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ABSTRACT

Seeking to inform hearing officers in Oregon of due process procedures in cases involving handicapped students, this handbook describes the rights and obligations of parents and school districts, the legal basis for such hearings, and the steps involved in the conduct of hearings. The handbook affirms the rights of parents to inspect and copy their child's educational records, to request that such records be amended, or to seek an independent evaluation. Other topics include the appointment of surrogate parents and notice requirements. Specific procedures for conducting hearings are presented, including statement of issues, burden of proof, questioning, objections, and rules of evidence. The appendix includes sample legal forms, and relevant excerpts from the Federal Register, Oregon Revised Statutes, and Oregon Administrative Rules. (JEH)

DUE PROCESS HEARING HANDBOOK

January 1980

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State Superintendent of
Public Instruction

Oregon Department of Education
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STATEMENT OF ASSURANCE

Oregon Department of Education

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FOREWORD

This publication is intended to help hearing officers handle due process procedures in contested cases involving important decisions on the handicapped child's education. It describes the rights and obligations of the parent and school district, the legal basis for such hearings, and steps involved in conducting hearings.

It should be pointed out that the law is subject to change and it should be checked whenever a due process procedure is initiated. An attorney representing the school district from the start can help assure that all legal requirements are met.

For further information, contact Mason McQuiston, Director of Special Education at the Department, 378-3164.

ACKNOWLEDGMENTS

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RIGHTS AND OBLIGATIONS

Access to Records

Local school districts need to establish and maintain procedural safeguards to be in compliance with Public Law 94-142--the Education for All Handicapped Children Act of 1975,[1] as well as applicable Oregon laws and rules (see pages 14 and 15). Such safeguards include the right of the parent of a handicapped child (see also Appointment of Surrogate Parent, page 4) to inspect and copy all educational records which involve the identification, evaluation, and educational placement of the child, and the right of a parent to have a free appropriate public education provided for the child.

If requested, any agency involved with the education of a handicapped child needs to provide the parent with a list of the types and locations of educational records on the child.[2] Such information must be provided without unnecessary delay, within 45 days of the request, and before any meeting or hearing.

The right to access records should be exercised at reasonable times, such as during regular business hours.[3] The school district may not charge any fee for copying records, except the cost of the copy paper that is used (e.g., 10 cents per page). According to federal rules and commentaries, agencies are encouraged to provide copies free of charge.[4]

If the parent thinks the information is inaccurate, misleading, or violates the privacy or other rights of the child, the parent may request that this information be amended. Should the school district refuse to amend the record, the district must advise the parent of the right to a hearing.[5]

Independent Evaluation

The parents have a right to secure an independent educational evaluation for the child. An independent evaluation is defined as "an evaluation conducted by a qualified examiner not employed by the public agency responsible for the education of the child."[6] According to Oregon statute,[7] the parent may obtain an independent evaluation before or during a contested case, or before or during any appeal to the State Superintendent of Public Instruction. Such an evaluation is justified if the parent disagrees with the action or failure to act on the part of the school district, or if the parent claims that the child is not being provided a free appropriate education.[8]

According to federal rule: "A parent has the right to an independent educational evaluation at public expense if the parent disagrees with the evaluation obtained by the public agency."[9] However, this same rule allows the public agency to initiate a due process hearing in order to prove that its evaluation is appropriate.

Criteria Involved in Evaluation

Minimal criteria for evaluations are established by federal rule.[10] Tests must be:

> in the native language of the child or other mode of communication, unless clearly not feasible;
>
> validated for the specific purpose(s) for which they are used;
>
> administered by trained personnel in accordance with manufacturers' instructions;
>
> tailored to assess the specific information sought, not merely a general intelligence quotient score;
>
> reflective of the aptitude or achievement of the child, rather than the child's impaired sensory, manual or speaking skills (unless the impaired skill is the subject of the test).

The evaluation is to be conducted by a multidisciplinary team, including a teacher or certified expert with knowledge of the suspected disability. The child is to be assessed in all areas of possible disability as appropriate: health, vision, hearing, social and emotional status, intelligence quotient, academic performance, communicative status, and motor activities.[11] According to commentary in the federal rules, children with speech impairments do not require the full battery of tests.

With regard to learning disabilities, additional evaluation requirements are specified by federal rule.[12] The team shall include the child's regular teacher or, if the child has no regular teacher, a regular classroom teacher qualified to teach a child of that age. However, if the child is less than school age, then the team should include an individual qualified by the state educational agency to teach a child of that age, and at least one person qualified to conduct individual diagnostic examinations of children such as a school psychologist, speech/language pathologist, or remedial reading teacher.[13] (Note: Even if an evaluation presented by the parent at the hearing does not meet these requirements, it should be admitted into evidence.)

Paying for the Evaluation

The primary question regarding a parent's right to an independent evaluation is--who pays the costs? According to Oregon law,[14] if it is decided by the State Superintendent or hearing officer that the distict's evaluation is appropriate, the parent pays; if it is decided that the district should revise its evaluation significantly, the district pays. However, the officer can request an independent evaluation for which the district must pay.[15] No child is entitled to more than one evaluation paid for by the district in any given year.

If the parent is unable to pay for an evaluation, or seeks a second evaluation, and the Department decides that the parent has just cause and is unable to pay, the Department may pay for the evaluation and bill the district. It is recommended that the district pay for any evaluation requested by the parent. Should the question of payment be contested, the courts may rule that federal law gives the parent the right to such an evaluation paid for by the school district, with no restrictions.

Appointment of Surrogate Parent

If the school district cannot identify or locate a child's parent or guardian, or if the child is a ward of the state, the federal act states that an individual can be assigned to act as a surrogate parent. Oregon law[16] provides that when there is reasonable cause to believe the child is handicapped and is a ward of the state, the school district appoints the surrogate. The appointee must be on the approved list of nominees made available to the school district by the Oregon Department of Education. If the district is unable or unwilling to appoint a surrogate, the Department has this authority. A child is entitled to a surrogate parent until age 21, or until it is determined that the child is no longer eligible for special education services.[17]

A surrogate parent cannot be any individual from an agency involved with the education or care of the child, or an employe of the appointing authority or the Department of Education.[18]

According to federal law, the district may not appoint a surrogate due to a lack of cooperation on the part of the natural parent. However, Oregon law[19] allows the parent to consent in writing to the appointment of a surrogate in situations other than those provided by federal law. The same law[20] purports

to authorize the Department to establish procedures in rule form to protect the rights of handicapped children, as well as the rights of those children suspected of being handicapped. In addition, the law calls for rules prescribing procedures applicable to situations where a parent is uncooperative or unresponsive to the special education needs of the child.

Prior Notice

When the school district proposes or refuses to initiate or change the identification, evaluation or placement status of a child, the district must give written "prior notice"[21] to the parent before any action is taken. (See Appendix B for prior notice form.) Prior notice is defined as a written statement to the parent describing the proposed action and providing an explanation of parental rights. The circumstances requiring prior notice and the required contents are specified by law.[22]

It is customary for the school district to have the parent accept service of prior notice in a conference setting. If the parent is represented by or has consulted an attorney, then the attorney must: be notified, consent to any contact between the district and the parent, and be given an opportunity to be present. This provision applies to the serving of prior notice as well as to all contacts initiated by the school district. Once the parent has accepted service, the notice should be maintained in district files, and the parent given a copy. (Note: Should prior notice not be served at a conference, then the district should employ the same method as is used for serving the "Notice of Hearing," page 9. Requirements are spelled out in statute.)

Prior notice must be served upon the parties within a reasonable time before any action on the part of the district--no less than 20 days prior to any district action.[23]

Federal and state rules are very specific about how the notice should be written. The following information must be included:

1. Reference to the particular section of the law and rules involved.[24]
2. A description of the proposed or requested action, and reasons why such action is deemed appropriate. The notice needs to indicate whether the district intends to place the child in or transfer the child from a particular special education program. The notice requests parental consent, and if the parent consents in writing, the action is taken.
3. A description of any options considered by the district and the reasons why such options were rejected.
4. A description of any tests, reports or evaluation procedures upon which the proposed action is based.
5. A description of any other factors which are relevant to the district's proposal or refusal.
6. A statement that the parent has a right to a hearing.
7. A statement of the authority and jurisdiction under which the hearing will be held.
8. A statement that the parent has the right to have the child present at the hearing. If not, the officer may interview the child in the presence of attorney for the parent and district or, if the parent consents, the district's attorney only.
9. A statement that the parent has the right to open the hearing to the public.
10. If the parent requests a hearing, a statement that the district must be notified in writing within 20 days following the mailing of the notice.
11. A statement that the parent may be represented at the hearing by an attorney as well as by individuals with special knowledge or training with respect to handicapped children.
12. A statement that the parent has the right to obtain an independent educational evaluation of the child, and the right to request a list of public and private agencies from which such evaluations may be obtained.

13. A statement that district files, records and reports pertaining to the child will be available to the parent and designated representatives for inspection, and photocopying at a reasonable cost.

14. A statement that during any administrative or judicial proceedings, the child will remain in the present educational placement. Or, if applying for initial admission to public school, the child shall be placed in the public school with the consent of the parent. Should the parent and the district agree that other arrangements should be made to provide appropriate educational services for the child, or if there is a possibility of imminent danger to the health or safety of the child or others, the child may be excluded temporarily from public school.

15. If the parent requests a hearing, a statement that the parent will be notified of the time and place of the hearing and the issues involved.

16. If the parent requests a hearing, a statement that the parent shall have the right to present evidence and confront, cross-examine and compel the attendance of witnesses.

17. If the parent requests a hearing, a statement that a written or electronic verbatim record will be made of the hearing.

18. If the parent requests a hearing, a statement that the parent will have the right to a written findings of fact, and a written decision.

19. A statement that a final decision will be rendered after the hearing, in accordance with the law.

In addition, the notice to the parent must be written in language that is understandable to the general public, or written in the native language of the parent, unless it is clearly not feasible to do so. If not feasible, or the mode of communication of the parent is not a written language, the district must take steps to assure that: (a) the notice is translated orally or by other means to the parent in the parent's native language or other mode of communication, (b) the parent understands the contents of the notice, and (c) there is a written record of compliance with (a) and (b) above.

Preplacement Evaluation

The parent must grant consent before a preplacement evaluation can be made or before the initial placement of the child in a special education program. If the parent does not consent, the school district can request a hearing to determine if a child may be evaluated and placed. If the hearing officer upholds the decision, no consent is necessary.[25] While state law[26] does not require the consent of the parent before the preplacement evaluation, federal law requires a hearing if consent is not granted.

Need for Hearing

Should a parent complain to the school district, every effort should be made to negotiate and mediate the matter without the necessity of going to hearing. If the complaint cannot be resolved after all possible efforts have been made, then the parent will probably request a hearing.

An impartial due process hearing is necessary when either the parent or the school district requests a hearing.[27] The request for hearing need not be formal (i.e., "I request a hearing . . ."); communication alone from the parent may constitute such a request.

If the parent, guardian or surrogate parent requests a hearing, the district must: advise the parent of available free or low-cost legal or relevant services (legal aid),[28] and must secure and pay for a qualified interpreter for any parent who is deaf or speaks a language other than English (unless the parent files a written statement declining an interpreter, or personally arranges for an interpreter).[29]

Notice of Hearing

The school district must have prepared and served the "Notice of Hearing." Requirements are set out at length in the Administrative Procedures Act.[30] This second notice must contain the date, place and time of the hearing, a clear statement of the issues, a statement of the legal authority under which the hearing is held, as well as applicable rules and statutes. The notice must be sent or served personally upon the parent no later than thirty days before the date of the hearing.[31] As with prior notice, this notice can be accepted by the parent in a conference setting. Again, if the parent is represented by an attorney, district employes may have no contact with the parent without the knowledge and consent of the attorney.

The same form of acceptance as that for prior notice can be used, except that the form should read: "Service of the Notice of Hearing is accepted." If service of the notice is not accepted in writing and in the form required, then notice must be served in accordance with the requirements of Oregon law for the service of legal notices.[32] There are two methods of service: registered or certified mail, or personal service by a process server. Personal service never means service by a district employe or representative--the district is a party to the hearing. If the parent accepts service and signs the form of acceptance, the parent is, in fact, waiving the right to be served by mail or personal service. Should service be by mail, and the notice is not received, there is no service. If the party is represented by an attorney, the attorney may sign an acceptance of service, or the party may sign in the presence of the attorney. It is the responsibility of the district to see that service is made and to pay all costs involved.

Time Factors

The school board and the hearing officer usually must act within forty-five days of request by the parent to the mailing of the decision to each party (the hearing officer can extend this), and the parent or district must file an appeal within thirty days after the decision.

Status of the Child

While the hearing is underway, and until an order is entered, the child must remain in the current educational placement.[33] The district may not place the child pending the order unless the child is truly a danger to the self or others.[34]

Who Can Serve as a Hearing Officer

The district must retain a hearing officer,[35] as well as keep a list of hearing officers, including the qualifications of each. Any employe of a public agency responsible for the education or care of the child in any capacity cannot serve as a hearing officer. Too, any individual with a personal or professional interest in the case cannot serve (e.g., spouse, relative, employer, co-worker).[36]

The district may wish to consider a person with legal background for the position of hearing officer; however, that individual may not have any connection with the district, the parent, or the child (i.e., client-attorney, relative, etc.)

General Conduct of the Hearing Officer

A hearing officer's conduct should be impartial--no first names, coffee, extended conversations. The officer should not make any contact unless all parties are present. If one of the parties attempts to speak with the officer, the officer should briefly explain why such contact needs to be avoided.

Subpoenas

The district or the officer must issue subpoenas upon request of the parties. (See Appendix C for subpoena form.) The party requesting the subpoena serves the subpoena and pays the witness fees ($5) and round trip mileage (8 cents a mile) for the witness. In addition, the district or officer must order depositions upon request. The party requesting pays for the deposition, and the witness fee involved (if any).

Full Disclosure

The parties must have made full disclosure of any evidence to be presented at the hearing at least five days before the hearing.[37]

Keeping a Record

A record is needed in case of appeal. The district and officer are responsible for making and keeping a verbatim record of the hearing, and the district pays any costs for storing these records.[38] Records may be made by either hiring a court reporter, or making a tape recording. It is suggested that someone other than hearing officer serve in this capacity.

The Appeal

Either party may appeal to the State Superintendent of Public Instruction.[39] The Superintendent's opinion may be appealed by civil case in federal district court or by appealing to the Oregon Court of Appeals.[40]

LEGAL BASIS

Due Process

"Due process of law" refers to legal guarantees* accorded to all parties involved in a trial or hearing. As such, it involves:

providing adequate notice to all parties which states the issues, as well as the date, place and time of the hearing;

opportunity for involved parties to be heard;

the right to be represented by legal counsel;

testimony under oath;

the right to cross-examine witnesses;

the right to compel the producing of evidence and the attendance of witnesses through subpoena;

a decision in writing or on the record;

opportunity to appeal;

a permanent record.

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*The right to due process is guaranteed by the fifth and fourteenth amendments of the United States Constitution: ". . . nor shall any person be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation." (Fifth Amendment) "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, nor deny any person within its jurisdiction the equal protection of the laws." (Fourteenth Amendment)

Purpose of the Act

The Education for All Handicapped Children Act of 1975[41] provides federal assistance to school districts so that they can provide a free appropriate education to all handicapped children between the ages of three and eighteen. All handicapped children, regardless of severity of condition, are to be identified, located and evaluated to determine how many are receiving special education services and how many are not.

Under the law, handicapped children are to be educated, to the maximum extent appropriate, with children who are not handicapped. Special classes, separate schooling or other "removal" from the regular classroom setting is appropriate only when education in the regular classroom setting cannot be achieved with the use of supplementary aids and services. Testing and evaluation procedures are to be free of racial and cultural bias, and no single procedure is to be the "sole criterion" for determining a child's educational program.

Precedence Relating to Due Process

Laws covering due process under the act include:

Federal Law--Public Law 94-142 (11-29-75) as amended. 20 United States Code 1401, entitled the Education for All Handicapped Children Act.

Federal Rules and Regulations--Federal Register (8/12/77) Part II, Department of Health, Education and Welfare, Office of Education. The Education for All Handicapped Children Act of 1975 document contains commentary as well as rules. Federal Register (12/29/77) Part III, Department of Health, Education and Welfare, Office of Education, Assistance to States for Education of Handicapped Children, Procedures for Evaluating Specific Learning Disabilities.

Administrative Procedures Act--Chapter 183.310 through 183.500.

Oregon Revised Statutes Chapter 343, and particularly 343.055 and 343.077, as amended by Oregon Law 1979, Chapter 423 (Senate Bill 434).

Oregon Administrative Rules (relating to special education) 581-15-025, filed 3/6/75 as IEB 190, effective 3/25/75. Renumbered from 581-22-165, 9/17/76. Amended as IEB 248, effective 9/27/76, particularly 581-15-073 through 581-15-096.

Various cases interpreting these laws: Eberle v. Board Public Education 444 Fed. Supp. 41; Stuart v. Nappi 443 Fed. Supp. 1235.

THE HEARING

Opening

The hearing officer makes the opening introduction, "I am (name) and I have been selected by (school district) to conduct this hearing involving (child)." Then parties introduce themselves, spelling names and including addresses for the record. As the child's representative, to make an introduction, "I am (name), attorney at law, (address and city)"; ask the district representative to do the same. It is the duty of the hearing officer to be sure that all parties are properly identified for the record; circulating a sign in sheet prior to the hearing can serve this purpose.

The hearing officer begins the hearing by stating for the record, "This is the time and place set for hearing in the matter of (the title of hearing). The hearing officer is (name). (Name first party) is present and is represented by (name), attorney at law (if present), and (name second party) is present and is represented by (name), attorney at law (if present)." The officer asks each party, "Are you ready to proceed?" If one of the parties is not ready, the officer may wish to postpone the hearing. For example, should a party decide at the last minute to retain an attorney, or if one of the parties is ill, the officer should agree to postpone as part of due process. The officer has the duty to see that the hearing is convenient for all parties involved.

Should one party fail to appear on time, it is customary to wait twenty minutes. On the record, the officer should record: "This is the time and place set for the hearing, and (name), who is involved in this hearing, is not present. We will now go off the record and wait twenty minutes for (name) to arrive."

After twenty minutes, if the party has not arrived, the officer should state that fact on the record, and also state that the party is in default. For the protection of the other party, as well as the hearing officer, the officer should allow the party in attendance to present evidence. This means that there is a prima facie case on record on which the hearing officer may base findings, despite the fact that the party in default must lose.[42]

Stating the Issue

Once parties are properly identified, the hearing officer should briefly state the issue(s) involved. "It is my understanding that the issue before me today is whether (name child) should be removed from the second grade at (school), and be transferred to an institution where the child can receive special attention in accordance with the child's ability." Continuing, the officer should ask the first party, "Do you agree or disagree with the issues which I have stated?" If the first party agrees with the statement, then the officer should ask the second party the same question. If either party disagrees, then the officer should ask for a statement of understanding.

If agreement is reached over the issue(s), the officer should ask if the first party would wish to make an opening statement, followed by the second party.

Burden of Proof and Going Forward with the Evidence

The officer is ready to begin the hearing. The burden of proof, as well as the burden of going forward with the evidence, is usually on the party seeking to change the existing situation. For example, should the district seek to remove a child from regular classes, then the burden is with district; if the parent wishes the child enrolled in regular classes, then the burden is with the

parent. However, it is often more convenient for the school district to present evidence first, regardless of the burden, provided neither party objects. The officer directs the first party, "Please call your first witness." The witness should state name and address for the record.

The Oath

The officer administers the oath. "Please raise your right hand and be sworn. Do you solemnly swear that the evidence you shall give in the matter now pending shall be the truth, the whole truth and nothing but the truth, so help you God?" or "Do you solemnly affirm that the evidence you shall give in the matter now pending shall be the truth, the whole truth and nothing but the truth?" If the witness is a child under ten years of age, no oath is needed.

Questioning

The party calling the witness is the first allowed to question the witness; cross-examination by the second party follows. Once cross-examination is complete, then the officer asks the first party whether redirect examination is in order. In theory, redirect examination is limited to those matters which have been brought up during cross-examination, and which have not been brought up during direct examination. However, redirect examination seldom is limited. Should any "new matter" be brought up, the second party has the right to question, as does the hearing officer.

When both parties have finished questioning the witness, the officer allows the witness to step down. If the witness asks to be excused, the officer should first ask the parties whether there are any objections; if there are none, then the officer should excuse the witness.

Identification of Exhibits

If a witness has presented an exhibit, it should be marked by the officer or recording assistant--"P-1" (parent's first exhibit), etc. Once the presenting witness identifies the exhibit and states that it was indeed prepared by the witness, it should be shown to the other party for examination and possible objections. If there are no objections, the officer should state, "P-1 is admitted into evidence."

Common Objections to Evidence and Exhibits

Should objections be raised, the officer should hear them out, examine the evidence again (if necessary), and then make a decision. If necessary, this ruling can be deferred until the finding. As a rule, exhibits prepared by experts should be admitted.

Generally, objections fall into three categories: hearsay, relevancy to the issue, leading questions.

Hearsay is more than just "(Someone not present) told me that . . ." Hearsay also includes affidavits, books, reports, cards, brochures, or any other written or oral matter whose "author" is not present. Although generally regarded as unrealiable, hearsay according to the federal act and the Administrative Procedures Act, is admissible if it merits consideration in making a substantive decision. Although it is not a good practice to base an opinion on hearsay, there is one federal decision based entirely upon heresay (discrimination in advertising). Hearsay may be substantiated by bringing in the witness, having a court reporter take the witness's testimony with both parties (or representatives) present, or by submitting questions in writing to the witness from both parties.

To avoid questions of hearsay, testimony should be taken under oath, it should be only about facts within a witness's own knowledge or perceptions, and such testimony is subject to cross-examination.

There are a number of exceptions. For example, official files and records of public agencies, as well as private business records, are never classified as hearsay.

Objections on the grounds of materiality or relevancy are decided by the officer, and it is seldom that an officer will reject evidence on these grounds. However, if more than two witnesses speak along the same general lines, the officer may request only that new material be covered.

A leading question is any question that suggests the answer. In effect, the examiner is testifying, not the witness. Leading questions are used in preliminary examination (e.g., "Your name is? You live at?") If an objection is raised concerning a leading question, and the officer concurs, the officer may sustain the objection to the form of the question, and the question can be rephrased. It should be noted leading questions are entirely proper in the context of cross-examination.

"Later-Filed" Exhibits

In administrative hearings, often later-filed exhibits are accepted. For example, should the second party wish to submit a doctor's report not available at the time of the hearing, it can be accepted at the hearing. The first party has the right to present testimony concerning the report, or to question the doctor.

Offers of Proof

Should the officer refuse to admit testimony into evidence, the party submitting the evidence should be allowed to offer the evidence "under the rule" or make an "offer of proof." This means that the party whose testimony is not admitted may show for the record what that testimony would have entailed. Any testimony should be presented under oath.

If exhibits have been offered, but not received, it should be noted for the record. Once a proposed exhibit is offered, unless withdrawn by the party making the offer, it becomes part of the permanent record and should be retained by the hearing officer, even if not admitted into evidence.

When in doubt, let evidence come in. While the court will not reverse the officer's decision because there is too much evidence presented in the record, it could if evidence has been excluded.

Conclusions of the First Party

Following the first witness, the first party should be asked to call the other witnesses, until all witnesses for the first party have testified. Then, the attorney for the first party should state, "We rest," or the officer can ask if there are any more witnesses. If not, then the officer will turn to the second party, "You may proceed with your case." The same procedure is followed.

Rebuttal and Surrebuttal

When the second party is finished presenting witnesses, the officer turns to the first party and asks, "Do you have any rebuttal?" Generally, rebuttal is a denial of statements by the second party's witnesses. Should any new matter be raised, the second party is entitled to rebut this new matter. This is called surrebuttal.

Officer's Right to Question

The hearing officer has a right to ask questions. Should a party object to the officer's questions, the objection should be overruled and questioning continued.

Closing Argument

Each party should have an opportunity to present closing arguments. The first party presents, the opposing party responds, and then the first party responds. The second party does not have another chance to respond, unless under special circumstance with the permission of the officer. Although parties may wish to submit closing arguments in writing, for the sake of time the officer should discourage this approach.

Conclusion of the Hearing

Once closing arguments have been presented, the officer should state, "If there is nothing further, the hearing is concluded."

Briefs

It may be necessary to request that parties submit briefs if there is a legal issue about which the officer is in doubt. The first party should submit the first brief, usually due twenty days after the close of the hearing. The second party then is required to file a brief ten days after receipt of the first brief; the first has five days in which to reply to the second. Parties may request the right to submit briefs, and unless the officer feels that it would serve no purpose, requests should be granted using the same timeline and procedures outlined above.

THE DECISION

The officer renders the decision in writing. It is not necessary to discuss or quote testimony. The heading and caption would be the same as with other filed papers. The body should read:

"THIS MATTER coming on regularly to be heard before me, (name the hearing officer) on the _____ day of _____, 19__, at the Courthouse in (town), Oregon. The minor child (name), being present in person, and the parent (name), being present and represented by (name), attorney at law of (town), Oregon and the (school district) being represented by (name), attorney at law of (town), Oregon, and the parties having offered evidence consisting of the testimony of various witnesses, and various exhibits. The following exhibits were offered and received into evidence (list):

The following proposed exhibits were offered and not received (list):

ISSUE

The issue before me is whether the child, who is handicapped should be allowed to continue in public school, or be transferred to an institution that can provide this child special care and training.

DISCUSSION

It appears to the hearings officer that (child's name) is visually handicapped (with approximately 20/200 capacity) and aurally impaired (unable to hear the normal spoken word). The school district is seeking to have the child removed from public school and transferred to an institution that can deal more

adequately with such deficiencies. In support of this decision, the school district introduced the testimony of (name), a fully certified educational specialist. (Specialist's name) indicated that the child could make faster progress if placed in a special school rather than continuing in the public school system. (Specialist's name) also submitted a detailed written report.

The child's parent is opposed to the transfer. The child is in the fourth grade, has received adequate grades, although not outstanding, and is well adjusted in both home life and school activities. The parent called the child's teacher as a witness. The witness testified that the child was doing adequate work, but because of handicaps, the child required additional attention to the neglect of certain other children in the room.

These records indicate that the child had been doing poor to fair work, but that grades improved in the most recent period of the present school year. When this was brought to the attention of the child's present teacher, the teacher agreed that this probably was true. The teacher attributed this improvement in grades to the fact that more time was being spent with the child than perhaps previous teachers had.

THE LAW

As provided in the Education for All Handicapped Children Act of 1975, all children must be provided a free appropriate education. Federal legislation indicates that handicapped children should be given every opportunity to perform in the public school, and only in rare circumstances should they be transferred to special educational facilities.

FINDINGS OF FACT

The hearing officer hereby finds as follows:

(1) That (child's name) is in the fourth grade in public school.

(2) That (child's name) is performing adequately in the fourth grade, although the child requires special attention from the teacher.

(3) That (child's name) should remain in the public school because the child is performing adequately without causing any undue burden on other students or the school.

(4) That the (school district) offered evidence that (child's name) might progress faster in a special educational facility. This conclusion cannot outweigh the fact that the child is doing average work in the public school, and that the child should remain there.

(5) That the (school district) is seeking to change the status quo; that it has failed to sustain its burden of proof to show that it would be advantageous to the child to be moved to a special educational facility.

ORDER

IT IS THEREFORE ORDERED AND DECREED THAT (child's name) shall remain a student in the (school district) until further ordered.

DATED this _____ day of _____, 19_____.

_____
Hearing Officer

The hearing officer's decision must contain directions as to how an appeal is to be made. For example, "NOTICE: IF YOU DISAGREE WITH THIS OPINION YOU MUST WRITE A LETTER TO THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION, 700 PRINGLE PARKWAY SE, SALEM, OREGON 97310, ASKING FOR A REVIEW. THE LETTER MUST BE RECEIVED BY THE SUPERINTENDENT NO LATER THAN _____ DAYS OF THE DATE THESE FINDINGS OF FACT. IF THE LETTER IS NOT RECEIVED BY THE SUPERINTENDENT WITHIN _____ DAYS OF THE DATE THESE FINDINGS WERE MAILED, ALL OF YOUR APPEAL RIGHTS WILL BE LOST."[43] The officer should check the length of time allowed for appeal; laws and regulations are subject to change. In addition, the length of time is not clear under the law.[44]

APPENDIX

1. (pg 1) PL 94-142 (11-29-75) Sec. 615 (a), 89 Stat. 788, as amended
2. (pg 1) Federal Rules, Sec. 121a.565; ORS 343.173(1)
3. (pg 1) PL 94-142 (11-29-75), Sec 615 (b)(1)(A), 89 Stat. 788, as amended; Federal Rules, Sec. 121a.502; ORS 343.173(1)
4. (pg 1) Federal Rules, Sec. 121a.566
5. (pg 1) Federal Rules, Sec. 121a.567, 121a.568; OAR 581-15-075
6. (pg 2) Federal Rules, Sec. 121a.503(a)(3)(i); OAR 581-15-005(6)
7. (pg 2) ORS 343.173(2)
8. (pg 2) PL 94-142 (11/29/75) Sec. 615(b)(1)(A), 89 Stat. 788, as amended; Federal Rules, Sec. 121a.503; ORS 343.173(2) OAR 581-15-094(1)(2), and rules to be enacted in conformity with Oregon law 1979, Chapter 423 (Senate Bill 434)
9. (pg 2) Federal Rules, Sec. 121a.503(b); OAR 581-15-094
10. (pg 2) Federal Rules, Sec. 121a.532; OAR 581-15-072
11. (pg 3) Federal Rules, Sec. 121a.532(f); OAR 581-15-072(5)(6)
12. (pg 3) Federal Rules, Sec. 121a.540; OAR 581-15-072(7)
13. (pg 3) Federal Rules, Sec. 121a.541, 121a.542 ; OAR 581-15-072(7)(A)(B)
14. (pg 3) ORS 343.173(3)
15. (pg 3) Federal Rules, Sec. 121a.503(d); OAR 581-15-094(6)

16. (pg 4) PL 94-142 (11/29/75) Sec. 615(b)(1)(B); Federal Rules, Sec. 121a.514; ORS 343.185; OAR 581-15-099(1)

17. (pg 4) PL 94-142 (11/29/75) Sec. 615(b)(1)(B); Federal Rules, Sec. 121a.514 (3)(d); ORS 343.185(2); Oregon Law 1979, Chapter 836, Sec. 12 (Senate Bill 112)

18. (pg 4) PL 94-142 (11-29-75) Sec. 615(b)(1)(B); Federal Rules, Sec. 121a.514 (3)(d); ORS 343.185(6)

19. (pg 4) ORS 343.185(3)

20. (pg 4) ORS 343.155(1)

21. (pg 5) PL 94-142 (11-29-75) Sec. 615(b)(1)(C); ORS 343.163

22. (pg 5) PL 94-142 (11-29-75) Sec. 615(b)(1)(C); Federal Rules, Sec. 121a.504; ORS 343.055, 343.163(2); OAR 581-15-075

23. (pg 6) Federal Rules, Sec. 121a.504(2); OAR 581-15-075

24. (pg 5) PL 94-142 (11-29-75) Sec. 615(b)(1)(C)(D)(E); Federal Rules, Sec. 121a.5, 121a.505, 121a.541, 121a.542, 121a.543 121a.702; ORS Chapter 183; ORS 343.163-343.193, particularly ORS 343.163(2); OAR 581-15-075, 581-15-080

25. (pg 8) Federal Rules, Sec. 121a.504(c); ORS 343.165(1); OAR 581-15-081

26. (pg 8) ORS 343.163(1); OAR 581-15-081

27. (pg 8) PL 94-142 (11-29-75) Sec. 615(b)(2); ORS 343.165

28. (pg 8) Federal Rules, Sec. 121a.506(c); OAR 581-15-081

29. (pg 8) ORS 183.418

30. (pg 9) ORS 183.415(2)

31. (pg 9) OAR 581-15-080

32. (pg 9) ORS 183.415(1)

33. (pg 10) PL 94-142 (11-29-75) Sec. 615(e)(3); ORS 343.177; OAR 581-15-080(e)

34. (pg 10) Stuart v. Nappi, 443 Fed. Suppl. 1235 (1978); ORS 343.177(4)

35. (pg 10) Federal Rules, Sec. 121a.507; ORS 343.055; OAR 581-15-096(1)(2)

36. (pg 10) PL 94-142 (11-29-75) Sec. 615(2); Federal Rules, Sec. 121a.507; ORS 343.055; OAR 581-15-096(1)

37. (pg 11) Federal Rules, Sec. 121a.508; ORS 343.165(3)

38. (pg 11) PL 94-142 (11-29-75) Sec. 615(b)(2)(d); Federal Rules, Sec. 121a.508(4); ORS 183.415(3); OAR 581-15-092

39. (pg. 11) PL 94-142 (11-29-75) Sec. 615(b)(2)(c); ORS 343.175(1); OAR 581-15-105

40. (pg 11) PL 94-142 (11-29-75) Sec. 615(e)(2); ORS 343.175(5)

41. (pg 14) PL 94-142 (11-29-75)

42. (pg 18) OAR 581-15-084(1)(2); ORS 183.415(5); ORS 343.055, ORS 343.

43. (pg 28) PL 94-142 (11-29-75) Sec. 615(b)(2)(d)(4)

44. (pg. 28) ORS 343.175; OAR 581-15-105(2)

Service of this prior notice is accepted at

_____ on _____ 19_____

(Signed) _____
Parent

(Signed) _____
Parent

If this form is not written on the prior notice, then the form should read:

Acceptance of this prior notice, which is marked Exhibit A and attached hereto and by this reference made a part hereof, is hereby accepted at

_____ on _____ 19_____

(Signed) _____
Parent

(Signed) _____
Parent

BEFORE THE HEARINGS OFFICER PURSUANT

TO PUBLIC LAW 94-142

IN THE MATTER OF:

Parent or Guardian,

Petitioners

vs.

SCHOOL DISTRICT,

Respondent.

SUBPOENA

No. _____

TO: _____ (witness)

You are commanded to appear before the Hearings Officer on the _____ day of _____, 19__ , at the hour of _____ o'clock _M. at _____, Oregon, as a witness in behalf of (parent) at the hearing.

You are further commanded to bring with you and produce at said hearing:

(List here any books, records or other material the witness is required to bring)

Signed this _____ day of _____, 19___, Salem, Oregon

By _____

Name, address and telephone number of attorney or person requesting or issuing the foregoing subpoena:

_____

_____

_____

STATE OF OREGON)
) ss.
County of _____)

I, _____, do hereby certify that I am a competent person of lawful age, and that I did at _____ in said county and state, serve the within subpoena on the within named _____ on the _____ day of _____, 19___, by showing the original subpoena and delivering a copy containing its substance to the said _____ personally and in person.

Signed by _____

NOTE: Public Law 94-142, November 29, 1975, (89 Stat. 788-789), Sec. 615(b)(2)(d)(2) and ORS 183.440. In applicable cases, the Circuit Court of any county shall compel obedience to subpoenas issued and served and punish disobedience or any refusal to certify or to answer any lawful inquiry.

"PROCEDURAL SAFEGUARDS

20 USC 1415.

"SEC. 615. (a) Any State educational agency, any local educational agency, and any intermediate educational unit which receives assistance under this part shall establish and maintain procedures in accordance with subsection (b) through subsection (e) of this section to assure that handicapped children and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies and units.

"(b)(1) The procedures required by this section shall include, but shall not be limited to—

"(A) an opportunity for the parents or guardian of a handicapped child to examine all relevant records with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child;

"(B) procedures to protect the rights of the child whenever the parents or guardian of the child are not known, unavailable, or the child is a ward of the State, including the assignment of an individual (who shall not be an employee of the State educational agency, local educational agency, or intermediate educational unit involved in the education or care of the child) to act as a surrogate for the parents or guardian;

"(C) written prior notice to the parents or guardian of the child whenever such agency or unit—

"(i) proposes to initiate or change, or

"(ii) refuses to initiate or change,

the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child;

"(D) procedures designed to assure that the notice required by clause (C) fully inform the parents or guardian, in the parents' or guardian's native language, unless it clearly is not feasible to do so, of all procedures available pursuant to this section; and

"(E) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.

Hearing.

"(2) Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate educational unit, as determined by State law or by the State educational agency. No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child.

"(c) If the hearing required in paragraph (2) of subsection (b) of this section is conducted by a local educational agency or an intermediate educational unit, any party aggrieved by the findings and decision rendered in such a hearing may appeal to the State educational agency which shall conduct an impartial review of such hearing. The officer conducting such review shall make an independent decision upon completion of such review.

"(d) Any party to any hearing conducted pursuant to subsections (b) and (c) shall be accorded (1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of handicapped children, (2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses, (3) the right to a written or electronic verbatim record of such hearing, and (4) the right to written findings of fact and decisions (which findings and decisions shall also be transmitted to the advisory panel established pursuant to section 613(a)(12)).

"(e)(1) A decision made in a hearing conducted pursuant to paragraph (2) of subsection (b) shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (c) and paragraph (2) of this subsection. A decision made under subsection (c) shall be final, except that any party may bring an action under paragraph (2) of this subsection.

Civil action.

"(2) Any party aggrieved by the findings and decision made under subsection (b) who does not have the right to an appeal under subsection (c), and any party aggrieved by the findings and decision under subsection (c), shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

"(3) During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

District court jurisdiction.

"(4) The district courts of the United States shall have jurisdiction of actions brought under this subsection without regard to the amount in controversy.

§ 121a.503 Independent educational evaluation.

(a) *General.* (1) The parents of a handicapped child have the right under this part to obtain an independent educational evaluation of the child, subject to paragraphs (b) through (e) of this section.

(2) Each public agency shall provide to parents, on request, information about where an independent educational evaluation may be obtained.

(3) For the purposes of this part:

(i) "Independent educational evaluation" means an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question.

(ii) "Public expense" means that the public agency either pays for the full cost of the evaluation or insures that the evaluation is otherwise provided at no cost to the parent, consistent with § 121a.301 of Subpart C.

(b) *Parent right to evaluation at public expense.* A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency. However, the public agency may initiate a hearing under § 121a.506 of this subpart to show that its evaluation is appropriate. If the final decision is that the evaluation is appropriate, the parent still has the right to an independent educational evaluation, but not at public expense.

(c) *Parent initiated evaluations.* If the parent obtains an independent educational evaluation at private expense, the results of the evaluation:

(1) Must be considered by the public agency in any decision made with respect to the provision of a free appropriate public education to the child, and

(2) May be presented as evidence at a hearing under this subpart regarding that child.

(d) *Requests for evaluations by hearing officers.* If a hearing officer requests an independent educational evaluation as part of a hearing, the cost of the evaluation must be at public expense.

(e) *Agency criteria.* Whenever an independent evaluation is at public expense, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, must be the same as the criteria which the public agency uses when it initiates an evaluation.

(20 U.S.C. 1415(b)(1)(A).)

§ 121a.504 Prior notice; parent consent.

(a) *Notice.* Written notice which meets the requirements under § 121a.505 must be given to the parents of a handicapped child a reasonable time before the public agency:

(1) Proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child, or

(2) Refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child.

(b) *Consent.* (1) Parental consent must be obtained before:

(i) Conducting a preplacement evaluation; and

(ii) Initial placement of a handicapped child in a program providing special education and related services.

(2) Except for preplacement evaluation and initial placement, consent may not be required as a condition of any benefit to the parent or child.

(c) *Procedures where parent refuses consent.* (1) Where State law requires parental consent before a handicapped child is evaluated or initially provided special education and related services, State procedures govern the public agency in overriding a parent's refusal to consent.

(2)(i) Where there is no State law requiring consent before a handicapped child is evaluated or initially provided special education and related services, the public agency may use the hearing procedures in §§ 121a.506–121a.508 to determine if the child may be evaluated or initially provided special education and related services without parental consent.

(ii) If the hearing officer upholds the agency, the agency may evaluate or initially provide special education and related services to the child without the parent's consent, subject to the parent's rights under §§ 121a.510—121a.513.

(20 U.S.C. 1415(b)(1)(C), (D).)

Comment. 1. Any changes in a child's special education program, after the initial placement, are not subject to parental consent under Part B, but are subject to the prior notice requirement in paragraph (a) and the individualized education program requirements in Subpart C.

2. Paragraph (c) means that where State law requires parental consent before evaluation or before special education and related services are initially provided, and the parent refuses (or otherwise withholds) consent, State procedures, such as obtaining a court order authorizing the public agency to conduct the evaluation or provide the education and related services, must be followed.

If, however, there is no legal requirement for consent outside of these regulations, the public agency may use the due process procedures under this subpart to obtain a decision to allow the evaluation or services without parental consent. The agency must notify the parent of its actions, and the parent has appeal rights as well as rights at the hearing itself.

§ 121a.505 Content of notice.

(a) The notice under § 121a.504 must include:

(1) A full explanation of all of the procedural safeguards available to the parents under Subpart E;

(2) A description of the action proposed or refused by the agency, an explanation of why the agency proposes or refuses to take the action, and a description of any options the agency considered and the reasons why those options were rejected;

(3) A description of each evaluation procedure, test, record, or report the agency uses as a basis for the proposal or refusal; and

(4) A description of any other factors which are relevant to the agency's proposal or refusal.

(b) The notice must be:

(1) Written in language understandable to the general public, and

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

(c) If the native language or other mode of communication of the parent is not a written language, the State or local educational agency shall take steps to insure:

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

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

(3) That there is written evidence that the requirements in paragraph (c) (1) and (2) of this section have been met.

(20 U.S.C. 1415(b)(1)(D))

§ 121a.506 Impartial due process hearing.

(a) A parent or a public educational agency may initiate a hearing on any of the matters described in § 121a.504(a)(1) and (2).

(b) The hearing must be conducted by the State educational agency or the public agency directly responsible for the education of the child, as determined under State statute, State regulation, or a written policy of the State educational agency.

(c) The public agency shall inform the parent of any free or low-cost legal and other relevant services available in the area if:

(1) The parent requests the information; or

(2) The parent or the agency initiates a hearing under this section.

(20 U.S.C. 1415(b)(2).)

Comment: Many States have pointed to the success of using mediation as an intervening step prior to conducting a formal due process hearing. Although the process of mediation is not required by the statute or these regulations, an agency may wish to suggest mediation in disputes concerning the identification, evaluation, and educational placement of handicapped children, and the provision of a free appropriate public education to those children. Mediations have been conducted by members of State educational agencies or local educational agency personnel who were not previously involved in the particular case. In many cases, mediation leads to resolution of differences between parents and agencies without the development of an adversarial relationship and with minimal emotional stress. However, mediation may not be used to deny or delay a parent's rights under this subpart.

§ 121a.507 Impartial hearing officer.

(a) A hearing may not be conducted:

(1) By a person who is an employee of a public agency which is involved in the education or care of the child, or

(2) By any person having a personal or professional interest which would conflict with his or her objectivity in the hearing.

(b) A person who otherwise qualifies to conduct a hearing under paragraph (a) of this section is not an employee of the agency solely because he or she is paid by the agency to serve as a hearing officer.

(c) Each public agency shall keep a list of the persons who serve as hearing officers. The list must include a statement of the qualifications of each of those persons.

(20 U.S.C. 1414(b)(2).)

§ 121a.508 Hearing rights.

(a) Any party to a hearing has the right to:

(1) Be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of handicapped children;

(2) Present evidence and confront, cross-examine, and compel the attendance of witnesses;

(3) Prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least five days before the hearing;

(4) Obtain a written or electronic verbatim record of the hearing;

(5) Obtain written findings of fact and decisions. (The public agency shall transmit those findings and decisions, after deleting any personally identifiable information, to the State advisory panel established under Subpart F).

(b) Parents involved in hearings must be given the right to:

(1) Have the child who is the subject of the hearing present; and

(2) Open the hearing to the public.

(20 U.S.C. 1415(d).)

§ 121a.509 Hearing decision; appeal.

A decision made in a hearing conducted under this subpart is final, unless a party to the hearing appeals the decision under § 121a.510 or § 121a.511.

(30 U.S.C. 1415(c).)

§ 121a.510 Administrative appeal; impartial review.

(a) If the hearing is conducted by a public agency other than the State educational agency, any party aggrieved by the findings and decision in the hearing may appeal to the State educational agency.

(b) If there is an appeal, the State educational agency shall conduct an impartial review of the hearing. The official conducting the review shall:

(1) Examine the entire hearing record;

(2) Insure that the procedures at the hearing were consistent with the requirements of due process;

(3) Seek additional evidence if necessary. If a hearing is held to receive additional evidence, the rights in § 121a.508 apply;

(4) Afford the parties an opportunity for oral or written argument, or both, at the discretion of the reviewing official;

(5) Make an independent decision on completion of the review; and

(6) Give a copy of written findings and the decision to the parties.

(c) The decision made by the reviewing official is final, unless a party brings a civil action under § 121a.512.

(20 U.S.C. 1415 (c), (d); H. Rep. No. 94-664, at p. 49 (1975).)

Comment. 1. The State educational agency may conduct its review either directly or through another State agency acting on its behalf. However, the State educational agency remains responsible for the final decision on review.

2. All parties have the right to continue to be represented by counsel at the State administrative review level, whether or not the reviewing official determines that a further hearing is necessary. If the reviewing official decides to hold a hearing to receive additional evidence, the other rights in section 121a.508, relating to hearings, also apply.

§ 121a.511 Civil action.

Any party aggrieved by the findings and decision made in a hearing who does not have the right to appeal under § 121a.510 of this subpart, and any party aggrieved by the decision of a reviewing officer under § 121a.510 has the right to bring a civil action under section 615(e)(2) of the Act.

(20 U.S.C. 1415.)

§ 121a.512 Timeliness and convenience of hearings and reviews.

(a) The public agency shall insure that not later than 45 days after the receipt of a request for a hearing:

(1) A final decision is reached in the hearing; and

(2) A copy of the decision is mailed to each of the parties.

(b) The State educational agency shall insure that not later than 30 days after the receipt of a request for a review:

(1) A final decision is reached in the review; and

(2) A copy of the decision is mailed to each of the parties.

(c) A hearing or reviewing officer may grant specific extensions of time beyond the periods set out in paragraphs (a) and (b) of this section at the request of either party.

(d) Each hearing and each review involving oral arguments must be conducted at a time and place which is reasonably convenient to the parents and child involved.

(20 U.S.C. 1415.)

§ 121a.513 Child's status during proceedings.

(a) During the pendency of any administrative or judicial proceeding regarding a complaint, unless the public agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her present educational placement.

(b) If the complaint involves an application for initial admission to public school, the child, with the consent of the parents, must be placed in the public school program until the completion of all the proceedings.

(20 U.S.C. 1415(e)(3).)

Comment. Section 121a.513 does not permit a child's placement to be changed during a complaint proceeding, unless the parents and agency agree otherwise. While the placement may not be changed, this does not preclude the agency from using its normal procedures for dealing with children who are endangering themselves or others.

§ 121a.514 Surrogate parents.

(a) *General.* Each public agency shall insure that the rights of a child are protected when:

(1) No parent (as defined in § 121a.10) can be identified;

(2) The public agency, after reasonable efforts, cannot discover the whereabouts of a parent; or

(3) The child is a ward of the State under the laws of that State.

(b) *Duty of public agency.* The duty of a public agency under paragraph (a) of this section includes the assignment of an individual to act as a surrogate for the parents. This must include a method (1) for determining whether a child needs a surrogate parent, and (2) for assigning a surrogate parent to the child.

(c) *Criteria for selection of surrogates.* (1) The public agency may select a surrogate parent in any way permitted under State law.

(2) Public agencies shall insure that a person selected as a surrogate:

(i) Has no interest that conflicts with the interests of the child he or she represents; and

(ii) Has knowledge and skills, that insure adequate representation of the child.

(d) *Non-employee requirement; compensation.* (1) A person assigned as a surrogate may not be an employee of a public agency which is involved in the education or care of the child.

(2) A person who otherwise qualifies to be a surrogate parent under paragraph (c) and (d)(1) of this section, is not an employee of the agency solely because he or she is paid by the agency to serve as a surrogate parent.

(e) *Responsibilities.* The surrogate parent may represent the child in all matters relating to:

(1) The identification, evaluation, and educational placement of the child, and

(2) The provision of a free appropriate public education to the child.

(20 U.S.C. 1415(b)(1)(B).)

PROTECTION IN EVALUATION PROCEDURES

§ 121a.530 General.

(a) Each State educational agency shall insure that each public agency establishes and implements procedures which meet the requirements of §§ 121a.530–121a.534.

(b) Testing and evaluation materials and procedures used for the purposes of evaluation and placement of handicapped children must be selected and administered so as not to be racially or culturally discriminatory.

(20 U.S.C. 1412(5)(C).)

§ 121a.531 Preplacement evaluation.

Before any action is taken with respect to the initial placement of a handicapped child in a special education program, a full and individual evaluation of the child's educational needs must be

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conducted in accordance with the requirements of § 121a.532.

(20 U.S.C. 1412(5)(C).)

§ 121a.532 Evaluation procedures.

State and local educational agencies shall insure, at a minimum, that:

(a) Tests and other evaluation materials:

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

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

(3) Are administered by trained personnel in conformance with the instructions provided by their producer;

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

(c) Tests are selected and administered so as best to ensure that when a test is administered to a child with impaired sensory, manual, or speaking skills, the test results accurately reflect the child's aptitude or achievement level or whatever other factors the test purports to measure, rather than reflecting the child's impaired sensory, manual, or speaking skills (except where those skills are the factors which the test purports to measure);

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

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

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

(20 U.S.C. 1412(5)(C).)

Comment. Children who have a speech impairment as their primary handicap may not need a complete battery of assessments (e.g., psychological, physical, or adaptive behavior). However, a qualified speech-language pathologist would (1) evaluate each speech impaired child using procedures that are appropriate for the diagnosis and appraisal of speech and language disorders, and (2) where necessary, make referrals for additional assessments needed to make an appropriate placement decision.

Part 121a of Title 45 of the Code of Federal Regulations is amended as follows:

1. Section 121a.5 is amended by revising paragraph (b)(9) to read as follows:

§ 121a.5 Handicapped Children.

• • • • • •

(b) • • •

(9) "Specific learning disability" means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which may manifest itself in an imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations. The term includes such conditions as perceptual handicaps, brain injury, minimal brain disfunction, dyslexia, and developmental aphasia. The term does not include children who have learning problems which are primarily the result of visual, hearing, or motor handicaps, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage.

• • • • • •

§ 121a.702 [Amended]

2. Section 121a.702 is amended by deleting paragraph (a)(2).

3. The following new sections are added:

ADDITIONAL PROCEDURES FOR EVALUATING SPECIFIC LEARNING DISABILITIES

§ 121a.540 Additional team members.

In evaluating a child suspected of having a specific learning disability, in addition to the requirements of § 121a.532, each public agency shall include on the multidisciplinary evaluation team:

(a)(1) The child's regular teacher; or

(2) If the child does not have a regular teacher, a regular classroom teacher qualified to teach a child of his or her age; or

(3) For a child of less than school age, an individual qualified by the State educational agency to teach a child of his or her age; and

(b) At least one person qualified to conduct individual diagnostic examinations of children, such as a school psychologist, speech-language pathologist, or remedial reading teacher.

(20 U.S.C. 1411 note)

§ 121a.541 Criteria for determining the existence of a specific learning disability.

(a) A team may determine that a child has a specific learning disability if:

(1) The child does not achieve commensurate with his or her age and ability levels in one or more of the areas listed in paragraph (a)(2) of this section, when provided with learning experiences appropriate for the child's age and ability levels; and

(2) The team finds that a child has a severe discrepancy between achievement and intellectual ability in one or more of the following areas:

(i) Oral expression;

(ii) Listening comprehension;

(iii) Written expression;

(iv) Basic reading skill;

(v) Reading comprehension;

(vi) Mathematics calculation; or

(vii) Mathematics reasoning.

(b) The team may not identify a child as having a specific learning disability if the severe discrepancy between ability and achievement is primarily the result of:

(1) A visual, hearing, or motor handicap;

(2) Mental retardation;

(3) Emotional disturbance; or

(4) Environmental, cultural or economic disadvantage.

(20 U.S.C. 1411 note.)

§ 121a.542 Observation.

(a) At least one team member other than the child's regular teacher shall observe the child's academic performance in the regular classroom setting.

(b) In the case of a child of less than school age or out of school, a team member shall observe the child in an environment appropriate for a child of that age.

(20 U.S.C. 1411 note.)

§ 121a.543 Written report.

(a) The team shall prepare a written report of the results of the evaluation.

(b) The report must include a statement of:

(1) Whether the child has a specific learning disability;

(2) The basis for making the determination;

(3) The relevant behavior noted during the observation of the child;

(4) The relationship of that behavior to the child's academic functioning;

(5) The educationally relevant medical findings, if any;

(6) Whether there is a severe discrepancy between achievement and ability which is not correctable without special education and related services; and

(7) The determination of the team concerning the effects of environmental, cultural, or economic disadvantage.

(c) Each team member shall certify in writing whether the report reflects his or her conclusion. If it does not reflect his or her conclusion, the team member must submit a separate statement presenting his or her conclusions.

(20 U.S.C. 1411 note.)

183.310 Definitions for ORS 183.310 to 183.500. As used in ORS 183.310 to 183.500:

(1) "Agency" means any state board, commission, department, or division thereof, or officer authorized by law to make rules or to issue orders, except those in the legislative and judicial branches.

(2) "Contested case" means a proceeding before an agency:

(a) In which the individual legal rights, duties or privileges of specific parties are required by statute or Constitution to be determined only after an agency hearing at which such specific parties are entitled to appear and be heard; or

(b) Where the agency has discretion to suspend or revoke a right or privilege of a person; or

(c) For the suspension, revocation or refusal to renew or issue a license required to pursue any commercial activity, trade, occupation or profession where the licensee or applicant for a license demands such hearing; or

(d) Where the agency by rule or order provides for hearings substantially of the character required by ORS 183.415, 183.425 and 183.450 to 183.470.

(3) "License" includes the whole or part of any agency permit, certificate, approval, registration or similar form of permission required by law to pursue any commercial activity, trade, occupation or profession.

(4) "Order" means any agency action expressed verbally or in writing directed to a named person or named persons, other than employes, officers or members of an agency, but including agency action under ORS chapter 657 making determination for purposes of unemployment compensation of employes of the state and agency action under ORS chapter 240 which grants, denies, modifies, suspends or revokes any right or privilege of such person.

(5) "Party" means each person or agency entitled as of right to a hearing before the agency, or named or admitted as a party.

(6) "Person" means any individual, partnership, corporation, association, governmental subdivision or public or private organization of any character other than an agency.

(7) "Rule" means any agency directive, regulation or statement of general applicability that implements, interprets or prescribes law or policy, or describes the procedure or practice requirements of any agency. The term includes the amendment or repeal of a prior rule, but does not include:

(a) Internal management directives, regulations or statements between agencies, or their officers or their employes, or within an agency, between its officers or between employes, unless hearing is required by statute, or action by agencies directed to other agencies or other units of government.

(b) Declaratory rulings issued pursuant to ORS 183.410 or 305.105.

(c) Intra-agency memoranda.

(d) Executive orders of the Governor.

(e) Rules of conduct for persons committed to the physical and legal custody of the Corrections Division of the Department of Human Resources, the violation of which will not result in:

(A) Placement in segregation or isolation status in excess of seven days.

(B) Institutional transfer or other transfer to secure confinement status for disciplinary reasons.

(C) Noncertification to the Governor of a deduction from the term of his sentence under ORS 421.120.

(D) Disciplinary procedures adopted pursuant to ORS 421.180.

[1957 c.717 s.1; 1965 c.285 s.78a; 1967 c.419 s.32; 1969 c.80 s.37a; 1971 c.734 s.1; 1973 c.386 s.4; 1973 c.621 s.1a]

183.415 Notice, hearing and record in contested cases. (1) In a contested case, all parties shall be afforded an opportunity for hearing after reasonable notice, served personally or by registered or certified mail.

(2) The notice shall include:

(a) A statement of the party's right to hearing, or a statement of the time and place of the hearing;

(b) A statement of the authority and jurisdiction under which the hearing is to be held;

(c) A reference to the particular sections of the statutes and rules involved; and

(d) A short and plain statement of the matters asserted or charged.

(3) Parties may elect to be represented by counsel and to respond and present evidence and argument on all issues involved.

(4) Unless precluded by law, informal disposition may be made of any contested case by stipulation, agreed settlement, consent order or default.

(5) An order adverse to a party may be issued upon default only upon prima facie case made on the record of the agency. When an order is effective only if a request for hearing is not made by the party, the record may be made at the time of issuance of the order, and if the order is based only on material included in the application or other submissions of the party, the agency may so certify and so notify the party, and such material shall constitute the evidentiary record of the proceeding if hearing is not requested.

(6) Testimony shall be taken upon oath or affirmation of the witness from whom received. The officer presiding at the hearing shall administer oaths or affirmations to witnesses.

(7) The record in a contested case shall include:

(a) All pleadings, motions and intermediate rulings.

(b) Evidence received or considered

(c) Stipulations.

(d) A statement of matters officially noticed.

(e) Questions and offers of proof, objections and rulings thereon.

(f) Proposed findings and exceptions.

(g) Any proposed, intermediate or final order.

(8) A verbatim oral, written or mechanical record shall be made of all motions, rulings and testimony. The record need not be transcribed unless requested for purposes of rehearing or court review. The agency may charge the party requesting transcription the cost of a copy of transcription, unless the party files an appropriate affidavit of indigency. However, upon petition, a court having jurisdiction to review under ORS 183.480 may reduce or eliminate the charge upon finding that it is equitable to do so, or that matters of general interest would be determined by review of the order of the agency.
[1971 c.734 s.13]

183.418 Interpreter for handicapped person in contested case. (1) When a handicapped person is a party to a contested case, he is entitled to a qualified interpreter to interpret the proceedings to the handicapped person and to interpret the testimony of the handicapped person to the agency.

(2) (a) Except as provided in paragraph (b) of this subsection, the agency shall appoint the qualified interpreter for the handicapped person; and the agency shall fix and pay the fees and expenses of the qualified interpreter if:

(A) The handicapped person makes a verified statement and provides other information in writing under oath showing his inability to obtain a qualified interpreter, and provides any other information required by the agency concerning his inability to obtain such an interpreter; and

(B) It appears to the agency that the handicapped person is without means and is unable to obtain a qualified interpreter.

(b) If the handicapped person knowingly and voluntarily files with the agency a written statement that he does not desire a qualified interpreter to be appointed for him, the agency shall not appoint such an interpreter for the handicapped person.

(3) As used in this section:

(a) "Handicapped person" means a person who cannot readily understand or communicate the English language, or cannot understand the proceedings or a charge made against him, or is incapable of presenting or assisting in the presentation of his defense, because he is deaf, or because he has a physical hearing impairment or physical speaking impairment.

(b) "Qualfied interpreter" means a person who is readily able to communicate with the handicapped person, translate the proceedings for him, and accurately repeat and translate the statements of the handicapped person to the agency.
[1973 c.386 s.6]

Note: (1) 183.418 was not added to and made a part of 183.310 to 183.500.

Section 6. ORS 183.310 is amended to read:

183.310. As used in ORS 183.310 to 183.500:

(1) "Agency" means any state board, commission, department or division thereof, or officer authorized by law to make rules or to issue orders, except those in the legislative and judicial branches.

(2) (a) "Contested case" means a proceeding before an agency:

[*(a)*] (A) In which the individual legal rights, duties or privileges of specific parties are required by statute or Constitution to be determined only after an agency hearing at which such specific parties are entitled to appear and be heard; [*or*]

[*(b)*] (B) Where the agency has discretion to suspend or revoke a right or privilege of a person; [*or*]

[*(c)*] (C) For the suspension, revocation or refusal to renew or issue a license [*required to pursue any commercial activity, trade, occupation or profession*] where the licensee or applicant for a license demands such hearing; or

[*(d)*] (D) Where the agency by rule or order provides for hearings substantially of the character required by ORS 183.415, 183.425 and 183.450 to 183.470.

(b) "Contested case" does not include proceedings in which an agency decision rests solely on the result of a test.

(3) "License" includes the whole or part of any agency permit, certificate, approval, registration or similar form of permission required by law to pursue any commercial activity, trade, occupation or profession.

(4) (a) "Order" means any agency action expressed [*verbally*] orally or in writing directed to a named person or named persons, other than employes, officers or members of an agency[, *but including*]. "Order" includes any agency determination or decision issued in connection with a contested case proceeding. "Order" includes:

(A) Agency action under ORS chapter 657 making determination for purposes of unemployment compensation of employes of the state ; and

(B) Agency action under ORS chapter 240 which grants, denies, modifies, suspends or revokes any right or privilege of [*such person*] an employe of the state.

(b) "Final order" means final agency action expressed in writing. "Final order" does not include any tentative or preliminary agency declaration or statement that:

(A) Precedes final agency action; or

(B) Does not preclude further agency consideration of the subject matter of the statement or declaration.

(5) "Party" means:

(a) Each person or agency entitled as of right to a hearing before the agency; [*or*]

(b) Each person or agency named by the agency to be a party; or

(c) Any person requesting to participate before the agency as a party or in a limited party status which the agency determines either has an interest in the outcome of the agency's proceeding or represents a public interest in such result. The agency's determination is subject to judicial review in the manner provided by ORS 183.482 after the agency has issued its final order in the proceedings.

(6) "Person" means any individual, partnership, corporation, association, governmental subdivision or public or private organization of any character other than an agency.

(7) "Rule" means any agency directive, standard, regulation or statement of general applicability that implements, interprets or prescribes law or policy, or describes the procedure or practice requirements of any agency. The term includes the amendment or repeal of a prior rule, but does not include:

(a) Unless a hearing is required by statute, internal management directives, regulations or statements which do not substantially affect the interests of the public:

(A) Between agencies, or their [*offices*] officers or their employes[,] ; or

(B) Within an agency, between its officers or between employes [, *unless hearing is required by statute, or*].

(b) Action by agencies directed to other agencies or other units of government which do not substantially affect the interests of the public.

[*(b)*] (c) Declaratory rulings issued pursuant to ORS 183.410 or 305.105.

[*(c)*] (d) Intra-agency memoranda.

[*(d)*] (e) Executive orders of the Governor.

[*(e)*] (f) Rules of conduct for persons committed to the physical and legal custody of the Corrections Division of the Department of Human Resources, the violation of which will not result in:

(A) Placement in segregation or isolation status in excess of seven days.

(B) Institutional transfer or other transfer to secure confinement status for disciplinary reasons.

(C) Disciplinary procedures adopted pursuant to ORS 421.180.

SECTION 14. Section 15 of this Act is added to and made a part of ORS 183.310 to 183.500.

SECTION 15. (1) Notwithstanding ORS 183.335, when an agency is required to adopt rules or regulations promulgated by an agency of the Federal Government and the agency has no authority to alter or amend the content or language of those rules or regulations prior to their adoption, the agency may adopt those rules or regulations under the procedure prescribed by this section.

(2) Prior to the adoption of a federal rule or regulation under subsection (1) of this section, the agency shall give notice of the adoption of the rule or regulation, the effective date of the rule or regulation in this state and the subject matter of the rule or regulation in the manner established in subsection (1) of ORS 183.335.

(3) After giving notice the agency may adopt the rule or regulation by filing a copy with the Secretary of State in compliance with ORS 183.355. The agency is not required to conduct a public hearing concerning the adoption of the rule or regulation.

(4) Nothing in this section authorizes an agency to amend federal rules or regulations or adopt rules in accordance with federal requirements without giving an opportunity for hearing as required by ORS 183.335.

Section 18. ORS 183.415 is amended to read:

183.415. (1) In a contested case, all parties shall be afforded an opportunity for hearing after reasonable notice, served personally or by registered or certified mail.

(2) The notice shall include:

(a) A statement of the party's right to hearing, or a statement of the time and place of the hearing;

(b) A statement of the authority and jurisdiction under which the hearing is to be held;

(c) A reference to the particular sections of the statutes and rules involved; and

(d) A short and plain statement of the matters asserted or charged.

(3) Parties may elect to be represented by counsel and to respond and present evidence and argument on all issues involved.

(4) Agencies may adopt rules of procedure governing participation in contested cases by persons appearing as limited parties.

[*(4)*] (5) Unless precluded by law, informal disposition may be made of any contested case by stipulation, agreed settlement, consent order or default. Informal settlement may be made in license revocation proceedings by written agreement of the parties and the agency consenting to a suspension, fine or other form of intermediate sanction.

[*(5)*] (6) An order adverse to a party may be issued upon default only upon prima facie case made on the record of the agency. When an order is effective only if a request for hearing is not made by the party, the record may be made at the time of issuance of the order, and if the order is based only on material included in the application or other submissions of the party, the agency may so certify and so notify the party, and such material shall constitute the evidentiary record of the proceeding if hearing is not requested.

[*(6)*] (7) Testimony shall be taken upon oath or affirmation of the witness from whom received. The officer presiding at the hearing shall administer oaths or affirmations to witnesses.

(8) The officer presiding at the hearing shall place on the record a statement of the substance of any written or oral ex parte communications on a fact in issue made to the officer during the pendency of the proceeding and notify the parties of the communication and of their right to rebut such communications.

[*(7)*] (9) The record in a contested case shall include:

(a) All pleadings, motions and intermediate rulings.

(b) Evidence received or considered.

(c) Stipulations.

(d) A statement of matters officially noticed.

(e) Questions and offers of proof, objections and rulings thereon.

(f) A statement of any ex parte communications on a fact in issue made to the officer presiding at the hearing.

[*(f)*] (g) Proposed findings and exceptions.

[*(g)*] (h) Any proposed, intermediate or final order prepared by the agency or a hearings officer.

[*(8)*] (10) A verbatim oral, written or mechanical record shall be made of all motions, rulings and testimony. The record need not be transcribed unless requested for purposes of rehearing or court review. The agency may charge the party requesting transcription the cost of a copy of transcription, unless the party files an appropriate affidavit of indigency. However, upon petition, a court having jurisdiction to review under ORS 183.480 may reduce or eliminate the charge upon finding that it is equitable to do so, or that matters of general interest would be determined by review of the order of the agency.

343.065 Superintendent of Public Instruction to administer special programs. (1) The Superintendent of Public Instruction shall administer all programs established under this chapter. Subject to the approval of the State Board of Education and the provisions of ORS 342.120 to 342.175 and 342.177 to 342.420, he shall establish rules relative to such other qualifications of teachers, supervisors, work experience coordinators, coordinators of volunteer services and trainers of volunteer personnel, courses of study, admission, diagnosis, eligibility of pupils, size of special facilities, rooms and equipment, supervision, territory to be served, and such other rules as he considers necessary to administer this chapter.

(2) Out of such funds as may otherwise be appropriated to the State Board of Education for the purposes enumerated in this section, the State Board of Education may:

(a) Purchase and prepare equipment and supplies to be loaned to school districts and county or regional special education facilities which provide approved programs for handicapped children in the public schools.

(b) Contract with and pay an educational institution, either within or without the state, for the purpose of providing educational services for children who are both deaf and blind. [Formerly 343.500; 1967 c.329 §1; 1975 c.621 §2]

343.060 [Repealed by 1953 c.110 §2]

343.065 Superintendent of Public Instruction to employ personnel to supervise special programs. The Superintendent of Public Instruction shall employ personnel qualified by training and experience to supervise the types of services required by the special programs authorized by this chapter. Personnel so employed shall assist the school districts, county and regional facilities, and hospitals in the organization and development of special programs authorized by this chapter, shall have general supervision of such programs, and shall assist school districts in obtaining required services, equipment and materials, particularly where the number of children is too small to justify district purchase of equipment and materials. [Formerly 343.255]

343.070 [Repealed by 1953 c.110 §2]

343.075 [1965 c.100 §393; 1973 c.728 §5; repealed by 1975 c.621 §17]

343.077 [1975 c.621 §§12,13; 1977 c.530 §1; repealed by 1979 c.423 §1 (343.153 to 343.187 enacted in lieu of 343.077)]

Enrolled

Senate Bill 434

Sponsored by Senator HANLON, Representative GRANNELL (at the request of Legislative Counsel Committee)

CHAPTER 423

AN ACT

Relating to special education programs; creating new provisions; repealing ORS 343.077; and declaring an emergency.

Be It Enacted by the People of the State of Oregon:

SECTION 1. ORS 343.077 is repealed and sections 2 to 14 of this Act are enacted in lieu thereof.

SECTION 2. As used in this 1979 Act:

(1) "Decision" means the decision of the hearings officer which shall be final unless reviewed by the Superintendent of Public Instruction.

(2) "Determination" means the determination by the school district concerning the identification, preplacement or annual evaluation, individual education plan or placement of a handicapped child in a program paid for by the district.

(3) "Order" has the meaning given in ORS 183.310 to 183.500.

(4) "Parent" means the parent or legal guardian, other than a state agency, of the child or the surrogate for the parent appointed pursuant to section 12 of this 1979 Act.

(5) "School district" means a common or union high school district, an education service district or a state agency or institution that is charged with the duty or contracted with by a public agency to care for or educate, or both, children apparently eligible for special education.

(6) "Superintendent" means the Superintendent of Public Instruction or the designee of the Superintendent of Public Instruction.

SECTION 3. The Department of Education shall establish by rule procedures to protect the rights of every handicapped child who is eligible for special education and every child who there is a reasonable cause to believe is handicapped, including:

(1) Rules governing the procedures for the appointment of a surrogate for the parent and other rules necessary to protect the special educational rights of the child, which shall include but not be limited to:

(a) Rules applicable whenever the parents of the child are unknown or unavailable or when there is reasonable cause to believe that the child is handicapped and is a ward of the state; and

(b) Rules prescribing procedures applicable to situations where a parent is uncooperative or unresponsive to the special education needs of the child.

(2) Rules prescribing hearings procedures if identification, evaluation, individual education plan or placement is contested.

SECTION 4. (1) At any time a parent who has reasonable cause to believe that the child is eligible for special education may apply on behalf of the child to the school district wherein the child resides for admission of the child into a special education program.

(2) The school district or any employe thereof may also initiate the application if the district or employe has reasonable cause to believe that a child in the district is eligible for special education. However, in common or union high school districts or education service districts, employes may initiate the application only pursuant to procedures prescribed by the district.

SECTION 5. (1) Upon receipt of the application, the school district shall commence an appropriate preplacement evaluation of the child to determine the eligibility of the child for special

education. The evaluation shall be completed within a reasonable time after application is made. After the evaluation is completed, the school district shall notify the parent of its determination that the child is eligible or not eligible for special education.

(2) The notice must be in writing, and must be provided in the native language of the parent or other mode of communication used by the parent, unless it is clearly not feasible to do so. If the native language or other mode of communication of the parent is not a written language, the school district shall take steps to insure:

(a) That the notice is translated orally or by other means to the parent in the parent's native language or other mode of communication;

(b) That a reasonable effort is made to aid the parent in understanding the content of the notice; and

(c) That there is written evidence that the requirements of this subsection have been met.

(3) The notice shall indicate whether the district intends:

(a) To place the child in a particular special education program;

(b) To deny such placement;

(c) To transfer the child to such a program; or

(d) To transfer the child from such a program.

(4) The notice shall also contain an explanation of the right of the parent to contest the identification, preplacement or annual evaluation, individual education plan or the intended placement of the child and shall request parental consent to the intended placement. If the parent consents in writing to the intended placement, the child shall be so placed.

SECTION 6. (1) If the parent withholds or refuses consent to identification, preplacement or annual evaluation, individual education plan or placement, the school district shall follow procedures prescribed in rules of the Department of Education to act when consent is not obtained.

(2) A hearing shall be conducted pursuant to rules of the Department of Education if the parent:

(a) Contests the determination of the school district concerning identification, preplacement or annual evaluation, individual education plan or placement; or

(b) Claims that the result of the determination of the district is to deny the child free appropriate education.

(3) The department's rules in subsection (2) of this section shall be as consistent as possible with the procedures applicable to a contested case under ORS 183.310 to 183.500. However, the department's rules shall prohibit the introduction of any evidence at the hearing that has not been disclosed to both parties at least five days before the hearing. The parent shall be entitled to have the child who is the subject of the hearing present at the hearing and to have the hearing open to the public.

(4) The school district may also commence the contested case proceedings to obtain a decision whether its identification, preplacement or annual evaluation, individual education plan and placement are appropriate or whether the result of the determination of the district is to provide the child with free appropriate education.

SECTION 7. (1) If the finding at the hearing held under section 6 of this 1979 Act is that the identification, preplacement or annual evaluation, individual education plan and placement by the district are appropriate and that the child is being provided a free appropriate education, the hearings officer shall decide in support of the determination of the district.

(2) If the finding at the hearing is that the identification, preplacement or annual evaluation, individual education plan or placement is not appropriate or that the child is not being provided a free appropriate education, the hearings officer shall decide that the school district shall revise or modify its placement in order to provide the child with a free appropriate education.

(3) The decision shall be entered not later than 45 days after the request for hearing is filed unless an extension has been granted by the hearings officer at the request of the parent or the school district. Copies of the decision shall be sent to the parent and to the school district accompanied by a statement describing the method of appealing the decision. Any hearings held under section 6 of this 1979 Act must be conducted by an independent hearings officer who is not a regular employe of the school district or the Department of Education.

SECTION 8. (1) Notwithstanding the limitation on access to records under ORS 192.410 to 192.500 and 336.185 to 336.215, the parent is entitled at any reasonable time to examine all of the records of the school district pertaining to placement of the child.

(2) Any parent is entitled to obtain an independent evaluation either before or during the contested case proceedings under section 6 of this 1979 Act or before or during an appeal to the Superintendent of Public Instruction under section 9 of this 1979 Act, if:

(a) The parent disagrees with the identification, preplacement or annual evaluation, individual education plan or placement of the child by the district; and

(b) The parent claims that the child is entitled to but is not being provided a free appropriate education.

(3) If the hearings officer under section 6 of this 1979 Act or the Superintendent of Public Instruction under section 9 of this 1979 Act decides that the independent evaluation requires the determination of the school district to be revised significantly, the parent is entitled to have the costs of the independent evaluation that are incurred by the parent paid for by the school district. However, no child is entitled to be the subject of more than one independent evaluation paid for by the district in any given school year.

(4) If the parent is unable to pay for an independent evaluation or seeks a second independent evaluation, and the Department of Education decides that the parent is unable to pay for such an evaluation and has cause to seek such an evaluation, the department may pay for an independent evaluation.

(5) If the department pays for an independent evaluation that produces the result described in subsection (3) of this section, then the department may bill the school district for the cost of the independent evaluation so long as the district has not already paid the costs of an independent evaluation of the particular child during the current school year.

SECTION 9. (1) Notwithstanding ORS 183.480, the decision of the hearings officer under section 6 of this 1979 Act shall be reviewed by the Superintendent of Public Instruction:

(a) Upon request therefor by the parent;

(b) If the school district refuses to accept the decision of the hearings officer and notifies the Superintendent of Public Instruction of that refusal; or

(c) If the school district fails to implement the decision within 10 days and the superintendent is notified of that failure by the parent, unless the superintendent extends the time in exceptional cases for a reasonable period.

(2) The superintendent shall conduct an impartial review, examining the entire record of the hearing and determining whether the procedure at the hearing was consistent with the requirements of law. The superintendent may seek additional evidence to be presented if the superintendent finds the record to be inadequate. The parent and the school district shall be given an opportunity to present written and oral argument, or both.

(3) At the conclusion of the review, the superintendent shall enter a written final order modifying, sustaining or reversing the decision of the hearings officer.

(4) The order entered under this section shall be entered not later than 30 days after receipt of the request for the review unless an extension has been granted by the superintendent upon the request of the parent or the school district.

(5) Either the parent or the school district may appeal the order of the superintendent to the Court of Appeals under ORS 183.480.

SECTION 10. (1) If the placement of the child has been contested under section 6 of this 1979 Act:

(a) The child shall remain in the then current educational program placement until the proceedings are completed if the child is in an educational program.

(b) The child shall be placed with the consent of the parent in a program provided or selected by the district at the district's expense until the proceedings are completed if applying for initial admission to a public school.

(2) The provisions of paragraphs (a) and (b) of subsection (1) of this section do not apply if the parent and the school district agree to temporary placement in some other program.

(3) After completion of the proceedings as described in sections 6 to 9 of this 1979 Act, the decision regarding placement of the child shall be considered final unless the placement is changed:

(a) Pursuant to the annual evaluation of the individual educational program of the child;

(b) By agreement of the parent and the school district;

(c) If a significant change occurs in the condition of the child; or

(d) If there is new or additional significant evidence that the identification, preplacement, annual or independent evaluation, the individual education plan, or placement of the child is not consistent with a free appropriate education for that child.

(4) Nothing in sections 2 to 10 of this 1979 Act is intended to prevent the temporary exclusion of a child from the public schools if the condition or conduct of the child constitutes an imminent danger to the health or safety of the child or others. However, no pregnant child shall be excluded from the public schools solely on the basis of pregnancy.

SECTION 11. (1) In addition to and not in lieu of any other sanction that may be imposed against a noncomplying school district, the Department of Education may withhold all or any part of the funds otherwise due a district for special education until the district complies with the requirements of sections 2 to 12 of this 1979 Act.

(2) If the Department of Education finds that the school district has refused to pay for the independent evaluation when the results thereof required the determination of the school district to be revised significantly, the department may withhold from funds due the district for special education an amount not to exceed the expense incurred by the parent in obtaining the independent evaluation. The department shall use the funds thus withheld for payment of the costs of the independent evaluation.

SECTION 12. (1) The Department of Education, in cooperation with the State Advisory Council for Handicapped Children, shall consult with other organizations that represent the interests of handicapped children to secure nominations of persons to serve as surrogates. The nominees must then be approved by the Department of Education and the department shall maintain a list of approved nominees that shall be made available to school districts. Appointments of surrogates by other than school districts are not required to be made from the approved list. However, an appointing authority which does not use the list must assure that the surrogate is independent and unbiased. A surrogate so appointed may be challenged for bias. The department in cooperation with the council shall establish procedures to insure that surrogates have or can acquire the necessary knowledge and skills to represent the parent to protect the special educational rights of the child.

(2) Whenever the parents of the child are unknown or unavailable or when there is reasonable cause to believe the child is handicapped, and is a ward of the state, the school district shall appoint an individual to serve as a surrogate. The individual must be on the approved list of nominees, as provided in subsection (1) of this section, and shall act as a surrogate for the parent or guardian of the child in protecting the special educational rights of the child. If the district is unwilling or unable to do so, the Department of Education shall appoint an individual to act as a surrogate. A child is entitled to have a surrogate appointed to serve until the child is 21 years of age or until the child is determined to be no longer eligible for special education.

(3) Where a parent in writing consents thereto, a surrogate may be appointed in situations other than those described in subsection (2) of this section.

(4) If a person appointed as a surrogate is no longer able or willing to serve, the person shall notify the appointing authority who shall appoint another surrogate.

(5) Any person appointed as a surrogate pursuant to this section or any other law shall not be held liable for actions taken in good faith on behalf of the parent in protecting the special educational rights of the child.

(6) A person appointed as surrogate shall not be an employe of the appointing authority or of the Department of Education.

(7) Nothing in this section prevents the appointment of a surrogate in a manner otherwise provided by law.

SECTION 13. During the 1979-1981 biennium, the Department of Education in consultation with the State Advisory Council for Handicapped Children and organizations representing the interest of handicapped children, including school districts, shall prepare a plan for recruiting, training and appointing surrogates and shall report on the plan to the Sixty-first Legislative Assembly.

SECTION 14. In addition to any other rules which may be adopted pursuant to section 3 of this 1979 Act, the Department of Education shall establish by rule procedures for considering and obtaining special education for pregnant children. Such rules shall include, but not be limited to, the obligation of the school district to:

(1) Inform pregnant students and their parents of the students' rights to special educational services under this section and the availability of such services in the school district or education service district;

(2) Facilitate the provision of related services, including counseling, to pregnant students; and

(3) Inform pregnant students and their parents of the availability of resources provided by other agencies, including health and social services.

SECTION 15. This Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this Act takes effect on passage.

DETERMINATION OF ELIGIBILITY FOR SPECIAL EDUCATION

343.153 Definitions for ORS 343.153 to 343.187. As used in ORS 343.153 to 343.187:

(1) "Decision" means the decision of the hearings officer which shall be final unless reviewed by the Superintendent of Public Instruction.

(2) "Determination" means the determination by the school district concerning the identification, preplacement or annual evaluation, individual education plan or placement of a handicapped child in a program paid for by the district.

(3) "Order" has the meaning given in ORS 183.310 to 183.500.

(4) "Parent" means the parent or legal guardian, other than a state agency, of the child or the surrogate for the parent appointed pursuant to ORS 343.185.

(5) "School district" means a common or union high school district, an education service district or a state agency or institution that is charged with the duty or contracted with by a public agency to care for or educate, or both, children apparently eligible for special education.

(6) "Superintendent" means the Superintendent of Public Instruction or the designee of the Superintendent of Public Instruction. [1979 c.423 §2 (enacted in lieu of 343.077)]

343.155 State rules relating to eligibility. The Department of Education shall establish by rule procedures to protect the rights of every handicapped child who is eligible for special education and every child who there is a reasonable cause to believe is handicapped, including:

(1) Rules governing the procedures for the appointment of a surrogate for the parent and other rules necessary to protect the special educational rights of the child, which shall include but not be limited to:

(a) Rules applicable whenever the parents of the child are unknown or unavailable or when there is reasonable cause to believe that the child is handicapped and is a ward of the state; and

(b) Rules prescribing procedures applicable to situations where a parent is uncooperative or unresponsive to the special education needs of the child.

(2) Rules prescribing hearings procedures if identification, evaluation, individual education plan or placement is contested. [1979 c.423 §3 (enacted in lieu of 343.077)]

343.157 Application for admission to special education program. (1) At any time a parent who has reasonable cause to believe that the child is eligible for special education may apply on behalf of the child to the school district wherein the child resides for admission of the child into a special education program.

(2) The school district or any employe thereof may also initiate the application if the district or employe has reasonable cause to believe that a child in the district is eligible for special education. However, in common or union high school districts or education service districts, employes may initiate the application only pursuant to procedures prescribed by the district. [1979 c.423 §4 (enacted in lieu of 343.077)]

343.160 [Repealed by 1965 c.100 §456]

343.163 Preplacement evaluation; notice of eligibility. (1) Upon receipt of the application, the school district shall commence an appropriate preplacement evaluation of the child to determine the eligibility of the child for special education. The evaluation shall be completed within a reasonable time after application is made. After the evaluation is completed, the school district shall notify the parent of its determination that the child is eligible or not eligible for special education.

(2) The notice must be in writing, and must be provided in the native language of the parent or other mode of communication used by the parent, unless it is clearly not feasible to do so. If the native language or other mode of communication of the parent is not a written language, the school district shall take steps to insure:

(a) That the notice is translated orally or by other means to the parent in the parent's native language or other mode of communication;

(b) That a reasonable effort is made to aid the parent in understanding the content of the notice; and

(c) That there is written evidence that the requirements of this subsection have been met.

(3) The notice shall indicate whether the district intends:

(a) To place the child in a particular special education program;

(b) To deny such placement;

(c) To transfer the child to such a program; or

(d) To transfer the child from such a program.

(4) The notice shall also contain an explanation of the right of the parent to contest the identification, preplacement or annual evaluation, individual education plan or the intended placement of the child and shall request parental consent to the intended placement. If the parent consents in writing to the intended placement, the child shall be so placed. [1979 c.423 §5 (enacted in lieu of 343.077)]

343.165 Procedure if parent does not consent or contests recommendation; hearing. (1) If the parent withholds or refuses consent to identification, preplacement or annual evaluation, individual education plan or placement, the school district shall follow procedures prescribed in rules of the Department of Education to act when consent is not obtained.

(2) A hearing shall be conducted pursuant to rules of the Department of Education if the parent:

(a) Contests the determination of the school district concerning identification, preplacement or annual evaluation, individual education plan or placement; or

(b) Claims that the result of the determination of the district is to deny the child free appropriate education.

(3) The department's rules in subsection (2) of this section shall be as consistent as possible with the procedures applicable to a contested case under ORS 183.310 to 183.500. However, the department's rules shall prohibit the introduction of any evidence at the hearing that has not been disclosed to both parties at least five days before the hearing. The parent shall be entitled to have the child who is the subject of the hearing present at the hearing and to have the hearing open to the public.

(4) The school district may also commence the contested case proceedings to obtain a decision whether its identification, preplacement or annual evaluation, individual education plan and placement are appropriate or whether the result of the determination of the district is to provide the child with free appropriate education. [1979 c.423 §6 (enacted in lieu of 343.077)]

343.167 Result of hearing. (1) If the finding at the hearing held under ORS 343.165 is that the identification, preplacement or annual evaluation, individual education plan and placement by the district are appropriate and that the child is being provided a free appropriate education, the hearings officer shall decide in support of the determination of the district.

(2) If the finding at the hearing is that the identification, preplacement or annual evaluation, individual education plan or placement is not appropriate or that the child is not being provided a free appropriate education, the hearings officer shall decide that the school district shall revise or modify its placement in order to provide the child with a free appropriate education.

(3) The decision shall be entered not later than 45 days after the request for hearing is filed unless an extension has been granted by the hearings officer at the request of the parent or the school district. Copies of the decision shall be sent to the parent and to the school district accompanied by a statement describing the method of appealing the decision. Any hearings held under ORS 343.165 must be conducted by an independent hearings officer who is not a regular employe of the school district or the Department of Education. [1979 c.423 §7 (enacted in lieu of 343.077)]

343.170 [Repealed by 1965 c.100 §456]

343.173 Parental rights; costs. (1) Notwithstanding the limitation on access to records under ORS 192.410 to 192.500 and 336.185 to 336.215, the parent is entitled at any reasonable time to examine all of the records of the school district pertaining to placement of the child.

(2) Any parent is entitled to obtain an independent evaluation either before or during the contested case proceedings under ORS 343.165 or before or during an appeal to the Superintendent of Public Instruction under ORS 343.175, if:

(a) The parent disagrees with the identification, preplacement or annual evaluation, individual education plan or placement of the child by the district; and

(b) The parent claims that the child is entitled to but is not being provided a free appropriate education.

(3) If the hearings officer under ORS 343.165 or the Superintendent of Public Instruction under ORS 343.175 decides that the

independent evaluation requires the determination of the school district to be revised significantly, the parent is entitled to have the costs of the independent evaluation that are incurred by the parent paid for by the school district. However, no child is entitled to be the subject of more than one independent evaluation paid for by the district in any given school year.

(4) If the parent is unable to pay for an independent evaluation or seeks a second independent evaluation, and the Department of Education decides that the parent is unable to pay for such an evaluation and has cause to seek such an evaluation, the department may pay for an independent evaluation.

(5) If the department pays for an independent evaluation that produces the result described in subsection (3) of this section, then the department may bill the school district for the cost of the independent evaluation so long as the district has not already paid the costs of an independent evaluation of the particular child during the current school year. [1979 c.423 §8 (enacted in lieu of 343.077)]

343.175 Review by Superintendent of Public Instruction; order; appeal. (1) Notwithstanding ORS 183.480, the decision of the hearings officer under ORS 343.165 shall be reviewed by the Superintendent of Public Instruction:

(a) Upon request therefor by the parent;

(b) If the school district refuses to accept the decision of the hearings officer and notifies the Superintendent of Public Instruction of that refusal; or

(c) If the school district fails to implement the decision within 10 days and the superintendent is notified of that failure by the parent, unless the superintendent extends the time in exceptional cases for a reasonable period.

(2) The superintendent shall conduct an impartial review, examining the entire record of the hearing and determining whether the procedure at the hearing was consistent with the requirements of law. The superintendent may seek additional evidence to be presented if the superintendent finds the record to be inadequate. The parent and the school district shall be given an opportunity to present written and oral argument, or both.

(3) At the conclusion of the review, the superintendent shall enter a written final order modifying, sustaining or reversing the decision of the hearings officer.

(4) The order entered under this section shall be entered not later than 30 days after receipt of the request for the review unless an extension has been granted by the superintendent upon the request of the parent or the school district.

(5) Either the parent or the school district may appeal the order of the superintendent to the Court of Appeals under ORS 183.480. [1979 c.423 §9 (enacted in lieu of 343.077)]

343.177 Effect of contest of placement; change of placement; temporary exclusion of child. (1) If the placement of the child has been contested under ORS 343.165:

(a) The child shall remain in the then current educational program placement until the proceedings are completed if the child is in an educational program.

(b) The child shall be placed with the consent of the parent in a program provided or selected by the district at the district's expense until the proceedings are completed if applying for initial admission to a public school.

(2) The provisions of paragraphs (a) and (b) of subsection (1) of this section do not apply if the parent and the school district agree to temporary placement in some other program.

(3) After completion of the proceedings as described in ORS 343.165 to 343.175, the decision regarding placement of the child shall be considered final unless the placement is changed:

(a) Pursuant to the annual evaluation of the individual educational program of the child;

(b) By agreement of the parent and the school district;

(c) If a significant change occurs in the condition of the child; or

(d) If there is new or additional significant evidence that the identification, preplacement, annual or independent evaluation, the individual education plan, or placement of the child is not consistent with a free appropriate education for that child.

(4) Nothing in ORS 343.153 to 343.177 is intended to prevent the temporary exclusion of a child from the public schools if the condition or conduct of the child constitutes an imminent danger to the health or safety of the child or others. However, no pregnant child shall be excluded from the public schools solely on the basis of pregnancy. [1979 c.423 §10 (enacted in lieu of 343.077)]

343.180 [Repealed by 1965 c.100 §456]

343.183 Effect of school district failure to comply. (1) In addition to and not in lieu of any other sanction that may be imposed against a noncomplying school district, the Department of Education may withhold all or any part of the funds otherwise due a district for special education until the district complies with the requirements of ORS 343.153 to 343.185.

(2) If the Department of Education finds that the school district has refused to pay for the independent evaluation when the results thereof required the determination of the school district to be revised significantly, the department may withhold from funds due the district for special education an amount not to exceed the expense incurred by the parent in obtaining the independent evaluation. The department shall use the funds thus withheld for payment of the costs of the independent evaluation. [1979 c.423 §11 (enacted in lieu of 343.077)]

343.185 Recruitment and appointment of surrogate parents; liability; qualification. (1) The Department of Education, in cooperation with the State Advisory Council for Handicapped Children, shall consult with other organizations that represent the interests of handicapped children to secure nominations of persons to serve as surrogates. The nominees must then be approved by the Department of Education and the department shall maintain a list of approved nominees that shall be made available to school districts. Appointments of surrogates by other than school districts are not required to be made from the approved list. However, an appointing authority which does not use the list must assure that the surrogate is independent and unbiased. A surrogate so appointed may be challenged for bias. The department in cooperation with the council shall establish procedures to insure that surrogates have or can acquire the necessary knowledge and skills to represent the parent to protect the special educational rights of the child.

(2) Whenever the parents of the child are unknown or unavailable or when there is reasonable cause to believe the child is handicapped, and is a ward of the state, the school district shall appoint an individual to serve as a surrogate. The individual must be on the approved list of nominees, as provided in subsection (1) of this section, and shall act as a surrogate for the parent or guardian of the child in protecting the special educational rights of the child. If the district is unwilling or unable to do so, the Department of Education shall appoint an individual to act as a surrogate. A child is entitled to have a surrogate appointed to serve until the child is 21 years of age or until the child is determined to be no longer eligible for special education.

(3) Where a parent in writing consents thereto, a surrogate may be appointed in situations other than those described in subsection (2) of this section.

(4) If a person appointed as a surrogate is no longer able or willing to serve, the person shall notify the appointing authority who shall appoint another surrogate.

(5) Any person appointed as a surrogate pursuant to this section or any other law shall not be held liable for actions taken in good faith on behalf of the parent in protecting the special educational rights of the child.

(6) A person appointed as surrogate shall not be an employe of the appointing authority or of the Department of Education.

(7) Nothing in this section prevents the appointment of a surrogate in a manner otherwise provided by law. [1979 c.423 §12 (enacted in lieu of 343.077)]

343.187 Rules governing special education for pregnant children. In addition to any other rules which may be adopted pursuant to ORS 343.155, the Department of Education shall establish by rule procedures for considering and obtaining special education for pregnant children. Such rules shall include, but not be limited to, the obligation of the school district to:

(1) Inform pregnant students and their parents of the students' rights to special educational services under this section and the availability of such services in the school district or education service district;

(2) Facilitate the provision of related services, including counseling, to pregnant students; and

(3) Inform pregnant students and their parents of the availability of resources provided by other agencies, including health and social services. [1979 c.423 §14 (enacted in lieu of 343.077)]

343.190 [Repealed by 1965 c.100 §456]

343.193 Duty to report when child appears handicapped; effect of report. (1) Any public or private official having reasonable cause to believe that any child with whom the official comes in contact officially is a handicapped child who is eligible for but not enrolled in a special education program shall

report to the Superintendent of Public Instruction the child's name and the facts leading the official to the belief.

(2) Nothing in ORS 44.040 shall affect the duty to report imposed by subsection (1) of this section except that a physician, licensed psychologist, clergyman or attorney shall not be required to report information communicated by an adult if such information is privileged under ORS 44.040.

(3) Upon receipt of a report under subsection (1) of this section, the Superintendent of Public Instruction shall verify whether the child is enrolled in a special education program and may cause an investigation, including an evaluation under ORS 343.227, to be made to determine whether the child is eligible for a program under ORS 343.221 or 343.236.

(4) As used in this section, "public or private official" has the meaning given in ORS 418.740. [1979 c.836 §6]

343.200 [Repealed by 1965 c.100 §456]

343.210 [Repealed by 1965 c.721 §1]

581-15-005 Definitions
The follcwing definitions apply to Oregon Administrative Rules 581-15-015 through 581-15-201, unless the context requires otherwise;

(1) "Consent" means that:
  (a) The parent has been fully informed of all information relevant to the activity for which consent is sought, in the parent's native language or other mode of communication;
  (b) The parent understands and agrees in writing to the carrying out of the activity for which consent is sought, and the consent describes the activity and lists the records (if any) which will be released and to whom; and
  (c) The parent understands that the granting of consent is voluntary on the part of the parent and may be revoked at any time.

(2) "Decision" means the decision of the hearing officer, which shall be final unless reviewed by the State Superintendent of Public Instruction.

(3) "Determination" means the determination by the school district concerning the identification, preplacement or annual evaluation, individualized educational plan or placement of a handicapped child in a program paid for by the district.

(4) "Evaluation" means procedures used to ascertain the aptitude and achievement of the child, as well as to determine whether the child is handicapped, and the nature and extent of the special education that the child needs. The term refers to procedures used selectively with the individual child and does not include basic tests administered to or procedures used with all children in school, grade, or class.

(5) "Handicapped children" includes children who require special education in order to obtain the education of which they are capable, because of mental, physical, emotional or learning problems. These groups include, but are not limited to those categories that traditionally have been designated: mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, other health impaired, children with specific learning disabilities, and individuals who are pregnant.
  (a) "Deaf" means a hearing impairment which is so severe that the child's hearing, with amplified sound, is nonfunctional for the purposes of educational performance.
  (b) "Deaf-blind" means concomitant hearing and visual impairments, the combination of which causes such severe communication and other developmental and educational problems that the child cannot be accommodated in special education programs designed solely for deaf or blind children.
  (c) "Hard of hearing" means a hearing condition which is functional with or without amplified sound, and adversely affects a child's educational performance.
  (d) "Mental retardation" refers to significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period.
    (A) Educable mentally retarded means a child:
      (i) Who has mild retardation,
      (ii) Whose intelligence test score ranges between 2 and 3

standard deviations below the norm on a standardized individual test, and

(iii) Who fully meets eligibility criteria under OAR 581-15-051 (7).

The approved cost of special education programs for educable mentally retarded children will be reimbursed from the Oregon Department of Education under provisions of OAR 581-15-046.

(B) Trainable mentally retarded means a child:

(i) Who has a moderate, severe, or profound level of mental retardation,

(ii) Whose intelligence test score is 3 standard deviations below the mean on a standardized individual test, and

(iii) Who fully meets eligibility criteria under OAR 581-15-051 (7).

The approved excess cost of special education programs for trainable retarded children will be reimbursed from the Oregon Mental Health Division under provisions of ORS 430.780.

(e) "Multihandicapped" means concomitant impairments (such as mentally retarded-blind, mentally retarded-orthopedically impaired,) the combination of which causes such severe educational problems that the child cannot be accommodated in special education programs solely for one of the impairments. The term does not include children who are deaf-blind.

(f) "Orthopedically impaired" means a severe orthopedic impairment which adversely affects a child's educational performance. The term includes impairments caused by congenital anomaly (e.g., clubfoot or absence of some member), impairments caused by disease (e.g., poliomyelitis or bone tuberculosis) and impairments from other causes (e.g., fractures or burns which cause contractures, amputation or cerebral palsy).

(g) "Other health impaired" means limited strength, vitality, or alertness, due to chronic or acute health problems such as a heart condition, tuberculosis, rheumatic fever, nephritis, asthma, sickle cell anemia, hemophilia, epilepsy, lead poisoning, leukemia, or diabetes, which adversely affects a child's educational performance.

(h) "Seriously emotionally disturbed" means an emotional problem which affects a child's educational performance to the extent that the child cannot make satisfactory progress in the regular school program. The seriously emotionally disturbed child exhibits one or more of the following characteristics over an extended period of time and to a marked degree:

(A) An inability to learn at a rate commensurate with the child's intellectual, sensory-motor, and physical development;

(B) An inability to establish or maintain satisfactory interpersonal relationships with peers, parents, or teachers;

(C) Inappropriate types of behavior or feelings under normal circumstances;

(D) A variety of excessive behaviors ranging from hyperactive, impulsive responses to depression and withdrawal; or

(E) A tendency to develop physical symptoms, pains, or fears associated with personal, social, or school problems.

(i) "Specific learning disability" means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which may manifest itself in an

imperfect ability to listen, think, speak, read, write, spell or do mathematical calculations. Children with a specific learning disability are unable to profit from regular classroom methods and materials without special educational help, and are, or will become, extreme underachievers. These deficits may be exhibited in mild to severe difficulties with perception (the ability to attach meaning to sensory stimuli), conceptualization, language, memory, motor skills, or control of attention. Specific learning disability includes such conditions as perceptual handicaps, brain injury, dyslexia, minimal brain dysfunction, and developmental aphasia. The term does not include children who have learning problems which are primarily the result of visual, hearing, or motor handicaps, mental retardation, emotional disturbance, or environmental, cultural, or economic disadvantage.

(j) "Speech impaired" means a communication disorder, such as a language impairment, stuttering, impaired articulation, or a voice impairment, which adversely affects a child's educational performance.

(k) "Visually handicapped" means a visual impairment which, even with correction, adversely affects a child's educational performance. The term includes those children who are partially sighted or blind.

(6) "Independent educational evaluation" means an evaluation that is not conducted by the public agency responsible for the education of the child in question.

(7) "Independent educational evaluator" is a certified or licensed professional examiner who is not a regular employe of the public agency responsible for the education of the child in question.

(8) "Individualized educational program" means an educational plan which is developed and implemented under OAR 581-15-064 through 581-15-069 for each handicapped child.

(9) "Individual having educational knowledge of the child" means the child's teacher, counselor or other person employed by the school district or other agency involved in the education or care of the child who, by professional training or skill and by acquaintance with the child, is in a position to make a professional judgment concerning the child's need for special education.

(10) "Native language" with reference to a person of limited English-speaking ability means the language normally used by that person or, in the case of a child, the language normally used by the parent of the child.

(11) "Order" has the meaning given in ORS 183.310 to 183.500.

(12) "Parent" means the parent or legal guardian, other than a state agency, of the child or the surrogate for the parent appointed pursuant to ORS 343.153.

(13) "Personally identifiable" means information that includes:
(a) The name of the child, the child's parent or other family member,
(b) The address of the child,

(c) A personal identifier, such as the child's social security number or student number, and
(d) A list of personal characteristics or other information which would make it possible to identify the child with reasonable certainty.

(14) "Private educational agency" means the educational component of those agencies listed in ORS 343.960(1) or the agency furnishing such components to the agencies listed therein, and private schools with which school districts contract for the provision of special education to handicapped children pursuant to ORS 343.221(4).

(15) "Private school" means an educational institution or agency not operated by a public agency.

(16) "Regular school year" means the time in which pupils are normally enrolled in an annual period exclusive of any distinct extra or special session, such as separate summer sessions.

(17) "Related services" includes transportation and such developmental, corrective and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, special equipment, reader service, volunteer services to enhance special educational programs, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education, and includes early identification and assessment of handicapping conditions in children.

(18) "School District," as used in ORS 343.153, means a common or union high school district, an education service district or a state agency or institution that is charged with the duty or contracted with by a public agency to care for or educate, or both, children apparently eligible for special education.

(19) "Special education" means instruction specially designed to meet the unique needs of a handicapped child, including regular classroom instruction, instruction in physical education, home instruction, related services, and instruction in hospitals, institutions and special schools.

(20) "Superintendent" means the State Superintendent of Public Instruction or the designee of the State Superintendent of Public Instruction.

(21) "Surrogate Parent" means an individual who acts in place of a parent in safeguarding a child's rights in the special education decision-making process when the parent is unknown, unavailable, or the child is a ward of the state, and the child is handicapped or is suspected of being handicapped.
(a) "Unknown" means the parent cannot be identified or ascertained by diligent inquiry.
(b) "Unavailable" means the public agency, after reasonable efforts, cannot discover the whereabouts of a parent.

(22) "Placement" means educational placement, not social service placement, by a state agency.

(23) "Substitute care provider" means private agency as defined in ORS 418.205(1).

Statutory Authority: ORS 343.055

581-15-075 Prior Notice Required for Identification, Evaluation, or Placement

(1) Written prior notice shall be given to the parent, substitute care provider, or state agency which has legal guardianship of a child, within a reasonable period of time before a school district proposes to initiate or change, or refuses to initiate or change, the identification, preplacement or annual evaluation, individualized educational plan, educational placement of the child, or the provision of a free appropriate public education to the child.

(2) Content of the written prior notice shall include:
(a) A description of the action proposed or refused by the school district;
(b) An explanation of why the district proposed or refused to take the action;
(c) A description of any options which the school district considered and reasons why those options were rejected;
(d) A description of each evaluation procedure, test, record, or report which is directly relevent to the proposal or refusal;
(e) A description of any other factors which are relevant to the school district's proposal or refusal; and
(f) A description of all of the procedural safeguards available to the parent which include the right to:
(A) Inspect and review all educational records with respect to the identification, preplacement or annual evaluation, individualized educational plan and educational placement of the child, and the provision of a free appropriate public education to the child;
(B) A response from the participating agency to reasonable requests for explanations and interpretations of the child's records;
(C) Request that the school district provide copies of the records at a reasonable cost unless the fee would effectively prevent the parent from exercising the right to inspect and review the records in which case the copies shall be provided without cost to the parent;
(D) Have a representative of the parent inspect and review the records;
(E) Obtain an independent educational evaluation of the child pursuant to OAR 581-15-094;
(F) Request from the school district information about where an independent educational evaluation may be obtained;
(G) Refuse consent for preplacement evaluation;
(H) Refuse consent for initial placement of the handicapped child in a program providing special education and related services;
(I) Initiate an impartial due process hearing related to a proposal or refusal to initiate or change the identification,

preplacement or annual evaluation, individualized educational plan or educational placement of the child, or the provision of a free appropriate public education to the child. If the parent desires a hearing the school district must be notified within 20 days of the date the prior notice was mailed to the parent;

(J) Be informed of any free or low-cost legal and other relevant services available in the area;

(K) Request a list of the types and locations of educational records collected, maintained, or used by the school district;

(L) Request amendment of the child's educational records if there is reasonable cause to believe that they are inaccurate, misleading, or otherwise in violation of the privacy or other rights of the child. If the school district refuses this request for amendment, it shall notify the parent within a reasonable time, not to exceed 30 days, and advise the parent of the parent's right to a hearing;

(M) Request a hearing to challenge information in the child's educational records to insure that they are not inaccurate, misleading, or otherwise in violation of the privacy or other rights of the child;

(N) Refuse consent for the disclosure of personally identifiable information related to the child to anyone other than school officials or person acting in an official capacity for the school district collecting or using the information;

(O) Refuse consent for the use of personally identifiable information related to the child for any purpose other than the identification, preplacement or annual evaluation, individualized educational plan or educational placement of the child, or the provision of a free appropriate public education to the child; and

(P) Request the destruction of personally identifiable information collected, maintained, or used by the school district when it is determined by the school district to be no longer needed to provide educational services to the child under the provisions of this rule. However, the required contents of the permanent record must be retained in accordance with the provisions of OAR 581-22-258.

(3) The prior notice must be:
   (a) Written in language understandable to the general public; and
   (b) Provided in the native language of the parent or other mode of communication used by the parent, unless it is clearly not feasible to do so.

(4) If the native language or other mode of communication of the parent is not a written language, the school district shall take steps to insure that:
   (a) The notice is translated orally or by other means to the parent in the parent's native language or other mode of communication;
   (b) A reasonable effort is made to aid the parent in understanding the content of the notice, and
   (c) There is written evidence that the requirements in Section (4)(a) and (b) have been met.

Statutory Authority: ORS 343.055, 343.163 and 343.173

581-15-080 Notice of Hearing and Hearing Rights

(1) Upon receipt of a written request by a parent, or the school district for a hearing regarding the identification, preplacement or annual evaluation, individualized educational plan, educational placement of a child or the provision of a free appropriate public education to a child, the school district board shall appoint a hearing officer, in accordance with OAR 581-15-096, to conduct the hearing and shall provide a notice to the parties of the hearing. The notice shall be served personally, or by registered or certified mail.

(2) Content of the notice shall include:
(a) A statement of the time and place of the hearing;
(b) A statement of the authority and jurisdiction under which the hearing is to be held;
(c) A reference to the particular sections of the statutes and rules involved;
(d) A short and plain statement of the matters asserted or charged;
(e) A statement that, during the pendence of any administrative or judicial proceeding, the child shall remain in the present educational placement unless the school district and the parent agree otherwise for the provision of appropriate educational services. If applying for initial admission to a public school the child, with consent of the parent, shall be placed in a program provided or selected by the district at the district's expense until all proceedings are completed. The school district, however, may temporarily exclude the child if the condition or conduct of the child constitutes an imminent danger to the health or safety of the child or to others;
(f) A statement that any party to a hearing has the right to:
(A) Be accompanied and advised by counsel and by individuals who have special knowledge or training with respect to the problems of handicapped children,
(B) Present evidence and confront, cross-examine, and compel the attendance of witnesses,
(C) Obtain a written or electronic verbatim record of the hearing at a reasonable cost, and
(D) Obtain a copy of the hearing decision;
(g) A statement that the parent involved in a hearing must be given the right to:
(A) Have the child present who is the subject of the hearing, and
(B) Open the hearing to the public.

(3) The notice must be:
(a) Written in language understandable to the general public; and
(b) Provided in the native language of the parent or other mode of communication used by the parent, unless it is clearly not feasible to do so.

(4) If the native language or other mode of communication of the parent is not a written language, the school district shall take steps to insure that:
(a) The notice is translated orally or by other means to the parent in his or her native language or other mode of communication;
(b) A reasonable effort is made to aid the parent in understanding the content of the notice; and

(c) There is written evidence that the requirements in Section (4)(a) and (b) have been met.

Statutory Authority: ORS 343.055, 343.163 and 343.165

581-15-081 When Hearing May be Requested

(1) A parent or the school district may request a hearing when either party does not agree with the identification, preplacement or annual evaluation, individualized educational plan, educational placement of a child, or the provision of a free appropriate education to a child who may be handicapped, and the school district may request a hearing when a parent refuses to give consent pursuant to OAR 581-15-039.

(2) If requested by a parent or if a parent or the school district initiates a hearing, the school district shall inform the parent of any available free or low-cost legal and other relevant services.

(3) If an eligible handicapped child in the custody of the Children's Services Division is receiving educational services pursuant to ORS 343.960, and if the parent requests a hearing, the hearing shall be conducted by the Children's Services Division.

Statutory Authority: ORS 343.055 and 343.165

581-15-084 Failure to Appear at a Hearing

(1) When a parent, having requested a hearing, fails to appear at the specified time and place, the hearing officer shall enter a decision which supports the school district action.

(2) The decision supporting the school district action shall set forth the material on which the action is based, or the material shall be attached to and made a part of the decision.

Statutory Authority: ORS 343.055 and ORS 183.415(5)

581-15-085 Subpoenas and Depositions

(1) Subject to paragraph (2) a hearing officer may upon request by either party issue subpoenas to compel the attendance of witnesses.

(2) Before issuing subpoenas to the requesting party, the hearing officer may require a showing of need, general relevancy and the evidence to be given by the witness to be within the reasonable scope of the proceedings.

(3) On petition of any party, the hearing officer may order the testimony of any material witness to be taken by deposition in the manner prescribed by ORS Ch 45 for depositions in civil cases. The petition shall include:
(a) The name and address of the witness whose testimony is desired;
(b) A showing of materiality of the testimony; and

(c) A request for an order that the testimony of the witness be taken before an officer named in the petition for that purpose.

(4) If the hearing officer issues an order for the taking of a deposition and the witness resides in this state and is unwilling to appear, the hearing officer may issue a subpoena as provided in paragraph (1) requiring the witness's appearance before the officer taking the deposition.

(5) Any witness appearing pursuant to subpoena, other than parties or officers or employes of the school district, shall be tendered fees and mileage as prescribed by law in civil actions. The party requesting the subpoena shall be responsible for service of the subpoena and tendering the fees and mileage to the witness.

Statutory Authority: ORS 343.055, 343.155, 183.425 and 183.440

581-15-087 Evidence

(1) Evidence of a type commonly relied upon by reasonably prudent persons in conduct of their serious affairs shall be admissible, except evidence which has not been disclosed to both parties at least five days before the hearing.

(2) Upon objection by a party the hearing officer may exclude evidence which the hearing officer finds to be irrelevant, immaterial, or unduly repetitious.

(3) Evidence objected to may be received by the hearing officer with rulings on its admissibility or exclusion to be made at the time a final order is issued.

Statutory Authority: ORS 343.055, 343.165 and 183.450

581-15-088 Decision of Hearing Officer

(1) The decision of the hearing officer in a contested case shall be made pursuant to ORS 343.167.

(2) The decision shall be entered not later than 45 days after the request for hearing is filed unless an extension has been granted by the hearing officer at the request of the parent or the school district.

(3) A copy of the hearing decision shall be sent to the parent and school district accompanied by a statement describing the method of appealing the decision.

(4) The school district shall submit a copy of the hearing decision to the Executive Secretary, State Advisory Council for Handicapped Children, Oregon Department of Education.

(5) If the hearing was a closed hearing the district shall delete personally identifiable information before sending a copy of the hearing

decision to the Executive Secretary, State Advisory Council for Handicapped Children.

Statutory Authority: ORS 343.055 and 343.167

581-15-092

(1) Upon request parties are entitled to a verbatim electronic recording or a written transcript of the record of hearing.

(2) The requesting party may be charged the cost of recordings and transcripts furnished unless the charges therefor are reduced or waived in the manner prescribed by ORS 183.415(10).

Statutory Authority: ORS 343.055, and 183.415(8)

581-15-094

(1) If a parent disagrees with the identification, preplacement or annual evaluation, individualized educational plan, placement of the child or the provision of a free appropriate education to the child the parent may request that an independent educational evaluation be made. The cost of the independent evaluation shall be paid in accordance with ORS 343.173. If a hearing regarding the child has been requested, the request for an independent educational evaluation may be made either before or during the contested case proceedings, or before an appeal to the State Superintendent of Public Instruction.

(2) Before an independent educational evaluation is made, the school district may initiate a hearing, as provided in ORS 343.165, on the issue of the appropriateness of its educational evaluation of the child.

(3) The results of an independent educational evaluation:
   (a) Shall be communicated promptly to the school district;
   (b) Shall be considered by the school district with regard to any further action taken concerning the child; and
   (c) May be presented as evidence at a subsequent hearing regarding placement of the child.

(4) Whether an independent educational evaluation is requested or not, the parent shall be given an opportunity to examine all records with respect to the identification, preplacement or annual evaluation, individualized educational plan and educational placement of the child.

(5) The school district shall maintain a list of public and private agencies from which an independent educational evaluation may be obtained and shall furnish the list to the parent upon request.

(6) If a hearing officer requests an independent educational evaluation as a part of a hearing, the evaluation shall be at school district expense if the independent evaluation requires the determination by

the school district to be revised significantly and the child was not the subject of another independent evaluation paid for by the district in a given year.

Statutory Authority: ORS 343.055, 343.167, and 343.173

581-15-099 Surrogate Parents

(1) As defined in ORS 343.153 each school district shall insure that the rights of a child are protected when:
   (a) The parent, as defined in OAR 581-15-005(8), cannot be identified;
   (b) The school district, after reasonable efforts, cannot discover the whereabouts of a parent; or
   (c) The child is a ward of the state and there is reasonable cause to believe the child is handicapped.

(2) A surrogate parent shall be appointed in the manner prescribed in ORS 343.185.

(3) In determining the need for a surrogate, the school district shall consider whether it is likely to take any action regarding the child which would require notice to the parents, substitute care provider, or state agency which has legal guardianship under OAR 581-15-075.

(4) An appointed surrogate parent shall be given written prior notice by the school district of any proposal to initiate, change, or refusal to initiate or change the identification, preplacement or annual evaluation, individualized educational plan, educational placement of the child, or the provision of a free appropriate public education to the child.

(5) Criteria for selection of a surrogate shall insure that the surrogate is:
   (a) Not an employe of the Oregon Department of Education;
   (b) Not an employe of a public agency involved in the education or care of the child;
   (c) Free of any conflict of interest that would interfere with representing the child's special education interests.

(6) A surrogate shall not be considered an employe of a school district solely on the basis that the surrogate is compensated from public funds.

(7) The duties of the surrogate parent are to:
   (a) Protect the special education rights of the child;
   (b) Be acquainted with the child's handicap and the child's special education needs;
   (c) Represent the child in all matters relating to the identification, preplacement or annual evaluation, individualized educational plan and educational placement of the child; and
   (d) Represent the child in all matters relating to the provision of a free appropriate public education to the child.

(8) Pursuant to ORS 343.185 a parent may give written consent for a surrogate to be appointed when:

(a) A parent does not wish to participate or circumstances clearly make it not feasible for the parent to participate in protecting the special education rights of the child; or
(b) The parent lives at such a distance from the child's educational placement that it is not practicable to participate in protecting the special education rights of the child.

(9) A request for change or termination of assignment as surrogate may be made when:
(a) The person appointed as surrogate is no longer willing to serve;
(b) The child reaches 21 years of age or the child's elementary/secondary schooling is terminated;
(c) The child is no longer eligible for special education services;
(d) The legal guardianship of the child is transferred to a person who is able to carry out the role of the parent;
(e) The parent, who was previously unknown or unavailable, is now known or available; or
(f) The appointed surrogate is no longer eligible.

(10) Pursuant to ORS 343.185 a person appointed as surrogate shall not be held liable for actions taken in good faith on behalf of the parent in protecting the special education rights of the child.

(11) The school district shall not appoint a surrogate when the parent is uncooperative or unresponsive to the special education needs of the child.

Statutory Authority: ORS 343.055 and 343.185

581-15-100 Special Education for Pregnant Individuals

(1) School districts shall insure that pregnant individuals receive such special education services as temporarily necessitated by their condition.

(2) Special education and related services for pregnant individuals shall be consistent with the requirements in ORS 343.187.

Statutory Authority: ORS 343.055 and 343.187

581-15-105 Administrative Review of Local District Hearing Decision

(1) The decision of the hearing officer under OAR 581-15-088 shall be reviewed by the State Superintendent of Public Instruction:
(a) Upon request by the parent;
(b) If the school district refuses to accept the decision of the hearing officer and notifies the State Superintendent of that refusal; or
(c) If the school district fails to implement the decision within 10 days and the State Superintendent is notified of that failure by the parent, unless the State Superintendent extends the time in exceptional cases for a reasonable period.

(2) A petition to review the hearing officer's decision shall be filed by the parent with the State Superintendent of Public Instruction

within 20 days of the date of the decision. The petition shall be served on all parties and on the State Superintendent personally or by certified mail.

(3) The petition to review shall specify the reasons for the request the alleged procedural or substantive errors and omissions in the hearings record and in the hearing decision, a request for oral arguments, if desired, and any legal arguments to support the appellant's position.
   (a) Within 15 days of the date on which the petition for review is filed, the respondent may file a response to the petition. The response shall speak to the issues raised in the petition. The response shall be served on all parties and the State Superintendent personally or by certified mail.

(4) If an oral argument is requested by either party, and granted by the State Superintendent, the Superintendent may hear such oral arguments within 10 days after the respondent's response is due. Oral arguments shall be conducted at a time and place reasonably convenient to the parties involved.

(5) The State Superintendent's review of the case shall be confined to the record of the original proceeding. The hearing decision from the original proceeding shall be reversed only if the State Superintendent finds:
   (a) The hearing decision to be unlawful in substance or procedure, but procedure shall not be cause for reversal unless substantive rights of the appellant were prejudiced; or
   (b) The hearing decision is not supported by substantial evidence in the record.

(6) The State Superintendent may ask for clarification of the evidence in the record, or may seek additional evidence to be presented if the State Superintendent feels the record to be inadequate. The State Superintendent may also take notice of judicially cognizable facts, or general, technical, or scientific facts within the field of Special Education. Prior to making a final order the State Superintendent shall notify the parties of any materials so noticed and shall afford the parties an opportunity to contest the facts so noticed.

(7) Within 30 days from the date on which the petition for review is received, the State Superintendent shall reverse or affirm the hearing decision. The State Superintendent may extend the time for issuing an order upon the request of a party or upon a showing of good and sufficient cause. A copy of the findings and order shall be sent by certified mail or delivered personally to each of the parties. Each party shall be notified of the right to appeal the order of the State Superintendent to the Court of Appeals under ORS 183.480. A copy of the order with all personally identifiable information deleted shall be filed with the State Advisory Council for Handicapped Children.

(8) The State Superintendent may order time extensions beyond the periods set forth in this rule.

Statutory Authority: ORS 343.055 and 343.175