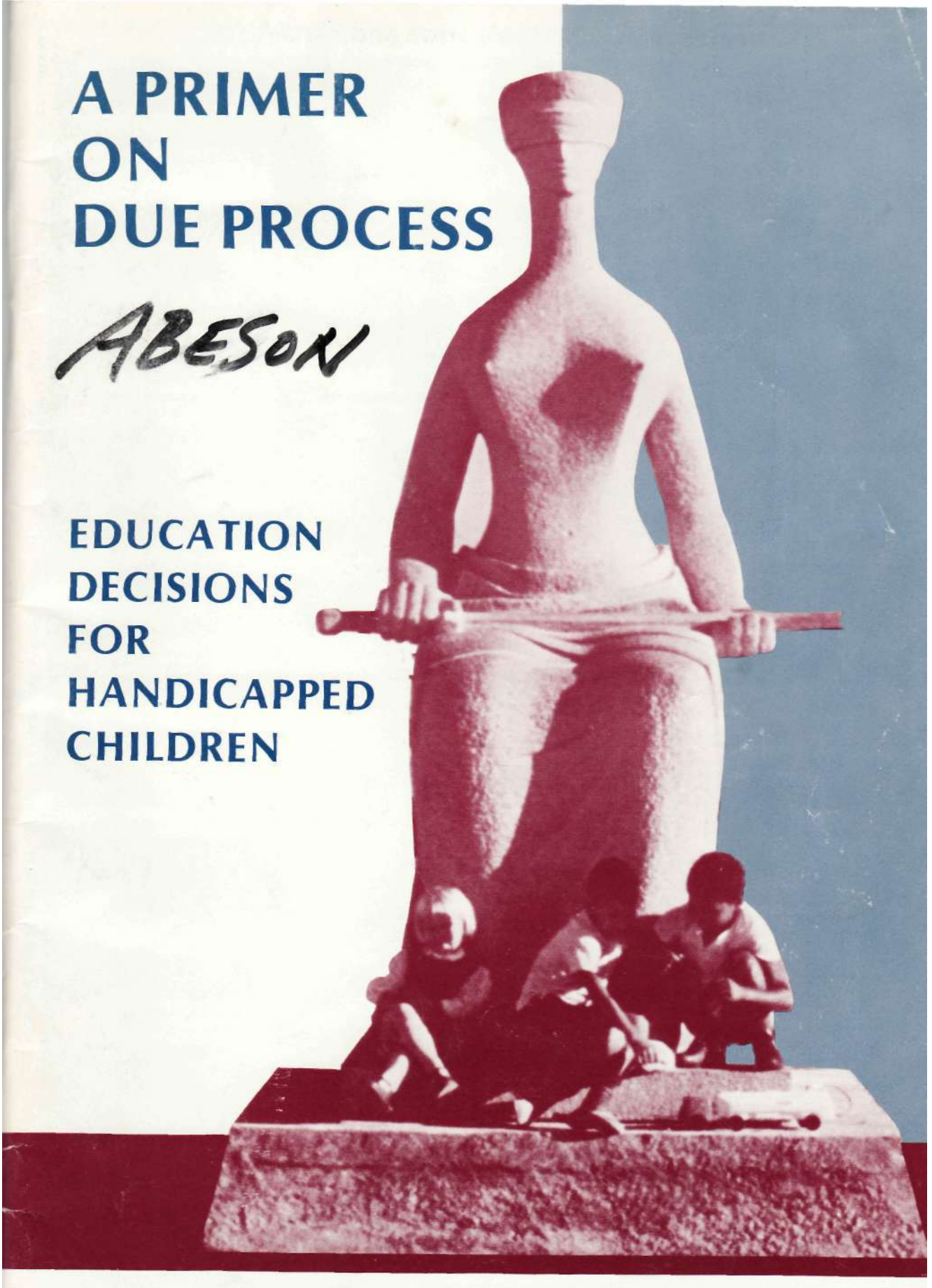
A PRIMER ON DUE PROCESS

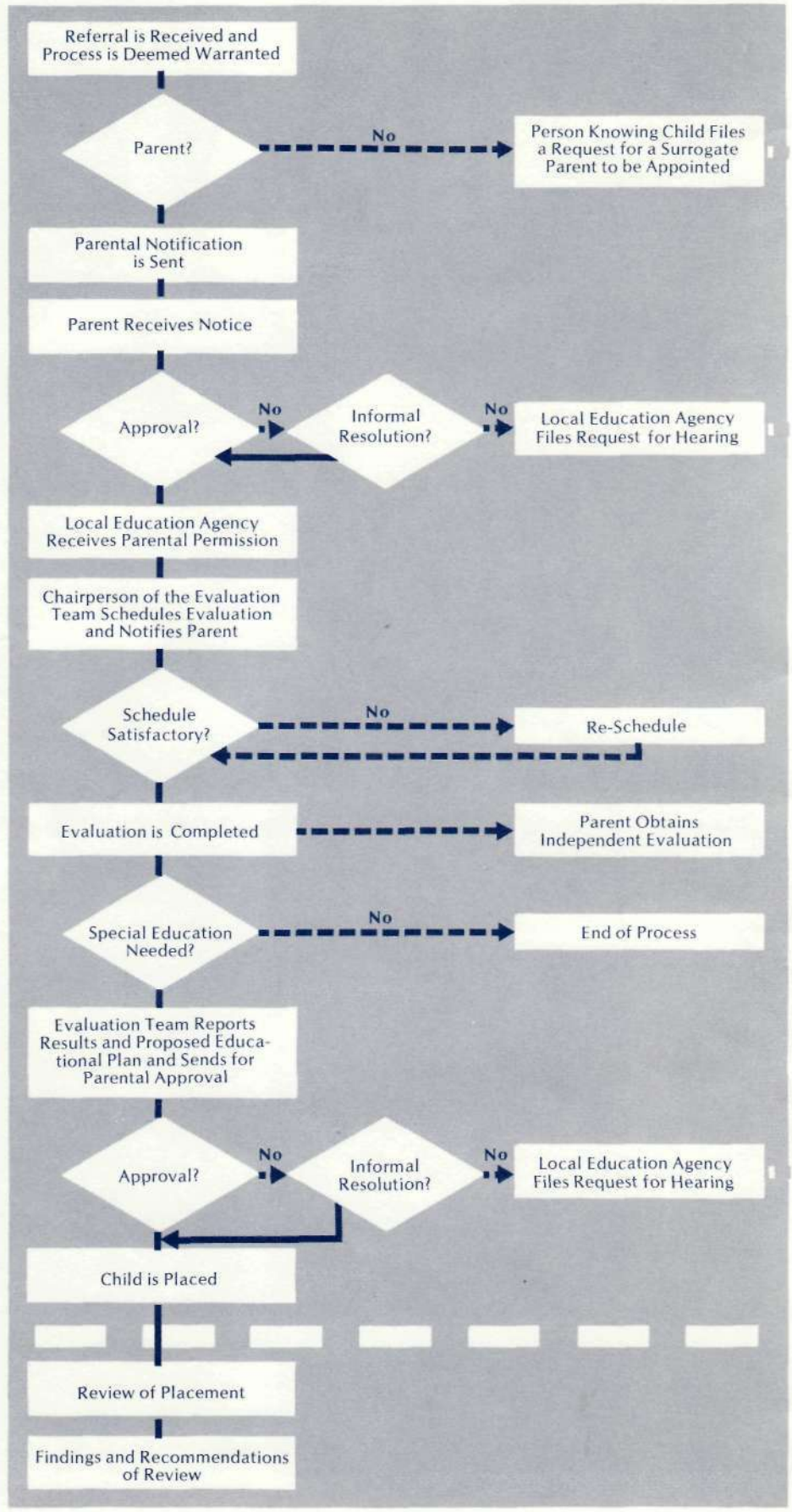
ABESON

EDUCATION DECISIONS FOR HANDICAPPED CHILDREN



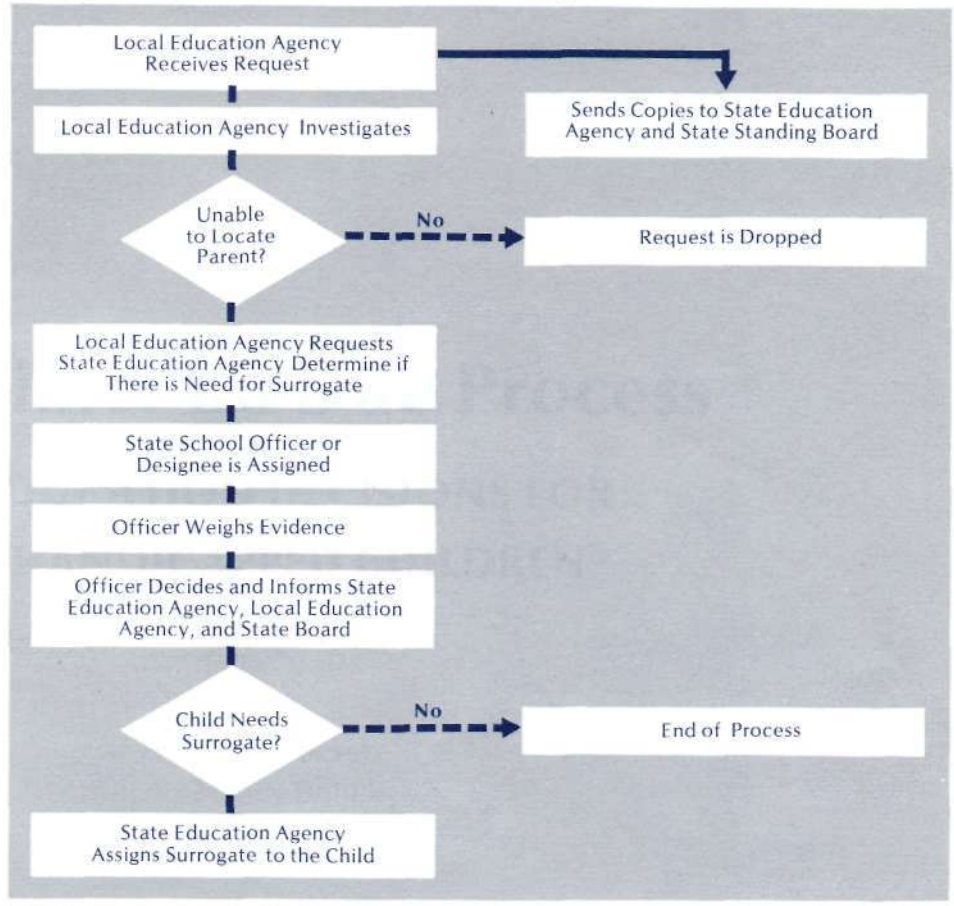
Evaluation and Placement

Cumulative Time	Maximum Time For Each Step
5 days	5 days
7 days	2 days
22 days	15 days
27 days	5 days
57 days	30 days
67 days	10 days
77 days	10 days
	8 months
	10 days



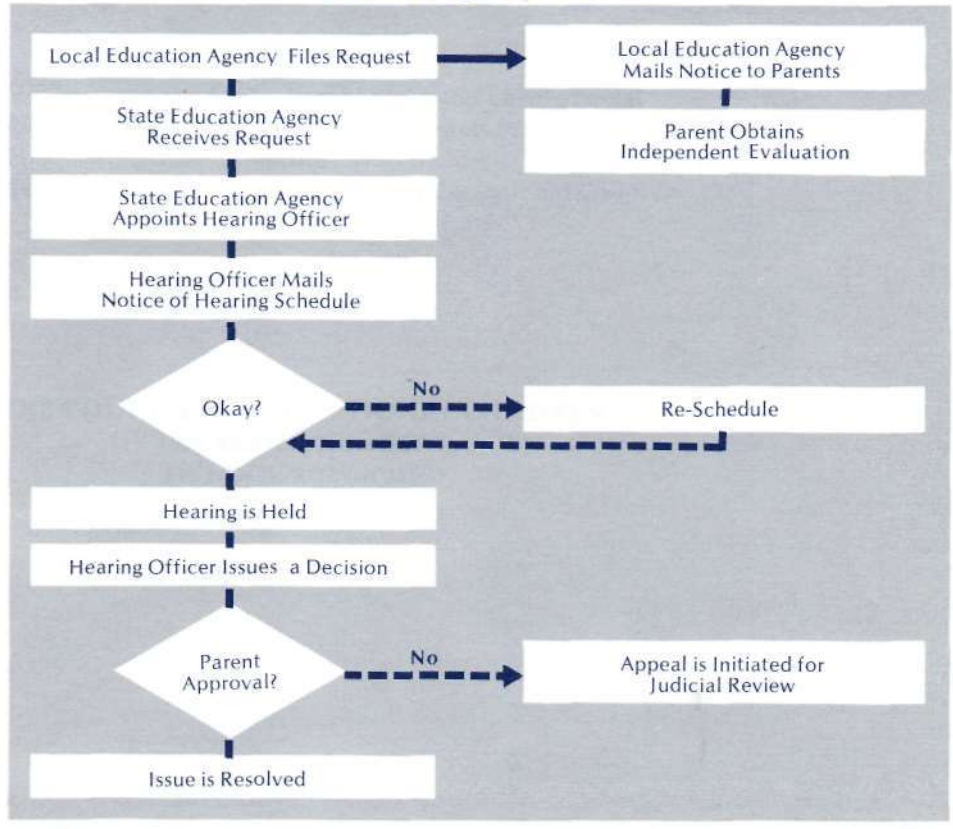
Request for a Surrogate Parent

Cumulative Time	Maximum Time For Each Step
10 days	10 days
40 days	30 days
45 days	5 days



Hearing Process

Cumulative Time	Maximum Time For Each Step
5 days	5 days
15 days	10 days
25 days	10 days
65 days	40 days
75 days	10 days



A Primer on Due Process

EDUCATION DECISIONS FOR HANDICAPPED CHILDREN

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Contents

Acknowledgments

Special thanks must be given to William Schipper of the National Association of State Directors of Special Education for his critical and positive reading of an early draft, and to George Wilson who helped with an early draft of one chapter of the document. Acknowledgment is also given to the states of Pennsylvania and Massachusetts, whose administrative literature was extrapolated in the production of the sample forms.

Introduction

In early 1975, two US Supreme Court rulings added great weight to the mandate that public education officials abide by due process requirements in making decisions about students (Coss *v. Lopez*, 1975; *Wood* v. *Strickland,* 1975). In *Wood,* the Court declared that a school board member engaged in any actions that "would violate the constitutional rights of the students affected or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student" is personally liable for the "intentional or otherwise inexcusable deprivation" of the student's constitutional rights. These decisions follow similar rulings regarding student rights in courts at all levels across the country. The basis of such rulings is the US Constitution which provides in the Fifth Amendment that no person shall "be deprived of life, liberty, or property, without due process of law" and in the Fourteenth Amendment that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law."

The clear responsibility of American educators to adhere to due process requirements has only emerged in the early 1970's. In the past, decisions exempting a child from school, placing him in a special class, or otherwise changing his educational placement were often made without regard to fair procedure. Traditionally, the children most affected by such arbitrary and capricious decision making were the handicapped or exceptional—the mentally retarded, emotionally disturbed, physically handicapped, hearing handicapped, visually handicapped, speech handicapped, learning disabled, and sometimes the gifted. Exceptional children, individually and collectively, were frequently denied the benefits of appropriate public education.

Since the early 1970's, however, the situation has changed dramatically. Extensive litigation and legislation have resulted in the requirement that state and local education agencies guarantee due process protection to handicapped children in all matters pertaining to their identification, evaluation, and educational placement. With enactment by the US Congress of the Education Amendments of 1974 (Public Law 93-380), all state education agencies, in order to remain eligible for federal funds for the education of handicapped children, were required to adopt a state plan that would include provision of adequate due process in educational decision making.

This document presents an approach to meeting the requirements of due process in the identification, evaluation, and educational placement

of handicapped children. Attention is devoted to the steps needed to meet the requirements and the sequence in which they can be implemented. That sequence is intended to meet the test of adequate procedural due process by providing sufficient procedural safeguards so that when an individual is faced with a decision or potential decision affecting his educational environment, he has the opportunity to be heard in his own behalf as well as the right to impartial resolution of conflicting positions.

Although there is no single set of procedures that can be described as standard, the following elements, discussed more fully in Chapter 2, would seem to suffice:

- Timely and written notice must be given prior to the identification, evaluation, or educational placement of a handicapped child.
- An opportunity to respond to the substance of such notice must be provided.
- A hearing must be held, if necessary, in which the child and his parent, guardian, or surrogate and/or their representative, such as legal counsel of their own choosing, will have an opportunity to review and challenge all evidence (including relevant school records), cross examine all witnesses, present evidence, obtain an independent evaluation, and receive a complete and accurate record of the proceedings.
- The burden of proof as to the recommended action must be borne by the education agency through the presentation of appropriate evidence.
- The hearing officers will make a decision solely on the evidence presented at the hearing.
- Opportunity must exist for the parties to appeal the decision of the hearing officer.

In response to this affirmation of due process in public policy, the Special Training Project of the National Association of State Directors of Special Education, the Development and Evaluation of State and Local Special Education Administrative Policy Manuals Project of the State-Federal Information Clearinghouse for Exceptional Children, and The Council for Exceptional Children have combined resources to produce the material presented herein. It was our collective intent to provide education officials and policymakers at all levels of government with a short yet comprehensive package of practical information regarding due process. The following material is included.

Chapter 1. DUE PROCESS OF LAW: BACKGROUND AND INTENT

The first chapter deals primarily with the background, major issues, and intent of the application of due process procedures to educational decision making for handicapped children. Included is a brief review of

the legal developments in this area, including both state and federal statutory requirements and judicial directives.

Chapter 2. DUE PROCESS OF LAW: PROCEDURES, SEQUENCES, AND FORMS

Chapter 2 contains a specific presentation of the elements of due process in a "how to do it" framework. Also included is an indication of an appropriate time frame in which all steps should be undertaken. Sample forms that can help to effectively organize and administer due process are included in the Appendix. The procedures described may seem overly exhaustive to some readers, but our intent was to suggest a procedure that would meet not only today's requirements, but would also incorporate emerging demands being established by public policymakers. The most obvious element is the clear intent to make effective and meaningful the communication between the public schools and the recipients of service, whether they be a child, a parent, a parent surrogate, or a legal guardian.

Chapter 3. HEARING OFFICERS AND PROCEDURES

A major element of the due process procedures suggested here is the possible use of impartial hearing examiners to resolve issues between the public schools and families when informal negotiating is ineffective. Of great importance is the training of hearing officers and the manner in which they operate in the hearing setting. It is the intent of this chapter to provide a basic outline for these activities.

Chapter 4. THE PARENT SURROGATE: ONE APPROACH

The final chapter suggests a set of procedures that would involve state and local education agency personnel in the development and operation of a system to provide every child with adequate representation during educational decision making activities. New federal law requires that children whose parents are unavailable or unknown and children who are wards of the state are entitled to receive the protection of impartial due process proceedings. Without the assignment of surrogates to these youngsters, they are in effect prevented from receiving the same benefits provided to children in more conventional circumstances.

We recognize that it may not be possible or desirable for all public education systems that serve handicapped children to adopt all suggested procedures presented. Nevertheless, it is our hope that these materials will be useful in helping educators to understand what must occur so that the due process rights of handicapped children receive the same protection guaranteed to all.

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Due Process of Law Background and Intent

> *Children's rights cannot be secured until some particular institution has recognized them and assumed responsibility for enforcing them. In the past, adult institutions have not performed this function partly ...because it was thought children had few rights to secure. Unfortunately, the institutions designed specifically for children also have failed to accomplish this aim, largely because they were established to safeguard interests, not to enforce rights, on the assumption that the former could be done without the latter.* (Rodham, 1973, p.506)

With the conflict between safeguarding interests and assuring individual rights as a backdrop, the rights of children in many areas of American life are being examined and clarified, often through judicial intervention. Nowhere is this examination more intense than in public education. In this decade, questions of "rights" for public school students have been raised in relation to freedom of expression, personal rights such as hair length and dress regulations, marriage and pregnancy, police intervention, corporal punishment, discipline, and confidentiality of records. While all of these have an impact on handicapped children, none is more pervasive than the right to due process which governs decisions regarding identification, evaluation, and educational placement.

CHILDREN OUT OF SCHOOL

In years past, prior to clarification of the due process obligations of public schools, thousands of children were arbitrarily suspended, excluded, pushed out of school or prevented from enrolling. Based on its analysis of 1970 US Bureau of the Census data on nonenrollment, the Children's Defense Fund (CDF) reported that "nearly two million children 7 to 17 years of age were not enrolled in school" (CDF, 1974). CDF postulated that the two million nonenrolled figure only "reflects the surface" of the total number. While no specific data is presently available on the precise number of handicapped children not receiving an educaton, it is well known that many are excluded from school. Indicative is the following CDF observation.

> We found that if a child is white but not middle class, does not speak English, is poor, needs special help with seeing, hearing, walking, reading, learning, adjusting, growing up, is pregnant or married at age 15, is not smart enough or is too smart, then, in too many places school officials decide school is not the place for that child. In sum, out of school children share a common characteristic of different-ness by virtue of race, income, physical, mental or emotional "handi-cap," and age. They are, for the most part, out of school not by choice but because they have been excluded. It is as if many school officials have decided that certain groups of children are beyond their responsibility and are expendable. Not only do they exclude these children, they frequently do so arbitrarily, discriminatorily, and with impunity. (CDF, 1974, pp. 3-4)

EXCLUSION AND THE RIGHT TO AN EDUCATION

Much litigation recently has been concerned with handicapped children seeking affirmation of their right to an education and the protection of due process of law (Abeson & Bolick, 1974). This wave of litigation is evi-dence of the way in which public schools in the past often ignored appro-priate legal processes in denying these children their rights. The public schools often based such action upon law which was interpreted to give them the right to deny the opportunity of a public education to some chil-dren, either on a short term or permanent basis.

Today, it is a matter of public policy that the purported purpose of the public school is to provide every child with the opportunity for a free, public, and appropriate education. This policy makes it clear that to solve the problems a child is having in school by excluding him is not to solve the problems of the child, but of the school. It is unreasonable for the public schools to expel a child because of a behavioral problem (more popularly known as a discipline problem), an inability to learn, or any handicapping condition. The language of the courts is well known in the face of such abuses:

> There is no question that the plaintiff will suffer irreparable harm if her school career is permanently terminated and this may well result if her indefinite expulsion continues.... No authority is needed for the fundamental American principle that a public school education through high school is a basic right of all citizens. (*Cook v. Edwards,* 1972)

> A sentence of banishment from the local educational system is, inso-far as the institution has power to act, the extreme penalty, the ulti-mate punishment.... Stripping a child of access to educational op-portunity is a life sentence to second-rate citizenship (Lee v. *Macon County Board of Education*, 1974)

> In these days it is doubtful that any child may reasonably be ex-

> pected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms. *{Brown v. Board of Education,* 1954)
>
> The Court declares that it is the established policy of the State of Maryland to provide a free education to all persons between the ages of five and twenty years, and this includes children with handicaps, and particularly mentally retarded children, regardless of how severely and profoundly retarded they may be. (*Maryland Association for Retarded Children* v. *State of Maryland,* 1974)

Prior to 1971 and the clear directives provided by the courts *(Pennsylvania Association for Retarded Children* v. *Commonwealth of Pennsylvania,* 1971; *Mills* v. *Board of Education of the District of Columbia,* 1972; the *Maryland* case cited above; and others), some school exclusion was based on existing law and was in many quarters considered legal and appropriate. Typical were state statutes containing provisions for excluding children with physical or mental conditions or attitudes that prevented or rendered inadvisable their attendance at school or application to study. Often such provisions excluded children who were blind, "dumb," or "feebleminded" for whom no adequate instructional programs had been provided and children who lived more than a minimum distance from a public school or on a route on which no transportation was provided by school authorities.

The rationale that perhaps partially explains the existence of such statutes is represented by a 1919 ruling of the Wisconsin Supreme Court. That ruling provided for the exclusion of a non-physically-threatening cerebral palsied child on the basis that his "condition" produced a "depressing and nauseating effect on the teachers and school children and that he required an undue portion of the teacher's time" *(Seattle v. State Board of Education,* 1919).

Statutory provisions such as those indicated above sanctioned only the most obvious exclusion. Other more subtle devices have been and are today being used to accomplish similar objectives. An example is the use of tuition grant programs in most states, which enable the state and/or local education agency to provide public funds to parents for the purchase of private education programs (Trudeau & Nye, 1973a). Most often, such payments may be provided only when appropriate public programs are not available. These policies have the potential for wealth discrimination and exclusion because frequently a dollar ceiling insufficient to cover the cost of private tuition is placed on the amount of public funds that can be made available. If the family is unable to pay the difference, the child is subject to exclusion or inappropriate placement.

The right to education principle makes clear that when a state undertakes to provide education for any child and does so through the use of

public or private programs as a matter of public policy, then the state must assume full financial responsibility for all children. This position has been clearly articulated in the order in *Maryland Association for Retarded Children v. State of Maryland* (1974). A series of decisions in New York Family Court also supported the right of every child to a free public appropriate education. Notable is *In Re Downey* (1973), in which the court stated that "to order a parent to contribute to the education of his handicapped child when free education is supplied to all other children would be a denial of the constitutional right of equal protection, United States Constitution, Amendment XIV; New York State Constitution Article XI, Section 1." Similarly in *In Re K.* (1973), the court held:

> It would be a denial of the right of equal protection and morally inequitable not to reimburse the parents of a handicapped child for monies they have advanced in order that their child may attend a private school for the handicapped when no public facilities were available while other children who are more fortunate can attend public school without paying tuition and without regard to the assets and income of their parents

Another practice used to exclude handicapped children occurs as a function of limited program alternatives. For example, in some states children who need homebound or hospitalized instruction do not receive these services because they are not provided for by law. In other states children are placed on home instruction but then are provided no services or insufficient services to meet the standard of an appropriate public education. Frequently, children who are being considered for special education are assigned to waiting lists prior to an evaluation which is required by law before a special assignment can be made. Unfortunately, these children often wait at home rather than in school, and often for unnecessarily lengthy periods of time.

LABELING AND MISLABELING-CLASSIFICATION AND MISCLASSIFICATION

Regardless of the types of exclusion that have been used and regardless of where they have occurred, the common denominator is that such practices have usually occurred with little or no regard for due process of law. The same observation can be made with regard to the manner in which children are placed in educational programs other than those provided for nonhandicapped children. Other practices associated with placement decisions include identification and evaluation that occur when school personnel suspect that a child may be handicapped and in need of a special program. In ignoring due process, the schools have in many instances, with or without appropriate supporting data, assigned labels to children, subjected children to individual psychological assessment, and altered their education status without parental knowledge or permission. The fol-

lowing, taken from a letter written to one of the authors, aptly describes the problem:

> Harris, my only son, is ten and is somewhat small for his age but has always been very active, playing with friends in his neighborhood. Last spring I got a note asking me to come to school. The pupil adjustment counselor told me that Harris and another boy, who had once been his friend, had been fighting and that Harris was not to return to school for a week. When he returned to school he was immediately sent home again for no specific length of time, but with the message that he couldn't return again until he "learns to behave." When I again went to school to see his teacher, I learned that Harris had been placed in a class for retarded children since last year. I became very upset because I had never been told of this. I did get a note from someone last year saying that Harris was receiving some special help with his studies, but it said nothing about a class for retarded children.

It is well known that labeling in and of itself, even when done carefully and with good intent, may produce negative effects on children. There can be no justification for unnecessarily submitting children to such effects. Three of the major problems associated with labeling practices are:

1. Labeled children often become victimized by stigma associated with a label. This may be manifested by isolation from usual school opportunities and taunting and rejection by both children and school personnel.
2. Assigning a label to a child often suggests to those working with him that the child's behavior should conform to the stereotyped behavioral expectations associated with the label. This often contributes to a self fulfilling prophecy in that the child, once labeled, is expected to conform to the stereotyped behavior associated with the label and ultimately does so. When a child is labeled and placement is made on the basis of that label, there is often no opportunity to escape from either the label or the placement.
3. Children who are labeled and placed on the basis of that label may often not need special education programs. This is obviously true for children who are incorrectly labeled, but it also applies to children with certain handicaps, often of a physical nature. Just because a child is physically handicapped does not mean that a special education is required.

Decisions to label a child, even in his best interest, have grave consequences. Mercer (1975) quoted Alfred Binet's early concern about labeling practices and stigmatization resulting from such practices: "It will never be to one's credit to have attended a special school. We should at the least spare from this mark those who do not deserve it. Mistakes are excusable, especially at the beginning." Mercer added that "we are no

longer at the 'beginning' in psychological assessment. 'Mistakes' are no longer excusable. We believe that children have a right to be free of stigmatizing labels" (p. 140).

Hobbs (1975) put the total issue into perspective. "Categories and labels are powerful instruments for social regulation and control, and they are often employed for obscure, covert, or hurtful purposes: to degrade people, to deny them access to opportunity, to exclude undesirables whose presence in some way offends, disturbs familiar custom, or demands extraordinary effort" (p. 11).

Among the responses to the many challenges that have been directed at labeling and associated practices have been laws passed at both the state and federal levels establishing controls on such practices. In California, for example, state law specifies the type of evaluation to be used for children suspected of being mentally retarded. It also establishes specific standards which must be met prior to proclaiming a child mentally retarded (*California Education Code,* Sec. 6902.085). To specifically guard against the now widely recognized problem of penalizing children through the use of psychological instruments totally inappropriate to their culture, the Federal Education Amendments of 1974 (Public Law 93-380) require that state plans for the education of handicapped children will "contain procedures to insure the testing and evaluation materials and procedures utilized for the purposes of classification and placement of handicapped children will be selected and administered so as not to be racially or culturally discriminatory" (Sec. 612, (13) (c)).

As has been indicated, there is widespread criticism, both formal and informal, as to the evils of labeling and the associated practices of misclassification and misplacement. While it is true that labeling may produce negative effects, these effects can be eliminated or reduced by better professional practices. The intent of placing a label on a child in the first place is to obtain special benefits for that child; it is not to single the child out for abuse, ridicule, or nonservice. Hobbs (1975) in the report of the massive Project on Classification of Exceptional Children, concluded:

> Classification of exceptional children is essential to get services for them, to plan and organize helping programs, and to determine the outcomes of the intervention efforts. We do not concur with sentiments widely expressed that classification of exceptional children should be done away with. Although we understand that some people advocate the elimination of classification in order to get rid of its harmful effects, their proposed solution oversimplifies the problem. Classification and labeling are essential to human communication and problem solving; without categories and concept designators, all complex communicating and thinking stop. (p. 5)

The dilemma is well summarized by Hobbs, who indicated that

> children who are categorized and labeled as different may be per-

> manently stigmatized, rejected by adults and other children, and excluded from opportunities essential for their full and healthy development. Yet categorization is necessary to open doors to opportunity: To get help for a child, to write legislation, to appropriate funds, to design service programs, to evaluate outcomes, to conduct research, even to communicate about the problems of the exceptional child, (p. 3)

If one accepts Hobbs' conclusion that labeling and classification practices must continue, then equally important is acceptance of the critical relationship of due process. Given the positive and negative effects that can accrue to a labeled and classified individual, safeguards must be established to control these practices. Due process offers the potential for such a safeguard. Adherence to due process will reduce unnecessary labeling and classification and will contribute to delivery of the specialized services needed by children with special learning needs. Emphasizing the provision of due process to children suspected of being exceptional and in need of special education services is in part an attempt to build an effective review and control mechanism to guard against improper labeling and classification practices.

DUE PROCESS

The PARC Consent Agreement

Due process requirements of the public schools were first, and perhaps most clearly, established in the *Pennsylvania Association tor Retarded Children (PARC) v. Commonwealth of Pennsylvania* Consent Agreement. Prior to ruling on the question of each mentally retarded child's right to an education, the court approved a stipulation which provided that "no child who is mentally retarded or thought to be mentally retarded can be assigned initially or re-assigned to either a regular or special educational status, or excluded from a public education without a prior recorded hearing before a special hearing officer" (PARC Consent Agreement, 1972). As part of that order a 23 step procedure was established guaranteeing due process, including a hearing, as indicated below:

> Whenever any mentally retarded or allegedly mentally retarded child, aged five years, six months, through twenty-one years, is recommended for a change in educational status by a school district, intermediate unit or any school official, notice of the proposed action shall first be given to the parent or guardian of the child.
>
> Notice of the proposed action shall be given in writing by registered mail to the parent or guardian of the child (N.B. being changed to certified mail).
>
> The notice shall describe the proposed action in detail, including specification of the statute or regulation under which such action is proposed and a clear and full statement of the reasons therefor,

including specification of any tests or reports upon which such action is proposed.

The notice shall advise the parent or guardian of any alternative education opportunities, if any, available to his child other than that proposed.

The notice shall inform the parent or guardian of his right to contest the proposed action at a full hearing before the Secretary of Education, or his designee, in a place and at a time convenient to the parent, before the proposed action may be taken.

The notice shall inform the parent or guardian of his right to be represented at the hearing by legal counsel, of his right to counsel, of his right to examine before the hearing his child's school records including any tests or reports upon which the proposed action may be based, of his right to present evidence of his own, including expert medical, psychological, and educational testimony, and of his right to confront and to cross-examine any school official, employee, or agent of a school district, intermediate unit or the department who may have evidence upon which the proposed action may be based.

The notice shall inform the parent or guardian of the availability of various organizations, including the local chapter of the Pennsylvania Association for Retarded Children, to assist him in connection with the hearing and the school district or intermediate unit involved shall offer to provide full information about such organization to such parent or guardian upon request.

The notice shall inform the parent or guardian that he is entitled under the Pennsylvania Mental Health and Mental Retardation Act to the services of a local center for an independent medical, psychological, and educational evaluation of his child and shall specify the name, address, and telephone number of the MH-MR center in his catchment area.

The notice shall specify the procedure for pursuing a hearing, which procedure shall be stated in a form to be agreed upon by counsel, which form shall distinctly state that the parent or guardian must fill in the form and mail the same to the school district or intermediate unit involved within 14 days of the date of notice

If the parent or guardian does not exercise his right to a hearing by mailing in the form requesting a hearing within 14 days of receipt of the aforesaid notice, the school district or intermediate unit involved shall send out a second notice in the manner prescribed above, which notice shall also distinctly advise the parent or guardian that he has a right to a hearing as prescribed above, that he had been notified once before about such right to a hearing and that his failure to respond to the second notice within 14 days of the date thereof will constitute his waiver to a right to a hearing. Such second notice shall also be accompanied with a form for requesting a hearing of the type specified above.

The hearing shall be scheduled not sooner than 20 days nor later than 45 days after receipt of the request for a hearing from the parent or guardian.

The hearing shall be held in the local district and at a place reasonably convenient to the parent or guardian of the child At the option of the parent or guardian, the hearing may be held in the evening and such option shall be set forth in the form requesting the hearing aforesaid.

The hearing officer shall be the Secretary of Education, or his designee, but shall not be an officer, employee or agent of any local district or intermediate unit in which the child resides.

The hearing shall be an oral, personal hearing, and shall be public unless the parent or guardian specifies a closed hearing.

The decision of the hearing officer shall be based solely upon the evidence presented at the hearing.

The local school district or intermediate unit shall have the burden of proof.

A stenographic or other transcribed record of the hearing shall be made and shall be available to the parent or guardian or his representative. Said record may be discarded after three years.

The parent or guardian or his counsel shall be given reasonable hearing by legal counsel of his choosing.

The parent or guardian or his counsel shall be given reasonable access prior to the hearing to all records of the school district or intermediate unit concerning his child, including any tests or reports upon which the proposed action may be based.

The parent or guardian or his counsel shall have the right to compel the attendance of, to confront and to cross-examine any witness testifying for the school board or intermediate unit and any official, employee, or agent of the school district, intermediate unit, or the department who may have evidence upon which the proposed action may be based.

The parent or guardian shall have the right to present evidence and testimony, including expert medical, psychological or educational testimony.

No later than 30 days after the hearing, the hearing officer shall render a decision in writing which shall be accompanied by written findings of fact and conclusions of law and which shall be sent by registered mail to the parent or guardian and his counsel.

Pending the hearing and receipt of notification of the decision by the parent or guardian, there shall be no change in the child's educational status.

While the PARC order was limited to the mentally retarded, in the subsequent *Mills* (1972) decision the court ordered implementation of due process procedures closely comparable to the PARC requirements, but includinga// handicapped children.

The Tennessee Law

Shortly after the decisions in the early right to education cases were delivered, provisions for due process began to appear in both state and federal statutes. Among the first was Tennessee's 1972 special education law (*Tennessee Code Annotated*, Chapter 839, 1972) which contained the following section:

> SECTION 8. A. 1. A child, or his parent or guardian, may obtain review of an action or omission by state or local authorities on the ground that the child has been or is about to be:
>
> a. denied entry or continuance in a program of special education appropriate to his condition and needs.
> b. placed in a special education program which is inappropriate to his condition and needs.
> c. denied educational services because no suitable program of education or related services is maintained.
> d. provided with special education or other education which is insufficient in quantity to satisfy the requirements of law.
> e. provided with special education or other education to which he is entitled only by units of government or in situations which are not those having the primary responsibility for providing the services in question.
> f. assigned to a program of special education when he is not handicapped.
>
> 2. The parent or guardian of a child placed or denied placement in a program of special education shall be notified promptly, by registered certified mail, return receipt requested, of such placement, denial or impending placement or denial. Such notice shall contain a statement informing the parent or guardian that he is entitled to review of the determination and of the procedure for obtaining such review.
>
> 3. The notice shall contain the information that a hearing may be had, upon written request, no less than fifteen (15) days nor more than thirty (30) days from the date on which the notice was received.
>
> 4. No change in the program assignment or status of a handicapped child shall be made within the period afforded the parent or guardian to request a hearing, which period shall not be less than fourteen (14) days, except that such change may be made with the written consent of the parent or guardian. If the health or safety of the child or of other persons would be endangered by delaying the change in assignment, the change may be sooner made, but without prejudice to any rights that the child and his parent or guardian may have pursuant to this subsection or otherwise pursuant to law.
>
> 5. The parent or guardian shall have access to any reports, records, clinical evaluations or other materials upon which the determination to be reviewed was wholly or partially based or which could reason-

ably have a bearing on the correctness of the determination. At any hearing held pursuant to this section, the child and his parent or guardian shall be entitled to examine and cross-examine witnesses, to introduce evidence, to appear in person, and to be represented by counsel. A full record of the hearing shall be made and kept, including a transcript thereof if requested by the parent or guardian.

6. A parent or guardian, if he believes the diagnosis or evaluation of his child as shown in the records made available to him pursuant to subsection 5 of this subsection to be in error, may request an independent examination and evaluation of the child and shall have the right to secure the same and to have the report thereof presented as evidence in the proceeding. If the parent or guardian is financially unable to afford an independent examination or evaluation, it shall be provided at state expense.

7. The state board of education shall make and, from time to time, may amend or revise rules and regulations for the conduct of hearings authorized by this subsection and otherwise for the implementation of its purpose. Among other things, such rules and regulations shall require that the hearing officer or board be a person or composed of persons other than those who participated in the action or who are responsible for the omission being complained of; fix the qualifications of the hearing officer or officers; and provide that the hearing officer or board shall have authority to affirm, reverse or modify the action previously taken and to order the taking of appropriate action. The rules and regulations shall govern proceedings pursuant to this subsection whether held by the State Board of Education, or by a County, City, or Special School District Board of Education.

8. The determination of a hearing officer or board shall be subject to judicial review in the manner provided for judicial review of determinations of the state or local education agency, as the case may be.

9. If a determination of a hearing officer or board is not fully complied with or implemented, the aggrieved party may enforce it by a proceeding in the chancery or circuit court. Any action pursuant to this subsection shall not be a bar to any administrative or judical proceeding by or at the instance of the State Department of Education to secure compliance or otherwise to secure proper administration of laws and regulations relating to the provision of regular or special education.

10. The remedies provided by this subsection are in addition to any other remedies which a child, his parent or guardian may otherwise have pursuant to law

B. Nothing in this Act shall be construed to limit any right which any child or his parent or guardian may have to enforce the provision of any regular or special educational service, nor shall the time at

which school districts are required to submit plans or proceed with implementation of special education programs be taken as authorizing any delay in the provision of education or related services to which a child may otherwise be entitled.

The Massachusetts Law

In that same year the Massachusetts legislature also enacted a new special education statute *(Massachusetts Law,* Chapter 766, 1972), containing the following due process provisions:

> SECTION 3. In accordance with the regulations, guidelines and directives of the department issued jointly with the departments of mental health and public health and with assistance of the department, the school committee of every city, town or school district shall identify the school age children residing therein who have special needs, diagnose and evaluate the needs of such children, propose a special education program to meet those needs, provide or arrange for the provision of such special education program, maintain a record of such identification, diagnosis, proposal and program actually provided and make such reports as the department may require. Until proven otherwise, every child shall be presumed to be appropriately assigned to a regular education program and presumed not to be a school age child with special needs or a school age child requiring special education.
>
> No school committee shall refuse a school age child with special needs admission to or continued attendance in public school without the prior written approval of the department. No child who is so refused shall be denied an alternative form of education approved by the department, as provided for in section ten, through a tutoring program at home, through enrollment in an institution operated by a state agency or through any other program which is approved for the child by the department.
>
> No child shall be placed in a special education program without prior consultation, evaluation, reevaluation, and consent as set forth and implemented by regulations promulgated by the department.
>
> Within five days after the referral of a child enrolled in a regular education program by a school official, parent or guardian, judicial officer, social worker, family physician, or person having custody of the child for purposes of determining whether such child requires special education, the school committee shall notify the parents or guardians of such child in writing in the primary language of the home of such referral, the evaluation procedure to be followed, and the child's right to an independent evaluation at clinics or facilities approved by the department under regulations adopted jointly by the department and the departments of mental health and public health and the right to appeal from any evaluation, first to the department, and then to the courts.

Within thirty days after said notification the school committee shall provide an evaluation as hereinafter defined. Said evaluation shall include an assessment of the child's current educational status by a representative of the local school department, an assessment by a classroom teacher who has dealt with the child in the classroom, a complete medical assessment by a physician, an assessment by a psychologist, an assessment by a nurse, social worker, or a guidance or adjustment counselor of the general home situation and pertinent family history factors; and assessments by such specialists as may be required in accordance with the diagnosis including when necessary, but not limited to an assessment by a neurologist, an audiologist, an ophthalmologist, a specialist competent in speech, language and perceptual factors and a psychiatrist.

The department jointly with the departments of mental health and public health shall issue regulations to specify qualifications for persons assessing said child.

These departments through their joint regulations may define circumstances under which the requirement of any or all of these assessments may be waived so long as an evaluation appropriate to the needs of the child is provided.

Those persons assessing said child shall maintain a complete and specific record of diagnostic procedures attempted and their results, the conclusions reached, the suggested courses of special education and medical treatment best suited to the child's needs, and the specific benefits expected from such action. A suggested special education program may include family guidance or counseling services. When the suggested course of study is other than regular education those persons assessing said child shall present a method of monitoring the benefits of such special education and conditions that would indicate that the child should return to regular classes, and a comparison of expected outcomes in regular class placement.

If a child with special needs requires of a [sic] medical or psychological treatment as part of a special education program provided pursuant to this section, or if his parent or guardian requires social services related to the child's special needs, such treatment or services, or both, shall be made available in accordance with regulations promulgated jointly by the departments of education, mental health, public health and public welfare in connection with the child's special education program. Reimbursement of the costs of such treatment or services or both shall be made according to the provisions of section thirteen.

Upon completion of said evaluation the child may obtain an independent evaluation from child evaluation clinics or facilities approved by the department jointly with the departments of mental health and public health or, at private expense, from any specialists.

The written record and clinical history from both the evaluation provided by the school committee and any independent evaluation,

shall be made available to the parents, guardians, or persons with custody of the child. Separate instructions, limited to the information required for adequate care of the child, shall be distributed only to those persons directly concerned with the care of the child. Otherwise said records shall be confidential.

The department may hold hearings regarding said evaluation, said hearings to be held in accordance with the provisions of chapter thirty A. The parents, guardians, or persons with custody may refuse the education program suggested by the initial evaluation and request said hearing by the department into the evaluation of the child and the appropriate education program. At the conclusion of said hearing, with the advice and consultation of appropriate advisory councils established under section one P of chapter fifteen, the department may recommend alternative educational placements to the parents, guardians or persons with custody, and said parents, guardians and persons with custody may either consent to or reject such proposals. If rejected, and the program desired by the parents, guardian or person with custody is a regular education program, the department and the local school committee shall provide the child with the educational program chosen by the parent, guardian or persons with custody except where such placement would seriously endanger the health or safety of the child or substantially disrupt the program for other students. In such circumstances the local school committee may proceed to the superior court with jurisdiction over the residence of the child to make such showing. Said court upon such showing shall be authorized to place the child in an appropriate education program.

If the parents, guardians or persons with custody reject the educational placements recommended by the department and desire a program other than a regular education program, the matter shall be referred to the state advisory commission on special education to be heard at its next meeting. The commission shall make a determination within thirty days of said meeting regarding the placement of the child. If the parents, guardians, or person with custody reject this determination, they may proceed to the superior court with jurisdiction over the residence of the child and said court shall be authorized to order the placement of the child in an appropriate education program.

During the course of the evaluations, assessments, or hearings provided for above, a child shall be placed in a regular education program unless such placement endangers the health or safety of the child or substantially disrupts such education program for other children.

No parent or guardian of any child placed in a special education program shall be required to perform duties not required of a parent or guardian of a child in a regular school program.

> Within ten months after placement of any child in a special education program, and at least annually thereafter the child's educational progress shall be evaluated as set forth above. If such evaluation suggests that the initial evaluation was in error or that a different program or medical treatment would now benefit the child more, appropriate reassignment or alteration in treatment shall be recommended to the parents, guardians or persons having custody of the child. If the evaluation of the special education program shows that said program does not benefit the child to the maximum extent feasible, then such child shall be reassigned.

Public Law 93-380

By October 1, 1974, a survey of state policies regarding due process was completed by the State-Federal Information Clearinghouse for Exceptional Children (SFICEC, 1974). The survey revealed that 12 states were required by statute to provide such procedures, 13 were similarly required by regulation, and the remainder had no policy mandate. This situation will undoubtedly change significantly, if not as a result of the continuance of the successful challenges that have already occurred, then in response to the new requirements of Public Law 93-380.

Specifically, Public Law 93-380 requires that a state, in order to retain its eligibility to receive federal funds for the education of the handicapped, must develop a plan, to be approved by the US Commissioner of Education, that will:

> (13) provide procedures for insuring that handicapped children and their parents or guardians are guaranteed procedural safeguards in decisions regarding identification, evaluation and educational placement of handicapped children including, but not limited to (A) (i) prior notice to parents or guardians of the child when the local or State educational agency proposes to change the educational placement of the child, (ii) an opportunity for the parents or guardians to obtain an impartial due process hearing, examine all relevant records with respect to the classification or educational placement of the child, and obtain an independent educational evaluation of the child, (iii) procedures to protect the rights of the child when the parents or guardians are not known, unavailable, or the child is a ward of the State including the assignment of an individual (not to be an employee of the State or local educational agency involved in the education or care of children) to act as a surrogate for the parents or guardians, and (iv) provision to insure that the decisions rendered in the impartial due process hearing required by this paragraph shall be binding on all parties subject only to appropriate administrative or judicial appeal. (Public Law 93-380, Title VIB, Sec. 612 (d) (13A))

It is expected that these plans will be in force as of fiscal year 1976.

ual plans be developed will lead to further specific determinations as to needed resources including personnel, space, and dollars required for educating each child. Such data can be presented to appropriations bodies such as the local board of education or state legislature

In addition, individual plans provide the basis for intelligent assessment of a child's progress in relation to the objectives initially established. This concept of periodic review, also a requirement of total due process protection, conforms with good educational programing as well. A 1973 review of state laws and administrative procedures relating to the placement of exceptional children (Trudeau & Nye, 1973b) revealed tremendous variability among the states in this regard. Analysis of the variance indicated that depending on the state, periodic reviews are required continuously, once a semester, routinely within 3 years of initial placement, or never.

Adherence to the provisions of due process also permits the school to adopt a totally new public relations approach to the education of handicapped children. Because the schools can no longer be secretive in the way they deal with these children and their parents, they have the opportunity to be totally honest in explaining to the community what they can and cannot do and the reasons why. One of the criticisms that has been directed at the psychiatric community by Chief US District Court Judge David Bazelon regarding its role in courts of law has been its failure to be honest. Bazelon demands of individuals working with persons who have psychiatric problems: "Tell us you can't handle the caseload, or that you don't know, or that the conditions under which you work make decent evaluations impossible." Such admissions, he reasons, will help "ventilate" the problem, and perhaps, make the issue a ripe candidate for reform (Pekkanen, 1974, p. 27).

Due process also provides an opportunity for public educators to effectively meet the educational needs of children even when there is parental resistance. From time to time, all school agencies face situations in which children who are in desperate need of assistance are prevented from receiving aid due to parental wishes. Procedures can be established by which the process, including hearings, can operate to provide the schools with the opportunity to evaluate and, when necessary, to place the children in special programs.

Finally, educators must be aware that adherence to due process procedures will in no way reduce their professional responsibility or authority. It can provide them with the leverage to do that which must be their goal —to act openly and in the best interests of the children they serve.

2

Due Process of Law Procedures, Sequences, and Forms

> *The late Supreme Court justice Felix Frankfurter, discussing the constitutional dimensions of due process, described the nature of the concept: "Fairness of procedure is 'due process in the primary sense'____'Due process' cannot be imprisoned within the treacherous limits of any formula____Due process is not a mechanical instrument. It is not a yardstick. It is a process. It is a delicate process of adjustment inescapably involving the exercise of judgment"* (Joint Anti-Facist Committee v. McGrath).

Providing a child with an appropriate education is of equal interest and importance to the child, the family, and the schools. To insure that education, it is imperative that, when initial educational evaluation and placement decisions or changes in existing placement are being considered, due process protections must be provided to the child, the famiiy, and the schools. All of these parties will benefit from adherence to well developed educational practices and the elements of due process. When appropriate decisions about a child's education are made in a forthright manner, these parties will be in harmony and the challenges inherent in due process need not be involved. Under other less positive circumstances, however, conflict will emerge and require resolution. Hearings conducted by impartial officers serving as designees of the chief state school officer will be convened, not to place blame or determine right or wrong, but to achieve resolution of the conflict and define an appropriate education program for the child. While the procedures presented here may appear complex and perhaps circuitous, it must be emphasized that none of the alternative routes to challenge need be used if all parties agree on the educational needs of the child and the appropriateness of the program proposed by the schools.

The right to due process is entrenched in the Fifth and Fourteenth Amendments of the US Constitution. The Fourteenth Amendment provides that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law." This constitutional responsibility was affirmed by the US Con-

gress in 1974 when all states were required to include due process procedures in their state plan for the education of handicapped children in order to remain eligible to participate in federally sponsored programs for these children (Public Law 93-380, 1974).

Most states have in force administrative appeals procedures that apply generally to all types of administrative decision making, including education. Typically, a parent who raises an education issue with a local administrator must carry his position to the superintendent, the local board, the chief state school officer responsible for education, the state board of education, and finally, if necessary, to the courts. Unfortunately, years can and frequently do go by before the issue is resolved. Such a time lapse violates an individual's right to speedy proceedings. In addition, such routes often violate the complaining party's right to fair proceedings. There may be no opportunity to present additional evidence or challenge existing evidence. Serious question can also be raised as to the "fairness" of the same agency officers sitting in review.

In the following pages procedures are proposed that limit the total time spent by all parties engaged in administrative due process regarding identification, evaluation, and placement decisions about handicapped children. The proposed procedures are precise and systematically tied together. The proposed process builds on the establishment of a single hearing before a hearing officer whose actions and decisions represent those of the state education agency and are directly appealable to an appropriate court. It is recognized that this procedure may not be compatible with existing law regarding due process and/or administrative appeals in all states. However, it does provide the potential for fair and speedy resolution of the issues. Further, these procedures are intended to encourage state and local education agencies to examine and possibly refine their particular due process procedures, including changing the law where necessary. It is important to keep sight of the basic intent of the proposed administrative procedures—to provide parents* and school districts with viable means to achieve the most equitable resolution of conflicts.

DUE PROCESS MINIMUMS

A review of judicial orders, existing state and federal legislation, and the work of legal analysts suggests that the following procedures must be provided in order to meet minimum due process standards in identification, evaluation, and educational placement of handicapped children:

1. Written notification before evaluation. In addition, parents always have the right to an interpreter/translator if their primary language is

*The term *parent* shall be used to mean the child's parent, legal guardian, or surrogate parent, or the child himself when over the age of majority.

not English. (See Form 1, Request for Interpreter/Translator, in the Appendix.)

2. Written notification before change in educational placement.
3. Periodic review of educational placement.
4. Opportunity for an impartial hearing including the right to:
   - Receive timely and specific notice of such hearing.
   - Review all records.
   - Obtain an independent evaluation.
   - Be represented by counsel.
   - Cross examine.
   - Bring witnesses.
   - Present evidence.
   - Receive a complete and accurate record of proceedings.
   - Appeal the decision.
5. Assignment of a surrogate parent for children when:
   - The child's parent or guardian is not known.
   - The child's parents are unavailable.
   - The child is a ward of the state.
6. Access to educational records.

In order to execute these minimums the state, in adopting its procedures, must provide for:

- Enforcement of the requirements.
- Training of state and local education agency personnel.
- Identification, training, and monitoring of hearing officers.
- Recruitment, training, and monitoring of surrogate parents.

The state in providing appropriate due process procedures should build, to the greatest degree possible, on a combination of formal procedures and informal negotiation. Appropriate formal administrative due process procedures will greatly reduce the need for and frequency of judicial review, and sound informal discussions will reduce the need for hearings. Frequently, unresolved issues that lead to hearings are discovered to be issues because of ineffective communication between the parent and schools. Often a casual afterschool parent-school conference or other informal conversation will avoid the necessity for a hearing.

Educational administrators, teachers, and parents should work together to achieve the following conditions that enhance informal review:

- Parent involvement in all decisions that affect the educational programming of their child.

- Parent and professional awareness of their rights and responsibilities and those of the child.
- Access by parents to all levels of the educational hierarchy and system.
- Carefully developed administrative procedures that are written, codified, and made known to all involved in the process.

SUGGESTED DUE PROCESS PROCEDURES

It is the responsibility of both state and local education agencies to provide appropriate administrative due process procedures that include at least the minimums described earlier. Additional procedures are presented here that incorporate the minimums within a total process that guarantees full protection of the law to children, their parents, and the public schools. In presenting these suggested procedures, it is recognized that there may be state and local education agency policies that bar adoption of some elements of the suggested procedures in their present form. Changes may have to be made in the procedures and/or state and local policies to fulfill the due process obligation. Incorporated into these suggestions are related directives that insure both appropriate educational practices and adherence to newly emerging state and federal law.

Nothing in the suggested procedures should be construed as authorizing any delay in the provision of education or other related services to which a child is otherwise entitled. Neither should the procedures be construed as a bar to any administrative or judicial proceeding by the child, parent, or public school personnel to secure compliance or otherwise to secure the proper implementation of the laws and regulations relating to the provision of regular or special education. Forms addressing the major elements of the due process procedure can be found in the Appendix.

WRITTEN NOTIFICATION BEFORE AN EVALUATION

When there is reason to believe that a preschool or school age child is in need of special education services and the child becomes a candidate for individual evaluation procedures (Form 2, Referral for Evaluation), including informal assessment or observation and formal testing, then written permission must be obtained by the local education agency from the parents before the process can begin. This shall also apply when periodic reevaluation is planned.

Notice of Intent

Prior to the performance of an evaluation the parent shall be provided with both written and oral notices of intent to conduct an evaluation (Form 3, Notice of Intent to Conduct an Evaluation). The written notice shall be in the primary language of the home and in English and will be delivered to the parent during a conference or mailed by certified mail. Oral

interpretation shall always be given in the primary language of the home. If the primary language of the home is other than English and a member of the household requests that English also be used, then a second oral interpretation shall be given in English. When necessary, arrangements shall be made to effectuate communication with hearing and visually handicapped parents.

The notice of intent should contain the following:

1. The reasons the evaluation has been requested and the name of the person(s) who initiated the process.
2. The evaluation procedures and instruments that will be used.
3. A description of the scope of the procedures and instruments that will be used.
4. A statement of the right to review the procedures and instruments to be used.
5. A statement of the right to review and obtain copies of all records related to the request for the evaluation and to give this authority to a designee of the parent as indicated in writing.
6. A description of how the findings of the evaluation are to be used, by whom, and under what circumstances.
7. A statement of the right to refuse permission for the evaluation with the understanding that the local education agency can then request a hearing to present its reasons and try to obtain approval to conduct the evaluation.
8. A statement of the right to be fully informed of the results of the evaluation.
9. A statement of the right of the parent to obtain an independent educational evaluation, either from another public agency with the fee determined on a sliding scale or privately at full cost to the parent.
10. A declaration that the child's educational status will not be changed without the parent's knowledge and written approval or completion of the due process procedures described in the right to hearing section of these procedures (p. 27).
11. Identification of the education agency employee (chairperson of the evaluation team) to whom the parent response should be sent and the deadline for response given in terms of the day, date, and time. In no case should the deadline be less than 10 school days nor more than 15 school days after receipt of the notice.

A form requesting written parent permission to conduct the evaluation should be enclosed with the notice of intent (Form 4, Parent Permission Form). This form should be written in the primary language of the home and in English. In addition to written parental permission to evaluate, the local education agency should obtain written parental acknowledgment of receipt and understanding of the notice of intent.

Notice of the Local Education Agency's Request for Hearing

Upon receipt of written parental permission, evaluation procedures should be put into motion. However, if the parent refuses to grant permission for an evaluation or if he fails to return the permission form within 15 school days of receipt of the notice of intent, the local education agency shall have the right to request a hearing to obtain approval to conduct an evaluation. If it requests a hearing, the local education agency must provide written notice to the parent in the primary language of the home (Form 5, Notice of the Filing of a Request for a Hearing). This notice should be sent by certified mail so that a signed receipt can be obtained. It should be sent on the same day the request for a hearing is filed. The notice should include:

1. A copy of the original notice of intent to conduct an evaluation.
2. A detailed description of all of the rights regarding procedures at the due process hearing (see p. 28).
3. A list of those agencies in the community from which legal counsel may be obtained for those unable to pay.
4. A description of the procedures for appealing the decision resulting from the due process hearing (see p. 30).

In addition to written notification, the local education agency should also attempt to provide oral notice and interpretation in the primary language of the home". This shall be given by the chairperson (with an interpreter, if necessary) of the proposed evaluation team.

Evaluation Procedures

Often the evaluation process is supervised by a special education administrator, facilitated and coordinated by the chairperson of the student's evaluation team, and carried out by a team of professionals from several disciplines—school officials, teachers, social workers, registered nurses, physicians, psychologists, and, as appropriate, other diagnostic specialists. Frequently, evaluation teams are also referred to as interdisciplinary teams, multidisciplinary teams, core evaluation teams, or student assessment teams. The work of the team should be carried out in a manner that encourages substantial parent participation.

The following procedures apply to periodic reevaluation as well as to the initial evaluation.

1. Within 5 school days after receipt of written parental permission, or after a final decision to conduct an evaluation is forthcoming from a due process hearing, the chairperson of the evaluation team shall advise the parent of the evaluation schedule (date, time, and location). This notice shall be delivered in writing, in the primary language of the home and in English, and orally in the primary language of the home (Form 6, Evaluation Schedule and Procedures).

2. Within 30 school days after notifying the parent of the schedule, the evaluation will be completed unless another date is specified and agreed to in writing by the parent,
3. Within 15 school days after completion of the evaluation, the parent shall be given, in writing in the primary language of the home and in English and orally in the primary language of the home, the results of the evaluation, the educational implications, and a written individualized educational plan (Form 7, Educational Plan: Development). The parent should be provided with the opportunity to be an active participant in the development of the educational plan.
4. The chairperson of the evaluation team will assure the parent that no change in the child's educational status will occur without the knowledge and written approval of the parent and that due process procedures (described on p. 28) will be followed.
5. The chairperson of the evaluation team will indicate in writing that reevaluation will be required no later than 8 calendar months after the initial evaluation and then at least every calendar year so long as the child continues to receive special services; but that upon parent request, a review may be conducted at any reasonable time after the first 3 months of the placement.

WRITTEN NOTIFICATION BEFORE CHANGE IN EDUCATION PLACEMENT

Within 15 school days after completion of the evaluation and development of the written individualized educational plan (Form 7, Educational Plan: Development), the chairperson of the evaluation team or periodic review team shall inform the parent in writing by certified mail or personally in a conference held in the primary language of the home and in English that a change in the educational status of the child is proposed or that a requested change in placement is denied. A form requesting parental approval of the proposed educational plan and placement should be included (Form 8, Educational Plan: Request for Parent's Approval).

Information included in this written notice should:

1. Describe in detail the proposed individualized educational plan, the method by which it was developed, the reasons why the proposed placement is deemed appropriate for the education of the child, and the reasons why it is the least restrictive program setting appropriate for the education of the child.
2. Specify any tests, reports, or evaluation procedures on which the proposed educational placement is based.
3. State that the school reports, files, and records pertaining to the child

shall be available to the parents, or their designee as indicated in writing, for inspection and copying at the actual cost of such copying.

4. Describe in detail the right to obtain a hearing if there are objections to the proposed action or nonaction, including a description of all of the rights regarding procedures at such a hearing. This notice should emphasize that the parent need not accept the proposed decision to change or not change the status of the child when there is disagreement with the proposed alternative program.
5. Describe in detail the procedures the parent should use to appeal a hearing decision.
6. Explain that if the proposed action is rejected by the parent, the child will be temporarily continued in his present educational placement unless the present placement endangers the health or safety of the child or other children and/or substantially disrupts the educational programs of other children. In this instance the local education agency shall notify the parent of the interim change in writing, by certified mail in the primary language of the home and in English, and orally in the primary language of the home. This notice should specify:
   a. The manner in which the health and safety of the child or other children is endangered or the manner in which the educational program of other children is being disrupted.
   b. The nature, duration, and location of the interim placement, which must not exceed 15 school days.
   c. That the interim placement may be extended beyond 15 school days only upon the decision of a hearing officer and that in no case may it extend beyond the duration of the entire due process procedures.
   d. The name of the person responsible for the interim placement and the date the interim placement will begin.
7. State that no parent of a child placed in a special program will be required to perform duties not required of any other parent whose child is enrolled in the public schools.

PERIODIC REVIEW OF EDUCATIONAL PLACEMENT

No later than 8 calendar months after a child's educational status has been changed and during each calendar year thereafter, so long as the child continues to receive special services, the local education agency should conduct a review of the child's program to evaluate its effectiveness in meeting the educational needs of the child. At least 5 days prior to each review, the parent should be notified in writing, in the primary language of the home and in English, and orally in the primary language of the home, that the review is scheduled. The notice should also indicate the following information:

1. The date, time, and place of the review.
2. An invitation to the parents to participate in the review.
3. A description of the procedures to be used in the review.
4. A statement that the parents will receive the findings and recommendations of the review team within 10 days after completion of the review.
5. A reiteration of the procedures and rights first encountered at the initial evaluation (Form 9, Review of Educational Placement).

THE RIGHT TO AN IMPARTIAL HEARING

A major element of due process is that, at some point, an opportunity is provided for the creation of a forum—a hearing that will provide an objective review of the parent-school disagreement and ultimately produce an objective decision resolving the dispute. Regardless of the formal and informal steps leading to a hearing and the many procedural and process provisions that must be met in the hearing situation itself, the key concept is that the final decision of the hearing officer will be as impartial as possible. In this text, the term *hearing officer* refers to the individual who when acting in that role is an official representative of the state commissioner of education. Hearings may be convened when:

1. The child is being considered for evaluation and permission is not granted by the parents.
2. A change in the child's educational placement is planned by the state or local education agency or has been requested by the parent and there is disagreement over the recommendation.
3. A request for an extension of a temporary placement has been filed.

Prerequisites to the Hearing

Within 5 days of the request for a hearing, the local education agency will schedule a conference with the parent to review the proceedings, findings, and recommendations to date for the purpose of settling the controversy and if possible avoiding the hearing. If resolution is not achieved at the conference or if there is insufficient communication to convene the conference, the hearing will be scheduled. Prior to the hearing the following steps should occur:

1. Prior notice of the intent to convene a hearing should be provided to the parents (Form 5, Notice of the Filing of a Request for a Hearing).
2. The parent or his designee as established in writing shall be allowed access to school reports, files, and records pertaining to the child and shall be allowed to obtain copies at the actual cost of copying.
3. Within 10 school days of receipt of a request for a hearing, a trained impartial hearing officer shall be appointed by the state education agency to preside at the hearing.

4. Within 5 school days of the appointment of the hearing officer and at least 20 school days prior to the hearing, the state education agency shall provide notice of the time and place of the hearing to the hearing officer, to the parent, and to the officials of the local education agency. The hearing shall be held at a time and place reasonably convenient to the parent, but shall not occur more than 30 school days after the appointment of the hearing officer. Notice to the parties involved shall be in writing in the primary language of the home and in English and shall be sent via certified mail
5. A parent should be informed of the right to require the attendance at the hearing of any officer, employee, or agent of the local or state education agency who may have evidence or testimony relevant to the needs, abilities, proposed programs, or status of the child.
6. The child shall remain in his current educational placement until the hearing officer enters a decision following the hearing, except in an emergency situation when the health and safety of the child or other children would be endangered or when the child's presence substantially disrupts the educational programs for other children as previously described (p. 26).

Procedures at the Hearing

The following are guidelines for conducting the hearing:

1. The hearing officer shall preside at the hearing and shall conduct the proceedings in a fair and impartial manner so that all parties involved in the hearing shall have an opportunity and be encouraged to present their evidence and testimony.
2. The parent and the local education agency may bring representatives including legal counsel, agency representatives, or others to the hearing. Each shall have the right to a full and complete listing of persons the other party will have at the hearing.
3. The hearing shall be open to the public unless the parent requests a closed hearing.
4. The parent and the local education agency, or their respective representatives, shall have the right to present evidence and testimony.
5. The parent and the local education agency, or their respective representatives, shall have the opportunity to confront and question all witnesses at the hearing.
6. If the child is over the age of majority he or she shall have all rights of the parent, including the right to exclude the parent(s).
7. If the child has not reached the age of majority, the parents shall have the right to determine if the child shall attend the hearing, except upon a finding by the hearing officer that attendance of the child would be

harmful to the child's welfare The child may then be excluded from all or part of the hearing.

8. The burden of proof as to the adequacy and appropriateness of the proposed course of action shall be upon the local education agency. In the case of a placement question, the local education agency must demonstrate why less restrictive placement alternatives could not adequately and appropriately serve the child's educational needs.
9. A tape recording or other verbatim record of the hearing should be made. Such record shall remain under the control of the state education agency. The parent and the local education agency shall have the right to this record on request.
10. At all stages of the hearing, interpretation for the deaf and interpreters in the primary language of the home shall be provided, when necessary, at public expense.

Decision of the Hearing Officer

Within 10 school days after the hearing is held, the hearing officer shall issue a decision in accord with the following:

1. The decision shall be in writing in the primary language of the home and in English and shall be sent by certified mail to the parent, the local education agency, and the state education agency.
2. The decision of the hearing officer shall be based solely on evidence and testimony presented at the hearing.
3. The written decision shall include findings of fact, conclusions, and reasons for them. If the decision is to disapprove a proposed educational plan, it shall state what would be an adequate and appropriate educational plan for the child. If the decision is to approve a proposed educational plan, it shall indicate why less restrictive placement alternatives could not adequately and appropriately serve the child's educational needs.
4. The decision shall include a statement of the procedures necessary to obtain an appeal of the hearing officer's decision, including a list of those agencies from which the parent may obtain legal assistance.
5. The decision shall be binding on the parent and on the local education agency, officers, employees, and agents. If the case is appealed, the decision of the hearing officer shall be adhered to pending outcome of the appeal, unless specific waiver is obtained.

Record of the Hearing

A summary of the proceedings at the hearing shall be made. Included will be any material or statements specifically requested by any of the parties to appear in the record. The summary shall be made available to the

parties to the hearing. On request of the parent or the local education agency, a copy of the tape recording or other verbatim record of the hearing shall be transcribed and provided.

HEARING DECISION APPEAL PROCEDURES

Within 10 days after a decision has been made, an appeal of the decision may be initiated by the parent or by the local education agency to the appropriate administrative official (e.g., the state superintendent of schools or court, as indicated by the state administrative procedures act).

3

Hearing Officers and Procedures

> *Decision by an impartial, objective third party is certainly a fundamental aspect of traditional due process.* (Kirp, Buss, & Kuriloff, 1974, p. 138)

Public policymakers, whether legislators or judges at both the state and federal level, have made clear that decisions about identifying, evaluating, and placing exceptional children in education programs must be governed by due process safeguards. Implicit in that requirement is that whenever a decision is contested to the point that a hearing is to be convened, the hearing must be conducted in an impartial manner by an impartial hearing officer or a neutral review panel.

MAINTAINING NEUTRALITY

Webster defines *impartial* as meaning "not partial and unbiased" and refers the reader to the synonym *fair. Neutral* is defined as "not engaged on either side" and *fair* as "marked by impartiality and honesty" (Webster, 1967). These definitions are readily translatable to principles which must be maintained in the selection of hearing officers, either alone or as part of a panel. The principles apply as well to the manner in which hearing officers discharge their responsibilities.

At the outset it must be recognized that whenever a state or local education agency hires and compensates people to serve as hearing officers, such individuals become employees of the agency and cannot technically be termed neutral. While such an allegation may be made, and perhaps verified, education agencies will counter by emphasizing that they encourage these "employees" to function independently and objectively to meet the spirit and intent of due process. A review of the literature and conversations with attorneys familiar with due process reveal no obvious solution to this potential problem. Whether the selection or compensation of officers is done by an advocacy arm of state government apart from the education agency, by the state or local education agency, or by any other agency, in the final analysis the funds originate in the public sector and thus pressures can be brought to "neutralize" the neutrality of hearing officers.

One method of dealing with the neutrality problem is to require that the hearing officer or board members not be employees of the agency making the contested recommendation about the child or those who in any way

"participated in the action or who are responsible for the omission being complained of" (*Tennessee Code Annotated*, 1972). This principle raises the more basic question of whether a local board of education can ever meet the desired level of neutrality since it is in fact its employees who have directly made the decision. Consequently, the test of objectivity is violated by statutes or regulations that suggest that "in case of appeal, the *final approval* of the enrollment of any eligible handicapped child in a special educational program shall be made by the board of education of the school district of the child's residence" *[Colorado Revised Statutes,* Chapter 123, 1973, emphasis added).

As a rule of thumb, the greater the administrative agency distance between the selection, training, and assignment of hearing officers and the actual implementation of resulting decisions, the greater the likelihood of preserving neutrality.

While recognizing the potential for a hearing officer system to be compromised, the fear must not be overstated. Virtually all states presently have in force administrative appeals or procedures acts calling for some type of high level bureaucratic review of certain administrative decisions. In many ways, these can be described as a type of due process. The final review step is often judicial as is the case with the due process mechanisms described in this document. Consequently, the final analysis of decisions by school officials regarding the identification, evaluation, and placement of exceptional children can occur in courts of law which are not vulnerable to the same type of compromising pressures.

SELECTION OF HEARING OFFICERS

Specifying criteria which can be used for the selection of effective hearing officers in all settings is an impossible task. There are, however, a few general rules which can be made. Individuals selected should:

1. Not be involved in the decisions already made about a child regarding identification, evaluation, placement, or review.
2. Possess special knowledge, acquired through training and/or experience, about the nature and needs of exceptional children. An awareness and understanding of the types and quality of programs that are available at any time for exceptional children is essential.
3. Be sufficiently open minded so that they will not be predisposed toward any decisions that they must make or review. However, they must also be capable of making decisions.
4. Possess the ability to objectively, sensitively, and directly solicit and evaluate both oral and written information that needs to be considered in relation to decision making.
5. Have sufficient strength to effectively structure and operate hearings in conformity with standard requirements and limits and to encourage the participation of the principal parties and their representatives.

6. Be sufficiently free of other obligations to provide sufficient priority to their hearing officer responsibilities. They must be able to meet the required timelines for conducting hearings and reporting written decisions.
7. Be aware that the role of the hearing officer is unique and relatively new, requiring constant evaluation of the processes, their own behavior, and the behavior of all the principals involved for purposes of continuously trying to improve the effectiveness of the hearing process.

Obviously, special people are required to fulfill the heavy responsibility of hearing officers, but then, they are in special situations making special decisions. What is most desired is competency and impartiality. To contribute to the maintenance of impartiality, two additional safeguards are suggested. The first is for the state to accept only persons who are already employed and would undertake the responsibility of hearing officer on a part time basis. Such individuals will never be totally dependent on earnings generated from their hearing officer responsibilities, a factor which could contribute to their ability to remain impartial.

Because there can never be a guarantee that the officers will perform in a manner consistent with the thrust of due process, development of a system for monitoring and evaluating the performance of the hearing officers is suggested as a final safeguard. While a major goal of such a procedure is to insure that the hearing officers are appropriately performing their responsibilities, it could also be used to oversee the entire system. To provide as objective a review as possible of both the workings of the system and the hearing officers, the review function should be carried out by a standing state board concerned with the handicapped, if possible one independent of the state education agency. Since most states have such boards, another bureaucratic agency need not be established. For maximum effectiveness, this board must be given the power to review the transcripts of hearings and the decisions made, sit as observers in hearings, and recommend to the state the discharge of those hearing officers judged to be ineffective.

TRAINING OF HEARING OFFICERS

All persons selected to serve as hearing officers *must* be provided with a training program. As can be seen from the selection criteria, people from many walks of life will qualify. Certainly, special and regular educators, educational and other psychologists, attorneys, parents, medically trained people such as physicians and nurses, social workers, and parents of handicapped and nonhandicapped children could meet the requirements. Since all of these people, regardless of their knowledge and experience with the education of handicapped chldren, will be relatively naive about the authority and responsibilities of hearing officers, the training program must be broad enough to cover at least the subject areas described below.

Public Policy and the Education of Handicapped Children

At the outset, hearing officers must understand the public policy in force in each state as expressed in statutes, administrative rules and regulations, case law, and rulings of attorneys general. This body of information will clearly establish the boundaries for decision making by the hearing officers. The material provided should not be restricted to special education since other policies will also have impact: for example, state provisions regarding transportation of school age children or vocational education.

Public policy will also define, often with some precision, the children who are eligible to receive a special education, the conditions under which such determinations will be made, and the type and content of the various programs that are to be provided.

The Nature and Needs of Handicapped Children

While all those persons who meet the criteria for hearing officers could be considered sufficiently knowledgeable about exceptional children, there will be, in fact, various levels of knowledge. Consequently, all hearing officers will need to become acquainted with the latest information about the educational nature and needs of handicapped children. Emphasis should be placed on specific descriptions of all handicapping conditions, particularly as they are expressed in terms of educational needs. Equally important is training that focuses on effective instructional strategies and settings that can appropriately be used to educate exceptional children. Of utmost importance is that all persons receive extensive information about the range of program alternatives that can be used for educating these youngsters. At the heart of that information is emphasis on the concept of educating children in the least restrictive alternative setting. This concept, sometimes called mainstreaming or educational normalization, stresses that handicapped children should be removed no farther than necessary from the most normalized setting.

Also of importance, yet often ignored, are the curricular offerings of the variety of programs made available for handicapped youngsters. While at the present time there are no specific standards which are applicable in assessing the quality of any specific education program, there are questions which, if asked, can offer insight. Thus, in reviewing the recommendations of the public schools or in considering the requested placement by parents of exceptional children, the hearing officers can and must balance the program offered against the needs of the child.

Conducting the Hearing

Although the specific responsibilities of hearing officers will vary from setting to setting, hearing officers must be aware of the manner in which they are to conduct hearings. For example, hearing officers must, at a minimum, follow these steps

1. The hearing officer should explain the entire due process procedure (including the hearing itself) and the appeals process, should the parents disagree with the outcome of the hearing.
2. Hearing officers should solicit the participation of all present at the hearing, particularly parents, and allow cross examination of all principal participants. The hearing officers must be trained to be sensitive to the tendency on the part of some to totally dominate the hearing, thus preventing all parties from equal participation.
3. Through prior reading and questioning, the hearing officer must assess the quality of the educational evaluation completed regarding the child in question. Obviously, this assessment must consider the type of personnel involved in the evaluation, the procedures used, and the interpretation of the results.
4. The decision of the hearing officer regarding a program placement must be based on the relationship between the educational needs of the child, the educational prescription offered by the schools, and the apparent ability of the schools to deliver the recommended services.
5. The hearing officer has an obligation to make decisions on the basis of all evidence as it is presented in both written and oral testimony.
6. Because the public schools must bear the burden of proof in demonstrating that their recommendation is best, the hearing officer must assess the recommendation to ensure that a unified position is presented and that all school officials are in agreement. The hearing officer must make sure that the hearing is being recorded and advise the parties that they have the right to obtain copies of transcripts. At the outset of the hearing, the hearing officer should explain the procedures that will be followed during the hearing so that all parties can be assured that they will have an opportunity to present their statements. The hearing officer must understand and make clear to the participants that, since the decision that will be made is largely based on the testimony given, he must be free to ask questions at any time.
7. The hearing officer must be aware of the structure of the written report to be developed at the conclusion of each hearing. The information presented should include at least the following: (a) a statement of the purpose for the hearing, (b) a list of all persons attending the hearing, including identification information, (c) a review of the facts as presented by the school system, (d) the specific points being challenged and defended, (e) a review of the evidence, (f) the decision, and (g) the justification for the decision.
8. Hearing officers must be aware that there will, at times, be a conflict between the interests of the child and the interests of his parents. Generally, the law in this area supports parents over their minor children, unless it can be determined that to follow the course desired by the parents will endanger the health or safety of the child.

9. If hearing officers feel they have insufficient material to make a decision, they may call the hearing incomplete, clearly indicate to all parties the type of information needed, and then reschedule the hearing.
10. The hearing described here is not a judicial proceeding and therefore the hearing officer need not enforce strict rules of evidence and strict formality. It is desirable to facilitate communication and benefit from the informality. The seating arrangement should permit all participants to easily hear and see each other. Obviously if there are participants who have visual or auditory problems or who speak a foreign language, adequate arrangements for translators should be made.

The use of hearings in special education decisions is relatively uncommon and presents a new set of circumstances. The role and responsibility of the hearing officer is immense, for the future of a child may well lie with the decisions made by that individual. Undoubtedly, many participants in the hearing will be emotional by the time they have reached that stage of negotiations. The hearing officer must be sensitive to the emotional needs of these individuals, but he must control their behavior as well as his own and make his decisions as objectively as possible.

4

The Parent Surrogate: One Approach

> *The best interests of the child shall be the guiding principle of those responsible for his education and guidance; that responsibility lies in the first place with his parents.* (Principle 7, United Nations General Assembly Resolution, 1959)

Legal doctrines have developed in this country to protect the person and rights of the child. The legal status of minor is imposed on all children below an age varying from 18 to 21 in different states. This expresses an official, irrefutable presumption that persons so young are too immature physically, emotionally, intellectually, and socially to deal with their life situations themselves.

This concept is echoed in a second protective doctrine in American law which recognizes the legal disabilities imposed on a minor. This doctrine supplies a legal remedy in the form of a guardian of the person of the child. The guardian is vested with powers and duties to furnish the child responsible representation so that his personal rights can become functionally effective in his everyday life situations. Two major types of guardians are recognized by law: the natural guardian (the child's own parents or adoptive parents) and the legal guardian. Ideally, a legal guardian is appointed for a minor child whenever he is without proper guardianship from his parents. In this way the child's person and legal rights will be continuously in competent hands identified with his interests and welfare. A judicial process is used to provide a child with a legal guardian so that the exercise of authority and control by the legal guardian over the person and rights of the child will always be accountable at law (Weisman, 1973).

Public Law 93-380, the Education Amendments of 1974, contains many provisions and safeguards that attempt to make the rights expressed in the United Nations' Principle 7 a reality for all American children, including the handicapped. The specific due process procedures of Public Law 93-380 secure a child's right, through representation by his parents or guardian, to the opportunity for full participation in the total educational identification, evaluation, and placement process. The assumption is that the parents or guardians will be available and willing to participate in this decision making process, fully accepting the responsibility of representing the child's best interests.

There are, however, children who lack this kind of personal representation, protective legal doctrines notwithstanding. They are the children whose parents or guardians are unknown or unavailable, or children who are wards of the state. The rights of these children are not safeguarded if they are without an advocate to act for them. Recognizing this, Public Law 93-380 provides for the appointment of a "parent surrogate," i.e., an individual appointed to safeguard a child's rights in the specific instance of educational decision making—identification, evaluation and placement.

CHILDREN IN NEED OF A SURROGATE

Although the law, through its doctrines of minority and guardianship, has evidenced a basic commitment to children, there remain many who have the protection of neither parent nor guardian with the legal capacity to represent them. This is frequently the case with a child whose parents die or are otherwise unable to provide a home for him. Often such a child will go to live with aunts or uncles or older siblings in an extended family situation where he in essence becomes a member of another household. In situations where families assume responsibility for one of their own, there may be no court appointed guardian, resulting in an informal arrangement that leaves the child without a formally declared legal representative.

When the extended family is not a practical alternative, an increasingly frequent situation as our society becomes more mobile and the nuclear family becomes physically and emotionally isolated, the state steps in with protective strategies and assumes what was once a family responsibility. The state may impose guardianship on a child or arrange for legal adoption, two options which could provide a legal representative for the child in the form of either one person or adoptive parents. The child's legal representative takes on all parental responsibilities. Other arrangements made by the state provide a home and services for a child but do not give one person legal guardianship status over him. This situation arises when the child is made a ward of the state.

A 1972 Massachusetts law sums up the prevailing attitude:

> It is hereby declared to be the policy of the commonwealth to assure every child a fair and full opportunity to reach his full potential by providing and encouraging services which strengthen family life and support families in their essential function of nurture for a child's physical, social, educational, moral, and spiritual development. Every child shall be entitled to the full protection of the commonwealth. In the absence or inability of parents to provide care and protection for their children, it shall be the responsibility of the commonwealth to assure substitute residential care and protection for every child. *[Massachusetts Law,* Chapter 785, 1972)

When a child becomes a ward of the state he is generally assigned to a particular state administrative agency. For example, a child whose parents are unable to provide a suitable home due to a temporary illness of one or both parents will be made a ward of the state social services department and placed in a foster home, with the long range intention that he will return to his parents' home when the current crisis has passed. The parents have relinquished custody for the interim, and although the foster parents provide a home and supervise the day to day life of the child, they are not his legal guardians. The child is in fact a ward of the social services department and his needs are attended to by the social worker and foster parents, both agents of the department. He is, however, without an independent advocate, for no court has vested the duties and responsibilities of guardianship in one individual. This, then, is a child in need of a surrogate.

Other children falling into the same legal gap are confined to institutions, detention homes, or other state facilities. They too lack a personal advocate. Frequently a state official becomes the guardian of such a child, but to conceptualize the quality of guardianship that can be exercised one must only take a look at a typical statute. In Michigan, for example, "the commissioner of revenue shall ex officio be the public guardian of every patient admitted to an institution until he is discharged therefrom" (*Michigan Statutes,* Title 14, Sec. 14.811(1)). Given this huge responsibility, one can only wonder how much time a state official can spend working for the rights of all the children under his jurisdiction. The parent surrogate concept found in Public Law 93-380 is intended to fill this gap for children, but in one specific instance only—the educational decision making process. It extends the state's protective strategies role and assures that all children, including the handicapped, are guaranteed complete due process in educational decision making.

MATCHING A CHILD WITH A SURROGATE

Under the procedures proposed here, when it is determined that a child is a potential candidate for special education services, the parents or guardian must be informed that an evaluation is being considered. School personnel or others involved in the education or treatment of children (e.g., an employee of a residential school or hospital, a physician, or a judicial officer) may feel that a particular child is in need of special education services. To begin the evaluation process, the local education agency, informed of the need, must secure written permission from the parents or guardian. If the permission is not forthcoming and there is reason to suspect that this is due to the unavailability of the parents or guardian, the local education agency must make written inquiry to the adult in charge of the child's place of residence, as well as to the parents or guardian at their last known address. If these efforts find that the child is without a parent or guardian, or if one of the persons initiating the re-

quest knows that they are unavailable, then a request for a surrogate will be filed with the child's local education agency (Form 10, Request for Assignment of a Surrogate Parent). Copies of the request should be sent to the state education agency and perhaps a state standing board or advisory committee on the handicapped.

After a local education agency receives a request for the assignment of a surrogate, it must in turn request the state education agency, through the chief state school officer or his designee, to determine if the child in question is in need of a surrogate. It is suggested that those nominated as hearing officers fill this role, but acting as impartial agents rather than in their capacity as hearing officers. In reaching a decision, all available information, such as the child's records, the documented evidence of attempts to contact the parents or guardian, and court records outlining previous legal action concerning the child's status, will be weighed. This study must take place within 30 days of the local agency's request, after which time notice of the decision will be sent to the local education agency, the state education agency, and the state board.

If the recommendation is that the child is in need of a surrogate, the state education agency must assign one to the child within 5 days after receiving notice. Once the assignment is made, the surrogate will be responsible for representing the child, just as the parents or guardian would, through the complete decision making process. The responsibilities extend to the appeals procedure as well, if that occurs, and to at least the first review of the placement. The rights of the child are respected throughout this entire process, and it is important to remember that the surrogate assignment is always contingent on the child's acceptance of him. The child reserves the right to request a change of surrogate at any step along the way.

THE PARENT SURROGATE

The task of locating individuals to act as surrogates could be done by a state level standing board or advisory committee established to advise and work with the state as it delivers services to handicapped children. Members of this type of board are concerned with quality education and generally include parents, teachers, professionals involved with the education and treatment of children with special needs, and other community members who are interested in the education of handicapped children. Such a group has channels of communication open to local professional organizations concerned with the handicapped (Association for Retarded Citizens for example) and to individuals such as parents of handicapped and nonhandicapped children, pediatricians, or attorneys sensitive to the needs of children. These are individuals who may be considered for selection as surrogates. It is recommended that any pool of surrogates not include state or local education employees. Because of their employment, they may be unable to act as impartially as desired. A surrogate

must have the child's best interests constantly in mind, and if he is employed by a local or state system concerned with handicapped children, he is placed in the position of serving two masters.

Once the state board has identified persons it feels would be effective surrogates, it will send their names to the state education agency, which has the responsibility of assigning a surrogate to a specific child. Individuals should be located in all parts of the state so that every child will have easy access to his/her surrogate. The state agency should develop a training program, devise a system of compensation, determine the rules and regulations governing the employment of a surrogate, and develop plans to disseminate information about the program.

TRAINING

A surrogate can be truly effective only if he is well informed of the special needs of handicapped children and the provisions the state has made for filling those needs. Elements of a training program should include at least the following:

1. The role and responsibilities of the surrogate.
2. The specific nature and needs of different types of handicapping conditions.
3. The state's policies regarding the education of exceptional children including case law, rulings of attorneys general, and special education statutes and regulations.
4. Existing programs.
5. Options to consider, such as special class placement, special tutors, regular class placement with modification, and alternatives to public school.
6. The procedures governing the operation of special education programs.

COMPENSATION

There are many arguments concerning the value of volunteer surrogates as opposed to those who are paid for their services. However, there is support for the idea that in a decision as important as educational placement, a trained, paid surrogate is preferable to a volunteer. Some of the methods of payment for consideration by the state include:

- A flat rate for each assignment, much as a court appoints a lawyer for a specific case.
- Actual costs incurred in each case (time spent in meetings, travel, etc.).
- An annual salary scale, or some variation, regardless of the number of children appointed to one surrogate. In this case a limit would have to be placed on the number of assignments so that quality of representation would be insured.

EMPLOYMENT

Of prime importance in any advocacy system is the commitment of the advocate to the individual he represents. He must act in his client's best interests and attempt to meet his client's needs. As mentioned earlier, there is some doubt that a surrogate who is a public employee involved with children can adequately represent a child in a proceeding that also involves a public question. Particularly important, then, would be adherence to review mechanisms that could monitor surrogates to insure that they are truly representing their clients. Perhaps this monitoring responsibility could be shared with the state board that originally selected the surrogates. This shared responsibility would lend an element of objectivity to a potentially partisan situation. What must always be of paramount concern to all involved is that the child's rights are protected and that he is receiving quality representation.

DISSEMINATION

The state board charged with the responsibility of identifying parent surrogates should also be one of the mechanisms through which the program becomes visible. The board will have direct access to all types of persons interested in and involved with handicapped children—parents, teachers, professionals, professional groups, and more. These are the people who would either be interested in serving as surrogates or know of others who would be good possibilities. They might also be aware of children eligible for a surrogate.

The state's avenues to those who should be made aware of the program are many: the local education agencies, PTA's, teachers' groups, medical personnel, social services agencies, and others. A media campaign is most effective in reaching the general population and is an important part of implementing the whole concept. If the public at large is not familiar with the surrogate plan all eligible children will not be adequately served.

The parent surrogate system described here puts the responsibility for the program squarely on the state. The means a state chooses to effect the surrogate plan are not the important thing. What is important is the surrogate concept itself— a concept that can be extremely effective in insuring that all children are treated equally and are assured of the rights common to all, at least in the educational decision making process.

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Appendix

FORM 1

REQUEST FOR INTERPRETER/TRANSLATOR

ORIGINATOR: Special Education Administrator.

PURPOSE: All communication with parents of children referred for service or receiving service should be conducted in the primary language of the home. If the special education administrator determines that the language is other than English and that an interpreter/translator is needed to facilitate communications between the evaluation team members and the parents and/or the child, then this form should be completed.

1. CHILD'S NAME:_____

   PARENT'S NAME:_____

   ADDRESS:_____
   Number Street

   City State Zip Code

2. The primary language of the home is_____

3. An interpreter/translator will be needed for the following:
   _____Preevaluation (written)
   _____Preevaluation (oral)
   _____Conference
   _____Review of educational plan (written)
   _____Review of educational plan (oral)
   _____Review of records (written)
   _____Hearing procedure
   _____Identification of a surrogate parent

4. An interpreter/translator is needed on the following date(s):

FORM 2

REFERRAL FOR EVALUATION

ORIGINATOR: School personnel (including a teacher), a parent, a judicial officer, a social worker, a physician, a person having custody of the child, any other person including a school age child who may ask for a referral through any one of those listed above.

PURPOSE: To begin the evaluation process.

SEND TO: Special Education Administrator.

Date:_____

STUDENT

1. NAME:_____
Last First Middle

2. ADDRESS:_____
Number Street

City State Zip Code

3. TELEPHONE:_____
Area Code Number

4. BIRTH DATE:_____/_____/_____ 5. GRADE:_____
Month Day Year

6. CURRENT EDUCATIONAL PROGRAM:

• Regular • None • Special Needs • Other

PARENT

1. NAME:_____
Last First Middle

2. ADDRESS:_____
Number Street

City State Zip Code

3. TELEPHONE:_____
Area Code Number

4. PRIMARY LANGUAGE OF THE HOME:

• English • Other Specify_____

IS THIS AN INITIAL EVALUATION? • Yes No

SPECIFIC REASONS FOR REFERRAL

Please indicate the specific reasons and/or situations which make you feel that an evaluation is needed.

1_____

2.

3..

ATTEMPTS TO RESOLVE

Please indicate all attempts to resolve each of the above listed reasons within the current educational program. This should include what was done, for how long, and by whom. Attempts to resolve should follow the sequence of reasons listed above.

1

2.

3..

FORM 3

NOTICE OF INTENT TO CONDUCT AN EVALUATION

ORIGINATOR: Special Education Administrator.

PURPOSE: To inform parents that a referral for an evaluation has been made and to inform parents of their rights.

Date:_____

Dear Parent:

(Name) (Title)

recently filed a form requesting that your child,_____(Child's name)_____be evaluated by this office. A copy of the request as filed is enclosed for your review.

The evaluation procedures and their associated instruments that will be used in each of the following areas are:

Intelligence:

Achievement:

Behavior:

Physical:

Other:

The findings of the evaluation will be used by the following people to develop a set of program recommendations for your child.

Name	Title
Name	Title
Name	Title

It is very important that you be aware of and understand that you have the following rights:

1. To review all records related to the referral for evaluation.
2. To review the procedures and instruments to be used in the evaluation.
3. To refuse to permit the evaluation (in which case the local education agency can request a hearing to try to overrule you).
4. To be fully informed of the results of the evaluation.
5. To get an outside evaluation for your child from a public agency, at public expense if necessary.

Your child's educational status will not be changed without your knowledge and written approval.

Enclosed is a Parent Permission Form which must be completed by you and returned to this office within 10 school days.

Should you have any questions please do not hesitate to call me.

Yours truly,

Name

Title

Telephone Number

Enclosures: Form 2
Form 4

FORM 4

PARENTAL PERMISSION FORM

Name of Director of Special Education:

Address:_____

Dear (Director of Special Education):

I am in receipt of the Notice of Intent to Conduct an Evaluation for my child,_____(Child's name)_____I understand the reasons and the description of the evaluation process that you provided and have checked the appropriate box below.

D Permission is given to conduct the evaluation as described.

• Permission is denied.

Parent's Signature

Date

FORM 5

NOTICE OF THE FILING OF A REQUEST FOR A HEARING

ORIGINATOR: Special Education Administrator.

PURPOSE: To inform the parents that the local education agency has filed for a hearing in response to a parent's refusal to permit an evaluation or placement or in response to a disagreement with the proposed education plan.

Date:_____

Dear Parent:

Since we have been unable to reach agreement on the proposed evaluation (educational placement) of your child, this agency has today filed a request for a hearing before an impartial officer. It is hoped that this hearing will enable a fair and speedy resolution of our differences.

You have the right to an independent evaluation of your child from a public agency at public expense and the right to be represented at the hearing by any person or persons of your choice. You are entitled to review and photocopy all of your child's school files and records.

A description of the hearing procedure and a list of your rights relative to the hearing are enclosed. A list of agencies in the community from which legal counsel may be obtained is also enclosed. Should you have any questions or concerns please feel free to contact me.

We are looking forward to settling this quickly so that we are all assured that your child is receiving an appropriate education.

Sincerely yours,

Special Education Administrator

Telephone Number

Enclosures

A full description of the hearing procedures followed in your district should be included as an enclosure. The following information should be highlighted.

1. The description of the hearing procedure should state that the parent has the right:
   - To be represented by legal counsel.
   - To bring witnesses.
   - To request certain school personnel to be present.
   - To cross examine.
   - To obtain an independent evaluation.
   - To request a "closed" hearing if desired.
   - To examine and reproduce all school records.

2. The following procedural elements should be emphasized:
   - A record of the hearing will be made if requested.
   - If the child has not reached the age of majority, the parents shall have the right to determine if the child shall attend the hearing, except on a finding by the hearing officer that attendance would be harmful to the welfare of the child. The child may then be excluded from all or part of the hearing.

3. The burden of proof as to the adequacy and appropriateness of the proposed course of action shall be upon the local education agency.

4. A tape recording or other verbatim record of the hearing shall be made and shall be controlled by the state education agency. The parent and the local education agency shall have the right to this record on request.

5. At all stages of the hearing, interpretation for the deaf and interpreters in the primary language of the home (when other than English) shall be provided at public expense.

FORM 6

EVALUATION SCHEDULE AND PROCEDURES

ORIGINATOR: Chairperson of the Evaluation Team.

PURPOSE: To keep the parent thoroughly informed about the evaluation process and to encourage parental participation.

Date:_____

Dear Parent:

Thank you for responding promptly and granting permission for_____(Child's name)_____to be evaluated. The evaluation will be conducted exactly as it was described to you in the Notice of Intent to Conduct an Evaluation.

We have scheduled the evaluation for:

Date Time Place

If for some reason this schedule is not acceptable to you, please contact me as soon as possible. The evaluation will be completed within 30 days of the date of this letter unless you submit a written request for a delay.

If you have any questions please feel free to call me at any time.

Yours truly,

Chairperson of the Evaluation Team

Telephone Number

FORM 7

EDUCATIONAL PLAN: DEVELOPMENT

ORIGINATOR: Evaluation Team.

PURPOSE: To review the results of the evaluation and, based on the outcome, to determine specific educational objectives and recommend a service delivery plan to meet those objectives. It is then the special education administrator's responsibility to see that services are delivered.

The evaluation team finds that your child ☐ **requires** ☐ **does not require** **special services.**

GENERAL EDUCATIONAL OBJECTIVES

1. Based on the various demonstrated capabilities indicated by the evaluation, the overall objectives for this student during the next 2 to 3 years are:

2. The evaluation team believes this student should be doing the following work in 1 year (e.g., activities, levels of performance):

3. Considering the above statements and the results of the evaluation, the educational activities that are required for next year are (items such as recommended teaching approach, suggested work load, and supportive elements such as parent counseling, special materials and equipment, etc.):

(Continued)

FORM 7 (Continued)

SPECIFIC EDUCATIONAL OBJECTIVES

Date:_____

This statement covers the period_____, 19_____, to 19_____

Behavioral objective	Support element	Equipment	Goals realized				
			When			Where	
			1st semester	2nd semester	Summer	School	Home

This statement of general and specific educational objectives is in no way intended to limit the student's educational program, but rather indicates priorities the evaluation team considers essential.

Signature:_____ Date:_____
Chairperson

FORM 8

EDUCATIONAL PLAN: REQUEST FOR PARENT'S APPROVAL

ORIGINATOR: Special Education Administrator.

PURPOSE: To present the proposed educational objectives to the parents and obtain their approval for the recommended placement.

Name of Special Education Administrator:_____

Address:_____

Date:_____

Dear Parent:

The evaluation of your child has been completed. All papers relevant to the evaluation, including the actual results of each assessment, are available for your inspection. All school reports, files, and records pertaining to your child are available to you for copying.

Your child's educational plan and placement and the services that will be provided to attain the prescribed objectives of the plan are described in the enclosed forms. Please review this information carefully.

Do you approve of the proposed educational objectives? • Yes D No

Do you approve of the proposed educational placement? • Yes • No

Signature:_____ Date:_____
Parent

If you have not approved this plan, we would like to discuss this with you informally sometime during the next 30 days. During this period you have the right to meet with any member of the evaluation team or with the entire team to try to resolve any differences. If we cannot resolve any disagreement informally, then you have the right to obtain a hearing before an impartial officer. During any period of disagreement over placement, your child will continue in his present educational placement.

If you have signified that you accept the plan as presented, your child's proposed educational program will start immediately after receipt of this form.

Sincerely yours,

Special Education Administrator

Enclosure: Form 7

FORM 9

REVIEW OF EDUCATIONAL PLACEMENT

ORIGINATOR: Special Education Administrator.

PURPOSE: No later than 8 months after a child's educational status has been changed and during each calendar year thereafter, the local education agency must conduct a review of the program to evaluate its effectiveness in meeting the child's educational needs. This form letter is to notify the parents when the review is scheduled.

Dear Parent:

It has been almost 8 months (1 year) since_____(Child's name)_____was placed in his current educational program. In order to evaluate how well suited the program is, we have scheduled a review (reevaluation).

The review will take place on_____at_____
Day Date Time

at_____
Place

I would like you to participate in this review. If the scheduled time is not convenient please contact me immediately so that we might rearrange it.

The following procedures will occur:

Within 10 days after the reevaluation you will receive notice of the findings and recommendations made.

It is very important that you be aware of and understand that you have the following rights:

1. To go over all records related to the reevaluation.
2. To go over the procedures of the reevaluation.
3. To reject the conduct of a reevaluation (in which case the local education agency can request a hearing to try to overrule you).
4. To be fully informed of the results of the reevaluation.

Should you have any questions please feel free to call me at any time.

Yours truly,

Special Education Administrator

FORM 10

REQUEST FOR ASSIGNMENT OF A SURROGATE PARENT

ORIGINATOR: Any employee of a school district, state education agency, residential school, institution, or hospital; any judicial officer; or any other person whose work involves education or treatment of children who knows of a child possibly needing special educational services and knows that:

- The child's parents or guardians are not known.
- The child's parents or guardians are not available.
- The child is a ward of the state,

PURPOSE: To request assignment of a surrogate parent to the child. The request shall be filed with the local education agency.

Date:_____

CHILD

1. NAME:_____

2. ADDRESS:_____
Number Street

City State Zip Code

3. TELEPHONE:_____
Area Code Number

4. WITH WHOM IS THE CHILD RESIDING?
NAME:_____

RELATIONSHIP:_____

INQUIRER

1. NAME:_____

2. POSITION TITLE:_____

3. EMPLOYER/AGENCY:_____

4. BUSINESS ADDRESS:_____
Number Street

City State Zip Code

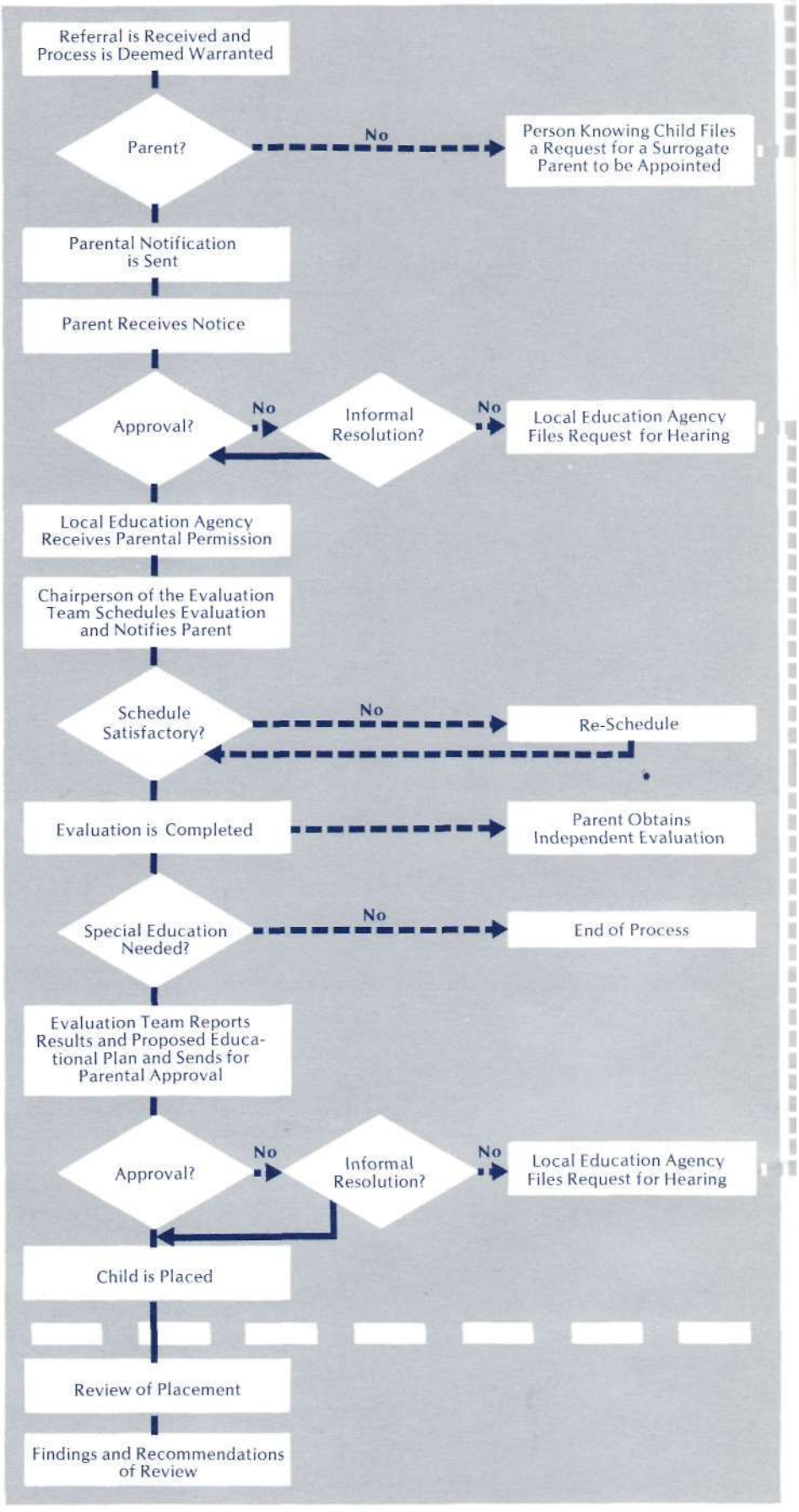
5. BUSINESS TELEPHONE:_____
Area Code Number

6. WHY HAS THIS REQUEST BEEN MADE?

Signature:_____
Person Making Request

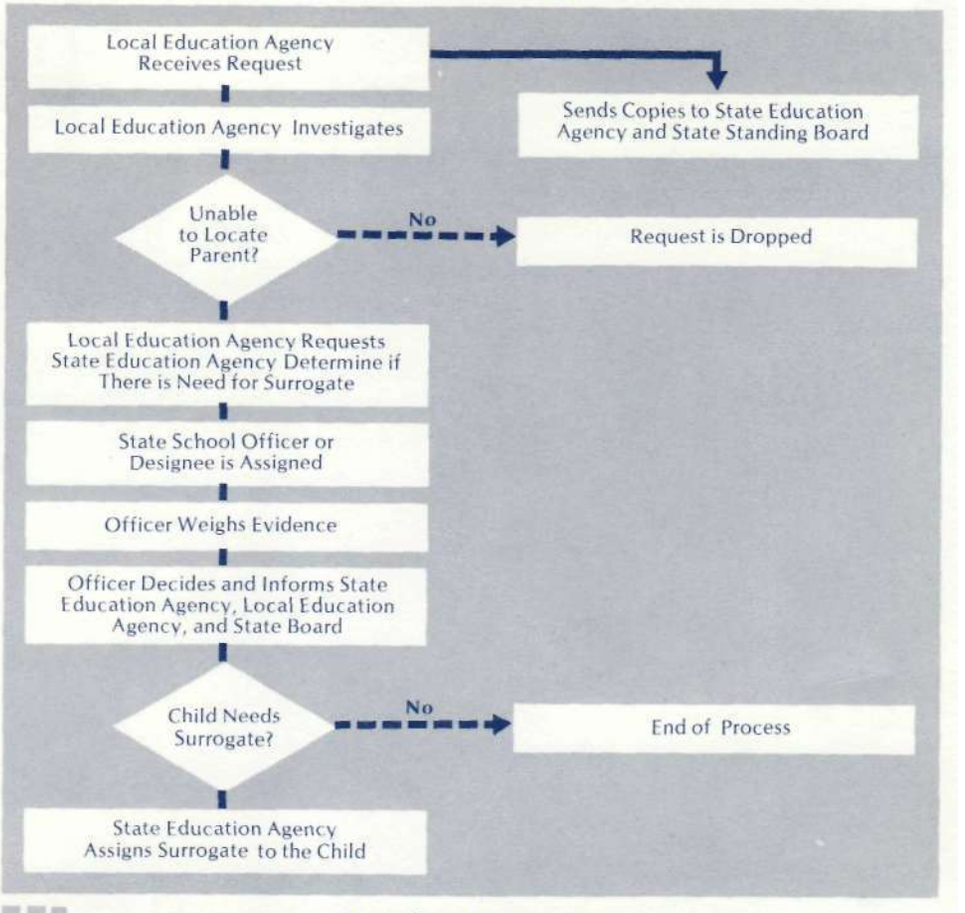
Evaluation and Placement

Cumulative Time	Maximum Time For Each Step
5 days	5 days
7 days	2 days
22 days	15 days
27 days	5 days
57 days	30 days
67 days	10 days
77 days	10 days
	8 months
	10 days



Request for a Surrogate Parent

Cumulative Time	Maximum Time For Each Step
10 days	10 days
40 days	30 days
45 days	5 days



Hearing Process

Cumulative Time	Maximum Time For Each Step
5 days	5 days
15 days	10 days
25 days	10 days
65 days	40 days
75 days	10 days