sides, and would certainly have been to the advantage of the child.

It is worthy of note here that, while the cases in desegregation and those in special education began in the same manner, they have been resolved in very different fashions. In the area of desegregation, there has been little in the way of specific regulations for procedures to be followed in desegregating schools, and by and large, the problems have been handled on a continuing basis by litigation. There are several authors who have traced the development of this line of cases (Yudof, et.al., pp.413 f) On the other hand, in special education, there are such specific regulations available that the case law has been confined to definition of small portions of the regulations. There are some obvious differences between race and disability. Race

is easier to define and diagnose, it remains constant throughout the life span of the child, and it is not subject to the many differences in degree, severity, etc., that handicap is. It is also not something which changes with educational treatment. Nevertheless, the comparisons between the two areas of law and their development would be a good subject for a future research study.

BIBLIOGRAPHY

Children's Defense Fund, Children Out of School in America, Children's Defense Fund, Cambridge, Mass.,1974.

Eisenberg, Theodore, Civil Rights Legislation, The Michid Co., Indianapolis, 1981.

Comment, Senate Report No. 94-168, Pg. 12, 1975.

Cottle, Thomas J., Barred from School: Two Million Children, New Republic Books, Washington, D.C., 1976.

Hearings before the Subcommittee on the Handicapped of the Committee on Labor and Public Welfare, United States Senate, 93rd Congress, Second Session, U.S. Gov't. Printing Off., 1974.

Illinois School Code, Ill. Rev.Stats., Ch. 122, §14-1.01 et seq.

"Legal Reform of Special Education: Empirical Studies and Procedural Proposals," Calif. L. R., vol. 62, No.1, Jan., 1974.

Nazzaro, J. Exceptional Timetables: Historic Events Affecting the Handicapped and Gifted, Council for Exceptional Children, 1977.

"The Right to a Free Appropriate Public Education," in The Courts and Education, Univ. of Chicago Press, Chicago, 1978.

Rights of Parents and Responsibilities of Schools, Educators Public Service, Cambridge, Mass.

Senate Report No. 168, 94th Congress, 1st Session, 22 (1975).

Silberman, Charles E. Crisis in the Classroom: The Remaking of American Education, Random House, New York, New York, 1970.

Update, Council for Exceptional Children, 13 Update No. 4 (1982).

Workshop Proceedings, AAMD, Chicago, Illinois, 1975.

Yudof, Mark G., et.al., Educational Policy and the Law, Second Edition, McCutchon Publishing Company, Berkeley, California, 1982.

TABLE OF CASES

In the Matter of the "A" Family, 602 P.2d (Mont., 1979).

Beattie v. State Bd. of Educ.,172 N.W. 153 (1919).

Bolling v. Sharpe, 347 U.S. 497, 74 S. Ct. 693 (1954).

Brown v. Bd. of Educ. of Topeka, 347 U.S. 483 (1954).

Cherry v. Mathews, 419 F.Supp. 922 (D.D.C., 1976).

In the Matter of Claudia K., _____Il. _____,1982.

Dixon v. Ala. St. Bd. of Educ., 294 F.2d 150 (5th Cir., 1975).

Doe v. Laconia, 396 F. Supp. (D.N.H., 1975).

Gary B. v. Cronin, 542 F. Supp. 102 (N.D. Ill.,1980).

Goldberg V. Kelley, 397 U.S. 245 (1969).

Goss v. Lopez, 419 U.S. 565 (1975).

Hairston v. Drosick, 423 F. Supp. 180 (S.D.W. Va., 1976).

Jenkins v. Ballantyne, 8 Utah 245, 30 P. 760.

Bd. of Curators of Univ. of Missouri v. Horowitz, 435 U.S. 78 (1978).

Kruelle v. New Castle County S.D., 642 F.2nd 687 (3rd Cir., 1981).

Maryland Assoc. for Retarded Children v. Maryland, Equity No. 100/182/77676 (Cir. Ct., Baltimore Cty., April 9, 1974).

Mattie T. v. Holliday, Cir. Act. No. DC-75-31-S (N.D. Miss., filed April 25, 1925

McLaurin v. Okla. St. Regents for Higher Educ., 339 U.S. 637 (1950).

Mills v. Bd. of Educ. of Dist. of Columbia, 348 F. Supp 866 (D.D.C., 1972).

Nebbia v. New York, 291 U.S. 502, 54 S.Ct. 505.

North v. Dist. of Col. Bd. of Educ., 471 F. Supp. 136 (D.D.C., 1979).

Off v. Morehead, 235 Ill. 40, 85 N.E. 264.

Papacoda v. Connecticut, 528 F. Supp. 68 (D. Conn., 1981).

Pennsylvania Ass'n for Retarded Children V. Commonwealth of Pa., 334 F. Supp. 1257 (E.D. Pa., 1971), 343 F. Supp. 279 (E.D. Pa.,1972).

Plessy v. Ferguson, 163 U.S. 537 (1896).

Board of Regents of State Colleges V. Roth, 408 U.S. 564 (1972).

Rowley v. Hendrick Hudson Central School Dist. Bd. of Educ., 50 U.S.L.W. 4925 (June 28, 1982), 483 F. Supp. 528 (S.D.N.Y.), 632 F. 2d 945 (2nd Cir., 1980).

Snyder v. Massachusetts, 291 U.S. 97, 54 S. Ct. 330.

Sweatt v. Painter, 339 U.S. 629 (1950).

Tatro v. Texas, 516 F. Supp. 968 (N.D. Tex. 1981).

Tokarcik V. Forest Hills S.D., 665 F. 2d 443 (3rd Cir. 1981).

Tinker v. Des Moines Indep. Comm. School Dist., 393 U.S. 503 (1969).

APPENDIX A

TABLE OF CONTENTS

Article I	Definition of Terms	2
Article II	Responsibility for Special Education	6
Article III	The Establishment and Administration of Special Education	8
Article IV	Special Education Instructional and Resource Program	11
Article V	Special Education Related Services	14
Article VI	Prevocational Programs	17
Article VII	Home and Hospital Programs	17
Article VIII	State-Operated or Private Programs	19
Article IX	Identification, Evaluation, and Placement of Exceptional Children	22
Article X	Impartial Due Process Hearing	37
Article XI	Surrogate Parents	46
Article XII	Special Education Personnel	48
Article XIII	Special Transportation	49
Article XIV	Evaluation of Special Education	50
Article XV	Special Education Services for Children in Residential Care Facilities	51

DEFINITION OF TERMS

ARTICLE I

1.01
Case Study:

shall be defined as a series of indepth multidisciplinary diagnostic procedures, conducted within an established time frame and designed to provide information about the child, the nature of the problems which are or will be affecting his/her educational development, and the type of intervention and assistance needed to alleviate these problems.

1.01a
Consent:

The parent (s)
1. has been informed of all necessary information
2. understands and agrees in writing to carrying out the activity for which consent is sought
3. understands that the granting of consent is voluntary on his or her part and may be revoked at any time.

1.01b
Continuum of Alternative Placements:

the availability of different types of educational environments, for example: regular classes, resource room classes, self-contained classes, day and residential special schools, home instruction, hospital instruction, and institutional instruction.

1.01c
Counseling Services:

services provided by qualified personnel such as: social workers, psychologists, guidance counselors, or other qualified personnel.

1.02
Exceptional Children:

shall be defined as all children designated in Article XIV of The School Code of Illinois. These children may exhibit handicapping or exceptional characteristics ranging from very mild to very severe.

1.02a
Individualized Education Program (IEP):

a written statement for an exceptional child that provides at least a statement of: the child's present levels of educational performance; annual goals and short-term instructional objectives; specific special education and related services; the extent of participation in the regular education program; the projected dates for initiation of services; anticipated duration of services; appropriate objective criteria and evaluation procedures; and a schedule for annual determination of short-term objectives.

1.03
Instructional Programs:

shall be defined as those activities which provide the principle elements of the exceptional child's educational development at any given time. These activities may include any or all of the following:

1. evaluation of the nature of the child's educational needs
2. amelioration of and compensation for visual, auditory, physical, speech or other impairments
3. development of language concepts and communication skills
4. educational experiences which are adjusted in content, emphasis, rate or location
5. modification of social skills or emotional adjustment.

For the purpose of these rules and regulations, an instructional program shall be considered as one in which the exceptional child spends 50% or more of his/her school day.

1.04
Language Use Pattern:

shall be defined as the language or combination of languages which the child uses to conceptualize and communicate those conceptualizations.

1.05
Least Restrictive Environment:

to the maximum extent appropriate, handicapped children are educated with nonhandicapped children. Special classes, separate schooling or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap requires that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

1.05a
Multidisciplinary Conference:

a deliberation among appropriate persons for the purpose of determining eligibility for special education, developing recommendations for special education placement, reviewing educational progress, or considering the continuation or termination of special education for an individual child.

1.06
Parent:

shall be defined as the natural or adoptive parent, a guardian, a person acting as a parent of a child, or surrogate parent who has been appointed by the Illinois Office of Education.

1.06a
Parent Counseling and Training:

procedures utilized in assisting parents in understanding the special needs of their child and providing parents with information about child development.

1.06b
Psychological Evaluation:

an individual evaluation of the child's functioning in the cognitive, psychomotor, social/emotional, and academic achievement or aptitude areas using appropriately validated formal and informal tests and evaluation material.

1.07
Qualified Specialist:

shall be defined as those professional special education personnel who meet either the certification or approval requirements described in Article XII of these rules and regulations.

1.07a
Reevaluation:

a series of diagnostic procedures which are performed in accordance with Article 9.09 for the purpose of determining a child's continued eligibility for special education.

1.08
Referral:

shall be defined as a formal procedure, established by the local school district, by which a case study evaluation may be requested.

1.08a
Related Services:

the developmental, corrective, and other supportive services which are required to assist a handicapped child to benefit from special education. Such services include: speech pathology and audiology, psychological services, physical and occupational therapy, recreation, early identification and assessment of disabilities in children, counseling services, and medical services for diagnostic or evalation purposes. The term also includes transportation, school health services, social work services, and parent counseling and training.

1.08b
Resource Programs:

specialized educational instructional services which are provided to the child for less than 50% of his or her school day.

1.09
School Days:

shall be defined as those days on which school is officially conducted during the regularly established school year. (See Illinois Revised Statutes, Chapter 122, Section 10-19)

1.09a
School Health Services:

services provided by a qualified school nurse of other qualified persons.

1.10
Screening:

shall be defined as the process of reviewing all children in a given group with a set of criteria for the purpose of identifying certain individuals for evaluations who may be in need of special education.

1.11
Social Developmental Study:

shall be defined as a compilation and analysis of information concerning those life experiences of the child, both past and present, which pertain to the child's problems and/or to the possible alleviation of those problems.

1.12
Special Education:

shall be defined as those instructional and resource programs and related services, unique materials, physical plant adjustments, and other special educational facilities described or implied in Article XIV in The School Code of Illinois which, to meet the unique needs of exceptional children, modify, supplement, support, or are in the place of the standard educational program of the public schools. The term includes speech pathology and vocational education.

1.13
Special Education Placement:

shall be defined as the provision of specified public special education services, including and limited to a special education instructional program, resource program, special education related services, speech and language services, homebound services, hospital services, referral to a nonpublic program or a state-operated facility.

1.14
Special School:

shall be defined as an educational setting which is established by the local school district exclusively to meet the needs of exceptional children.

1.15
Special Transportation:

shall be defined as those transportation services which are required because of the child's exceptional characteristics or the location of the special education program, or related services, and which are in addition to the regular transportation services provided by the local school district.

1.16
Standard Education Program:

shall be defined as the educational program generally offered by the local school district to the majority of its students.

1.16a
Staff Conference
See Article 1.05a, Multidisciplinary Conference, for definition of staff conference.

1.17
Surrogate Parent:

a person who acts in the educational behalf of an exceptional child, in accordance with Article XI of these regulations.

RESPONSIBILITY FOR SPECIAL EDUCATION

ARTICLE II

2.01
The local school district shall be responsible for providing and maintaining appropriate and effective education programs, at no cost to the child's parents, for all exceptional children who are resident therein.

2.02
Each local school district, independently or in cooperation with other districts, shall provide a comprehensive program of special education for those exceptional children who are between the ages of three and twenty-one and who are resident in the district. Additionally, each local school district shall have a goal of providing full educational opportunity to all handicapped children birth to age three. A comprehensive program shall include:

1. A viable organizational and financial structure.

2. Systematic procedures for identifying and evaluating the need for special education and related services.

3. A continuum of program options which incorporate appropriate instructional programs, resource programs, and related services.

4. Qualified personnel, consistent with Article XII of these regulations, who can provide:

a. Administration of the program
b. Supervisory services
c. Instructional programs
d. Related services
e. Transportation services
f. Resource programs

5. Appropriate and adequate facilities, equipment and materials.

6. Functional relationships with those public and private agencies which can supplement or enhance the special education programs of the public schools.

7. Interaction with parents, and with other concerned persons, which facilitates the educational development of exceptional children.

8. Procedures for internal evaluation of the special education programs and services.

9. Continuous planning for program growth and improvement based on internal and external evaluation.

2.03
Special education shall be established and conducted as an integral part of the local district educational effort.

1. The local school district shall be considered the primary agent for the delivery of special education services to exceptional children.

2. An organizational unit developed by joint agreement between districts shall be considered a service agent of the participating districts.

3. The cooperative programs shall be directed by, and responsible to, all participating local districts.

2.04
The local school district shall be responsible for ensuring that those children who require special education services enjoy rights and privileges equal to those of all other children.

1. No exceptional child between the ages of three and twenty-one may be permanently excluded from the public schools, either by direct action by the board of education, by indication of the district's inability to provide an educational program, or by informal agreement between parents and the school district to allow the child to remain without an educational program.

2. A child who has been determined eligible for a special education instructional or resource program or related service shall not be expelled for behavior or a condition which is, or results from, an exceptional characteristic as defined in Illinois Revised Statutes, 1973, Chapter 122, Section 14-1.01 through Section 14-1.07 and these rules and regulations.

a. Nothing in these rules and regulations shall be construed to prohibit the suspension of any child, pending special education placement, as herein provided, when such suspension is warranted due to the physical danger to the student, other students, faculty, or school property caused by the child's presence.

b. If a child has been suspended due to the physical danger to himself or herself, other students, faculty, or school property caused by the child's continued presence, the local school district shall be responsible for developing and providing an appropriate educational program during the period preceding special education placement.

THE ESTABLISHMENT AND ADMINISTRATION OF SPECIAL EDUCATION

ARTICLE III

3.01
Each local school district shall establish and maintain special education instructional programs, resource programs, and related services which meet the educational needs of children with the following exceptional characteristics:

a. Auditory, visual, physical, or health impairment.
b. Speech or language impairment.
c. Deficits in the essential learning processes of perception, conceptualization, memory, attention, or motor control.
d. Deficits in intellectual development and mental capacity.
e. Educational maladjustment related to social or cultural circumstances.
f. Affective disorders or adaptive behavior which restricts effective functioning.

3.02
Special education instructional programs, resource programs, and related services shall range along a continuum based on the nature and degree of the intervention. This continuum of program options shall include, but not be limited to:

1. Standard Program with Modification--The child receives his/her basic educational experience through the standard program. However, these experiences are modified through:

   a. Additional or specialized education from the teacher
   b. Consultation to and with the teacher
   c. Provision of special equipment and materials
   d. Modification in the instructional program (e.g., multi-age placement, expectations, grading, etc.)

2. Alternate Standard Program--The child receives his or her basic educational experiences in a standard program whose curricular content and educational methodology have been substantially changed. Such changes shall occur when the special education needs of a proportionately large, identifiable segment of the school population are not otherwise being met.

3. Standard or Alternate Standard Program with Resource Programs or Related Services--The child receives his or her basic educational experiences through the standard, or alternate standard, program. However, these experiences are augmented by one or more resource programs or related services.

4. Special Program--The child receives most of his or her basic educational experience through an instructional program in a special class, which is largely self-contained, or in a special school.

   a. Inclusion in those parts of the standard program which are appropriate.
   b. Provision of related services as needed.

5. Cooperative Program--The child receives most of his or her educational experiences through either the standard or the special program of the public school. However, this is supplemented through work-experience programs or shared agency involvement.

6. Home and Hospital Program--The child who is eligible for either standard or the special program, but who is unable to attend such programs, receives instructional or resource programs or related services in his or her home or in the hospital.

7. State-Operated or Private Program--The child whose exceptional characteristics are so profound or complex that no special education program offered by the public schools can adequately or appropriately meet his or her needs is referred to either a state-operated or a private facility.

3.03
Special education instructional programs, resource programs, and related services, including diagnostic services, shall be available to exceptional children who are between the ages of three and twenty-one and who are enrolled in the local school district.

1. When an exceptional child becomes three years old, the child shall be eligible for special education services, including private placement if required, at any time thereafter.

2. An exceptional child who requires continued public school educational experience to facilitate his or her integration into society shall be considered eligible for such services until age twenty-one or upon successful completion of the secondary program. The child who becomes twenty-one during the school year shall be allowed to complete that year.

3. An exceptional child who has satisfactorily completed a secondary program and has been assisted in locating further educational and vocational experience as necessary shall be granted a diploma. Both parents and the student shall be made aware that eligibility for the public school special education services is terminated following the granting of a diploma and that the parents may request a review of the recommendation for graduation.

3.04
Each local school district shall ensure that to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and that special classes, separate schooling or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

3.05
Facilities used for special education programs and services shall be appropriate to, and adequate for, the specific program or service. Such facilities shall be at least equal to those provided to the students in the standard program.

3.06
Written policies shall be developed by the local school district concerning the method by which information concerning a student will be collected, the confidential nature of that information, the use to which it will be put, recorded and maintained, the period for which it will be maintained, the persons to whom it will be available and under what circumstances. All such policies shall be consistent with: 1) The Illinois School Student Records Act; 2) Rules and Regulations to Govern School Student Records; and 3) SBE-1, The Illinois Program for Evaluation, Supervision, and Recognition of Schools.

1. Such policies shall provide that all information maintained concerning a student receiving special education services be directly related to the provision of services to that child.

2. These policies shall be made known to the parents or guardians of all students receiving special education services, and shall be available to the public.

3.07
The establishment and operation of all special education programs and services shall be under the coordination and educational direction of a state-approved director of special education. Such director refers to an individual functioning in that capacity whose credentials have been approved by the State Board of Education.

3.08
All special education programs and services shall be provided with state-approved supervisory services, specific to the nature of the program or service. Supervisory personnel shall provide consultation to and coordination of special education programs and services.

3.09
Within each local school or district, the building principal or other designated local district administrator shall, in cooperation with special education administrative and supervisory personnel, facilitate the functioning of special education instructional and resource programs and related services as an integral part of the school program.

3.10
The specific responsibilities of special education administrative and supervisory personnel and local district administrative personnel in relation to special education instructional and resource programs and related services shall be delineated in writing and made known to all persons involved.

3.11
Special education programs and services which would not comply with these Rules and Regulations to Govern the Administration and Operation of Special Education shall require written approval from the Illinois Office of Education prior to the implementation of the program or service. Factors to be taken into consideration shall include but are not limited to: student exceptional characteristics, class size, staff qualifications, physical plant and evaluation plan.

SPECIAL EDUCATION INSTRUCTIONAL PROGRAMS AND RESOURCE PROGRAMS

ARTICLE IV

4.01
Special education instructional programs shall be designated in direct response to the educational needs of exceptional children.

1. Specific types of instructional programs may be formulated according to common exceptional characteristics of the students, or, for students with differing exceptional characteristics:

   a. Instructional programs formulated according to common exceptional characteristics of the students shall be in accord with those characteristics described in rule 9.16
   b. Instructional programs which group students with differing exceptional characteristics shall be formulated only under when the following circumstances:

      (1) The students are grouped in relation to a common educational need, or
      (2) The program can be completely individualized, and
      (3) The teacher is qualified to plan and provide an appropriate educational program for each student in the group.

2. Student-based objectives shall be developed for each type of special education instructional program.

3. The objectives of the program shall have direct and observable relationship to the objectives which have been established for each child who is placed in that program.

4.02
A curriculum of educational experiences adaptable to individual needs, interests, or abilities of each child shall be developed for each type of instructional program.

1. This curriculum shall be:

   a. Sequential
   b. Developmental
   c. Goal-directed
   d. Clearly stated and available to the public
   e. Subject to continuing evaluation and revision.

4.03
In the formation of special education instructional programs, consideration shall be given to the chronological age, mental age, physical size, motor ability, level of achievement, and social and emotional adjustment of the students.

1. Special education age groupings shall be early childhood (generally ages 3-5), primary (generally ages 6-8), intermediate (generally ages 9-11), junior high (generally ages 12-14), and secondary (generally ages 15-21).

2. The age range of students within a special program or in any individual instructional grouping shall not exceed four (4) years.

4.04
The principle determinants of the number of students served in each special education instructional program shall be the age of the students, the nature and severity of their exceptional characteristics, and the degree of intervention necessary. All exceptions to the following program size limitations shall require the written approval of the Illinois Office of Education prior to the implementation of the program.

1. Early childhood instructional programs shall have a maximum ratio of one (1) qualified teacher to five (5) students in attendance at any one given time; total enrollment shall be limited according to the needs of the students for individualized programming.

2. Instructional programs which primarily serve children whose exceptional characteristics are either profound in degree or multiple in nature shall have a maximum enrollment of five (5) students.

3. Instructional programs which primarily serve children whose principle exceptional characteristics are severe visual, auditory, physical, speech or language impairments, or behavioral disorders shall have a maximum enrollment of eight (8) students.

4. Instructional programs which primarily serve children whose principle exceptional characteristics are learning disabilities or severe mental impairment; programs which are primarily diagnostic or developmental or programs which serve children with differing exceptional characteristics shall have a maximum enrollment of ten (10) students.

5. Instructional programs which primarily serve children whose principle exceptional characteristics are moderate visual or auditory impairment shall have a maximum enrollment of twelve (12) students.

6. Instructional programs which primarily serve children whose principle exceptional characteristics are educational handicaps or mild/moderate mental impairment shall have a maximum enrollment of twelve (12) students at the primary level and fifteen (15) students at the intermediate, junior high, and secondary levels.

7. The local school district may increase the enrollment in a special education instructional program by a maximum of two (2) additional students to meet unique circumstances which occur during the school year. Such additions may be made only when the educational needs of all students who would be enrolled in the expanded program can be adequately and appropriately met, OR, the school district may increase the enrollment in a special education instructional program by a maximum of five (5) additional students when the program is provided with a full-time, non-certified assistant.

8. When the district wishes to exceed the maximum enrollments indicated above, approval shall be requested in writing to the Illinois Office of Education, Department of Specialized Educational Services. The request shall include a rationale for the proposed enrollment variation and a plan for its evaluation. If the request for an enrollment deviation is denied, the district may appeal the decision to the State Superintendent of Education.

4.05
Integration into a standard program of a student enrolled in a special education instructional program shall be determined in relation to the individual objectives established for the student. When a student is integrated into a standard educational program from a special program, the special teacher of that student shall be responsible for intensive coordination with the standard program teacher.

4.06
Special education resource programs shall be designed in direct response to the educational needs of exceptional children.

1. Resource programs shall be provided to exceptional children whose educational needs can be adequately met through part-time instruction by a special education teacher. Part-time instruction shall be considered as less then 50% of the school day. Such instruction may be delivered in resource room classes or on an itinerant basis.

   a. Such programs shall include consultation with the standard program teacher and provision of special materials and equipment.

   b. Enrollment in such a program shall be limited to the number of students who can effectively and appropriately receive assistance, ordinarily not to exceed a total of twenty (20). The teacher of each resource program shall actively participate in determining the appropriate enrollment.

   c. Resource programs which group children with differing exceptional characteristics shall be formulated under the following circumstances:

(1) The students are grouped in relation to a common educational need, or
(2) The program can be completely individualized, and
(3) The teacher is qualified to plan and provide an appropriate educational program for each student in the group.

SPECIAL EDUCATION RELATED SERVICES

ARTICLE V

5.01
Related services which shall be provided by the school district are: those activities supplemental to the standard educational program, special education instructional programs, or resource programs which serve to facilitate the child's development. The activities include evaluation, therapeutic or consultation services.

The related services to be provided are:

1. Speech and language services for all students with speech and/or language impairments which interfere with their educational or social development.

   a. Speech and language services may be made available as:

      (1) A special education related service
      (2) A special education resource program
      (3) A special education instructional program

   b. Speech and langauge services shall include, but not be limited to:

      (1) Screening and diagnosis of children with suspected language impairment
      (2) Planning and developing the clinical program
      (3) Therapy for children with impairments of oral language comprehension, production, or usage, including disorders of fluency, phonation, resonance, articulation, and oral language formation
      (4) Parent counseling
      (5) Referrals and follow-up
      (6) Consultative and resource services to other professional personnel.

   c. The number of children seen by a speech and language clinician shall be based on the nature of the speech and language needs of the individual children. At no time shall the case load exceed eighty (80) students.

2. School psychological services to and on behalf of students who require psychological evaluation and assistance in their educational or behavioral adjustment.

   a. School psychological services shall include, but not be limited to:

(1) Screening of school enrollments to identify children who should be referred for individual study
(2) Individual psychological examination and interpretation of those findings and recommendations which will lead to meaningful educational experiences for the child
(3) Counseling and performing psychological remedial measures as appropriate to the needs of students, individually or in groups
(4) Participating in parent education and the development of parent understanding
(5) Consulting with teachers and other school personnel in relation to behavior management and learning problems
(6) Consulting in program development.

b. School psychological services shall be available, in an appropriate quantity, to all children for whom the district is responsible.
c. School psychological services shall be utilized to assist in the process of developing an educational climate conducive to the optimum development of all children. Emphasis shall be placed on prevention as well as rehabilitation, or indirect as well as direct services.

3. School social work services to and on behalf of students whose educational or behavioral development is restricted due to social or emotional considerations, family circumstances, or problems of the environment.

a. School social work services shall include, but no be limited to:

(1) Services to school personnel on behalf of children
The school social worker shall provide consultation and in-service training experiences to school personnel.
(2) Identification of children in need of services
The school social worker shall be responsible for providing the social developmental study in a case study evaluation and for participating in the identification of those children who require social work intervention.
(3) Direct services to children
(4) Service to parents on behalf of children
The school social worker shall be responsible for serving as a liaison between the home and the school and for providing parental education and counseling as appropriate in relation to the child's problem.
(5) Utilization of community resources
The school social worker shall facilitate the effective utilization of existing community resources to meet the needs of school children and shall assist in developing services which are needed but unavailable.

b. School social work services shall be available, in an appropriate quantity, to all children for whom the district is responsible
c. School social work services shall be utilized to assist in the process of developing an educational climate conducive to the optimum development of all children. Emphasis shall be placed on prevention as well as rehabilitation, on indirect as well as direct services.

4. Special reader services, braillists, typists, and interpreters shall be provided as required by the child's IEP.

5. Therapy services shall be provided for exceptional children whose educationally related, therapeutic needs have been determined in a multidisciplinary conference.

   a. Physical and/or occupational therapy shall be provided for exceptional students whose physical impairments require appropriate therapeutic attention if the students are to receive full benefit from the instructional program provided them. Such therapy shall be provided to individual children in accord with the recommendation and prescription of a licensed medical examiner.

   b. Other therapeutic services shall be provided as required to facilitate the education of exceptional children.

6. Consultant services shall be provided as required by the IEP, developed in accordance with Article 9.18a.

   a. Psychiatric consultation or other professional consultation which provides a therapeutic component shall be provided to those special education instructional programs or resource programs which serve children who exhibit affective or behavioral disorders.

   b. Other consultant services shall be provided as required to facilitate the education of exceptional children and as approved by the Illinois Office of Education.

5.02
Other related services including school health services, counseling services and parent counseling or training shall be provided by the local district when the multidisciplinary conference determines that such services would facilitate the educational development of exceptional children.

5.03
Student-based objectives shall be determined for each special education related service.

5.04
Specific objectives shall be established for each child who receives special education related services.

5.05
Related services time spent with or on behalf of the student shall be sufficient to be educationally or therapeutically adequate, as determined by the evaluation of the child's needs.

PREVOCATIONAL PROGRAM

ARTICLE VI

6.01
Prevocational programs consisting of organized instructional experiences, training experiences, and resource programs shall be provided to exceptional children in accordance with their needs and as determined by the IEP.

6.02
Provision of a prevocational program to individual students shall be determined at a multidisciplinary conference.

6.03
A vocational plan indicating specific vocational objectives, the training required, service personnel required, and the length of the proposed program shall be developed for each child determined to require a prevocational program. This plan shall be developed in cooperation with the student and his or her parents, shall be adapted to the student's interests and aptitudes, and shall be incorporated into the IEP.

6.04
Community work experiences which are part of the student's vocational plan shall occur during the school day, unless this is precluded by the nature of the experience.

6.05
No student shall spend more than one-half of the established school day participating in community work experiences or in local rehabilitation facilities.

6.06
All community work experiences which are provided by the school as part of the vocational plan and for which the student receives educational credit shall be supervised by appropriate school personnel.

6.07
Prevocational programs serving exceptional students shall be coordinated with other vocational programs of the local school district, and other public, private, and state agencies or organizations.

HOME OR HOSPITAL PROGRAM

ARTICLE VII

7.01
The home or hospital program shall consist of appropriate special education and related services which are provided by the school to a child in his or her home or in a hospital.

7.02
The home and hospital program shall be provided:

1. To any child with a health or physical impairment which, in the opinion of a licensed medical examiner, will cause an absence from school for more than two consecutive weeks, and who school personnel determine can educationally benefit from such a program.

7.03
Home and/or hospital services may begin as soon as eligibility has been established and the child's physical and mental health permit.

7.04
The amount of instructional or related service time provided through the home or hospital program shall be determined in relation to each child's educational needs, as well as physical and mental health.

1. A child who requires a home or hospital program on a temporary basis shall be provided with instructional services sufficient to enable him or her to return to school with a minimum of difficulty. Instructional time shall not be less than five (5) hours per week in order to qualify for full reimbursement.

   a. If the attending physician for the child has certified the child should not receive as many as five (5) hours of instruction in a school week, however, reimbursement on account of that child shall be computed proportionate to the actual hours of instruction per week for that child divided by five (5).

2. A child who requires the home or hospital program for an extended time shall be provided with instructional services sufficient to appropriately advance his or her basic educational development.

3. A child whose home or hospital instruction is being provided through a home-school telephone, or other similar device, shall be provided with not less than two (2) hours per week of direct instructional services.

7.05
Instructional time shall be scheduled only on days when school is regularly in session.

7.06
When a student, for health related reasons, requires additional work to complete the preceding year's educational program, he or she may be provided with home and hospital instructional services during the summer.

7.07
Periodic conferences shall be established between appropriate school personnel and home and hospital personnel and parents to coordinate the courses of study and to facilitate the student's return to school.

7.08
The school district shall not utilize the home and hospital program to avoid its responsibilities to establish in-school programs nor to eliminate children from the school program.

STATE OPERATED OR PRIVATE PROGRAMS

ARTICLE VIII

8.01
If a child exhibits exceptional characteristics which are determined in a multidisciplinary conference to be so profound, complex, or otherwise unique that no special education program offered by the public schools can adequately or appropriately meet his or her needs, the student shall be referred for placement in either a state-operated or a private facility.

8.02
The availability of community resources as an extension of the public school education program in no way relieves the local district of its responsibility to provide a comprehensive program of special education nor of its responsibility to the individual student.

8.03
When a multidisciplinary conference determines that a child cannot be provided with an education in the public schools, appropriate school personnel shall meet with the parents of the child, and representatives of the nonpublic school to develop an IEP in accordance with these rules and regulations prior to placement. If the representative cannot attend, the local school district shall use other methods to insure participation by the private school.

8.04
The district shall be responsible for locating an appropriate state-operated or private program and for facilitating the referral to that program. An appropriate program is one which will provide the child with special education experiences which are both adequate and appropriate to the student's needs.

1. With the exception of emergency psychiatric placements which include an educational component, the decision to place the child in a private facility shall precede such placement and shall be made by the local school district and the state-approved director of special education. Placements made by parents in violation of this regulation shall not be approved for reimbursement unless the multidisciplinary conference recommends and the board or state-approved director of special education, if designated, decides that an appropriate program cannot be provided within the public schools, and is sufficiently knowledgeable of the proposed private facility to be assured that the program to be provided will be appropriate to the student's needs.

2. When the multidisciplinary conference, the parents of the child, and the state-approved director of special education determines that a nondistrict residential or day educational program is indicated, the district shall consult the representatives of the appropriate state agency to determine whether a state-operated program is available and/or is appropriate to the child's needs. State-operated programs, when available, should be given first consideration; however, the district shall recommend referral of the child to the agency or facility which is most appropriate to the individual situation. Consideration shall be given to the proximity of the child's home.

3. Dual placement in a private school and a public school utilizing the provisions of Section 14-7.02 of The School Code of Illinois shall be approved only when the child is being reintegrated into the public school program or when the student over the age of 16 receives part-time pre-vocational training in an appropriate private program.

4. If for any reason the recommended placement cannot be achieved, the district shall provide an alternate educational plan.

8.05
When a private facility is utilized, the local district shall be responsible for payment of tuition and provision of transportation as provided by law. (See Illinois Revised Statutes, 1975, Chapter 122, Section 14-7.02).

1. All such private placements shall be approved by the Illinois Office of Education.

2. Approval of the recommended placement shall be contingent upon the following criteria:

   a. The child is enrolled in the public school
   b. The local district special education program is in compliance with Article XIV of The School Code of Illinois
   c. The facility's program is appropriate in relation to the needs of the individual child
   d. The facility is licensed by the State of Illinois or appropriate agency of the state in which the facility is located
   e. The facility is registered with the Illinois Office of Education and meets the standards established by that office
   f. The facility is within the United States
   g. The facility provides an educational program for at least 176 days per year.

3. A school district which has been denied approval for the placement of a child in a private facility cannot independently place the child and provide the tuition.

8.06
All private facility placements shall be reapproved by the Illinois Office of Education on an annual basis.

8.07
If the recommended private school placement is approved, the local district and the private facility shall enter into an agreement utilizing a format provided by the Illinois Office of Education. The agreement shall provide for, but not be limited to:

1. The child's IEP.

2. The tuition cost.

3. Periodic progress reports on the child from the private facility to be submitted at least annually.

4. Acceptance that the special education staff of the placing school district may inspect the private facility and confer with the staff at reasonable times.

5. Assurances that this placement is at no cost to parents in accordance with Section 14-7.02 of The School Code of Illinois.

8.08
The local school district shall maintain a record of supportive data on each child placed in a private facility. This data will include:

1. A summary of the child's individual problems.

2. A description of the program required by the child.

3. An explanation of why the child's needs cannot be met by the public school.

4. The description of the special education program offered by the private facility.

5. The request for placement of the child in a private facility as approved by the Illinois Office of Education.

6. Copy of the agreement with the facility.

7. Conference reports and periodic progress reports submitted by the private facility.

8. An annual reassessment of the need for continued private placement.

8.09
When a state-operated or private day program is utilized, the local district shall provide transportation for the children in this program. Other services may be provided as mutually agreed between the district and the state-operated or private facility.

8.10
The local school district shall be expected to follow the progress of those children placed in a state-operated or private program. Public school personnel shall communicate at least annually with private or state facility personnel to evaluate the child's progress and, as appropriate, facilitate the child's return to the public school program.

8.11
Transportation to a residential school shall be provided at least once, round trip, each school year.

IDENTIFICATION, EVALUATION, AND PLACEMENT OF EXCEPTIONAL CHILDREN

ARTICLE IX

9.01
Each local district shall develop and implement procedures for creating public awareness of special education programs and for advising the public of the rights of exceptional children.

1. All such procedures shall assure that information regarding special education programs and the rights of exceptional children is made available in each of the major languages represented in the district and in phrases which will be understandable to parents, regardless of ethnic or cultural background, or hearing or visual abilities.

2. Procedures developed by the district to create public awareness of special education programs and for advising the public of the rights of exceptional children shall include, but need not be limited to:

   a. Annual notification to all parents in the district regarding the special education programs and services available in or through that district and of their rights to receive, upon request, a copy of these rules and regulations.

   b. An annual dissemination of information to the community served by the school district regarding the special education program and services available in or through the district and the rights of exceptional children.

3. Documentation, including examples as appropriate, of the district's efforts to create public awareness of special education programs and inform parents of the rights of exceptional children shall be maintained in the district files.

9.02
Each local school district shall be responsible for actively seeking out and identifying all exceptional children in the district who are between the ages of 3 and 21. Procedures developed to fulfill this responsibility shall include but not be limited to:

1. An annual screening of children between the ages of 3 and 5, to identify those who may need special education.

2. Hearing and vision screening at regular intervals during the child's school career (see Illinois Revised Statutes, Chapter 23, Paragraphs 2331 through 2337, and Chapter 122, Section 27-8).

3. Speech and language screening of each child upon initial enrollment in a public school district in Illinois.

4. Annual screening by teachers and other professional personnel, for referral of those children who exhibit problems which interfere with their educational progress and/or their adjustment to the educational setting.

ocedures may include coordination with local and state service agencies and isting parent groups.

03
en a child is identified through the screening process, or exhibits problems ich interfere with the child's educational progress and/or adjustment to the lucational setting, or when there is reason to believe that a child may equire special education services, the child shall be referred for a case tudy evaluation.

. Each local school district shall develop, and make known to all concerned persons, procedures by which a case study evaluation of a child may be requested. These procedures shall:

a. Designate the steps to be taken in making a referral

b. Designate the person to whom a referral shall be made

c. Indicate the information which should be provided.

Referrals may be made by school district personnel, the parents of the child, community service agencies, persons having primary care and custody of the child, other professional persons having knowledge of the child's problems, the child or the Illinois Office of Education.

The local school district shall be responsible for determining the appropriateness of the referral, deciding what further action should be taken, and initiating the necessary procedures.

a. To determine whether the referred child requires a formal case study evaluation, the local school district may conduct preliminary evaluative procedures such as observation of the child, assessment for instructional purposes, consultation with the teacher or the referring agent if it is someone other than a teacher, or a conference with the child.

b. When the referral has been made by a professional staff member of the local school district, by the child's parents or by the child, the district shall be responsible for informing the person making the referral regarding its decision to conduct or not to conduct a case study evaluation. If the district decides not to conduct a case study evaluation of a child for whom such an evaluation has been requested, the information provided to the referring party shall contain, subject to the Illinois School Student Records Act and the Rules and Regulations to Govern School Student Records, the reasons for that decision.

c. If the parents of the child, other persons having primary care and custody of the child or the child initiated a referral for a case study evaluation which the district refuses or fails to conduct, the parents, other persons having primary care and custody of the child, or the child may appeal this decision in an impartial due process hearing.

d. When the district decides not to conduct a case study evaluation, the parents shall be notified, in writing, of the following:

(1) The date of the referral and the reasons the case study evaluation was requested
(2) The reasons the district has decided not to conduct a case study evaluation.

9.04
Parents or guardians of an exceptional child must be notified in writing when the local school district proposes to initiate or change the identification, evaluation or educational placement of the child or the lack of a provision of a free appropriate public education to the child.

1. The notice shall be:

a. Written in language understandable to the general public, and

b. Provided in the native language of the parent or other mode of communication used by the parents, unless it is clearly not feasible to do so.

c. If the native language or other mode of communication of the parent is not a written language, the local school district shall insure:

(1) That the notice is translated orally or by other means to the parent in his or her native language or other mode of communication,

(2) That the parent understands the content of the notice, and

(3) That there is written evidence on file that the requirements of these regulations have been met.

2. The notice shall contain:

a. A full explanation of all of the procedural safeguards available to the parents, including the availability upon request of a list of free or low cost legal and other relevant services available locally to assist parents in initiating an impartial due process hearing;

b. A description of the action proposed or refused by the local school district, an explanation of why that district proposes or refuses to take the action, and a description of any options that district considered and the reasons why those options were rejected;

c. A description of each evaluation procedure, test, record, or report that district uses as a basis for the proposal or refusal; and

d. A description of any other factors which are relevant to that district's proposal or refusal.

9.06
Parental consent shall be obtained before:

1. Conducting any case study evaluation or reevaluation of the child

2. Initial placement of an exceptional child in a program providing special education and related services.

9.07
If the parents object to a proposed case study evaluation by refusing to sign consent, and such objection is not resolved by a conference with the parents, the district may request an impartial due process hearing.

9.08
Before a child is given a case study evaluation, the local school district shall be responsible for determining the child's language use pattern, mode of communication, and cultural background.

1. Determination of the child's language use pattern and cultural background shall be made by determining the language(s) spoken in the child's home and the language(s) used most comfortably and frequently by the child.

2. Determination of the child's mode of communication shall be made by assessing the extent to which the child uses expressive language and the use he or she makes of other modes of communication (e.g., gestures, signing, unstructured sounds) as a substitute for expressive language.

3. The child's language use pattern, proficiency in English, mode of communication and cultural background shall be noted in the child's temporary student records.

9.09
The child shall be given a case study evaluation appropriate to the nature of the problems which caused the referral. The intensity of the evaluation procedures shall be determined by the complexity of the child's problems and the amount of information necessary to understand those problems and develop the IEP in accordance with Articles 9.13, 9.14, 9.15 and 9.18a.

1. For the child who requires special education placement at home or in a hospital because of a temporary physical or health impairment, estimated to last six months or less, a homebound services case study evaluation shall be conducted, and an IEP developed. This evaluation shall include, but need not be limited to:

   a. Evaluation of the physical or health impairment by a licensed medical physician, for diagnostic and evaluative purposes.

   b. Estimation by the physician of the time the child will require homebound services.

   c. A review of the child's current educational status and academic needs.

2. For the child whose problems seem to be limited to the area of speech or language, a speech and language case study evaluation shall be conducted and an IEP developed. This evaluation shall include, but need not be limited to:

   a. A hearing screening completed at the time of the evaluation or within the previous six months.

   b. A review of the child's medical history and current health status

   c. A review of the child's academic history and current educational functioning

   d. An assessment of the child's speech and language by a certified speech and language clinician.

   e. An interview with the child.

   The speech or language impaired child with additional handicapping conditions or educational deficits shall be referred for further evaluation.

3. For all other children, a comprehensive case study evaluation shall be conducted. This evaluation shall include, but need not be limited to:

   a. An interview with the child

   b. Consultation with the child's parents

   c. A social developmental study, including an assessment of the child's adaptive behavior and cultural background

   d. A report regarding the child's medical history and current health status

   e. A vision and hearing screening, completed at the time of the evaluation or within the previous six months

   f. A review of the child's academic history and current educational functioning

   g. An educational evaluation of the child's learning processes and level of educational achievement

   h. An assessment of the child's learning environment

   i. Specialized evaluations specific to the nature of the child's problems.

      (1) A psychological evaluation by a certified school psychologist, with the extent to be determined by the individual situation, shall be required:

         (a) In order to place any child in a special education placement for children with mental impairment (See Illinois Revised Statutes, Chapter 122, Section 14-8.01)

(b) In order to place any child in a special education instructional program

(c) In order to place any child in a special education placement for children with behavior disorders

(d) In order to place any child where there are questions about his or her intellectual functioning and/or learning capacity.

A psychological evaluation for all other children shall be considered optional.

As appropriate, the psychologist may limit this evaluation to a review of the results of tests administered by other school district personnel and/or the results of externally administered evaluations, an analysis of the learning environment and learning processes, participation in the multidisciplinary conference and such other procedures as deemed necessary.

(2) An appropriate medical examination by a physician licensed to practice medicine in all of its branches shall be obtained, for diagnostic and evaluative purposes, for any child with either a suspected physical, health, vision or hearing impairment. This examination shall be conducted at no cost to the parent. Nothing in these regulations shall be construed to require any child to undergo any physical examinations or medical treatment whose parents or guardian object thereto on the grounds that such examinations or treatment conflicts with his or her religious beliefs.

(3) A certified speech and language clinician shall administer a comprehensive evaluation for any child suspected of having a speech or language impairment.

(4) For all children other specialized evaluations appropriate to the nature of the child's problems shall be provided at no cost to the parents.

(a) When specialized evaluation procedures not usually provided by the local school district are required to provide a better understanding of the child's educational or educationally related problems, the local school district recommending such evaluation procedures shall be responsible for assisting the parents in locating and making use of appropriate local and/or state resources

(1) Consideration shall be given to resources of state agencies or third party payors.

(2) The child may not be prohibited from receiving a special education program or service because he or she is financially or otherwise unable to obtain specialized evaluation procedures.

(5) An audiological evaluation appropriate to the needs of the child shall be provided by an audiologist when necessary.

(6) If the parent disagrees with an evaluation obtained by the local school district, the district shall inform the parent of the opportunity to obtain an independent evaluation at public expense.

(a) In such cases, the local district may initiate an impartial due process hearing prior to such independent evaluation to demonstrate that the district's evaluation is appropriate.

(b) If the final decision is that the local district's evaluation is appropriate, the parent shall have the right to an independent evaluation, but not at public expense.

9.10
If all requirements for the case study evaluation cannot be fulfilled, due to lack of parental involvement, religious convictions of the family, or inability of the child to participate in an evaluative procedure, the district shall note the missing component(s) in the child's temporary student records and give the reason(s) it could not be provided.

9.11
Each case study evaluation shall be conducted so as to assure that it is linguistically, culturally, racially, and sexually nondiscriminatory.

1. The language(s) used to evaluate a child shall be consistent with the child's language use pattern. (See Rule 9.08) If the language use pattern involves two or more languages, the child shall be evaluated using each of the languages used by the child.

2. Psychological evaluation of a child shall be performed by a certified school psychologist who has demonstrated competencies in, and knowledge of, the language and culture of the child.

a. If documented efforts to locate and secure services from such a psychologist are unsuccessful, the district may employ a qualified psychologist who has demonstrated competencies in, and knowledge of, the language and culture of the child; this person may act as a consultant to the district's certified school psychologist performing the evaluation

b. The district having exhausted all other alternatives and not securing the services of either a certified school psychologist or a qualified psychologist who has demonstrated competencies in, and knowledge of, the language and culture of the child, the certified school psychologist regularly employed by the district shall conduct assessment procedures which do not depend upon language, or utilize the services of an interpreter. Any special education placement resulting from such alternative procedures shall be reviewed at regular intervals until the child acquires a predominantly English

language use pattern which will assure that a psychological evaluation given by a certified school psychologist will not be discriminatory or until the need for special education is substantially verified.

3. Tests given to a child whose primary language is other than English shall be relevant, to the maximum extent possible, to his or her culture.

4. If the child's receptive and/or expressive communication skills are impaired due to hearing and/or language deficits, the district shall utilize test instruments and procedures which do not stress spoken language and one of the following:

   a. Visual communication techniques in addition to auditory techniques

   b. An interpreter to assist the evaluative personnel with language and testing.

5. Each local district shall insure that testing and evaluation materials and procedures used for evaluation and placement of exceptional children must be selected and administered so as not to be racially or culturally discriminatory.

6. Each local district shall insure that:

   a. Tests and other evaluation materials:

      (1) Are provided and administered in the child's native language or other mode of communication, unless it is clearly not feasible to do so;

      (2) Have been validated for the specific purpose for which they are used; and

      (3) Are administered by trained personnel (e.g., certified school psychologists) in conformance with the instructions provided by their producer.

   b. Tests and other evaluation materials include those tailored to assess specific areas of educational need and not merely those which are designed to provide a single general intelligence quotient.

   c. When tests are administered to a child with impaired sensory, motor or communication skills, tests shall be selected and administered to ensure that the results accurately reflect the child's aptitude or achievement level rather than reflecting the child's impaired sensory, motor or communication skills except where those skills are the factors which the test(s) purports to measure.

   d. No single procedure is used as the sole criterion for determining an appropriate educational program for a child; and

   e. The evaluation is made by a multidisciplinary team, including at least one teacher or other specialist with knowledge in the area of

the suspected disability. For the child suspected of having specific learning disabilities, the following additional team members must also be included: the child's regular teacher; or if the child does not have a regular teacher, a regular classroom teacher certified to teach a child of his or her age; or for a child of less than school age, an individual qualified to teach a child of his or her age.

f. The child is assessed in all areas related to the suspected disability, including, where appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities.

9.12
In those instances in which a child has been evaluated by qualified professional personnel outside the school district, that evaluation shall be considered and may be utilized in determining eligibility and need for special education placement.

9.13
Upon completion of a homebound services case study evaluation (See Rule 9.09.1) the local district superintendent or designee shall determine the child's eligibility for homebound special education placement and recommend an appropriate placement. (See Article VII) A report regarding these recommendations and all documentation upon which they were based shall be placed in the child's temporary student records.

9.14
Upon completion of a speech and language case study evaluation (See Rule 9.09.2) the speech and language clinician shall review the findings, determine the child's eligibility and need for speech and language services, and convene a conference for the purpose of developing the child's IEP as described in Article 9.18a of these regulations. Following the IEP meeting, the speech and language clinician shall make recommendations to the local district superintendent or designee for appropriate placement.

1. A speech and language impaired child exhibiting additional problems shall be referred for further evaluation.

2. A report of these findings and recommendations shall be placed in the child's temporary student records.

9.15
Upon completion of a comprehensive case study evaluation (See Rule 9.09.3) one or more conferences shall be convened for the purpose of formulating program and service options. This may or may not be the conference at which the IEP is developed. If not, an additional meeting is to be held, in accordance with Article 9.18a.

1. Participants in the conferences shall include appropriate representatives of the child's local district of residence; the special education director or designee who is qualified to provide or supervise the provision of special education; all those school personnel involved in the evaluation of the child; the parent(s); other persons having significant

information regarding the child; and those persons who may become responsible for providing the special education program or service to the child; the child, where appropriate, and other individuals at the discretion of the parent or local district.

2. The purposes of the above conference(s) shall be to:

   a. Establish a composite understanding of the child's learning characteristics, sensory and motor skills, and behaviors.

   b. Determine eligibility for special education programs and/or services.

   c. Determine the child's unique educational needs and the extent to which these needs can be met by the standard program.

   d. Determine the nature and degree of special education intervention which is needed, and recommend corresponding placement which is least restrictive of interaction with nonhandicapped children.

3. If the above conference is also used for the development of the IEP, then the components of Article 9.18a of these regulations shall be followed.

9.16
Eligibility for special education programs and services shall be determined by the presence of one or more of the following exceptional characteristics:

1. Visual impairment - The child's visual impairment is such that the child cannot develop his or her educational potential without special services and materials. (For reference, see 14-1.02 of The School Code of Illinois)

2. Hearing impairment - The child's residual hearing is not sufficient to enable him or her to understand the spoken word and to develop language, thus causing extreme deprivation in learning and communication. Or the child exhibits a hearing loss which prevents full awareness of environmental sounds and spoken language, limiting normal language acquisition and learning achievement. (For reference, see 14.1.02 of The School Code of Illinois)

3. Physical and health impairment - The child exhibits a physical or health impairment, either temporary or permanent, which interferes with his or her learning and/or which requires adaptation of the physical plant. (For reference, see 14-1.02 of The School Code of Illinois)

4. Speech and/or language impairment - The child exhibits deviations of speech and/or language processes which are outside the range of acceptable deviation within a given environment and which prevent full social or educational development. (For reference, see 14-1.06 of The School Code of Illinois)

5. Specific learning disability - The child exhibits a disorder in one or more of the basic psychological processes involved in understanding or in

using language, spoken or written, which may manifest itself in an imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations. Such term includes conditions as perceptual handicaps, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. The term does not include children who have learning problems which are primarily the result of visual, hearing, or motor handicaps, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage.

6. Education handicap - The child exhibits educational maladjustment related to social or cultural circumstances. (For reference, see 14-1.03 of The School Code of Illinois)

7. Behavior disorder - The child exhibits an affective disorder and/or adaptive behavior which significantly interferes with his or her learning and/or social functioning. (For reference, see 14-1.03 of The School Code of Illinois)

8. Mental impairment - The child's intellectual development, mental capacity, adaptive behavior, and academic achievement are markedly delayed. Such mental impairment may be mild/moderate, severe, or profound. (For reference, see 14-1.04 and 14-1.05 of The School Code of Illinois)

9. Multiple impairment - The child exhibits two or more impairments, severe in nature or total impact, which significantly affect his or her ability to benefit from the educational program. (For reference, see 14-1.07 or The School Code of Illinois)

9.17
Recommendations made at the multidisciplinary conference shall be determined by consensus of the participating public school personnel; if an agreement cannot be reached, additional information shall be obtained. In considering a child with mental impairment, a certified school psychologist must concur with the child's eligibility based on the results of a psychological evaluation.

1. Recommendations for special education placement shall be based on the following:

   a. The child shall be placed in the educational program which is appropriate to the student's needs and least restrictive of the interaction with nonhandicapped children.

   b. The special education placement must be based on the child's IEP, and located as close as possible to the child's home.

   c. Unless a handicapped child's IEP requires some other arrangement, the child must be educated in the school which he or she would attend if not handicapped.

   d. Consideration must be given to any potentially harmful effect on the child, on the quality of services which he or she needs, or that which impedes the education of other students in the environment.

2. The proposed placement shall be consistent with the findings of the case study evaluation and the established eligibility of the child.

9.18
A written report of the results and recommendations of the multidisciplinary conference shall be prepared.

1. The conference report shall be dated, and list the names of all those in attendance at the conference.

2. A copy of the conference report, together with all documentation upon which it is based, shall be kept on file by the local school district. The parents shall be informed of their rights to access of the report.

9.18a
If the initial multidisciplinary conference was held for the purpose of formulating a placement recommendation, an additional meeting or meetings must be held for the purpose of developing the exceptional child's IEP. Each local district must be responsible for initiating and conducting one or more meetings for the purpose of developing, reviewing and revising the IEP. The meeting at which an exceptional child's IEP is developed must be held within thirty (30) calendar days of a determination that the child needs special education and related services.

1. Parents of an exceptional child must be notified of the meeting to develop, review, and revise an exceptional child's IEP. The local school district must take steps to insure that the parents of an exceptional child are present at each meeting or are afforded the opportunity to participate, including:

   a. Notifying parents of the meeting early enough to insure that they will have an opportunity to attend; and

   b. Scheduling the meeting at a mutually agreed on time and place.

   c. The notice must indicate the purpose, time and location of the meeting, and who will be in attendance.

2. The following participants must be included in the IEP meeting:

   a. A representative of the local district, other than the child's teacher, who is qualified to provide, or supervise the provision of special education (e.g., the state-approved special education director or designee).

   b. The child's teacher. Teacher organization representatives may not attend without parental and district consent.

   c. One or both of the child's parents or guardians.

      (1) If neither parent can attend, the local district shall use other methods to insure parent participation, including individual or conference telephone calls.

(2) A meeting may be conducted without a parent in attendance if the local district is unable to convince the parents that they should attend. In this case the local district must have a record of its attempts to arrange a mutually agreed on time and place such as:

(a) Detailed records of telephone calls made or attempted and the results of those calls.

(b) Copies of correspondence sent to the parents and any responses received, and

(c) Detailed records of visits made at the parent's home or place of employment and the results of those visits.

d. The child, where appropriate.

e. Other individuals at the discretion of the parent or local district.

3. For an exceptional child who has been evaluated for the first time, the local district shall insure that a member of the evaluation team participates in the meeting or that the representative of the local district, the child's teacher, or some other person who is knowledgeable about the evaluation procedures used with the child and is familiar with the results of the evaluation, participates in the meeting, as well as an interpreter for the deaf if necessary.

4. The IEP shall include, but is not limited to, the following:

a. A statement of the child's present levels of educational performance;

b. A statement of annual goals, including short-term instructional objectives;

c. A statement of the specific special education and related services to be provided to the child, and the extent to which the child will be able to participate in regular educational programs;

d. The projected dates for initiation of services and the anticipated duration of the services; and

e. Appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether the short-term instructional objectives are being achieved.

5. The local district shall give the parent, on request, a copy of the exceptional child's IEP.

6. Following the determinaton of the child's IEP, parents shall be afforded, on an ongoing basis, reasonable opportunity for comment on and input into their child's educational program.

9.19
The local school board has the authority to place students in special education programs. The board may also authorize, by regulation, that the director of special education place students in special education programs. (See Illinois Revised Statutes, Chapter 122, Section 10-22.41)

9.20
The case study evaluation and multidisciplinary conference shall be completed within sixty (60) school days of the date of referral or the date of application for admittance to the public school by the parents of the child. (See Illinois Revised Statutes, Chapter 122, Section 14-8.01)

9.21
At least ten (10) calendar days prior to the actual placement of the child, the parents shall be notified, in writing, of the following:

1. The results of the case study evaluation.

2. The nature of the special education program or service needed by the child.

3. The recommendations for placement and the plan for implementing those recommendations.

4. Their right to object to the proposed placement and the specific procedures in making such an objection, including the procedures for requesting an impartial due process hearing.

Record of such notice shall be entered in the child's temporary student record.

9.22
If the parents consent to the proposed placement and waive the ten (10) calendar day interval before placement, the child shall be placed in the recommended program as soon as practicable.

9.23
If the parents object to the proposed placement within ten (10) calendar days of their receipt of notification of the proposed placement, they shall contact the local district, indicating their objection. The district shall then arrange a conference with the parents in an attempt to resolve the disagreement on placement. If the parents continue to object, they may appeal the proposed placement by requesting an impartial due process hearing. That request shall be made in writing to the superintendent of the local school district.

1. Receipt of a request for an impartial due process hearing shall cause the district to postpone its proposed placement of the child until the matter is resolved.

2. The child shall remain in his or her current educational placement, unless a mutual agreement is reached between the parents and local school district, until the placement issue is resolved.

3. If the child is receiving no educational service and the parents are seeking initial placement in a public school, the child, with the consent of the parents, must be placed in the public school program until the completion of all the proceedings.

9.24
Special education placement shall be made as soon as possible after the determination of eligibility and need for such placement but in no case shall placement occur later than the beginning of the next school semester. (See Illinois Revised Statutes, Chapter 122, Section 14-8.01)

1. When special education placement is not possible prior to the next school semester, the local school district shall be responsible for providing interim services between placement determination and actual placement which are as appropriate to the child's needs as possible.

2. The local school district shall provide written notification to the parents of the child and the State Superintendent of Education regarding the nature of the services the child will receive in the interim. Written verification of the provision of these services shall be kept in the child's temporary student record.

9.25
In addition to initial placement conferences and/or IEP meetings, the educational status and continued special education placement of each child shall be reviewed at least annually in a conference attended by those professional persons working with the student, the parents, the child where appropriate, the special education director or designee who is qualified to supervise the provision of special education, and other individuals at the discretion of the parent or local district.

1. Utilizing appropriate evaluation information, including teacher and parent opinions, the annual review shall determine the extent to which the child has met the objectives and goals as specified in the child's IEP and recommend further evaluation or revise the child's IEP.

2. When further evaluation is indicated, pursuant to the annual review, a review of the child's status as requested by the teachers, parents, other knowledgeable persons, or as a result of an impartial due process hearing, such an evaluation shall be completed within sixty (60) school days of the request.

3. A reevaluation of the child shall be conducted every three years or more frequently if conditions warrant or if the child's parent or teacher requests an evaluation.

9.26
Notification to parents regarding continuation, change, reevaluation, or termination of placement shall inform the parents of their right to object and of the procedures to be followed to make such an objection.

9.27
Written notification regarding the continuation of the child's special education placement shall be provided to the parents of the child as soon as possible but not later than ten (10) calendar days prior to the beginning of each school year.

9.28
At least ten (10) calendar days prior to any major change in the educational placement of an exceptional child (excluding changes in levels, i.e., primary to intermediate), including those stated in rule 9.26, the parents shall be given written notification of the proposed change, including the reasons for the change and a description of the proposed program.

1. If the parents request an impartial due process hearing regarding a proposed change in the educational placement of their child, the district shall not change the placement until the matter is resolved.

2. If the parents agree to the proposed placement, then a meeting shall be held for the revision of the child's IEP.

9.29
Special education placement may be terminated only after a conference has been held, to which the child's parents have been afforded a reasonable opportunity to attend and participate. A complete review of the child's educational status shall be conducted at that conference, determining that such placement is no longer required, and that termination of the placement is in the best interests of the child, or that the child was inappropriately placed.

1. When the district decides to terminate a special education placement, the parents shall be notified at least ten (10) calendar days prior to such termination.

2. If the parents request termination of special education placement, the district shall review the child's educational status to determine whether the requested termination is in the best interests of the child. If, pursuant to this review, a continuation of the placement is recommended by the district, the parents may request an impartial due process hearing.

3. When the child's special education placement is terminated, a specific plan of transition, to include any provision of necessary related service and periodic followup, shall be developed and implemented.

IMPARTIAL DUE PROCESS HEARING

ARTICLE X

10.01
After informal procedures consistent with these rules and regulations have been exhausted, and there remain differences between the local school district and the parents or other persons having primary care and custody of the child, or the child, an impartial due process hearing may be requested.

1. A hearing may be requested by the parents, other persons having primary care and custody of the child, the child or the district regarding, but not limited to, the following:

   a. Objection to signing consent for a proposed case study evaluation or initial placement.

   b. Failure of the local school district, upon request of the parents, other persons having primary care and custody of the child, the child, or the Illinois Office of Education, to provide a case study evaluation.

   c. Failure of a local school district to consider evaluations completed by qualified professional personnel outside the school district.

   d. Objection to a proposed special education placement, either an initial placement, a continuation of a previous placement, or a major change in the placement.

   e. Termination of a special education placement.

   f. Failure of the local school district to provide a special education placement consistent with the finding of the case study evaluation and the recommendations of the multidisciplinary conference.

   g. Failure of the local school district to provide the least restrictive special education placement appropriate to the child's needs.

   h. Provision of special education instructional or resource programs, or related services in an amount insufficient to meet the child's needs.

   i. A suspension totalling individually or in aggregate ten (10) or more school days in a given school year of a child who is in a special education instructional or resource program or who receives special education related services.

   j. A suspension totalling individually or in aggregate ten (10) or more school days in a given school year of a child who is eligible for a special education instructional program or resource service but who has not been placed in such a program or provided such a service.

   k. Reasonable belief by the parents, other persons having primary care and custody of the child, or the child, that the child's suspension or expulsion resulted from behavior or a condition symptomatic of an exceptional characteristic as defined in the Illinois Revised Statutes, Chapter 122, Sections 14-1.02 through 14-1.07.

   l. Recommendation for the graduation of an exceptional child.

   m. Failure of the local school district to comply with any of these rules and regulations and/or The School Code of Illinois.

n. Failure of the local school district to provide an exceptional child with a free appropriate public education.

10.02
The local school district shall be responsible for informing parents in writing of their right to a hearing and of the procedures to follow to make a request for such a hearing. The director of special education shall assist the parents in taking whatever action is necessary to utilize the hearing process. The local school district shall inform the parent of any free or low cost legal and othe relevant services available in the area if the parent requests the information or if the parent or local school district initiates a hearing.

10.03
A request for a hearing shall be made, in writing, to the superintendent of the local school district in which the child is a resident. Such a request shall contain the reasons the hearing is being requested and all other information pertinent to the request.

1. A request for a hearing or an appeal to the Illinois Office of Education may be made at any time significant different circumstances prevail; otherwise, a hearing may not be requested nor an appeal made more than once each calendar year.

2. Such a request shall be made in writing, within ten (10) calendar days of the parents' receipt of the written notification regarding the proposed placement. If the parents have not made a request within the ten (10) day period, the parent may request a hearing at a later date in accordance with the provisions of Article 10.01 of these regulations.

10.04
Within five (5) school days of the receipt of a request for a hearing, the local school district shall:

1. Send a certified letter to the Illinois Office of Education requesting the appointment of an impartial hearing officer. This letter shall include: the name, address, and telephone number of the child and parents and of the person making the request for the hearing, if it is someone other than the child or parents; the date on which the request for the hearing was received by the local school district; the nature of the controversy to be resolved; and the primary language spoken by the parents and the child.

2. Send to the person requesting the hearing, by certified mail, a copy of the letter sent to the Illinois Office of Education.

   a. If the hearing has been requested by someone other than the child's parents, the parents shall be informed of the request and invited to participate in the proceedings. Thereafter, unless the parents indicate that they do not wish to be informed and/or involved in the hearing process, all communication from the local school district, the hearing officer, and the Illinois Office of Education shall be directed to both the person requesting the hearing and the parents.

b. All references to parents made in the remainder of this Article shall be understood to include both the parents and the person requesting the hearing.

10.05
If the district decides not to honor the request for a hearing, the parents or guardian of the student shall be notified of this denial. Such notification shall be made in writing within five (5) calendar days of the receipt of the request and shall contain the reasons for the denial.

1. If the local district fails to notify the parents of their right to a hearing, as prescribed in these rules and regulations, or if the request for a hearing is denied either directly or by failure to provide such a hearing, the parent may appeal such a denial directly to the Illinois Office of Education.

2. In the event of a direct appeal to the Illinois Office of Education, the State Superintendent of Education shall order that a hearing be conducted at the local level, or order the district to perform such other measures as deemed necessary.

10.06
Within five (5) calendar days of its receipt of the request from the local school district, the Illinois Office of Education shall provide a list of five (5) prospective trained impartial hearing officers, one of which shall be selected as the impartial hearing officer to conduct the local hearing. Criteria for hearing officers are as follows:

1. Shall not be an employee of the Illinois Office of Education, the local school district, any joint agreement or cooperative program in which the district participates, or any other agency or organization that is directly involved in the diagnosis, education or care of the student or the State Board of Education.

2. Shall not be a resident of the district involved.

3. Shall not be involved in the decisions already made about a child regarding indentification, evaluation, or placement, and may not have a personal or professional interest which would conflict with his or her objectivity.

4. Shall possess knowledge, information acquired through training under the auspices of the Illinois Office of Education, and/or experiences, about the nature and needs of exceptional children. An awareness and understanding of the types and quality of programs available for exceptional children is essential.

The Illinois Office of Education will pay expenses and a per diem to the hearing officer for his or her services at the local hearing.

10.06a
Selection of one hearing officer from the list shall occur within five (5) calendar days after receipt of the list from the Illinois Office of Education and shall occur as follows:

1. The parents shall first strike a name from the list.

2. The local school district shall next strike a name from the list.

3. Both parties shall continue striking from the list until one name remains; that person shall serve as the impartial hearing officer.

4. The local school district shall notify the Illinois Office of Education, within five (5) calendar days of receipt of the list, the name of the person to be the impartial hearing officer.

    a. This notification may be transmitted verbally to the Illinois Office of Education provided that the verbal notification is confirmed in writing, with verification by the local district and the parent/guardian, to the Illinois Office of Education with five (5) calendar days.

5. Upon receipt of the notification, the Illinois Office of Education shall appoint the hearing officer selected by the local district and the parent(s) to convene a hearing. If the selected hearing officer is unable or unwilling to accept the appointment the Illinois Office of Education shall seek from the local district and parent a mutually acceptable alternate. If the local district and parent are unable to agree to a mutually acceptable alternate, the Illinois Office of Education shall provide the local district and parent with an additional list of five prospective hearing officers. The local district and parent shall then repeat the selection process as detailed above.

6. The Illinois Office of Education shall maintain a list of those persons who serve as hearing officers, along with their qualifications.

10.06b
The hearing shall not be considered adversary in nature, but shall be directed toward bringing out all facts necessary for the hearing officer to make a decision.

10.07
Within five (5) calendar days of his or her appointment, the hearing officer shall set the time and place for the hearing.

1. The hearing shall be held at a time and place reasonably convenient for both parties involved. However, it shall be scheduled not later than fifteen (15) calendar days after the appointment of the hearing officer, unless the hearing officer permits an extension of time due to extenuating circumstances, not to exceed fifteen (15) calendar days, unless both parties agree.

1a. If the local district and parent cannot agree to a reasonably convenient time and place, the hearing officer shall make such a determination and proceed to schedule the hearing.

2. The Illinois Office of Education shall inform the parent by mail no later than five (5) calendar days prior to the hearing, that:

a. They or their designated representative shall have an opportunity to inspect all school records regarding the child and to obtain copies at their own expense prior to the hearing.

b. They may request an independent evaluation of their child prior to the hearing, at their own expense. The hearing officer may consider this request an extenuating circumstance and thereby authorize an extension of time for the hearing date, not to exceed thirty (30) calendar days, unless both parties agree.

c. They may require the attendance at the hearing of any school district employee or any other person who may have information relevant to the needs and abilities of the child, the proposed programs, or the status of the child. The hearing officer may issue subpoenaes requiring the attendance of witnesses and, at the request of the parent or school board representatives, shall issue such subpoenaes. The hearing officer may limit the number of witnesses to be subpoenaed in behalf of the parent or school board to not more than ten (10).

d. They may bring representatives, including legal counsel, agency representatives, or others, to the hearings at their own expense. These persons shall be given an opportunity to participate in the hearing process according to procedures established by the impartial hearing officer. The local school district shall maintain, on file, a list of independent evaluation sites, legal and other relevant services available in the area, and shall provide parents with the above information, upon request.

e. The educational status of the child will not be changed, pending the completion of the due process proceedings, unless the superintendent or designee decides that such change would be warranted due to immediate physical danger to the child or other persons. In such a case, the local school district shall be responsible for developing and implementing an appropriate interim placement.

f. Any party to the hearing has the right to prohibit the introduction of any evidence which has not been disclosed to that party at least five (5) calendar days prior to the hearing.

g. Either party may request that an interpreter be made available.

10.08
Parents involved in hearings have the right to have the child who is the subject of the hearing present, and open the hearing to the public.

10.09
The hearing officer shall conduct the hearing in a fair, impartial, and orderly manner.

1. At all stages of the hearing, the hearing officer shall require that interpreters be made available by the local school district for persons who are deaf or for persons whose normally spoken language is other than English.

2. At all stages of the hearing, the hearing officer shall assure that the parents are aware of and understand their rights and responsibilities in regard to this process.

3. The hearing officer shall have the authority to require additional information or evidence where he or she deems it necessary to make a complete record. He or she may recess the hearing for a specified period in order to obtain the additional information necessary.

4. The hearing officer may order an independent evaluation at local school district expense.

10.10
At any hearing which has been requested regarding the placement of a child, the hearing officer shall seek to establish the issues, allow the introduction of evidence which is relevant to those issues, and derive conclusions therefrom. These conclusions may include, but are not limited to the following:

1. That the child has needs which require special education intervention.

2. That the evaluation procedures utilized in determining the child's needs have been appropriate in nature and degree.

3. That the diagnostic profile of the child on which the placement recommendation was based is substantially verified.

4. That the proposed placement is directly related to the child's needs.

5. That the child's rights have been fully observed.

10.11
A hearing which has been requested regarding any other controversy shall seek to establish the issues as perceived by the prospective parties and the facts on which these issues depend.

10.11a
The local school district shall present evidence that the special education needs of the child have been appropriately identified and that the special education program and related services proposed to meet the needs of the child are adequate, appropriate and available.

10.12
The parents of the child, and the local school district or their respective representatives shall have a right to present testimony, cross-examine, and confront all witnesses at the hearing.

10.13
The rules of evidence shall not apply to the hearing process.

10.14
A record of the hearing proceedings shall be made by the local school district, either by a court reporter or by a tape recorder. The parents have a right to obtain a written or electronic verbatim record of the hearing, and to obtain written findings of fact and decisions. Additionally, the record of

the hearing shall be part of the child's temporary record, and is governed by the Illinois School Students Records Act. The cost for such record shall be shared equally by the Illinois Office of Education and the local school district.

10.15
Within ten (10) calendar days after the conclusion of the hearing, the hearing officer shall render his or her decision, by certified mail, to the district, the parents, and the Illinois Office of Education.

1. The findings of fact and decision shall be in English and in the language normally spoken by the parents if it is other than English.

2. The Illinois Office of Education shall distribute the information in a nonpersonnally identifiable form to the State Advisory Council on the Education of Handicapped Children.

3. The hearing officer's decision shall be binding upon the local school board and the parent unless such decision is appealed, pursuant to Article 10.16.

10.16
Either party aggrieved by the decision of the impartial hearing officer may appeal that decision to the State Superintendent of Education. The request for appeal shall be submitted in writing to the Illinois Office of Education, Legal Department, and shall include a statement of the specific reasons upon which the appeal is predicated. It shall be postmarked within fifteen (15) calendar days of the receipt of the hearing officer's decision. A copy of the request for an appeal shall be sent also to the other party to the hearing. Upon initiating a request for appeal or upon receipt of notice of a parental request for appeal, the local district shall immediately undertake the preparation and compilation of transcripts and documents for submission to the Illinois Office of Education for its review.

1. If a tape recorder was used to record the hearing procedures, then a verbatim typewritten transcript shall be made by the district within fifteen (15) calendar days and reviewed by the parents within ten (10) calendar days. Inaccuracies shall be recorded and the transcript signed by the parents and a school district representative. If a court reporter is used, the parent need not sign the transcript.

2. The typewritten transcript and tape recording of the hearing shall be subjected to the Illinois School Students Records Act and the Rules and Regulations to Govern School Student Records.

10.17
In all appeals, the district shall send a completed appeal form provided by the Illinois Office of Education and send five (5) copies each of the typewritten transcript of the local hearing to the Illinois Office of Education, Legal Division, Springfield, Illinois. If there are disputes concerning the accuracy of the transcript of the tape recording, the district shall also send a statement of the inaccuracies and the original tape recording.

1. The district shall provide to the parents a copy of the transcript which is being sent to the Illinois Office of Education.

10.18
Pending the completion of the due process hearing, and any appeal to the Illinois Office of Education, the district shall postpone any proposed change in the child's educational placement, unless the State Superintendent of Education decides that the health and safety of the child or others would be endangered. In such a case, the local school district shall be responsible for developing an appropriate interim placement.

10.19
Upon receipt of a request for a state-level review, the State Superintendent of Education or designee shall designate a trained, impartial hearing panel, composed of appropriate attorneys and educational employees of the Illinois Office of Education. The State Superintendent of Education or designee may issue subpoenaes requiring the attendance of witnesses at the state-level review.

10.20
The impartial reviewing panel shall consider the appeal based upon a study of the entire hearing record. It is at the discretion of the reviewing panel whether to afford the parties an opportunity for additional testimony. If additional testimony is allowed or additional evidence is to be considered, a hearing shall be convened and all due process rights shall be afforded the parties.

10.21
A report of the reviewing panel, including its recommendations, shall be submitted to the State Superintendent of Education, who shall decide the appeal within thirty (30) calendar days of receipt of the entire hearing record of the appeal by the Illinois Office of Education. (See Illinois Revised Statutes, Chapter 122, Section 2-3.38)

1. If a hearing is convened for the purpose of receiving additional testimony or considering additional evidence, the thirty (30) day deadline for a final decision may be extended for a specified period of time.

2. The State Superintendent of Education may dismiss any appeal he deems lacking in substance.

    a. The State Superintendent of Education may dismiss an appeal in which the parents refuse to cooperate or provide additional information requested.
    b. The decision of the State Superintendent of Education requesting further information may be enforced as specified in these regulations.

10.22
Copies of the decision of the State Superintendent of Education shall be sent by certified mail to the local school district and the parents. The decision shall be written in English and in the language normally spoken by the parents if it is other than English. The Illinois Office of Education shall transmit

these findings and decisions, after deleting any personally identifiable information, to the State Advisory Council on the Education of Handicapped Children.

10.23
The decision of the State Superintendent of Education shall be binding on all parties. (See Illinois Revised Statutes, Chapter 122, Section 2-3.38)

10.24
The local school district shall be responsible for implementing the decision of the State Superintendent of Education. All decisions of the State Superintendent of Education issued pursuant to these regulations may be enforced by denying approval of special education programs, denying personnel reimbursement, reducing school district recognition status, or by such other measures as may be appropriate.

SURROGATE PARENTS

ARTICLE XI

11.01
The concept of "surrogate parents" will be implemented by guaranteeing procedural safeguards to children who are wards of the state pursuant to the provision of the Juvenile Court Act. (See Illinois Revised Statutes, Chapter 37, Sections 701-708)

1. When a child is a ward of the state, the child's court-appointed guardian or custodian shall be notified of the following:

   a. Referral for a case study evaluation (See Rule 9.03)
   b. The time and place of the conference at which the IEP will be developed, and invited to attend and participate in that conference
   c. The proposed placement
   d. Continuation, change or termination of placement (See Rules 9.26, 9.27, and 9.28)

2. The court-appointed guardian or custodian shall be entitled to rights and privileges accorded to the natural parent of a child resident in the district, i.e., an impartial due process hearing, etc.

11.02
The local school district shall make all reasonable attempts to contact the parents of the child who has been referred. If the parent is unavailable or inaccessible and the local school district has reason to believe that a surrogate parent is needed, the request for the appointment of such a person shall be sent to the Illinois Office of Education, Legal Division, Springfield.

1. The local school district shall provide documentation of their efforts to contact the parents.

2. The local school district shall provide information on the racial, linguistic and cultural background of the child whose parents are unavailable or inaccessible.

11.03
Within five (5) calendar days of receipt of the request for the appointment of a surrogate parent, the State Superintendent of Education shall consider the request. If the State Superintendent of Education decides that a surrogate parent is required, the Illinois Office of Education shall appoint one or more persons to represent the interests of the child. Such an appointment shall be made not more than ten (10) calendar days after receipt of the district's request.

1. A surrogate parent may be any responsible citizen other than an employee of the Illinois Office of Education, the local school district in which the child is enrolled, and agency created by joint agreement, or an agency involved in the education or care of the student.

2. The surrogate parent must meet the following criteria:

   a. All reasonable attempts shall be made to secure a surrogate parent whose racial, linguistic, and cultural background is similar to the child's.

   b. The surrogate parent must be trained by the Illinois Office of Education.

   c. The surrogate parent has no interest that conflicts with the interests of the child he or she represents.

11.04
Pursuant to the appointment of a surrogate parent, the Illinois Office of Education shall provide written notification to the local school district specifying the name and address of the surrogate parent, the specific responsibilities to be fulfilled, and the length of time for which the appointment is valid.

11.05
The Illinois Office of Education will pay expenses to the surrogate parent for his or her services.

11.06
If the Illinois Office of Education determines that a surrogate parent is not needed, the local school district shall be notified, in writing, regarding this decision. As appropriate, this notification shall indicate the reasons for the decision and/or direct the local school district regarding further action in the matter.

11.07
If the child's natural parent becomes available or accessible, the Illinois Office of Education shall withdraw the services of the surrogate parent specified in 11.04 above.

11.08
Any person participating in good faith as a surrogate parent on behalf of the child before school officials or a hearing officer shall have immunity from civil or criminal liability that otherwise might result by reason of such participation, except in cases of willful and wanton misconduct.

SPECIAL EDUCATION PERSONNEL

ARTICLE XII

12.01
Professional and noncertified personnel shall be employed in sufficient numbers with appropriate qualifications to deliver to each exceptional child resident in the district the special education program necessary.

12.02
Professional instructional personnel shall qualify under any one of the following circumstances:

1. Hold standard Special Illinois Teachers Certificate, Type 10, in the area of responsibility.

2. Hold standard Illinois Teachers Certificate and have met full approval outlined by the Illinois Office of Education in the Special Education Certification and Approval Requirements and Procedures.

3. Hold standard Illinois Teachers Certificate and receive approval by the Illinois Office of Education for specialized functioning in relation to a special education program.

4. In Chicago, hold a valid certificate issued by the Board of Examiners of the Chicago Public Schools which entitles the holder to teach in a specific area of responsibility.

12.03
Other certified personnel employed by the school district to provide special education services shall hold accreditation appropriate to the area of responsiblity and shall be approved by the Illinois Office of Education in the Special Education Certification and Approval Requirements and Procedures.

12.04
Each director and assistant director of special education shall hold a valid administrative certificate and shall meet requirements for approval as outlined by the Illinois Office of Education in the Special Education Certification and Approval Requirements and Procedures.

12.05
Supervisory personnel shall hold a valid certificate in the area of responsibility and shall meet requirements for approval as outlined by the Illinois Office of Education in the Special Education Certification and Approval Requirements and Procedures.

12.06
The chief administrator of a special school shall hold a principal's certificate and approval in a least one area of exceptionality served by the school.

12.07
Necessary noncertified personnel employed in classes, programs, or services in all areas of speical education shall be under the direct supervision of a qualified specialist.

1. All necessary noncertified personnel employed in relation to special eduation instructional or resource programs or related services shall be provided with inservice training experiences appropriate to the nature of their responsibilities. For noncertified personnel working in a special education instructional program or resource programs, such inservice training shall be in lieu of the requirements for noncertified personnel set by the State Teacher Certification Board.

12.08
Special education personnel shall function as members of the local building or district staff with all attendant privileges and responsibilities.

12.09
A comprehensive personnel development program shall be developed and implemented for all personnel involved with the education of exceptional children.

SPECIAL TRANSPORTATION

ARTICLE XIII

13.01
Each child who exhibits one or more exceptional characteristics as described in Article XIV of The School Code of Illinois shall be eligible for special transportation. Such transportation shall be provided as the child's exceptionalities or the program location may require.

13.02
Vehicles utilized for special transportation shall be adapted to the specific needs of the children receiving this service.

13.03
Personnel responsible for special transportation shall be given inservice experiences which will enable them to understand and appropriately relate to exceptional children.

13.03a
The provisions for transportation services and vehicle adaptation shall be included in the IEP.

13.03b
When there is a change in the student's transportation from special bus to another mode of transportation such as regular bus or walking to school, this change shall be included in the IEP.

13.04
Special transportation shall be scheduled in such a way that a child's health and ability to relate to the educational experiences provided are not adversely affected. Every effort should be made to limit the child's total travel time to not more than one (1) hour each way to and from the special education facility.

13.05
The special education student's arrival and departure times shall insure a full instructional day as provided for in the IEP.

13.06
Transportation to a residential school shall be provided as indicated in Article 8.11.

EVALUATION OF SPECIAL EDUCATION

ARTICLE XIV

14.01
The extent to which the local school district is fulfilling its responsibilities to exceptional children shall be determined by the Illinois Office of Education.

1. Official representatives of the Illinois Office of Education shall be authorized to examine all documentation, including student records, which would facilitate such determination.

14.02
Evaluation by the Illinois Office of Education shall focus on the local district's provision of special education services, on each special education cooperative organization of which it is a participant, and on community resources utilized by the district.

14.03
Evaluation of special education programs and services shall be based on all of the following elements:

1. A Special Education Services Comprehensive Plan. This plan shall describe the district's provision of special education services, its plan for program involvement, and those factors unique to the individual district or cooperative which must be considered in the evaluation. This plan shall be filed with the Illinois Office of Education and revised at least triannually.

2. Continuous Internal Evaluation. The district and the cooperative unit designated to provide special education services shall develop and implement procedures which assess the extent to which exceptional children are being adequately served and the effectiveness of each special education program and service.

3. Recognition Criteria for Special Education. These criteria shall be assessed through an indepth study conducted on site by a team representing the Department of Recognition and Supervision of the Illinois Office of Education.

4. Records must be maintained to demonstrate compliance with assurances agreed to in the applications for state and federal funds. These records will be monitored by the staff of the Illinois Office of Education, Department of Specialized Educational Services.

14.04
Written reports of the results of the evaluation conducted by the Illinois Office of Education and any subsequent recommendations or actions shall be provided to the appropriate board(s) of education. Reports of the evaluation shall be considered in the public domain.

14.05
The recognition status of the local school district shall be affected by its provision of special education services.

SPECIAL EDUCATION SERVICES FOR CHILDREN IN RESIDENTIAL CARE FACILITIES

ARTICLE XV

15.01
The purpose of Section 14-7.03 of The School Code of Illinois shall be considered to be to assure equal access to educational opportunity for exceptional children living in residential care facilities.

15.02
For the implementation of Section 14-7.03, the following definitions shall be utilized:

Orphanage

shall be defined as any licensed residential institution, other than those directly sponsored by the State of Illinois, which cares for dependent children.

Children's Home

shall be defined as any licensed residential institution, other than those directly operated by the State of Illinois, which cares for handicapped, neglected, delinquent, and/or dependent children.

Foster Family Home

shall be defined as an individual residential unit which cares for one or more handicapped, neglected, delinquent, or dependent children who are not members of the primary family. Such a home accepts foster children for care under specific and written authority of a municipal, county, or state agency authorized to make such placement.

Other State Agencies

shall be defined as residential institutions which are directly operated and primarily funded by an agency of the State of Illinois.

State Residential Units

shall be defined as houses, housing units, or housing accomodations which are on the grounds of any welfare, penal, or educational institution which is maintained and operated by the State of Illinois on property owned by the State of Illinois.

Care

shall mean that responsibility for all or part of the life development of a child has been assumed by the designated unit through guardianship, wardship, custody, or inpatient status.

15.03
For the implementation of Section 14-7.03, the following shall be excluded:

1. Any individual residential unit which received financial support from the State of Illinois for the maintenance of the family (e.g., homes whose primary financial support is received from one or more of the public assistance programs), unless the unit qualifies as a "foster family home."

2. Any residential facility which collects service charges and other payments in lieu of taxes (e.g., low-income housing units built and maintained with public funds). However, an individual unit in such a facility would be included if it qualified as a "foster family home."

3. Any bonafide school in which children are primarily taught branches of education corresponding to those taught in public schools, grades one through twelve.

4. Any residential unit maintained by the State of Illinois as housing for students in the state-supported institutions of higher education (e.g., university dormitories).

15.04
All children who live in eligible residential care facilities and who are to receive educational services from the local school district must be enrolled in that district.

15.05
When the local school district establishes and maintains an educational program on the site of an orphanage or children's home, that program must be appropriate to the needs of the students, and must be in accordance with the least restrictive environment.

1. Handicapped children shall be provided with a special education program which is in compliance with the Rules and Regulations to Govern the Administration and Operation of Special Education.

2. Educational programs which are provided to handicapped children on the site of an orphanage or children's home and which are not in compliance with the Rules and Regulations to Govern the Administration and Operation of Special Education shall not be eligible for reimbursement under Section 14-7.03 or Section 18-3 of The School Code of Illinois.

15.06
If the local district wishes to establish and maintain a special education program on the site of an orphanage or children's home, the program must be approved by the Illinois Office of Education prior to its implementation.

15.07
When children from an orphanage, children's home, foster family home, state agency, or state residential unit attend special education classes in the public school which are maintained by the local district, or the cooperative of which it is a participant, every effort shall be made to serve these students in the least restrictive environment.

15.07a
All exceptional children specified in this article of these regulations shall have an IEP.

15.08
All special education programs and services provided by the public schools to exceptional children from orphanages, children's homes, foster family homes, other state agencies, or state residential units shall be in compliance with the Rules and Regulations to Govern the Administration and Operation of Special Education and shall be subject to evaluation by the Illinois Office of Education.

15.09
An individual child shall be eligible for special education services under Section 14-7.03 if he or she meets all of the following criteria:

1. He or she is a resident of one of the residential care facilities described in Rule 15.02.

2. He or she would not be a resident of that school district except by virtue of his or her placement in one of the residential care facilities described in Rule 15.02.

3. He or she has been declared eligible according to these Rules and Regulations to Govern the Administration and Operation of Special Education.

15.10
Children resident in a residential care facility are entitled to all privileges and services provided by that district.

15.11
Children resident in a residential care facility and enrolled in the local school district shall be subject to all rules, regulations, and policies of that district.

15.12
All communication regarding the child's special education program shall be directed to the parents and when appropriate to the administrator of the residential care facility.

15.13
Individual reimbursement shall be made under Section 14-7.03 only on those children who have been declared eligible under Rules 15.04 and 15.09.

15.14
When a special education program is maintained on the site of an orphanage or children's home and when the children in that program are highly transient, reimbursement may be approved for the cost of maintaining said program. In such instances, Rule 15.04 may be waived if the child is enrolled in another public school district in the State of Illinois. Rule 15.09.2 may also be waived under this program.

15.15
The amount of reimbursement for which a district shall be eligible under Section 14-7.03 shall be computed by determining the actual cost of maintaining the program. All special education and related services shall be provided at no cost to the parents.

1. The costs for administration and supervision shall be computed on the percentage basis that the average daily membership of children in the special classes bears to the total average daily membership of that district.

2. Costs for the use of building facilities shall not exceed 10% of the expenditures of the classes.

3. All payments authorized by law, including state or federal grants for the ecucation of children, shall be deducted in tuition or program reimbursement.

4. Programs and services provided under the auspices of, and funded by, Public Law 89-750 shall not be considered in the computation of tuition or program reimbursement.

5. When a child from an eligible residential care facility is receiving one or more special education related services while remaining in the standard educational program, the district may claim reimbursement under Section 14-7.03 and/or Sections 18-3 and 18-4; however, the total combined reimbursement shall not exceed 100% of the costs incurred by the district for the education of that child.

6. Total reimbursment for a child who is living in an eligible residential care facility and who has been placed in an eligible nonpublic special education program shall not exceed the amount authorized under Section 14-7.02 of The School Code of Illinois.

15.16
Each district eligible for reimbursement under Section 14-7.03 shall file a preapproval application within 30 days after the initiation of the program(s). The application shall include per capita cost estimate on forms provided by the Illinois Office of Education.

15.17
In all instances, the district making claim under Section 14-7.03 shall maintain complete and accurate documentation of the expenses for which the claim is being made. The documentation shall be made available for review by the Illinois Office of Education.

APPENDIX B

approval of the Director of the Department of Corrections transfer inmates and wards to other schools and other facilities where particular subject matter or facilities are more suited to or are needed to complete said inmates or wards education. Further, the Assistant Director of the Adult Division of the Department of Corrections or the Assistant Director of the Juvenile Division may authorize an educational furlough for an inmate or ward to attend institutions of higher education, other schools, vocational or technical schools or enroll and attend classes in subjects not available within the School District, to be financed by the inmate or ward or any grant or scholarship which may be available, or applicable therefor, including school aid funds of any kind when approved by the Board and the Director of the Department.

The Department of Corrections may extend the limits of the place of confinement of an inmate or inmates, ward or wards, under the above conditions and for the above purposes, to leave for the aforesaid reasons, the confines of such place, accompanied or unaccompanied, in the discretion of the Director of such Department by a custodial agent or educational personnel.

The willful failure of an inmate or ward to remain within the extended limits of his confinement or to return within the time prescribed to the place of confinement designated by the Department of Corrections in granting such extension or ordered to return by the custodial personnel or the educational personnel or other departmental order shall be deemed an escape from the custody of such Department and punishable as provided in Section 17 of "An Act in relation to the Illinois State Penitentiary," approved June 30, 1933, as now or hereafter amended [1] as to the Adult Division inmates, and the applicable provision of the Juvenile Court Act [2] shall apply to wards of the Juvenile Division who might abscond.

Added by P.A. 77-1779, § 1, eff. July 1, 1972.

[1] Chapter 108, § 105 et seq. (repealed).
[2] Chapter 37, § 701-1 et seq.

13—44.4 Educational fund—Custody—Budget.] § 13-44.4 An educational fund shall be established wherein all moneys received from the Common School Fund, Federal Aid and grants, Vocational, Educational funds and grants, gifts and grants by individuals, foundations and corporations shall be deposited and the said educational Fund shall be kept separate from general funds and shall be held by the State Treasurer as ex-officio custodian in a separate fund, and shall be used to pay the expense of the schools and school district of the Department of Corrections together with and supplemental to regular appropriations to said Department for educational purpose. This shall include any and all cost including, but not limited to teacher salaries, supplies and materials, building upkeep and costs, transportation, scholarships, non-academic salaries, equipment and other school costs.

Beginning in 1972, the Board of Education shall, by November 15, adopt an annual educational fund budget for the next school year which it deems necessary to defray all necessary expenses and liabilities of the district to be assumed by said fund, and in such annual budget shall specify the objects and purposes of each item and amount needed for each object or purpose. The budget shall contain a statement of cash on hand at the beginning of the fiscal year, an estimate of the cash expected to be received during such fiscal year from all sources, an estimate of the expenditure contemplated for such fiscal year, and a statement of the estimated cash expected to be on hand at the end of such year. Prior to the adoption of the annual educational budget, said budget shall be submitted to the Department of Corrections and the Office of the Superintendent of Public Instruction for incorporation.

Added by P.A. 77-1779, § 1, eff. July 1, 1972.

13—44.5 Permission to leave institution or facility.] § 13-44.5 In all cases where an inmate or ward is to leave the institution or facility where he or she is confined for educational furloughs, vocational training, for field trips or for any other reason herein stated, authority must first be granted by the Department of Corrections and the said authority shall be discretionary with the Department of Corrections. The question of whether or not the said inmate or ward or group of inmates or wards shall be accompanied or not accompanied by security personnel, custodial agent or agents or only educational personnel shall be in the discretion of the Department of Corrections. All transfers must be approved by the Department of Corrections.

Added by P.A. 77-1779, § 1, eff. July 1, 1972.

13—45. Inapplicability of certain provisions of School Code.] § 13-45. Other provisions of this Code shall not apply to the Department of Corrections School District being all of the following Articles and Sections: Articles 7, 8, 9, those sections of Article 10 in conflict with any provisions of Sections 13—40 through 13—45, and Articles 11, 12, 15, 17, 18, 19, 19A, 20, 22, 24, 26, 31, 32, 33, 34, 35. Also Article 28 shall not apply except that this School District may use any funds available from State, Federal and other funds for the purchase of textbooks, apparatus and equipment.

Added by P.A. 77-1779, § 1, eff. July 1, 1972.

ARTICLE 14. HANDICAPPED CHILDREN

Sec.
14—1 Repealed.
14—1.01 Meaning of terms.
14—1.02 Physically handicapped children.
14—1.03 Maladjusted children.
14—1.03a Children with specific learning disabilities.
14—1.04 Educable mentally handicapped children.
14—1.05 Trainable mentally handicapped children.
14—1.06 Speech defective children.
14—1.07 Multiply handicapped children.
14—1.08 Special educational facilities and services.
14—1.09 School psychologist.
14—1.10 Professional worker.
14—2. Repealed.
14—2.01 Advisory committees.
14—3. Repealed.
14—3.01 Advisory Council.
14—4. Repealed.
14—4.01 Special educational facilities for handicapped children.
14—5. Repealed.
14—5.01 Application of article.
14—6. Repealed.
14—6.01 Powers and duties of school boards.

Sec.
14—7. Repealed.
14—7.01 Children attending classes in another district.
14—7.02 Children attending private schools, public out-of-state schools or private special education facilities.
14—7.02a Children requiring extraordinary special education services and facilities.
14—7.03 Special education classes for children from orphanages, foster family homes, children's homes, or in State housing units.
14—7.03a Combined reimbursement.
14—8. Repealed.
14—8.01 Supervision of special education buildings and facilities.
14—8.02 Identification, Evaluation and Placement of Children.
14—9. Repealed.
14—9.01 Qualifications of teachers, other professional personnel and necessary workers.
14—10. Repealed.
14—10.01 Traineeship and fellowship program—training of professional personnel.
14—11. Repealed.
14—11.01 Educational materials coordinating unit.
14—11.02 Service centers for the deaf/blind.
14—12. Repealed.
14—12.01. Account of expenditures—Cost report—Reimbursement.
14—13.01 Reimbursement payable by state—amounts.
14—13.02 Reimbursement for special education building purposes.
14—14.01 Warrants for reimbursement.

14—1. § 14-1. Repealed by act approved July 21, 1965. L.1965, p. 1948.

14—1.01 § 14-1.01. **Meaning of terms.** Unless the context indicates otherwise, the terms used in this Article have the meanings ascribed to them in Sections 14—1.02 to 14—1.10, each inclusive. Added by act approved July 21, 1965. L.1965, p. 1948.

14—1.02 § 14-1.02 **Physically handicapped children.** "Physically handicapped children", means children, other than those with a speech defect, between the ages of 3 and 21 years who suffer from any physical disability making it impracticable or impossible for them to benefit from or participate in the normal classroom program of the public schools in the school districts in which they reside and whose intellectual development is such that they are capable of being educated through a modified classroom program. Added by act approved July 21, 1965. L.1965, p. 1948.

14—1.03 § 14-1.03. **Maladjusted children.** "Maladjusted children" means children between the ages of 3 and 21 years who because of social or emotional problems are unable to make constructive use of their school experience and require the provisions of special services signed to promote their educational growth and development.

Amended by P.A. 80-1089, § 1, eff. Nov. 22, 1977.

14—1.03a § 14-1.03a **Children with specific learning disabilities.** "Children with Specific Learning Disabilities" means children between the ages of 3 and 21 years who have a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in imperfect ability to listen, think, speak, read, write, spell or do mathematical calculations. Such disorders include such conditions as perceptual handicaps, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. Such term does not include children who have learning problems which are primarily the result of visual, hearing or motor handicaps, of mental retardation, emotional disturbance or environmental disadvantage.

Added by P.A. 77-1318, § 1, eff. July 1, 1972.

14—1.04 § 14-1.04 **Educable mentally handicapped children.** "Educable mentally handicapped children" means children between the ages of 3 and 21 years who because of retarded intellectual development as determined by individual psychological evaluation are incapable of being educated profitably and efficiently through ordinary classroom instruction but who may be expected to benefit from special educational facilities designed to make them economically useful and socially adjusted.

Amended by P.A. 77-1319, § 1, eff. July 1, 1972.

14—1.05 § 14-1.05. **Trainable mentally handicapped children.** "Trainable mentally handicapped children" means children between the ages of 3 and 21 years who because of retarded intellectual development, as determined by individual psychological evaluation, are incapable of being educated properly and efficiently through ordinary classroom instruction or special educational facilities for educable mentally handicapped children, but who may be expected to benefit from training in a group setting designed to further their social adjustment and economic usefulness in their homes or in a sheltered environment.

Amended by P.A. 80-1089, § 1, eff. Nov. 22, 1977.

14—1.06 § 14-1.06 **Speech defective children.** "Speech defective children" means children between the ages of 3 and 21 years whose diagnosis by a certified teacher meeting the requirements of the Superintendent of Public Instruction as a qualified speech correctionist indicates that specialized instruction would improve or correct the defects.

Amended by P.A. 77-1319, § 1, eff. July 1, 1972.

14—1.07 § 14-1.07 **Multiply handicapped children.** "Multiply handicapped children" means children between 3 and 21 years who may be placed within 2 or more classifications of this Article, or in at least 2 different programs provided under Section 14—1.02 of this Article. Added by act approved July 21, 1965. L.1965, p. 1948.

14—1.08 § 14-1.08. **Special educational facilities and services.** "Special educational facilities and services" includes special schools, special classes, special housing, special instruction, special reader service, braillists and typists for visually handicapped children, sign language interpreters, transportation, maintenance, instructional material, therapy, professional consultant services, medical services only for diagnostic and evaluation purposes provided by a physician licensed to practice medi-

cine in all its branches to determine a child's need for special education and related services, psychological services, school social worker services, special administrative services salaries of all required special personnel, and other special educational services, including special equipment for use in the classroom, required by the child because of his disability if such services or special equipment are approved by the State Board of Education and the child is eligible therefor under this Article and the regulations of the State Board of Education.

Amended by P.A. 80-1404, § 1, eff. Aug. 25, 1978.

14—1.09 § 14-1.09 School psychologist. "School psychologist" means a psychologist who has graduated with a master's or higher degree in psychology or educational psychology from an institution of higher learning which maintains equipment, course of study, and standards of scholarship approved by the Superintendent of Public Instruction, who has had at least one school year of full-time supervised experience in the individual psychological evaluation of children of a character approved by the Superintendent of Public Instruction, and who has such additional qualifications as may be required by the Superintendent of Public Instruction, and who holds a permit from the Superintendent of Public Instruction valid for 4 years and renewable upon application and submission to the Superintendent of Public Instruction of evidence of having performed acceptable psychological work within the time period designated in the permit. Added by act approved July 21, 1965. L.1965, p. 1948.

14—1.10 § 14-1.10 Professional worker. "Professional worker" means a trained specialist, and shall be limited to speech correctionist, school social worker, school psychologist, psychologist intern, school social worker intern, special administrator intern, registered therapist, professional consultant, special administrator or supervisor giving full time to special education, and teacher of any class or program defined in this Article who meets the requirements of this Article, who has the required special training in the understandings, techniques, and special methods of instruction for children who because of their handicapping conditions are placed in any program provided for in this Article and who works in such program. Added by act approved July 21, 1965. L.1965, p. 1948.

14—2. § 14-2 Repealed by act approved July 21, 1965. L.1965, p. 1948

14—2.01 § 14-2.01 Advisory Committees. There shall be established in each county a Special Education Advisory Committee to consist of 7 members appointed by the regional superintendent of schools who shall hold office for 4 years. Upon expiration of the terms of the original appointees, and every 4 years thereafter, the regional superintendent shall appoint or reappoint the members of the Special Education Advisory Committee, to hold office for 4 years. Vacancies shall be filled in like manner for the unexpired balance of the term.

The members appointed shall be citizens of the United States and of this State and shall be selected, as far as may be practicable, on the basis of their knowledge of, or experience in, problems of the education of handicapped children.

The Advisory Committee shall organize with a chairman selected by the Committee members and shall meet at the call of the chairman upon 10 days written notice but not less than 4 times in each calendar year. The Advisory Committee shall by July 1, 1967, complete and report to the State Board of Education a comprehensive plan whereby all handicapped children resident in the county may receive a good common school education. The Advisory Committee shall, at least every four years thereafter recommend to the State Board of Education additions to or modifications of their comprehensive plans. All such additions or modifications shall be forwarded to the State Board of Education by the Advisory Council with its recommendations for its approval or rejection.

The regional superintendent shall act as executive secretary of the Advisory Committee and shall furnish all clerical assistance necessary for the performance of its powers and duties.

Advisory Committees of two or more counties may cooperatively complete and report by July 1, 1967, a regional plan whereby all handicapped children in the cooperating counties may receive a good common school education if such an approach seems desirable due to population sparsity, geographic factors, or because of other substantial reasons, including the existence of cooperative or joint agreements to serve those counties. At least every 4 years thereafter, such Advisory Committees shall recommend to the State Board of Education such additions or modifications of that regional plan.

In developing all county and regional plans, the special education programs operated by the Department of Children and Family Services and the Department of Mental Health and Developmental Disabilities should be given full consideration and may be utilized where appropriate.

The State Board of Education shall furnish professional consultant assistance to the Advisory Committees under the general direction of the person designated as executive secretary of the Advisory Council and furnish guidelines for the implementation of this Act.

Amended by P.A. 80-1406, § 1, eff. Aug. 25, 1978.

14—3. § 14-3 Repealed by act approved July 21, 1965. L.1965, p. 1948

14—3.01 § 14-3.01 Advisory Council. There is hereby created a special education Advisory Council on Education of Handicapped Children to consist of 15 members appointed by the Governor, who shall hold office for 4 years. No person shall be appointed to serve more than 2 consecutive terms on the Advisory Council. The terms of members serving at the time of this amendatory Act of 1978 are not affected by this amendatory Act. The membership shall include a handicapped adult, 2 parents of handicapped children, a consumer representative, a representative of a private provider, a teacher of the handicapped, a regional superintendent of an educational service region, a superintendent of a school district, a director of special education from a district of less than 500,000 population, a professional affiliated with an institution of higher education, and a member of the general public and the Director of Special Education for the Chicago Board of Education, ex-officio. Of the members appointed after the effective date of this amendatory Act of 1978, the Governor shall appoint one member to an initial term of 2 years, one member to an initial term of 3 years and one

member to an initial term of 4 years. Vacancies shall be filled in like manner for the unexpired balance of the term.

Because of the responsibility of the Department of Children and Family Services, the Department of Mental Health and Developmental Disabilities and the Division of Vocational Rehabilitation for special education programs, the Director of the Department of Children and Family Services and the Director of the Department of Mental Health and Developmental Disabilities and the Director of the Division of Vocational Rehabilitation or their designees shall be members of the Council, ex-officio.

The members appointed shall be citizens of the United States and of this State and shall be selected, as far as practicable, on the basis of their knowledge of, or experience in, problems of the education of handicapped children.

The State Board of Education shall seek the advice of the Advisory Council regarding all rules or regulations related to the education of handicapped children to be promulgated by it. The State Board shall seek the advice of the Advisory Council on modifications or additions to county or regional comprehensive plans. Additionally, the Advisory Council shall: (a) advise the General Assembly, the Governor and the State Board on the unmet needs in the education of handicapped children, (b) assist the State Board in developing and reporting data and evaluations which may assist the United States Commissioner of Education in the performance of his responsibilities under the Education of the Handicapped Act,[1] (c) advise the State Board relative to qualifications for hearing officers and the rules and procedures for hearings conducted under Section 14—8.02 of this Act and (d) comment publicly on any rules or regulations proposed by the State regarding the education of handicapped children and the procedures for distribution of funds under this Act.

The Council shall organize with a chairman selected by the Council members and shall meet at the call of the chairman upon 10 days written notice but not less than 4 times a year. The Council shall consider any rule or regulation or plan submitted to it by the State Board of Education within 60 days after its receipt by the chairman. Members of the Council shall serve without compensation but shall be entitled to reasonable amounts for expenses necessarily incurred in the performance of their duties.

The State Board of Education shall designate an employee to act as executive secretary of the Council and shall furnish all professional and clerical assistance necessary for the performance of its powers and duties.

Amended by P.A. 80-1406, § 1, eff. Aug. 25, 1978.

[1] Section 14—1.01 et seq. of this chapter.

14—4. § 14-4. Repealed by act approved July 21, 1965. L.1965, p. 1948.

14—4.01 § 14-4.01. Special educational facilities for handicapped children. School boards of any school districts that maintain a recognized school, whether operating under the general law or under a special charter, subject to any limitations hereinafter specified, shall establish and maintain such special educational facilities as may be needed for one or more of the types of handicapped children defined in Sections 14-1.02 through 14-1.07 of this Article who are residents of their school district, and such children, residents of other school districts as may be authorized by this Article.

All such school boards shall place or by regulation may authorize the director of special education to place, pursuant to procedures required by this Act and rules and regulations promulgated by the State Board of Education, eligible children into special education programs designed to benefit handicapped children defined in Sections 14-1.02 through 14-1.07 of this Act.

Amended by P.A. 80-1403, § 1, eff. Aug. 25, 1978.

14—5. § 14-5. Repealed by act approved July 21, 1965. L.1965, p. 1948.

14—5.01 § 14-5.01. Application of Article. This Article applies to school boards of all types and sizes of school districts, including but not limited to special charter districts, community consolidated school districts, community unit school districts, consolidated school districts, high school districts, non-high school districts, community high school districts, and districts exceeding 500,000 inhabitants. Added by act approved July 21, 1965. L.1965, p. 1948.

14—6. § 14-6. Repealed by act approved July 21, 1965. L.1965, p. 1948; P.A. 76-969, § 1, eff. Aug. 19, 1969.

14—6.01. § 14-6.01. Powers and duties of school boards. School boards of one or more school districts establishing and maintaining any of the educational facilities described in this Article shall, in connection therewith, exercise similar powers and duties as are prescribed by law for the establishment, maintenance and management of other recognized educational facilities. Such school boards shall include only eligible children in the program and shall comply with all the requirements of this Article and all rules and regulations established by the State Board of Education. Such school boards shall accept in part-time attendance handicapped children of the types described in Sections 14—1.02 through 14—1.07 who are enrolled in nonpublic schools. A request for part-time attendance must be submitted by a parent or guardian of the handicapped child and may be made only to those public schools located in the district where the child attending the nonpublic school resides, however, nothing in this Section shall be construed as prohibiting an agreement between the district where the child resides and another public school district to provide special educational services if such an arrangement is deemed more convenient and economical. Special educational services shall be provided to such students as soon as possible after the identification, evaluation and placement procedures provided in Section 14—8.02, but no later than the beginning of the next school semester following the completion of such procedures. School districts shall provide transportation for handicapped children accepted in part time attendance on the same basis as those pupils provided transportation under Section 29—4 of "The School Code".

Effective July 1, 1966, high school districts are financially responsible for the education of handicapped pupils resident in their districts when such pupils have reached age 16 but may admit handicapped children into special educational facilities without regard to graduation from the eighth grade after such pupils have reached the age of 14½ years.

Any district maintaining a recognized high school is authorized to issue certificates of graduation to handicapped pupils completing special educational programs approved by the State Board of Education.

Amended by P.A. 80-1508, § 1, eff. Jan. 9, 1979.

14—7. § 14-7. Repealed by act approved July 21, 1965. L.1965, p. 1948.

14—7.01 § 14-7.01 Children attending classes in another district.) If a child, resident of one school district, because of his handicap, attends a class or school for any of such types of children in another school district, the school district in which he resides shall grant the proper permit, provide any necessary transportation, and pay to the school district maintaining the special educational facilities the per capita cost of educating such children.

Such per capita cost shall be computed in the following manner. The cost of conducting and maintaining any special educational facility shall be first determined and shall include the following expenses applicable only to such educational facility under rules and regulations established by the Superintendent of Public Instruction as follows:

(a) Salaries of teachers, professional workers, necessary non-certified workers, clerks, librarians, custodial employees, readers, and any district taxes specifically for their pension and retirement benefits.

(b) Educational supplies and equipment including textbooks.

(c) Administrative costs and communication.

(d) Operation of physical plant including heat, light, water, repairs, and maintenance.

(e) Auxiliary service, not including any transportation cost.

(f) Depreciation of physical facilities at a rate of $200 per pupil. From such total cost thus determined there shall be deducted the State reimbursement due on account of such educational facility for the same year, not including any State reimbursement for special education transportation. Such net cost shall be divided by the average number of pupils in average daily attendance in such special education facility for the school year in order to arrive at the net per capita tuition cost.

If the child, resident of any school district, because of his handicap, attends a class or school for any of such types of children maintained in a teacher training center supported by public funds or State institution of higher learning, the resident district shall provide any necessary transportation and shall be eligible to the transportation reimbursement provided in Section 14—13.01.

A resident district may, upon request, provide transportation for residents of the district who meet the requirements, other than the specified age of any of the definitions of handicaps in Sections 14—1.02 through 14—1.07, who attend classes in another district, and shall make a charge for any such transportation in an amount equal to the cost thereof, including a reasonable allowance for depreciation of the vehicles used.

Amended by P.A. 79-914, § 1, eff. Oct. 1, 1975.

14—7.02 § 14-7.02. Children attending private schools, public out-of-state schools or private special education facilities. The General Assembly recognizes that non-public schools or special education facilities provide an important service in the educational system in Illinois. If because of his or her handicap the special education program of a district is unable to meet the needs of a child and the child attends a non-public school or special education facility, a public out-of-state school or a special education facility owned and operated by a county government unit that provides special educational services required by the child and is in compliance with the appropriate rules and regulations of the State Superintendent of Education, the school district in which the child is a resident shall pay the actual cost of tuition for special education and related services provided during the regular school term and during the summer school term if the child's educational needs so require, excluding room, board and transportation costs charged the child by that non-public school or special education facility, public out-of-state school or $4,500 per year, whichever is less, and shall provide him any necessary transportation. The State Board of Education shall promulgate rules and regulations for transportation to and from a residential school. Transportation to and from home to a residential school more than once each school term shall be subject to prior approval by the State Superintendent in accordance with the rules and regulations of the State Board. A school district making tuition payments pursuant to this Section is eligible for reimbursement from the State for the amount of such payments actually made in excess of the district per capita tuition charge for students not receiving special education services. Such reimbursement shall be paid in accordance with Section 14—12.01 for each school year ending June 30, to the board of each such school district, through the regional superintendent of schools, on the warrant of the State Comptroller in accordance with the payment times and procedures contained herein.

No child shall be placed in a special education program pursuant to this Section if the tuition cost for special education and related services increases more than 10 percent over the tuition cost for the previous school year or exceeds $4,500 per year unless such costs have been approved by the Governor's Purchased Care Review Board. The Governor's Purchased Care Review Board shall consist of the following persons, or their designees: the Directors of Children and Family Services, Mental Health and Developmental Disabilities, Public Health, Public Aid and the Bureau of the Budget; the State Superintendent of Education; and such other persons as the Governor may designate. The Review Board shall establish rules and regulations for its operations and shall establish uniform standards and criteria which it shall follow.

The Review Board shall establish uniform definitions and criteria for accounting separately by special education, room and board and other related services costs. The Board shall also establish guidelines for the coordination of services and financial assistance provided by all State agencies to assure that no otherwise qualified handicapped child receiving services under Article 14 shall be excluded from participation in, be denied the benefits of or be subjected to discrimination under any program or activity provided by any State agency.

The Review Board shall review the costs for special education and related services provided by non-public schools or special education facilities and shall approve or disapprove such facilities in

accordance with the rules and regulations established by it with respect to allowable costs.

The Review Board may employ staff and contract with independent auditors for such services as may be needed to verify that all fees, tuitions and charges are fair and justified.

The Review Board shall seek the advice of the Advisory Council on Education of Handicapped Children on the rules and regulations to be promulgated by it relative to providing special education services.

If a child has been placed in a program in which the actual cost of tuition for special education and related services excluding room, board and transportation costs, exceed $4,500 and such costs have been approved by the Review Board, the district shall pay such total costs which exceed $4,500. A district making such tuition payments in excess of $4,500 pursuant to this Section shall be responsible for an amount in excess of $4,500 equal to the district per capita tuition charge and shall be eligible for reimbursement from the State for the amount of such payments actually made in excess of the districts per capita tuition charge for students not receiving special education services.

If a child has been placed in an approved individual program and the tuition costs including room and board costs have been approved by the Review Board, then such room and board costs shall be paid by the appropriate State agency subject to the provisions of Section 14—6.01 of this Act. Room and board costs not provided by a State agency other than the State Board of Education shall be provided by the State Board of Education on a current basis. In no event, however, shall the State's liability for funding of these tuition costs begin until after the legal obligations of third party payors have been subtracted from such costs. If the money appropriated by the General Assembly for such purpose for any year is insufficient, it shall be apportioned on the basis of the claims approved. Each district shall be paid an estimated claim payment, through the regional superintendent of schools, on the warrants of the State Comptroller equal to one-half of the estimated reimbursement approved under this section on December 30 and three-fourths of the estimated reimbursement minus the December 30 payment on March 30. Each district shall file a final claim with the regional superintendent on or before June 30. The regional superintendent shall transmit such claim to the State Superintendent of Education on or before July 15. The State Superintendent of Education shall determine the accuracy of such claims and make final payment to each district, through the regional superintendent of schools, on warrants of the State Comptroller, on September 15. Such current state reimbursement shall be reduced by an amount equal to the proceeds which the child or child's parents are eligible to receive under any public or private insurance or assistance program. Nothing in this Section shall be construed as relieving an insurer or similar third party from an otherwise valid obligation to provide or to pay for services provided to a handicapped child.

If it otherwise qualifies, a school district is eligible for the transportation reimbursement under Section 14—13.01 and for the reimbursement of tuition payments under this Section whether the non-public school or special education facility, public out-of-state school or county special education facility, attended by a child who resides in that district and requires special educational services, is within or outside of the State of Illinois. However, a district is not eligible to claim transportation reimbursement under this Section unless the district certifies to the State Superintendent of Education that the district is unable to provide special educational services required by the child for the current school year.

Nothing in this Section authorizes the reimbursement of a school district for the amount paid for tuition of a child attending a non-public school or special education facility, public out-of-state school or county special education facility unless the school district certifies to the State Superintendent of Education that the special education program of that district is unable to meet the needs of that child because of his handicap and the State Superintendent of Education finds that the school district is in substantial compliance with Section 14—4.01.

Any educational or related services provided, pursuant to this Section in a non-public school or special education facility or a special education facility owned and operated by a county government unit shall be at no cost to the parent or guardian of the child. However, current law and practices relative to contributions by parents or guardians for costs other than educational or related services are not affected by this amendatory Act of 1978.

Amended by P.A. 80-1405, § 1, eff. Aug. 25, 1978.

[1] Section 14-1 et seq. of this chapter.

14—7.02a § 14-7.02a Children requiring extraordinary special education services and facilities. A school district providing for a child requiring extraordinary special education services because of the nature of his handicap is eligible for reimbursement from the State for the per capita cost of educating that child in excess of the district per capita tuition charge for the prior year or $2,000, whichever is less. Per capita costs shall be actual expenditures minus State reimbursement under Section 14—13.01.

A child is deemed to require extraordinary special education services and facilities under the following conditions:

1) the school district has determined that the child requires extraordinary special education facilities;

2) the school district maintains adequate cost accounting to document the per capita cost of special education; and

3) the Superintendent of Public Instruction has reviewed the case study and staffing recommendation for each child referred and has approved the district's recommendations regarding eligibility of the child for the extraordinary special education services and facilities.

Amended by P.A. 79-863, § 1, eff. Oct. 1, 1976.

14—7.03 § 14-7.03. Special Education Classes for Children from Orphanages, Foster Family Homes, Children's Homes, or in State Housing Units. If a school district maintains special education classes on the site of orphanages and children's homes, or if children from the orphanages, children's homes, foster family homes, other State agencies, or State residential units for children attend classes for handicapped children in which the school district is a participating member of a joint agreement, or if the children from the orphanages, children's homes, foster family homes,

other State agencies, or State residential units attend classes for the handicapped children maintained by the school district, then reimbursement shall be paid to eligible districts in accordance with the provisions of this Section through the regional superintendent on the warrant of the Comptroller.

The amount of tuition for such children shall be determined by the actual cost of maintaining such classes, but costs for administration and supervision shall be computed on the percentage basis that the average daily membership of children in the special classes bears to the total average daily membership of the district and any costs for the use of building facilities shall not exceed 10% of the expenditure for the classes, such program and cost to be pre-approved by the State Superintendent of Education.

On forms prepared by the State Superintendent of Education, the district shall certify to the regional superintendent the following:

1. The name of the home or State residential unit with the name of the owner or proprietor and address of those maintaining it;

2. That no service charges or other payments authorized by law were collected in lieu of taxes therefrom or on account thereof during either of the calendar years included in the school year for which claim is being made;

3. The number of children qualifying under this Act in special education classes for instruction on the site of the orphanages and children's homes;

4. The number of children attending special education classes for handicapped children in which the district is a participating member of a special education joint agreement;

5. The number of children attending special education classes for handicapped children maintained by the district;

6. The computed amount of tuition payment claimed as due, as approved by the State Superintendent of Education, for maintaining these classes.

If a school district makes a claim for reimbursement under Section 18—3 or 18—4 of this Act it shall not include in any claim filed under this Section a claim for such children. Payments authorized by law, including State or federal grants for education of children included in this Section, shall be deducted in determining the tuition amount.

Nothing in this Act shall be construed so as to prohibit reimbursement for the tuition of children placed in for profit facilities. Private facilities shall provide adequate space at the facility for special education classes provided by a school district or joint agreement for handicapped children who are residents of the facility at no cost to the school district or joint agreement upon request of the school district or joint agreement. If such a private facility provides space at no cost to the district or joint agreement for special education classes provided to handicapped children who are residents of the facility, the district or joint agreement shall not include any costs for the use of such facilities in its claim for reimbursement.

The State Board of Education shall establish such rules and regulations as may be necessary to implement the provisions of this Section.

For the 1977-78 school year and thereafter, each district shall claim reimbursement on a current basis. To make such a claim, the district shall file with the regional superintendent for transmittal to the State Superintendent of Education by September 1, December 1 and March 1, respectively, an estimated claim, computed in a manner acceptable to the State Superintendent of Education in accordance with this Section, and a final adjustment claim by June 15. Upon receipt of such a quarterly claim, the State Superintendent of Education shall direct the Comptroller to pay a specified amount to the district by the 15th day of September, December or March or the 30th day of June, respectively.

The claim of a school district otherwise eligible to be reimbursed in accordance with Section 14—12.01 for the 1976-77 school year but for this amendatory Act of 1977 shall not be paid unless the district ceases to maintain such classes for one entire school year.

If a school district's current reimbursement payment for the 1977-78 school year only is less than the prior year's reimbursement payment owed, such district shall be paid the amount of the difference between the payments in addition to the current reimbursement payment and such amount so paid shall be subtracted from the amount of prior year's reimbursement payment owed to the district.

Amended by P.A. 80-1095, § 1, eff. Nov. 23, 1977. P.A. 80-1364, § 60, eff. Aug. 13, 1978.

14—7.03a § 14-7.03a. **Combined reimbursement.** A school district may claim reimbursement under both Section 14—7.02 and Section 14—7.03 for those children served under Section 14—7.03 whose needs also require placement under Section 14—7.02.

Added by P.A. 80-1481, § 1, eff. Jan. 1, 1979.

14—8. § 14-8. Repealed by act approved July 21, 1965. L.1965, p. 1948.

14—8.01 § 14-8.01. **Supervision of special education buildings and facilities.** All special educational facilities, building programs, housing, and all educational programs for the types of handicapped children defined in Sections 14—1.02 through 14—1.07 shall be under the supervision of and subject to the approval of the State Board of Education.

All educational programs for the types of handicapped children defined in Sections 14—1.02 through 14—1.07 administered by any State agency shall be under the general supervision of the State Board of Education. Such supervision shall be limited to insuring that such educational programs meet standards jointly developed and agreed to by both the Illinois Office of Education and the operating State agency, including standards for educational personnel.

Any State agency providing special educational programs for the types of handicapped children defined in Sections 14—1.02 through 14—1.07 shall promulgate rules and regulations, in consultation with the State Board of Education and pursuant to the Illinois Administrative Procedure Act as now or hereafter amended, to insure that all such programs comply with this Section and Section 14—8.02.

No otherwise qualified handicapped child receiving special education and related services under Article 14 shall, solely by reason of his or her handicap be excluded from the participation in or be denied the benefits of or be subjected to discrimination under any program or activity provided by a State agency.

State agencies providing special education and related services (including room and board, either

directly or through grants or purchases of services shall continue to provide these services according to current law and practice. Room and board costs not provided by a State agency other than the State Board of Education shall be provided by the State Board of Education. An amount equal to one-half of the State education agency's share of PL 94-142 federal monies,[3] or so much thereof as may actually be needed, shall annually be appropriated to pay for the additional costs of providing for room and board for those children placed pursuant to Section 14—7.02 of this Act.

Special education and related services included in the child's individualized educational program which are not provided by another State agency shall be included in the special education and related services provided by the State Board of Education and the local school district.

The State Board of Education with the advice of the Advisory Council shall prescribe the standards and make the necessary rules and regulations for special education programs administered by local school boards, including but not limited to establishment of classes, training requirements of teachers and other professional personnel, eligibility and admission of pupils, the curriculum, class size limitation, building programs, housing, transportation, special equipment and instructional supplies, and the applications for claims for reimbursement. The State Board of Education shall promulgate rules and regulations for annual evaluations of the effectiveness of all special education programs and annual evaluation by the local school district of the individualized educational program for each child for whom it provides special education services.

Amended by P.A. 80-1403, § 1, eff. Aug. 25, 1978.

[1] Chapter 127, § 1001 et seq.
[2] Section 14—1.01 et seq. of this chapter.
[3] 20 U.S.C.A. §§ 1401, 1411 et seq., 1453.

14—8.02 § 14-8.02. Identification, Evaluation and Placement of Children. The State Board of Education shall make rules under which local school boards shall determine the eligibility of children to receive special education. Such rules shall ensure that a free appropriate public education be available to all handicapped children as defined in Sections 14—1.02 through 14—1.07. For purposes of determining the eligibility of children the State Board of Education shall include in the rules definitions of "case study", "staff conference", "individualized educational program", and "qualified specialist" appropriate to each category of handicapped children as defined in this Article.

No child shall be eligible for special education facilities except with a carefully completed case study fully reviewed by professional personnel in a staff conference and only upon the recommendation of qualified specialists. No child shall be eligible for admission to a special class for the educable mentally handicapped or for the trainable mentally handicapped except with a psychological evaluation and recommendation by a school psychologist. Consent shall be obtained from the parent or guardian of a child before any evaluation is conducted. If consent is not given then the school district may initiate an impartial due process hearing under this Section. The school district shall inform the parent or guardian of a child of the opportunity to obtain an independent evaluation at public expense if the parent disagrees with an evaluation obtained by the school district. In such cases the school district may initiate an impartial due process hearing under this Section prior to such independent evaluation to demonstrate that the district's evaluation is appropriate. If the final decision is that the school district's evaluation is appropriate the parent shall have the right to an independent evaluation, but not at public expense. The determination of eligibility shall be made within 60 school days from the date of referral by school authorities for evaluation by the district or date of application for admittance by the parent or guardian of the child. After a child has been determined to be eligible for a special education class, such child must be placed in the appropriate program pursuant to the individualized educational program by or no later than the beginning of the next school semester. The district shall indicate to the parent or guardian and the State Board of Education the nature of the services the child will receive for the regular school term while waiting placement in the appropriate special education class.

To the maximum extent appropriate, the placement shall provide the child with the opportunity to be educated with children who are not handicapped. Placement in special classes, separate schools or other removal of the handicapped child from the regular educational environment shall occur only when the nature of the severity of the handicap is such that education in the regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

No child who comes from a home in which a language other than English is the principal language used may be assigned to any class or program under this Article until he has been given, in the principal language used in his home, tests reasonably related to his cultural environment. All testing and evaluation materials and procedures utilized for evaluation and placement shall not be racially or culturally discriminatory.

Nothing in this Article shall be construed to require any child to undergo any physical examination or medical treatment whose parents or guardian object thereto on the grounds that such examination or treatment conflicts with his religious beliefs.

School boards or their designee shall provide to the parents or guardian of a child prior written notice of any decision (a) proposing to initiate or change, or (b) refusing to initiate or change, the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to their child, and the reasons therefor. Such written notification shall also inform the parent or guardian of the opportunity to present complaints with respect to any matter relating to the educational placement of the student, or the provision of a free appropriate public education and to have an impartial due process hearing on the complaint. The notice shall inform the parents or guardian in the parents' or guardian's native language, unless it is clearly not feasible to do so, of their rights and all procedures available pursuant to this Act and federal law 94-142; it shall be the responsibility of the State Superintendent to develop uniform notices setting forth the procedures available under this Act and federal law 94-142 to be used by all school boards. The notice shall also inform the parents or guardian of the availability upon request of a list of free or low-cost legal and other relevant services available locally to assist parents or guardians in initiating

an impartial due process hearing. Any parent or guardian who is deaf, or does not normally communicate using spoken English, who participates in a meeting with a representative of a local educational agency for the purposes of developing an individualized educational program shall be entitled to the services of an interpreter.

An impartial due process hearing shall be conducted upon the request of the parents or guardian or local school board by an impartial hearing officers appointed as follows: If the request is made through the local school district, within 5 school days of receipt of the request, the local school district shall forward the request to the State Superintendent. Within 5 days after receiving this request of hearing, the State Board of Education shall provide a list of 5 prospective, impartial hearing officers. No one on the list may be a resident of the school district. The board and the parents or guardian or their legal representatives within 5 days shall alternatively strike one name from the list until only one name remains. The parents or guardian shall have the right to proceed first with the striking. The per diem allowance for the hearing officer shall be established and paid by the State Board of Education. The hearing shall be closed to the public except that the parents or guardian may require that the hearing be public. The hearing officer shall not be an employee of the school district, an employee in any joint agreement or cooperative program in which the district participates, or any other agency or organization that is directly involved in the diagnosis, education or care of the student or the State Board of Education. All impartial hearing officers shall be adequately trained in federal and state statutes and rules and regulations regarding special education. The impartial hearing officer shall have the authority to require additional information or evidence where he or she deems it necessary to make a complete record and may order an independent evaluation of the child, the cost of said evaluation to be paid by the local school district. Such hearing shall not be considered adversary ih nature, but shall be directed toward bringing out all facts necessary for the impartial hearing officer to render an informed decision. The State Board of Education shall, with the advice and approval of the Advisory Council on Education of Handicapped Children, promulgate rules and regulations to establish the qualifications of the hearing officers and the rules and procedure for such hearings. The school district shall present evidence that the special education needs of the child have been appropriately identified and that the special education program and related services proposed to meet the needs of the child are adequate, appropriate and available. Any party to the hearing shall have the right to: (a) be represented by counsel and be accompanied and advised by individuals with special knowledge or training with respect to the problems of handicapped children at the party's own expense; (b) present evidence and confront and cross-examine witnesses; (c) prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least 5 days before the hearing; (d) obtain a written or electronic verbatim record of the hearing; (e) obtain written findings of fact and a written decision. The student shall be allowed to attend the hearing unless the hearing officer finds that attendance is not in the child's best interest or detrimental to the child. The hearing officer shall specify in the findings the reasons for denying attendance by the student. The hearing officer may issue subpoenas requiring the attendance of witnesses and, at the request of the parent, guardian or school board representatives, shall issue such subpoenas. The hearing officer may limit the number of witnesses to be subpoenaed in behalf of the parent or guardian or school board to not more than 10. The State Board of Education and the school board shall share equally the costs of providing a written or electronic record of the proceedings. The hearing officer shall render a decision and shall submit a copy of the findings of fact and decision to the parent or guardian and to the local school board within 10 school days after the conclusion of the hearing. The hearing officer's decision shall be binding upon the local school board and the parent unless such decision is appealed pursuant to the provisions of this Section.

Any party aggrieved by the decision may appeal the hearing officer's decision to the State Superintendent of Education. The Superintendent of Education or his designee shall conduct an impartial review of the hearing and may issue subpoenas requiring the attendance of witnesses at such review. The parties to the appeal shall be afforded the opportunity to present oral argument and additional evidence at the review. Upon completion of the review the State Superintendent of Education shall render a decision and shall provide a copy of the decision to all parties.

Any party aggrieved by the decision of the State Superintendent, including the parent or guardian, shall have the right to bring a civil action with respect to the complaint presented pursuant to this Section, which action may be brought in any circuit court of competent jurisdiction. The civil action provided above shall not be exclusive of any rights or causes of action otherwise available. In any action brought under this Section the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and basing its decision on the preponderance of the evidence shall grant such relief as the court determines is appropriate.

During the pendency of any proceedings conducted pursuant to this Section, unless the State Superintendent of Education, or the school district and the parents or guardian otherwise agree, the student shall remain in the then current educational placement of such student, or if applying for initial admission to the school district, shall, with the consent of the parents or guardian, be placed in the school district program until all such proceedings have been completed.

Whenever the parents or guardian of a child of the type described in Sections 14—1.02 through 14—1.107 are not known, or unavailable, a person shall be assigned to serve as an advocate for the child in matters relating to the identification, evaluation, and educational placement of the child and the provision of a free appropriate public education to the child. Persons shall be assigned as an advocate by the State Superintendent of Education. The State Board of Education shall promulgate rules and regulations establishing qualifications of such persons and their responsibilities and the procedures to be followed in making such assignments. Such advocate shall not be an employee of the school district, an agency created by joint agreement under Section 10—22.31, an agency involved

in the education or care of the student, or the State Board of Education. Services of any person assigned as an advocate shall terminate if the parent or guardian becomes available unless otherwise requested by the parents or guardian. The assignment of a person as an advocate at no time supersedes, terminates, or suspends the parents' or guardian's legal authority relative to the child. Any person participating in good faith as an advocate on behalf of the child before school officials or a hearing officer shall have immunity from civil or criminal liability that otherwise might result by reason of such participation, except in cases of willful and wanton misconduct.

At all stages of the hearing the hearing officer shall require that interpreters be made available by the local school district for persons who are deaf or for persons whose normally spoken language is other than English.

Added by P.A. 80-1403, § 1, eff. Aug. 25, 1978.

[20 U.S.C.A. §§ 1401, 1411 et seq., 1453.

14—9. § 14-9. Repealed by act approved July 21, 1965. L.1965, p. 1948.

14—9.01 § 14-9.01 Qualifications of teachers, other professional personnel and necessary workers. No person shall be employed to teach any class or program authorized by this Article who does not hold a valid teacher's certificate as provided by law and unless he has had such special training as the Superintendent of Public Instruction may require. All other professional personnel employed in any class, service, or program authorized by this Article shall hold such certificates and shall have had such special training as the Superintendent of Public Instruction may require. Nothing contained in this Act prohibits the school board from employing necessary workers to assist the teacher with the special educational facilities except that all such necessary workers must have had such training as the Superintendent of Public Instruction may require.

The employment of any teacher in a special education program provided for in Sections 14—1.01 to 14—14.01, inclusive, shall be subject to the provisions of Sections 24—11 to 24—16, inclusive. Any teacher employed in a special education program in which 2 or more districts participate shall enter upon contractual continued service in each of the participating districts subject to the provisions of Sections 24—11 to 24—16, inclusive. Added by act approved July 21, 1965. L.1965, p. 1948.

14—10. § 14-10. Repealed by act approved July 21, 1965. L.1965, p. 1948.

14—10.01 § 14-10.01 Traineeship and fellowship programs—Training of professional personnel. The Superintendent of Public Instruction with the advice of the Advisory Council may make traineeship or fellowship grants to persons of good character who are interested in working in programs for the education of handicapped children, for either part-time or full-time study in programs designed to qualify them under Section 14—1.10 of this Article. Persons to qualify for a traineeship must have earned at least 60 semester hours of college credit and persons to qualify for a fellowship must be graduates of a recognized college or university. Such traineeships and fellowships may be in amounts of not more than $1,500 per academic year for traineeships and not more than $3,000 per academic year for fellowships except in addition, an additional sum up to $2,500 annually for each grantee may be allowed to any approved institution of higher learning in Illinois for the actual cost to the institution, as certified by the institution. Part-time students and summer session students may be awarded grants on a pro rata basis. All grants shall be made under rules and regulations prescribed by the Superintendent of Public Instruction and issued pursuant to this Act.

The Superintendent of Public Instruction may contract with any approved institution of higher learning in Illinois to offer courses required for the professional training of special education personnel at such times and locations as may best serve the needs of handicapped children in Illinois and may reimburse the institution of higher learning for any financial loss incurred due to low enrollments, distance from campus, or other good and substantial reason satisfactory to the Advisory Council.

The Superintendent of Public Instruction shall administer the traineeship and fellowship account and related record of each person who is attending an institution of higher learning under a traineeship or fellowship awarded pursuant to this section and at each proper time shall certify to the Auditor of Public Accounts or the State Comptroller, as the case may be, the current payment to be made to the holder of each fellowship, in accordance with an appropriate certificate of the holder of such fellowship endorsed by the institution of higher learning attended by him.

Following the completion of such program of study the recipient of such traineeship or fellowship is expected to accept employment within one year in an approved program of special education for handicapped children in Illinois on the basis of $\frac{1}{2}$ year of service for each academic year of training received through a grant under this Article. Persons who fail to comply with this provision may, at the discretion of the Superintendent of Public Instruction with the advice of the Advisory Council, be required to refund all or part of the traineeship or fellowship monies received.

Amended by P.A. 77-1386, § 1, eff. Aug. 31, 1971.

14—11. § 14-11. Repealed by act approved July 21, 1965. L.1965, p. 1948.

14—11.01 § 14-11.01 Educational materials coordinating unit. There shall be established within the Office of the Superintendent of Public Instruction under the direction of the Superintendent an educational materials coordinating unit for handicapped children to provide:

(1) Staff and resources for the coordination, cataloging, standardizing, production, procurement, storage, and distribution of educational materials needed by visually handicapped children and adults.

(2) Staff and resources of an instructional materials center to include library, audio-visual, programed, and other types of instructional materials peculiarly adapted to the instruction of handicapped pupils.

The educational materials coordinating unit shall have as its major purpose the improvement of instructional programs for handicapped children and the in-service training of all professional personnel associated with programs of special education and to these ends is authorized to operate under rules and regulations of the Superintendent of Public Instruction with the advice of the Advisory Council. Added by act approved July 21, 1965. L.1965, p. 1948.

14—11.02 Service centers for the deaf/blind.] § 14-11.02 Notwithstanding any other Sections of this Article, the Illinois Office of Education shall develop and operate a service center for deaf/blind individuals. For the purpose of this Section, a "deaf/blind" individual is a person who has both auditory and visual impairments, the combination of which causes such severe communication and other developmental, educational, vocational and rehabilitation problems that such person cannot properly be accommodated in special education or vocational rehabilitation programs either for the hearing handicapped or the visually handicapped.

The Illinois Office of Education is empowered to establish, maintain and operate a permanent statewide service center with services including, but not limited to:

1. Identification and case finding;
2. Providing families with appropriate counseling;
3. Referring deaf/blind individuals to appropriate agencies for medical and diagnostic services;
4. Referring deaf/blind individuals to appropriate agencies for educational, training and care services;
5. Developing and expanding services to deaf/blind individuals throughout the State. This will include ancillary services, such as transportation so that the individuals can take advantage of the expanded services;
6. Having available by one year from the effective date of this amendatory Act a temporary residential-educational training facility in the Chicago metropolitan area. Such facility shall be located in an area accessible to public transportation. A permanent facility shall be constructed at a later date pursuant to the recommendations of the Advisory Board, as provided in this Section;
7. Receiving and dispensing State and Federal funds designated for services to deaf/blind individuals;
8. Coordinating services to deaf/blind individuals through all appropriate agencies including the Department of Children and Family Services, the Department of Mental Health and Developmental Disabilities, and the Division of Vocational Rehabilitation; and
9. Entering into contracts with other agencies to provide services to the deaf/blind.

The center shall operate on a no-reject basis. Any deaf/blind individual under the age of 21 referred to the center for service and diagnosed as deaf/blind, as defined in this Act, shall qualify for all the available services of the center.

The requirement of the concept of no reject shall be paramount in negotiating contracts and in supporting other agencies services.

The center shall serve as the referral clearinghouse for all deaf/blind individuals age 21 and older. Those individuals will be assisted by the center in locating vocational or other necessary services.

The Illinois Office of Education shall continue to carry out responsibilities required by Title VI, Part C, of the Federal Elementary and Secondary Education Act.]

There is hereby created the Advisory Board for Services for Deaf/Blind Individuals which shall provide advice to the State Superintendent of Education, the Governor, and the General Assembly on all matters pertaining to policy on deaf/blind individuals, including the implementation of legislation enacted on their behalf. Within 6 months from the effective date of this amendatory Act, the Advisory Board shall present to the General Assembly recommendations for educational and vocational training and care for deaf/blind individuals; recommendations on the proper organizational and administrative procedures and arrangements for the maintenance, operation and educational functions of the permanent residential-educational training facility for deaf/blind individuals in the Chicago metropolitan area; and shall provide in said recommendations a detailed analyses of the costs of constructing and operating a permanent deaf/blind service center in the Chicago metropolitan area. The recommendations shall propose a specific site for the facility and shall detail the proposed source or sources of funds for construction of said facility.

The Advisory Board shall cooperate with the Capital Development Board in attaining the final selection of a site for the establishment of a permanent deaf/blind service center in the Chicago metropolitan area. The Capital Development Board shall cooperate with and lend all such assistance as may be requested by the Advisory Board in the development of specifications and the selection of a site for a deaf/blind service center.

The Advisory Board shall also make recommendations pertaining to but not limited to the following matters:

1. Existing and proposed programs of services for deaf/blind individuals of all State agencies;
2. The State program and financial plan for deaf/blind services and the system of priorities to be developed by the Illinois Office of Education;
3. Standards for services in facilities serving deaf/blind individuals;
4. Standards and rates for State payments for any services purchased for deaf/blind individuals;
5. Services and research activities in the deaf/blind field, including evaluation of services; and
6. Planning for professional training in a State university or college.

The Advisory Board shall consist of one person appointed by the Governor; 2 persons appointed by the State Superintendent of Education; 2 persons appointed each by the Directors of the Departments of Children and Family Services, and Mental Health and Developmental Disabilities; and 2 persons appointed by the Director of the Division of Vocational Rehabilitation. One person designated by each agency may be an employee of such agency. The appointments of each appointing authority other than the Governor shall include at least one parent of a deaf/blind individual.

The 9 Advisory Board members initially appointed shall draw lots to determine which 3 shall serve 3 year terms, which 3 shall serve 2 year terms, and which 3 shall serve a one year term. Vacancies in terms shall be filled by the original appointing authority. After the original terms, all terms shall be for 3 years.

The above appointments shall be made within 30 days of the effective date of this amendatory Act.

Except for those members of the Advisory Board who are compensated for State service on a full-time basis, members shall be reimbursed for all actual expenses incurred in the performance of their

duties. Each member who is not compensated for State service on a full-time basis shall be compensated at a rate of $50 per day which he spends on Advisory Board duties. The Advisory Board shall meet at least 4 times per year and not more than 12 times per year.

The Advisory Board shall provide for its own organization.

Five members of the Advisory Board shall constitute a quorum. The affirmative vote of a majority of all members of the Advisory Board shall be necessary for any action taken by the Advisory Board.

Added by P.A. 79-966, § 1, eff. Sept. 12, 1975.

1 20 U.S.C.A. § 1401 et seq.

14—12. § 14-12. Repealed by act approved July 21, 1965. L.1965, p. 1948.

14—12.01 § 14-12.01. Account of expenditures—Cost report—Reimbursement. Each school board shall keep an accurate, detailed and separate account of all monies paid out by it for the maintenance of each of the types of facilities, classes and schools authorized by this Article for the instruction and care of pupils attending them and for the cost of their transportation, and shall annually report thereon indicating the cost of each such elementary or high school pupil for the school year ending June 30.

Applications for preapproval for reimbursement for costs of special education must be first submitted through the office of the regional superintendent of schools to the State Superintendent of Education on or before 30 days after a special class or service is started. Applications shall set forth a plan for special education established and maintained in accordance with this Article. Such applications shall be limited to the cost of construction and maintenance of special education facilities designed and utilized to house instructional programs, diagnostic services, other special education services for handicapped children and reimbursement as provided in Section 14—13.01. Such application shall not include the cost of construction or maintenance of any administrative facility separated from special education facilities designed and utilized to house instructional programs, diagnostic services, and other special education services for handicapped children. Reimbursement claims for special education shall be made as follows:

Each district shall file its claim computed in accordance with rules prescribed by the State Board of Education with the regional superintendent of schools, in triplicate, on or before August 1, for approval on forms prescribed by the State Superintendent of Education. Data used as a basis of reimbursement claims shall be for the school year ended on June 30 preceding. The regional superintendent of schools shall check and upon approval provide the State Superintendent of Education with the original and one copy of the claims on or before August 15. The State Superintendent of Education before approving any such claims shall determine their accuracy and whether they are based upon services and facilities provided under approved programs. Upon approval he shall transmit by September 20 the State report of claims to the State Comptroller showing the amounts due the respective educational service regions for their district reimbursement claims. Beginning with the 1973 fiscal year, the first 2 vouchers shall be prepared by the State Superintendent of Education and transmitted to the Comptroller on the 30th day of September, December and March, respectively, and the final voucher, no later than June 20. If, after preparation and transmittal of the September 30 vouchers, any claim has been redetermined by the State Superintendent of Education, subsequent vouchers shall be adjusted in amount to compensate for any overpayment or underpayment previously made. If the money appropriated by the General Assembly for such purpose for any year is insufficient, it shall be apportioned on the basis of the claims approved.

Failure on the part of the school board to prepare and certify the report of claims due under this Section on or before August 1 of any year, and its failure thereafter to prepare and certify such report to the regional superintendent of schools within 10 days after receipt of notice of such delinquency sent to it by the State Superintendent of Education by registered mail, shall constitute a forfeiture by the school district of its right to be reimbursed by the State under this Section.

Amended by P.A. 79-1307, § 1, eff. July 22, 1976; P.A. 80-575, § 1, eff. Sept. 12, 1977.

14—13.01 § 14-13.01. Reimbursement payable by state—Amounts. Reimbursement for furnishing special educational facilities in a recognized school to the type of children defined in Sections 14—1.02 through 14—1.07, shall be paid in accordance with Section 14—12.01 for each school year ending June 30 to the school boards, through the regional superintendent on the warrant of the State Comptroller out of any money in the treasury appropriated for such purposes, on the presentation of vouchers as prescribed in this Section.

The reimbursement shall be limited to funds expended for construction and maintenance of special education facilities designed and utilized to house instructional programs, diagnostic services, other special education services for handicapped children and reimbursement as provided in Section 14—13.01. There shall be no reimbursement for construction and maintenance of any administrative facility separated from special education facilities designed and utilized to house instructional programs, diagnostic services and other special education services for handicapped children.

(a) For eligible physically handicapped children in hospital or home instruction ½ of the teacher's salary but not more than $1,000 annually per child or $6,250 per teacher, whichever is less. Children to be included in any reimbursement under this paragraph must regularly receive a minimum of one hour of instruction each school day, or in lieu thereof of a minimum of 5 hours of instruction in each school week in order to qualify for full reimbursement under this Section. If the attending physician for such a child has certified that the child should not receive as many as 5 hours of instruction in a school week, however, reimbursement under this paragraph on account of that child shall be computed proportionate to the actual hours of instruction per week for that child divided by 5.

(b) For children of the type described in Sections 14—1.02 to 14—1.07, ½ of the cost of transportation for each such child, whom the Superintendent of Public Instruction determined in advance requires special transportation service in order to take advantage of special educational facilities. Such transportation cost shall be limited to expenditure items other than the cost of ac-

quiring equipment, interest, and rent of facilities, and shall include a reasonable allowance for depreciation to be computed in accordance with regulations to be prescribed by the Superintendent of Public Instruction. For purposes of this subsection (b), the dates for processing claims specified in Section 29—6 shall apply.

(c) For each professional worker excluding those included in subparagraphs (a), (d), (e), and (f) of this Section, the annual sum of $6,250.

(d) For one full time qualified director of the special education program of each school district which maintains a fully approved program of special education the annual sum of $6,250. Districts participating in a joint agreement special education program shall not receive such reimbursement if reimbursement is made for a director of the joint agreement program.

(e) For each school psychologist as defined in Section 14—1.09 the annual sum of $6,250.

(f) For each qualified teacher working in a fully approved program for children of preschool age who are deaf or hard-of-hearing the annual sum of $6,250.

(g) For readers, working with blind or partially seeing children ½ of their salary but not more than $400 annually per child. Readers may be employed to assist such children and shall not be required to be certified but prior to employment shall meet standards set up by the Superintendent of Public Instruction.

(h) For necessary non-certified employees working in any class or program for children defined in this Article, ½ of the salary paid or $2,500 annually per employee, whichever is less.

The Superintendent of Public Instruction shall set standards and prescribe rules for determining the allocation of reimbursement under this section on less than a full time basis and for less than a school year.

When any school district eligible for reimbursement under this Section operates a school or program approved by the Superintendent of Public Instruction for a number of days in excess of the adopted school calendar but not to exceed 235 school days, such reimbursement shall be increased by $\frac{1}{185}$ of the amount or rate paid hereunder for each day such school is operated in excess of 185 days per calendar year.

Amended by P.A. 80-1496, § 53, eff. Jan. 8, 1979.

14—13.02 § 14-13.02 Reimbursement for special education building purposes.) For school districts, including school districts which, by proper resolution, are obligated to contribute a proportionate part to a building program authorized under Section 10—22.31b, or under the "Intergovernmental Cooperation Act", as now or hereafter amended,[1] and have levied the tax authorized by Sections 17—2.2a or 18—31 and there remains a shortage of necessary funds for the payment of the district's proportionate share of said building project, a $1,000 reimbursement shall be given for each professional worker in the district.

Such reimbursement shall be paid in accordance with Section 14—13.01 for each school year ending June 30 to the school boards, through the county superintendent of schools, on the warrant of the State Comptroller out of any money in the treasury appropriated for such purposes, on the presentation of vouchers.

School districts, including school districts which have entered into a joint building program for education of the types of children defined in Sections 14—1.02 through 14—1.07 in accordance with Section 10—22.31b, or under the "Intergovernmental Cooperation Act", as now or hereafter amended, which have utilized the tax provided for in Sections 17—2.2a or 18—31, and the grants provided in this Section may when there remains a need for additional funds, apply not more than 50% of the reimbursements made to said district under subsections (a) through (h) of Section 14—13.01 to the completion of such projects for the current year. Districts with a population of 500,000 or more inhabitants shall not be required to levy the tax authorized under Section 17—2.2a in order to qualify under the provisions of this Section. However, such districts must provide proof to the State Board of Education that an equivalent amount of money shall be utilized for such special education building purposes.

Amended by P.A. 79-864, § 1, eff. Sept. 10, 1975.

[1] Chapter 127, § 741 et seq.

14—14.01 § 14-14.01 Warrants for reimbursement. The State Comptroller shall draw his warrants on the State Treasurer on or before September 30 of each year for the respective sums for reimbursement for special education reported to him on presentation of vouchers approved by the Superintendent of Public Instruction.

Amended by P.A. 78-592, § 43, eff. Oct. 1, 1973.

ARTICLE 14A. GIFTED CHILDREN

Sec.

14A—1. Purpose.
14A—2. Gifted children.
14A—3. Supervision of program.
14A—4. Advisory council.
14A—5. Reimbursement for services and materials.
14A—6. Contracts for area service centers, experimental projects and institutes.
14A—7. Consulting staff.
14A—8. Fellowship program.

Article 14A added by act approved Aug. 5, 1963. L.1963, p. 2392.

14A—1. § 14A-1. Purpose. This enactment is for the purpose of assisting and encouraging local school districts in the development and improvement of an education program that will increase the educational services of the public schools of Illinois for gifted children as defined herein. Added by act approved Aug. 5, 1963. L.1963, p. 2392.

14A—2. § 14A-2. Gifted children. "Gifted children" for the purpose of this and subsequent sections means children whose mental development is accelerated beyond the average to the extent they need and can profit from specially planned educational services. As amended by act approved Aug. 2, 1965. L.1965, p. 2376.

14A—3. § 14A-3. Supervision of program. The administration of the program herein enacted shall be supervised by the Superintendent of Public Instruction with the advice of an Advisory Council on Education of Gifted Children. Added by act approved Aug. 5, 1963. L.1963, p. 2392.

14A—4. § 14A-4. Advisory Council. There is hereby created an Advisory Council on Education of Gifted Children to consist of 7 members appointed by the Superintendent of Public Instruction, who shall hold office for seven years, except that the initial appointments shall be made for periods of from one to seven years, inclusive. At the expiration of these initial appointments, subsequent appointments shall be for the full 7 year term. Vacancies shall be filled in like manner for the unexpired balance of the term only.

The members appointed shall be citizens of the United States and of this State and shall be selected, as far as may be practicable, on the basis of their knowledge of, or experience in, problems of the education of gifted children.

The Superintendent of Public Instruction shall seek the advice of the Advisory Council regarding all rules or regulations to be promulgated by him.

The Council shall organize with a chairman selected by the Council members and shall meet at the call of the chairman upon ten days written notice but not less than four times in each calendar year. The Council shall consider any rule or regulation proposed by the Superintendent of Public Instruction within 40 days after its receipt by the chairman. Members of the Council shall serve without compensation but shall be entitled to reasonable amounts for expenses necessarily incurred in the performance of their duties.

The Superintendent of Public Instruction shall designate an employee of his office to act as executive secretary of the Council and shall furnish all clerical assistance necessary for the performance of its powers and duties. Added by act approved Aug 5, 1963. L.1963, p. 2292.

14A—5. § 14A-5. Reimbursement for services and maximum rates. Pursuant to regulations of the State Board of Education proposed programs for gifted children may be submitted to the Council by a school district, 2 or more cooperating school districts, a county, or 2 or more cooperating counties. Such proposals shall include a statement of the qualifications and duties of the personnel required in the fields of diagnostic, counseling and consultative services and the educational materials necessary.

Upon receipt of such proposals the Council shall evaluate them and if found to contribute to the development of a State plan to increase the service of the public school in the field of education of gifted children the Council shall recommend the acceptance thereof to the State Superintendent of Education, who may approve the same. Upon the approval of the district's program and its operation for a full school term, the district shall be entitled to reimbursement for the services and materials required therefor by the method described in either (a) or (b) as follows:

(a) For the product of ½ of the average per capita cost of pupils included in all the approved programs for gifted children in the school districts of the State, as determined by the State Board of Education, multiplied by the number of pupils in average daily attendance in the district's program, multiplied by one of the following factors:

The factors for school districts having different assessed valuations per pupil in average daily attendance shall be:

1 in districts with $20,000 or more;

1.2 in districts with $16,000 but less than $20,000;

1.3 in districts with $12,000 but less than $16,000;

1.4 in districts with $9,000 but less than $12,000;

1.5 in districts with less than $9,000.

In no case shall the claim for reimbursement of any district exceed the per capita cost of such program in the district multiplied by the number of pupils in average daily attendance in the district's program nor shall the number of pupils for whom reimbursement is claimed exceed 5% of the number of pupils in average daily attendance in the district.

(b) For each professional worker, who meets the established standards for his position, employed in the district's program at the annual rate of $5,000.

On or before July 10, annually, the president and the secretary of the district shall certify to the regional superintendent upon forms prescribed by the State Superintendent of Education the district's claim for reimbursement for the school year ended on June 30 next preceding. The regional superintendent shall check all such claims to ascertain compliance with the prescribed standards and upon his approval shall certify not later than July 25 to the State Superintendent of Education the regional report of claims for reimbursements. The State Superintendent of Education shall check and upon approval he shall transmit by September 15 the State report of claims to the State Comptroller and prepare the vouchers showing the amounts due respective regions for their district reimbursement claims.

If the amount appropriated for such reimbursement for any year is insufficient it shall be apportioned on the basis of the claims approved.

When any school district eligible for reimbursement under this Section operates a school for a full year in accordance with Section 10—19.1 of this Act such reimbursement shall be increased by ⅕ of the amount or rate paid hereunder for each day such school is operated in excess of 180 days per calendar year.

Amended by P.A. 80-655, § 1, eff. Oct. 1, 1977.

14A—6. § 14A-6. Contracts for area service centers, experimental projects and institutes. The State Board of Education with the advice of the Council is authorized to enter into contracts with school districts, colleges and universities for the conduct of area service centers, experimental projects and institutes in the field of education of gifted children as defined herein.

Such area service centers, experimental projects and institutes shall be established and conducted under rules and regulations prescribed by the State Board of Education and issued pursuant to this Act.

Prior to entering into such contracts the State Superintendent of Education and the Council shall evaluate proposals for the conduct of such area service centers, experimental projects and institutes as to the soundness of their design, the possibilities of securing productive results, the adequacy of resources to conduct the proposed area service center, experimental project or institute and their relationship to other area service centers, experi-

mental projects or institutes already completed or in progress.

Upon the approval of the performance of such contracts the State Superintendent of Education shall prepare and submit vouchers for their payment to the State Comptroller to be paid out of any money appropriated for such purpose.
Amended by P.A. 80-658, § 1, eff. Oct. 1, 1977.

14A—7. § 14A-7. Consulting staff. The Superintendent of Public Instruction shall maintain a consulting staff of persons qualified by personality and experience to provide consultative assistance for the planning, operation and evaluation of programs for the education of gifted children. Added by act approved Aug. 5, 1963. L.1963, p. 2392.

14A—8. § 14A-8. Fellowship program. The Superintendent of Public Instruction with the advice and consent of the Council may make fellowship grants to persons of good character who are graduates of a recognized college or university and are interested in working in programs for the education of gifted children, for full time study at the graduate level in programs designed to improve their competence for working in such programs. Such grants shall not exceed 60 in any academic year and may be in amounts of $2,000.00 per academic year and shall be granted under rules and regulations prescribed by the Superintendent of Public Instruction and issued pursuant to this Act.

The Superintendent of Public Instruction shall administer the fellowship account and related record of each person who is attending an institution of higher learning under a fellowship awarded pursuant to this section and at each proper time shall certify to the Auditor of Public Accounts or the State Comptroller, as the case may be, the current payment to be made to the holder of each fellowship, in accordance with an appropriate certificate of the holder of such fellowship endorsed by the institution of higher learning attended by him.

Following the completion of such program of study the recipient of such fellowship is expected to contribute to the further development of educational programs for gifted children in Illinois for a period of five years.
Amended by P.A. 77-1366, § 1, eff. Aug. 31, 1971.

ARTICLE 14B. EDUCATIONALLY DISADVANTAGED CHILDREN

Sec.
14B—1. Purpose.
14B—2. Definitions.
14B—3. Supervision of program.
14B—4. Advisory council.
14B—5. Approval of programs.
14B—6. Standards.
14B—7. Rules and regulations.
14B—8. Funding.

Article 14B was added by act approved Aug. 20, 1965. L.1965, p. 3232.

14B—1. § 14B-1. Purpose. The purpose of this enactment is to assist and encourage local school districts in the development and improvement of an educational program that will increase the educational services of the public schools of Illinois for educationally disadvantaged children as defined herein. Added by act approved Aug. 20, 1965. L.1965, p. 3232.

14B—2. § 14B-2. Definitions. For purposes of this Article:

"Educationally disadvantaged children" includes children between the ages of 3 and 18 years who do not qualify for the special educational facilities provided for in Article 14 of this Act[1] but who, because of their home and community environment are subject to such language, cultural, economic and like disadvantages that it is unlikely they will graduate from high school unless special educational programs and services supplementing the regular public school program are made available to them.

"Compensatory education program" means a program of instruction and services, supplementary to the regular public school program, for educationally disadvantaged children including those enrolled in school, those who have dropped out of school before graduation, and those who have not yet entered first grade. "Compensatory education program" includes only such programs as provide for instruction and services to all educationally disadvantaged children of the school district, including those who attend non-public schools organized not for profit, without regard to whether enrolled in any other program or course offered by the school district. Such a program may be offered during or outside of the regular school day and includes (1) individualized psychological services, (2) individualized instruction, (3) remedial instruction, (4) activities planned to broaden the cultural experience of such children, (5) working relationships with parents and guardians of such children, (6) special guidance and counseling of such children and persons in the homes of such children, (7) cooperation with local, state and federal agencies providing facilities, services or activities for such children, (8) employment of additional teachers where it is necessary to reduce the size of regular classes for such children, and (9) such other programs meeting the standards of this Act, and the standards and requirements set forth in Title I of the Federal Elementary and Secondary Education Act of 1965[2], as are directed to the stimulating of the educational and cultural capabilities of such children or to assisting and encouraging high school drop outs to complete their requirements for graduation. Added by act approved Aug. 20, 1965. L.1965, p. 3232.

[1] Section 14—1 of this chapter.
[2] See 20 U.S.C.A. § 236 et seq.

14B—3. § 14B-3. Supervision of Program. The administration of compensatory education programs shall be supervised by the Superintendent of Public Instruction with the advice of the Advisory Council on Compensatory Education. Added by act approved Aug. 20, 1965. L.1965, p. 3232.

14B—4. § 14B-4. Advisory Council. There is created an Advisory Council on Compensatory Education to consist of 7 members appointed by the Superintendent of Public Instruction, who shall hold office for 3 years, except that the initial appointments shall be made for periods of from 1 to 3 years inclusive. At the expiration of these initial appointments subsequent appointments shall be for the full 3 year term. Vacancies shall be filled in like manner for the unexpired balance of the term.

The members appointed shall be citizens of the United States and of this State and shall be select-

Title 45—Public Welfare

CHAPTER I—OFFICE OF EDUCATION, DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

EDUCATION OF HANDICAPPED CHILDREN

Implementation of Part B of the Education of the Handicapped Act

AGENCY: U.S. Office of Education, HEW.

ACTION: Final regulation.

SUMMARY: These regulations implement amendments to Part B of the Education of the Handicapped Act (as required by the Education for All Handicapped Children Act of 1975) by: (1) amending the existing regulations governing assistance to States for education of handicapped children, (2) adding a new part on incentive grants programs for handicapped children aged three through five, and (3) making certain conforming amendments to the general provisions for State-administered programs.

These regulations govern the provision of formula grant funds to State and local educational agencies to assist them in the education of handicapped children.

The regulations include provisions which are designed (1) to assure that all handicapped children have available to them a free appropriate public education; (2) to assure that the rights of handicapped children and their parents are protected; (3) to assist States and localities to provide for the education of handicapped children; and (4) to assess and assure the effectiveness of efforts to educate such children.

These regulations also include the final rules for counting and reporting handicapped children. (The child count rules were published in proposed form on September 8, 1976, and were incorporated into the December 30 proposed regulations for the convenience of the reader.)

EFFECTIVE DATE: October 1, 1977.

FOR FURTHER INFORMATION CONTACT:

Daniel Ringelheim, Director, Division of Assistance to States, Bureau of Education for the Handicapped, 400 Maryland Ave. SW., (room 4046 Donohoe Building), Washington, D.C. 20202, telephone: 202-472-2265;

or

Thomas E. Irvin, Policy Officer, Bureau of Education for the Handicapped, 400 Maryland Ave. SW., (room 4026 Donohoe Building), Washington, D.C. 20202, telephone: 202-245-9406.

SUPPLEMENTARY INFORMATION:

RULEMAKING HISTORY—PUBLIC PARTICIPATION

Because of the potential impact that Pub. L. 94-142 will have on the education of handicapped children throughout the Nation, and on the agencies that serve them, the Office of Education recognized the need for intensive public participation in the development of regulations, and took steps to insure maximum public involvement throughout the entire rulemaking process. A description of these steps is included in the following paragraphs:

Before the proposed rules were drafted, the Office of Education carried out a massive effort to obtain comments and suggestions for developing regulations from interested parties throughout the Nation. This involved participating in approximately 20 meetings about the law conducted on both a geographic and special interest basis. Approximately 2,200 people participated in these meetings and several hundred comments were received.

In June 1976, the Office of Education convened a national writing group of approximately 170 people to develop concept papers for use in writing the regulations. This group was composed of parents, representatives of special interest organizations (i.e., AFT, NEA, private schools), and administrators of State and local schools. These concept papers formed the basis for the proposed regulations.

During the months of July–November, the Office of Education prepared several redrafts of the concept papers and continued to seek inputs on these drafts from various interested parties.

On December 30, 1976, the proposed rules were published in the FEDERAL REGISTER. Written comments and recommendations on the proposed rules were invited for a 60-day comment period ending March 1, 1977; and public hearings were held in Washington, San Francisco, Denver, Chicago, Boston, and Atlanta. Over 1,600 written comments were received during that period, all of which were reviewed and considered by the Office of Education in preparing these final regulations.

The tapes of the hearings and copies of written comments are available for public inspection at the Bureau of Education for the Handicapped, room 4061, Donohoe Building, 400 6th Street SW., Washington, D.C. 20202.

In addition to the above public comment activities, the Office of Education continued with other public participation efforts, including:

(1) Participating in 10 regional meetings of the American Association of School Administrators and other regional meetings with the Council of the Great City Schools;

(2) Conducting a national conference on the regulations for administrators of various State agency programs for the handicapped, and participating in meetings at other national conferences; and

(3) Participating in a special series of meetings organized by the Institute for Educational Leadership and composed of representatives of the National Governors' Conference, the National Conference of State Legislatures, the National Association of State Boards of Education, and the Education Commission of the States.

ACTION TAKEN ON PUBLIC COMMENTS

PART 100b—STATE ADMINISTERED PROGRAMS

No comments were received on the proposed amendments to Part 100b, and no changes have been made.

PART 121a—ASSISTANCE TO STATES FOR EDUCATION OF HANDICAPPED CHILDREN

The Office of Education conducted a careful review of the public comments received and summarized them by subpart and topic.

A very large number of comments dealt with specific statutory requirements. These comments expressed concerns about the statute and suggested changes to be made in the statutory provisions. However, because they are statutory, the Office of Education is not able to make any changes in the regulations with respect to those points. Some of the statutory provisions on which comments were received, together with concerns about them, are included below:

(1) Free appropriate public education—problems with timelines and concerns about the cost of implementing this requirement;

(2) Priorities—concerns about Federal priorities which are not consistent with State and local priorities;

(3) Individualized education programs—suggestions that the requirement be deleted from the regulation unless more funds are available for implementing it;

(4) Prior notice and other due process procedures—concerns about the amount of detail in these requirements and the time, cost and paper work involved in their implementation;

(5) State educational agency responsibility for general supervision of all special education programs in the State—concerns about lack of authority over other State agencies and the lack of funds to efficiently implement the provision;

(6) Child count—concerns about the dates on which the count must be taken.

Another large number of commenters cited specific concerns or issues with respect to the content of the proposed rules. Because of the large number of comments received, individual comments have been consolidated.

PART 121m—INCENTIVE GRANTS

Part 121m sets forth the conditions under which States may receive grants to assist in the education of handicapped children aged three through five. Congress established incentive grants in the recognition that when education begins at the earlier stages of development (1) benefits are maximized, (2) additional or more severe handicaps may be prevented, and (3) greater long-term cost effectiveness is realized.

Comment: An issue was raised concerning the possible use of incentive grant funds for children from birth through two years of age.

Response: Section 619 of the Act and the legislative history specify that the use of incentive grant funds is limited to children aged three through five years. However, the State's entitlement under section 611 of the Act may be used for children from birth through age twenty-one.

Comment: An issue was raised as to whether incentive grant funds may be

used for administrative or supervisory costs.

Response: The regulation has been amended to make it clear that administrative costs are allowable.

Minimum Regulations—Future Rulemaking Plans

The preamble to the proposed rules contained the following statement regarding minimum regulations:

The Department sees the development of regulations for implementing Pub. L. 94-142 as being an evolutionary process which will continue over a period of several years. The actual impact and consequences of the statutory provisions and problems which States and local educational agencies may have in implementing these provisions are not known at this time. Therefore, the Department feels that the most rational approach to follow is (1) to write minimum regulations at this point, and (2) to amend and revise such regulations in the future as need and experience dictate.

Because the Statute is very comprehensive and specific on many points, the Department has elected (1) to incorporate the basic wording or substance of the Statute directly into the regulations and (2) to expand on the statutory provisions only where additional interpretation seems to be necessary.

Although some commenters felt that more extensive regulations were necessary, many persons who responded to the proposed rules felt that the Office of Education had already over-regulated and should cut back on the rules when they are published in final form. At this juncture, the Office of Education holds to the same position that it took in the proposed rules, and for the same reasons as set forth in that document.

The Office of Education believes that some working experience with this regulation is essential before determining whether there is a need to amend it. Once the regulation becomes effective (Oct. 1, 1977) and people gain experience in implementing it, there will likely be a series of questions raised in individual States which could result in the development of policies and interpretations that would be proposed for addition to these regulations.

Overview of Changes in the Part 121a Regulations

A substantial number of changes have been made in response to comments received on the proposed rules. However, few of these changes have resulted in adding major substantive requirements. Most of the changes are technical or have been made in an attempt to provide greater clarity or to add more explanatory material.

Extensive use has been made of explanatory comments in the text of the regulations. The purpose of these comments is to attempt, where appropriate, to clarify or further interpret a particular rule, or to provide direction and assistance without imposing additional requirements. For example, an extensive explanation is included under the excess cost requirement and an example is given on how to make the computation under that requirement.

Organization of Regulations

Three parts of Title 45 of the Code of Federal Regulations are amended by this document:

(1) Part 100b—*State Administered Programs.* This includes certain conforming amendments to the regulations under section 434(b)(1)(A) of the General Education Provisions Act.

(2) Part 121a—*Assistance to States for Education of Handicapped Children.* This is divided into seven subparts: (A) General, (B) State Annual Program Plans and Local Applications, (C) Services, (D) Private Schools, (E) Procedural Safeguards, (F) State Administration, and (G) Allocation of Funds and Reports.

(3) Part 121m—*Incentive Grants.* This governs the administration of the incentive grants program for handicapped children aged three through five, authorized under section 619 of the Act.

Analysis of Regulations

Appendix A of Part 121a includes an analysis of each subpart, which (1) discusses significant comments received and the action taken with respect to those comments, and (2) explains the basis for any changes made from the proposed rules published on December 30, 1976.

Topical Index

Appendix B of Part 121a includes an index of the major topics in the regulations (e.g., free appropriate public education, priorities, and individualized education program) and the specific sections under which each term is used.

NOTE.—The Department of Health, Education, and Welfare has determined that this document contains a major proposal requiring preparation of an Economic Impact Analysis (EIA) Statement under Executive Orders 11821 and 11949 and OMB Circular A-107, and certifies that an Economic Impact Analysis has been prepared. However, because the portion of this regulation involving major costs is virtually identical to the content of subpart D of the regulation issued on discrimination against the handicapped under section 504 of the Rehabilitation Act of 1973 (45 CFR Part 84; published May 4, 1977, at 45 FR 22676), the Department has determined that (a) this regulation involves no substantial costs not imposed by Part 84 and (b) the pertinent parts of the EIA Statement for that regulation meet the EIA requirements for this regulation. Both regulations impose the following requirements: (1) appropriate education to handicapped children; (2) identification and evaluation of handicapped children; and (3) procedural safeguards for handicapped children and their parents.

(Catalog of Federal Domestic Assistance Number 13.449, Education of Handicapped Children, Part B.)

Dated: August 12, 1977.

JOHN ELLIS,
Acting U.S. Commissioner of Education.

Approved: August 15, 1977.

HALE CHAMPION,
Acting Secretary of Health, Education, and Welfare.

Title 45 of the Code of Federal Regulations is amended as follows:

PART 100b—STATE ADMINISTERED PROGRAMS

1. In Part 100b, § 100b.17 is revised to read as follows:

§ 100b.17 General applications.

(a) The general application of a State must meet the requirements of section 434(b)(1)(A) of the General Education Provisions Act.

(b) A State does not have to resubmit its general application.

(20 U.S.C. 1232c(b)(1)(A).)

(c)(1) The following statutes require that a State must submit certain provisions to the Commissioner which are similar to provisions in the general application.

(2) Subject to paragraph (d) of this section, if the Commissioner has approved a State's general application, the State does not have to submit the provisions required under the following statutes:

(i) *Compensatory education.* Section 142(a) (2) and (3) of Title I of the Elementary and Secondary Education Act of 1965, as amended.

(20 U.S.C. 1238a(b)(1)(A)(ii) (II), (III).)

(ii) *School library resources.* Section 203(a) (5), (6) and (7) of Title II of the Elementary and Secondary Education Act of 1965, as amended.

(20 U.S.C. 1238a(b)(1)(A)(ii) (II), (III), and (IV).)

(iii) *Supplementary educational centers and services; guidance, counseling, and testing.* Section 305(b) (9)(B), (10), and (11) of Title II of the Elementary and Secondary Education Act of 1965, as amended.

(20 U.S.C. 1232c(b)(1)(A)(ii) (II), (III) and (IV).)

(iv) *Education of the handicapped.* Section 613(a) (7)(A), (9)(B), and (10) of Part B of the Education of the Handicapped Act, as amended.

(20 U.S.C. 1238c(b)(1)(A)(ii) (II), (III) and (IV).)

(v) *Adult education.* Section 306(a) (6) and (7) of the Adult Education Act, as amended.

(20 U.S.C. 1232c(b)(1)(A)(ii) (II), (III).)

(vi) *Strengthening instruction in academic subjects.* Section 1004(a) (2) and (3) of Title X of the National Defense Education Act of 1958, as amended.

(20 U.S.C. 1238a(b)(1)(A)(ii), (II), (III).)

(vii) *State reading improvement programs.* Section 714(a)(10) of Title VII-B of the Education Amendments of 1974.

(20 U.S.C. 1238a(b)(1)(A)(ii), (III).)

(d)(1) The general application does not change the legal substance of the provisions listed under paragraph (c)(2) of this section.

(2) If a provision listed in paragraph (c)(2) of this section is different in wording from an assurance in the general application, the provision listed in that paragraph governs any question of compliance with the assurance.

(20 U.S.C. 1232a(b)(1)(E)(i), (b)(1)(E)(iii), (b)(2).)

2. In Part 100b, § 100b.35 is revised to read as follows:

§ 100b.35 Effective date of an application, plan, or amendment.

(a) Federal funds are available only for obligations incurred under:

(1) A State plan approved by the Commissioner (in the case of the programs set forth in § 100b.10 other than those referenced in § 100b.15(a)); or

(2) A general application and an annual program plan approved by the Commissioner (in the case of the programs referenced in § 100b.15(a)).

(b) A State plan, general application, annual program plan, or amendment to any of them, is effective on the date the State submits it to the Federal Government in substantially approvable form. However, the effective date cannot be earlier than the first day of the fiscal period for which it is submitted.

(c) The Commissioner sends the State agency a notice of approval, including notice of the effective date, when the application, plan, or amendment is approved.

(d) Federal funds are not available for obligation by a State or local agency before the effective date of the State plan or annual program plan (whichever is submitted under paragraph (a) of this section). If funds are expressly made available by statute for the development of the State plan, general application, or annual program plan, the first sentence of this paragraph does not apply to obligations by the State for that purpose.

(20 U.S.C. 1221e-3(a)(1).)

3. In Part 100b, § 100b.55 is revised to read as follows:

§ 100b.55 Obligation by recipients.

(a) *Period for obligation.* Federal funds which the Federal government may obligate during a fiscal period remain available for obligation by State and local recipients through the end of that fiscal period. Federal funds made available for construction of facilities remain available for obligation by State and local recipients for that purpose for a reasonable period of time as determined by the Commissioner.

(b) *Carryovers.* In accordance with section 414(b) of the General Education Provisions Act, any Federal funds which are not obligated by State and local recipients before the end of the fiscal period under paragraph (a) of this section, remain available for obligation by those agencies for one additional fiscal year.

(c) *Determinations of obligation.* (1) An obligation for the acquisition of real or personal property, for the construction of facilities, or for the performance of work, is incurred by a recipient on the date it makes a binding written commitment.

(2) An obligation for personal services, for services performed by public utilities, for travel, or for the rental of real or personal property, is incurred by a recipient on the date it receives the services, its personnel takes the travel, or it uses the rented property.

(20 U.S.C. 1221c(a); 1225(b); 1232c(b)(1)(A)(ii)(II).)

4. Part 121a is revised to read as follows:

PART 121a—ASSISTANCE TO STATES FOR EDUCATION OF HANDICAPPED CHILDREN

Subpart A—General

PURPOSE, APPLICABILITY, AND GENERAL PROVISIONS REGULATIONS

Sec.
121a.1 Purpose.
121a.2 Applicability to State, local, and private agencies.
121a.3 General provisions regulations.

DEFINITIONS

121a.4 Free appropriate public education.
121a.5 Handicapped children.
121a.6 Include.
121a.7 Intermediate educational unit.
121a.8 Local educational agency.
121a.9 Native language.
121a.10 Parent.
121a.11 Public agency.
121a.12 Qualified.
121a.13 Related services.
121a.14 Special education.
121a.15 State.

Subpart B—State Annual Program Plans and Local Applications

ANNUAL PROGRAM PLANS—GENERAL

121a.110 Condition of assistance.
121a.111 Contents of plan.
121a.112 Certification by the State educational agency and attorney general.
121a.113 Approval; disapproval.
121a.114 Effective period of annual program plan.

ANNUAL PROGRAM PLANS—CONTENTS

121a.120 Public participation.
121a.121 Right to a free appropriate public education.
121a.122 Timelines and ages for free appropriate public education.
121a.123 Full educational opportunity goal.
121a.124 Full educational opportunity goal—data requirement.
121a.125 Full educational opportunity goal—timetable.
121a.126 Full educational opportunity goal—facilities, personnel, and services.
121a.127 Priorities.
121a.128 Identification, location, and evaluation of handicapped children.
121a.129 Confidentiality of personally identifiable information.
121a.130 Individualized education programs.
121a.131 Procedural safeguards.
121a.132 Least restrictive environment.
121a.133 Protection in evaluation procedures.
121a.134 Responsibility of State educational agency for all educational programs.
121a.135 Monitoring procedures.
121a.136 Implementation procedures—State educational agency.
121a.137 Procedures for consultation.
121a.138 Other Federal programs.
121a.139 Comprehensive system of personnel development.
121a.140 Private schools.
121a.141 Recovery of funds for misclassified children.
121a.142 Control of funds and property.
121a.143 Records.
121a.144 Hearing on application.
121a.145 Prohibition of commingling.
121a.146 Annual evaluation.
121a.147 State advisory panel.
121a.148 Policies and procedures for use of Part B funds.
121a.149 Description of use of Part B funds.
121a.150 Nondiscrimination and employment of handicapped individuals.
121a.151 Additional information if the State educational agency provides direct services.

LOCAL EDUCATIONAL AGENCY APPLICATIONS—GENERAL

121a.180 Submission of application.
121a.181 Responsibilities of State educational agency.
121a.182 The excess cost requirement.
121a.183 Meeting the excess cost requirement.
121a.184 Excess costs—computation of minimum amounts.
121a.185 Computation of excess costs—consolidated application.
121a.186 Excess costs—limitation on use of Part B funds.
121a.190 Consolidated applications.
121a.191 Payments under consolidated applications.
121a.192 State regulation of consolidated applications.
121a.193 State educational agency approval; disapproval.
121a.194 Withholding.

LOCAL EDUCATIONAL AGENCY APPLICATIONS—CONTENTS

121a.220 Child identification.
121a.221 Confidentiality of personally identifiable information.
121a.222 Full educational opportunity goal; timetable.
121a.223 Facilities, personnel, and services.
121a.224 Personnel development.
121a.225 Priorities.
121a.226 Parent involvement.
121a.227 Participation in regular education programs.
121a.228 Public control of funds.
121a.229 Excess cost.
121a.230 Nonsupplanting.
121a.231 Comparable services.
121a.232 Information—reports.
121a.233 Records.
121a.234 Public participation.
121a.235 Individualized education program.
121a.236 Local policies consistent with statute.
121a.237 Procedural safeguards.
121a.238 Use of Part B funds.
121a.239 Nondiscrimination and employment of handicapped individuals.
121a.240 Other requirements.

APPLICATION FROM SECRETARY OF INTERIOR

121a.260 Submission of annual application; approval.
121a.261 Public participation.
121a.262 Use of Part B funds.
121a.263 Applicable regulations.

PUBLIC PARTICIPATION

121a.280 Public hearings before adopting an annual program plan.
121a.281 Notice.
121a.282 Opportunity to participate; comment period.

121a.303 Review of public comments before adopting plan.
121a.304 Publication and availability of approved plan.

Subpart C—Services

FREE APPROPRIATE PUBLIC EDUCATION

121a.300 Timeliness for free appropriate public education.
121a.301 Free appropriate public education—methods and payments.
121a.302 Residential placement.
121a.303 Proper functioning of hearing aids.
121a.304 Full educational opportunity goal.
121a.305 Program options.
121a.306 Nonacademic services.
121a.307 Physical education.

PRIORITIES IN THE USE OF PART B FUNDS

121a.320 Definitions of "first priority children" and "second priority children."
121a.321 Priorities.
121a.322 First priority children—school year 1977–1978.
121a.323 Services to other children.
121a.324 Application of local educational agency to use funds for the second priority.

INDIVIDUALIZED EDUCATION PROGRAMS

121a.340 Definition.
121a.341 State educational agency responsibility.
121a.342 When individualized education programs must be in effect.
121a.343 Meetings.
121a.344 Participants in meetings.
121a.345 Parent participation.
121a.346 Content of individualized education program.
121a.347 Private school placements.
121a.348 Handicapped children in parochial or other private schools.
121a.349 Individualized education program—accountability.

DIRECT SERVICE BY THE STATE EDUCATIONAL AGENCY

121a.360 Use of local educational agency allocation for direct services.
121a.361 Nature and location of services.
121a.370 Use of State educational agency allocation for direct and support services.
121a.371 State matching.
121a.372 Applicability of nonsupplanting requirement.

COMPREHENSIVE SYSTEM OF PERSONNEL DEVELOPMENT

121a.380 Scope of system.
121a.381 Participation of other agencies and institutions.
121a.382 Inservice training.
121a.383 Personnel development plan.
121a.384 Dissemination.
121a.385 Adoption of educational practices.
121a.386 Evaluation.
121a.387 Technical assistance to local educational agencies.

Subpart D—Private Schools

HANDICAPPED CHILDREN IN PRIVATE SCHOOLS PLACED OR REFERRED BY PUBLIC AGENCIES

121a.400 Applicability of §§ 121a.401–121a.408.
121a.401 Responsibility of State educational agency.
121a.402 Implementation by State educational agency.
121a.403 Placement of children by parents.

HANDICAPPED CHILDREN IN PRIVATE SCHOOLS NOT PLACED OR REFERRED BY PUBLIC AGENCIES

121a.450 Applicability of §§ 121a.451–121a.466.
121a.451 State educational agency responsibility.
121a.452 Local educational agency responsibility.
121a.453 Determination of needs, number of children, and types of services.
121a.454 Service arrangements.
121a.455 Differences in services to private school handicapped children.
121a.456 Personnel.
121a.457 Equipment.
121a.458 Prohibition of segregation.
121a.459 Funds and property not to benefit private school.
121a.460 Existing level of instruction.

Subpart E—Procedural Safeguards

DUE PROCESS PROCEDURES FOR PARENTS AND CHILDREN

121a.500 Definitions of "consent", "evaluation", and "personally identifiable".
121a.501 General responsibility of public agencies.
121a.502 Opportunity to examine records.
121a.503 Independent educational evaluation.
121a.504 Prior notice; parent consent.
121a.505 Content of notice.
121a.506 Impartial due process hearing.
121a.507 Impartial hearing officer.
121a.508 Hearing rights.
121a.509 Hearing decision; appeal.
121a.510 Administrative appeal; impartial review.
121a.511 Civil action.
121a.512 Timelines and convenience of hearings and reviews.
121a.513 Child's status during proceedings.
121a.514 Surrogate parents.

PROTECTION IN EVALUATION PROCEDURES

121a.530 General.
121a.531 Preplacement evaluation.
121a.532 Evaluation procedures.
121a.533 Placement procedures.
121a.534 Reevaluation.

LEAST RESTRICTIVE ENVIRONMENT

121a.550 General.
121a.551 Continuum of alternative placements.
121a.552 Placements.
121a.553 Nonacademic settings.
121a.554 Children in public or private institutions.
121a.555 Technical assistance and training activities.
121a.556 Monitoring activities.

CONFIDENTIALITY OF INFORMATION

121a.560 Definitions.
121a.561 Notice to parents.
121a.562 Access rights.
121a.563 Record of access.
121a.564 Records on more than one child.
121a.565 List of types and locations of information.
121a.566 Fees.
121a.567 Amendment of records at parent's request.
121a.568 Opportunity for a hearing.
121a.569 Result of hearing.
121a.570 Hearing procedures.
121a.571 Consent.
121a.572 Safeguards.
121a.573 Destruction of information.
121a.574 Children's rights.
121a.575 Enforcement.
121a.576 Office of Education.

OFFICE OF EDUCATION PROCEDURES

121a.580 Opportunity for a hearing.
121a.581 Hearing panel.
121a.582 Hearing procedures.
121a.583 Initial decision; final decision.
121a.584 Waiver of requirement regarding supplementing and supplanting with Part B funds.
121a.585 Withholding payments.
121a.586 Reinstating payments.
121a.587 Public notice by State and local educational agencies.
121a.588 Judicial review of Commissioner's final action on annual program plan.

Subpart F—State Administration

STATE EDUCATIONAL AGENCY RESPONSIBILITY; GENERAL

121a.600 Responsibility for all educational programs.
121a.601 Monitoring and evaluation activities.
121a.602 Adoption of complaint procedures.

USE OF FUNDS

121a.620 Federal funds for State administration.
121a.621 Allowable costs.

STATE ADVISORY PANEL

121a.650 Establishment.
121a.651 Membership.
121a.652 Advisory panel—functions.
121a.653 Advisory panel—procedures.

Subpart G—Allocation of Funds; Reports

ALLOCATIONS

121a.700 Special definition of the term State.
121a.701 State entitlement; formula.
121a.702 Limitations and exclusions.
121a.703 Ratable reductions.
121a.704 Hold harmless provision.
121a.705 Within-State distribution: fiscal year 1978.
121a.706 Within-State distribution: fiscal year 1979 and after.
121a.707 Local educational agency entitlement; formula.
121a.708 Reallocation of local educational agency funds.
121a.709 Payments to Secretary of Interior.
121a.710 Entitlements to jurisdictions.

REPORTS

121a.750 Annual report of children served—report requirement.
121a.751 Annual report of children served—information required in the report.
121a.752 Annual report of children served—certification.
121a.753 Annual report of children served—criteria for counting children.
121a.754 Annual report of children served—other responsibilities of the State educational agency.

APPENDICES

Appendix A—Analysis of Final Regulation. (45 CFR Part 121a.) Under Part B of the Education of the Handicapped Act.

Appendix B—Index to Part 121a.

AUTHORITY: Part B of the Education of the Handicapped Act, Pub. L. 91-230, Title VI, as amended, 89 Stat. 773-794 (20 U.S.C. 1411-1420), unless otherwise noted.

Subpart A—General

PURPOSE, APPLICABILITY, AND GENERAL PROVISIONS; REGULATIONS

§ 121a.1 Purpose.

The purpose of this part is:

(a) To insure that all handicapped children have available to them a free appropriate public education which in-

cludes special education and related services to meet their unique needs,

(b) To insure that the rights of handicapped children and their parents are protected,

(c) To assist States and localities to provide for the education of all handicapped children, and

(d) To assess and insure the effectiveness of efforts to educate those children.

(20 U.S.C. 1401 Note.)

§ 121a.2 Applicability to State, local, and private agencies.

(a) *States.* This part applies to each State which receives payments under Part B of the Education of the Handicapped Act.

(b) *Public agencies within the State.* The annual program plan is submitted by the State educational agency on behalf of the State as a whole. Therefore, the provisions of this part apply to all political subdivisions of the State that are involved in the education of handicapped children. These would include: (1) The State educational agency, (2) local educational agencies and intermediate educational units, (3) other State agencies and schools (such as Departments of Mental Health and Welfare and State schools for the deaf or blind), and (4) State correctional facilities.

(c) *Private schools and facilities.* Each public agency in the State is responsible for insuring that the rights and protections under this part are given to children referred to or placed in private schools and facilities by that public agency.

(See §§ 121a.400–121a.402.)

(20 U.S.C. 1412(1), (6); 1413(a); 1413(a)(4)(B).)

Comment. The requirements of this part are binding on each public agency that has direct or delegated authority to provide special education and related services in a State that receives funds under Part B of the Act, regardless of whether that agency is receiving funds under Part B.

§ 121a.3 General provisions regulations.

Assistance under Part B of the Act is subject to Parts 100, 100b, 100c, and 121 of this chapter, which include definitions and requirements relating to fiscal, administrative, property management, and other matters.

(20 U.S.C. 1417(b).)

DEFINITIONS

Comment. Definitions of terms that are used throughout these regulations are included in this subpart. Other terms are defined in the specific subparts in which they are used. Below is a list of those terms and the specific sections and subparts in which they are defined:

Consent (Section 121a.500 of Subpart E)
Destruction (Section 121a.560 of Subpart E)
Direct services (Section 121a.370(b)(1) of Subpart C)
Evaluation (Section 121a.500 of Subpart E)
First priority children (Section 121a.320(a) of Subpart C)
Independent educational evaluation (Section 121a.503 of Subpart E)
Individualized education program (Section 121a.340 of Subpart C)
Participating agency (Section 121a.500 of Subpart E)
Personally identifiable (Section 121a.500 of Subpart E)
Private school handicapped children (Section 121a.450 of Subpart D)
Public expense (Section 121a.502 of Subpart E)
Second priority children (Section 121a.320(b) of Subpart C)
Special definition of "State" (Section 121a.700 of Subpart G)
Support services (Section 121a.370(b)(2) of Subpart C)

§ 121a.4 Free appropriate public education.

As used in this part, the term "free appropriate public education" means special education and related services which:

(a) Are provided at public expense, under public supervision and direction, and without charge,

(b) Meet the standards of the State educational agency, including the requirements of this part,

(c) Include preschool, elementary school, or secondary school education in the State involved, and

(d) Are provided in conformity with an individualized education program which meets the requirements under §§ 121a.340–121a.349 of Subpart C.

(20 U.S.C. 1401(18).)

§ 121a.5 Handicapped children.

(a) As used in this part, the term "handicapped children" means those children evaluated in accordance with §§ 121a.530–121a.534 as being mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, other health impaired, deaf-blind, multi-handicapped, or as having specific learning disabilities, who because of those impairments need special education and related services.

(b) The terms used in this definition are defined as follows:

(1) "Deaf" means a hearing impairment which is so severe that the child is impaired in processing linguistic information through hearing, with or without amplification, which adversely affects educational performance.

(2) "Deaf-blind" means concomitant hearing and visual impairments, the combination of which causes such severe communication and other developmental and educational problems that they cannot be accommodated in special education programs solely for deaf or blind children.

(3) "Hard of hearing" means a hearing impairment, whether permanent or fluctuating, which adversely affects a child's educational performance but which is not included under the definition of "deaf" in this section.

(4) "Mentally retarded" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period, which adversely affects a child's educational performance.

(5) "Multihandicapped" means concomitant impairments (such as mentally retarded-blind, mentally retarded-orthopedically impaired, etc.), the combination of which causes such severe educational problems that they cannot be accommodated in special education programs solely for one of the impairments. The term does not include deaf-blind children.

(6) "Orthopedically impaired" means a severe orthopedic impairment which adversely affects a child's educational performance. The term includes impairments caused by congenital anomaly (e.g., clubfoot, absence of some member, etc.), impairments caused by disease (e.g., poliomyelitis, bone tuberculosis, etc.), and impairments from other causes (e.g., cerebral palsy, amputations, and fractures or burns which cause contractures).

(7) "Other health impaired" means limited strength, vitality or alertness, due to chronic or acute health problems such as a heart condition, tuberculosis, rheumatic fever, nephritis, asthma, sickle cell anemia, hemophilia, epilepsy, lead poisoning, leukemia, or diabetes, which adversely affects a child's educational performance.

(8) "Seriously emotionally disturbed" is defined as follows:

(i) The term means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree, which adversely affects educational performance:

(A) An inability to learn which cannot be explained by intellectual, sensory, or health factors;

(B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers;

(C) Inappropriate types of behavior or feelings under normal circumstances;

(D) A general pervasive mood of unhappiness or depression; or

(E) A tendency to develop physical symptoms or fears associated with personal or school problems.

(ii) The term includes children who are schizophrenic or autistic. The term does not include children who are socially maladjusted, unless it is determined that they are seriously emotionally disturbed.

(9) "Specific learning disability" means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which may manifest itself in an imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations. The term includes such conditions as perceptual handicaps, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. The term does not include children who have learning problems which are primarily the result of visual, hearing, or motor handicaps, of mental retardation, or of environmental, cultural, or economic disadvantage.

(10) "Speech impaired" means a communication disorder, such as stuttering, impaired articulation, a language impairment, or a voice impairment, which

adversely affects a child's educational performance.

(11) "Visually handicapped" means a visual impairment which, even with correction, adversely affects a child's educational performance. The term includes both partially seeing and blind children.

(20 U.S.C. 1401(1), (15).)

§ 121a.6 Include.

As used in this part, the term "include" means that the items named are not all of the possible items that are covered, whether like or unlike the ones named.

(20 U.S.C. 1417(b).)

§ 121a.7 Intermediate educational unit.

As used in this part, the term "intermediate educational unit" means any public authority, other than a local educational agency, which:

(a) Is under the general supervision of a State educational agency;

(b) Is established by State law for the purpose of providing free public education on a regional basis; and

(c) Provides special education and related services to handicapped children within that State.

(20 U.S.C. 1401(23).)

§ 121a.8 Local educational agency.

(a) As used in this part, the term "local educational agency" means a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for public elementary or secondary schools in a city, county, township, school district, or other political subdivision of a State, or such combination of school districts or counties as are recognized in a State as an administrative agency for its public elementary or secondary schools. Such term also includes any other public institution or agency having administrative control and direction of a public elementary or secondary school.

(b) For the purposes of this part, the term "local educational agency" also includes intermediate educational units.

(20 U.S.C. 1401(8).)

§ 121a.9 Native language.

As used in this part, the term "native language" has the meaning given that term by section 703(a)(2) of the Bilingual Education Act, which provides as follows:

The term "native language", when used with reference to a person of limited English-speaking ability, means the language normally used by that person, or in the case of a child, the language normally used by the parents of the child.

(20 U.S.C. 3223-1(a)(2); 1401(21).)

Comment. Section 602(21) of the Education of the Handicapped Act states that the term "native language" has the same meaning as the definition from the Bilingual Education Act. (The term is used in the prior notice and evaluation sections under § 121a.-505(b)(2) and § 121a.532(a)(1) of Subpart E.) In using the term, the Act does not prevent the following means of communication:

(1) In all direct contact with a child (including evaluation of the child), communication would be in the language normally used by the child and not that of the parents, if there is a difference between the two.

(2) If a person is deaf or blind, or has no written language, the mode of communication would be that normally used by the person, (such as sign language, braille, or oral communication).

§ 121a.10 Parent.

As used in this part, the term "parent" means a parent, a guardian, a person acting as a parent of a child, or a surrogate parent who has been appointed in accordance with § 121a.514. The term does not include the State if the child is a ward of the State.

(20 U.S.C. 1415.)

Comment. The term "parent" is defined to include persons acting in the place of a parent, such as a grandmother or stepparent with whom a child lives, as well as persons who are legally responsible for a child's welfare.

§ 121a.11 Public agency.

As used in this part, the term "public agency" includes the State educational agency, local educational agencies, intermediate educational units, and any other political subdivisions of the State which are responsible for providing education to handicapped children.

(20 U.S.C. 1412(2)(B); 1413(a); 1413(a).)

§ 121a.12 Qualified.

As used in this part, the term "qualified" means that a person has met State educational agency approved or recognized certification, licensing, registration, or other comparable requirements which apply to the area in which he or she is providing special education or related services.

(20 U.S.C. 1417(b).)

§ 121a.13 Related services.

(a) As used in this part, the term "related services" means transportation and such developmental, corrective, and other supportive services as are required to assist a handicapped child to benefit from special education, and includes speech pathology and audiology, psychological services, physical and occupational therapy, recreation, early identification and assessment of disabilities in children, counseling services, and medical services for diagnostic or evaluation purposes. The term also includes school health services, social work services in schools, and parent counseling and training.

(b) The terms used in this definition are defined as follows:

(1) "Audiology" includes:

(i) Identification of children with hearing loss;

(ii) Determination of the range, nature, and degree of hearing loss, including referral for medical or other professional attention for the habilitation of hearing;

(iii) Provision of habilitative activities, such as language habilitation, auditory training, speech reading (lip-reading), hearing evaluation, and speech conservation;

(iv) Creation and administration of programs for prevention of hearing loss;

(v) Counseling and guidance of pupils, parents, and teachers regarding hearing loss; and

(vi) Determination of the child's need for group and individual amplification, selecting and fitting an appropriate aid, and evaluating the effectiveness of amplification.

(2) "Counseling services" means services provided by qualified social workers, psychologists, guidance counselors, or other qualified personnel.

(3) "Early identification" means the implementation of a formal plan for identifying a disability as early as possible in a child's life.

(4) "Medical services" means services provided by a licensed physician to determine a child's medically related handicapping condition which results in the child's need for special education and related services.

(5) "Occupational therapy" includes:

(i) Improving, developing or restoring functions impaired or lost through illness, injury, or deprivation;

(ii) Improving ability to perform tasks for independent functioning when functions are impaired or lost; and

(iii) Preventing, through early intervention, initial or further impairment or loss of function.

(6) "Parent counseling and training" means assisting parents in understanding the special needs of their child and providing parents with information about child development.

(7) "Physical therapy" means services provided by a qualified physical therapist.

(8) "Psychological services" include:

(i) Administering psychological and educational tests, and other assessment procedures;

(ii) Interpreting assessment results;

(iii) Obtaining, integrating, and interpreting information about child behavior and conditions relating to learning.

(iv) Consulting with other staff members in planning school programs to meet the special needs of children as indicated by psychological tests, interviews, and behavioral evaluations; and

(v) Planning and managing a program of psychological services, including psychological counseling for children and parents.

(9) "Recreation" includes:

(i) Assessment of leisure function;

(ii) Therapeutic recreation services;

(iii) Recreation programs in schools and community agencies; and

(iv) Leisure education.

(10) "School health services" means services provided by a qualified school nurse or other qualified person.

(11) "Social work services in schools" include:

(i) Preparing a social or developmental history on a handicapped child;

(ii) Group and individual counseling with the child and family;

(iii) Working with those problems in a child's living situation (home, school, and community) that affect the child's adjustment in school; and

(iv) Mobilizing school and community resources to enable the child to receive maximum benefit from his or her educational program.

(2) "Speech pathology" includes:

(i) Identification of children with speech or language disorders;

(ii) Diagnosis and appraisal of specific speech or language disorders;

(iii) Referral for medical or other professional attention necessary for the habilitation of speech or language disorders;

(iv) Provision of speech and language services for the habilitation or prevention of communicative disorders; and

(v) Counseling and guidance of parents, children, and teachers regarding speech and language disorders.

(3) "Transportation" includes:

(i) Travel to and from school and between schools,

(ii) Travel in and around school buildings, and

(iii) Specialized equipment (such as special or adapted buses, lifts, and ramps), if required to provide special transportation for a handicapped child.

(20 U.S.C. 1401(17).)

Comment. With respect to related services, the Senate Report states:

The Committee bill provides a definition of "related services," making clear that all such related services may not be required for each individual child and that such term includes early identification and assessment of handicapping conditions and the provision of services to minimize the effects of such conditions.

(Senate Report No. 94-168, p.12 (1975).)

The list of related services is not exhaustive and may include other developmental, corrective, or supportive services (such as artistic and cultural programs, and art, music, and dance therapy), if they are required to assist a handicapped child to benefit from special education.

There are certain kinds of services which might be provided by persons from varying professional backgrounds and with a variety of operational titles, depending upon requirements in individual States. For example, counseling services might be provided by social workers, psychologists, or guidance counselors; and psychological testing might be done by qualified psychological examiners, psychometrists, or psychologists, depending upon State standards.

Each related service defined under this part may include appropriate administrative and supervisory activities that are necessary for program planning, management, and evaluation.

§ 121a.14 Special education.

(a)(1) As used in this part, the term "special education" means specially designed instruction, at no cost to the parent, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions.

(2) The term includes speech pathology, or any other related service, if the service consists of specially designed instruction, at no cost to the parents, to meet the unique needs of a handicapped child, and is considered "special education" rather than a "related service" under State standards.

(3) The term also includes vocational education if it consists of specially designed instruction, at no cost to the parents, to meet the unique needs of a handicapped child.

(b) The terms in this definition are defined as follows:

(1) "At no cost" means that all specially designed instruction is provided without charge, but does not preclude incidental fees which are normally charged to non-handicapped students or their parents as a part of the regular education program.

(2) "Physical education" is defined as follows:

(i) The term means the development of:

(A) Physical and motor fitness;

(B) Fundamental motor skills and patterns; and

(C) Skills in aquatics, dance, and individual and group games and sports (including intramural and lifetime sports).

(ii) The term includes special physical education, adapted physical education, movement education, and motor development.

(20 U.S.C. 1401(16).)

(3) "Vocational education" means organized educational programs which are directly related to the preparation of individuals for paid or unpaid employment, or for additional preparation for a career requiring other than a baccalaureate or advanced degree.

(20 U.S.C. 1401(16).)

Comment. (1) The definition of "special education" is a particularly important one under these regulations, since a child is not handicapped unless he or she needs special education. (See the definition of "handicapped children" in section 121a.5.) The definition of "related services" (section 121a.13) also depends on this definition, since a related service must be necessary for a child to benefit from special education. Therefore, if a child does not need special education, there can be no "related services," and the child (because not "handicapped") is not covered under the Act.

(2) The above definition of vocational education is taken from the Vocational Education Act of 1963, as amended by Pub. L. 94-482. Under that Act, "vocational education" includes industrial arts and consumer and homemaking education programs.

§ 121a.15 State.

As used in this part, the term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virginia Islands, and the Trust Territory of the Pacific Islands.

(20 U.S.C. 1401(8).)

Subpart B—State Annual Program Plans and Local Applications

Annual Program Plans—General

§ 121a.110 Conditions of assistance.

In order to receive funds under Part B of the Act for any fiscal year, a State must submit an annual program plan to the Commissioner through its State educational agency.

(20 U.S.C. 1232c(b), 1412, 1413.)

§ 121a.111 Contents of plan.

Each annual program plan must contain the provisions required in this subpart.

(20 U.S.C. 1412, 1413, 1232c(b).)

§ 121a.112 Certification by the State educational agency and attorney general.

Each annual program plan must include:

(a) A certification by the officer of the State educational agency authorized to submit the plan that:

(1) The plan has been adopted by the State educational agency, and

(2) The plan is the basis for the operation and administration of the activities to be carried out in that State under Part B of the Act; and

(b) A certification by the State Attorney General or other authorized State legal officer that:

(1) The State educational agency has authority under State law to submit the plan and to administer or to supervise the administration of the plan, and

(2) All plan provisions are consistent with State law.

(20 U.S.C. 1413(a).)

§ 121a.113 Approval; disapproval.

(a) The Commissioner shall approve any annual program plan which meets the requirements of this part and Subpart B of Part 100b of this chapter.

(b) The Commissioner shall disapprove any annual program plan which does not meet those requirements but may not finally disapprove a plan before giving reasonable notice and an opportunity for a hearing to the State educational agency.

(c) The Commissioner shall use the procedures set forth in §§ 121a.580–121a.583 of Subpart E for a hearing under this section.

(20 U.S.C. 1413(c).)

§ 121a.114 Effective period of annual program plan.

(a) Each annual program plan is effective for a period from the date it becomes effective under § 100b.33 of this chapter through the following June 30.

(b) The Commissioner may extend the effective period of an annual program plan, on the request of a State, if the plan meets the requirements of this part and Part B of the Act.

(20 U.S.C. 1413(a), 1232c(b).)

ANNUAL PROGRAM PLANS—CONTENTS

§ 121a.120 Public participation.

(a) Each annual program plan must include procedures which insure that the requirements in §§ 121a.280–121a.284 are met.

(b) Each annual program plan must also include the following:

(1) A statement describing the methods used by the State educational agency to provide notice of the public hearings on the annual program plan. The statement must include:

(i) A copy of each news release and advertisement used to provide notice.

(ii) A list of the newspapers and other media in which the State educational agency announced or published the notice, and

(iii) The dates on which the notice was announced or published.

(2) A list of the dates and locations of the public hearings on the annual program plan.

(3) A summary of comments received by the State educational agency and a description of the modifications that the State educational agency has made in the annual program plan as a result of the comments.

(4) A statement describing the methods by which the annual program plan will be made public after its approval by the Commissioner. This statement must include the information required under paragraph (b)(1) of this section.

(20 U.S.C. 1412(7).)

§ 121a.121 Right to a free appropriate public education.

(a) Each annual program plan must include information which shows that the State has in effect a policy which insures that all handicapped children have the right to a free appropriate public education within the age ranges and timelines under § 121a.122.

(b) The information must include a copy of each State statute, court order, State Attorney General opinion, and other State document that shows the source of the policy.

(c) The information must show that the policy:

(1) Applies to all public agencies in the State;

(2) Applies to all handicapped children;

(3) Implements the priorities established under § 121a.127(a)(1) of this subpart; and

(4) Establishes timelines for implementing the policy, in accordance with § 121a.122.

(20 U.S.C. 1412(1)(2)(B), (6); 1413(a)(3).)

§ 121a.122 Timelines and ages for free appropriate public education.

(a) *General.* Each annual program plan must include in detail the policies and procedures which the State will undertake or has undertaken in order to insure that a free appropriate public education is available for all handicapped children aged three through eighteen within the State not later than September 1, 1978, and for all handicapped children aged three through twenty-one within the State not later than September 1, 1980.

(b) *Documents relating to timelines.* Each annual program plan must include a copy of each statute, court order, attorney general decision, and other State document which demonstrates that the State has established timelines in accordance with paragraph (a) of this section.

(c) *Exception.* The requirement in paragraph (a) of this section does not apply to a State with respect to handicapped children aged three, four, five, eighteen, nineteen, twenty, or twenty-one to the extent that the requirement would be inconsistent with State law or practice, or the order of any court, respecting public education for one or more of those age groups in the State.

(d) *Documents relating to exceptions.* Each annual program plan must:

(1) Describe in detail the extent to which the exception in paragraph (c) of this section applies to the State, and

(2) Include a copy of each State law, court order, and other document which provides a basis for the exception.

(20 U.S.C. 1412(2)(B).)

§ 121a.123 Full educational opportunity goal.

Each annual program plan must include in detail the policies and procedures which the State will undertake, or has undertaken, in order to insure that the State has a goal of providing full educational opportunity to all handicapped children aged birth through twenty-one.

(20 U.S.C. 1412(2)(A).)

§ 121a.124 Full educational opportunity goal—data requirement.

Beginning with school year 1978–1979, each annual program plan must contain the following information:

(a) The estimated number of handicapped children who need special education and related services.

(b) For the current school year:

(1) The number of handicapped children aged birth through two, who are receiving special education and related services; and

(2) The number of handicapped children:

(i) Who are receiving a free appropriate public education,

(ii) Who need, but are not receiving a free appropriate public education,

(iii) Who are enrolled in public and private institutions who are receiving a free appropriate public education, and

(iv) Who are enrolled in public and private institutions and are not receiving a free appropriate public education.

(c) The estimated numbers of handicapped children who are expected to receive special education and related services during the next school year.

(d) A description of the basis used to determine the data required under this section.

(e) The data required by paragraphs (a), (b), and (c) of this section must be provided:

(1) For each disability category (except for children aged birth through two), and

(2) For each of the following age ranges: birth through two, three through five, six through seventeen, and eighteen through twenty-one.

(20 U.S.C. 1412(2)(A).)

Comment. In Part B of the Act, the term "disability" is used interchangeably with "handicapping condition". For consistency in this regulation, a child with a "disability" means a child with one of the impairments listed in the definition of "handicapped children" in § 121a.5, if the child needs special education because of the impairment. In essence, there is a continuum of impairments. When an impairment is of such a nature that the child needs special education, it is referred to as a disability, in these regulations, and the child is a "handicapped" child.

States should note that data required under this section are not to be transmitted to the Commissioner in personally identifiable form. Generally, except for such purposes as monitoring and auditing, neither the States nor the Federal Government should have to collect data under this part in personally identifiable form.

§ 121a.125 Full educational opportunity goal—timetable.

(a) *General requirement.* Each annual program plan must contain a detailed timetable for accomplishing the goal of providing full educational opportunity for all handicapped children.

(b) *Content of timetable.* (1) The timetable must indicate what percent of the total estimated number of handicapped children the State expects to have full educational opportunity in each succeeding school year.

(2) The data required under this paragraph must be provided:

(i) For each disability category (except for children aged birth through two), and

(ii) For each of the following age ranges: birth through two, three through five, six through seventeen, and eighteen through twenty-one.

(20 U.S.C. 1412(2)(A).)

§ 121a.126 Full educational opportunity goal—facilities, personnel, and services.

(a) *General requirement.* Each annual program plan must include a description of the kind and number of facilities, personnel, and services necessary throughout the State to meet the goal of providing full educational opportunity for all handicapped children. The State educational agency shall include the data required under paragraph (b) of this section and whatever additional data are necessary to meet the requirement.

(b) *Statistical description.* Each annual program plan must include the following data:

(1) The number of additional special class teachers, resource room teachers, and itinerant or consultant teachers needed for each disability category and

the number of each of these who are currently employed in the State.

(2) The number of other additional personnel needed, and the number currently employed in the State, including school psychologists, school social workers, occupational therapists, physical therapists, home-hospital teachers, speech-language pathologists, audiologists, teacher aides, vocational education teachers, work study coordinators, physical education teachers, therapeutic recreation specialists, diagnostic personnel, supervisors, and other instructional and non-instructional staff.

(3) The total number of personnel reported under paragraph (b) (1) and (2) of this section, and the salary costs of those personnel.

(4) The number and kind of facilities needed for handicapped children and the number and kind currently in use in the State, including regular classes serving handicapped children, self-contained classes on a regular school campus, resource rooms, private special education day schools, public special education day schools, private special education residential schools, public special education residential schools, hospital programs, occupational therapy facilities, physical therapy facilities, public sheltered workshops, private sheltered workshops, and other types of facilities.

(5) The total number of transportation units needed for handicapped children, the number of transportation units designed for handicapped children which are in use in the State, and the number of handicapped children who use these units to benefit from special education.

(c) *Data categories.* The data required under paragraph (b) of this section must be provided as follows:

(1) Estimates for serving all handicapped children who require special education and related services.

(2) Current year data, based on the actual numbers of handicapped children receiving special education and related services (as reported under Subpart G), and

(3) Estimates for the next school year.

(d) *Rationale.* Each annual program plan must include a description of the means used to determine the number and salary costs of personnel.

(20 U.S.C. 1412(2)(A).)

§ 121a.127 Priorities.

(a) *General requirement.* Each annual program plan must include information which shows that:

(1) The State has established priorities which meet the requirements under §§ 121a.320–121a.324 of Subpart C.

(2) The State priorities meet the timelines under § 121a.122 of this subpart, and

(3) The State has made progress in meeting those timelines.

(b) *Child data.* (1) Each annual program plan must show the number of handicapped children known by the State to be in each of the first two priority groups named in §§ 121a.321 of Subpart C:

(i) By disability category, and

(ii) By the age ranges in § 121a.124(c)(2) of this subpart.

(c) *Activities and resources.* Each annual program plan must show for each of the first two priority groups:

(1) The programs, services, and activities that are being carried out in the State.

(2) The Federal, State, and local resources that have been committed during the current school year, and

(3) The programs, services, activities, and resources that are to be provided during the next school year.

(20 U.S.C. 1412(3).)

§ 121a.128 Identification, location, and evaluation of handicapped children.

(a) *General requirement.* Each annual program plan must include in detail the policies and procedures which the State will undertake or has undertaken to insure that:

(1) All children who are handicapped, regardless of the severity of their handicap, and who are in need of special education and related services are identified, located, and evaluated; and

(2) A practical method is developed and implemented to determine which children are currently receiving needed special education and related services and which children are not currently receiving needed special education and related services.

(b) *Information.* Each annual program plan must:

(1) Designate the State agency (if other than the State educational agency) responsible for coordinating the planning and implementation of the policies and procedures under paragraph (a) of this section;

(2) Name each agency that participates in the planning and implementation and describe the nature and extent of its participation;

(3) Describe the extent to which:

(i) The activities described in paragraph (a) of this section have been achieved under the current annual program plan, and

(ii) The resources named for these activities in that plan have been used;

(4) Describe each type of activity to be carried out during the next school year, including the role of the agency named under paragraph (b)(1) of this section, timelines for completing those activities, resources that will be used, and expected outcomes;

(5) Describe how the policies and procedures under paragraph (a) of this section will be monitored to insure that the State educational agency obtains:

(i) The number of handicapped children within each disability category that have been identified, located, and evaluated, and

(ii) Information adequate to evaluate the effectiveness of those policies and procedures; and

(6) Describe the method the State uses to determine which children are currently receiving special education and related services and which children are not receiving special education and related services.

(20 U.S.C. 1412(2)(C).)

Comment. The State is responsible for insuring that all handicapped children are identified, located, and evaluated, including children in all public and private agencies and institutions in the State. Collection and use of data are subject to the confidentiality requirements in §§ 121a.560–121a.576.

§ 121a.129 Confidentiality of personally identifiable information.

(a) Each annual program plan must include in detail the policies and procedures which the State will undertake or has undertaken in order to insure the protection of the confidentiality of any personally identifiable information collected, used, or maintained under this part.

(b) The Commissioner shall use the criteria in §§ 121a.560–121a.576 of Subpart E to evaluate the policies and procedures of the State under paragraph (a) of this section.

(20 U.S.C. 1412(2)(D); 1417(c).)

Comment. The confidentiality regulations were published in the FEDERAL REGISTER in final form on February 27, 1976 (41 FR 8603–8670), and met the requirements of Part B of the Act, as amended by Pub. L. 94-142. These regulations are incorporated in § 121a.560–121a.576 of Subpart E.

§ 121a.130 Individualized education programs.

(a) Each annual program plan must include information which shows that each public agency in the State maintains records of the individualized education program for each handicapped child, and each public agency establishes, reviews, and revises each program as provided in Subpart C.

(b) Each annual program plan must include:

(1) A copy of each State statute, policy, and standard that regulates the manner in which individualized education programs are developed, implemented, reviewed, and revised, and

(2) The procedures which the State educational agency follows in monitoring and evaluating those programs.

(20 U.S.C. 1412(4).)

§ 121a.131 Procedural safeguards.

Each annual program plan must include procedural safeguards which insure that the requirements in §§ 121a.500–121a.514 of Subpart E are met.

(20 U.S.C. 1412(5)(A).)

§ 121a.132 Least restrictive environment.

(a) Each annual program plan must include procedures which insure that the requirements in §§ 121a.550–121a.556 of Subpart E are met.

(b) Each annual program plan must include the following information:

(1) The number of handicapped children in the State, within each disability category, who are participating in regular education programs, consistent with §§ 121a.550–121a.556 of Subpart E.

(2) The number of handicapped children who are in separate classes or separate school facilities, or who are otherwise removed from the regular education environment.

(20 U.S.C. 1413(5)(B).)

§ 121a.133 Protection in evaluation procedures.

Each annual program plan must include procedures which insure that the requirements in §§ 121a.530–121a.534 of Subpart E are met.

(20 U.S.C. 1413(5)(C).)

§ 121a.134 Responsibility of State educational agency for all educational programs.

(a) Each annual program plan must include information which shows that the requirements in § 121a.600 of Subpart F are met.

(b) The information under paragraph (a) of this section must include a copy of each State statute, State regulation, signed agreement between respective agency officials, and any other document that shows compliance with that paragraph.

(20 U.S.C. 1413(6).)

§ 121a.135 Monitoring procedures.

Each annual program plan must include information which shows that the requirements in § 121a.601 and § 121a.602 of Subpart F are met.

(20 U.S.C. 1413(6).)

§ 121a.136 Implementation procedures—State educational agency.

Each annual program plan must describe the procedures the State educational agency follows to inform each public agency of its responsibility for insuring effective implementation of procedural safeguards for the handicapped children served by that public agency.

(20 U.S.C. 1413(6).)

§ 121a.137 Procedures for consultation.

Each annual program plan must include an assurance that in carrying out the requirements of section 612 of the Act, procedures are established for consultation with individuals involved in or concerned with the education of handicapped children, including handicapped individuals and parents of handicapped children.

(20 U.S.C. 1413(7)(A).)

§ 121a.138 Other Federal programs.

Each annual program plan must provide that programs and procedures are established to insure that funds received by the State or any public agency in the State under any other Federal program, including section 121 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 241e–2), section 306 (b)(8) of that Act (20 U.S.C. 844a(b)(8)) or Title IV–C of that Act (20 U.S.C. 1831), and section 110(a) of the Vocational Education Act of 1963, under which there is specific authority for assistance for the education of handicapped children, are used by the State, or any public agency in the State, only in a manner consistent with the goal of providing free appropriate public education for all handicapped children, except that nothing in this section limits the specific requirements of the laws governing those Federal programs.

(20 U.S.C. 1413(a)(2).)

§ 121a.139 Comprehensive systems of personnel development.

Each annual program plan must include the material required under §§ 121a.380–121a.387 of Subpart C.

(20 U.S.C. 1413(a)(3).)

§ 121a.140 Private schools.

Each annual program plan must include policies and procedures which insure that the requirements of Subpart D are met.

(20 U.S.C. 1413(a)(4).)

§ 121a.141 Recovery of funds for misclassified children.

Each annual program plan must include policies and procedures which insure that the State seeks to recover any funds provided under Part B of the Act for services to a child who is determined to be erroneously classified as eligible to be counted under section 611(a) or (d) of the Act.

(20 U.S.C. 1413(a)(5).)

§ 121a.142 Control of funds and property.

Each annual program plan must provide assurance satisfactory to the Commissioner that the control of funds provided under Part B of the Act, and title to property acquired with those funds, is in a public agency for the uses and purposes provided in this part, and that a public agency administers the funds and property.

(20 U.S.C. 1413(a)(6).)

§ 121a.143 Records.

Each annual program plan must provide for keeping records and affording access to those records as the Commissioner may find necessary to assure the correctness and verification of reports and of proper disbursement of funds provided under Part B of the Act.

(20 U.S.C. 1413(a)(7)(B).)

§ 121a.144 Hearing on application.

Each annual program plan must include procedures to insure that the State educational agency does not take any final action with respect to an application submitted by a local educational agency before giving the local educational agency reasonable notice and an opportunity for a hearing.

(20 U.S.C. 1413(a)(8).)

§ 121a.145 Prohibition of commingling.

Each annual program plan must provide assurance satisfactory to the Commissioner that funds provided under Part B of the Act are not commingled with State funds.

(20 U.S.C. 1413(a)(9).)

Comment. This assurance is satisfied by the use of a separate accounting system that includes an "audit trail" of the expenditure of the Part B funds. Separate bank accounts are not required. (See 45 CFR 100b, Subpart F (Cash Depositories).)

§ 121a.146 Annual evaluation.

Each annual program plan must include procedures for evaluation at least annually of the effectiveness of programs in meeting the educational needs of handicapped children, including evaluation of individualized education programs.

(20 U.S.C. 1413(a)(11).)

§ 121a.147 State advisory panel.

Each annual program plan must provide that the requirements of §§ 121a.650–121a.653 of Subpart F are met.

(20 U.S.C. 1413(a)(12).)

§ 121a.148 Policies and procedures for use of Part B funds.

Each annual program plan must set forth policies and procedures designed to insure that funds paid to the State under Part B of the Act are spent in accordance with the provisions of Part B, with particular attention given to sections 611(b), 611(c), 611(d), 612(2), and 612(3) of the Act.

(20 U.S.C. 1413(a)(1).)

§ 121a.149 Description of use of Part B funds.

(a) *State allocation.* Each annual program plan must include the following information about the State's use of funds under § 121a.370 of Subpart C and § 121a.620 of Subpart F:

(1) A list of administrative positions, and a description of duties for each person whose salary is paid in whole or in part with those funds.

(2) For each position, the percentage of salary paid with those funds.

(3) A description of each administrative activity the State educational agency will carry out during the next school year with those funds.

(4) A description of each direct service and each support service which the State educational agency will provide during the next school year with those funds, and the activities the State advisory panel will undertake during that period with those funds.

(b) *Local educational agency allocation.* Each annual program plan must include:

(1) An estimate of the number and percent of local educational agencies in the State which will receive an allocation under this part (other than local educational agencies which submit a consolidated application).

(2) An estimate of the number of local educational agencies which will receive an allocation under a consolidated application.

(3) An estimate of the number of consolidated applications and the average number of local educational agencies per application, and

(4) A description of direct services the State educational agency will provide under § 121a.260 of Subpart C.

(20 U.S.C. 1232a(b)(1)(B)-(E).)

§ 121a.150 Nondiscrimination and employment of handicapped individuals.

(a) Each annual program plan must include an assurance that the program assisted under Part B of the Act will be operated in compliance with Title 45 of the Code of Federal Regulations Part 84 (Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving or Benefiting from Federal Financial Assistance). The State educational agency may incorporate this assurance by reference if it has already been filed with the Department of Health, Education, and Welfare.

(b) The assurance under paragraph (a) of this section covers, among other things, the specific requirement on employment of handicapped individuals under section 606 of the Act, which states:

> The Secretary shall ensure that each recipient of assistance under this Act shall make positive efforts to employ and advance in employment qualified handicapped individuals in programs assisted under this Act.

(20 U.S.C. 1405; 29 U.S.C. 794.)

§ 121a.151 Additional information if the State educational agency provides direct services.

If a State educational agency provides free appropriate public education for handicapped children or provides them with direct services, its annual program plan must include the information required under §§ 121a.226-121a.228, 121a.231, and 121a.235.

(20 U.S.C. 1413(b).)

LOCAL EDUCATIONAL AGENCY APPLICATIONS—GENERAL

§ 121a.180 Submission of applications.

In order to receive payments under Part B of the Act for any fiscal year a local educational agency must submit an application to the State educational agency.

(20 U.S.C. 1414(a).)

§ 121a.181 Responsibilities of State educational agency.

Each State educational agency shall establish the procedures and format which a local educational agency uses in preparing and submitting its application.

(20 U.S.C. 1414(a).)

§ 121a.182 The excess cost requirement.

A local educational agency may only use funds under Part B of the Act for the excess costs of providing special education and related services for handicapped children.

(20 U.S.C. 1414(a)(1), (a)(2)(B)(i).)

§ 121a.183 Meeting the excess cost requirement.

(a) A local educational agency meets the excess cost requirement if it has on the average spent at least the amount determined under § 121a.184 for the education of each of its handicapped children. This amount may not include capital outlay or debt service.

(b) Each local educational agency must keep records adequate to show that it has met the excess cost requirement.

(20 U.S.C. 1403(20); 1414(a)(1).)

Comment. The excess cost requirement means that the local educational agency must spend a certain minimum amount for the education of its handicapped children before Part B funds are used. This insures that children served with Part B funds have at least the same average amount spent on them, from sources other than Part B, as do the children in the school district taken as a whole.

The minimum amount that must be spent for the education of handicapped children is computed under a statutory formula. Section 121a.184 implements this formula and gives a step-by-step method to determine the minimum amount. Excess costs are those costs of special education and related services which exceed the minimum amount. Therefore, if a local educational agency can show that it has (on the average) spent the minimum amount for the education of each of its handicapped children, it has met the excess cost requirement, and all additional costs are excess costs. Part B funds can then be used to pay for these additional costs, subject to the other requirements of Part B (priorities, etc.). In the "Comment" under section 121a.184, there is an example of how the minimum amount is computed.

§ 121a.184 Excess costs—computation of minimum amount.

The minimum average amount a local educational agency must spend under § 121a.183 for the education of each of its handicapped children is computed as follows:

(a) Add all expenditures of the local educational agency in the preceding school year, except capital outlay and debt service:

(1) For elementary school students, if the handicapped child is an elementary school student, or

(2) For secondary school students, if the handicapped child is a secondary school student.

(b) From this amount, subtract the total of the following amounts spent for elementary school students or for secondary school students, as the case may be:

(1) Amounts the agency spent in the preceding school year from funds awarded under Part B of the Act and Titles I and VII of the Elementary and Secondary Education Act of 1965, and

(2) Amounts from State and local funds which the agency spent in the preceding school year for:

(i) Programs for handicapped children,

(ii) Programs to meet the special educational needs of educationally deprived children, and

(iii) Programs of bilingual education for children with limited English-speaking ability.

(c) Divide the result under paragraph (b) of this section by the average number of students enrolled in the agency in the preceding school year:

(1) In its elementary schools, if the handicapped child is an elementary school student, or

(2) In its secondary schools, if the handicapped child is a secondary school student.

(20 U.S.C. 1414(a)(1).)

Comment. The following is an example of how a local educational agency might compute the average minimum amount it must spend for the education of each of its handicapped children, under § 121a.184. This example follows the formula in § 121a.184. Under the statute and regulations, the local educational agency must make one computation for handicapped children in its elementary schools and a separate computation for handicapped children in its secondary schools. The computation for handicapped elementary school students would be done as follows:

a. First, the local educational agency must determine its total amount of expenditures for elementary school students from all sources—local, State, and Federal (including Part B)—in the preceding school year. Only capital outlay and debt service are excluded.

Example: A local educational agency spent the following amounts last year for elementary school students (including its handicapped elementary school students):

(1) From local tax funds	$8,730,000
(2) From State funds	7,000,000
(3) From Federal funds	730,000
	16,460,000

Of this total, $660,000 was for capital outlay and debt service relating to the education of elementary school students. This must be subtracted from total expenditures:

	$16,460,000
	−660,000
Total expenditures for elementary school students (less capital outlay and debt service)	= 15,800,000

b. Next, the local educational agency must subtract amounts spent for:

(1) Programs for handicapped children;

(2) Programs to meet the special educational needs of educationally deprived children; and

(3) Programs of bilingual education for children with limited English-speaking ability.

These are funds which the local educational agency actually spent, not funds received last year but carried over for the current school year.

Example: The local educational agency spent the following amounts for elementary school students last year:

(1) From funds under Title I of the Elementary and Secondary Education Act of 1965	$800,000
(2) From a special State program for educationally deprived children	200,000
(3) From a grant under Part B	200,000
(4) From State funds for the education of handicapped children	500,000

(5) From a locally-funded program for handicapped children	$200,000
(6) From a grant for a bilingual education program under Title VII of the Elementary and Secondary Education Act of 1965	150,000
Total	1,000,000

(A local educational agency would also include any other funds it spent from Federal, State, or local sources for the three basic purposes: handicapped children, educationally deprived children, and bilingual education for children with limited English-speaking ability.)

This amount is subtracted from the local educational agency's total expenditure for elementary school students computed above:

$10,000,000
− 1,600,000
8,400,000

c. The local educational agency must must divide by the average number of students enrolled in the elementary schools of the agency last year (including the handicapped students).

Example: Last year, an average of 7,000 students were enrolled in the agency's elementary schools. This must be divided into the amounts computed under the above paragraph:

$8,400,000
7,000 students
= $1,200/student

This figure is in the minimum amount the local educational agency must spend (on the average) for the education of each of its handicapped students. Funds under Part B may be used only for costs over and above this minimum. In this example, if the local educational agency has 100 handicapped elementary school students, it must keep records adequate to show that it has spent at least $120,000 for the education of these students (100 students times $1,200/student), not including capital outlay and debt service.

This $120,000 may come from any funds except funds under Part B, subject to any legal requirements that govern the use of those other funds.

If the local educational agency has handicapped secondary school students, it must do the same computation for them. However, the amounts used in the computation would be those the local educational agency spent last year for the education of secondary school students, rather than for elementary school students.

§ 121a.185 Computation of excess costs—consolidated applications.

The minimum average amount under § 121a.183 where two or more local educational agencies submit a consolidated application, is the average of the combined minimum average amounts determined under § 121a.184 in those agencies for elementary or secondary school students, as the case may be.

(20 U.S.C. 1414(a)(1).)

§ 121a.186 Excess costs—limitation on use of Part B funds.

(a) The excess cost requirement prevents a local educational agency from using funds provided under Part B of the Act to pay for all of the costs directly attributable to the education of a handicapped child, subject to paragraph (b) of this section.

(b) The excess cost requirement does not prevent a local educational agency from using Part B funds to pay for all of the costs directly attributable to the education of a handicapped child in any of the age ranges three, four, five, eighteen, nineteen, twenty, or twenty-one, if no local or State funds are available for non-handicapped children in that age range. However, the local educational agency must comply with the non-supplanting and other requirements of this part in providing the education and services.

(20 U.S.C. 1402(20); 1414(a)(1).)

§ 121a.190 Consolidated applications.

(a) *Voluntary applications.* Local educational agencies may submit a consolidated application for payments under Part B of the Act.

(b) *Required applications.* A State educational agency may require local educational agencies to submit a consolidated application for payments under Part B of the Act if the State educational agency determines that an individual application submitted by a local educational agency will be disapproved because:

(1) The agency's entitlement is less than the $7,500 minimum required by section 611(c)(4)(A)(i) of the Act (§ 121a.360(a)(1) of Subpart C); or

(2) The agency is unable to establish and maintain programs of sufficient size and scope to effectively meet the educational needs of handicapped children.

(c) *Size and scope of program.* The State educational agency shall establish standards and procedures for determinations under paragraph (b)(2) of this section.

(20 U.S.C. 1414(c)(1).)

§ 121a.191 Payments under consolidated applications.

In any case in which a consolidated application is approved by the State educational agency, the payments to the participating local educational agencies must be equal to the sum of the entitlements of the separate local educational agencies.

(20 U.S.C. 1414(c)(2)(A).)

§ 121a.192 State regulation of consolidated applications.

(a) The State educational agency shall issue regulations with respect to consolidated applications submitted under this part.

(b) The State educational agency's regulations must:

(1) Be consistent with section 612(1)–(7) and section 613(a) of the Act, and

(2) Provide participating local educational agencies with joint responsibilities for implementing programs receiving payments under this part.

(20 U.S.C. 1414(c)(3)(B).)

(c) If an intermediate educational unit is required under State law to carry out this part, the joint responsibilities given to local educational agencies under paragraph (b)(2) of this section do not apply to the administration and disbursement of any payments received by the intermediate educational unit. Those administrative responsibilities must be carried out exclusively by the intermediate educational unit.

(20 U.S.C. 1414(c)(2)(C).)

§ 121a.193 State educational agency approval; disapproval.

(a) *Approval.* A State educational agency shall approve an application submitted by a local educational agency if the State educational agency determines that the application meets the requirements under §§ 121a.220–121a.240. However, the State educational agency may not approve any application until the Commissioner approves its annual program plan for the school year covered by the application.

(b) *Disapproval.* The State educational agency shall disapprove an application if the State educational agency determines that the application does not meet a requirement under §§ 121a.220–121a.240.

(20 U.S.C. 1414(b)(1).)

(c) In carrying out its functions under this section, each State educational agency shall consider any decision resulting from a hearing under §§ 121a.506–121a.513 of Subpart E which is adverse to the local educational agency involved in the decision.

(20 U.S.C. 1414(b)(3).)

§ 121a.194 Withholding.

(a) If a State educational agency, after giving reasonable notice and an opportunity for a hearing to a local educational agency, decides that the local educational agency in the administration of an application approved by the State educational agency has failed to comply with any requirement in the application, the State educational agency, after giving notice to the local educational agency, shall:

(1) Make no further payments to the local educational agency until the State educational agency is satisfied that there is no longer any failure to comply with the requirement; or

(2) Consider its decision in its review of any application made by the local educational agency under § 121a.180;

(3) Or both.

(b) Any local educational agency receiving a notice from a State educational agency under paragraph (a) of this section is subject to the public notice provision in § 121a.592.

(20 U.S.C. 1414(b)(2).)

Local Educational Agency Applications—Contents

§ 121a.220 Child identification.

Each application must include procedures which insure that all children residing within the jurisdiction of the local educational agency who are handicapped, regardless of the severity of their handicap, and who are in need of special education and related services are identified, located, and evaluated, including a practical method of determining which children are currently receiving needed

special education and related services and which children are not currently receiving needed special education and related services.

(20 U.S.C. 1414(a)(1)(A).)

Comment. The local educational agency is responsible for insuring that all handicapped children within its jurisdiction are identified, located, and evaluated, including children in all public and private agencies and institutions within that jurisdiction. Collection and use of data are subject to the confidentiality requirements in §§ 121a.560–121a.576 of Subpart E.

§ 121a.221 Confidentiality of personally identifiable information.

Each application must include policies and procedures which insure that the criteria in §§ 121a.560–121a.574 of Subpart E are met.

(20 U.S.C. 1414(a)(1)(B).)

§ 121a.222 Full educational opportunity goal; timetable.

Each application must: (a) Include a goal of providing full educational opportunity to all handicapped children, aged birth through 21, and

(b) Include a detailed timetable for accomplishing the goal.

(20 U.S.C. 1414(a)(1)(C), (D).)

§ 121a.223 Facilities, personnel, and services.

Each application must provide a description of the kind and number of facilities, personnel, and services necessary to meet the goal in § 121a.222.

(20 U.S.C. 1414(a)(1)(E).)

§ 121a.224 Personnel development.

Each application must include procedures for the implementation and use of the comprehensive system of personnel development established by the State educational agency under § 121a.140.

(20 U.S.C. 1414(a)(1)(C)(i).)

§ 121a.225 Priorities.

Each application must include priorities which meet the requirements of §§ 121a.320–121a.324.

(20 U.S.C. 1414(a)(1)(C)(ii).)

§ 121a.226 Parent involvement.

Each application must include procedures to insure that, in meeting the goal under § 121a.222, the local educational agency makes provision for participation of and consultation with parents or guardians of handicapped children.

(20 U.S.C. 1414(a)(1)(C)(iii).)

§ 121a.227 Participation in regular education programs.

(a) Each application must include procedures to insure that to the maximum extent practicable, and consistent with §§ 121a.550–121a.563 of Subpart E, the local educational agency provides special services to enable handicapped children to participate in regular educational programs.

(b) Each application must describe:

(1) The types of alternative placements that are available for handicapped children, and

(2) The number of handicapped children within each disability category who are served in each type of placement.

(20 U.S.C. 1414(a)(1)(C)(iv).)

§ 121a.228 Public control of funds.

Each application must provide assurance satisfactory to the State educational agency that control of funds provided under Part B of the Act and title to property acquired with those funds, is in a public agency for the uses and purposes under this part, and that a public agency administers the funds and property.

(20 U.S.C. 1414(a)(2)(A).)

§ 121a.229 Excess cost.

Each application must provide assurance satisfactory to the State educational agency that the local educational agency uses funds provided under Part B of the Act only for costs which exceed the amount computed under § 121a.184 and which are directly attributable to the education of handicapped children.

(20 U.S.C. 1414(a)(2)(B).)

§ 121a.230 Nonsupplanting.

(a) Each application must provide assurance satisfactory to the State educational agency that the local educational agency uses funds provided under Part B of the Act to supplement and, to the extent practicable, increase the level of State and local funds expended for the education of handicapped children, and in no case to supplant those State and local funds.

(b) To meet the requirement in paragraph (a) of this section:

(1) The total amount or average per capita amount of State and local school funds budgeted by the local educational agency for expenditures in the current fiscal year for the education of handicapped children must be at least equal to the total amount or average per capita amount of State and local school funds actually expended for the education of handicapped children in the most recent preceding fiscal year for which the information is available. Allowance may be made for:

(i) Decreases in enrollment of handicapped children; and

(ii) Unusually large amounts of funds expended for such long-term purposes as the acquisition of equipment and the construction of school facilities; and

(2) The local educational agency must not use Part B funds to displace State or local funds for any particular cost.

(20 U.S.C. 1414(a)(2)(B).)

Comment. Under statutes such as Title I of the Elementary and Secondary Education Act of 1965, as amended, the requirement is to not supplant funds that "would" have been expended if the Federal funds were not available. The requirement under Part B, however, is to not supplant funds which have been "expended." This use of the past tense suggests that the funds referred to are those which the State or local agency actually spent at some time before the use of the Part B funds. Therefore, in judging compliance with this requirement, the Commissioner looks to see if Part B funds are used for any costs which were previously paid for with State or local funds.

The nonsupplanting requirement prohibits a local educational agency from supplanting State and local funds with Part B funds on either an aggregate basis or for a given expenditure. This means that if an LEA spent $100,000 for special education in FY 1977, it must budget at least $100,000 in FY 1978, unless one of the conditions in § 121a.230 (b)(1) applies.

Whether a local educational agency supplants with respect to a particular cost would depend on the circumstances of the expenditure. For example, if a teacher's salary has been switched from local funding to Part B funding, this would appear to be supplanting. However, if that teacher was taking over a different position (such as a resource room teacher, for example), it would not be supplanting. Moreover, it might be important to consider whether the particular action of a local educational agency led to an increase in services for handicapped children over that which previously existed. The intent of the requirement is to insure that Part B funds are used to increase State and local efforts and are not used to take their place. Compliance would be judged with this aim in mind. The supplanting requirement is not intended to inhibit better services to handicapped children.

§ 121a.231 Comparable services.

(a) Each application must provide assurance satisfactory to the State educational agency that the local educational agency meets the requirements of this section.

(b) A local educational agency may not use funds under Part B of the Act to provide services to handicapped children unless the agency uses State and local funds to provide services to those children which, taken as a whole, are at least comparable to services provided to other handicapped children in that local educational agency.

(c) Each local educational agency shall maintain records which show that the agency meets the requirement in paragraph (b) of this section.

(20 U.S.C. 1414(a)(2)(C).)

Comment. Under the "comparability" requirement, if State and local funds are used to provide certain services, those services must be provided with State and local funds to all handicapped children in the local educational agency who need them. Part B funds may then be used to supplement existing services, or to provide additional services to meet special needs. This, of course, is subject to the other requirements of the Act, including the priorities under §§ 121a.227–121a.324.

§ 121a.232 Information—reports.

Each application must provide that the local educational agency furnishes information (which, in the case of reports relating to performance, is in accordance with specific performance criteria developed by the local educational agency and related to program objectives) as may be necessary to enable the State educational

agency to perform its duties under this part, including information relating to the educational achievement of handicapped children participating in the local educational agency's programs for handicapped children.

(20 U.S.C. 1414(a)(3)(A).)

§ 121a.233 Records.

Each application must provide that the local educational agency keeps such records, and affords access to those records, as the State educational agency may find necessary to insure the correctness and verification of the information that the local educational agency furnishes under § 121a.232.

(20 U.S.C. 1414(a)(3)(B).)

§ 121a.234 Public participation.

(a) Each application must:

(1) Provide for making the application and all documents related to the application available to parents and the general public; and

(2) Provide that all evaluations and reports required under § 121a.232 are public information.

(b) In implementing the requirement in paragraph (a)(1), the local educational agency shall use methods for public participation within its jurisdiction which are comparable to those required in §§ 121a.280–121a.284 of this subpart. However, the local educational agency is not required to hold public hearings.

(20 U.S.C. 1414(a)(6).)

§ 121a.235 Individualized education program.

Each application must include procedures to assure that the local educational agency complies with §§ 121a.346–121a.349 of Subpart C.

(20 U.S.C. 1414(a)(5).)

§ 121a.236 Local policies consistent with statute.

Each application must provide assurance satisfactory to the State educational agency that all policies and programs which the local educational agency establishes and administers are consistent with section 612(1)–(7) and section 613(a) of the Act.

(20 U.S.C. 1414(a)(6).)

§ 121a.237 Procedural safeguards.

Each application must provide assurance satisfactory to the State educational agency that the local educational agency has procedural safeguards which meet the requirements of §§ 121a.500–121a.514 of Subpart E.

(20 U.S.C. 1414(a)(7).)

§ 121a.238 Use of Part B funds.

Each application must describe how the local educational agency will use the funds under Part B of the Act during the next school year.

(20 U.S.C. 1424(a).)

§ 121a.239 Nondiscrimination and employment of handicapped individuals.

(a) Each application must include an assurance that the program assisted under Part B of the Act will be operated in compliance with Title 45 of the Code of Federal Regulations Part 84 (Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving or Benefitting from Federal Financial Assistance). The local educational agency may incorporate this assurance by reference if it has already been filed with the Department of Health, Education, and Welfare.

(b) The assurance under paragraph (a) of this section covers, among other things, the specific requirement on employment of handicapped individuals under section 606 of the Act, which states:

> The Secretary shall assure that each recipient of assistance under this Act shall make positive efforts to employ and advance in employment qualified handicapped individuals in programs assisted under this Act.

(29 U.S.C. 1405; 29 U.S.C. 794.)

§ 121a.240 Other requirements.

Each local application must include additional procedures and information which the State educational agency may require in order to meet the State annual program plan requirements under §§ 121a.120–121a.151.

(20 U.S.C. 1414(a)(6).)

Application From Secretary of Interior

§ 121a.260 Submission of annual application; approval.

In order to receive payments under this part, the Secretary of Interior shall submit an annual application which:

(a) Meets applicable requirements of section 614(a) of the Act;

(b) Includes monitoring procedures which are consistent with § 121a.601; and

(c) Includes other material as agreed to by the Commissioner and the Secretary of Interior.

(20 U.S.C. 1411(f).)

§ 121a.261 Public participation.

In the development of the application for the Department of Interior, the Secretary of Interior shall provide for public participation consistent with §§ 121a.280–121a.284.

(20 U.S.C. 1411(f).)

§ 121a.262 Use of Part B funds.

(a) The Department of Interior may use five percent of its payments in any fiscal year, or $200,000, whichever is greater, for administrative costs in carrying out the provisions of this Part.

(b) The remainder of the payments to the Secretary of Interior in any fiscal year must be used in accordance with the priorities under §§ 121a.320–121a.324 of Subpart C.

(20 U.S.C. 1411(f).)

§ 121a.263 Applicable regulations.

The Secretary of Interior shall comply with the requirements under Subparts C, E, and F.

(20 U.S.C. 1411(f)(2).)

Public Participation

§ 121a.280 Public hearings before adopting an annual program plan.

(a) Prior to its adoption of an annual program plan, the State educational agency shall:

(1) Make the plan available to the general public,

(2) Hold public hearings, and

(3) Provide an opportunity for comment by the general public on the plan.

(20 U.S.C. 1412(7).)

§ 121a.281 Notice.

(a) The State educational agency shall provide notice to the general public of the public hearings.

(b) The notice must be in sufficient detail to inform the public about:

(1) The purpose and scope of the annual program plan and its relation to Part B of the Education of the Handicapped Act,

(2) The availability of the annual program plan,

(3) The date, time, and location of each public hearing,

(4) The procedures for submitting written comments about the plan, and

(5) The timetable for developing the final plan and submitting it to the Commissioner for approval.

(c) The notice must be published or announced:

(1) In newspapers or other media, or both, with circulation adequate to notify the general public about the hearings, and (2) Enough in advance of the date of the hearings to afford interested parties throughout the State a reasonable opportunity to participate.

(20 U.S.C. 1412(7).)

§ 121a.282 Opportunity to participate; comment period.

(a) The State educational agency shall conduct the public hearings at times and places that afford interested parties throughout the State a reasonable opportunity to participate.

(b) The plan must be available for comment for a period of at least 30 days following the date of the notice under § 121a.281.

(20 U.S.C. 1412(7).)

§ 121a.283 Review of public comments before adopting plan.

Before adopting its annual program plan, the State educational agency shall:

(a) Review and consider all public comments, and

(b) Make any necessary modifications in the plan.

(20 U.S.C. 1412(7).)

§ 121a.284 Publication and availability of approved plan.

After the Commissioner approves an annual program plan, the State educational agency shall give notice in newspapers or other media, or both, that the plan is approved. The notice must name places throughout the State where the plan is available for access by any interested person.

(20 U.S.C. 1412(7).)

Subpart C—Services

FREE APPROPRIATE PUBLIC EDUCATION

§ 121a.300 Timelines for free appropriate public education.

(a) *General.* Each State shall insure that free appropriate public education is available to all handicapped children aged three through eighteen within the State not later than September 1, 1978, and to all handicapped children aged three through twenty-one within the State not later than September 1, 1980.

(b) *Age ranges 3–5 and 18–21.* This paragraph provides rules for applying the requirement in paragraph (a) of this section to handicapped children aged three, four, five, eighteen, nineteen, twenty, and twenty-one:

(1) If State law or a court order requires the State to provide education for handicapped children in any disability category in any of these age groups, the State must make a free appropriate public education available to all handicapped children of the same age who have that disability.

(2) If a public agency provides education to non-handicapped children in any of these age groups, it must make a free appropriate public education available to at least a proportionate number of handicapped children of the same age.

(3) If a public agency provides education to 50 percent or more of its handicapped children in any disability category in any of these age groups, it must make a free appropriate public education available to all of its handicapped children of the same age who have that disability.

(4) If a public agency provides education to a handicapped child in any of these age groups, it must make a free appropriate public education available to that child and provide that child and his or her parents all of the rights under Part B of the Act and this part.

(5) A State is not required to make a free appropriate public education available to a handicapped child in one of these age groups if:

(i) State law expressly prohibits, or does not authorize, the expenditure of public funds to provide education to non-handicapped children in that age group; or

(ii) The requirement is inconsistent with a court order which governs the provision of free public education to handicapped children in that State.

(20 U.S.C. 1412(2)(B); Sen. Rept. No. 94-168 p. 19 (1975).)

Comment. 1. The requirement to make free appropriate public education available applies to all handicapped children within the State who are in the age ranges required under section 121a.300 and who need special education and related services. This includes handicapped children already in school and children with less severe handicaps, who are not covered under the priorities under § 121a.321.

2. In order to be in compliance with § 121a.300, each State must insure that the requirement to identify, locate, and evaluate all handicapped children is fully implemented by public agencies throughout the State. This means that before September 1, 1978, every child who has been referred or is on a waiting list for evaluation (including children in school as well as those not receiving an education) must be evaluated in accordance with §§ 121a.530–121a.532 of Subpart E. If, as a result of the evaluation, it is determined that a child needs special education and related services, an individualized education program must be developed for the child by September 1, 1978, and all other applicable requirements of this part must be met.

3. The requirement to identify, locate, and evaluate handicapped children (commonly referred to as the "child find system") was enacted on August 21, 1974, under Pub. L. 93-380. While each State needed time to establish and implement its child find system, the four year period between August 21, 1974, and September 1, 1978, is considered to be sufficient to insure that the system is fully operational and effective on a State-wide basis.

Under the statute, the age range for the child find requirement (0–21) is greater than the mandated age range for providing free appropriate public education (FAPE). One reason for the broader age requirement under "child find" is to enable States to be aware of and plan for younger children who will require special education and related services. It also ties in with the full educational opportunity goal requirement, which has the same age range as child find. Moreover, while a State is not required to provide "FAPE" to handicapped children below the age ranges mandated under § 121a.300, the State may, at its discretion, extend services to those children, subject to the requirements on priorities under §§ 121a.320–121a.324.

§ 121a.301 Free appropriate public education—methods and payments.

(a) Each State may use whatever State, local, Federal, and private sources of support are available in the State to meet the requirements of this part. For example, when it is necessary to place a handicapped child in a residential facility, a State could use joint agreements between the agencies involved for sharing the cost of that placement.

(b) Nothing in this part relieves an insurer or similar third party from an otherwise valid obligation to provide or to pay for services provided to a handicapped child.

(20 U.S.C. 1401(18); 1412(2)(B).)

§ 121a.302 *Residential placement.*

If placement in a public or private residential program is necessary to provide special education and related services to a handicapped child, the program, including non-medical care and room and board, must be at no cost to the parents of the child.

(20 U.S.C. 1412(2)(B); 1413(a)(4)(B).)

Comment. This requirement applies to placements which are made by public agencies for educational purposes, and includes placements in State-operated schools for the handicapped, such as a State school for the deaf or blind.

§ 121a.303 Proper functioning of hearing aids.

Each public agency shall insure that the hearing aids worn by deaf and hard of hearing children in school are functioning properly.

(20 U.S.C. 1412(2)(B).)

Comment. The report of the House of Representatives on the 1978 appropriation bill includes the following statement regarding hearing aids:

In its report on the 1976 appropriation bill the Committee expressed concern about the condition of hearing aids worn by children in public schools. A study done at the Committee's direction by the Bureau of Education for the Handicapped reveals that up to one-third of the hearing aids are malfunctioning. Obviously, the Committee expects the Office of Education will ensure that hearing impaired school children are receiving adequate professional assessment, follow-up and services.

(House Report No. 94-381, p. 67 (1977).)

§ 121a.304 Full educational opportunity goal.

(a) Each State educational agency shall insure that each public agency establishes and implements a goal of providing full educational opportunity to all handicapped children in the area served by the public agency.

(b) Subject to the priority requirements under §§ 121a.320–121a.324, a State or local educational agency may use Part B funds to provide facilities, personnel, and services necessary to meet the full educational opportunity goal.

(20 U.S.C. 1412(2)(A); 1414(a)(1)(C).)

Comment. In meeting the full educational opportunity goal, the Congress also encouraged local educational agencies to include artistic and cultural activities in programs supported under this part, subject to the priority requirements under §§ 121a.320–121a.324. This point is addressed in the following statements from the Senate Report on Pub. L. 94-142:

The use of the arts as a teaching tool for the handicapped has long been recognized as a viable, effective way not only of teaching special skills, but also of reaching youngsters who had otherwise been unteachable. The Committee envisions that programs under this bill could well include an arts component and, indeed, urges that local educational agencies include the arts in programs for the handicapped funded under this Act. Such a program could cover both appreciation of the arts by the handicapped youngsters, and the utilization of the arts as a teaching tool per se.

Museum settings have often been another effective tool in the teaching of handicapped children. For example, the Brooklyn Museum has been a leader in developing exhibits utilizing the heightened tactile sensory skill of the blind. Therefore, in light of the national policy concerning the use of museums in Federally-supported education programs enunciated in the Education Amendments of 1974, the Committee also urges local educational agencies to include museums in programs for the handicapped funded under this Act.

(Senate Report No. 94-168, p. 13 (1975).)

§ 121a.305 Program options.

Each public agency shall take steps to insure that its handicapped children have available to them the variety of educational programs and services available to non-handicapped children in the

area served by the agency, including art, music, industrial arts, consumer and homemaking education, and vocational education.

(20 U.S.C. 1412(2)(A); 1414(a)(1)(C).)

Comment. The above list of program options is not exhaustive, and could include any program or activity in which nonhandicapped students participate. Moreover, vocational education programs must be specially designed if necessary to enable a handicapped student to benefit fully from those programs; and the set-aside funds under the Vocational Education Act of 1963, as amended by Pub. L. 94-482, may be used for this purpose. Part B funds may also be used, subject to the priority requirements under §§ 121a.320-121a.324.

§ 121a.306 Nonacademic services.

(a) Each public agency shall take steps to provide nonacademic and extracurricular services and activities in such manner as is necessary to afford handicapped children an equal opportunity for participation in those services and activities.

(b) Nonacademic and extracurricular services and activities may include counseling services, athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the public agency, referrals to agencies which provide assistance to handicapped persons, and employment of students, including both employment by the public agency and assistance in making outside employment available.

(20 U.S.C. 1412(2)(A); 1414(a)(1)(C).)

§ 121a.307 Physical education.

(a) *General.* Physical education services, specially designed if necessary, must be made available to every handicapped child receiving a free appropriate public education.

(b) *Regular physical education.* Each handicapped child must be afforded the opportunity to participate in the regular physical education program available to non-handicapped children unless:

(1) The child is enrolled full time in a separate facility; or

(2) The child needs specially designed physical education, as prescribed in the child's individualized education program.

(c) *Special physical education.* If specially designed physical education is prescribed in a child's individualized education program, the public agency responsible for the education of that child shall provide the services directly, or make arrangements for it to be provided through other public or private programs.

(d) *Education in separate facilities.* The public agency responsible for the education of a handicapped child who is enrolled in a separate facility shall insure that the child receives appropriate physical education services in compliance with paragraphs (a) and (c) of this section.

(20 U.S.C. 1401(16); 1412(5)(B); 1414(a)(6).)

Comment. The Report of the House of Representatives on Pub. L. 94-142 includes the following statement regarding physical education:

Special education as set forth in the Committee bill includes instruction in physical education, which is provided as a matter of course to all non-handicapped children enrolled in public elementary and secondary schools. The Committee is concerned that although these services are available to and required of all children in our school systems, they are often viewed as a luxury for handicapped children.

* * * * *

The Committee expects the Commissioner of Education to take whatever action is necessary to assure that physical education services are available to all handicapped children, and has specifically included physical education within the definition of special education to make clear that the Committee expects such services, specially designed where necessary, to be provided as an integral part of the educational program of every handicapped child.

(House Report No. 94-332, p. 9 (1975).)

PRIORITIES IN THE USE OF PART B FUNDS

§ 121a.320 Definitions of "first priority children" and "second priority children."

For the purposes of §§ 121a.321-121a.324, the term:

(a) "First priority children" means handicapped children who:

(1) Are in an age group for which the State must make available free appropriate public education under § 121a.300; and

(2) Are not receiving any education.

(b) "Second priority children" means handicapped children, within each disability, with the most severe handicaps who are receiving an inadequate education.

(20 U.S.C. 1412(3).)

Comment. After September 1, 1978, there should be no second priority children, since States must insure, as a condition of receiving Part B funds for fiscal year 1979, that all handicapped children will have available a free appropriate public education by that date.

NOTE.—The term "free appropriate public education," as defined in § 121a.4 of Subpart A, means "special education and related services which * * * are provided in conformity with an individualized education program * * *."

How "First priority children" will continue to be found by the State after September 1, 1978 through on-going efforts to identify, locate, and evaluate all handicapped children.

§ 121a.321 Priorities.

(a) Each State and local educational agency shall use funds provided under Part B of the Act in the following order of priorities:

(1) To provide free appropriate public education to first priority children, including the identification, location, and evaluation of first priority children.

(2) To provide free appropriate public education to second priority children, including the identification, location, and evaluation of second priority children.

(3) To meet the other requirements in this part.

(b) The requirements of paragraph (a) of this section do not apply to funds which the State uses for administration under § 121a.620.

(20 U.S.C. 1411 (b)(1)(B), (b)(2)(B), (c)(1)(B), (c)(2)(A)(ii).

(c) State and local educational agencies may not use funds under Part B of the Act for preservice training.

(20 U.S.C. 1413(a)(3); Senate Report No. 94-168, p. 34 (1975).)

Comment. Note that a State educational agency as well as local educational agencies must use Part B funds (except the portion used for State administration) for the priorities. A State may have to set aside a portion of its Part B allocment to be able to serve newly-identified first priority children.

After September 1, 1978, Part B funds may be used:

(1) To continue supporting child identification, location, and evaluation activities;

(2) To provide free appropriate public education to newly identified first priority children;

(3) To meet the full educational opportunities goal required under section 121a.304, including employing additional personnel and providing inservice training, in order to increase the level, intensity and quality of services provided to individual handicapped children; and

(4) To meet the other requirements of Part B.

§ 121a.322 First priority children—school year 1977-1978.

(a) In school year 1977-1978, if a major component of a first priority child's proposed educational program is not available (for example, there is no qualified teacher), the public agency responsible for the child's education shall:

(1) Provide an interim program of services for the child; and

(2) Develop an individualized education program for full implementation no later than September 1, 1978.

(b) A local educational agency may use Part B funds for training or other support services in school year 1977-1978 only if all of its first priority children have available to them at least an interim program of services.

(c) A State educational agency may use Part B funds for training or other support services in school year 1977-1978 only if all first priority children in the State have available to them at least an interim program of services.

(20 U.S.C. 1411 (b), (c).)

Comment. This provision is intended to make it clear that a State or local educational agency may not delay placing a previously unserved (first priority) child until it has, for example, implemented an inservice training program. The child must be placed. After the child is in at least an interim program, the State or local educational agency may use Part B funds for training or other support services needed to provide that child with a free appropriate public education.

§ 121a.323 Services to other children.

If a State or a local educational agency is providing free appropriate public education to all of its first priority children,

that State or agency may use funds provided under Part B of the Act:

(a) To provide free appropriate public education to handicapped children who are not receiving any education and who are in the age groups not covered under § 121a.300 in that State; or

(b) To provide free appropriate public education to second priority children; or

(c) Both.

(20 U.S.C. 1411(b)(1)(E), (b)(2)(E), (c)(2)(A)(ii).)

§ 121a.324 Application of local educational agency to use funds for the second priority.

A local educational agency may use funds provided under Part B of the Act for second priority children, if it provides assurance satisfactory to the State educational agency in its application (or an amendment to its application):

(a) That all first priority children have a free appropriate public education available to them;

(b) That the local educational agency has a system for the identification, location, and evaluation of handicapped children, as described in its application; and

(c) That whenever a first priority child is identified, located, and evaluated, the local educational agency makes available a free appropriate public education to the child.

(20 U.S.C. 1411 (b)(1)(E), (c)(1)(E); 1414 (a)(1)(C)(ii).)

Individualized Education Programs

§ 121a.340 Definition.

As used in this part, the term "individualized education program" means a written statement for a handicapped child that is developed and implemented in accordance with §§ 121a.341–121a.349.

(20 U.S.C. 1402(19).)

§ 121a.341 State educational agency responsibility.

(a) *Public agencies.* The State educational agency shall insure that each public agency develops and implements an individualized education program for each of its handicapped children.

(b) *Private schools and facilities.* The State educational agency shall insure that an individualized education program is developed and implemented for each handicapped child who:

(1) Is placed in or referred to a private school or facility by a public agency; or

(2) Is enrolled in a parochial or other private school and receives special education or related services from a public agency.

(20 U.S.C. 1412 (4), (6); 1412(6)(4).)

Comment. This section applies to all public agencies, including other State agencies (e.g., departments of mental health and welfare), which provide special education to a handicapped child either directly, by contract or through other arrangements. Thus, if a State welfare agency contracts with a private school or facility to provide special education to a handicapped child, that agency would be responsible for insuring that an individualized education program is developed for the child.

§ 121a.342 When individualized education programs must be in effect.

(a) On October 1, 1977, and at the beginning of each school year thereafter, each public agency shall have in effect an individualized education program for every handicapped child who is receiving special education from that agency.

(b) An individualized education program must:

(1) Be in effect before special education and related services are provided to a child; and

(2) Be implemented as soon as possible following the meetings under § 121a.343.

(20 U.S.C. 1412 (2)(B), (4), (6); 1414(a)(5); Pub. L. 94-142, Sec. 8(c) (1975).)

Comment. Under paragraph (b)(2), it is expected that a handicapped child's individualized education program (IEP) will be implemented immediately following the meetings under § 121a.343. An exception to this would be (1) when the meetings occur during the summer or a vacation period, or (2) where there are circumstances which require a short delay (e.g., working out transportation arrangements). However, there can be no undue delay in providing special education and related services to the child.

§ 121a.343 Meetings.

(a) *General.* Each public agency is responsible for initiating and conducting meetings for the purpose of developing, reviewing, and revising a handicapped child's individualized education program.

(b) *Handicapped children currently served.* If the public agency has determined that a handicapped child will receive special education during school year 1977–1978, a meeting must be held early enough to insure that an individualized education program is developed by October 1, 1977.

(c) *Other handicapped children.* For a handicapped child who is not included under paragraph (b) of this section, a meeting must be held within thirty calendar days of a determination that the child needs special education and related services.

(d) *Review.* Each public agency shall initiate and conduct meetings to periodically review each child's individualized education program and if appropriate revise its provisions. A meeting must be held for this purpose at least once a year.

(20 U.S.C. 1412 (2)(B), (4), (6); 1414(a)(5).)

Comment. The dates on which agencies must have individualized education programs (IEPs) in effect are specified in § 121a.342 (October 1, 1977, and the beginning of each school year thereafter). However, except for new handicapped children (i.e., those evaluated and determined to need special education after October 1, 1977), the timing of meetings to develop, review, and revise IEPs is left to the discretion of each agency.

In order to have IEPs in effect by the dates in § 121a.342, agencies could hold meetings at the end of the school year or during the summer preceding those dates. In meeting the October 1, 1977 timeline, meetings could be conducted up through the October 1 date. Thereafter, meetings may be held any time throughout the year, as long as IEPs are in effect at the beginning of each school year.

The statute requires agencies to hold a meeting at least once each year in order to review, and if appropriate revise, each child's IEP. The timing of these meetings could be on the anniversary date of the last IEP meeting on the child, but this is left to the discretion of the agency.

§ 121a.344 Participants in meetings.

(a) *General.* The public agency shall insure that each meeting includes the following participants:

(1) A representative of the public agency, other than the child's teacher, who is qualified to provide, or supervise the provision of, special education.

(2) The child's teacher.

(3) One or both of the child's parents, subject to § 121a.345.

(4) The child, where appropriate.

(5) Other individuals at the discretion of the parent or agency.

(b) *Evaluation personnel.* For a handicapped child who has been evaluated for the first time, the public agency shall insure:

(1) That a member of the evaluation team participates in the meeting; or

(2) That the representative of the public agency, the child's teacher, or some other person is present at the meeting, who is knowledgeable about the evaluation procedures used with the child and is familiar with the results of the evaluation.

(20 U.S.C. 1401(19); 1412 (2)(B), (4), (6); 1414(a)(5).)

Comment. 1. In deciding which teacher will participate in meetings on a child's individualized education program, the agency may wish to consider the following possibilities:

(a) For a handicapped child who is receiving special education, the "teacher" could be the child's special education teacher, if the child's handicap is a speech impairment, the "teacher" could be the speech-language pathologist.

(b) For a handicapped child who is being considered for placement in special education, the "teacher" could be the child's regular teacher, or a teacher qualified to provide education in the type of program in which the child may be placed, or both.

(c) If the child is not in school or has more than one teacher, the agency may designate which teacher will participate in the meeting.

2. Either the teacher or the agency representative should be qualified in the area of the child's suspected disability.

3. For a child whose primary handicap is a speech impairment, the evaluation personnel participating under paragraph (b)(1) of this section would normally be the speech-language pathologist.

§ 121a.345 Parent participation.

(a) Each public agency shall take steps to insure that one or both of the parents of the handicapped child are present at each meeting or are afforded the opportunity to participate, including:

(1) Notifying parents of the meeting early enough to insure that they will have an opportunity to attend; and

(2) Scheduling the meeting at a mutually agreed on time and place.

(b) The notice under paragraph (a)(1) of this section must indicate the pur-

pose, time, and location of the meeting, and who will be in attendance.

(c) If neither parent can attend, the public agency shall use other methods to insure parent participation, including individual or conference telephone calls.

(d) A meeting may be conducted without a parent in attendance if the public agency is unable to convince the parents that they should attend. In this case the public agency must have a record of its attempts to arrange a mutually agreed on time and place such as:

(1) Detailed records of telephone calls made or attempted and the results of those calls.

(2) Copies of correspondence sent to the parents and any responses received, and

(3) Detailed records of visits made to the parent's home or place of employment and the results of those visits.

(e) The public agency shall take whatever action is necessary to insure that the parent understands the proceedings at a meeting, including arranging for an interpreter for parents who are deaf or whose native language is other than English.

(f) The public agency shall give the parent, on request, a copy of the individualized education program.

(20 U.S.C. 1401(19); 1412 (2)(B), (4), (6); 1414(a)(5).)

Comment. The notice in paragraph (a) could also inform parents that they may bring other people to the meeting. As indicated in paragraph (c), the procedure used to notify parents (whether oral or written or both) is left to the discretion of the agency, but the agency must keep a record of its efforts to contact parents.

§ 121a.346 Content of individualized education program.

The individualized education program for each child must include:

(a) A statement of the child's present levels of educational performance;

(b) A statement of annual goals, including short term instructional objectives;

(c) A statement of the specific special education and related services to be provided to the child, and the extent to which the child will be able to participate in regular educational programs;

(d) The projected dates for initiation of services and the anticipated duration of the services; and

(e) Appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether the short term instructional objectives are being achieved.

(20 U.S.C. 1401(19); 1412 (2)(B), (4), (6), 1414(a)(5); Senate Report No. 94-168, p. 11 (1975).)

§ 121a.347 Private school placements.

(a) *Developing individualized education programs.* (1) Before a public agency places a handicapped child in, or refers a child to, a private school or facility, the agency shall initiate and conduct a meeting to develop an individualized education program for the child in accordance with § 121a.343.

(2) The agency shall insure that a representative of the private school facility attends the meeting. If the representative cannot attend, the agency shall use other methods to insure participation by the private school or facility, including individual or conference telephone calls.

(3) The public agency shall also develop an individualized educational program for each handicapped child who was placed in a private school or facility by the agency before the effective date of these regulations.

(b) *Reviewing and revising individualized education programs.* (1) After a handicapped child enters a private school or facility, any meetings to review and revise the child's individualized education program may be initiated and conducted by the private school or facility at the discretion of the public agency.

(2) If the private school or facility initiates and conducts these meetings, the public agency shall insure that the parents and an agency representative:

(i) Are involved in any decision about the child's individualized education program; and

(ii) Agree to any proposed changes in the program before those changes are implemented.

(c) *Responsibility.* Even if a private school or facility implements a child's individualized education program, responsibility for compliance with this part remains with the public agency and the State educational agency.

(20 U.S.C. 1413(a)(4)(B).)

§ 121a.348 Handicapped children in parochial or other private schools.

If a handicapped child is enrolled in a parochial or other private school and receives special education or related services from a public agency, the public agency shall:

(a) Initiate and conduct meetings to develop, review, and revise an individualized education program for the child, in accordance with § 121a.343; and

(b) Insure that a representative of the parochial or other private school attends each meeting. If the representative cannot attend, the agency shall use other methods to insure participation by the private school, including individual or conference telephone calls.

(20 U.S.C. 1413(a)(4)(A).)

§ 121a.349 Individualized education program—accountability.

Each public agency must provide special education and related services to a handicapped child in accordance with an individualized education program. However, Part B of the Act does not require that any agency, teacher, or other person be held accountable if a child does not achieve the growth projected in the annual goals and objectives.

(20 U.S.C. 1412(2)(B); 1414(a) (5), (6); Cong. Rec. at H 7169 (daily ed., July 21, 1975).)

Comment. This section is intended to relieve concerns that the individualized education program constitutes a guarantee by the public agency and the teacher that a child will progress at a specified rate. However, this section does not relieve agencies and teachers from making good faith efforts to assist the child in achieving the objectives and goals listed in the individualized education program. Further, the section does not limit a parent's right to complain and ask for revisions of the child's program, or to invoke due process procedures, if the parent feels that these efforts are not being made.

DIRECT SERVICE BY THE STATE EDUCATIONAL AGENCY

§ 121a.360 Use of local educational agency allocation for direct services.

(a) A State educational agency may not distribute funds to a local educational agency, and shall use those funds to insure the provision of a free appropriate public education to handicapped children residing in the area served by the local educational agency, if the local educational agency, in any fiscal year:

(1) Is entitled to less than $7,500 for that fiscal year (beginning with fiscal year 1978);

(2) Does not submit an application that meets the requirements of §§ 121a.220–121a.240;

(3) Is unable or unwilling to establish and maintain programs of free appropriate public education;

(4) Is unable or unwilling to be consolidated with other local educational agencies in order to establish and maintain those programs; or

(5) Has one or more handicapped children who can best be served by a regional or State center designed to meet the needs of those children.

(b) In meeting the requirements of paragraph (a) of this section, the State educational agency may provide special education and related services directly, by contract, or through other arrangements.

(c) The excess cost requirements under §§ 121a.182–121a.186 do not apply to the State educational agency.

(20 U.S.C. 1411(c)(4); 1413(b); 1414(d).)

Comment. Section 121a.360 is a combination of three provisions in the statute (Sections 611(c)(4), 613(b), and 614(d)). This section focuses mainly on the State's administration and use of local entitlements under Part B.

The State educational agency, as a recipient of Part B funds is responsible for insuring that all public agencies in the State comply with the provisions of the Act, regardless of whether they receive Part B funds. If a local educational agency elects not to apply for its Part B entitlement, the State would be required to use those funds to insure that a free appropriate public education ("FAPE") is made available to children residing in the area served by that local agency. However, if the local entitlement is not sufficient for this purpose, additional State or local funds would have to be expended in order to insure that "FAPE" and the other requirements of the Act are met.

Moreover, if the local educational agency is the recipient of any other Federal funds, it would have to be in compliance with Subpart D of the regulations for section 504 of the Rehabilitation Act of 1973 (45 CFR Part 84). It should be noted that the term "FAPE" has different meanings under Part B and section 504. For example, under Part

B. "FAPE" is a statutory term which requires special education and related services to be provided in accordance with an individualized education program (IEP). However, under section 504, each recipient must provide an education which includes services that are "designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met • • •" These regulations state that implementation of an IEP in accordance with Part B is one means of meeting the "FAPE" requirement.

§ 121a.361 Nature and location of services.

The State educational agency may provide special education and related services under § 121a.360(a) in the manner and at the location it considers appropriate. However, the manner in which the education and services are provided must be consistent with the requirements of this part (including the least restrictive environment provisions in §§ 121a.550–121a.556 of Subpart E).

(20 U.S.C. 1414(d).)

§ 121a.370 Use of State educational agency allocation for direct and support services.

(a) The State shall use the portion of its allocation it does not use for administration to provide support services and direct services in accordance with the priority requirements under §§ 121a.320–121a.324.

(b) For the purposes of paragraph (a) of this section:

(1) "Direct services" means services provided to a handicapped child by the State directly, by contract, or through other arrangements.

(2) "Support services" includes implementing the comprehensive system of personnel development under §§ 121a.380–121a.388, recruitment and training of hearing officers and surrogate parents, and public information and parent training activities relating to a free appropriate public education for handicapped children.

(20 U.S.C. 1411(b)(3), (c)(2).)

§ 121a.371 State matching.

Beginning with the period July 1, 1978–June 30, 1979, and for each following year, the funds that a State uses for direct and support services under § 121a.370 must be matched on a program basis by the State from funds other than Federal funds. This requirement does not apply to funds that the State uses under § 121a.360.

(20 U.S.C. 1411(c)(2)(B). (c)(4)(B).)

Comment. The requirement in § 121a.371 would be satisfied if the State can demonstrate that the amount of State funds expended for each major program area (e.g., the comprehensive system of personnel development) is at least equal to the expenditure of Federal funds in that program area.

§ 121a.372 Applicability of nonsupplanting requirement.

Beginning with funds appropriated for Fiscal Year 1979 and for each following Fiscal Year, the requirement in section 613(a)(9) of the Act, which prohibits supplanting with Federal funds, does not apply to funds that the State uses from its allocation under § 121a.370(a) of Subpart G for administration, direct services, or support services.

(20 U.S.C. 1471(c)(3).)

COMPREHENSIVE SYSTEM OF PERSONNEL DEVELOPMENT

§ 121a.380 Scope of system.

Each annual program plan must include a description of programs and procedures for the development and implementation of a comprehensive system of personnel development which includes:

(a) The inservice training of general and special educational instructional, related services, and support personnel;

(b) Procedures to insure that all personnel necessary to carry out the purposes of the Act are qualified (as defined in § 121a.12 of Subpart A) and that activities sufficient to carry out this personnel development plan are scheduled; and

(c) Effective procedures for acquiring and disseminating to teachers and administrators of programs for handicapped children significant information derived from educational research, demonstration, and similar projects, and for adopting, where appropriate, promising educational practices and materials developed through those projects.

(20 U.S.C. 1413(a)(3).)

§ 121a.381 Participation of other agencies and institutions.

(a) The State educational agency must insure that all public and private institutions of higher education, and other agencies and organizations (including representatives of handicapped, parent, and other advocacy organizations) in the State which have an interest in the preparation of personnel for the education of handicapped children, have an opportunity to participate fully in the development, review, and annual updating of the comprehensive system of personnel development.

(b) The annual program plan must describe the nature and extent of participation under paragraph (a) of this section and must describe responsibilities of the State educational agency, local educational agencies, public and private institutions of higher education, and other agencies:

(1) With respect to the comprehensive system as a whole, and

(2) With respect to the personnel development plan under § 121a.382.

(20 U.S.C. 1412(7)(A); 1413(a)(3).)

§ 121a.382 Inservice training.

(a) As used in this section, "inservice training" means any training other than that received by an individual in a full-time program which leads to a degree.

(b) Each annual program plan must provide that the State educational agency:

(1) Conducts an annual needs assessment to determine if a sufficient number of qualified personnel are available in the State; and

(2) Initiates inservice personnel development programs based on the assessed needs of State-wide significance related to the implementation of the Act.

(c) Each annual program plan must include the results of the needs assessment under paragraph (b)(1) of this section, broken out by need for new personnel and need for retrained personnel.

(d) The State educational agency may enter into contracts with institutions of higher education, local educational agencies or other agencies, institutions, or organizations (which may include parent, handicapped, or other advocacy organizations), to carry out:

(1) Experimental or innovative personnel development programs;

(2) Development or modification of instructional materials; and

(3) Dissemination of significant information derived from educational research and demonstration projects.

(e) Each annual program plan must provide that the State educational agency insures that ongoing inservice training programs are available to all personnel who are engaged in the education of handicapped children, and that these programs include:

(1) The use of incentives which insure participation by teachers (such as released time, payment for participation, options for academic credit, salary step credit, certification renewal, or updating professional skills);

(2) The involvement of local staff; and

(3) The use of innovative practices which have been found to be effective.

(f) Each annual program plan must:

(1) Describe the process used in determining the inservice training needs of personnel engaged in the education of handicapped children;

(2) Identify the areas in which training is needed (such as individualized education programs, non-discriminatory testing, least restrictive environment, procedural safeguards, and surrogate parents);

(3) Specify the groups requiring training (such as special teachers, regular teachers, administrators, psychologists, speech-language pathologists, audiologists, physical education teachers, therapeutic recreation specialists, physical therapists, occupational therapists, medical personnel, parents, volunteers, hearing officers, and surrogate parents);

(4) Describe the content and nature of training for each area under paragraph (f)(2) of this section;

(5) Describe how the training will be provided in terms of (i) geographical scope (such as Statewide, regional or local), and (ii) staff training source (such as college and university staffs, State and local educational agency personnel, and non-agency personnel);

(6) Specify: (i) The funding sources to be used, and

(ii) The time frame for providing it; and

(7) Specify procedures for effective evaluation of the extent to which program objectives are met.

(20 U.S.C. 1413(a)(3).)

§ 121a.383 Personnel development plan.

Each annual program plan must: (a) Include a personnel development plan which provides a structure for personnel planning and focuses on preservice and inservice education needs;

(b) Describe the results of the needs assessment under § 121a.382(b)(1) with respect to identifying needed areas of training, and assigning priorities to those areas; and

(c) Identify the target populations for personnel development, including general education and special education instructional and administrative personnel, support personnel, and other personnel (such as paraprofessionals, parents, surrogate parents, and volunteers).

(20 U.S.C. 1413(a)(3).)

§ 121a.384 Dissemination.

(a) Each annual program plan must include a description of the State's procedures for acquiring, reviewing, and disseminating to general and special educational instructional and support personnel, administrators of programs for handicapped children, and other interested agencies and organizations (including parent, handicapped, and other advocacy organizations) significant information and promising practices derived from educational research, demonstration, and other projects.

(b) Dissemination includes:

(1) Making those personnel, administrators, agencies, and organizations aware of the information and practices;

(2) Training designed to enable the establishment of innovative programs and practices targeted on identified local needs; and

(3) Use of instructional materials and other media for personnel development and instructional programming.

(20 U.S.C. 1413(a)(3).)

§ 121a.385 Adoption of educational practices.

(a) Each annual program plan must provide for a statewide system designed to adopt, where appropriate, promising educational practices and materials proven effective through research and demonstration.

(b) Each annual program plan must provide for thorough reassessment of educational practices used in the State.

(c) Each annual program plan must provide for the identification of State, local, and regional resources (human and material) which will assist in meeting the State's personnel preparation needs.

(20 U.S.C. 1413(a)(3).)

§ 121a.386 Evaluation.

Each annual program plan must include:

(a) Procedures for evaluating the overall effectiveness of:

(1) The comprehensive system of personnel development in meeting the needs for personnel, and

(2) The procedures for administration of the system; and

(b) A description of the monitoring activities that will be undertaken to assure the implementation of the comprehensive system of personnel development.

(20 U.S.C. 1413(a)(3).)

§ 121a.387 Technical assistance to local educational agencies.

Each annual program plan must include a description of technical assistance that the State educational agency gives to local educational agencies in their implementation of the State's comprehensive system of personnel development.

(20 U.S.C. 1413(a)(3).)

Subpart D—Private Schools

HANDICAPPED CHILDREN IN PRIVATE SCHOOLS PLACED OR REFERRED BY PUBLIC AGENCIES

§ 121a.400 Applicability of §§ 121a.401–121a.403.

Sections 121a.401–121a.403 apply only to handicapped children who are or have been placed in or referred to a private school or facility by a public agency as a means of providing special education and related services.

(20 U.S.C. 1413(a)(4)(B).)

§ 121a.401 Responsibility of State educational agency.

Each State educational agency shall insure that a handicapped child who is placed in or referred to a private school or facility by a public agency:

(a) Is provided special education and related services:

(1) In conformance with an individualized education program which meets the requirements under §§ 121a.340–121a.349 of Subpart C;

(2) At no cost to the parents; and

(3) At a school or facility which meets the standards that apply to State and local educational agencies (including the requirements in this part); and

(b) Has all of the rights of a handicapped child who is served by a public agency.

(20 U.S.C. 1413(a)(4)(B).)

§ 121a.402 Implementation by State educational agency.

In implementing § 121a.401, the State educational agency shall:

(a) Monitor compliance through procedures such as written reports, on-site visits, and parent questionnaires;

(b) Disseminate copies of applicable standards to each private school and facility to which a public agency has referred or placed a handicapped child; and

(c) Provide an opportunity for those private schools and facilities to participate in the development and revision of State standards which apply to them.

(20 U.S.C. 1413(a)(4)(B).)

§ 121a.403 Placement of children by parents.

(a) If a handicapped child has available a free appropriate public education and the parents choose to place the child in a private school or facility, the public agency is not required by this part to pay for the child's education at the private school or facility. However, the public agency shall make services available to the child as provided under §§ 121a.450–121a.460.

(b) Disagreements between a parent and a public agency regarding the availability of a program appropriate for the child, and the question of financial responsibility, are subject to the due process procedures under §§ 121a.500–121a.514 of Subpart E.

(20 U.S.C. 1412(2)(B); 1415).)

HANDICAPPED CHILDREN IN PRIVATE SCHOOLS NOT PLACED OR REFERRED BY PUBLIC AGENCIES

§ 121a.450 Applicability of §§ 121a.451–121a.460.

As used in §§ 121a.451–121a.460, "private school handicapped children" means handicapped children enrolled in private schools or facilities other than handicapped children covered under §§ 121a.400–121a.403.

(20 U.S.C. 1413(a)(4)(A).)

§ 121a.451 State educational agency responsibility.

The State educational agency shall insure that:

(a) To the extent consistent with their number and location in the State, provision is made for the participation of private school handicapped children in the program assisted or carried out under this part by providing them with special education and related services; and

(b) The other requirements in §§ 121a.452–121a.460 are met.

(20 U.S.C. 1413(a)(4)(A).)

§ 121a.452 Local educational agency responsibility.

(a) Each local educational agency shall provide special education and related services designed to meet the needs of private school handicapped children residing in the jurisdiction of the agency.

(b) Each local educational agency shall provide private school handicapped children with genuine opportunities to participate in special education and related services consistent with the number of those children and their needs.

(20 U.S.C. 1413(a)(4)(A); 1414(a)(6).)

§ 121a.453 Determination of needs, number of children, and types of services.

The needs of private school handicapped children, the number of them who will participate under this part, and the types of special education and related services which the local educational agency will provide for them must be determined after consultation with persons knowledgeable of the needs of these

children, on a basis comparable to that used in providing for the participation under this part of handicapped children enrolled in public schools.

(20 U.S.C. 1413(a)(4)(A).)

§ 121a.454 Service arrangements.

Services to private school handicapped children may be provided through such arrangements as dual enrollment, educational radio and television, and the provision of mobile educational services and equipment.

(20 U.S.C. 1413(a)(4)(A).)

§ 121a.455 Differences in services to private school handicapped children.

A local educational agency may provide special education and related services to private school handicapped children which are different from the special education and related services it provides to public school children, if:

(a) The differences are necessary to meet the special needs of the private school handicapped children, and

(b) The special education and related services are comparable in quality, scope, and opportunity for participation to those provided to public school children with needs of equal importance.

(20 U.S.C. 1413(a)(4)(A); *Wheeler* v. *Barrera*, 417 U.S. 402 (1974).)

§ 121a.456 Personnel.

(a) Public school personnel may be made available in other than public school facilities only to the extent necessary to provide services required by the handicapped children for whose needs those services were designed, and only when those services are not normally provided by the private school.

(b) Each State or local educational agency providing services to children enrolled in private schools shall maintain continuing administrative control and direction over those services.

(c) The services provided with funds under Part B of the Act for eligible handicapped children enrolled in private schools may not include:

(1) The payment of salaries of teachers or other employees of private schools except for services performed outside their regular hours of duty and under public supervision and control; or

(2) The construction of private school facilities.

(20 U.S.C. 1413(a)(4)(A).)

§ 121a.457 Equipment.

(a) Equipment acquired with funds under Part B of the Act may be placed on private school premises for a limited period of time, but the title to and administrative control over all equipment must be retained and exercised by a public agency.

(b) In exercising administrative control, the public agency shall keep records of and account for the equipment, and shall insure that the equipment is used solely for the purposes of the program or project, and remove the equipment from the private school premises if necessary to avoid its being used for other purposes or if it is no longer needed for the purposes of the program or project.

(20 U.S.C. 1413(a)(4)(A).)

§ 121a.458 Prohibition of segregation.

Programs or projects carried out in public facilities, and involving joint participation by eligible handicapped children enrolled in private schools and handicapped children enrolled in public schools, may not include classes that are separated on the basis of school enrollment or the religious affiliations of the children.

(20 U.S.C. 1413(a)(4)(A).)

§ 121a.459 Funds and property not to benefit private schools.

Funds provided under Part B of the Act and property derived from those funds may not inure to the benefit of any private school.

(20 U.S.C. 1413(a)(4)(A).)

§ 121a.460 Existing level of instruction.

Provisions for serving private school handicapped children may not include the financing of the existing level of instruction in the private schools.

(20 U.S.C. 1413(a)(4)(A).)

Subpart E—Procedural Safeguards

Due Process Procedures for Parents and Children

§ 121a.500 Definitions of "consent", "evaluation", and "personally identifiable".

As used in this part: "Consent" means that: (a) The parent has been fully informed of all information relevant to the activity for which consent is sought, in his or her native language, or other mode of communication;

(b) The parent understands and agrees in writing to the carrying out of the activity for which his or her consent is sought, and the consent describes that activity and lists the records (if any) which will be released and to whom; and

(c) The parent understands that the granting of consent is voluntary on the part of the parent and may be revoked at any time.

"Evaluation" means procedures used in accordance with §§ 121a.530–121a.534 to determine whether a child is handicapped and the nature and extent of the special education and related services that the child needs. The term means procedures used selectively with an individual child and does not include basic tests administered to or procedures used with all children in a school, grade, or class.

"Personally identifiable" means that information includes:

(a) The name of the child, the child's parent, or other family member;

(b) The address of the child;

(c) A personal identifier, such as the child's social security number or student number; or

(d) A list of personal characteristics or other information which would make it possible to identify the child with reasonable certainty.

(20 U.S.C. 1415, 1417 (c).)

§ 121a.501 General responsibility of public agencies.

Each State educational agency shall insure that each public agency establishes and implements procedural safeguards which meet the requirements of §§ 121a.500–121a.514.

(20 U.S.C. 1415(a).)

§ 121a.502 Opportunity to examine records.

The parents of a handicapped child shall be afforded, in accordance with the procedures in §§ 121a.562–121a.569 an opportunity to inspect and review all education records with respect to:

(a) The identification, evaluation, and educational placement of the child, and

(b) The provision of a free appropriate public education to the child.

(20 U.S.C. 1415(b)(1)(A).)

§ 121a.503 Independent educational evaluation.

(a) *General.* (1) The parents of a handicapped child have the right under this part to obtain an independent educational evaluation of the child, subject to paragraphs (b) through (e) of this section.

(2) Each public agency shall provide to parents, on request, information about where an independent educational evaluation may be obtained.

(3) For the purposes of this part:

(i) "Independent educational evaluation" means an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question.

(ii) "Public expense" means that the public agency either pays for the full cost of the evaluation or insures that the evaluation is otherwise provided at no cost to the parent, consistent with § 121a.301 of Subpart C.

(b) *Parent right to evaluation at public expense.* A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency. However, the public agency may initiate a hearing under § 121a.506 of this subpart to show that its evaluation is appropriate. If the final decision is that the evaluation is appropriate, the parent still has the right to an independent educational evaluation, but not at public expense.

(c) *Parent initiated evaluations.* If the parent obtains an independent educational evaluation at private expense, the results of the evaluation:

(1) Must be considered by the public agency in any decision made with respect to the provision of a free appropriate public education to the child, and

(2) May be presented as evidence at a hearing under this subpart regarding that child.

(d) *Requests for evaluations by hearing officers.* If a hearing officer requests an independent educational evaluation as part of a hearing, the cost of the evaluation must be at public expense.

(e) *Agency criteria.* Whenever an independent evaluation is at public expense, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, must be the same as the criteria which the public agency uses when it initiates an evaluation.

(20 U.S.C. 1415(b)(1)(A).)

§ 121a.504 Prior notice; parent consent.

(a) *Notice.* Written notice which meets the requirements under § 121a.505 must be given to the parents of a handicapped child a reasonable time before the public agency:

(1) Proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child, or

(2) Refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child.

(b) *Consent.* (1) Parental consent must be obtained before:

(i) Conducting a preplacement evaluation; and

(ii) Initial placement of a handicapped child in a program providing special education and related services.

(2) Except for preplacement evaluation and initial placement, consent may not be required as a condition of any benefit to the parent or child.

(c) *Procedures where parent refuses consent.* (1) Where State law requires parental consent before a handicapped child is evaluated or initially provided special education and related services, State procedures govern the public agency in overriding a parent's refusal to consent.

(2) (i) Where there is no State law requiring consent before a handicapped child is evaluated or initially provided special education and related services, the public agency may use the hearing procedures in §§ 121a.506–121a.508 to determine if the child may be evaluated or initially provided special education and related services without parental consent.

(ii) If the hearing officer upholds the agency, the agency may evaluate or initially provide special education and related services to the child without the parent's consent, subject to the parent's rights under §§ 121a.510—121a.513.

(20 U.S.C. 1415(b)(1) (C), (D).)

Comment. 1. Any changes in a child's special education program, after the initial placement, are not subject to parental consent under Part B, but are subject to the prior notice requirement in paragraph (a) and the individualized education program requirements in Subpart C.

2. Paragraph (c) means that where State law requires parental consent before evaluation or before special education and related services are initially provided, and the parent refuses (or otherwise withholds) consent, State procedures, such as obtaining a court order authorizing the public agency to conduct the evaluation or provide the education and related services, must be followed.

If, however, there is no legal requirement for consent outside of these regulations, the public agency may use the due process procedures under this subpart to obtain a decision to allow the evaluation or services without parental consent. The agency must notify the parent of its actions, and the parent has appeal rights as well as rights at the hearing itself.

§ 121a.505 Content of notice.

(a) The notice under § 121a.504 must include:

(1) A full explanation of all of the procedural safeguards available to the parents under Subpart E;

(2) A description of the action proposed or refused by the agency, an explanation of why the agency proposes or refuses to take the action, and a description of any options the agency considered and the reasons why those options were rejected;

(3) A description of each evaluation procedure, test, record, or report the agency uses as a basis for the proposal or refusal; and

(4) A description of any other factors which are relevant to the agency's proposal or refusal.

(b) The notice must be:

(1) Written in language understandable to the general public, and

(2) Provided in the native language of the parent or other mode of communication used by the parent, unless it is clearly not feasible to do so.

(c) If the native language or other mode of communication of the parent is not a written language, the State or local educational agency shall take steps to insure:

(1) That the notice is translated orally or by other means to the parent in his or her native language or other mode of communication;

(2) That the parent understands the content of the notice, and

(3) That there is written evidence that the requirements in paragraph (c) (1) and (2) of this section have been met.

(20 U.S.C. 1415(b)(1)(D))

§ 121a.506 Impartial due process hearing.

(a) A parent or a public educational agency may initiate a hearing on any of the matters described in § 121a.504(a)(1) and (2).

(b) The hearing must be conducted by the State educational agency or the public agency directly responsible for the education of the child, as determined under State statute, State regulation, or a written policy of the State educational agency.

(c) The public agency shall inform the parent of any free or low-cost legal and other relevant services available in the area if:

(1) The parent requests the information; or

(2) The parent or the agency initiates a hearing under this section.

(20 U.S.C. 1415(b)(2).)

Comment: Many States have pointed to the success of using mediation as an intervening step prior to conducting a formal due process hearing. Although the process of mediation is not required by the statute or these regulations, an agency may wish to suggest mediation in disputes concerning the identification, evaluation, and educational placement of handicapped children, and the provision of a free appropriate public education to those children. Mediations have been conducted by members of State educational agencies or local educational agency personnel who were not previously involved in the particular case. In many cases, mediation leads to resolution of differences between parents and agencies without the development of an adversarial relationship and with minimal emotional stress. However, mediation may not be used to deny or delay a parent's rights under this subpart.

§ 121a.507 Impartial hearing officer.

(a) A hearing may not be conducted:

(1) By a person who is an employee of a public agency which is involved in the education or care of the child, or

(2) By any person having a personal or professional interest which would conflict with his or her objectivity in the hearing.

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

(c) Each public agency shall keep a list of the persons who serve as hearing officers. The list must include a statement of the qualifications of each of those persons.

(20 U.S.C. 1414(b)(2).)

§ 121a.508 Hearing rights.

(a) Any party to a hearing has the right to:

(1) Be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of handicapped children;

(2) Present evidence and confront, cross-examine, and compel the attendance of witnesses;

(3) Prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least five days before the hearing;

(4) Obtain a written or electronic verbatim record of the hearing;

(5) Obtain written findings of fact and decisions. The public agency shall transmit those findings and decisions, after deleting any personally identifiable information, to the State advisory panel established under Subpart F).

(b) Parents involved in hearings must be given the right to:

(1) Have the child who is the subject of the hearing present; and

(2) Open the hearing to the public.

(20 U.S.C. 1415(d).)

§ 121a.509 Hearing decision; appeal.

A decision made in a hearing conducted under this subpart is final, unless

a party to the hearing appeals the decision under § 121a.510 or § 121a.511.

(20 U.S.C. 1415(c).)

§ 121a.510 *Administrative appeal; impartial review.*

(a) If the hearing is conducted by a public agency other than the State educational agency, any party aggrieved by the findings and decision in the hearing may appeal to the State educational agency.

(b) If there is an appeal, the State educational agency shall conduct an impartial review of the hearing. The official conducting the review shall:

(1) Examine the entire hearing record;

(2) Insure that the procedures at the hearing were consistent with the requirements of due process;

(3) Seek additional evidence if necessary. If a hearing is held to receive additional evidence, the rights in § 121a.508 apply;

(4) Afford the parties an opportunity for oral or written argument, or both, at the discretion of the reviewing official;

(5) Make an independent decision on completion of the review; and

(6) Give a copy of written findings and the decision to the parties.

(c) The decision made by the reviewing official is final, unless a party brings a civil action under § 121a.512.

(20 U.S.C. 1415 (c), (d); H. Rep. No. 94-664, at p. 49 (1975).)

Comment. 1. The State educational agency may conduct its review either directly or through another State agency acting on its behalf. However, the State educational agency remains responsible for the final decision on review.

2. All parties have the right to continue to be represented by counsel at the State administrative review level, whether or not the reviewing official determines that a further hearing is necessary. If the reviewing official decides to hold a hearing to receive additional evidence, the other rights in section 121a.508, relating to hearings, also apply.

§ 121a.511 Civil action.

Any party aggrieved by the findings and decision made in a hearing who does not have the right to appeal under § 121a.510 of this subpart, and any party aggrieved by the decision of a reviewing officer under § 121a.510 has the right to bring a civil action under section 615(e)(2) of the Act.

(20 U.S.C. 1415.)

§ 121a.512 Timelines and convenience of hearings and reviews.

(a) The public agency shall insure that not later than 45 days after the receipt of a request for a hearing:

(1) A final decision is reached in the hearing; and

(2) A copy of the decision is mailed to each of the parties.

(b) The State educational agency shall insure that not later than 30 days after the receipt of a request for a review:

(1) A final decision is reached in the review; and

(2) A copy of the decision is mailed to each of the parties.

(c) A hearing or reviewing officer may grant specific extensions of time beyond the periods set out in paragraphs (a) and (b) of this section at the request of either party.

(d) Each hearing and each review involving oral arguments must be conducted at a time and place which is reasonably convenient to the parents and child involved.

(20 U.S.C. 1415.)

§ 121a.513 *Child's status during proceedings.*

(a) *During the pendency of* any administrative *or judicial* proceeding regarding a complaint, *unless the public agency and the parents of the child agree otherwise*, the child involved in the complaint must *remain in* his or her present educational placement.

(b) If the complaint involves an application for initial admission to public school, the child, with the consent of the parents, must be placed in the public school program until the completion of all the proceedings.

(20 U.S.C. 1415(e)(3).)

Comment. Section 121a.513 does not permit a *child's* placement to be changed during a complaint proceeding, unless the parents and agency agree otherwise. While the placement may not be changed, this does not preclude the agency from using its normal procedures for dealing with children who are endangering themselves or others.

§ 121a.514 Surrogate parents.

(a) *General.* Each public agency shall insure that the rights of a child are protected when:

(1) No parent (as defined in § 121a.10) can be identified;

(2) The public agency, after reasonable efforts, cannot discover the whereabouts of a parent; or

(3) The child is a ward of the State under the laws of that State.

(b) *Duty of public agency.* The duty of a public agency under paragraph (a) of this section includes the assignment of an individual to act as a surrogate for the parents. This must include a method (1) for determining whether a child needs a surrogate parent, and (2) for assigning a surrogate parent to the child.

(c) *Criteria for selection of surrogates.* (1) The public agency may select a surrogate parent in any way permitted under State law.

(2) Public agencies shall insure that a person selected as a surrogate:

(i) Has no interest that conflicts with the interests of the child he or she represents; and

(ii) Has knowledge and skills that insure adequate representation of the child.

(d) *Non-employee requirement; compensation.* (1) A person assigned as a surrogate may not be an employee of a public agency which is involved in the education or care of the child.

(2) A person who otherwise qualifies to be a surrogate parent under paragraph (c) and (d)(1) of this section, is not an employee of the agency solely because he or she is paid by the agency to serve as a surrogate parent.

(e) *Responsibilities.* The surrogate parent may represent the child in all matters relating to:

(1) The identification, evaluation, and educational placement of the child, and

(2) The provision of a free appropriate public education to the child.

(20 U.S.C. 1415(b)(1)(B).)

PROTECTION IN EVALUATION PROCEDURES

§ 121a.530 General.

(a) Each State educational agency shall insure that each public agency establishes and implements procedures which meet the requirements of §§ 121a.530–121a.534.

(b) Testing and evaluation materials and procedures used for the purposes of evaluation and placement of handicapped children must be selected and administered so as not to be racially or culturally discriminatory.

(20 U.S.C. 1412(5)(C).)

§ 121a.531 Preplacement evaluation.

Before any action is taken with respect to the initial placement of a handicapped child in a special education program, a full and individual evaluation of the child's educational needs must be conducted in accordance with the requirements of § 121a.532.

(20 U.S.C. 1412(5)(C).)

§ 121a.532 Evaluation procedures.

State and local educational agencies shall insure, at a minimum, that:

(a) Tests and other evaluation materials:

(1) Are provided and administered in the child's native language or other mode of communication, unless it is clearly not feasible to do so;

(2) Have been validated for the specific purpose for which they are used; and

(3) Are administered by trained personnel in conformance with the instructions provided by their producer;

(b) Tests and other evaluation materials include those tailored to assess specific areas of educational need and not merely those which are designed to provide a single general intelligence quotient;

(c) Tests are selected and administered so as best to ensure that when a test is administered to a child with impaired sensory, manual, or speaking skills, the test results accurately reflect the child's aptitude or achievement level or whatever other factors the test purports to measure, rather than reflecting the child's impaired sensory, manual, or speaking skills (except where those

skills are the factors which the test purports to measure);

(d) No single procedure is used as the sole criterion for determining an appropriate educational program for a child; and

(e) The evaluation is made by a multidisciplinary team or group of persons, including at least one teacher or other specialist with knowledge in the area of suspected disability.

(f) The child is assessed in all areas related to the suspected disability, including, where appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities.

(20 U.S.C. 1412(5)(C).)

Comment. Children who have a speech impairment as their primary handicap may not need a complete battery of assessments (e.g., psychological, physical, or adaptive behavior). However, a qualified speech-language pathologist would (1) evaluate each speech impaired child using procedures that are appropriate for the diagnosis and appraisal of speech and language disorders, and (2) where necessary, make referrals for additional assessments needed to make an appropriate placement decision.

§ 121a.533 Placement procedures.

(a) In interpreting evaluation data and in making placement decisions, each public agency shall:

(1) Draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior;

(2) Insure that information obtained from all of these sources is documented and carefully considered;

(3) Insure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and

(4) Insure that the placement decision is made in conformity with the least restrictive environment rules in §§ 121a.550–121a.554.

(b) If a determination is made that a child is handicapped and needs special education and related services, an individualized education program must be developed for the child in accordance with §§ 121a.340–121a.349 of Subpart C.

(20 U.S.C. 1412(5)(C); 1414(a)(5).)

Comment. Paragraph (a)(1) includes a list of examples of sources that may be used by a public agency in making placement decisions. The agency would not have to use all the sources in every instance. The point of the requirement is to insure that more than one source is used in interpreting evaluation data and in making placement decisions. For example, while all of the named sources would have to be used for a child whose suspected disability is mental retardation, they would not be necessary for certain other handicapped children, such as a child who has a severe articulation disorder as his primary handicap. For such a child, the speech-language pathologist in complying with the multisource requirement, might use (1) a standardized test of articulation, and (2) observation of the child's articulation behavior in conversational speech.

§ 121a.534 Reevaluation.

Each State and local educational agency shall insure:

(a) That each handicapped child's individualized education program is reviewed in accordance with §§ 121a.340–121a.349 of Subpart C, and

(b) That an evaluation of the child, based on procedures which meet the requirements under § 121a.532, is conducted every three years or more frequently if conditions warrant or if the child's parent or teacher requests an evaluation.

(20 U.S.C. 1412(5)(C).)

Least Restrictive Environment

§ 121a.550 General.

(a) Each State educational agency shall insure that each public agency establishes and implements procedures which meet the requirements of §§ 121a.550–121a.556.

(b) Each public agency shall insure:

(1) That to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and

(2) That special classes, separate schooling or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

(20 U.S.C. 1412(5)(B); 1414(a)(1)(C)(iv).)

§ 121a.551 Continuum of alternative placements.

(a) Each public agency shall insure that a continuum of alternative placements is available to meet the needs of handicapped children for special education and related services.

(b) The continuum required under paragraph (a) of this section must:

(1) Include the alternative placements listed in the definition of special education under § 121a.13 of Subpart A (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions), and

(2) Make provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement.

(20 U.S.C. 1412(5)(B).)

§ 121a.552 Placements.

Each public agency shall insure that:

(a) Each handicapped child's educational placement:

(1) Is determined at least annually,

(2) Is based on his or her individualized education program, and

(3) Is as close as possible to the child's home;

(b) The various alternative placements included under § 121a.551 are available to the extent necessary to implement the individualized education program for each handicapped child;

(c) Unless a handicapped child's individualized education program requires some other arrangement, the child is educated in the school which he or she would attend if not handicapped; and

(d) In selecting the least restrictive environment, consideration is given to any potential harmful effect on the child or on the quality of services which he or she needs.

(20 U.S.C. 1412(5)(B).)

Comment. Section 121a.552 includes some of the main factors which must be considered in determining the extent to which a handicapped child can be educated with children who are not handicapped. The overriding rule in this section is that placement decisions must be made on an individual basis. The section also requires each agency to have various alternative placements available in order to insure that each handicapped child receives an education which is appropriate to his or her individual needs.

The analysis of the regulations for Section 504 of the Rehabilitation Act of 1973 (45 CFR Part 84—Appendix Paragraph 24) includes several points regarding educational placements of handicapped children which are pertinent to this section:

1. With respect to determining proper placements, the analysis states: "* * * it should be stressed that, where a handicapped child is so disruptive in a regular classroom that the education of other students is significantly impaired, the needs of the handicapped child cannot be met in that environment. Therefore regular placement would not be appropriate to his or her needs * * *"

2. With respect to placing a handicapped child in an alternative setting, the analysis states that among the factors to be considered in placing a child is the need to place the child as close to home as possible. Recipients are required to take this factor into account in making placement decisions. The parent's right to challenge the placement of their child extends not only to placements in special classes or separate schools, but also to placement in a distant school, particularly in a residential program. An equally appropriate education program may exist closer to home; and this factor may be raised by the parent under the due process provisions of this subpart.

§ 121a.553 Nonacademic settings.

In providing or arranging for the provision of nonacademic and extracurricular services and activities, including meals, recess periods, and the services and activities set forth in § 121a.306 of Subpart C, each public agency shall insure that each handicapped child participates with nonhandicapped children in those services and activities to the maximum extent appropriate to the needs of that child.

(20 U.S.C. 1412(5)(B).)

Comment. Section 121a.553 is taken from a new requirement in the final regulations for Section 504 of the Rehabilitation Act of 1973. With respect to this requirement, the analysis of the Section 504 Regulations includes the following statement: "(A new paragraph) specifies that handicapped children must also be provided nonacademic services in an integrated a setting as possible. This requirement is especially important for children whose educational needs necessitate their being solely with other handicapped children during most of each day. To the maximum extent appropriate, children in residential settings are also to be provided

opportunities for participation with other children." (45 CFR Part 84—Appendix. Paragraph 24.)

§ 121a.554 Children in public or private institutions.

Each State educational agency shall make arrangements with public and private institutions (such as a memorandum of agreement or special implementation procedures) as may be necessary to insure that § 121a.550 is effectively implemented.

(20 U.S.C. 1412(5)(B).)

Comment. Under section 612(5)(B) of the statute, the requirement to educate handicapped children with nonhandicapped children also applies to children in public and private institutions or other care facilities. Each State educational agency must insure that each applicable agency and institution in the State implements this requirement. Regardless of other reasons for institutional placement, no child in an institution who is capable of education in a regular public school setting may be denied access to an education in that setting.

§ 121a.555 Technical assistance and training activities.

Each State educational agency shall carry out activities to insure that teachers and administrators in all public agencies:

(a) Are fully informed about their responsibilities for implementing § 121a.550, and

(b) Are provided with technical assistance and training necessary to assist them in this effort.

(20 U.S.C. 1412(5)(B).)

§ 121a.556 Monitoring activities.

(a) The State educational agency shall carry out activities to insure that § 121a.550 is implemented by each public agency.

(b) If there is evidence that a public agency makes placements that are inconsistent with § 121a.550 of this subpart, the State educational agency:

(1) Shall review the public agency's justification for its actions, and

(2) Shall assist in planning and implementing any necessary corrective action.

(20 U.S.C. 1412(5)(B).)

CONFIDENTIALITY OF INFORMATION

§ 121a.560 Definitions.

As used in this subpart:

"Destruction" means physical destruction or removal of personal identifiers from information so that the information is no longer personally identifiable.

"Education records" means the type of records covered under the definition of "education records" in Part 99 of this title (the regulations implementing the Family Educational Rights and Privacy Act of 1974).

"Participating agency" means any agency or institution which collects, maintains, or uses personally identifiable information, or from which information is obtained, under this part.

(20 U.S.C. 1412(2)(D); 1417(c).)

§ 121a.561 Notice to parents.

(a) The State educational agency shall give notice which is adequate to fully inform parents about the requirements under § 121a.128 of Subpart B, including:

(1) A description of the extent to which the notice is given in the native languages of the various population groups in the State;

(2) A description of the children on whom personally identifiable information is maintained, the types of information sought, the methods the State intends to use in gathering the information (including the sources from whom information is gathered), and the uses to be made of the information;

(3) A summary of the policies and procedures which participating agencies must follow regarding storage, disclosure to third parties, retention, and destruction of personally identifiable information; and

(4) A description of all of the rights of parents and children regarding this information, including the rights under section 438 of the General Education Provisions Act and Part 99 of this title (the Family Educational Rights and Privacy Act of 1974, and implementing regulations).

(b) Before any major identification, location, or evaluation activity, the notice must be published or announced in newspapers or other media, or both, with circulation adequate to notify parents throughout the State of the activity.

(20 U.S.C. 1412(2)(D); 1417(c).)

§ 121a.562 Access rights.

(a) Each participating agency shall permit parents to inspect and review any education records relating to their children which are collected, maintained, or used by the agency under this part. The agency shall comply with a request without unnecessary delay and before any meeting regarding an individualized education program or hearing relating to the identification, evaluation, or placement of the child, and in no case more than 45 days after the request has been made.

(b) The right to inspect and review education records under this section includes:

(1) The right to a response from the participating agency to reasonable requests for explanations and interpretations of the records;

(2) The right to request that the agency provide copies of the records containing the information if failure to provide those copies would effectively prevent the parent from exercising the right to inspect and review the records; and

(3) The right to have a representative of the parent inspect and review the records.

(c) An agency may presume that the parent has authority to inspect and review records relating to his or her child unless the agency has been advised that the parent does not have the authority under applicable State law governing such matters as guardianship, separation, and divorce.

(20 U.S.C. 1412(2)(D); 1417(c).)

§ 121a.563 Record of access.

Each participating agency shall keep a record of parties obtaining access to education records collected, maintained, or used under this part (except access by parents and authorized employees of the participating agency), including the name of the party, the date access was given, and the purpose for which the party is authorized to use the records.

(20 U.S.C. 1412(2)(D); 1417(c).)

§ 121a.564 Records on more than one child.

If any education record includes information on more than one child, the parents of those children shall have the right to inspect and review only the information relating to their child or to be informed of that specific information.

(20 U.S.C. 1412(2)(D); 1417(c).)

§ 121a.565 List of types and locations of information.

Each participating agency shall provide parents on request a list of the types and locations of education records collected, maintained, or used by the agency.

(20 U.S.C. 1412(2)(D); 1417(c).)

§ 121a.566 Fees.

(a) A participating education agency may charge a fee for copies of records which are made for parents under this part if the fee does not effectively prevent the parents from exercising their right to inspect and review those records.

(b) A participating agency may not charge a fee to search for or to retrieve information under this part.

(20 U.S.C. 1412(2)(D); 1417(c).)

§ 121a.567 Amendment of records at parent's request.

(a) A parent who believes that information in education records collected, maintained, or used under this part is inaccurate or misleading or violates the privacy or other rights of the child, may request the participating agency which maintains the information to amend the information.

(b) The agency shall decide whether to amend the information in accordance with the request within a reasonable period of time of receipt of the request.

(c) If the agency decides to refuse to amend the information in accordance with the request it shall inform the parent of the refusal, and advise the parent of the right to a hearing under § 121a.568.

(20 U.S.C. 1412(2)(D); 1417(c).)

§ 121a.568 Opportunity for a hearing.

The agency shall, on request, provide an opportunity for a hearing to challenge information in education records to insure that it is not inaccurate, misleading,

or otherwise in violation of the privacy or other rights of the child.

(20 U.S.C. 1412(2)(D); 1417(c).)

§ 121a.569 Result of hearing.

(a) If, as a result of the hearing, the agency decides that the information is inaccurate, misleading or otherwise in violation of the privacy or other rights of the child, it shall amend the information accordingly and so inform the parent in writing.

(b) If, as a result of the hearing, the agency decides that the information is not inaccurate, misleading, or otherwise in violation of the privacy or other rights of the child, it shall inform the parent of the right to place in the records it maintains on the child a statement commenting on the information or setting forth any reasons for disagreeing with the decision of the agency.

(c) Any explanation placed in the records of the child under this section must:

(1) Be maintained by the agency as part of the records of the child as long as the record or contested portion is maintained by the agency; and

(2) If the records of the child or the contested portion is disclosed by the agency to any party, the explanation must also be disclosed to the party.

(20 U.S.C. 1412(2)(D); 1417(c).)

§ 121a.570 Hearing procedures.

A hearing held under § 121a.568 of this subpart must be conducted according to the procedures under § 99.22 of this title.

(20 U.S.C. 1412(2)(D); 1417(c).)

§ 121a.571 Consent.

(a) Parental consent must be obtained before personally identifiable information is:

(1) Disclosed to anyone other than officials of participating agencies collecting or using the information under this part, subject to paragraph (b) of this section; or

(2) Used for any purpose other than meeting a requirement under this part.

(b) An educational agency or institution subject to Part 99 of this title may not release information from education records to participating agencies without parental consent unless authorized to do so under Part 99 of this title.

(c) The State educational agency shall include policies and procedures in its annual program plan which are used in the event that a parent refuses to provide consent under this section.

(20 U.S.C. 1412(2); (D); 1417(c).)

§ 121a.572 Safeguards.

(a) Each participating agency shall protect the confidentiality of personally identifiable information at collection, storage, disclosure, and destruction stages.

(b) One official at each participating agency shall assume responsibility for insuring the confidentiality of any personally identifiable information.

(c) All persons collecting or using personally identifiable information must receive training or instruction regarding the State's policies and procedures under § 121a.129 of Subpart B and Part 99 of this title.

(d) Each participating agency shall maintain, for public inspection, a current listing of the names and positions of those employees within the agency who may have access to personally identifiable information.

(20 U.S.C. 1412(2)(D); 1417(c).)

§ 121a.573 Destruction of information.

(a) The public agency shall inform parents when personally identifiable information collected, maintained, or used under this part is no longer needed to provide educational services to the child.

(b) The information must be destroyed at the request of the parents. However, a permanent record of a student's name, address, and phone number, his or her grades, attendance record, classes attended, grade levels completed, and year completed may be maintained without time limitation.

(20 U.S.C. 1412(2)(D); 1417(c).)

Comment. Under section 121a.573, the personally identifiable information on a handicapped child may be retained permanently unless the parents request that it be destroyed. Destruction of records is the best protection against improper and unauthorized disclosure. However, the records may be needed for other purposes. In informing parents about their rights under this section, the agency should remind them that the records may be needed by the child or the parents for social security benefits or other purposes. If the parents request that the information be destroyed, the agency may retain the information in paragraph (b).

§ 121a.574 Children's rights.

The State educational agency shall include policies and procedures in its annual program plan regarding the extent to which children are afforded rights of privacy similar to those afforded to parents, taking into consideration the age of the child and type or severity of disability.

(20 U.S.C. 1412(2)(D); 1417(c).)

Comment. Note that under the regulations for the Family Educational Rights and Privacy Act (45 CFR 99.4(a)), the rights of parents regarding education records are transferred to the student at age 18.

§ 121a.575 Enforcement.

The State educational agency shall describe in its annual program plan the policies and procedures, including sanctions, which the State uses to insure that its policies and procedures are followed and that the requirements of the Act and the regulations in this part are met.

(20 U.S.C. 1412(2)(D); 1417(c).)

§ 121a.576 Office of Education.

If the Office of Education or its authorized representatives collect any personally identifiable information regarding handicapped children which is not subject to 5 U.S.C. 552a (The Privacy Act of 1974), the Commissioner shall apply the requirements of 5 U.S.C. section 552a(b) (1)–(2), (4)–(11); (c); (d); (e)(1), (2), (3)(A), (B), and (D), (5)–(10); (h); (m); and (n), and the regulations implementing those provisions in Part 5b of this title.

(20 U.S.C. 1412(2)(D); 1417(c).)

OFFICE OF EDUCATION PROCEDURES

§ 121a.580 Opportunity for a hearing.

The Commissioner gives a State educational agency reasonable notice and an opportunity for a hearing before taking any of the following actions:

(a) Disapproval of a State's annual program plan under § 121a.113 of Subpart B.

(b) Withholding payments from a State under § 121a.590 or under section 434(c) of the General Education Provisions Act.

(c) Waiving the requirement under § 121a.589 of this subpart regarding supplementing and supplanting with funds provided under Part B of the Act.

(20 U.S.C. 1232c(c); 1413(a)(9)(B); 1413(c); 1416.)

§ 121a.581 Hearing panel.

The Commissioner appoints a Hearing Panel consisting of not less than three persons to conduct any hearing under § 121a.580 of this subpart.

(20 U.S.C. 1232c(c); 1417(a)(9)(B); 1413(c); 1416.)

§ 121a.582 Hearing procedures.

(a)(1) If the Hearing Panel determines that oral testimony would not materially assist the resolution of disputed facts, the Panel shall give each party an opportunity for presenting the case:

(i) In whole or in part in writing, or

(ii) In an informal conference before the Hearing Panel.

(2) The Hearing Panel shall give each party:

(i) Notice of the issues to be considered (if this notice has not already been given); and

(ii) An opportunity to be represented by counsel.

(b) If the Hearing Panel determines that oral testimony would materially assist the resolution of disputed facts, the Panel shall give each party, in addition to the requirements under paragraph (a)(2) of this section:

(1) An opportunity to obtain a record of the proceedings;

(2) An opportunity to present witnesses on the party's behalf; and

(3) An opportunity to cross-examine witnesses either orally or with written questions.

(20 U.S.C. 1232c(c); 1413(a)(9)(B); 1413(c); 1416.)

§ 121a.583 Initial decision; final decision.

(a) The Hearing Panel shall prepare an initial written decision which includes findings of fact and the conclusions based on those facts.

(b) The Hearing Panel shall mail a copy of the initial decision to each party (or to the party's counsel) and to the Commissioner, with a notice that each

party has an opportunity to submit written comments regarding the decision to the Commissioner within a specified reasonable time.

(c) The initial decision of the Hearing Panel is the final decision of the Commissioner unless, within 25 days after the end of the time for receipt of written comments, the Commissioner informs the Panel in writing that the decision is being reviewed.

(d) Review by the Commissioner is based on the decision, the written record, if any, of the Hearing Panel's proceedings, and written comments or oral arguments by the parties.

(e) No decision under this section becomes final until it is served on the State educational agency or its attorney.

(20 U.S.C. 1232c(c); 1412(a)(9)(b); 1413(c); 1416.)

§ 121a.389 Waiver of requirement regarding supplementing and supplanting with Part B funds.

(a) Under sections 613(a)(9)(B) and 614(a)(2)(B)(ii) of the Act, State and local Educational agencies must insure that Federal funds provided under Part B of the Act are used to supplement the level of State and local funds expended for the education of handicapped children, and in no case to supplant those State and local funds. Beginning with funds appropriated for fiscal year 1979 and for each following fiscal year, the nonsupplanting requirement only applies to funds allocated to local educational agencies. (See § 121a.372.)

(b) If the State provides clear and convincing evidence that all handicapped children have available to them a free appropriate public education, the Commissioner may waive in part the requirement under sections 613(a)(9)(B) and 614(a)(2)(B)(ii) of the Act if the Commissioner concurs with the evidence provided by the State.

(c) If a State wishes to request a waiver, it must inform the Commissioner in writing. The Commissioner then provides the State with a finance and membership report form which provides the basis for the request.

(d) In its request for a waiver, the State shall include the results of a special study made by the State to obtain evidence of the availability of a free appropriate public education to all handicapped children. The special study must include statements by a representative sample of organizations which deal with handicapped children, and parents and teachers of handicapped children, relating to the following areas:

(1) The adequacy and comprehensiveness of the State's system for locating, identifying, and evaluating handicapped children, and

(2) The cost to parents, if any, for education for children enrolled in public and private day schools, and in public and private residential schools and institutions, and

(3) The adequacy of the State's due process procedures.

(e) In its request for a waiver, the State shall include finance data relating to the availability of a free appropriate public education for all handicapped children, including:

(1) The total current expenditures for regular education programs and special education programs by function and by source of funds (State, local, and Federal) for the previous school year, and

(2) The full-time equivalent membership of students enrolled in regular programs and in special programs in the previous school year.

(f) The Commissioner considers the information which the State provides under paragraph (d) and (e) of this section, along with any additional information he may request, or obtain through on-site reviews of the State's education programs and records, to determine if all children have available to them a free appropriate public education, and if so, the extent of the waiver.

(g) The State may request a hearing under §§ 121a.580–121a.583 with regard to any final action by the Commissioner under this section.

(20 U.S.C. 1411(e)(3); 1413(a)(9)(B).)

§ 121a.390 Withholding payments.

(a) The Commissioner may make the following findings only after reasonable notice and an opportunity for a hearing under §§ 121a.580–121a.583 to the State educational agency involved (and to any local educational agency affected by any failure described in paragraph (a)(2) of this section):

(1) That there has been a failure to comply substantially with the provisions of section 612 and 613 of the Act, or

(2) That in the administration of the annual program plan there is a failure to comply with any provision of this part or with any requirement in the application of a local educational agency approved by the State educational agency under the annual program plan.

(b) After making either of the findings in paragraph (a) of this section, the Commissioner:

(1) Shall, after notifying the State educational agency, withhold any further payments to the State under this part, and

(2) May, after notifying the State educational agency, withhold further payments to the State under the Federal programs referred to in § 121a.139 of Subpart B which are within his jurisdiction, to the extent that funds under those programs are available for the provision of assistance for the education of handicapped children.

(c) If the Commissioner withholds payments under paragraph (b) of this section he may determine:

(1) That withholding is limited to programs or projects under the annual program plan, or portions of it, affected by the failure, or

(2) That the State educational agency must not make further payments under Part B of the Act to specified local educational agencies affected by the failure.

(20 U.S.C. 1416(a).)

§ 121a.391 Reinstating payments.

Until the Commissioner is satisfied that there is no longer any failure to comply with the provisions of this part, as specified in § 121a.590(a):

(a) No further payments shall be made to the State under this part or under the Federal programs specified in section 613(a)(2) of the Act which are within his jurisdiction to the extent that funds under those programs are available for the provision of assistance for the education of handicapped children, or

(b) Payments by the State educational agency under this part shall be limited to local educational agencies whose actions did not cause or were not involved in the failure.

(20 U.S.C. 1416(a).)

§ 121a.392 Public notice by State and local educational agencies.

Any State educational agency and local educational agency which receives a notice under § 121a.590(a) shall by means of a public notice, take any necessary measures to inform the public within the agency's jurisdiction of the pendency of the action.

(20 U.S.C. 1416(a).)

§ 121a.393 Judicial review of Commissioner's final action on annual program plan.

If any State is dissatisfied with the Commissioner's final action with respect to its annual program plan submitted under Subpart B, the State may under section 616(b) of the Act, within sixty days after notice of the action, file a petition for review of that action with the United States Court of Appeals for the circuit in which the State is located.

(20 U.S.C. 1416(b).)

Subpart F—State Administration

State Educational Agency Responsibilities: General

§ 121a.600 Responsibility for all educational programs.

(a) The State educational agency is responsible for insuring:

(1) That the requirements of this part are carried out; and

(2) That each educational program for handicapped children administered within the State, including each program administered by any other public agency:

(i) Is under the general supervision of the persons responsible for educational programs for handicapped children in the State educational agency, and

(ii) Meets education standards of the State educational agency (including the requirements of this part).

(b) The State must comply with paragraph (a) of this section through State statute, State regulation, signed agreement between respective agency officials, or other documents.

(20 U.S.C. 1412(6).)

Comment. The requirement in § 121a.600 (a) is taken essentially verbatim from sec-

tion 612(6) of the statute and reflects the desire of the Congress for a central point of responsibility and accountability in the education of handicapped children within each State. With respect to State educational agency responsibility, the Senate Report on P.L. 94-142 includes the following statements:

This provision is included specifically to assure a single line of responsibility with regard to the education of handicapped children, and to assure that in the implementation of all provisions of this Act and in carrying out the right to education for handicapped children, the State educational agency shall be the responsible agency * * *.

Without this requirement, there is an abdication of responsibility for the education of handicapped children. Presently, in many States, responsibility is divided, depending upon the age of the handicapped child, sources of funding, and type of services delivered. While the Committee understands that different agencies may, in fact, deliver services, the responsibility must remain in a central agency overseeing the education of handicapped children, so that failure to deliver services or the violation of the rights of handicapped children is squarely the responsibility of one agency. (Senate Report No. 94-168, p. 28 (1975).)

In meeting the requirements of this section, there are a number of acceptable options which may be adopted, including the following:

(1) Written agreements are developed between respective State agencies concerning State educational agency standards and monitoring. These agreements are binding on the local or regional counterparts of each State agency.

(2) The Governor's Office issues an administrative directive establishing the State educational agency responsibility.

(3) State law, regulation, or policy designates the State educational agency as responsible for establishing standards for all educational programs for the handicapped, and includes responsibility for monitoring.

(4) State law mandates that the State educational agency is responsible for all educational programs.

§ 121a.601 Monitoring and evaluation activities.

Each State educational agency shall:

(a) Undertake monitoring and evaluation activities to insure compliance of all public agencies within the State with the requirements of Subparts C, D, and E.

(b) Develop procedures (including specific timelines) for monitoring and evaluating public agencies involved in that education of handicapped children. These procedures must include:

(1) Collection of data and reports;

(2) Conduct of on-site visits;

(3) Audit of Federal fund utilization; and

(4) Comparison of a sampling of individualized education programs with the programs actually provided.

(20 U.S.C. 1412(6); 1413(a)(11).)

Comment. In carrying out the requirements of paragraph (b) of this section, State educational agencies could include additional procedures, such as involving parents or representatives of parent organizations in on-site visits and other monitoring activities.

§ 121a.602 Adoption of complaint procedures.

(a) Each State educational agency shall adopt effective procedures for reviewing, investigating, and acting on any allegations of substance, which may be made by public agencies, or private individuals or organizations, of actions taken by any public agency that are contrary to the requirements of this part.

(b) In carrying out the requirements in paragraph (a) of this section, the State educational agency shall:

(1) Designate specific individuals within the agency who are responsible for implementing the requirements;

(2) Provide for negotiations, technical assistance activities, and other remedial action to achieve compliance; and

(3) Provide for the use of sanctions, including the withholding of Part B funds in accordance with § 121a.194.

(20 U.S.C. 1412(6).)

Use of Funds

§ 121a.620 Federal funds for State administration.

A State may use five per cent of the total State allotment in any fiscal year under Part B of the Act, or $200,000, whichever is greater, for administrative costs related to carrying out sections 612 and 613 of the Act. However, this amount cannot be greater than the amount which the State may use under § 121a.704 or § 121a.705, as the case may be.

(20 U.S.C. 1411 (b), (c).)

§ 121a.621 Allowable costs.

(a) The State educational agency may use funds under § 121a.620 of this Subpart for:

(1) Administration of the annual program plan and for planning at the State level, including planning, or assisting in the planning, of programs or projects for the education of handicapped children;

(2) Approval, supervision, monitoring, and evaluation of the effectiveness of local programs and projects for the education of handicapped children;

(3) Technical assistance to local educational agencies with respect to the requirements of this part;

(4) Leadership services for the program supervision and management of special education activities for handicapped children; and

(5) Other State leadership activities and consultative services.

(b) The State educational agency shall use the remainder of its funds under § 121a.620 in accordance with § 121a.370 of Subpart C.

(20 U.S.C. 1411 (b), (c).)

State Advisory Panel

§ 121a.650 Establishment.

(a) Each State shall establish, in accordance with the provisions of this subpart, a State advisory panel on the education of handicapped children.

(b) The advisory panel must be appointed by the Governor or any other official authorized under State law to make those appointments.

(c) If a State has an existing advisory panel that can perform the functions in § 121a.652, the State may modify the existing panel so that it fulfills all of the requirements of this subpart, instead of establishing a new advisory panel.

(20 U.S.C. 1413(a)(12).)

§ 121a.651 Membership.

(a) The membership of the State advisory panel must be composed of persons involved in or concerned with the education of handicapped children. The membership must include at least one person representative of each of the following groups:

(1) Handicapped individuals.

(2) Teachers of handicapped children.

(3) Parents of handicapped children.

(4) State and local educational officials.

(5) Special education program administrators.

(b) The State may expand the advisory panel to include additional persons in the groups listed in paragraph (a) of this section and representatives of other groups not listed.

(20 U.S.C. 1413(d)(12).)

Comment. The membership of the State advisory panel, as listed in paragraphs (a)(1)-(5), is required in section 613(a)(12) of the Act. As indicated in paragraph (b), the composition of the panel and the number of members may be expanded at the discretion of the State. In adding to the membership, consideration could be given to having:

(1) An appropriate balance between professional groups and consumers (i.e., parents, advocates, and handicapped individuals);

(2) Broad representation within the consumer-advocate groups, to insure that the interests and points of view of various parents, advocates and handicapped individuals are appropriately represented;

(3) Broad representation within professional groups (e.g., (a) regular education personnel, (b) special educators, including teachers, teacher trainers, and administrators who can properly represent vertical dimensions in the extension of handicapped children, and (c) appropriate related services personnel); and

(4) Representatives from other State advisory panels (such as vocational education).

If a State elects to maintain a small advisory panel (e.g., 10-15 members), the panel itself could take steps to insure that it (1) consults with and receives inputs from various consumer and special interest professional groups, and (2) establishes committees for particular short-term purposes composed of representatives from those input groups.

§ 121a.652 Advisory panel functions.

The State advisory panel shall:

(a) Advise the State educational agency of unmet needs within the State in the education of handicapped children;

(b) Comment publicly on the State annual program plan and rules or regulations proposed for issuance by the

State regarding the education of handicapped children and the procedures for distribution of funds under this part; and

(c) Assist the State in developing and reporting such information and evaluations as may assist the Commissioner in the performance of his responsibilities under section 618.

(20 U.S.C. 1413(a)(12).)

§ 121a.653 Advisory panel procedures.

(a) The advisory panel shall meet as often as necessary to conduct its business.

(b) By July 1 of each year, the advisory panel shall submit an annual report of panel activities and suggestions to the State educational agency. This report must be made available to the public in a manner consistent with other public reporting requirements under this part.

(c) Official minutes must be kept on all panel meetings and shall be made available to the public on request.

(d) All advisory panel meetings and agenda items must be publicly announced prior to the meeting, and meetings must be open to the public.

(e) Interpreters and other necessary services must be provided at panel meetings for panel members or participants. The State may pay for these services from funds under § 121a.620.

(f) The advisory panel shall serve without compensation but the State must reimburse the panel for reasonable and necessary expenses for attending meetings and performing duties. The State may use funds under § 121a.620 for this purpose.

(20 U.S.C. 1413(a)(12).)

Subpart G—Allocation of Funds; Reports

ALLOCATIONS

§ 121a.700 Special definition of the term State.

For the purposes of § 121a.701, § 121a.702, and §§ 121a.704–121a.708, the term "State" does not include Guam, American Samoa, the Virgin Islands, and the Trust Territory of the Pacific Islands.

(20 U.S.C. 1411(a)(2).)

§ 121a.701 State entitlement; formula.

(a) The maximum amount of the grant to which a State is entitled under section 611 of the Act in any fiscal year is equal to the number of handicapped children aged three through 21 in the State who are receiving special education and related services, multiplied by the applicable percentage, under paragraph (b) of this section, of the average per pupil expenditure in public elementary and secondary schools in the United States.

(b) For the purposes of the formula in paragraph (a) of this section, the applicable percentage of the average per pupil expenditure in public elementary and secondary schools in the United States for each fiscal year is:

(1) 1978—5 percent,

(2) 1979—10 percent,

(3) 1980—20 percent,

(4) 1981—30 percent, and

(5) 1982, and for each fiscal year after 1982, 40 percent.

(20 U.S.C. 1411(a)(1).)

(c) For the purposes of this section, the average per pupil expenditure in public elementary and secondary schools in the United States, means the aggregate expenditures during the second fiscal year preceding the fiscal year for which the computation is made (or if satisfactory data for that year are not available at the time of computation, then during the most recent preceding fiscal year for which satisfactory data are available) of all local educational agencies in the United States (which, for the purpose of this section, means the fifty States and the District of Columbia), plus any direct expenditures by the State for operation of those agencies (without regard to the source of funds from which either of those expenditures are made), divided by the aggregate number of children in average daily attendance to whom those agencies provided free public education during that preceding year.

(20 U.S.C. 1411(a)(4).)

§ 121a.702 Limitations and exclusions.

(a) In determining the amount of a grant under § 121a.701 of this subpart, the Commissioner may not count:

(1) Handicapped children in a State to the extent that the number of those children is greater than 12 percent of the number of all children aged five through 17 in the State;

(2) Children with specific learning disabilities to the extent that the number of those children is greater than two percent of the number of all children aged five through 17 in the State; and

(3) Handicapped children who are counted under section 121 of the Elementary and Secondary Education Act of 1965.

(b) For the purposes of paragraph (a) of this section, the number of children aged five through 17 in any State shall be determined by the Commissioner on the basis of the most recent satisfactory data available to him.

(20 U.S.C. 1411(a)(5).)

§ 121a.703 Ratable reductions.

(a) *General.* If the sums appropriated for any fiscal year for making payments to States under section 611 of the Act are not sufficient to pay in full the total amounts to which all States are entitled to receive for that fiscal year, the maximum amount which all States are entitled to receive for that fiscal year shall be ratably reduced. In case additional funds become available for making payments for any fiscal year during which the preceding sentence is applicable, those reduced amounts shall be increased on the same basis they were reduced.

(20 U.S.C. 1411(g)(1).)

(b) *Reporting dates for local educational agencies and reallocations.*

(1) In any fiscal year in which the State entitlements have been ratably reduced, and in which additional funds have not been made available to pay in full the total of the amounts under paragraph (a) of this section, the State educational agency shall fix dates before which each local educational agency shall report to the State the amount of funds available to it under this part which it estimates it will expend.

(2) The amounts available under paragraph (a)(1) of this section, or any amount which would be available to any other local educational agency if it were to submit an application meeting the requirements of this part, which the State educational agency determines will not be used for the period of its availability, shall be available for allocation to those local educational agencies, in the manner provided in §121a.707, which the State educational agency determines will need and be able to use additional funds to carry out approved programs.

(20 U.S.C. 1411(g)(2).)

§ 121a.704 Hold harmless provision.

No State shall receive less than the amount it received under Part B of the Act for fiscal year 1977.

(20 U.S.C. 1411(a)(1).)

§ 121a.705 Within-State distribution: fiscal year 1978.

Of the funds received under § 121a.701 of this subpart by any State for fiscal year 1978:

(a) 50 percent may be used by the State in accordance with the provisions of § 121a.620 of Subpart F and § 121a.370 of Subpart C, and

(b) 50 percent shall be distributed to local educational agencies in the State in accordance with § 121a.707.

(20 U.S.C. 1411(b)(1).)

§ 121a.706 Within-State distribution: fiscal year 1979 and after.

Of the funds received under § 121a.701 by any State for fiscal year 1979, and for each fiscal year after fiscal year 1979:

(a) 25 percent may be used by the State in accordance with § 121a.620 of Subpart F and § 121a.370 of Subpart C, and

(b) 75 percent shall be distributed to the local educational agencies in the State in accordance with § 121a.707.

(20 U.S.C. 1411(c)(1).)

§ 121a.707 Local educational agency entitlements; formula.

From the total amount of funds available to all local educational agencies, each local educational agency is entitled to an amount which bears the same ratio to the total amount as the number of handicapped children aged three through 21 in that agency who are receiving special education and related services bears to the aggregate number of handicapped children aged three through 21 receiving special education and related services in all local educational agencies which apply to the State educational agency for funds under Part B of the Act.

(20 U.S.C. 1411(d).)

§ 121a.708 Reallocation of local educational agency funds.

If a State educational agency determines that a local educational agency is adequately providing a free appropriate public education to all handicapped children residing in the area served by the local agency with State and local funds otherwise available to the local agency, the State educational agency may reallocate funds or portions of those funds which are not required to provide special education and related services) made available to the local agency under § 121a.707, to other local educational agencies within the State which are not adequately providing special education and related services to all handicapped children residing in the areas served by the other local educational agencies.

(20 U.S.C. 1414(e).)

§ 121a.709 Payments to Secretary of Interior.

(a) The Commissioner is authorized to make payments to the Secretary of the Interior according to the need for that assistance for the education of handicapped children on reservations serviced by elementary and secondary schools operated for Indian children by the Department of the Interior.

(b) The amount of those payments for any fiscal year shall not exceed one percent of the aggregate amounts available to all States for that fiscal year under Part B of the Act.

(20 U.S.C. 1411(f)(1).)

§ 121a.710 Entitlements to jurisdictions.

(a) The jurisdictions to which this section applies are Guam, American Samoa, the Virgin Islands, and the Trust Territory of the Pacific Islands.

(b) Each jurisdiction under paragraph (a) of this section is entitled to a grant for the purposes set forth in section 601 (c) of the Act. The amount to which those jurisdictions are so entitled for any fiscal year shall not exceed an amount equal to 1 percent of the aggregate of the amounts available to all States under this part for that fiscal year. Funds appropriated for those jurisdictions shall be allocated proportionately among them on the basis of the number of children aged three through twenty-one in each jurisdiction. However, no jurisdiction shall receive less than $150,000, and other allocations shall be ratably reduced if necessary to insure that each jurisdiction receives at least that amount.

(c) The amount expended for administration by each jurisdiction under this section shall not exceed 5 percent of the amount allotted to the jurisdiction for any fiscal year, or $35,000, whichever is greater.

(20 U.S.C. 1411(e).)

Reports

§ 121a.750 Annual report of children served—report requirement.

(a) The State educational agency shall report to the Commissioner no later than April 1 of each year the number of handicapped children aged three through 21 residing in the State who are receiving special education and related services.

(b) The State educational agency shall submit the report on forms provided by the Commissioner.

(20 U.S.C. 1411(a)(3).)

Comment. It is very important to understand that this report and the requirements that relate to it are solely for allocation purposes. The population of children the State may count for allocation purposes may differ from the population of children to whom the State must make available a free appropriate public education. For example, while section 611(a)(3) of the Act limits the number of children who may be counted for allocation purposes to 12 percent of the general school population aged five through seventeen, a State might find that 14 percent (or some other percentage) of its children are handicapped. In that case the State must make free appropriate public education available to all of those handicapped children.

§ 121a.751 Annual report of children served—information required in the report.

(a) In its report, the State educational agency shall include a table which shows:

(1) The number of handicapped children receiving special education and related services on October 1 and on February 1 of that school year, and the average of the numbers for those two dates;

(2) The number of those handicapped children within each disability category, as defined in the definition of "handicapped children" in § 121a.5 of Subpart A; and

(3) The number of those handicapped children within each of the following age groups:

(i) Three through five;

(ii) Six through seventeen; and

(iii) Eighteen through twenty-one.

(b) A child must be counted as being in the age group corresponding to his or her age on the date of the count: October 1 or February 1, as the case may be.

(c) The State educational agency may not report a child under more than one disability category.

(d) If a handicapped child has more than one disability, the State educational agency shall report that child in accordance with the following procedure:

(1) A child who is both deaf and blind must be reported as "deaf-blind."

(2) A child who has more than one disability (other than a deaf-blind child) must be reported as "multihandicapped."

(20 U.S.C. 1411(a)(3); 1411(a)(5)(A)(ii); 1413(b).)

§ 121a.752 Annual report of children served—certification.

The State educational agency shall include in its report a certification signed by an authorized official of the agency that the information provided is an accurate and unduplicated count of handicapped children receiving special education and related services on the dates in question.

(20 U.S.C. 1411(a)(3); 1417(b).)

§ 121a.753 Annual report of children served—criteria for counting children.

(a) The State educational agency may include handicapped children in its report who are enrolled in a school or program which is operated or supported by a public agency, and which either:

(1) Provides them with both special education and related services; or

(2) Provides them only with special education if they do not need related services to assist them in benefitting from that special education.

(b) The State educational agency may not include handicapped children in its report who:

(1) Are not enrolled in a school or program operated or supported by a public agency;

(2) Are not provided special education that meets State standards;

(3) Are not provided with a related service that they need to assist them in benefitting from special education;

(4) Are counted by a State agency under section 121 of the Elementary and Secondary Education Act of 1965, as amended; or

(5) Are receiving special education funded solely by the Federal Government. However, the State may count children covered under § 121a.186(b) of Subpart B.

(20 U.S.C. 1411(a)(3); 1417(b).)

Comment. 1. Under paragraph (a), the State may count handicapped children in a Head Start or other preschool program operated or supported by a public agency if those children are provided special education that meets State standards.

2. "Special education," by statutory definition, must be at no cost to parents. As of September 1, 1978 under the free appropriate public education requirement, both special education and related services must be at no cost to parents.

There may be some situations, however, where a child receives special education from a public source at no cost, but whose parents pay for the bagel or regular education. This child may be counted. The Office of Education expects that there would only be limited situations where special education would be clearly separate from regular education—generally, where speech therapy is the only special education required by the child. For example, the child might be in a regular program in a parochial or other private school but receiving speech therapy in a program funded by the local educational agency. Allowing these children to be counted will provide incentives (in addition to complying with the legal requirement in section 613(a)(4)(A) of the Act regarding private schools) to public agencies to provide services to children in private schools, since funds are generated in part on the basis of the number of children provided special education and related services. Agencies should understand, however, that where a handicapped child is placed in or referred to a public or private school for educational purposes special education includes the entire educational program provided to the child. In that case, parents may not be charged for any part of the child's education.

A State may not count Indian children on or near reservations and children on military facilities if it provides them no special

education. If a State or local educational agency is responsible for serving these children, and does provide them special education and related services, they may be counted.

§ 121a.754 Annual report of children served—other responsibilities of the State educational agency.

In addition to meeting the other requirements in this subpart, the State educational agency shall:

(a) Establish procedures to be used by local educational agencies and other educational institutions in counting the number of handicapped children receiving special education and related services;

(b) Set dates by which those agencies and institutions must report to the State educational agency to insure that the State complies with § 121a.750(a);

(c) Obtain certification from each agency and institution that an unduplicated and accurate count has been made;

(d) Aggregate the data from the count obtained from each agency and institution, and prepare the reports required under this subpart; and

(e) Insure that documentation is maintained which enables the State and the Commissioner to audit the accuracy of the count.

(20 U.S.C. 1411(a)(3); 1417(b).)

Comment: States should note that the data required in the annual report of children served are not to be transmitted to the Commissioner in personally identifiable form. States are encouraged to collect these data in non-personally identifiable form.

APPENDIX A—ANALYSIS OF FINAL REGULATION (45 CFR PART 121a) UNDER PART B OF THE EDUCATION OF THE HANDICAPPED ACT

These regulations set forth requirements to be followed by States and localities if they are to receive funds under Part B of the Education of the Handicapped Act. The regulations cover matters such as the identification, location, and evaluation of handicapped children; the provision of free appropriate public education; the establishment of a full educational opportunity goal; the count of handicapped children for allocation purposes; priorities in the use of Part B funds; the proper use of Part B funds; the development of an individualized education program; the creation of a comprehensive personnel development system; procedural safeguards (e.g. right to notice and conduct of hearings); methods to guarantee public participation; and details about State annual program plans and local educational agency applications.

RELATIONSHIP BETWEEN REGULATIONS UNDER PART B AND REGULATIONS UNDER SECTION 504

The regulations under section 504 of the Rehabilitation Act of 1973 (45 CFR Part 84; published at 42 FR 22676; May 4, 1977) deal with nondiscrimination on the basis of handicap and basically require that recipients of Federal funds provide equal opportunities to handicapped persons (for example, that they meet the needs of handicapped persons to the same extent that the needs of nonhandicapped persons are met). Subpart D of the section 504 regulations ("Preschool, Elementary, and Secondary Education") contains requirements very similar to those in Part B of the Education of the Handicapped Act.

Basically, both require that handicapped persons be provided a free appropriate public education; that handicapped students be educated with nonhandicapped students to the extent appropriate; that educational agencies identify and locate all unserved handicapped children; that evaluation procedures be adopted to insure appropriate classification and educational services; and that procedural safeguards be established.

In several respects, however, the section 504 regulations are broader in coverage than Part B. For example, the definition of "handicapped person" and "qualified handicapped person" under section 504 covers a broader population than the definition of "handicapped children" under Part B. Under the Part B definition, a handicapped child is a child who has one of the impairments listed in the Act, who because of that impairment requires special education and related services. Under section 504, a handicapped person is a person who has a physical or mental impairment that substantially limits one or more major life activities, has a record of that type of impairment, or is regarded as having that impairment (§ 84.3(j)).

The regulations for section 504 also deal with a number of subjects not covered by the Part B regulations (for example, barrier-free facilities and program accessibility; employment; postsecondary education and health, welfare and social services). On the other side, Part B contains a substantial number of administrative requirements not included under section 504 (for example, annual program plans and local applications) and requires more detailed procedures and policies in many instances (such as due process procedures).

In several instances, the section 504 regulations specifically reference where a requirement may be met by complying with a requirement under Part B. For example, § 84.33(b)(2), dealing with appropriate education, cites implementation of an individualized education program as one means of meeting the requirement. Section 84.33(d) has a September 1, 1978 outside date for providing an appropriate education to qualified handicapped persons (conforming to the timelines in Part B). Section 84.36(c) indicates that a reevaluation procedure consistent with the Part B requirements is one means of meeting the reevaluation requirements under section 504. Section 84.36, dealing with due process requirements, indicates that compliance with the procedural safeguards in Part B is one means of meeting those requirements.

It should be noted that the term "free appropriate public education" (FAPE) has different meanings under Part B and section 504. For example, under Part B, "FAPE" is a statutory term which requires special education and related services to be provided in accordance with an individualized education program. However, under section 504, each recipient must provide an education which includes "the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met . . ."

There is also a major difference between Part B and the section 504 regulations concerning the matter of exclusion of handicapped children from school. As of the effective date of the section 504 regulations (June 3, 1977), exclusion of handicapped children from school constitutes a violation of those requirements. However, under Part B, States are not required to serve all handicapped children aged 3–18 until September 1, 1978. As stated in Appendix A of the section 504 regulations:

The EHA requires a free appropriate education to be provided to handicapped children "no later than September 1, 1978," but section 504 contains no authority for delaying enforcement. To resolve this problem, a new paragraph (d) has been added to § 84.33. Section 84.33(d) requires recipients to achieve full compliance with the free appropriate public education requirements of § 84.33 as expeditiously as possible, but in no event later than September 1, 1978. The provision also makes clear that, as of the effective date of this regulation, no recipient may exclude a qualified handicapped child from its educational program. This provision against exclusion is consistent with the order of providing services set forth in section 612(3) of the EHA, which places the highest priority on providing services to handicapped children who are not receiving an education.

PART 121a—ASSISTANCE TO STATES FOR EDUCATION OF HANDICAPPED CHILDREN

SUBPART A—GENERAL

Subpart A sets forth the purpose and applicability of these regulations and includes definitions of statutory terms (e.g. free appropriate public education, special education, and related services) and other definitions related to these terms.

The following comments were received regarding Subpart A.

APPLICABILITY OF REGULATIONS TO STATE, LOCAL AND PRIVATE AGENCIES (§ 121a.2)

Comment: A commenter felt that the statement regarding the applicability of the regulations was not clear, and should be revised to indicate that the requirements apply to any public agency serving handicapped children, even if the agency does not receive Part B funds.

Response: A definition of "public agency" has been added to the regulations. The definition includes all political subdivisions in the State that are responsible for educating handicapped children. Throughout the regulation, the term "public agency" has been used to make it clear where the requirements do not apply only to State and local educational agencies. In addition, an explanatory comment was added after section 121a.2 to make it clear that the requirements under Part B are binding on each public agency in the State that has direct or delegated authority for the education of handicapped children, regardless of whether that agency receives Part B funds.

DEFINITIONS (§§ 121a.4–121a.14)

Comment: Hundreds of comments were received regarding definitions in the proposed rules. Commenters requested that new definitions be added, or sought changes in existing definitions, especially definitions of various disability categories and the various types of related services. In many instances, revisions were sought to conform to the most recent definitions adopted or used by professional associations.

Response: Definitions of terms used in the regulations are taken from various statutes, Congressional reports, or materials provided by professional associations and other groups. Where appropriate, the Office of Education has attempted to incorporate changes recommended by commenters, and has made other changes to clarify the definitions. In addition, the following new terms were added:

Definitions of "deaf-blind" and "multi-handicapped" were added because these are recognized categories of handicapped children in most States.

A definition of "qualified" was added in order to be able to use a consistent term in

referring to the qualifications of the various personnel.

The definition of "handicapped children" has been modified only by making certain clarifying changes. Although some commenters requested additional changes in the definitions of the various disability categories, it is felt that the definitions in this regulation must closely conform to current usage in the States and professions.

The related services definition was expanded to include "school health services." In addition, changes were made in the definitions of the individual terms included under "related services" (e.g., psychological services and recreation) to conform to recommendations of professional associations.

SUBPART B—STATE ANNUAL PROGRAM PLANS AND LOCAL APPLICATIONS

Subpart B includes the requirements relating to State annual program plans, local educational agency applications, participation by the Bureau of Indian Affairs, and public participation.

Two new sections (sections 121a.180 and 121a.239) have been added to require assurances from the State educational agencies and local educational agencies that the program under Part B will be operated in compliance with the section 504 regulations, including the requirements under section 606 of the Education of the Handicapped Act regarding employment of qualified handicapped individuals in programs assisted under the Act. (The Office for Civil Rights has been delegated authority for enforcing section 606.)

A substantial number of commenters were concerned with the following major issues in this subpart: (1) the amount of data required of State and local educational agencies; (2) the excess costs, nonsupplanting and comparability requirements; and (3) the public participation requirements. In addition, as with other subparts, many commenters objected to statutory requirements and sought interpretations of the statute and regulations.

ANNUAL PROGRAM PLANS

CONDITION OF ASSISTANCE (§ 121a.110)

Section 434(b) of the General Education Provisions Act (GEPA), as amended by Pub. L. 93-380, requires each State to submit (1) a general application containing five assurances, and (2) an annual program plan for each Office of Education program under which funds are provided to local educational agencies through, or under the supervision of, the State educational agency. Under Section 434(b), and the implementing regulations (45 CFR 100b, Subpart B), the general application and an annual program plan take the place of a State plan for Part B (45 CFR 100b.19).

The five assurances required under section 434(b) of the GEPA cover proper administration, fiscal control and accounting, reports, supplanting, and submission of the annual program plan. Where Part B contains plan requirements covering the same subject matters, submission of those plan requirements is satisfied by the State's submission of the general application. They do not have to be submitted as part of the annual plan. The Part B plan provisions which do not have to be submitted in the annual program plan are referenced in 45 CFR § 100b.17(c)(2)(iv). Note that a substantive section on the nonsupplanting requirement for local educational agencies is set out in § 121a.230.

Under 45 CFR 100b.18(c), material may be incorporated by reference in an annual program plan if the material is in a document previously approved by the Commissioner and on file in the Office of Education. This should save some paperwork, particularly in the years after the first annual program plan (for school year 1977–1978) is submitted under these regulations.

The provisions to be included in the annual program plan for Part B are set forth in §§ 121a.120–121a.151 of these regulations (which include the conditions of eligibility and the State plan requirements under sections 612 and 613 of the Act and section 434(b)(1)(B)(ii) of the GEPA (which requires each annual program plan to "set forth a statement describing the purposes for which Federal funds will be expended during the fiscal year for which the annual program plan is submitted")).

APPROVAL; DISAPPROVAL (§ 121a.113)

The following is clarification about the submission of draft annual program plans for review by the Office of Education and how this would affect the issuance of grant award documents:

A State educational agency may elect to send a copy of its proposed annual program plan to the Commissioner for technical assistance purposes at the same time that the plan is being made available for public comment. However, funds cannot be obligated by a State before the date on which its official adopted plan is received in substantially approvable form by the Federal Government. (See 45 CFR 100b.38.)

EXAMPLE: A State educational agency's proposed plan for a particular school year is received by the Bureau of Education for the Handicapped on June 1. Its official plan is received on August 1. When BEH approves the plan (e.g. September 1), the State educational agency will receive a grant award document which will show August 1, as the earliest date of obligation under that plan.

EFFECTIVE PERIOD OF ANNUAL PROGRAM PLAN (§ 121a.114)

The Office of Education is proposing to use the period July 1–June 30 for State annual program plans in those programs where appropriations become available for obligation by the Federal Government each July 1 (the so-called "advance funded" programs). The purpose of this is to meet the statutory requirement for an annual program plan covering a 12-month period and at the same time to conform as closely as possible to the regular school year. However, even if the proposed procedure is adopted, the obligational period of State and local agencies for funds from any fiscal year would not be changed. If a State submits its annual program plan and receives its grant on the earliest possible date (July 1), the funds are available for obligation at the State and local level for 27 months, subject to submission or extension of the annual program plan for the following year. (This period includes the 12-month carryover provision under the Tydings Amendment. See 45 CFR 100b.55 (Obligation by recipients).) For example, if a State received its grant for fiscal year 1978 on July 1, 1977, the funds would be available for obligation at the State and local level from July 1, 1977 through September 30, 1979. The rules which govern when an annual program plan becomes effective, and State and local authority to obligate the Federal funds are located in 45 CFR Part 100b, Subpart B.

PUBLIC PARTICIPATION (§ 121a.130)

Comment: Commenters wanted this section to be expanded to require the States to describe in detail a number of additional specific steps to be taken in complying with the public participation requirements of the Act. For example, they wanted States to develop a roster of interested persons to whom plans and other documents would routinely be sent. The commenters felt that these steps would be necessary to insure full public participation.

Response: Requirements have been added (in §§ 121a.280 et seq.) to spell out in more detail the State's duties regarding public participation in development of the annual program plan (for example, indicating in the notice of public hearings of the plan the timetable for developing the final plan and submitting it to the Commissioner). A requirement has also been added to specify that the plan must be available for comment at least 30 days following the date notice is given.

Another revised section indicates that the public participation requirements for local educational agencies are to be comparable to those required of the State, except that public hearings are not required (§ 121a.234).

FULL EDUCATIONAL OPPORTUNITY GOAL REQUIREMENTS (§§ 121a.124–121a.128)

Comment: Commenters disagreed about the amount of data which should be required under this (and other) sections. Some commenters sought to have the regulations require a substantial amount of additional data (about the population of handicapped children and their placements) on the grounds that it is needed for effective monitoring. Others sought to have the amount of data to be reported substantially reduced as unnecessary and fulfilling no useful purpose.

Response: The final regulations eliminate the data requirements in proposed section 121a.24(a) for school year 1977–1978. Since the funds for FY 1978 became available for obligation by the Federal government on July 1, 1977, the States began submitting annual program plans for school year 1977–1978 before these regulations were published. Therefore, it would be inappropriate to impose a retroactive data requirement. No substantive change has been made in the data requirement for school years 1978–1979 and thereafter. The Office of Education believes that the remaining amount of data sought is necessary and adequate to provide information on what and how children are being served. Additional information may be sought on a case by case basis from each State where necessary to monitor compliance with Part B. In addition, requirements have been added to Subpart F to increase each State's monitoring and enforcement obligations.

Comment: Commenters requested that the data requirements regarding personnel needed to meet the full educational opportunity goal include various other professional groups, such as physical therapists, or use terms currently accepted by the professions, such as "therapeutic recreation specialists" rather than "recreation therapists."

Response: These changes have been made to cover the various personnel who provide special education or related services and to use terms currently recognized by the appropriate professional associations.

LOCAL EDUCATIONAL AGENCY APPLICATIONS

PARENT INVOLVEMENT (§ 121a.238)

Comment: Commenters wanted the regulations to require the establishment of a parent advisory committee in each school district.

Response: No change has been made. Extensive public and parental participation is already required under sections 121a.236 and 121a.234.

EXCESS COST REQUIREMENTS (§§ 121a.180–121a.185)

Comment: A substantial number of commenters requested clarification and explanation of the excess cost requirement.

Response: The section on excess costs has been broken out into five sections for clarification. Section 121a.180 specifies that a local educational agency must spend a certain minimum amount for the education of handicapped children before Part B funds may be used. A detailed example of determining the minimum amount follows revised section 121a.184.

NONSUPPLANTING AND COMPARABLE SERVICES (§§ 121a.550–121a.551)

Comment: A substantial number of commenters requested clarification of these requirements. Some commenters proposed detailed procedures and urged that the regulations require the reporting of a substantial amount of data to monitor compliance with these requirements. Some commenters felt the comparability requirement should be met by comparing expenses for regular and special education.

Response: These sections have been substantially revised to attempt to explain these requirements. Detailed procedures and reporting requirements are not adopted at this time because local educational agencies are otherwise required to maintain auditable records to document their compliance with these and other requirements.

Regarding nonsupplanting, the regulation provides that the requirement applies to total aggregate funds and particular costs. A local educational agency meets the requirement if (1) the total amount or average per capita amount of State and local school funds budgeted by the local educational agency for expenditures in the current fiscal year for the education of handicapped children is at least equal to the total amount or average per capita amount of State and local school funds actually expended for their education in the most recent preceding fiscal year for which information is available. Allowances may be made for decreases in enrollment of handicapped children and unusually large amounts of funds expended for long-term purposes (construction); and (2) Part B funds are not used to displace State or local funds for any particular cost.

The statutory requirement for comparability is implemented by prohibiting a local educational agency from using funds under Part B to provide services to handicapped children, unless the agency uses State and local funds to provide services to those children which, taken as a whole, are at least comparable to services provided to other handicapped children in that local educational agency. This should insure that handicapped children who receive services with Part B funds are treated equally with handicapped children who do not receive services with Part B funds. It would be too difficult to make an objective comparison between special and regular education. The concern of the commenters who asked for this comparison should be met by the excess cost requirement, which provides that a local educational agency must spend a minimum amount on the average, for each of its handicapped children.

Comment: Commenters requested that the regulations make it clear that the local applications must meet the requirements imposed on the State in Subpart B.

Response: A section has been added to make it clear that each local application must include additional procedures and other information which the State educational agency may require in order to meet the State annual program plan requirements in Subpart B. The requirement for local educational agencies to be consistent with the annual program plan is set forth in section 121a.280.

APPLICATIONS FROM SECRETARY OF INTERIOR (§§ 121a.260–121a.267)

These sections have been rewritten to clarify that the annual application by the Secretary of the Interior for schools operated for Indian children must meet the applicable requirements of section 614(a), include other material as agreed to by the Commissioner and the Secretary of the Interior, and meet monitoring and public participation requirements.

PUBLIC PARTICIPATION

See the comments on Section 121a.120.

SUBPART C—SERVICES

Subpart C contains regulations governing the major service components required under Part B of the Act. These include free appropriate public education, the full educational opportunity goal, priorities in the use of Part B funds, individualized education programs, direct services by the State educational agency, and the State comprehensive system of personnel development.

FREE APPROPRIATE PUBLIC EDUCATION

FREE APPROPRIATE PUBLIC EDUCATION REQUIREMENTS (§§ 121a.300–121a.303)

Comment: Commenters disagreed with the interpretation of "State law or practice" in the proposed regulations. Some commenters felt the exemption to the requirement to make free appropriate public education (FAPE) available to children in the age ranges three through five and 18 through 21 applies only if State law (or a court order) specifically prohibits services, or only if the State's practice is to provide services to less than a majority of the State's handicapped children. Others felt the requirement does not apply to the lower and upper age ranges unless the State is in fact serving all nonhandicapped children in those age ranges.

Response: The requirement has been redrafted to clarify the use of the exception and to insure at a minimum that handicapped children in any of these age ranges are served to the extent nonhandicapped children are served (to be consistent with nondiscrimination requirements under section 504).

Section 121a.300 ("Timeframe for free appropriate public education") breaks "practices" down by individual public agency, disability category, and age group. This revision is designed to maximize the number of handicapped children aged 3–5 and 18–21 who receive services. It should reduce the reluctance of agencies wishing to serve children in those age groups, because services to a few handicapped children will not require services to all handicapped children in all of the disabilities.

Section 121a.300 also includes an amendment designed to insure that each time a public agency elects to serve a handicapped child, the child receives the full range of rights and services, whether or not FAPE is mandated for that age range.

FREE APPROPRIATE PUBLIC EDUCATION REMOVAL ARE PAYMENTS (§ 121a.301–121a.303)

Comment: Commenters disagreed on which agencies or parties should bear the costs of educating a handicapped child, especially room and board costs. Commenters sought clarification of when the costs must be borne by the State or local educational agency.

Response: The proposed regulation on methods and costs for FAPE (proposed § 121a.301) has been redrafted and expanded as follows:

(1) A new paragraph has been added to section 121a.301, which states: "Nothing in this part relieves an insurer or similar third party from an otherwise valid obligation to provide or to pay for services provided to a handicapped child."

(2) Section 121a.302 states that if placement in a public or private residential program is necessary to provide FAPE to a handicapped child, the program (including non-medical care and room and board) must be at no cost to the child's parents.

Both of these changes have been made to conform to the regulations implementing section 504.

Other Changes: A new section 121a.303 has been added regarding the proper functioning of hearing aids. This section is based on a special study conducted by the Office of Education ("The Condition of Hearing Aids as Worn by Children in Public Schools," OEO publication date Summer, 1977).

FULL EDUCATIONAL OPPORTUNITY GOAL (§§ 121a.304–121a.306)

The statutory terms "free appropriate public education" and "full educational opportunity goal" are distinguished in this regulation as follows:

"Free appropriate public education" (FAPE) must (1) be made available to all handicapped children within the mandated time lines and age ranges set forth in the Act, and (2) include special education and related services which are provided in accordance with an individualized education program.

"Full educational opportunity goal" is broader in scope than "FAPE." It is an all-encompassing term, which (1) covers all handicapped children aged birth through twenty-one, (2) includes a basic planning dimension (including making projections of the estimated numbers of handicapped children), (3) permits each agency to establish its own timetable for meeting the goal, and (4) calls for the provision of additional facilities, personnel, and services to further enrich a handicapped child's educational opportunity beyond that mandated under the "FAPE" requirement. The term "goal" means an end to be sought. However, while an agency may never achieve its goal in the absolute sense, it must be committed to implementing this provision, and must be in compliance with the policies and procedures in the Annual Program Plan under this provision. Further, the agency is not relieved from its obligations under the "FAPE" requirement.

The proposed rule on full educational opportunity goal has been revised as follows: Proposed paragraph (a) (Program options) is now § 121a.305 and proposed paragraph (b) (Nonacademic services) is now § 121a.306. A new § 121a.304 has been added which (1) requires each State educational agency to insure that each public agency establishes and implements a goal of providing full educational opportunity to all handicapped children, and (2) authorizes State and local educational agencies to use Part B funds to provide the facilities, personnel and services necessary to meet the goal.

A comment has been added following section 121a.304 which points to Congressional interest in having artistic and cultural activities included in programs supported under this part, subject to the priorities.

Comment: Many commenters asked that additional areas be added to the program options requirement (e.g., leisure education, cultural and performing arts and occupational education). Other commenters requested that the term "consumer and homemaking education" be substituted for "home economics" in order to be consistent with the

vocational education amendments of 1976 (Pub. L. 94-482).

Response: No substantive change was made in this requirement. The program options included are examples and the list is not exhaustive. Under the regulation implementing section 504, any program provided to nonhandicapped students must also be made available to handicapped pupils. The language conforming to the vocational education amendments was added.

Comment: Commenters requested that under the requirement on nonacademic services the term "cocurricular" be substituted for "extra curricular" and that intramural, extramural, and interscholastic athletics be included in order to insure consistent use of terminology as it applies nationally. Another commenter suggested that specific language be included regarding participation of visually handicapped persons.

Response: The suggested terms were not adopted. This section conforms to the language in the final regulations under section 504. Also, the suggested language on visually handicapped was not included. This requirement applies to all handicapped individuals, including those with visual handicaps.

PHYSICAL EDUCATION (§ 121a.307)

Comment: Some commenters felt that the section on physical education (PE) needed to be clarified, particularly the conditions under which a handicapped child would not be required to participate in the regular PE program: (e.g., the child (a) is enrolled full-time in a separate facility, (b) needs specially designed PE, or (c) the parents and agency agree that the child should not participate). The main concern dealt with the parent-agency agreement, because it appeared to provide a loophole in which a child would not be required to participate in any PE activity.

Response: The statement on parent-agency agreement was deleted. With this change, a handicapped child attending a regular school would participate in the regular PE program, unless the child needs specially designed PE as prescribed in his or her individualized education program (IEP). Parent-agency agreement is inherent in the development of a child's IEP. The decision as to whether the child should be in the regular PE program or receive specially designed PE is made in the IEP meeting in which the parent and agency personnel are represented.

It should be noted that every handicapped child would participate in some type of PE activity. Specially designed PE could involve arrangements for a child to participate in some individual sport or physical activity (e.g., weight lifting, bowling, or an exercise or motor activity program).

Other changes: Proposed section 121a.304 (Incidental use of property) has been deleted.

PRIORITIES ON THE USE OF PART B FUNDS

As part of the provision on free appropriate public education, the law requires each State and local educational agency to establish priorities, first with respect to handicapped children not receiving an education (defined as "first priority children" in the regulations) and second with respect to handicapped children, within each disability, with the most severe handicaps who are receiving an inadequate education (defined as "second priority children"). The law further requires that, except for State administration funds, each State and local educational agency must use its full entitlement under part B "in accordance with the priorities." The regulations which implement these priority requirements are included in sections 121a.320-121a.324.

PRIORITIES (§ 121a.321)

Comment: Many commenters were concerned that first priority expenditures cannot be used for inservice training for personnel who can serve those students, and stated that such inservice training activities may be an essential component toward achieving the first priority.

Response: The proposed rules have been redrafted and expanded in order to address the above concerns. A new section was added to make it clear that an agency may use Part B funds for inservice training concurrently with placing a first priority child in school (in an interim program, if a component of the child's program is missing). However, the provision of inservice training may not be used as a pre-condition for service to the child.

The intent of Congress with respect to the education of first priority children is both long-standing (dating back to Pub. L. 93-380) and very clear, as reflected in the following statements:

(1) The Congress has a responsibility "* * * to see that all persons are assured equal opportunity. For handicapped children, this means, at the very least, that they must be educated * * * These funds must be focused in such a way that we are assured that handicapped children are provided their right to education." (Congressional Record—Senate, June 18, 1975, p. S10969)

(2) "First priority (or spending under the legislation is to provide services for handicapped children who are not now being served. The flexible approach in the Conference Report with respect to the current fiscal year, fiscal year 1977 and fiscal year 1978 will allow for concentrations of moneys so that this priority can be met." (Congressional Record—House of Representatives, November 18, 1975, p H12348)

(3) "There are millions of children with handicapping conditions who are receiving no services at all. And since we must have a place to start, it is appropriate that we give priority to those who are receiving no services at all first, and then try to reach those with the most severe handicaps who have traditionally received only minimal attention second." (Congressional Record—Senate, June 18, 1975, p S10981)

Comment: Several commenters requested clarification regarding whether the requirements on the use of funds for priorities apply within or among local educational agencies (e.g., if an agency is serving all of its first priority children, could a State give that agency's entitlement to another agency which is not serving all of its first priority children?).

Response: No change has been made. The statute does not permit the State to take away a local educational agency's Part B funds solely because the local educational agency is serving all of its first priority children. For the limited circumstances where a local educational agency's funds may be reallocated, see section 121a.708.

Other changes: A new paragraph (c) has been added to section 121a.321, which provides that Part B funds cannot be used for preservice training. This addition was made to implement Congressional intent expressed in Senate Report No. 94-168, p. 34 (1975), in which it was stated that funds for preservice training are available under the training program under Part D of the Act, and that Part B funds should not be used for this purpose.

INDIVIDUALIZED EDUCATION PROGRAMS

The requirements on individualized education programs (IEPs) in Subpart C have been reorganized and redrafted substantially, based largely on comments received. (These sections have been renumbered, starting with section 121a.340.) A summary of these changes is included below:

(1) A definition of IEP has been added which states that the term "IEP" means a written statement on a handicapped child that is developed and implemented in accordance with sections 121a.341-121a.349 of Subpart C.

(2) The proposed section entitled, "Scope" has been deleted and the substance combined with the section on "State educational agency responsibility."

(3) The proposed section on "Local educational agency responsibility" has been replaced by two new sections ("When IEPs must be in effect" and "Meetings").

(4) The section on "Participants in meetings" has been redrafted to adopt essentially verbatim the language in the Act and to add a new paragraph on participation of evaluation personnel.

(5) The proposed section on "Parent participation" has been amended to include specific provisions regarding notifying parents about the IEP meetings.

(6) The substance under the proposed section on "Content of IEP" has been replaced with the statutory language.

(7) The proposed section on "Private school placements" has been reorganized into two sections to conform to the two groups of private school handicapped children in Subpart D, and has been expanded to spell out in more detail the responsibilities of State and local educational agencies in administering this provision.

(8) A new section was added, entitled, "IEP—accountability."

TIMING OF IEP MEETINGS (§§ 121a.342-121a.343)

Comment: Many commenters felt that the final rules should provide more flexibility to agencies in terms of when IEP meetings are conducted.

Response: The following changes were made in the proposed rules in an attempt to clarify this provision. First, the regulations now specify the dates on which IEP's must be in effect (October 1, 1977, and the beginning of each school year thereafter). Second, except for new handicapped children (those initially evaluated after October 1, 1977), the timing of meetings to develop, review and revise IEPs is left to the discretion of each agency. (For a new handicapped child, a meeting must be held within thirty days of a determination that he or she needs special education.) The regulations are flexible on the schedule to be followed by public agencies in meeting the above dates.

PARTICIPANTS IN IEP MEETINGS (§ 121a.344)

Comment: A number of commenters recommended that personnel from specific disciplines be participants at IEP meetings (e.g., physicians, health care personnel, psychologists, and representatives from other agencies, such as Head Start). Some commenters felt that the meetings should include all direct service personnel who work with a handicapped child. Other commenters suggested cutting back on the number of people who participate.

Response: The final regulations only require the participants listed in the statute, except in the case of a child who has been evaluated for the first time. (NOTE: Participation of evaluation personnel in IEP meetings is covered under the next comment-response sequence.)

Generally, having a large group of people at an IEP meeting may be unproductive and

very costly, and could essentially defeat the purpose of insuring active, open parent involvement.

While it is necessary to insure that all direct services personnel who work with a handicapped child are informed about and involved in implementing the child's IEP, this does not mean that they should attend the IEP meetings. The mechanism for insuring the involvement of all IEP implementers is left to the discretion of each agency (e.g., the child's teacher, or principal, or supervisor could have that responsibility). However, this is a basic administrative procedure which can be handled outside of the context of the IEP meeting.

The statute does not require all IEP implementers to be involved in the meetings. In fact, the definition of IEP in section 602(19) of the Act includes only four people (e.g., a special education provider or supervisor, the teacher, the parents, and the child, where appropriate). Moreover, it was the intent of Congress that IEP meetings generally be small. This position is reflected in the following statement by Senator Randolph in the June 18, 1975 Congressional Record:

In answer to my colleague, it was the intent, and I believe, I can speak for the subcommittee and the committee in this matter, that these meetings * * * be small meetings; that is confined to those persons who have, naturally an intense interest in a particular child, i.e., the parent or parents and in some cases the guardian of the child. Certainly the teacher involved or even more than one teacher would be included. In addition, there should be a representative of the local educational agency who is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of handicapped children.

These are the persons that we thought might well be included. That is why we have called them "individualized planning conferences". We believe that they are worthwhile, and we discussed this very much as we drafted the legislation.

While very large IEP meetings might generally be inappropriate, there may be specific instances where additional participants are essential. In order to enable other persons to be included, the Office of Education retained a provision from the proposed rules which authorized the attendance of "other participants, at the discretion of the agency or parents."

Comment: Some commenters recommended that members of the evaluation team participate in IEP meetings.

Response: A new paragraph has been added which states, in effect, that an evaluation person must participate in any IEP meetings conducted for handicapped children who have been evaluated for the first time (i.e., the preplacement evaluation required under section 121a.531 of Subpart E). Since the meeting is intended to develop an education program for the child, it is essential that someone at the meeting be familiar with the child's evaluation.

Comment: Several commenters recommended that the representative of the agency be qualified in the disability area in which the IEP is written.

Response: A comment has been added following section 121a.344 which suggests (but does not require) that either the teacher or the agency representative should be qualified in the area of suspected disability. At the time of the meeting, the public agency may not yet have hired a person qualified to provide special education with respect to that suspected disability.

PARENT PARTICIPATION (§ 121a.345)

Comment: Some commenters stated that documenting efforts to involve parents would be difficult and time consuming. One commenter felt it was important to retain the general statements requiring agencies to involve parents, but recommended that the details in the parent participation section be deleted from the final regulation. Another commenter recommended that the section be dropped because it is now required in the law and is "* * * utterly paternalistic. If a local education agency is foolish enough to keep inadequate records on transactions with parents, it alone stands in jeopardy; there is no damage to parents or to handicapped children."

Response: The comments have not been adopted. The Office of Education believes that it is important to retain this section in the final regulations, for the following reasons:

First, the section provides rules that allow agencies to proceed in conducting IEP meetings in cases where parents cannot or will not attend. Without this authorization, the IEP process might come to a halt in some cases, since the law states that an IEP must be developed at a meeting with the parents.

Second, the section is designed to protect agencies by setting the conditions under which they can proceed.

Third, the section is designed to protect the rights of the parents. The Congress intended that IEP meetings be utilized as an extension of the procedural protections guaranteed under Pub. L. 93-380. However, if the regulations provided an authorization for agencies to proceed without the parents, there is a potential problem that the authorization (without documentation) might be inappropriately applied in individual cases, which could result in parents' rights not being protected.

Comment: A few commenters suggested using surrogate parents if a child's parents could not attend an IEP meeting. One commenter recommended adding a provision to enable the parents to designate a person to represent them at a meeting.

Response: The Office of Education elected not to write regulations on either of these suggestions.

First, a surrogate parent is appointed only in accordance with the procedural safeguards in Subpart E. The provision was not meant to apply in situations when parents are unwilling to participate, or when an agency makes unsuccessful efforts to communicate with a known parent. A surrogate parent is appointed only when the parents are unknown, unavailable or the child is a ward of the state. However, a surrogate parent appointed under appropriate circumstances would attend the IEP meetings and represent the child in all matters relating to the provision of a free appropriate public education to the child.

Second, with respect to parent designated representatives, the Office of Education does not feel that any change in the regulation is warranted. Parents unable to attend an IEP meeting, who are interested enough in their child's education to seek a third party representative, would have direct input in developing the child's IEP through individual or conference telephone calls or other methods authorized under paragraph (c) of section 121a.345.

Other changes. A new paragraph (f) has been added to require that parents be given a copy of the IEP on request. This should help to insure that the parents are fully informed of the program for their child, and will assist them in participating in future meetings on the IEP.

CONTENT OF IEP (§ 121a.346)

Comments: Hundreds of commenters responded to this section. Some commenters requested that additional services or other items be added. Other commenters recommended that the section be sharply cut back, because they felt that this went unnecessarily beyond the items listed in the statute. Many of the commenters wanted the specific service areas they represent added to the list of services to be provided in the IEP. Others felt that this went unnecessarily beyond the items listed in the statute.

Response: The Office of Education has elected to amend this section by adopting substantially verbatim the language from section 602(19) of the statute. The regulation retains one clarification from the proposed rules, that the individualized education program must include related services to be provided to the child, as well as special education and the extent to which the child can participate in regular education programs. However, given the controversy over this section and whether it is appropriate to add items not specifically covered in the statute, the Office of Education has decided that some experience operating under the statute would be useful before considering whether further regulations on this point would be appropriate.

IEP—ACCOUNTABILITY (§121a.349)

Comment: In the preamble to the proposed rules, a statement was made that the IEP is not a legally binding document. Many commenters recommended that this statement should be included in the body of the final regulations. Other commenters felt that the statement needed to be clarified.

Response: The Office of Education has added a new section, which states, in effect, that each public agency must provide special education and related services in accordance with a handicapped child's IEP. However, Part B does not require that the agency, the teacher, or other persons be held accountable if the child does not achieve the growth projected in the written statement.

COLLECTIVE BARGAINING

Comment: Numerous commenters recommended that the regulations deal with the fact that the required participation of teachers (and other agency staff) in the meetings to develop IEPs would require modification of collective bargaining agreements. Some commenters urged that the regulations require additional compensation for teachers to participate in these meetings, prescribe or limit any after-school-hours participation, and specify arrangements for relieving teachers from classroom duties for the meetings.

Response: No change has been made in the regulation. The requirement for teacher participation in developing IEPs is statutory. The Commissioner understands that collective bargaining agreements and individual annual contracts for teachers vary greatly among local educational agencies and may or may not deal with additional duties and compensation for after-hour activities. In some instances, especially in urbanized and highly unionized areas, collective bargaining agreements may have to be renegotiated to cover employee participation in IEPs. However, this is an area which is solely within the authority of the public agency and its employees (and their union representative, if any). It would be inappropriate and beyond the scope of the Commissioner's authority to prescribe how this requirement must be met. Where collective bargaining agreements must be modified, the public agency must negotiate the appropriate modifications to comply with the statute. The public agency is also responsible for insuring that the IEP meetings are conducted at a time reasonably convenient to parents. (In some cases this may be during school hours; in others, after hours.) The agency also must make its own arrangements for covering classrooms when teachers are absent.

DIRECT SERVICES BY THE STATE EDUCATIONAL AGENCY

The direct services provision of this subpart includes sections on (1) use of local educational agency (LEA) funds, (2) nature and location of services, (3) use of the State's (SEA's) entitlement, and (4) a State matching requirement.

The section on the use of LEA allocations (renumbered section 121a.360) has been redrafted to combine the proposed paragraphs (a) and (b) into a single paragraph. This paragraph sets out the conditions under which an SEA may use an LEA's entitlement.

A new paragraph (b) has been added to section 121a.360, which states that in meeting the requirements of this section, the SEA may provide special education and related services directly, by contract, or through other arrangements.

A new paragraph (c) has been added, which repeats the statutory provision that the excess cost requirement does not apply to State educational agencies.

Section 121a.360 (Nature and location of services) has been amended to correct an error made in the proposed rule. The proposed regulation stated that the least restrictive environment (LRE) provisions do not apply when the SEA provides direct services. The amended rule now states that the manner in which the education and services are provided must be consistent with the requirements of this part (including the LRE provisions).

The regulation on "State matching" was not substantially changed. However, a comment was added after this section to make it clear that the requirement would be satisfied if the State can document that the amount of State funds expended on each major program area (e.g., the comprehensive system of personnel development) is at least equal to the expenditure of Federal funds in that program area.

Comment: In the preamble to the proposed rules under the direct services provision, a point was made that an LEA would not be in compliance with the section 504 regulations if that agency did not make available a free appropriate public education (FAPE) to all of its handicapped children. A commenter, in responding to this statement, pointed out that the term FAPE has different meanings under section 504 and Pub. L. 94-142; and, therefore, an LEA would not have to meet the requirements of Pub. L. 94-142 in order to be in compliance with section 504.

Response: Under Part B, "FAPE" is a statutory term which requires services to be provided in accordance with an IEP. However, under the section 504 regulations, each recipient must provide an education which includes services that are "designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met • • •" Those regulations state that implementation of an IEP in accordance with Part B is one means of meeting the "FAPE" requirement. (NOTE.—A more detailed description of the relationship between section 504 and Pub. L. 94-142 is included in this appendix.)

Other changes: A new section 121a.372 has been added to implement section 611(c)(3) of the Act. This section provides that the nonsupplanting requirement does not apply to the State's expenditure of its allocation beginning with funds appropriated for Fiscal Year 1978 and for each following fiscal year.

COMPREHENSIVE SYSTEM OF PERSONNEL DEVELOPMENT

GENERAL

The proposed rules in this section created some controversy over the amount of detail contained in the regulations. Comments ranged from requests for more specificity to suggestions that everything be deleted except the statutory language.

The statute is very clear in requiring that a "comprehensive system of personnel development" be implemented in each State. Since this is a broad requirement, challenging each State to reach out to the expansive community of agencies involved in preparing personnel to educate the handicapped, many of which are private and not under the control of the State, it was felt that a regulation was needed that would provide sufficient information for the State and involved agencies to understand their responsibilities in achieving compliance.

SCOPE OF SYSTEM (§ 121a.380)

Comment: A commenter suggested that inservice education be available to all special, regular, and related service personnel.

Response: Paragraph (a) of section 121a.380 was changed to read "the inservice training of general and special educational instructional, related services, and support personnel."

Comment: A commenter suggested that all personnel preparation services be conducted in accredited institutions granting advanced degrees and that "no less than ten percent of the money under this Act be contracted to institutions of higher education." Another commenter recommended the earmarking of a percentage of funds for staff and program development.

Response: No change has been made in the regulations. The Office of Education believes that each State must have maximum latitude in decisions regarding the types of facilities and personnel that are used to implement the comprehensive system of personnel development.

With respect to targeting funds for training, the Office of Education feels that such a step would be inappropriate at this time.

Part B is a unique Federal statute in that it imposes requirements on States which must be implemented, regardless of the amount of Federal funds available. Given the scope and magnitude of the law, the Office of Education believes that each State should have maximum latitude in terms of how its Part B funds are used to implement the various statutory provisions, subject, of course, to the priority requirements in Subpart C.

DEFINITION OF "APPROPRIATELY AND ADEQUATELY PREPARED AND TRAINED" (PROPOSED § 121a.381)

A number of comments were received on the definition of "appropriately and adequately prepared and trained" which was in § 121a.381 of the proposed rules. The definition has been deleted in the final regulations. Instead, the term "qualified" is used, as defined in § 121a.12.

Comment: A commenter suggested that nationwide certification requirements be mandated to allow for the mobility of personnel.

Response: No change has been made. The intent of the Act is to insure that all personnel necessary to carry out the purposes of the Act are qualified. The Act does not authorize the establishment of national certification standards.

Comment: A commenter suggested that early childhood be required as an area for certification.

Response: No change has been made. These personnel must be included under the State's comprehensive personnel development system.

Comment: Several commenters expressed the belief that certification should not be required for all personnel directly serving the handicapped, or that such a requirement would result in great expense for the State. Still others felt that competency based systems should be used as opposed to the requirement for certification, registration, or licensing.

Response: The statutory language "appropriately and adequately prepared and trained" has been interpreted, by use of the term "qualified," to mean certification, registration, or licensing. These are commonly accepted procedures for determining if personnel are "appropriately and adequately prepared and trained."

PARTICIPATION OF OTHER AGENCIES AND INSTITUTIONS (§ 121a.381)

The comments on the level and intensity of the "participation" required in this section ranged from the belief expressed that special meetings on components of the state plan are not required in the Act, therefore the "participation" envisioned in section 121a.381 should be eliminated, to the suggested requirement that organizations not only have an opportunity to participate, but that they "must participate." The comprehensive system of personnel development is such a specialized aspect of the Act, necessarily involving agencies not under the jurisdiction of the State that "participation" is fully warranted, though not mandated in the statute. Thus, the regulations set a requirement for the State to insure that those agencies with an interest in the preparation of personnel for the education of the handicapped have an opportunity to participate fully in the development, review, and updating of the system. This is a reasonable requirement, especially considering the critical effect the system will have on these agencies preparing the personnel. Rather than a burden on the State, the "participation" should provide the direct opportunity for the State to encourage the development of quality personnel preparation programs, a factor essential to the provision of a "free appropriate public education."

Comment: Several commenters suggested that "representatives from each group be included in the planning" as well as parents. One commenter suggested that disability categories and groups be listed in the proposed rule.

Response: The regulation has been altered to include representatives of handicapped and parent organizations. This wording should be sufficient to involve all relevant groups.

Comment: A commenter suggested the addition of a subsection (3) to section 121a.381(b) that would require the annual program plan to include a description of agency responsibilities with respect to research and evaluation of exemplary programs that could be implemented in local educational settings.

Response: Sections 121a.385 and 121a.386 have been modified to classify agency responsibilities.

INSERVICE TRAINING (§ 121a.382)

Comment: There were a number of contrasting points of view and suggestions on this section, ranging from requests to mandate greater detail in the proposed rules, to the suggestion that the section be deleted altogether. Those proposing greater detail suggested that specific knowledge and areas of learning be emphasized and that teachers be trained "by having them work one-to-one with specialists" and that "inservice training be mandated at the local level, a county being the largest unit possible, to prevent the State from using the money for ineffectual regional workshops." Also, there were suggestions that where academic credit is to be made available that this be done

only in institutions of higher education with State approved programs.

On the other extreme there were suggestions that this section "exceeds statutory requirements" and "federal rules should not say how a task is accomplished" and "(state) provides adequate training and inservice and does not need more obstacles and regulations."

Response: The statute clearly requires inservice education as a central part of the comprehensive system of personnel development and it is appropriate for the rules to detail the nature and extent of the inservice education that is required. This has been accomplished through the outlining of procedures which define inservice education, its parameters, and relationship to required needs assessments. However, the rules do not define the specific nature of the training to be accomplished. Thus, the rules have been designed to outline the foundation for an adequate program of inservice education, without stifling the creativity of State and local personnel in their efforts to plan and implement such a system.

Comment: A commenter suggested that the statement "in cooperation with institutions of higher education" be inserted in section 121a.382(b)(1).

Response: No change has been made. However, involvement of institutions of higher education is required under § 121a.381(a).

Comment: A number of commenters suggested the addition of specific disciplines and professionals to this section, constituting an itemized list of personnel to be trained or involved in the review of training needs.

Response: No change has been made. The State's plan must include all personnel who need training.

Comment: Several commenters suggested wording changes designed to clarify the text of the proposed rule on inservice training.

Response: Changes were made where necessary to bring the regulation into conformity with current usage.

Comment: There were a number of suggestions concerning the financial arrangements for conducting inservice training. Some commenters advocated the funding of parent groups to conduct inservice training. Others suggested financial support for trainees involved in their programs. One commenter urged that the rule allow for contracting with other than non-profit organizations. One suggested contracts with institutions of higher education to carry out personnel development programs. Another suggested incentives for teacher participation, including released time and college credit. One suggested that inservice be provided during contract time, not involving extra hours.

Response: No substantive changes have been made. All of the suggestions in the above comments are authorized under these regulations.

PERSONNEL DEVELOPMENT PLAN (§ 121a.382)

Comment: Several commenters asked for special attention to physical education and service delivery models which take into account problems of rural families.

Response: No change has been made. Specialized needs in physical education and the unique aspects of providing services in rural settings should be addressed as appropriate in the needs assessment and plan.

Comment: One commenter objected to including preservice training under this section.

Response: No change has been made. The term "inservice" education is used in the Act. However, since the Act clearly requires that a "comprehensive system of personnel development" be developed, such a system must include the consideration of preservice training.

NOTE.—The data required in sections 121a.124 and 121a.126 of Subpart B on the numbers of handicapped children and the kind and number of personnel needed will serve as the uniform data base within the State for the personnel development system under § 121a.382 of this subpart. The data may also be used by institutions of higher education and other nonprofit educational training agencies in submitting personnel preparation applications under Part D of the Act. Section 121f.9 of the regulations under Part D (45 CFR 121f.9) provides as follows:

§ 121f.9 *State personnel needs.*

Each application shall include (a) a statement by the State educational agency of personnel needs for education of the handicapped and a statement by the applicant of how the proposed program relates to those stated needs, and (b) a description of the ways in which the recipient's program goals and objectives relate to the purposes of Part D of the Act.

(20 U.S.C. 1431, 1432, 1434)

DISSEMINATION (§ 121a.384)

Comment: One commenter suggested that "teachers organizations" be specified as recipients of information.

Response: No change has been made. Teacher organizations are included under the phrase "other interested agencies and organizations."

SUBPART D—PRIVATE SCHOOLS

The proposed rules created a certain amount of confusion among commenters in distinguishing between handicapped children placed in or referred to private schools by the State or by local educational agencies and handicapped children whose parents choose to educate them in private schools. The major difference between these two groups of children is in who bears the cost of the private school.

A free appropriate public education must be made available to each handicapped child by the public agencies of the State. Subject to the requirements on least restrictive environment, this could include placement in or referral to a private school or facility. Such a placement or referral must be at no cost to the parent.

On the other hand, even if a free appropriate public education is available, the parent may choose not to accept it. The parent may choose to send the child to a private school rather than take advantage of the free public education. If this happens, the Act does not require the State or local educational agency to bear the cost of the private school. For children placed in private schools by their parents, the State and its local educational agencies have a different duty. They must design their program so that handicapped children in those private schools can participate in special education and related services offered by the local educational agencies if the parents of those children so desire.

The regulations have been reorganized to make these distinctions clearer. The first set of sections (121a.400–121a.402) now cover children placed in or referred to private schools or facilities by a public agency in order to provide them with special education or related services. (These sections replace sections 121a.320–121a.323 of the proposed rules.)

Since the "State" includes all of its political subdivisions, the term "public agency" is used, as elsewhere in the regulations, to mean all of the political subdivisions of the State which are responsible for providing special education or related services to handicapped children.

The second set of sections (121a.450–121a.460) apply to handicapped children enrolled in private schools or facilities but who are not placed or referred there by a public agency to receive special education or related services. (These sections replace sections 121a.300–121a.306 of the proposed rules.)

The following comments were made regarding proposed Subpart D. Comments which asked for changes not authorized under the statute are not summarized. (Commenters who are concerned about the cost of room and board as a "related service" are referred to section 121a.302 and the discussion of that section in this preamble.) The comments are arranged in order of the final rules.

RESPONSIBILITY OF STATE EDUCATIONAL AGENCY (§ 121a.401)

Comment: A commenter asked that paragraph (a)(3) be deleted, which required that the special education given to a handicapped child placed by a public agency must meet the education standards of the State educational agency (SEA). The commenter stated that otherwise there would be conflicts between the SEA's standards and those of other agencies, in the day care area, for example.

Response. Paragraph (a)(3) cannot be deleted, since it is derived from a statutory requirement. However, it has been revised by using the language of the statute. This will broaden the types of standards that the SEA may apply, and therefore avoid conflict with other mandatory standards. Of course, those standards cannot override the provisions in Part B of the Act.

Comment: A commenter asked that provision be made for interstate referrals to private schools and communication among States regarding those referrals.

Response. No change has been made in the regulation. Referrals between States are to be handled under existing procedures. Unless a problem develops in this area that seriously interferes with the rights of handicapped children or their parents under Part B, the Office of Education is reluctant to regulate the mechanisms by which the States arrange to provide services.

IMPLEMENTATION BY SEA (§ 121a.402)

Comment: A commenter suggested that the State educational agency insure the monitoring of private schools, dissemination of standards to them, and involving them in developing State standards, rather than the State educational agency doing it directly.

Response: No change has been made. The statute places direct responsibility on the State educational agency to administer and monitor the requirements under Part B. While the State educational agency in many areas need only insure that the Part B requirements are met, monitoring must be done by the agency itself. Dissemination of standards could be done in a variety of ways. Involvement in development of State standards would have to be done directly by the State educational agency if it is the agency that develops those standards.

PLACEMENT OF CHILDREN BY PARENTS (§ 121a.403)

Comment: Commenters were concerned with the effect of this section on the rights of handicapped children in private schools and felt that the section was worded in a manner that would limit those rights.

Response: The section has been revised to make it clear that a free appropriate public education (FAPE) must be made available to

each handicapped child. This would include the development of an individualized education program and placement in the least restrictive environment. Free appropriate public education must be made available at no cost to the parents. If the parents feel that services were not adequate, they may have a due process hearing to show that more or better services must be provided to give their child FAPE. However, if the parents choose not to educate their child in the public school system, they are not required to do so. In that case, the relevant public agency has the remaining duty of offering special education and related services under sections 121a.450–121a.460, but does not have the duty of insuring that the private school meets the requirements of Part B (unless other handicapped children have been placed in or referred to that private school by the agency), or of paying for the cost of the private school. Language has been added to clarify the public agency's duties under sections 121a.450–121a.460.

Other changes: Proposed section 121a.322 (Placements in another State) has been deleted. It would have required private schools to meet the standards of both the sending and receiving States. This would have been an unreasonable burden on the receiving State to enforce.

HANDICAPPED CHILDREN IN PRIVATE SCHOOLS NOT PLACED OR REFERRED BY PUBLIC AGENCIES (§§ 121a.450–121a.460)

Comments: A number of commenters felt that clarification was needed in these sections. There was also some concern expressed regarding the State's legal authority to provide services to children enrolled in private schools.

Response: The regulations have been amended to conform more closely to those under Title I of the Elementary and Secondary Education Act of 1965 (education of educationally deprived children) (45 CFR, Section 116a.23). As under Title I, a balance is drawn between the statutory requirement to provide services, and the constitutional necessity of avoiding excessive entanglements between public agencies and church-related institutions. It is also important for the Office of Education to have a uniform policy regarding services to private school children under all Federal education programs it administers. The amendments to the proposed rules should serve all of these purposes.

SUBPART E—PROCEDURAL SAFEGUARDS

This subpart implements the procedural safeguards set forth in the Act, including due process procedures for parents and children, protection in evaluation procedures, least restrictive environment, confidentiality of information, and procedures of the Office of Education.

A substantial number of detailed comments were received on these sections. Many concerned the statute rather than the regulations or did not state what changes in the regulations were desired. Others requested revisions which did not appear to involve substantive changes. Some commenters sought substantially more detailed specification of due process rights while others indicated that the statute itself was so detailed in the due process area that the regulations should not go beyond the statute.

As stated earlier in this preamble, the Office of Education's position, while incorporating a number of the suggestions in the final regulations, is still to adopt minimum regulations in this area at this time, review experience under the regulations, and then make a determination as to whether more detailed regulations are required.

DUE PROCESS PROCEDURES FOR PARENTS AND CHILDREN

DEFINITIONS (§ 121a.500)

Comment: Commenters recommended that the phrase "unless it is clearly not feasible to do so" be deleted from the definition of consent and that additions be made to make it clear that consent may be revoked and may not be made a precondition to the child's right to participate in basic educational programs. The effect of deleting the phrase would be to require that a consent is not valid unless the parent is informed in every case of the information relevant to the consent.

Response: The phrase has been deleted. The deletion of the phrase will help to assure an informed consent in every case, regardless of the parent's language or other mode of communication. A phrase has been added to make it clear that parents have the right to revoke consent. A separate section 121a.504 states that consent may not improperly be made a precondition of services. While public agencies must obtain consent for preplacement evaluations or for initial placement, a public agency may not coerce parents to consent by withholding or threatening to withhold other regular education services or extracurricular activities unless the parent consents.

Comment: Several commenters requested changes in the definition of "evaluation" to indicate that an evaluation must be conducted by qualified personnel, that the findings must be reduced to writing, and that it must take into account the child's assets as well as deficits.

Response: No change has been made. The suggestion regarding qualified personnel is covered under section 121a.532. The Office of Education expects that evaluations will be in writing and that a child's assets will be considered. If a problem develops in this area, the Office of Education will reconsider the necessity for further regulations.

GENERAL RESPONSIBILITY OF PUBLIC AGENCIES (§ 121a.501)

Comment: Commenters suggested that parents have the right to complain and that agencies should be required to respond to them outside of the context of a hearing.

Response: No change has been made in the regulation. However, agencies should certainly seek to respond to complaints by informal discussions and negotiations. A comment section has been added which notes that mediation may be useful in some instances. In any case, negotiations may not delay a hearing if a parent has requested it.

INDEPENDENT EDUCATIONAL EVALUATION (§ 121a.503)

Comment: Commenters disagreed as to whether the parent's right to an independent evaluation should be broadened or narrowed.

Response: The section has been rewritten to require public agencies to provide parents information, upon request, of where an independent educational evaluation may be obtained. Also, "public expense" has been defined. However, the interpretation in the proposed regulations is retained. The evaluation must be at public expense if the parent disagrees with the evaluation by the public agency, unless the public agency initiates a hearing to show that its evaluation is appropriate. If upheld, the expense of the independent evaluation does not have to be borne by the agency. The independent evaluation must be considered in any hearing.

There are several competing interests which the regulation seeks to balance. The statutory right of the parent to an independent educational evaluation must be preserved. On the other hand, the public agencies should not be asked to bear the costs of unreasonably expensive independent evaluations. Also, for the independent evaluation to be useful, it must meet the same criteria as evaluations conducted by public agencies under this part.

PRIOR NOTICE; PARENT CONSENT AND CONTENT OF NOTICE (§§ 121a.504–121a.505)

Comment: Commenters sought further specificity as to the detail of information provided to parents in the notice. Other commenters felt that the requirements were too demanding. Some commenters asked that consent be required for preplacement evaluation and prior notice for reevaluation; and that consent be extended to include permission for placement. Other commenters sought to delete the consent requirement on the grounds that educational judgments should be final.

Response: The basic notice requirements in sections 121a.504 and 121a.505 were not changed. However, the following changes were made in the consent requirements:

(1) Consent was expanded to include permission for initial placement of a handicapped child in a special education program. Many commenters had requested this addition; and the Office of Education agrees that this requirement is as essential as consent for preplacement evaluation.

(2) The proposed consent rule was changed from consent for all evaluations to consent for the initial or preplacement evaluation. This change is essentially consistent with the section 504 final regulations (45 CFR Part 84, § 84.35(a)). The Office of Education agrees with commenters that there is no need to require consent for reevaluation. If a handicapped child is initially placed in accordance with section 121a.504, and if his or her individualized education program is annually reviewed in accordance with section 121a.343 of Subpart C, a requirement is not necessary. However, prior notice would have to be provided.

Comment: Commenters were especially concerned that clarification be added regarding procedures for overriding parents' refusal to consent.

Response: A subsection has been added to set out procedures for dealing with parental refusal to consent (see section 121a.504(c) and the comment following that section).

The procedures are designed not to interfere with existing State laws which may require consent. Where State law does not require consent, the parent is afforded a due process hearing under this Part. These rules should provide protection to the parent, the child, and the public agency.

IMPARTIAL DUE PROCESS HEARING (§ 121a.506)

Comment: A commenter asked that the regulations specify that the public agency must pay for the hearing.

Response: The change requested by the commenter has not been made. Since the statute requires that the public agency must afford parents an opportunity for a hearing, the agency must bear the cost of the hearing, except for paying for parents' representatives and witnesses. However, section 121a.506 has been amended to require agencies to provide parents with information about free or low-cost legal and other relevant services that are available.

IMPARTIAL HEARING OFFICER (§ 121a.507)

Comment: Commenters sought to have three-person panels, including parents, serve as the hearing officials. Some sought to allow and others sought not to allow school board officials from serving as hearing officials. Com-

menters also asked that lists of hearing officers be required, including their qualifications.

Response: A requirement has been added that each public agency keep a list of persons who serve as hearing officers and a statement of their qualifications. This should help to ensure that the requirement for impartiality is met. No other substantive change has been made. A three-person panel could be used under the existing rules, as long as the conditions of impartiality are met. However, a parent of the child in question and school board officials are disqualified under section 121a.508.

HEARING RIGHTS (§ 121a.506)

Comment: Commenters disagreed as to whether hearing rights set forth in the proposed rules should be expanded or restricted. Among the additional rights sought were the right to compel the attendance of witnesses, prohibit the introduction of evidence not disclosed prior to the hearing, allow the child to be present and the hearing to be open to the public at the parents' discretion, and to specify whether the record of the hearing must be free or at reasonable cost.

Response: The section has been revised to add rights for any party to prohibit the introduction of evidence not previously disclosed to the other party and for the child to be present and the hearing to be open to the public. The purpose of hearings under this part is to ensure that handicapped children are provided free appropriate public education. Opening up the hearing and the evidence that may be presented should serve to insure that the result of a hearing will be in the best interests of the child. No provision has been added relating to cost. However, it is expected that a copy of any decision would be provided to the parent at no cost.

HEARING DECISION; APPEAL (§ 121a.509)

Comment: A commenter sought to add a requirement that specifies that the hearing officer has the power to order any educational program for the child and that his or her power not be limited to accepting or rejecting the program by the public agency or parent.

Response: No change is necessary. The hearing officer has the function to decide what placement is appropriate, if that is the subject of the hearing.

ADMINISTRATIVE APPEAL; IMPARTIAL REVIEW (§ 121a.510)

Comment: Commenters disagreed on whether to reduce or expand the requirements in this section. Some commenters wanted short, specific timelines set out for various actions and specification of the rights that apply at the review level.

Response: The section has been revised to specify other duties and powers of the reviewing official, in addition to those already set out. For example, the official may seek additional evidence if necessary, including holding a new hearing and affording the parties an opportunity for written as well as oral argument (at the reviewing official's discretion). The reviewing official must give a copy of the written findings and decision to the parties. These duties and powers are regarded as necessary to insure that a full review will be conducted and that all parties will be informed of the result of the review. Revisions to timelines for any hearing or review are set out in section 121a.512.

CIVIL ACTION (§ 121a.511)

Comment: Commenters wanted the regulations revised to allow for direct appeal to the courts without first using administrative hearing and review procedures if those procedures would be futile, the timeliness or adequacy of the administrative proceedings are being challenged, or a class action is involved. Commenters cited language in the Congressional Record in support of this interpretation (121 Cong. Rec. S20433 daily ed., November 19, 1975).

Response: No change has been made. The legislative history cited is nongermane as it was made in reference to the Senate Bill (S. 6) which did not contain the final statutory provision on civil actions. The provision on civil action was added as a Conference substitute. The issue of exhaustion of remedies will be up to the courts to resolve.

TIMELINESS AND CONVENIENCE OF HEARINGS AND REVIEWS (§ 121a.512)

Comment: Commenters wanted clarification of the 45-day time limit for commencing and completing a hearing and review set out in the proposed regulations. They disagreed on whether the time should be shortened or lengthened.

Response: The section has been revised to set a 45 day time limit for a hearing and a 30 day limit for a State level review. In both instances, a decision must be reached and mailed to each of the parties within the time limits set. A hearing or reviewing officer may grant specific extensions, at his or her discretion, at the request of either party. The Office of Education believes reasonable outside time limits must be set to insure resolution of any dispute quickly so that the child's special education may proceed. Discretion for specific extensions is consistent with normal judicial and administrative practice.

CHILD'S STATUS DURING PROCEEDINGS (§ 121a.513)

Comment: Commenters suggested a provision be added to allow change of placement for health or safety reasons. One commenter requested that the regulations indicate that suspension not be considered a change in placement. Another commenter wanted more specificity to make it clear that where an initial placement is involved, the child be placed in the regular education program or, if the parents agree, in an interim special placement.

Response: A comment has been added to make it clear that this section would not preclude a public agency from using its regular procedures for dealing with emergencies.

SURROGATE PARENTS (§ 121a.514)

Comment: Commenters requested that the regulations clarify when surrogates may be appointed. One reason given was to insure that agencies do not attempt to appoint surrogates when parents are uncooperative or nonresponsive.

Response: The section has been revised to make it clear that the requirements for appointing surrogates apply only when no parent can be identified, the agency after reasonable efforts cannot discover the whereabouts of a parent, or the child is a ward of the State. Agencies are not allowed to appoint surrogates when parents are uncooperative or nonresponsive.

Comment: Commenters requested that the regulations further specify procedures to be used for the appointment of surrogates, including administrative proceedings with notice to interested parties and the right of interested parties to seek a review of the decision.

Response: No change has been made. State procedures for the appointment of surrogates will be followed. Disagreements about the choice of surrogates may be the subject of a due process hearing under section 121a.506.

Comment: A number of commenters suggested that the regulations provide more detail about the qualifications of the surrogates (for example, requiring training and a commitment to becoming acquainted with the child).

Response: No change has been made. The Office of Education believes these concerns are covered by section 121a.514(c)(2) which requires that the surrogate have knowledge and skills that insure adequate representation of the child.

Comment: A number of commenters were concerned about the legal liability of surrogates. Some commenters wanted the regulations to protect surrogates from any legal liability.

Response: No change has been made. The legal liability of surrogates will be determined under State law relating to such matters as breach of fiduciary duty, negligence, and conflict of interest. The Federal government has no authority to limit legal liability.

Comment: A number of commenters sought clarification regarding which agency employees could serve as surrogates. For example, one commenter wanted the regulations to indicate whether the head of a State institution could serve as the surrogate.

Response: The regulation has been reworded to make it clear that no employee of any agency involved in the education or care of the child may serve as the surrogate parent.

PROTECTION IN EVALUATION PROCEDURES

Section 612(5)(C) of the Act requires States to establish non-discriminatory testing procedures for use in the evaluation and placement of handicapped children. The requirements for public agencies to follow in carrying out this provision are set forth in sections 121a.530–121a.534 of Subpart E. (These section numbers have been changed to correspond with other number changes in Subpart E.)

The evaluation procedures in the proposed rules have been changed to conform to the corresponding requirements in the final regulations for section 504 of the Rehabilitation Act of 1973 (45 CFR Part 84, § 84.35) and in response to other comments received. (Many of the comments dealing with the language and substance of the proposed evaluation procedures are covered by the above conforming changes.) A summary of the changes in these procedures is included below:

(1) Proposed section 121a.431 ("Evaluation: change in placement") has been replaced with new section 121a.531 ("Preplacement evaluation"). This corresponds to section 84.35(a) of Part 84.

(2) Proposed section 121a.432 ("Evaluation procedures") has been divided into two sections (section 121a.532 "Evaluation procedures" and section 121a.533, "Placement procedures"). The new section on evaluation procedures (a) incorporates essentially verbatim the language of section 84.35(b) of Part 84, (b) adds two additional requirements from section 612(5)(C) of the Act which are not in Part 84 (e.g., the provision on native language, and the requirement that "No single procedure is used as the sole criterion for determining an appropriate educational program for a child"), and (c) requires that the evaluation be made by a "multidisciplinary team • • • including at least one teacher or other specialist with knowledge in the area of identified disability • • •"

(3) The new section on placement procedures incorporates essentially verbatim the language in section 84.35(c) of Part 84. In addition, the section ties the development

of an individualized education program to the placement procedures.

The following additional comments were made regarding evaluation procedures:

Comment: Several commenters felt that the regulations should require State and local educational agencies to develop procedures for the conduct of evaluations. This would make it possible to determine the adequacy of the evaluations and to insure uniformity in basic procedures.

Response: A paragraph was added to section 121a.530 (General) which requires the State educational agency to insure that each public agency establishes and implements evaluation—placement procedures.

Comment: Several commenters felt that timelines should be set for implementing the evaluation process (e.g., for initial referral to evaluation and placement).

Response: No change has been made. The Office of Education has elected to impose very few absolute timelines in the regulations for this part, because of the potential administrative and legal problems they can cause. Imposing timelines can actually delay the provision of a service (for example, if the time periods are regarded as both minimum and maximum times for implementing a procedure).

A child should be evaluated as soon as possible following referral. Any undue delay in providing the evaluation would raise the question of the State and local educational agencies' compliance with sections 121a.128 and 121a.220 (identification and evaluation of all handicapped children).

Comment: Some commenters requested clarification regarding whether a reevaluation is needed, as required by proposed section 121a.431(a)(2), if the parents and agency agree that the child should be transferred from a special education program to a full time regular class placement.

Response: This specific section has been deleted in the final regulations. However, any changes in a child's placement (including a transfer to a regular class) would not be made until after a meeting is held to review the child's individualized education program in accordance with the requirements under sections 121a.340–121a.349 of Subpart C. If the parents and agency agree that the child no longer needs special education, a reevaluation would not be necessary. Section 121a.531 requires an evaluation before initial placement only. Reevaluations are covered under section 121a.534.

Least Restrictive Environment

Section 612(5)(B) of the Act requires States to establish policies and procedures to insure that "to the maximum extent appropriate, handicapped children * * * are educated with nonhandicapped children * * *." The regulations for implementing this provision are set out in sections 121a.-550–121a.556 of Subpart E.

A new paragraph was added to section 121a.550 which requires the State to insure that all public agencies establish and implement procedures in accordance with the requirements of this subpart. In addition, a new section, entitled "Nonacademic settings" was added. This section is taken from a new requirement in the section 504 regulations (45 CFR Part 84, § 84.34).

General (§ 121a.550)

Comment: A number of commenters requested that provisions be made for special support in the regular classroom in order to accommodate handicapped children (e.g., including reducing the pupil-teacher ratio and assigning aides to the room).

Response: No change was made, since the statute already authorizes the use of supplementary aids and services as a means of enabling a handicapped child to be educated with nonhandicapped children.

Continuum of Alternative Placements (§ 121a.551)

Comment: Many commenters responded to this requirement. Some felt that terms other than "continuum" should be used (e.g., "range of programs" and "variety of services"). A large number of commenters felt that "continuum" carried negative connotations (e.g., statements were made that the concept undermines the ideals of Pub. L. 94–142, that it implies best-to-worst, etc.). Other commenters felt that it discriminated against residential or private schools, and suggested that efforts be made to counteract this bias.

Response: No change has been made in this section. The term "continuum," as with "least restrictive environment" (LRE), is commonly used by agencies, advocates, and parents. However, there is nothing to prohibit an agency from using terms such as those included above in administering these provisions.

As with "LRE," the term that is used is not as important as the basic provision and how that provision is implemented. The purpose of a continuum is to be able to accommodate to differences between handicapped children in terms of the degree of special assistance they need to receive a free appropriate public education. This matter was dealt with directly in the June 26, 1975 Report of the House of Representatives on H.R. 7217 (H. Rept. No. 94–332, p. 9):

> The Committee understands the importance of providing educational services to each handicapped child according to his or her individual needs. These needs may entail instruction to be given in varying environments, i.e., hospital, home, school or institution. The Committee urges that where possible and where most beneficial to the child, special educational services be provided in a classroom situation. An optimal situation, of course, would be one in which the child is placed in a regular classroom. The Committee recognizes that this is not always the most beneficial place of instruction. No child should be denied an educational opportunity; therefore, H.R. 7217 expands special educational services to be provided in hospitals, in the home, and in institutions.

When it is clear that, because of the nature or severity of a child's handicap, the child must be educated in a setting other than the regular class, it is appropriate to implement such a placement. However, the LRE provision is also designed as a rights provision to protect against indiscriminate placement of a child in a separate facility solely because the child is handicapped and not because special education is needed in that type of setting.

Even with respect to severely handicapped children, it may be possible to meet the "regular education setting" goal by having a separate class or separate wing in a regular school building.

Placements (§ 121a.552)

Comment: Many commenters were concerned that there may be an overzealous implementation of the LRE provision without regard to the needs of individual handicapped or nonhandicapped children.

Response: No substantive change has been made in this section, because the Office of Education feels that the section includes necessary safeguards to insure protection against the above concerns. With respect to those concerns, the overriding rule is that each child's placement must be determined annually and be based on his or her individualized education program.

With respect to concerns about the harmful effect of placing handicapped children in regular classes, the analysis of the section 504 regulations indicates: "* * * it should be stressed that, where a handicapped child is so disruptive in a regular classroom that the education of other students is significantly impaired, the needs of the handicapped child cannot be met in that environment. Therefore regular placement would not be appropriate to his or her needs * * *" (45 CFR Part 84—Appendix, paragraph 24)

Comment: A commenter requested that a new provision be added which requires State and local educational agencies to utilize community-based early childhood development programs for 3–6 year old handicapped children. The main intent of the new provision is "aimed solely at assuring maximum appropriate mainstreaming."

Response: No change was made in the section. The existing provisions are considered to be adequate to cover the intent of this request.

Confidentiality of Information

Notice to Parents (§ 121a.561)

Comment: Commenters asked that the detailed content of the notice requirements be deleted as excessive.

Response: No change has been made. The Office of Education believes the provisions require that States provide necessary information to inform parents about the type of information collected about handicapped children to meet the requirements of this part.

Access Rights (§ 121a.562)

Comment: Commenters requested that this section be expanded to require that access to records be given in no case less than five days prior to meetings to develop individualized education programs or any hearing and to permit authorized representatives of the parent to inspect the record. A commenter felt the 45-day outside time limitation could be misinterpreted to mean an agency need not comply at all after 45 days from the date of the request.

Response: Language has been added to make it clear that an agency must comply with a request for access before any meeting regarding an individualized education program. This will help insure that interested parents are able to familiarize themselves with their child's records prior to any meeting and be able to participate more knowledgeably. The prohibition against unnecessary delay places an obligation on the agency to make the records available in a timely manner so that the Office of Education does not believe it is necessary to specify a specific time limitation. Section 121a.562 has been amended to give parents the right to have an authorized representative inspect their child's education records.

The 45-day time limitation is not subject to the misinterpretation the commenter fears. This language is from the Family Educational Rights and Privacy Act, section 438 of the General Education Provisions Act (specifically section 483(a)(1)(A)), to which these regulations are tied (by statute).

Fees (§ 121a.566)

Comment: A commenter felt the first copy of a record should be given free upon request from the parents.

Response: No change has been made. The prohibition against charging a fee if it would effectively prevent the parents from inspecting and reviewing the record is based on a requirement in the Family Educational Rights and Privacy Act, to which these regulations are limited by statute (section 612

(2)(C)). Agencies may of course adopt policies of making copies available free of charge and are encouraged to do so.

HEARING PROCEDURES (§ 121a.570)

Comment: A commenter requested clarification of who conducts a hearing.

Response: The section states that the procedures under § 99.22 (the hearing procedures in the regulations for the Family Educational Rights and Privacy Act) be used. Section 99.22(b) states the hearing may be conducted by any party, including an official of the educational agency or institution, who does not have a direct interest in the outcome of the hearing.

CONSENT (§ 121a.571)

Comment: Commenters requested that "advanced students," "persons acting as practicum advisors," and researchers be given access to records without consent.

Response: No change has been made. The Family Educational Rights and Privacy Act specifically lists parties and conditions where records may be released without parental consent.

SAFEGUARDS (§ 121a.572)

Comment: A commenter requested a list of positions rather than a list of names of employees who may have access to personally identifiable information.

Response: The requirement has been modified to require a list of names and positions to more fully inform parents and the public of the categories of individuals given access to data as well as the specific individuals who may have access.

DESTRUCTION OF INFORMATION (§ 121a.573)

Comment: A number of commenters were concerned about the destruction requirements. The principle concern was that detailed records might be needed by the handicapped individuals to show proof of need for further services from other agencies. One recommendation was that the parent and child be notified of the existance of the records at the time of graduation and informed that they would be destroyed only upon request of the parent or child. Another commenter suggested that records be maintained, but that parents be given the option to have them destroyed.

Response: The requirement has been revised to permit the parents to request that the information be destroyed and to require the public agency to inform the parents of the destruction option and their right to have the records destroyed upon request. The notice would normally be given at the time a child graduates or otherwise leaves the agency. The purpose of the destruction option is to insure that nonessential records about a child's behavior, performance, and abilities, which may possibly by stigmatizing and are highly personal, are not kept after they are no longer needed for educational purposes. Destruction of these records is the best protection against improper or unauthorized disclosures. However, the handicapped child or his or her parents may need certain records for other purposes (such as proof of eligibility for benefits).

Comment: Commenters asked that notice be given to a child who has reached the age of majority.

Response: No change has been made. Section 121a.574 requires the State educational agency to have policies and procedures regarding children's privacy rights. Where education records are maintained by an agency covered under the Family Educational Rights and Privacy Act, these rights must include transfer of the rights of parents to the child when he or she reaches 18 or the postsecondary education level.

Other Changes: The regulations have been revised to make it clear that the records covered under this Act are the same as the type of records covered under the Family Educational Rights and Privacy Act. Consistency in coverage is necessary to avoid undue administrative burdens on public agencies covered by both laws.

OFFICE OF EDUCATION PROCEDURES

General: The requirements in these sections largely repeated the statute. Perhaps for this reason, few comments were received on the Office of Education procedures.

WAIVER OF REQUIREMENT REGARDING SUPPLEMENTING AND SUPPLANTING WITH PART B FUNDS (§ 121a.580)

Comment: A commenter requested that the special study to determine if a waiver of the requirement should be granted include a review of whether grievance procedures are operational. Other commenters disagreed on the need for this study.

Response: A requirement has been added to have the study cover the adequacy of the State's due process procedures, as this is an important part of insuring that grievances are heard and to determine if parents and other parties are satisfied with the adequacy of the State's programs for handicapped children.

WITHHOLDING PAYMENTS (§ 121a.582)

Comment: Commenters asked for definitions of "substantial compliance" and "failure to comply." Commenters also urged that the Office of Education, the Office for Civil Rights, and Departmental audit officials apply the same criteria.

Response: No change has been made. The Office of Education believes these terms will have to be defined on a case-by-case basis.

The Office of Education and the Office for Civil Rights will coordinate and cooperate in enforcing requirements under this Part and Part 84 (the regulations for section 504 of the Rehabilitation Act of 1973) where identical requirements are involved. The Office of Education will make every effort to insure that auditing officials understand and apply any criteria used by program officials.

SUBPART F—STATE ADMINISTRATION

This subpart has been expanded with requirements set out under the major headings: State Educational Agency Responsibilities, Use of Funds, and State Advisory Panel.

STATE EDUCATIONAL AGENCY RESPONSIBILITIES

Provisions on State educational agency responsibilities have been redrafted (and relocated from proposed section 121a.34) in response to comments, to better summarize general administrative and supervisory responsibilities in section 612(6) and other sections of the Act. A section on complaint procedures, which was included in previous regulations for Part B (prior section 121a.14) and inadvertently not included in the proposed regulations has been added.

Comment: Commenters requested addition of a new section on State educational agencies' responsibilities for monitoring, evaluation, and enforcement activities to insure compliance throughout the State with the requirements of this part. The commenters made specific suggestions for implementing such a section, including collection of data, conduct of on-site visits, audit of fund utilization, comparison of written individualized education programs with programs actually provided, meetings with parents and parent groups, public hearings, development of detailed criteria for evaluating program quality and effectiveness, and detailed procedures for enforcing requirements against noncomplying agencies.

Response: A new section has been added to require each State educational agency to develop procedures and specific timelines for monitoring and evaluating public agencies involved in the education of handicapped children. These are minimal requirements. Adoption of the other suggestions made by the commenters is encouraged but not required.

ALLOWABLE COSTS (§ 121a.621)

Comment: A number of commenters requested that the limitation on State administrative funds be raised and that provisions be added to allow local educational agencies to use funds for administrative costs.

Response: No change has been made on the State limit as it is a statutory limitation.

Comment: Commenters requested that the regulations require each State educational agency to use its funds for specific purposes. One recommendaiton was that ten percent of the administrative funds be used to train persons in local communities to assist and represent parents and to prepare and disseminate to parents information about their rights under these regulations. Another was that they be used to disseminate instructional material.

Response: No change has been made. The Office of Education does not believe it is appropriate to dictate to States how to use their limited administrative funds.

STATE ADVISORY PANEL

ESTABLISHMENT (§ 121a.650)

Comment: One commenter recommended that local panels be required.

Response: No change has been made. The statute only requires a State advisory panel. A State may, of course, decide to establish local panels.

MEMBERSHIP (§ 121a.651)

Comment: A substantial number of commenters requested additions to the list of representatives to be included on the panel, including professional groups, legal advocacy groups, and employees of State and local agencies. Some commenters recommended that handicapped individuals or their parents make up specific percentages of the panel.

Response: A provision has been added to make it clear that a State may expand the advisory panel to include additional persons in the groups listed (which are statutory) and representatives of other groups. The Office of Education does not believe it is appropriate to prescribe specific percentages, as the States should have some discretion to determine the proper mix of representatives. A comment has been added to indicate factors a State may consider in determining balanced membership of the panel.

ADVISORY FUNCTIONS AND ADVISORY PANEL PROCEDURES (§§ 121a.652—121a.653)

Comment: Commenters recommended that the regulations indicate that the panel must comment publicly on the State annual program plan as well as on any rules and regulations regarding education of handicapped children, review annual evaluations, and act as ombudspersons to hear complaints.

Response: A change has been made to require the panel to comment on the annual program plan. The annual program plan is an extremely important document and this addition makes it clear that the advisory panel must be involved in reviewing it. The other recommendations are legitimate activities but not ones the Federal government believes should be required by these regulations at this time.

Comment: Commenters requested that the regulations provide that panel members be reimbursed for reasonable and necessary expenses for attending meetings and performing duties.

Response: This change has been made. It is reasonable to require reimbursement for expenses so that persons will be able to participate without financial sacrifice.

Subpart G—Allocations of Funds; Reports

ALLOCATIONS

This major section of Subpart G is entirely statutory; therefore, there are no comments of substance on which to respond.

REPORTS—ANNUAL REPORT OF CHILDREN SERVED (§§ 121a.750–121a.754)

The following comments were received regarding the annual report by the States of the number of children receiving special education and related services. This report is the basis for each State's allocation of funds under Part B, and serves as a mechanism for the Commissioner to meet some of his reporting requirements to Congress under section 618 of the Act. Some commenters recommended changes that would require amendment of the Act. These have not been summarized except where further explanation seemed to be useful.

AMOUNT OF INFORMATION REQUIRED IN THE REPORT

Comment: Commenters varied in their views on what information should be included in the report. It was suggested that additional information be collected for compliance purposes. Objections were made to the requirement for reporting information by disability category, and for reporting the 0-2 year old population. On the other hand, some commenters recommended that additional categories be added to the report, particularly for deaf-blind children and for multihandicapped children.

Response: Two categories of handicapped children have been added to the report—one for multihandicapped children and one for deaf-blind children. These terms are defined in section 121a.5 of Subpart A. No other changes have been made on the amount of information to be reported.

The additional categories should help to insure that no handicapped child is counted more than once, since the States will not have to decide in which of two or more disability categories to count a multihandicapped child. The changes conform to existing reporting requirements used by the States.

The annual report of children served is not a compliance document. It is only used to determine each State's allocation and to assist the Commissioner in meeting his reporting requirements to the Congress under section 618. Under section 611 of the Act, allocations are based on the number of handicapped children in each State receiving special education and related services. Compliance with requirements such as "least restrictive environment" will be achieved through other mechanisms, including the State's annual program plan, the local educational agency's application, and monitoring by the State educational agency and the Office of Education.

As explained in the preamble to the proposed rules published in the FEDERAL REGISTER on September 8, 1976, the report requirements are the minimum needed by the Commissioner to carry out the Act. (See 41 FR 37814.) While the Commissioner is concerned about the possible harmful effects of "labeling" children, the Act requires that the Commissioner report a substantial amount of information, to Congress by disability category. For this reason, and for the other reasons stated in the September 8, 1976, FEDERAL REGISTER, there appears to be no workable alternative to retaining the categories in the States' annual reports. The various disability categories, as well as the requirements to use them in the Commissioner's reports to the Congress, are statutory.

WHO MAY BE COUNTED

Comment: Commenters disagreed as to whether handicapped children should be counted if their special education is paid for solely from private sources or solely from Federal funds (such as children living on military bases). Some thought that only publicly-funded special education should qualify, while others argued that since all children have a right to a free appropriate public education the source of funding (other than the parent) should not matter.

Response: Section 121a.753 has been amended to provide that handicapped children (including such children in Head Start or other preschool programs) may be counted only if they (1) are enrolled in a school or program which is operated or supported by a public agency, and (2) receive special education that meets State standards.

A State may not count a child whose special education is paid for solely by the Federal government, unless the child is in one of the age groups 3–5 or 18–21, and there are no local or State funds available for non-handicapped children in that age group.

Children funded solely by the Federal government would include Indian children whose special education is paid for solely by the Federal government, as well as children on military bases whose education is paid for solely with Federal funds. This rule is consistent with the requirement that a free appropriate public education (FAPE) be made available by the State to each handicapped child. Parents are not required to take advantage of FAPE. If they choose to educate their child outside of the public school system, even though FAPE is available, the State has discharged its responsibility. However, by the same token, the child should not be counted by the State for its allocation if the child is not being provided special education at public expense. The same reasoning applies to Indian children and other children who receive their special education from the Federal government. The rule should serve as an encouragement to States to provide services to all handicapped children, however, since any child provided special education from State or local funds may be counted.

Comment: Two other provisions in the regulations were objected to by commenters. The first of these provided that handicapped children "enrolled" in schools to receive special education could be counted as receiving special education. These commenters felt that enrollment did not guarantee actual receipt of services. The second provision stated, in essence, that a child who receives special education may be counted, but not a child who receives only "related services." This was viewed as an overly restrictive reading of the Act.

Response: No change has been made in the regulations. While no system is perfect, enrollment is a legitimate way of determining the number of handicapped children receiving special education on October 1 and on February 1, the two dates on which the Act requires the count of children served. It would not be practical to mass an actual head count of children in classrooms and other facilities where services are provided.

With respect to children who only receive "related services," this is governed by statutory language. "Related services" are only those "required to assist a handicapped child to benefit from special education." (Section 602(17) of the Act.) If a child does not need special education, there can be no "related services," as that term is defined in the Act. However, section 121a.14 permits a State to define certain services as "special education," if those services are "specially designed instruction to meet the unique needs of a handicapped child." (This is taken from the definition of "special education" in section 602(16) of the Act.)

REALLOCATION OF LOCAL EDUCATIONAL AGENCY FUNDS (§ 121a.760)

Comment: Commenters requested criteria be added for when funds may be reallocated.

Response: No criteria have been added as determinations will be made on a case-by-case basis.

Appendix B—Index to Part 121a

ADMINISTRATION

See: Monitoring.
Annual program plan requirements—§§ 121a.-112; 121a.134; 121a.136; 121a.141; 121a.142; 121a.146.
Certification of State authority—§ 121a.112.
Direct Service by State educational agency—§ 121a.360.
Local application requirements—§§ 121a.228; 121a.236; 121a.340.
Local education agency definition—§ 121a.5.
State administration—Subpart F.

ADVISORY PANEL (STATE)

Annual program plan requirement—§ 121a.-147.
General requirements—§§ 121a.650–121a.653.

ALLOCATIONS

Annual program plan condition of assistance—§ 121a.110.
Application by local agency condition of assistance—§ 121a.180.
Consolidated applications—§ 121a.191.
Count of children—See Reports.
Interior Department for Indian children—§ 121a.708.
Local agency allocation—See Reports.
  Formula—§§ 121a.706–121a.707.
  Reallocation—§ 121a.708.
  Use by the State—§ 121a.368.
Outlying areas—§ 121a.710.
Recovery for misclassified children—§ 121a.-141.
State allocation:
  Formula—§§ 121a.701–121a.703; 121a.706–121a.708.
  Hold harmless—§ 121a.704.
  Use for administration—§§ 121a.620–121a.-621.
Use of—See other headings.
Withholding—See: Hearings.
  From the local agency—§ 121a.194.
  From the State—§§ 121a.580–121a.583.

ANNUAL PROGRAM PLAN

Approval; disapproval—§ 121a.113.
Certifications—§ 121a.112.
Condition of assistance to State—§ 121a.110.
Contents—§§ 121a.111; 121a.112; 121a.120–121a.131.
Effective period—§ 121a.114.
General requirements—§§ 121a.110–121a.114.
Public participation—See: Public Participation.
Submission by State—§ 121a.110.

APPLICABILITY OF REGULATIONS—§ 121a.2

APPLICATION BY LOCAL AGENCY

Annual program plan requirement—§ 121a.-144.
Approval or disapproval by State educational agency—§§ 121a.193; 121a.360.

Second priority children—amendment of application—§ 121a.224.
Submission by local agency—§ 121a.180.
Condition of assistance to local agency—§ 121a.180.
Consolidated application—§§ 121a.190–121a.192.
Content—§§ 121a.220–121a.240.
Excess costs—See: Excess Costs.
Public participation—See Public Participation.

AUDITS

See: Monitoring.

COMPLAINTS

State educational agency procedures—§ 121a.602.
See: Hearings.

COMPARABLE SERVICES

Local application requirement—§ 121a.231.

CONSENT

Defined—§ 121a.500.
Disclosure of information—§ 121a.571.
Initial placement—§ 121a.504(b).
Placement status during a proceeding—§ 121a.513.
Preplacement evaluation of child—§ 121a.504(b).

CONFIDENTIALITY OF INFORMATION

Annual program plan requirement—§ 121a.128.
Definitions—§ 121a.560.
General requirements—§§ 121a.560–121a.572.
Local application requirements—§ 121a.231.

CONSOLIDATED APPLICATIONS

See: Application of local agency.

COUNT OF CHILDREN

Annual report of children served—§§ 121a.780–121a.784.
Allocations:
State entitlement—§§ 121a.701–121a.702.
Local educational agency entitlement—§ 121a.707.
Outlying areas entitlements—§ 121a.710.

DEFINITIONS—§§ 121a.4–121a.13

DUE PROCESS

See: Confidentiality of Information.
Evaluation.
Hearings.
Notice.
Procedures for parents and children—§§ 121a.500–121a.514.

EDUCATION

See: Free Appropriate Public Education.
Full Educational Opportunity Goal.
Individualized Education Program.
Personnel Development.
Physical Education.
Special Education.
Related Services.

EVALUATION

Advisory panel function—§ 121a.652.
Annual program plan requirements—§§ 121a.128; 121a.133; 121a.144.
Education programs—§ 121a.146.
Handicapped children:
Consent required for—§ 121a.504.
Defined—§ 121a.500.
Hearings—See Hearings.
Independent educational evaluation—§ 121a.503.
Information on achievement—§ 121a322.
Notice required—§§ 121a.504–121a.508.
Protection—§§ 121a.129, 121a.132, 121a.231, 121a.530–121a.534.
State responsibility—§ 121a.128.
Hearing aids—§ 121a.308.
Individualized education programs—§ 121a.146.
Personnel development—§ 121a.380.
Private school children service needs—§ 121a.452.
State educational agency activities—§§ 121a.146; 121a.601.
Training—See: Personnel development, this heading.

EXCESS COSTS

Generally—§§ 121a.182–121a.186.
Local application requirement—§ 121a.229.
Not applicable to State educational agency—§ 121a.360.

FREE APPROPRIATE PUBLIC EDUCATION

See: Individualized Education Programs.
Related Services.
Special Education.
Time Limits and Timetables.
Annual program plan requirements—§§ 121a.121–121a.122.
Defined—§ 121a.4.
Generally—§§ 121a.300–121a.308; 121a.307.
Initiation or change—See: Notice.
State practice exception—§ 121a.300.
State use of local agency's allocation—§ 121a.360.
Priorities—§§ 121a.320–121a.324.

FULL EDUCATIONAL OPPORTUNITY GOAL

Annual program plan requirements—§§ 121a.122–121a.126.
General requirements—§§ 121a.304–121a.306.
Local application requirements—§§ 121a.222–121a.223.

HANDICAPPED CHILDREN

Defined—§ 121a.5.

Rights

See: Confidentiality of Information.
Due Process.
Evaluation.
Free Appropriate Public Education.
Hearing.
Identification, Location, Evaluation.
Individualized Education Program.
Least Restrictive Environment.
Notice.
Private School Children.
Special Education.
Related Services.

HEARINGS

Disapproval of annual program plan—§ 121a.113.
Disapproval of local application—§ 121a.184.
Office of Education procedures—§§ 121a.560–121a.568.
Parents and children:
Identification, evaluation, placement—§§ 121a.506–121a.514.
Confidentiality of information—§§ 121a.560–121a.570.
Public hearings before adopting annual program plan—§§ 121a.280–121a.284.
Withholding payments from a State—§ 121a.890.

IDENTIFICATION, LOCATION, EVALUATION

See: Evaluations.
Annual program plan requirement—§ 121a.128.
Local application requirement—§ 121a.220.
Private school children—§ 121a.452.

INDIAN CHILDREN

Application from Secretary of Interior—§§ 121a.260–121a.262.
Count—§ 121a.782.
Payments to Secretary of Interior—§ 121a.709.

INDIVIDUALIZED EDUCATION PROGRAM

Accountability—§ 121a.349.
Annual program plan requirement—§ 121a.130.
Content—§ 121a.346.
Defined—§ 121a.340.
Effective dates—§ 121a.342.
First priority children—§ 121a.322.
Free appropriate public education definition—§ 121a.4.
General requirements—§§ 121a.340–121a.349.
Least restrictive environment—§ 121a.552.
Local application requirement—§ 121a.235.
Meetings—§§ 121a.345–121a.348.
Parent participation—§ 121a.344.
Placement—§§ 121a.533; 121a.552.
Private school children—§§ 121a.347–121a.348; 121a.401.
Reevaluation—§ 121a.534.

LEAST RESTRICTIVE ENVIRONMENT

Annual program plan requirement—§ 121a.132.
General requirements—§§ 121a.550–121a.556.
Local application requirement—§ 121a.227.
Nature and location of State services—§ 121a.361.
Nonacademic services and settings—§§ 121a.306; 121a.553.
Physical education—§ 121a.307.
Placement decisions—§§ 121a.513; 121a.533.
Program options—§ 121a.305.

MATCHING—§ 121a.371

MONITORING

Annual program plan requirements—§§ 121a.128(b)(8); 121a.130(b)(2); 121a.136.
Auditing count of children served—§ 121a.784.
Confidentiality of information—§ 121.578.
Identification, location, evaluation—§ 121a.128(b)(6).
Individualized education programs—§ 121a.130(b)(2).
Least restrictive environment—§ 121a.556.
Private school children—§ 121a.402(a).
State educational agency responsibility—§ 121a.601.

NONDISCRIMINATION

Annual program requirement—§ 121a.130.
Evaluation materials and procedures—§ 121a.530.
Local application requirement—§ 121a.239.
Nonacademic services—§ 121a.306.
Private school children—§ 121a.456.
Program options—§ 121a.305.
Testing materials and procedures—§ 121a.530.

NOTICE

Confidentiality of information—§§ 121a.561, 121a.573.
Individualized education program meeting—§ 121a.345.
Initiation or change of identification, evaluation, placement, or free appropriate public education—§§ 121a.504–121a.505.
Notice of opportunity for a hearing—See: Hearings.
Notice of procedural safeguards—§ 121a.505.
Public notice of withholding payments—§ 121a.892.

PERSONNEL DEVELOPMENT

Annual program plan requirement—§ 121a.139.
Comprehensive system of personnel development—§§ 121a.380–121a.387.
Included in State support services—§ 121a.370.
Least restrictive environment—§ 121a.555.
Local application requirement—§ 121a.224.
Personnel needs—§§ 121a.130; 121a.228.
Preservice training—§ 121a.321.

Trained personnel for evaluation materials—§ 121a.533.
Training regarding confidentiality of information—§ 121a.572.
Use of Part B funds for training—§§ 121a.321, 121a.322.

PHYSICAL EDUCATION

Included in special education—§ 121a.14.
Required—§ 121a.307.

PLACEMENTS

See: Evaluation.
Least Restrictive Environment.
Private schools.

PROHIBITION

See: Evaluation.
Identification. Location. Evaluation.
Annual program plan requirement—§ 121a.127.
Definitions:
First priority children—§ 121a.320(a).
Second priority children—§ 121a.320(b).
General requirements—§§ 121a.320–121a.326.
Local application requirement—§ 121a.225.
State direct and support services—§ 121a.370.

PRIVATE SCHOOL CHILDREN

Annual program plan requirement—§ 121a.140.
Confidentiality of information—§ 121a.560.
Cost of residential placement—§ 121a.302.
Handicapped children placed or referred by public agencies—§§ 121a.400–121a.408.
Handicapped children not placed or referred by public agencies—§§ 121a.450–121a.460.
Individualized education program—§§ 121a.347–121a.348.
Least restrictive environment—§ 121a.554.
Part B applicability to private schools—§ 121a.2.
Physical education—§ 121a.307.

PROCEDURAL SAFEGUARDS

See: Complaints.
Consent.
Hearings.
Notice.
Surrogate Parents.
Annual program plan requirements—§§ 121a.131; 121a.136.
Local application requirement—§ 121a.237.

PUBLIC PARTICIPATION

See: Hearings.
Annual program plan requirements—§§ 121a.120; 121a.137; 121a.280–121a.284.
Local application requirements—§§ 121a.226; 121a.234.
Secretary of Interior application—§ 121a.281.
State advisory panel—§§ 121a.650–121a.654.

RECORDS

See: Confidentiality of Information.
Annual program plan requirement—§ 121a.143.
Comparable services—§ 121a.231.
Count of children served—§ 121a.754.
Excess costs—§ 121a.185.
Individualized education programs—§ 121a.130.
Local application requirement—§ 121a.238.
Parents may examine—§ 121a.502; 121a.562.
Parents not participating in meetings—§ 121a.346.

RELATED SERVICES

See: Free Appropriate Public Education.
Individualized Education Program.
Defined—§ 121a.13.

REPORTS

Annual report of children served—§§ 121a.730–121a.734.
Local application requirements—§§ 121a.222; 121a.238.
State advisory panel—§ 121a.652.

SPECIAL EDUCATION

See: Free Appropriate Public Education.
Individualized Education Program.
Defined—§ 121a.14.

STATE ADVISORY PANEL

Annual program plan requirement—§ 121a.147.
General requirements—§§ 121a.650–121a.653.

STATE DIRECT AND SUPPORT SERVICES

Annual program plan requirement—§ 121a.51.
General requirements—§§ 121a.360–121a.372.

SUPPLANTING

Applicability to State educational agency—§ 121a.372.
Local application requirement—§ 121a.230.
Private schools—§ 121a.460.
Waiver of requirement—§ 121a.589.

SURROGATE PARENTS

Definition of parent—§ 121a.10.
Duty of public agency to assign—§ 121a.514.
Responsibilities—§ 121a.514.
Selection—§ 121a.514.

TESTING

See: Evaluation.

TIME LIMITS AND TIMETABLES

Annual program plan effective period—§ 121a.114.
Evaluation of educational programs—§ 121a.146.
Free appropriate public education—§§ 121a.122; 121a.300.
Full educational opportunity goal—§§ 121a.125; 121a.222.
Hearing decisions—§§ 121.512; 121a.583.
Individualized education programs—§§ 121a.342; 121a.343.
Public participation in the annual program plan—§ 121a.280–121a.284.
Reevaluation—§ 121a.534.
Report of children served—§ 121a.750–121a.754.
State monitoring of public agencies—§ 121a.601.
State review of hearing decision—§ 121a.512.

TRAINING

See: Personnel Development.

USE OF PART B FUNDS

Allocation formulas:
Consolidated applications—§§ 121a.190–121a.191.
Entitlements—§§ 121a.700–121a.710.
Annual program plan requirements—§§ 121a.148; 121a.140.
Department of the Interior (Indian children)—§ 121a.262.
Excess costs—§§ 121a.183–121a.186.
Local application requirement—§ 121a.238.
State and local educational agencies:
Free appropriate public education—§§ 121a.301–121a.302.
Full educational opportunity goal—§ 121a.304(b).
Priorities—§§ 121a.320–121a.324.
Private school children—§§ 121a.450–121a.460.
State educational agencies:
Allowable costs—§ 121a.621.
Federal funds for State administration—§ 121a.620.
Matching—§ 121a.271.
State advisory panel—§ 121a.652.
Use of local allocation for direct services—§§ 121a.360–121a.361.
Use of State educational agency allocation for direct and support services—§ 121a.370.
Supplanting—§§ 121a.230; 121a.372; 121a.589.
Training—See: Personnel Development.

5. A new Part 121m is added to read as follows:

PART 121m—INCENTIVE GRANTS

Sec.
121m. 1 Scope: purpose.
121m. 2 General provisions regulations.
121m. 3 Eligibility.
121m. 4 Application.
121m. 5 Application contents.
121m. 6 Amount of grant.
121m. 7 Participation by children not counted under Part B of the Act.
121m. 8 Excess costs.
121m. 9 Administration.
121m. 10 Annual evaluation report.

AUTHORITY: Sec. 619 of Pub. L. 91-230, as amended, 89 Stat. 793 (20 U.S.C. 1419), unless otherwise noted.

§ 121m.1 Scope: purpose.

(a) This part applies to assistance under section 619 of the Act.

(b) The Commissioner awards a grant to each State which provides special education and related services to handicapped children ages three, four, or five.

(c) The State shall use funds provided under this part to give special education and related services to handicapped children in the age groups named in paragraph (b) of this section.

(d) The terms "special education" and "related services" have the meanings defined in § 121a.12 and § 121a.13 of this chapter.

(20 U.S.C. 1419(c).)

§ 121m.2 General provisions regulations.

Assistance under this part is subject to the requirements in Parts 100, 100b, 100c, and 121 of this chapter (including definitions and fiscal, administrative, property management, and other matters).

(20 U.S.C. 1419.)

§ 121m.3 Eligibility.

A State is eligible to receive a grant if:

(a) The Commissioner has approved its annual program plan under Part 121a of this chapter; and

(b) The State provides special education and related services to any handicapped children aged three, four, or five.

(20 U.S.C. 1419(a).)

§ 121m.4 Application.

To receive funds under this part, a State must submit an application to the Commissioner through its State educational agency.

(20 U.S.C. 1419(b).)

§ 121m.5 Application contents.

An application must include the following material:

(a) A description of the State's goals and objectives for meeting the educational needs of handicapped children ages three through five. These goals and objectives must be consistent with the State's full educational opportunity goal under § 121a.123 of this chapter.

(b) A description of the objectives to be supported by the grant in sufficient

detail to determine what will be achieved with the grant.

(c) A description of the activities to be supported by the grant. The activities must be related to the objectives under paragraph (b) of this section and must be described in sufficient detail to determine how the grant will be used.

(d) A description of the impact the proposed activities will have on handicapped children ages three through five. This description must include evidence that the proposed activities are of sufficient size, scope, and quality to warrant the amount of the expenditure. The application must indicate the number of children to be served and the number of handicapped children who will be benefitted indirectly. If children are to be benefitted indirectly, there must be a rationale that demonstrates the benefit.

(e) The number of local educational agencies or intermediate educational units, and the number and names of other agencies which will provide contractual services under the grant, the activities they will carry out, and the reasons for selecting these agencies.

(f) The dollar amounts that will be spent for each major activity described.

(g) A description of the procedures the State will use to evaluate the extent to which the activities met the objectives described under paragraph (b) of this section.

(20 U.S.C. 1419(b).)

§ 121a.6 Amount of grant.

(a) The amount of a grant is $300 multiplied by the average number of children ages three through five counted during the current school year under §§ 121a.750–121a.754 of this chapter.

(b) If appropriated funds are less than enough to pay in full the grants under this part, the amount of each grant is ratably reduced.

(20 U.S.C. 1419(a), (d).)

§ 121a.7 Allowable expenditures.

(a) The State educational agency may use funds under this part to give special education and related services to handicapped children ages three through five who are not counted under §§ 121a.750–121a.754 of this chapter if the State educational agency insures that those children have all of the rights afforded under part 121a of this chapter.

(b) The State educational agency may use up to five percent of its grant for the costs of administering the funds provided under this part.

(20 U.S.C. 1419(c).)

Comment. In carrying out the provisions of this part some activities are considered particularly appropriate for the use of these funds: (1) Providing parents with child development information; (2) assisting parents in the understanding of the special needs of their handicapped child; (3) providing parent counseling and parent training, where appropriate, to enable parents to work more effectively with their children; (4) providing essential diagnosis and assessment; (5) providing transportation essential to the delivery of services; (6) providing speech therapy, occupational therapy, or physical therapy.

§ 121a.8 Excess costs.

(a) If local or State funds are available to pay for the education of nonhandicapped children of the same age as the handicapped children served with funds under this part, funds equal to that amount must also be made available for these handicapped children.

(b) If no local or State funds are available for nonhandicapped children of the same age, funds under this part may be used to pay for all of the costs directly attributable to the education of the handicapped children.

(20 U.S.C. 1419(c).)

§ 121a.9 Administration.

(a) The State educational agency shall administer the funds provided under this part.

(b) The State educational agency may use the funds itself, or may contract with local educational agencies, intermediate educational units, or other agencies.

(20 U.S.C. 1419(a).)

§ 121a.10 Annual evaluation report.

(a) Within 90 days after the end of the grant period, the State educational agency shall submit a report to the Commissioner on the activities carried out under this part during that period.

(b) The report must contain:

(1) The results of the evaluation under § 121a.5(g), and

(2) In brief narrative form, the impact that these funds have had on the State's educational services to handicapped children ages three, four, and five.

(20 U.S.C. 1419(e).)

[FR Doc.77-24083 Filed 8-22-77;8:45 am]

APPENDIX C

APPENDIX C

A MODEL SCHOOL DISCIPLINE CODE

(from Alexander, Kern, School Law,

West Publishing Co., 1982, pp.349-351)

A joint committee comprised of representatives from the American Association of University Professors, U.S. National Student Association, Association of American Colleges, National Association of Student Personnel Administrators, and National Association of Women Deans and Counselors have drafted a Joint Statement on Rights and Freedoms of Students. This statement prescribes the following standards of providing students with procedural due process.

PROCEDURAL STANDARDS IN DISCIPLINARY PROCEEDINGS

* * *

The administration of discipline should guarantee procedural fairness to an accused student. Practices in disciplinary cases may vary in formality with the gravity of the offense and the sanctions which may be applied. They should also take into account the presence or absence of an honor code, and the degree to which the institutional officials have direct acquaintance with student life in general and with the involved student and the circumstances of the case in particular. The jurisdictions of faculty or student judicial bodies, the disciplinary procedures, including the student's right to appeal a decision, should be clearly formulated and communicated in advance. Minor penalties may be assessed informally under prescribed procedures.

In all situations, procedural fair play requires that the student be informed of the nature of the charges against him, that he be given a fair opportunity to refute them, that the institution not be arbitrary in its actions, and that there be provision for appeal of a decision. The following are recommended as proper safeguards in such proceedings when there are no honor codes offering comparable guarantees.

A. Standards of Conduct Expected of Students

The institution has an obligation to clarify those standards of behavior which it considers essential to its educational mission and

its community life. These general behavioral expectations and the resultant specific regulations should represent a reasonable regulation of student conduct, but the student should be as free as possible from imposed limitations that have no direct relevance to his education. Offenses should be as clearly defined as possible and interpreted in a manner consistent with the aforementioned principles of relevancy and reasonableness. Disciplinary proceedings should be instituted only for violations of standards of conduct formulated with significant student participation and published in advance through such means as a student handbook or a generally available body of institutional regulations.

B. Investigation of Student Conduct

1. Except under extreme emergency circumstances, premises occupied by students and the personal possessions of students should not be searched unless appropriate authorization has been obtained. For premises such as residence halls controlled by the institution, an appropriate and responsible authority should be designated to whom application should be made before a search is conducted. The application should specify the reasons for the search and the objects or information sought. The student should be present, if possible, during the search. For premises not controlled by the institution, the ordinary requirements for lawful search should be followed.

2. Students detected or arrested in the course of serious violations of institutional regulations, or infractions of ordinary law, should be informed of their rights. No form of harassment should be used by institutional representatives to coerce admissions of guilt or information about conduct of other suspected persons.

C. Status of Student Pending Final Action

Pending action on the charges, the status of a student should not be altered, or his right to be present on the campus and to attend classes suspended, except for reasons relating to his physical or emotional safety and well-being, or for reasons relating to the safety and well-being of students, faculty, or university property.

D. Hearing Committee Procedures

When the misconduct may result in serious penalties and if the student questions the fairness of disciplinary action taken against him, he should be granted, on request, the privilege of a hearing before a regularly constituted hearing committee. The following suggested hearing committee procedures satisfy the requirements of procedural due process in situations requiring a high degree of formality.

1. The hearing committee should include faculty members or students, or, if regularly included or requested by the accused, both faculty and student members. No member of the hearing committee who is otherwise interested in the particular case should sit in judgment during the proceeding.

2. The student should be informed, in writing, of the reasons for the proposed disciplinary action with sufficient particularity, and in sufficient time, to insure opportunity to prepare for the hearing.

3. The student appearing before the hearing committee should have the right to be assisted in his defense by an adviser of his choice.

4. The burden of proof should rest upon the officials bringing the charge.

5. The student should be given an opportunity to testify and to present evidence and witnesses. He should have an opportunity to hear and question adverse witnesses. In no case should the committee consider statements against him unless he has been advised of their content and of the name of those who made them, and unless he has been given an opportunity to rebut unfavorable inferences which might otherwise be drawn.

6. All matters upon which the decision may be based must be introduced into evidence at the proceeding before the hearing committee. The decision should be based solely upon such matters. Improperly acquired evidence should not be admitted.

7. In the absence of a transcript, there should be both a digest and a verbatim record, such as a tape recording, of the hearing.

8. The decision of the hearing committee should be final, subject only to the student's right of appeal to the president or ultimately to the governing board of the institution.

APPENDIX D

APPENDIX D

MEMORANDUM OF UNDERSTANDING BETWEEN
the Department of Public Aid
Department of Mental Health/Developmental Disabilities,
Bureau of the Budget, Department of Children and Family Services,
Department of Public Health, Illinois State Board of Education,
Department of Rehabilitation Services, and the Governor's Office
AUGUST 26-27, 1980

Governor's Purchased Care Review Board

1. The members of the Governor's Purchased Care Review Board agree to revise Rule 3.21 and Rule 3.31 as attached upon their approval by the Department of Education at the next regularly scheduled meeting of the Board.

2. The Governor's Purchased Care Review Board agrees to apply Rule 3.30(b) to the cost included in Rule 3.21(b) to determine what is a reasonable level for such costs, based on staff analysis and report.

3. The Governor's Purchased Care Review Board agrees to work for alterations of state statutes or rules which will define clearly the differences between educational and non-educational placements and provide for payment for special education rendered in non-educational placements.

State Board of Education

1. The State Board of Education agrees that for 1980-81 no new psychiatric hospitals will be approved and that its rules 8.04.1 will be revised to prohibit new placements in currently approved facilities. This does not imply that an extended care facility, group home or other long-term care facility operated by or in conjunction with a licensed psychiatric hospital could not be approved as a residential facility.

2. The State Board of Education agrees to change any rules necessary so that no non-public facility will be eligible to receive educational placements unless its program is approved by the State Board of Education and its cost are approved by the Governor's Purchased Care Review Board and the facility agrees to charge no more than the Governor's Purchased Care Review Board costs for any educational placement. It is understood that the change in rules will lead to a change in the state approved contract format used for Section 14-7.02 placements.

Printed by authority of the State of Illinois
9-22-80/8001/353,/17

3. The State Board of Education may make payment in 1980-81 and as necessary thereafter in order to assure the Office of Special Education that all children now placed in Section 14-7.02 facilities which make charges in excess of the approved costs will receive a free appropriate public education until such time as those children can be placed in facilities which do not charge in excess of the approved costs. In order to do so it will be necessary to do a survey of districts and facilities with children in such placements regarding current parental payments and their purposes and develop a review/payment mechanism for assuring that cost as necessary (i.e., proposed new Rule 3.21A,B,C,) are paid for children with signed contracts so placed, and monitor same.

4. The Superintendent agrees to provide written directives to local education agencies (LEA's) regarding the preparation and content of individual education (IEP's). The rules and regulations of the State Board of Education will be modified to reflect the written directives given to LEA's regarding IEP's. The state Board of Education agree to utilize all existing mechanisms to enforce implementation of present rules and regulations relating to the development of IEP's.

5. The state Board of Education will develop a method of review for IEP's which recommend future placement in non-public residential facilities. This review will assess the appropriateness of the IEPs' proposed placement based on the restrictiveness of the environment, the participation of other state agencies that the placement is made solely for educational reasons and other criteria as specified. The rules and regulations of the State Board of Education will be altered to reflect the procedures developed for prior review of IEP's.

6. The State Board of Education will recognize that certain categories of children (ages 3-21) are placed in residential facilities for primarily non-educational reasons. These categories include: 1) children placed for mental health or developmental disabilities purposes in residential mental health facilities pursuant to the Mental Health and Developmental Disabilities Code and the powers and duties of the Department of Mental Health and Developmental Disabilities; 2) children involved in juvenile court proceedings (or in family situations likely to lead to such proceedings) which would lead to the involvement of the Department of Children and Family Services (DCFS): 3) children who have actions pending in juvenile court seeking adjudication for MINS or delinquency or are already adjudicated; 4) persons against whom criminal charges are pending or who have been convicted as adults; 5) status offenders; and 6) children requiring primarily medical care and treatment. When residential placement for a person who is a

member of any of these categories is contemplated, the LEA will invite representatives of the appropriate state agency(s) to attend the multi-disciplinary staffing to provide technical assistance and a preliminary assessment of the eligibility of the student to services of that state agency. The State Board of Education will revise its Rule 9.15 and prepare and implement any other rules and regulations necessary to accomplish this agreement.

Governor's Office and Other State Agencies

1. The Governor's Office agrees to provide direction to the directors of appropriate state agencies to participate fully and completely in the multi-disciplinary staffings as requested by the State Board of Education and LEA's to meet agreement #6 above.

2. The Department of Mental Health/Developmental Disabilities assures that responsible relative liability in present cooperative placements between LEA's and Department of Mental Health/Developmental Disabilities is not paid by the parent.

If administrative or regulatory changes are not sufficient to implement this agreement, statutory changes will be sought.

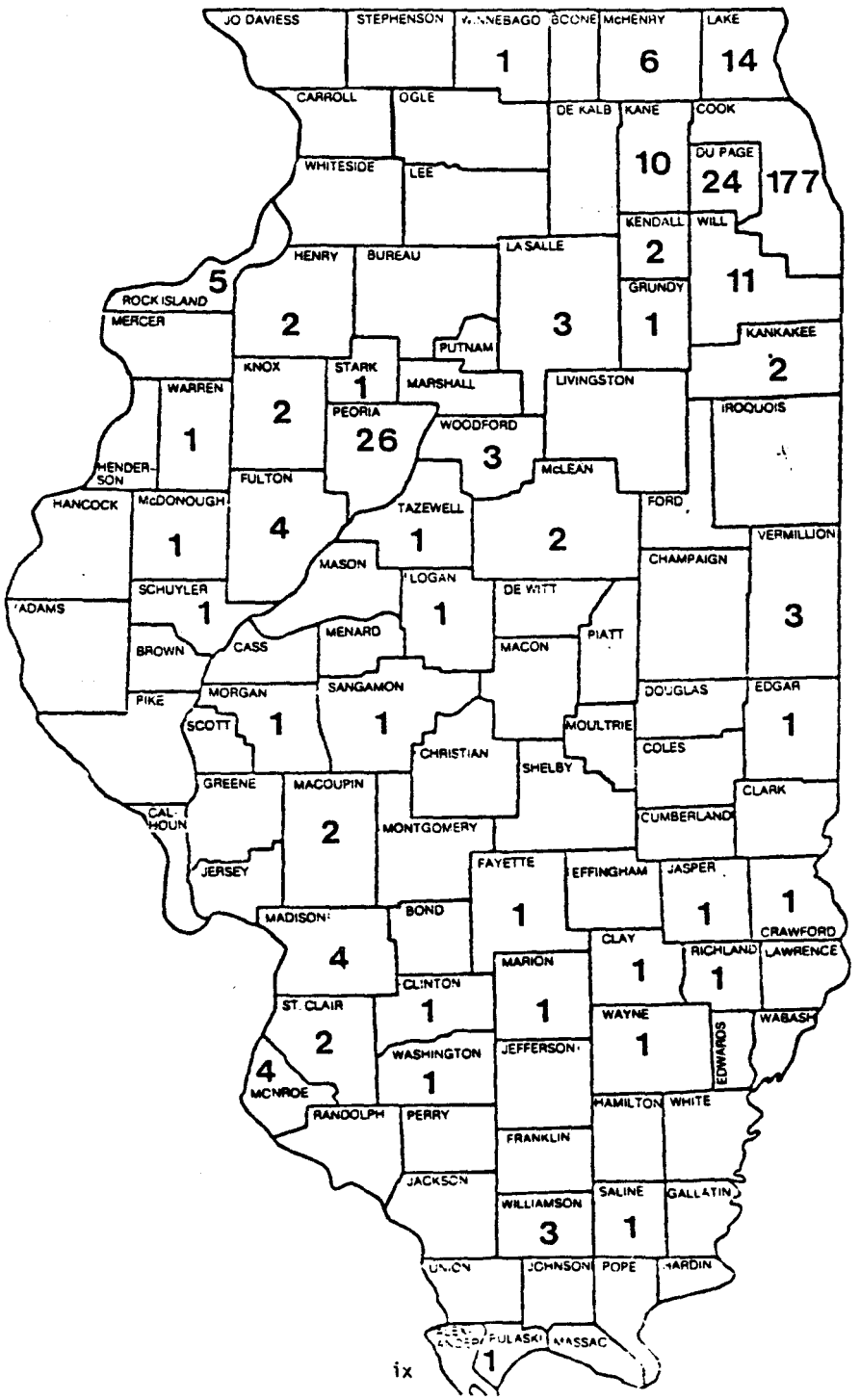
This agreement is made without prejudice to the contentions of the parties to this agreement and its provisions are binding in the light of approval of the plan and release of the funds by the U.S. Department of Education. However, its provisions are subject to recession(sic) unless all proceedings related to Public Law 94-142 and Section 504 initiated against the Governor's Purchased Care Review Board and the Illinois State Board of Education by the Office of Civil Rights are dismissed.

Date Adopted

September 17, 1980

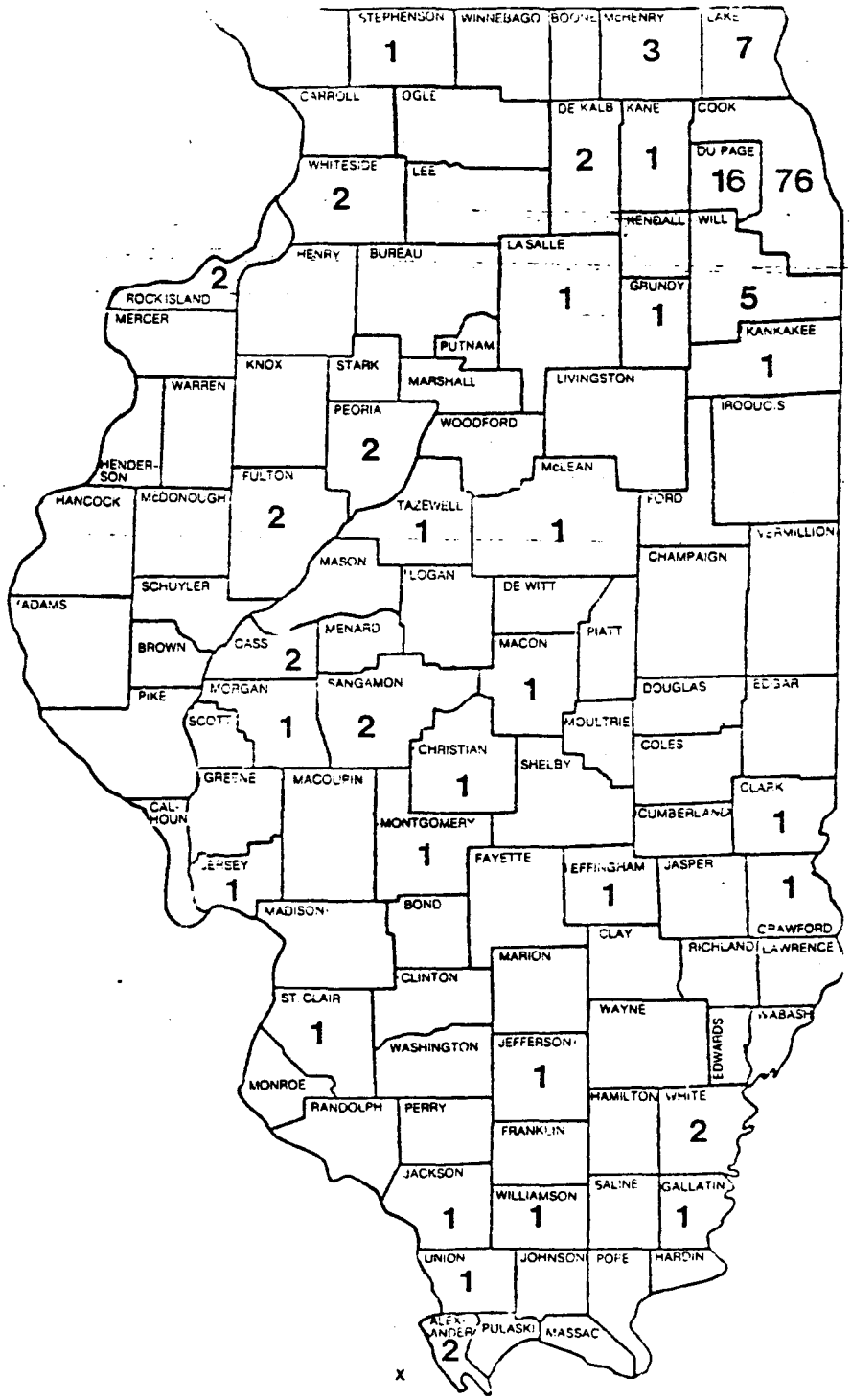
APPENDIX E

1981 (JANUARY-JUNE)
LOCAL-LEVEL
DUE PROCESS HEARINGS
TOTAL: 333



APPENDIX E

1981 (JANUARY-JUNE)
LOCAL-LEVEL
DUE PROCESS HEARINGS
TOTAL: 146



SUMMARY

Nature of Complaint in Descending Frequency Order

Placement[2] (Art.9)	119
Appriopriateness	40
Lack of	23
All other	56
Transportation (Art.13)	16
Financial responsibility (Art. 8.07 #5)	15
Miscellaneous	12
Denial of related services (Art. 5)	9
Failure to comply with administrative order (Art. 10.24)	4
Expulsion or suspension of special education student (Art. 2.04 #1)	4
Disagreement with teaching practices	3
Graduation of special education student (Art. 3.03)	3
Evaluation (Art. 9)	3
Due Process (Art. 10)	3
Parents' Rights (Art. 9)	3
Accessibility (Section 504 of Rehab. Act)	2
Communication between special education program and parent	2
Delay in provision of services (Art. 9.24)	2

[2]All citations are from the Rules and Regulations to Govern the Administration and Operation of Special Education.

APPROVAL SHEET

The dissertation submitted by Nancy Hablutzel has been read and approved by the following committee:

Dr. Samuel T. Mayo, Director
Professor, Education, Loyola

Dr. Jack A. Kavanagh
Associate Dean, Education, Loyola

Dr. Ronald Morgan
Associate Professor, Education, Loyola

Dr. Joy J. Rogers
Associate Professor, Education, Loyola

Dr. Allan Shoenberger
Professor, Law, Loyola

The final copies have been examined by the director of the dissertation and the signature which appears below verfies the fact that any necessary changes have been incorporated and that the dissertation is now given final approval by the Committee with reference to content and form.

The dissertation is therefore accepted in partial fulfillment of the requirements for the degree of Doctor of Philosophy.

12/1/82
Date

Samuel T. Mayo
Director's Signature