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# RECENT CHANGES IN THE LAW AFFECTING EDUCATIONAL HEARING PROCEDURES FOR HANDICAPPED CHILDREN

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*This article is a revised version of a report originally prepared for the Maryland State Bar Association, Special Committee on Law and the Handicapped by members of the Education Sub-committee. The article reviews and analyzes recent changes in the law affecting procedures for diagnosis, evaluation, and educational placement of handicapped children. The article reflects the views of the authors, and does not necessarily reflect the position of the Maryland State Bar Association.*

## I. INTRODUCTION

In the last two years, many changes have occurred in Maryland hearing procedures for placement of handicapped children in appropriate educational programs. Section 100A of Article 77 of the Maryland Annotated Code, the basic governing statute in the area, was amended once during the 1976 Session of the Maryland General Assembly, and three times during the 1977 Session.<sup>1</sup> In November, 1975, Congress, in recognition of the right of a handicapped child to a free public education, amended the Education of the Handicapped Act<sup>2</sup> by enacting P.L. 94-142.<sup>3</sup> The amendments added new Section 615 to the Act, prescribing procedural safeguards for educational placement of handicapped children.<sup>4</sup> In May, 1977, the Department of Health, Education and Welfare (hereinafter HEW) promulgated regulations<sup>5</sup> implementing the antidiscrimination provisions of

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1. MD. ANN. CODE art. 77, § 100A (1975) (set out at Appendix I and II).
2. 20 U.S.C. §§ 1401-1461 (1970).
3. 20 U.S.C. §§ 1401-1461 (Supp. V 1975) (amending 20 U.S.C. §§ 1401-1461 (1970)).
4. 20 U.S.C. § 1415 (Supp. V 1975); see also *id.* at § 1402(15), (19); § 1412(2)(B), (4)-(6); § 1413(a)(4); § 1414(a)(5).
5. 42 Fed. Reg. 22676 (1977).

Section 504 of the Rehabilitation Act of 1973,<sup>6</sup> which likewise contain provisions prescribing procedural safeguards for educational placement of handicapped children. Finally, in August, 1977, HEW promulgated federal regulations implementing P.L. 94-142,<sup>7</sup> including its procedural provisions.<sup>8</sup> This article summarizes the law before 1976, and analyzes and explains the recent legislative developments in the area.

The recent changes can best be understood if one has in mind a general outline of the basic steps involved in hearing procedures for educational placement of handicapped children.<sup>9</sup> When the issue of placement in a nonpublic school is not involved, the procedures are relatively straightforward. Either the parents or the local educational agency (hereinafter LEA) may initiate a proposal regarding a new educational program for a handicapped child. These proposals are handled administratively by the local agencies, but are addressed in different ways in different counties. If parents are not satisfied with the LEA's administrative solution, they may request a hearing at the local level before a hearing officer (often called a "local level hearing"). The LEA is required to give notice to the parents before making important changes in a child's educational program, and to advise parents of their right to a prior local level hearing. The decision of the local level hearing officer may be appealed to the State Board of Education (hereinafter BOE),<sup>10</sup> in which case the appeal is decided not by the BOE itself, but instead by a three-member hearing review board (in a proceeding often called a "state level hearing"). The decision of the hearing review board is subject to judicial review.

When placement in a private educational institution at the expense of the public schools is involved, the procedures become more complicated. As in other cases, either parents or the LEA may propose a funded nonpublic placement for a handicapped child. If the LEA disapproves a nonpublic placement sought by the parents, the decision is subject to a local level hearing as in other cases. The decision of the local level hearing officer is subject to appeal to

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6. 29 U.S.C. § 794 (Supp. V 1975).

7. 42 Fed. Reg. 42473 (1977) (to be codified in 45 C.F.R. § 121a.1 to -.754).

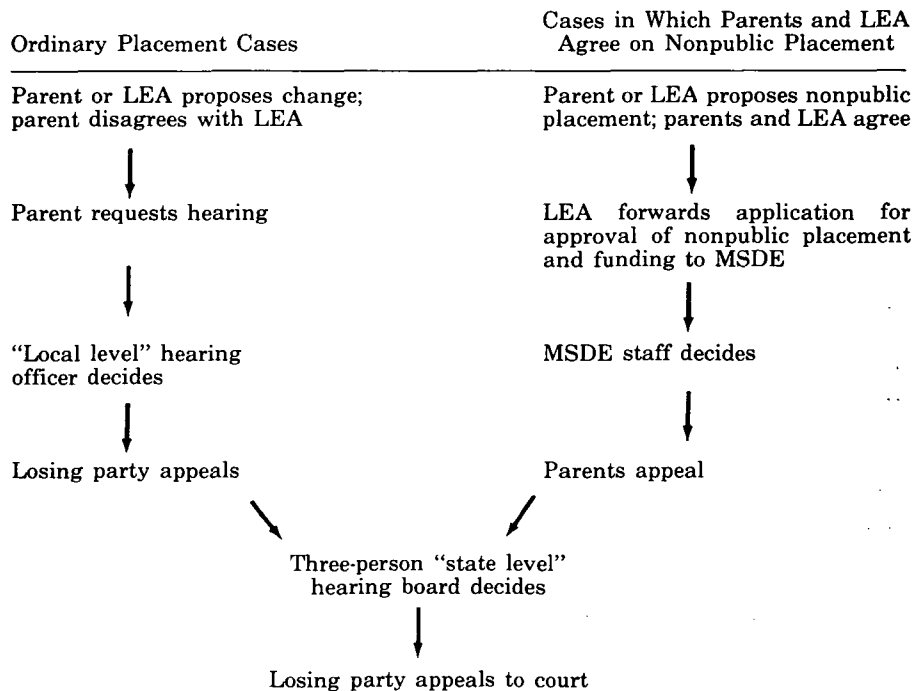
8. 42 Fed. Reg. 42494 (1977) (to be codified in 45 C.F.R. § 121a.500 to -.593).

9. See generally Comment, *A Procedural Guideline For Implementing The Right To Free Public Education For Handicapped Children*, 4 U. BALT. L. REV. 136 (1974); THE SPECIAL COMMITTEE ON MENTAL RETARDATION AND THE LAW OF THE MARYLAND STATE BAR ASSOCIATION, *GUIDE TO EDUCATIONAL PROCEDURES FOR HANDICAPPED CHILDREN* (1975) (hereinafter cited as *GUIDE*).

10. The state BOE, composed of nine members, is appointed by the governor, with the advice and consent of the senate. The state BOE is the "head" of the Maryland State Department of Education, determines educational policies of the state, and passes bylaws and regulations governing the administration of the public school system. MD. ANN. CODE art. 77, §§ 2, 3, 6 (Cum. Supp. 1977).

higher levels as in other cases; that was true, at least, until the enactment of Section 106D(g) of Article 77 of the Maryland Annotated Code, discussed below. On the other hand, if the parents and the LEA agree on a nonpublic placement, the LEA forwards an application for funding to the Maryland State Department of Education (hereinafter MSDE).<sup>11</sup> If the staff of the MSDE approves, the nonpublic placement is funded. If the staff of the MSDE does not approve, however, their decision can be appealed to a state level hearing review board, with judicial review thereafter.

Schematically, the steps are as follows:



## II. LAW BEFORE 1976

Hearing procedures in connection with the educational placement of handicapped children were the subject of litigation and court decisions before the adoption of procedures in Maryland.<sup>12</sup> In

11. The state department of education, executes policy, and enforces regulations adopted by the BOE. The department of education includes the state BOE, the state superintendent of schools, and the professional staff employed by the BOE.

12. See, e.g., *Mills v. Board of Educ. of D.C.*, 348 F. Supp. 866 (D.D.C. 1972); *Pennsylvania Ass'n for Retarded Children v. Pennsylvania*, 334 F. Supp. 1257 (E.D. Pa. 1971), and 343 F. Supp. 279 (E.D. Pa. 1972).

*Maryland Ass'n for Retarded Citizens v. Maryland*,<sup>13</sup> a 1973 case, the Association for Retarded Citizens sued state and local educational authorities in federal court, claiming that all handicapped children had a right to education, and that under the due process clause of the fourteenth amendment such children and their parents had a right to a hearing in connection with their educational placement. The right-to-hearing claim was dismissed by the plaintiffs voluntarily when the General Assembly enacted Section 100A of Article 77, and the BOE adopted Bylaws prescribing standards for local and state level hearing procedures.<sup>14</sup>

As originally enacted, Section 100A (Appendix I), together with provisions in the Bylaws dealing with pre-hearing procedures, provided for administrative due process at both the local and state levels, and judicial review thereafter. The principal features of these provisions were as follows:

A. *Local Level Procedures*

1. The parents of a handicapped child had the right to review information pertaining to screening, educational assessment, and the educational management plan.<sup>15</sup>

2. Parents had the "right of prior informed consent regarding their child's psychological evaluation, confidential information usage, special education programming, and placement."<sup>16</sup>

3. Local education authorities were responsible for "continuous screening of children for problems which impede learning."<sup>17</sup>

4. Each LEA was required to provide an "appropriate educational assessment" for all children identified through established screening procedures "as potentially in need of special educational programs and services."<sup>18</sup> According to the Bylaws, the educational assessment was to include at least the following, "when appropriate":

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13. No. 72-733-M (D. Md. July 19, 1972).

14. Maryland State Board of Education, Bylaw 13.04.01.21 (1975) (hereinafter cited as Bylaw). State BOE Bylaws are included in *The Public School Laws of Maryland* (Michie), which may be purchased from the Maryland State Department of Education.

To make effective use of these procedures, it is necessary to be familiar not only with the procedural provisions themselves, but also with federal, state, and local rules governing special education, including P.L. 94-142, the regulations implementing P.L. 94-142, the regulations implementing Section 504 of the Rehabilitation Act of 1973, Section 106D of Article 77 of the Maryland Annotated Code, and the state BOE Bylaws, all of which are more fully discussed in the text.

15. Bylaw 13.04.01.03.A.

16. *Id.* 13.04.01.03.C.

17. *Id.* 13.04.01.04.A.

18. *Id.* 13.04.01.04.B.

- a. attending skills and impulse control
- b. visual and auditory discrimination and perception
- c. receptive and expressive language
- d. speech development
- e. visual and auditory acuity
- f. visual and auditory memory — both short and long term
- g. input and output processes
- h. fine and gross motor skills
- i. social and emotional development including peer and teacher relationships
- j. medical and health status
- k. subject area achievement
- l. career interest and vocational aptitudes.<sup>19</sup>

The Bylaws further provided:

“The results of an educational assessment shall be written and shall include academic achievement, developmental patterns, techniques of learning, and behavioral patterns.”<sup>20</sup>

5. Each LEA was required to have an interdisciplinary admission, review, and dismissal (“ARD”) committee responsible for evaluation of educational assessment reports and recommendations for programming.<sup>21</sup>

6. With respect to programming, the Bylaws provided:

- B. Before admission into special education programs and services a child shall have a written educational assessment and a written educational management plan.
- C. The period between initiation of educational assessment and admission to appropriate programs and services shall be no longer than six months.
- D. The educational management plan shall have a direct and observable relationship to the assessment findings and to State and local curriculum goals. The objectives, activities, materials, and equipment for the curriculum goals shall be adopted to the needs, interests, and abilities of each child. This plan shall be periodically reviewed and modified when necessary.<sup>22</sup>

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19. *Id.*

20. *Id.*

21. *Id.* 13.04.01.05.A.

22. *Id.* 13.04.01.05.

7. Notice had to be given to parents, and parents were entitled to a hearing if they requested one, before a child (1) was placed in a program of special education, (2) was transferred to another significantly different program, (3) was denied a program of special education requested by his parents, or (4) was excluded from local free education programs.<sup>23</sup>

8. Except in emergency cases subject to shorter time limits, a hearing had to be held within forty-five days after a request for the hearing, and the hearing officer was required to announce his findings and decision within thirty days after the hearing. Thus, the initial decision was supposed to be rendered not later than seventy-five days after the request for a hearing.<sup>24</sup> No sanctions, however, were imposed for violations of these time limitations.<sup>25</sup>

9. Parents were entitled to examine all school system records relating to their child, to be represented by counsel or other persons, to present evidence both in documentary form and through witnesses, to call school system employees as witnesses, to question school system witnesses, to determine whether the hearing would be open or closed to the public, and to receive a tape or transcript of the proceedings.<sup>26</sup>

10. Hearing officers could not be persons who recommended the placement action under consideration, or who furnished significant advice or consultation in connection with the placement.<sup>27</sup> Employees of the LEA, however, were not prohibited from serving as hearing officers.

11. The decision had to be based solely on the record and limited to alternatives proposed by the staff, or the parents, prior to the hearing.<sup>28</sup>

12. Each child was entitled to free appropriate educational programs, either in the public schools, or in some other public or nonpublic facility, if an appropriate education could not be provided in the public schools.<sup>29</sup> In educational placement cases, therefore, the

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23. *Id.* 13.04.01.21.B.1. Exclusion from free educational programs was later held to be unlawful in *Maryland Ass'n for Retarded Children v. State*, No. 77676 (Balt. Co. Cir. Ct. May 3, 1974) (often referred to as the *Raine* decree). The draftsmen of the local level procedures intended that refusals to approve tuition assistance requests in connection with nonpublic placement of handicapped children were subject to review under these provisions. *GUIDE*, *supra* note 8, at 4. The MSDE has agreed with this view, but the point has been a matter of contention and needs to be dealt with more clearly in the Bylaws. *See, e.g.*, *Petition for Reconsideration granted in Matter of Giardina*, No. HE-1-76-FD, Maryland State Board of Education (June 29, 1977).

24. Bylaw 13.04.01.21.B.2, 7.

25. *See, e.g.*, *Petition for Reconsideration granted in Matter of Giardina*, No. HE-1-76-FD, Maryland State Board of Education (June 29, 1977).

26. Bylaw 13.04.01.21.B.5, 6.

27. *Id.* 13.04.01.21.B.6.d.

28. *Id.* 13.04.01.21.B.6.g.

29. *Maryland Ass'n for Retarded Children v. State*, No. 77676 (Balt. Co. Cir. Ct. May 3, 1974).

basic standard of decision was "appropriateness" of placement, which was defined in the Bylaws as that which reasonably meets the educational needs of the child in the least restrictive setting.<sup>30</sup>

13. Parents had to be notified of procedures for appealing the decision to the next highest authority.<sup>31</sup> No procedures or time limits were prescribed by the state Bylaws for local appeals from hearing officers' decisions, leaving that a matter to be governed by locally adopted rules.<sup>32</sup> Practices varied widely from county to county. Some, such as Montgomery County, allowed appeals to the local superintendent and then to the local board of education, provided a *de novo* hearing at each level, and prescribed strict time limits on disposition of appeals at each level.<sup>33</sup> Others, for example, Baltimore County, allowed an appeal to the local board of education on the record established before the original hearing officer, and imposed no time limit on disposition of the appeal.<sup>34</sup> Still others, like Prince George's County, did not provide for appeals to the local board of education.<sup>35</sup>

14. Except in emergency cases and expedited cases in which children were not in school, changes in placement could not be made without the parents' consent, pending the decision of the initial hearing officer. Once the decision was made, however, it had to be implemented as soon as possible, and in any event, within thirty days, unless the hearing officer stayed his decision pending appeal.<sup>36</sup>

### *B. State Level Procedures*

1. Cases could only be appealed to state level hearing review boards "after exhaustion of all locally available administrative remedies and procedures," i.e., all appeals allowed by local rules and practices.<sup>37</sup> The MSDE enforced this provision strictly.<sup>38</sup>

2. The kind of cases subject to appeal at the state level were described in Section 100A(a) and the Bylaws<sup>39</sup> as involving handicapped children in which review was sought "of (1) diagnosis, (2) evaluation of educational programs provided for the child by the local . . . board of education, or (3) the exclusion or exemption from

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30. Bylaw 13.04.01.21.B.6.h.

31. *Id.* 13.04.01.21.B.7.

32. *Id.* 13.04.01.21.B.10.

33. Montgomery Co. BOE Res. 563-74 (Nov. 12, 1974).

34. Baltimore Co. Pub. Schools, Policy (Feb. 14, 1974).

35. PRINCE GEORGE'S COUNTY PUBLIC SCHOOLS, PRINCE GEORGE'S COUNTY'S ADMINISTRATIVE HANDBOOK (1976-77).

36. Bylaw 13.04.01.21.B.8.

37. MD. ANN. CODE art. 77, §100(a) (1975); Bylaw 13.04.01.21.A.

38. *See, e.g.*, Matter of Giardina, No. HE-1-76-FD, Maryland State Board of Education (June 29, 1977).

39. Bylaw 13.04.01.21.A.



school privileges of the child by the local . . . board of education.”<sup>40</sup> Customarily, requests for state level hearings were entertained following adverse local decisions, and also following adverse decisions by the staff of the MSDE in tuition assistance cases.

3. Section 100A(a) provided that the state authorities would establish a three-person hearing review board within sixty days after receipt of a request for review following exhaustion of local procedures. The Bylaws added additional time limits. Upon receipt of a request for review, the MSDE was required to send the parents an official application, which had to be returned in fifteen days.<sup>41</sup> The hearing review board (which the MSDE presumably appointed at this stage) then had to conduct an initial review of the application and the child’s records within twenty days in order to determine whether there was “good cause” or “sufficient cause” for a hearing.<sup>42</sup> The state superintendent of schools<sup>43</sup> was then required to notify the parents of the outcome within five days.<sup>44</sup> If the board decided to hold a hearing, the hearing had “to be scheduled by written notice within 20 days,”<sup>45</sup> but no time limit applied to the actual hearing. After the hearing, the chairman of the board had to notify the MSDE of the board’s decision within five days, and the board was required to render a formal judgment, including findings, within ten days.<sup>46</sup>

4. As at the local level, parents were entitled to examine records pertaining to their child, to be represented by counsel or others, to present evidence in documentary form and through witnesses, to question witnesses, to determine whether the hearing would be open or closed to the public, and to receive a tape or transcript of the proceedings.<sup>47</sup> Unlike the local level procedures, however, the state level procedures did not include any provision enabling parents to require the attendance of school system employees as witnesses;<sup>48</sup>

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40. MD. ANN. CODE art. 77, §100A(a) (1975); Bylaw 13.04.01.21.A., A.6.b.(1). This obscure phraseology would seem to include all the kinds of local placement decisions that were subject to appeal under the local level standards summarized above. GUIDE, *supra* note 8, at 3-5, 31-32. However, at least one county took the position that applications for tuition assistance were not covered, suggesting the need for clarification in the Bylaws. See Matter of Giardina, No. HE-1-76-FD, Maryland State Board of Education (June 29, 1977).

41. Bylaw 13.04.01.21.A.1.

42. *Id.* 13.04.01.21.A.2. See generally GUIDE, *supra* note 8, at 34-35, for an explanation of the “good cause” requirement and its proper application.

43. The state BOE appoints the state superintendent of schools for a four year term, and his function is to direct the MSDE. MD. ANN. CODE art. 77, §23 (1975).

44. Bylaw 13.04.01.21.A.2.

45. *Id.*

46. *Id.* 13.04.01.21.A.6.B.(4), c.(1), (2).

47. *Id.* 13.04.01.21.A.3-5.

48. The attendance of such witnesses may be compelled under the Maryland Rules of Procedure. MD. RULE 114(b).

instead, the Bylaws provided only for the opportunity to question witnesses "called by the Hearing Review Board."<sup>49</sup>

5. Members of the state level hearing boards could be employees of the MSDE, or "qualified" persons from outside the department, but could not be persons who played some role in the child's case previously.<sup>50</sup>

6. Unlike the local level standards, the state level standards did not require that the decision of the hearing review board be based solely on the record. In a guide to hearing procedures, published by the Special Committee on Retardation and the Law of the Maryland State Bar Association (hereinafter Bar Committee's Guide), the committee concluded that a decision on the record was required.<sup>51</sup> The state level boards were also given authority "to confirm, modify, or reject any diagnosis, evaluation, educational program prescribed or exclusion<sup>52</sup> or exemption from school privileges and prescribe alternate special educational programs for the child,"<sup>53</sup> while the authority of local level boards was confined to the selection of alternatives proposed by the parties. The Bar Committee's Guide concluded, however, that the state level boards' powers did not include the power to prescribe placements as to which the parties had not been given the opportunity to present relevant evidence.<sup>54</sup>

7. Unlike the local level procedures, the state level procedures made no attempt to state any standard of decision.

8. Decisions of the hearing review boards were appealable to the circuit court for the child's county of residence or, in the case of Baltimore City children, to any one of the three common law courts of the Supreme Bench of Baltimore City.<sup>55</sup> Parents were routinely advised of the appeal procedures by the MSDE, but were not told that such appeals were subject to the thirty-day limit prescribed by the Maryland Rules of Procedure,<sup>56</sup> an omission which created a risk of inadvertent loss of the right to judicial review.

9. No provision was made in the state level standards for postponement of changes in placement when a decision of the hearing review board was pending.

49. Bylaw 13.04.01.21.A.5.c.

50. *Id.* 13.04.01.21.A.6; MD. ANN. CODE art. 77, § 100A(b) (1975).

51. GUIDE, *supra* note 8, at 40-41.

52. The reference to exclusions is now outdated since it is no longer lawful to exclude a handicapped child from a free education. See discussion note 23 *supra*; 42 Fed. Reg. 22682 (1977) (to be codified at 45 C.F.R. § 84.33(d)).

53. MD. ANN. CODE art. 77, § 100A(d) (1975); By law 13.04.01.21.A.6.b.

54. GUIDE, *supra* note 8, at 39. The power of the state level board was challenged in *Cantor v. Maryland State Dep't of Educ.*, No. 11677 (Howard Co. Cir. Ct.). Before the case was argued, however, the state consented to the placement originally requested and on which evidence had been presented.

55. MD. ANN. CODE art. 77, § 100A(d) (1975).

56. MD. RULE B-4 (1977). See generally GUIDE, *supra* note 8, at 42.

### C. *Judicial Review*

Decisions of the hearing review boards were subject to judicial review in the state courts<sup>57</sup> under the State Administrative Procedure Act.<sup>58</sup>

## III. CHANGES IN THE LAW

### A. *Maryland Law*

#### 1. Chapter 240, Acts of 1976<sup>59</sup>

The first change in the law governing the hearing procedures described above was occasioned by changes in the funding for education of handicapped children. In 1976, the Governor's Commission on Funding of Education of Handicapped Children (the Schifter Commission) recommended minimum expenditures for the education of handicapped children throughout the state, to which state and local authorities would contribute in varying amounts under a complicated equalization formula. In addition, the Schifter Commission recommended that the state make an additional contribution in cases in which it was necessary to place handicapped children in nonpublic programs costing more than three times the local average per capita cost. These recommendations were codified as Sections 106G-1 to G-8 of Article 77 of the Maryland Annotated Code.

In exchange for agreeing to the adoption of the recommendations on funding of nonpublic placements, the Governor insisted on two amendments to the existing substantive and procedural laws governing education of handicapped children. First, he insisted on the addition of a new subsection (g) to Section 106D in order to give the MSDE extensive power over the approval of nonpublic placements. The new subsection (g) provides:

(g) *Placement in nonpublic educational program.* — A child in need of special educational services that are not then provided in a public county, regional, or State program shall be placed in an appropriate nonpublic educational program offering these services. The cost of the nonpublic educational program shall be paid by the State and the county in which the child is domiciled in accordance with §106G-3 (d) or §106G-4 (d), as applicable. *However, payment or reimbursement for a nonpublic program may not be provided unless (1) the nonpublic program, (2) the placement in it, (3) the cost of the program, and (4) the amount of payment or reimbursement, are approved by the*

57. MD. ANN. CODE art. 77, §100A(d) (1975). See generally GUIDE, *supra* note 8, at 41-44 (description of procedures for judicial review in state courts).

58. MD. ANN. CODE art. 41, §§244-256A (Cum. Supp. 1977).

59. Act of May 4, 1976, ch. 240, 1976 Md. Laws (effective July 1, 1976).

*State Department of Education.* As part of the authority granted to it by subsection (a) of this section, the State Board of Education shall adopt bylaws setting forth standards and guidelines for these approvals. Except for a placement resulting from an appeal from a decision of the State Department of Education taken under the Administrative Procedures Act, a child may not be placed in a nonpublic educational program at public expense by any court unless the placement is in accord with this subsection (g). The State Department of Education shall be notified of every case in which placement of a child in a nonpublic educational program at public expense is sought or is under consideration by the court, and shall be made a party to the proceeding.<sup>60</sup>

The Governor also insisted that the power of hearing review boards with respect to nonpublic placements be made subject to the provisions of Section 106D(g), quoted above, by amending Section 100A(d) to read in relevant part as follows:

(d) *Subject to the provisions of § 106D(g),* the hearing board shall have the authority to confirm, modify, or reject any diagnosis, evaluation, educational program prescribed or exclusion or exception from school privileges and prescribe alternate special educational programs for the child.<sup>61</sup>

These provisions appear to give the MSDE staff, not the hearing review boards under Section 100A, the last word with respect to nonpublic placement of particular children and the extent of the funding of these placements. This construction of the provisions would restrict or nullify the right to a hearing concerning placement, and the right to a free education, both guaranteed by federal law as of October 1, 1977.<sup>62</sup> To preserve these rights the state BOE can provide a hearing when parents wish to appeal decisions of the staff under Section 106D(g).<sup>63</sup> It would be helpful for the state BOE to adopt bylaws implementing these amendments in a way that clarifies the respective jurisdictions of the staff, the state BOE, and the hearing review boards, and spells out procedures so that all parties and their counsel would know how to proceed.

60. MD. ANN. CODE art. 77, § 106D(g) (Cum. Supp. 1977) (emphasis added).

61. *Id.* § 100A(d) (Cum. Supp. 1977) (emphasis added).

62. 20 U.S.C. § 1415 (Supp. V 1975).

63. Just this kind of problem arose in one recent case in which the MSDE staff refused to fund a placement which had been approved by a hearing review board, and the parents appealed the staff's action to the state BOE, which eventually reversed the staff. Matter of Giardina, No. HE-1-76-FD, Maryland State Board of Education (June 29, 1977).

2. Chapter 413, Acts of 1977 (HB 288)<sup>64</sup>

The second change in the law was made during the 1977 Session of the Maryland General Assembly by HB 288, emergency legislation declared effective upon passage. HB 288 made three changes in Section 100A. First, it added provisions prescribing a time limit of sixty days applicable to local level hearings. Second, it prohibited local system employees or persons having interests conflicting with objectivity from serving as hearing officers at the local level. Third, it prohibited employees of either the MSDE or the local system, and persons having interests conflicting with objectivity, from serving on hearing review boards at the state level.<sup>65</sup>

These amendments are self-explanatory. The amendments concerning qualifications of hearing officers conform the Maryland procedures to the new federal requirements, discussed below. HB 288 still left uncertainty with respect to one important issue — whether

64. Act of May 17, 1976, ch. 413, 1977 Md. Laws (effective from date of passage) (Delegates Bienen and Pesci).

65. The changes with respect to local level hearings were made by renumbering Subsections (a) through (e) of old Section 100A as (c) through (g) and adding new Subsections (a) and (b) at the beginning of the section. These new subsections read as follows:

(a) 'Local board of education', as used in this section, includes the Board of School Commissioners of Baltimore City.

(b) After a placement decision by the local board of education for a child who is mentally, physically or emotionally handicapped has been rendered, the parent or guardian of the handicapped child may request in writing to the local board of education a review of the placement decision. Within 60 days of receipt of this request for a review, the local board of education shall appoint a hearing officer or board of persons knowledgeable in the fields and areas significant to the educational review of the handicapped child to hear and render a decision. Within the same 60-day period, the hearing officer or board of persons shall review the placement and render its decision. The hearing officer or members of the hearing board may not be employees of the local board of education which has direct responsibility for the education or care of the child or any person having an interest which would conflict with his or her objectivity in the hearing.

MD. ANN. CODE art. 77, § 100A(a)-(b) (Cum. Supp. 1977).

Amended Section 100A then went on to provide, as it did in Subsection (a) before HB 288 was enacted, that "after exhaustion of all locally available administrative remedies and procedures," parents may appeal to a state level hearing review board. MD. ANN. CODE art. 77, § 100A(c) (Cum. Supp. 1977).

The changes with respect to the qualifications of members of state level hearing review boards were made by repealing the provisions governing such qualifications in old Section 100A(b) and substituting a renumbered Section 100A(d) reading as follows:

(d) The State Board of Education shall on receipt of request for review within 60 days, establish a hearing board of not less than three qualified persons knowledgeable in the fields and areas significant to the educational review of the child. A person may not serve as a member of the hearing board if he or she (1) is an employee of the State Board of Education or of the local board of education which is involved in the education or care of the child or (2) has an interest which would conflict with his or her objectivity in the hearing.

MD. ANN. CODE art. 77, § 100A(d) (Cum. Supp. 1977).

the new sixty-day time limit applies to all local procedures from start to finish, or simply to the first level in existing procedures, beginning with the parents' request for a hearing and ending with the initial hearing officer's decision following the hearing.<sup>66</sup> The question, however, is now moot, because the new federal regulations,<sup>67</sup> discussed below, impose a shorter forty-five-day limit from request to decision coupled with a provision for finality.

### 3. Chapter 884, Acts of 1977 (SB 300)<sup>68</sup>

The third change in the law was made by SB 300. Originally SB 300 would have amended Section 100A to prohibit employees of the MSDE and the responsible local boards from serving on state level hearing review boards. That proposal, however, was eventually rejected. SB 300, instead, reenacted old Section 100A with only minor changes, deleted the provisions as to qualifications of hearing board members in old subsection (b), and added a new subsection to Section 100A, providing as follows:

(h) Except for a review conducted by a Circuit Court or by the Supreme Bench of Baltimore City, any review conducted at the request of a parent or guardian of a handicapped child shall be conducted consistent with the provisions of this Section and applicable federal law.<sup>69</sup>

This addition makes clear that hearings under Section 100A are to be conducted in compliance with federal requirements, and that Maryland statutes and bylaws are to be construed in conformity with federal law. Enactment of SB 300 had no other effect on the law.

### 4. Chapter 886, Acts of 1977 (SB 364)<sup>70</sup>

SB 364 further amended Section 100A. It modified Section 100A(b) by eliminating the former requirement that the state BOE

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66. It may well be that the authors of the provision intended to require local authorities to finish all local level procedures in 60 days unless the time limit is waived by the parents. While the provision clearly reduced to 60 days the 75 day time allowed from a request for a hearing to a decision by the hearing officer at the local level, the provision did not say that further local level appeals were precluded. On the contrary, like the existing Bylaws, Section 100a as amended by HB 288 contemplates local level "remedies and procedures," in the plural. Instead of providing that the initial local level decision may be appealed to a state level hearing review board, Subsection (c) of amended Section 100a provides that "[a]fter exhaustion of *all* locally available administrative remedies and procedures," parents may seek state level review. MD. ANN. CODE art. 77, §100A(c) (Cum. Supp. 1977) (emphasis added).

67. 45 C.F.R. 121a.508(b)(1) (1977).

68. Act of May 26, 1977, ch. 884, 1977 Md. Laws (effective July 1, 1977) (Senator Dorman).

69. MD. ANN. CODE art. 77, §100A(h) (Cum. Supp. 1977).

70. Act of May 26, 1977, ch. 886, 1977 Md. Laws (effective July 1, 1977) (Senator Bishop).

establish hearing review boards within sixty days after receipt of a request for review. The bill added a new subsection to Section 100A, imposing sixty-day time limits on the disposition of appeals at both the local level and the state level, and creating a right to go to court if the state authorities fail to decide a case within sixty days.<sup>71</sup> The new subsection provides in full:

(i) (1) A local board of education shall hear and render a decision on any appeal within 60 days of receipt of the appeal.

(2) The State Board of Education shall hear and render a decision on any appeal within 60 days of receipt of the appeal.

(3) If the State Board of Education does not comply with (2), the Circuit Court of Maryland, upon petition, shall hear and render a decision on the appeal as soon after transmission of the record as may be practicable. The State Board of Education shall comply with the ruling of the Circuit Court which ruling shall be enforceable by the Court and subject only to the Maryland Rules of Procedure and to the provisions of § 106D(g) of this Article.

(4) The time limitations imposed in subparagraphs (1) and (2) shall be extended or waived upon written request of the appellant made to the body conducting the appeal.<sup>72</sup>

##### 5. Reconcilability of HB 288, SB 300, and SB 364

There remains to be considered the interrelationship of these three bills, which is governed by Section 17, Article 1 of the Maryland Annotated Code:

If two or more amendments to the same section or subsection of the Code are enacted at the same or different sessions of the General Assembly, and one of them makes no reference to and takes no account of the other or others, the amendments shall be construed together, and each shall be given effect, if possible and with due regard to the wording of their titles. If the amendments are irreconcilable and it is not possible to construe them together, the latest in date of final enactment shall prevail.<sup>73</sup>

71. Like the 60 day provision applicable to requests for review at the local level under HB 288, the 60 day provision applicable to local appeals under SB 364 was unclear in that it did not state whether there could be several levels of appeal at the local level as under existing law, or whether instead, the provision was supposed to be a 60 day time limit on completion of all procedures at the local level. The question is moot, however, in view of the time limits imposed by recently adopted federal regulations, discussed *infra*.

72. MD. ANN. CODE art. 77, § 100A(i) (Cum. Supp. 1977).

73. MD. ANN. CODE art. 1, § 17 (1976).

None of the three recent enactments made reference to, or took account of the other two bills. The enactments, therefore, should be construed together, and each should be given effect unless they are irreconcilable.

The most difficult questions in reconciling the three enactments concern the amendments to *old* subsection (b) of Section 100A, which, prior to amendment, read as follows:

(b) The State Board of Education shall, on receipt of request for a review within 60 days, establish a hearing board of not less than three persons knowledgeable in the fields and areas significant to the educational review of the child. Members of the hearing board may be employees of the State Department of Education or may be qualified persons from outside the Department. No person shall serve as a member of the hearing board who participated in the previous diagnosis, evaluation, prescription of special educational services, and other educational records of the child, which records shall be furnished by the local or regional board of education.<sup>74</sup>

HB 288 renumbered the provision as subsection (d), added the word "qualified" to the first sentence describing the persons who may serve on a hearing review board, deleted the second two sentences dealing with qualifications of such persons, and substituted new provisions governing the qualifications of members of hearing review boards.

SB 300 purported to repeal old subsection (b) and to reenact the subsection without the old provisions as to qualifications of members of hearing review boards, but with the addition of the word "qualified" to the first sentence, as in HB 288. SB 300, however, did not include the new provisions on qualifications contained in HB 288.

Finally, SB 364 purported to repeal and reenact old subsection (b) of Section 100A in its original form with an entirely different amendment — deletion of the sixty day period for constituting a hearing review board for review of local decisions, and addition of the new subsection (i), dealing with time limits for disposition of appeals.

Analysis of the substantive changes in old subsection (b) made by the three bills shows that there is no inconsistency among them. It cannot reasonably be argued that the draftsmen of SB 364 intended that hearing officers not be "qualified," simply because they failed to add that description to persons able to serve on hearing review boards, or that SB 364 was designed to reinstate the original qualification provisions, which had just been eliminated by

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74. *Id.* art. 77, §100(A)(b) (1975).



HB 288 and SB 300. Rather, the amendment made by SB 364 simply dealt with an unrelated matter, the elimination of the sixty-day time limit in old subsection (b).

HB 288's new provisions governing the qualifications of hearing review board members, and conforming Maryland procedures to federal law, by prohibiting employees of state and local boards of education from serving on hearing review boards, were not reenacted in either of the later Senate bills. It cannot reasonably be inferred that the draftsmen of SB 364 intended to repeal the just-enacted provisions in HB 288, relating to the qualifications of hearing board members; rather, SB 364 dealt with a totally unrelated matter. The original version of SB 300, on the other hand, contained a provision on qualifications that was similar to the provision in HB 288; this provision was deleted from SB 300 by amendment. Conceivably, that amendment could provide the basis for a claim that there is an inconsistency between HB 288 and SB 300, read in light of the amendment. A more reasonable conclusion, however, is simply that the draftsmen of the amendment of SB 300 merely wished to avoid dealing affirmatively with qualifications in that bill.

Since there is no substantive inconsistency between the different amendments, the three bills should all "be construed together" and each should "be given effect." When this is done, the subsection reads as follows:

(d) The State Board of Education shall, on receipt of request for a review, establish a hearing board of not less than three qualified persons knowledgeable in the fields and areas significant to the educational review of the child. A person may not serve as a member of the hearing board if he or she (1) is an employee of the State Board of Education or of the local board of education which is involved in the education or care of the child or (2) has an interest which would conflict with his or her objectivity in the hearing.

A comparison of the other substantive changes in old Section 100A, approved in the three bills, shows that none of them is irreconcilable with any provision in either of the other two bills.<sup>75</sup>

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75. HB 288 added two new subsections at the beginning of Section 100A, dealing with local level hearings. These amendments (a) imposed a 60 day limit on the period between the receipt of request for review and the decision of the local level hearing officer, and (b) provided that the local level hearing officers should not be persons employed by the local board of education or persons having an interest conflicting with objectivity. The only other amendments to any of the three bills which deal in any way with local level hearing procedures are the amendments approved in SB 364, which contains a wholly consistent provision for decision of local level appeals within 60 days after receipt of the appeal.

SB 300 added a new Subsection (h) to Section 100A, providing that hearings should be conducted "consistent with the provisions of this Section and

Therefore, the amendments approved in all three bills should be given effect. Section 100A, revised to incorporate each of the amendments approved in these bills, is set forth in Appendix II.

### B. Federal Law

#### 1. Section 615 of the Education of the Handicapped Act (P.L. 94-142)<sup>76</sup>

Section 615 of the federal Education of the Handicapped Act now applies to hearing procedures in states accepting federal assistance for education of the handicapped. The principle features of Section 615 are as follows:

1. The new federal law guarantees parents access to relevant records,<sup>77</sup> as do the existing Maryland Bylaws.<sup>78</sup>

2. The new federal law guarantees parents an opportunity to obtain an independent educational evaluation.<sup>79</sup> The final regulations provide for independent evaluations at public expense, subject to certain conditions.<sup>80</sup> Under the existing Maryland Bylaws, parents may have independent evaluations made and are entitled to have them considered, but are denied financial assistance unless the independent evaluation is ordered by a state hearing review board.<sup>81</sup>

3. The new federal law requires state and local authorities receiving assistance to establish procedures protecting the rights of children without parents or guardians, including procedures for appointing persons to act as surrogates for the parents or guardians.<sup>82</sup> Although the Maryland Bylaws do not deal with this problem, Chapter 359 of the 1977 Acts (SB 882) added a new provision to Article 77 of the Maryland Annotated Code, bringing Maryland law in line with the federal requirements.<sup>83</sup>

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applicable federal law." MD. ANN. CODE art. 77, §100A(h) (Cum. Supp. 1977). None of the other amendments approved in any of the bills could be said to be to the contrary, i.e., to contemplate violations of federal law.

SB 364 deleted the 60 day limitation on the *establishment* of hearing review boards in Subsection (b) of the old Section 100A, and substituted a new subsection (i) which imposed 60 day time limits on the *decision* of appeals at both the local and state levels. MD. ANN. CODE art. 77, §100A(i) (Cum. Supp. 1977). Insofar as this provision imposes a time limit on local level appeals, it has the same effect as the 60 day provision added to Section 100A at another place by HB 288. In all other respects it deals with matters different substantively from matters dealt with in either of the other two bills.

76. 20 U.S.C. §1415 (Supp. V 1975) (effective Oct. 1, 1977).

77. 20 U.S.C. §1415(b)(1)(A) (Supp. V 1975); *cf.* 20 U.S.C. §1232(g) (Supp. V. 1975) (the Buckley amendment).

78. Bylaw 13.04.01.21.A.3.a, B.4.

79. 20 U.S.C. §1415(b)(1)(A) (Supp. V 1975).

80. 42 Fed. Reg. 42494 (1977) (to be codified in 45 C.F.R. §121.a.503).

81. MD. ANN. CODE art. 77, §100A (1975), Bylaw 13.04.01.21.A.6.b.(3) B.4.

82. 20 U.S.C. §1415(b)(1)(B) (Supp. V 1975).

83. MD. ANN. CODE art. 77, §106D-1 (Cum. Supp. 1977).

4. The new federal law requires prior written notice to parents whenever educational authorities propose, or refuse, 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."<sup>84</sup> The Maryland Bylaws require such notice at the local level when a question of educational placement arises. Written notice must be provided before a child is placed in a program of special education, transferred to a significantly different program of special education, or denied placement in a program of special education, and before a child in need of special education is excluded from free public education.<sup>85</sup> To conform the Maryland Bylaws to federal law, they should be amended to make clear that the notice requirement applies to identification and evaluation of handicapped children, as well as to placement, to make clear that children cannot be denied free appropriate education, except pursuant to valid disciplinary regulations and procedures, and to make clear that the state level boards' broad powers under Section 100A<sup>86</sup> and the Bylaws<sup>87</sup> do not allow them to proceed in a fashion that deprives parents of the requisite notice and opportunity to be heard.

5. The new federal law requires that notice be given in the parents' native language "unless it clearly is not feasible to do so."<sup>88</sup> The Maryland Bylaws do not include such a requirement.

6. The new federal law guarantees parents "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,"<sup>89</sup> and "an opportunity for an impartial due process hearing" whenever such a complaint is made.<sup>90</sup> The state Bylaws governing local level hearings do not make clear that parents have a right to be heard with respect to identification and evaluation of handicapped children, or with respect to funding of a nonpublic program, where the funding is essential to the "provision of free appropriate public education." The state Bylaws governing state level hearing procedures do not make clear that the right to be heard applies to placement and to funding questions, when the ultimate decisions on these issues may affect the provisions of a free appropriate education.<sup>91</sup>

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84. 20 U.S.C. § 1415(b)(1)(C) (Supp. V 1975).

85. Bylaw 13.04.01.21.B.1.

86. MD. ANN. CODE art. 77, § 100A(f) (Cum. Supp. 1977).

87. Bylaw 13.04.01.21.A.6.b(2).

88. 20 U.S.C. § 1415(b)(1)(D) (Supp. V 1975).

89. *Id.* § 1415(b)(1)(E).

90. *Id.* § 1415(b)(2).

91. Bylaw 13.04.01.21.A., B.

7. The federal law provides that hearings under the law may not "be conducted by an employee of [the LEA] involved in the education or care of the child."<sup>92</sup> HB 288 amended Section 100A of Article 77 of the Maryland Annotated Code to comply with this federal law, but the state Bylaws still must be conformed. Federal law and amended Section 100A appear to permit hearings not only before nonemployee hearing officers, but also before the local board of education, since the local board of education is not its own "employee."

8. The federal law provides for state level review of decisions made in local level due process hearings.<sup>93</sup> In Maryland, Section 100A and the Bylaws likewise provide for such review.<sup>94</sup>

9. The federal law provides that any party to a local level hearing or a state level hearing or review proceeding must be accorded the following rights:

- (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.<sup>95</sup>

The Maryland Bylaws track federal law, except they make no provision for compelling the attendance of witnesses at the state level.<sup>96</sup>

10. The new federal law provides for finality of decisions:

A decision made in a hearing conducted pursuant to paragraph (2) of subsection (b) [i.e., a local level hearing] . . . shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (c) [providing for state level administrative hearings] and paragraph (2) [providing for judicial review] of this subsection. A decision made under subsection (c) [providing for state level hearings] shall be final, except that any party may bring an action under paragraph (2) of this subsection.<sup>97</sup>

The present Maryland Bylaws allow local authorities to prescribe a number of levels of appeal locally.<sup>98</sup> The Bylaws should be modified

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92. 20 U.S.C. § 1415(b)(2) (Supp. V 1975).

93. *Id.* § 1415(c).

94. Bylaw 13.04.01.21.A.

95. 20 U.S.C. § 1415(d) (Supp. V 1975).

96. See discussion note 48 *supra*.

97. *Id.* § 1415(e)(1).

98. See Bylaw 13.04.01.21.B.7.

to insure compliance with the new federal requirements. The legislative history of the federal law does not indicate that in providing for finality, Congress meant to prevent local boards from giving *parents* the right to have a local board review a hearing officer's decision on either a discretionary or non-discretionary basis. All that appears to have been intended was to permit the parents to move to the next level of review — state or judicial — instead of having to pursue additional local remedies.

11. The new federal law gives a right to virtual *de novo* review in federal court following completion of administrative proceedings:

Any party aggrieved by the findings and decision made under subsection (b) [providing for local level hearings] who does not have the right to an appeal under subsection (c) [providing for state level review], and any party aggrieved by the findings and decision under subsection (c) [providing for state level hearings and review], 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.*<sup>99</sup>

Decisions of hearing review boards, then, can be appealed either to the state circuit courts under Section 100A, or to the United States District Court for the District of Maryland under the provision quoted above. If the appeal is taken to a state court, the restricted review available under the Maryland Rules and the State Administrative Procedure Act will probably be applied.<sup>100</sup> On the other hand, if the appeal is taken to federal court, a somewhat broader scope of review appears to be available. The references in the quoted provision to "additional evidence" and "preponderance of the evidence" appear to assign to federal courts the task of deciding the

99. 20 U.S.C. § 1415(e)(2) (Supp. V 1975) (emphasis added).

100. MD. ANN. CODE art. 41, §§ 244-256A (Cum. Supp. 1977). See generally GUIDE, *supra* note 8, at 42-43.

The scope of review provisions in the federal law apply both to actions in federal court and to actions in state courts "of competent jurisdiction." It is debatable whether Section 100A gives Maryland state courts jurisdiction to conduct the type of review specified in the federal statute, or only jurisdiction to conduct the more limited type of review provided for in the Administrative Procedure Act. Section 100A provides, however, that "any review . . . shall be conducted *consistent with the provisions of . . . applicable federal law.*" MD. ANN. CODE art. 77, § 100A(h) (Cum. Supp. 1977) (emphasis added).

merits of placement decisions de novo, rather than to confine their consideration to traditional substantial evidence review. Just how hospitable the federal courts will be to this broad scope of review, however, remains to be seen.

12. The new federal law will change existing Maryland practice in connection with placement of children pending completion of proceedings. The existing Maryland Bylaws prohibit changes in placement, without consent of the parent, pending a decision of the hearing officer at the first level of the local procedures, but then require implementation of that decision within thirty days.<sup>101</sup> The change, therefore, ordinarily occurs prior to completion of local procedures, and prior to any state level procedures or judicial review. The Maryland Bylaws, moreover, do not require children who are not attending school to be placed in school pending completion of these procedures, but instead provide only for an expedited procedure.<sup>102</sup> The new federal law changes this:

During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parent 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.<sup>103</sup>

This new federal provision changes the Maryland procedures in two respects. First, it makes clear that the prohibition against placement pending completion of proceedings, in cases in which children are already in public school, applies not only until completion of administrative proceedings at the local level, but also to completion of administrative proceedings at the state level and to judicial review thereafter. In addition, the provision makes clear that children who are not in public school, and are applying for admission to public school for the first time, must be placed in a public school program pending the completion of all proceedings. The Maryland Bylaws should be modified to conform to federal law regarding placement when completion of hearing procedures are pending.

13. Finally, the new law contains a grant of jurisdiction to the United States district courts as follows: "The district courts of the United States shall have jurisdiction of actions brought under this subsection without regard to the amount in controversy."<sup>104</sup>

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101. Bylaw 13.04.01.21.B.8.a.

102. *Id.* 13.04.01.21.B.8.b.

103. 20 U.S.C. §1415(e)(3) (Supp. V 1975).

104. *Id.* §1415(e)(4). The phrase "this subsection" means 20 U.S.C. §1415(e), subparagraph (2), which provides for de novo judicial review in federal court.

2. The P.L. 94-142 Regulations (implementing Section 615 of the Education of the Handicapped Act)<sup>105</sup>

The final regulations implementing P.L. 94-142 were published in the Federal Register on August 23, 1977.<sup>106</sup> These regulations include provisions which make the following additional changes in so-called "due process procedures" for handicapped children:

1. Not only notice, but also parental consent, must be obtained before conducting a preplacement evaluation, and making an initial placement of a handicapped child in a program providing special education and related services.<sup>107</sup> Parental refusal to consent can only be overridden pursuant to procedures prescribed by state law, and if state law provides no such procedures, then only by means spelled out in the regulations.<sup>108</sup>

2. If parents are not satisfied with a school system evaluation, they have a right to an independent educational evaluation at public expense; however, if the school system believes the request is unjustified, it can initiate a hearing before an independent hearing officer to determine whether its evaluation is "appropriate."<sup>109</sup> In addition, hearing officers may request an independent evaluation, which must be provided at public expense.<sup>110</sup> There has been no such requirement with respect to local level hearing officers in Maryland in the past.

3. The criteria governing requests for independent evaluations at public expense are as follows:

(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.<sup>111</sup>

4. Although the parties at an initial-level hearing required by P.L. 94-142 have the right "to present evidence and confront, cross-examine, and compel the attendance of witnesses,"<sup>112</sup> any evidence which has not been disclosed to all parties at least five days before the hearing will be disallowed upon request of the party claiming surprise.<sup>113</sup>

105. 42 Fed. Reg. 42474 (1977) (effective Oct. 1, 1977).

106. 42 Fed. Reg. 42473 (1977).

107. 42 Fed. Reg. 42495 (1977) (to be codified in 45 C.F.R. § 121a.504(b)).

108. *Id.* (to be codified in 45 C.F.R. § 121a.504(c)).

109. 42 Fed. Reg. 42494 (1977) (to be codified in 45 C.F.R. § 121a.503).

110. 42 Fed. Reg. 42495 (1977) (to be codified in 45 C.F.R. § 121a.503(d)).

111. *Id.* (to be codified in 45 C.F.R. § 121a.503(e)).

112. *Id.* (to be codified in 45 C.F.R. § 121a.508(a)(2)).

113. *Id.* (to be codified in 45 C.F.R. § 121a.508(a)(3)). This provision is designed to facilitate preparation and eliminate surprise.

5. The initial hearing, at the local level, or at the state level when there has been no hearing at the local level, is subject to a forty-five day time limit from receipt of the request for a hearing to mailing of the decision to each of the parties.<sup>114</sup> State level review following a local level hearing is subject to a thirty-day time limit from receipt of the request for such review to mailing of the decision to the parties.<sup>115</sup> These limits may be extended by the hearing or reviewing officer at the request of any party.<sup>116</sup>

6. The child involved must be allowed to attend the hearing at his parents' request.<sup>117</sup>

7. For some years, the Maryland State BOE Bylaws have provided for an Educational Management Plan for each handicapped child.<sup>118</sup> Such a plan is now required by P.L. 94-142 and the implementing regulations as part of the right to a "free appropriate public education."<sup>119</sup> These provisions change Maryland practice by giving parents the right to participate in all meetings at which the plan is formulated.<sup>120</sup> Such a plan (developed at meetings in which parents participated) must be in effect on October 1, 1977, for each child receiving special education services, including those children referred to nonpublic facilities, must be implemented promptly, and must be reviewed at least once a year.<sup>121</sup> Contents of these plans are prescribed both by the Maryland Bylaws,<sup>122</sup> and by the new federal regulations.<sup>123</sup>

### 3. The 504 Regulations (implementing Section 504 of the Rehabilitation Act)<sup>124</sup>

Section 615 of the Education of the Handicapped Act enacted by P.L. 94-142, discussed above, applies only to states that accept funds

114. 42 Fed. Reg. 42496 (1977) (to be codified in 45 C.F.R. § 121a.512(a)).

115. *Id.* (to be codified in 45 C.F.R. § 121a.512(b)).

116. *Id.* (to be codified in 45 C.F.R. § 121a.512(c)).

117. 42 Fed. Reg. 42495 (1977) (to be codified in 45 C.F.R. § 121a.508(b)(1)).

118. *See* Bylaw 13.04.01.05.

119. 20 U.S.C. § 1401(18), (19) (Supp. V 1975); 42 Fed. Reg. 42478 (1977) (to be codified in 45 C.F.R. § 121a.4); 42 Fed. Reg. 42490, 42491 (1977) (to be codified in 45 C.F.R. § 121a.340 to -349).

120. 20 U.S.C. § 1401(19) (Supp. V 1975); 42 Fed. Reg. 42490 (1977) (to be codified in 45 C.F.R. § 121a.344).

121. 42 Fed. Reg. 42490, 42491 (1977) (to be codified in 45 C.F.R. § 121a.342, .343, .347). 122. Bylaw 13.04.01.05.

123. 42 Fed. Reg. 42491 (1977) (to be codified in 45 C.F.R. § 121a.346).

124. The 504 regulations became effective June 3, 1977. 42 Fed. Reg. 22676. Although the 504 regulations provide that recipients of federal funds "may not exclude any qualified handicapped person from a public elementary or secondary education after the effective date of this part," they also provide that a recipient which is not in full compliance with the regulations on their effective date "shall meet such requirements at the earliest practicable time and in no event later than September 1, 1978." 42 Fed. Reg. 22683 (1977) (to be codified in 45 C.F.R. § 84.33).



under the Act.<sup>125</sup> If Maryland were to refuse funding, it would not be required to comply with new Section 615 of the Act. The state and its local education agencies must nevertheless comply with the regulations recently promulgated under Section 504 of the Rehabilitation Act of 1973,<sup>126</sup> since the regulations apply to recipients of *any* financial assistance from HEW — not just assistance under the Education of the Handicapped Act.

Section 84.36 of the 504 Regulations provides as follows:

A recipient that operates a public elementary or secondary education program shall establish and implement, with respect to actions regarding the identification, evaluation, or educational placement of persons who, because of handicap, need or are believed to need special instruction or related services, a system of procedural safeguards that includes notice, an opportunity for the parents or guardian of the person to examine relevant records, an impartial hearing with opportunity for participation by the person's parents or guardian and representation by counsel, and a review procedure. Compliance with the procedural safeguards of section 615 of the Education of the Handicapped Act is one means of meeting this requirement.<sup>127</sup>

This provision makes it clear that compliance with Section 615 of the Education of the Handicapped Act is not necessarily the only means of complying with Section 84.36. What departures HEW will permit, in the case of states that do not accept financial assistance under the Education of the Handicapped Act, remains to be seen. It seems likely that HEW will not permit significant departures, since the catalog of procedural guarantees in Section 84.36 covers virtually the entire substance of Section 615 — “notice, an opportunity for the parents or guardian of the person to examine relevant records, an impartial hearing with opportunity for participation by the person's parents or guardian and representation by counsel, and a review procedure.”<sup>128</sup>

#### 4. Maryland Bylaw Revision

On August 3, 1977, and again on December 2, 1977, a proposed revisions of Maryland State Board of Education Bylaws governing special education in Maryland were published in the Maryland

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125. Maryland has received 5.1 million dollars for fiscal year 1978, and will receive more than double that figure for fiscal year 1979.

126. 29 U.S.C. § 706 (Supp. V 1975).

127. 42 Fed. Reg. 22683 (1977) (to be codified in 45 C.F.R. § 84.36).

128. *Id.*

Register.<sup>129</sup> The procedural provisions of the proposed revisions Bylaws were designed to correct defects in the existing Bylaws. Inconsistencies between the proposed Bylaws and federal law were called to the attention of the BOE by members of the Education Subcommittee of the Maryland State Bar Committee on Law and the Handicapped.

#### IV. CONCLUSION AND RECOMMENDATIONS

There were three major sources of complaints about educational hearing procedures in Maryland prior to the recent changes in the law. First, local level hearing officers could be local system employees, and therefore prone to conflicts of interest. As a result, in some counties, parents *never* prevailed in local level hearings. Second, no time limits applied to certain steps in both local and state level procedures. In consequence, delays of months and years were sometimes encountered before the procedures were finally completed. Third, there were few established criteria for determining whether a program was "appropriate" or "adequate" for a particular child, and hearing officers rarely attempted to state what criteria, if any, they did employ in deciding the issue. Consequently, the whole process was perceived by many as highly subjective — and probably was.

The recent amendments of Section 100A deal with the first and second problems, as do the new federal requirements. On the other hand, the third problem remains. Reviewing officers and courts should require hearing boards to articulate the criteria they employ in making determinations as to appropriateness of a particular educational program for a particular child. The boards should be required to make findings that identify and quantify each of the child's handicapping characteristics and the specific educational needs arising therefrom, and findings that set forth the specific program accommodations that are required to meet those needs and forecast the availability of each of those program accommodations in any placement under consideration. Requiring hearing boards to articulate the reasoning behind their decisions will help to insure rational, objective, decision-making, and effective judicial review. In addition, the new federal law requires central reporting of findings and decisions in all cases.<sup>130</sup> Steps should be taken to make those decisions available to the public (with personally identifiable data deleted). These efforts would help build a sort of "common law" in the area.

Beyond these problems, the Bylaws need revision, or Section 100A needs further amendment, to deal with each of the changes in

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129. 4 Md. Reg. 1237, 1929 (1977).

130. 20 U.S.C. § 1415(d) (Supp. V 1975).

the law outlined above in discussions of Section 106D(g) and P.L. 94-142 and the implementing regulations. Perhaps the best approach would be to adopt the federal regulations in Maryland *in haec verba*. In any event, three needed revisions are of particular importance. First, language should be adopted defining the cases and issues on which a hearing is available in a way that explicitly includes all matters which are subject to a hearing under the new federal requirements. Second, the "good cause" requirement in Section 100A and the Bylaws should be clarified to make clear that cases cannot be dismissed without a hearing just because the hearing review board believes the parents' case to be weak or frivolous *on the merits*; cases should be dismissed for lack of "good cause" only when it is evident that the case is not of the kind subject to a hearing. Finally, written procedures should be adopted for implementation of the nonpublic placement provisions of Section 106D(g) in a manner that complies with federal hearing requirements, and parents and their advocates should be told which issues under 106D(g) are to be decided by hearing review boards, which issues are to be decided by the state BOE, and when and how to take any issues in the latter category to the state BOE.

With these changes, all of the parts of the puzzle will be in place. Maryland has been one of the nation's leaders in adopting due process procedures for educational placement of handicapped children. Only relatively minor modifications of the existing procedures are required by the new federal laws. The state has a record of which it can be proud.

#### ADDENDUM

On January 25, 1978, just as this Article went to press, the state BOE approved a revision of the Bylaws governing hearing procedures. Under the revised Bylaws, the basic pattern of local and state appeals remains the same as in the past, but the revision incorporates numerous changes required by the new state and federal law outlined in this Article. Among other things, the revision addresses the three major problems mentioned in the last two paragraphs of Part IV of the Article. The revised Bylaws will be published in the Maryland Register.

## APPENDIX I

*Section 100A of Article 77**Prior to Amendments in 1976 and 1977***§ 100A. Review of diagnosis, evaluation of educational program and exclusion or exemption from school privileges.**

(a) After exhaustion of all locally available administrative remedies and procedures, a parent or guardian of a mentally, physically or emotionally handicapped child or the board of education responsible for providing special education for such a child, with good cause, may request in writing to the State Board of Education, a review of (1) diagnosis, (2) evaluation of educational programs provided for the child by the local or regional board of education, or (3) the exclusion or exemption from school privileges of the child by the local or regional board of education.

(b) The State Board of Education shall, on receipt of request for a review within 60 days, establish a hearing board of not less than three persons knowledgeable in the fields and areas significant to the educational review of the child. Members of the hearing board may be employees of the State Department of Education or may be qualified persons from outside the Department. No person shall serve as a member of the hearing board who participated in the previous diagnosis, evaluation, prescription of special educational services, and other educational records of the child, which records shall be furnished by the local or regional board of education.

(c) The hearing board may dismiss any request for review, which after a review of the educational records of the child, it deems to have been made without good cause. The hearing board may hear any testimony as it shall deem relevant. The board may require a complete and independent diagnosis, evaluation and prescription of educational programs by qualified persons, the cost of which shall be paid by the State Board of Education.

(d) The hearing board shall have the authority to confirm, modify, or reject any diagnosis, evaluation, educational program prescribed or exclusion or exemption from school privileges and prescribe alternate special educational programs for the child. Appeal from the decision of the hearing board shall be to the circuit court for the county in which the child resides; and, if the child resides in Baltimore City, to any one of the three common law courts of the Supreme Bench.

(e) Members of the hearing board, other than those employed by the State Department of Education, shall be paid reasonable fees and expenses as established by the State Board of Education.

## APPENDIX II

*Section 100A of Article 77  
1977 Cumulative Supplement***§ 100A. Review of placement decision diagnosis, evaluation of educational program and exclusion or exemption from school privileges.**

(a) "Local board of education," as used in this section, includes the Board of School Commissioners of Baltimore City.

(b) After a placement decision by the local board of education for a child who is mentally, physically or emotionally handicapped has been rendered, the parent or guardian of the handicapped child may request in writing to the local board of education a review of the placement decision. Within 60 days of receipt of this request for a review, the local board of education shall appoint a hearing officer or board of persons knowledgeable in the fields and areas significant to the educational review of the handicapped child to hear and render a decision. Within the same 60-day period, the hearing officer or board of persons shall review the placement and render its decision. The hearing officer or members of the hearing board may not be employees of the local board of education which has direct responsibility for the education or care of the child or any person having an interest which would conflict with his or her objectivity in the hearing.

(c) After exhaustion of all locally available administrative remedies and procedures, a parent or guardian of a mentally, physically or emotionally handicapped child or the board of education responsible for providing special education for such a child, with good cause, may request in writing to the State Board of Education, a review of (1) diagnosis, (2) evaluation of educational programs provided for the child by the local or regional board of education, or (3) the exclusion or exemption from school privileges of the child by the local or regional board of education.

(d) The State Board of Education shall, on receipt of request for a review, establish a hearing board of not less than three qualified persons knowledgeable in the fields and areas significant to the educational review of the child. A person may not serve as a member of the hearing board if he or she (1) is an employee of the State Board of Education or of the local board of education which is involved in the education or care of the child or (2) has an interest which would conflict with his or her objectivity in the hearing.

(e) The hearing board may dismiss any request for review, which after a review of the educational records of the child, it deems to have been made without good cause. The hearing board may hear any testimony as it shall deem relevant. The board may require a complete and independent diagnosis, evaluation and prescription of

educational programs by qualified persons, the cost of which shall be paid by the State Board of Education.

(f) Subject to the provisions of § 106D (g), the hearing board may confirm, modify, or reject any diagnosis, evaluation, educational program prescribed or exclusion or exemption from school privileges and prescribe alternate special educational programs for the child. Appeal from the decision of the hearing board shall be to the circuit court for the county in which child resides; and, if the child resides in Baltimore City, to any one of the three common-law courts of the Supreme Bench.

(g) Members of the hearing board, other than those employed by the State Department of Education, appointed under subparagraph (d) shall be paid reasonable fees and expenses as established by the State Board of Education.

(h) Except for a review conducted by a circuit court or by the Supreme Bench of Baltimore City, any review conducted at the request of the parent or guardian of a handicapped child shall be conducted consistent with the provisions of this section and applicable federal law.

(i) (1) A local board of education shall hear and render a decision on any appeal within 60 days of receipt of the appeal.

(2) The State Board of Education shall hear and render a decision on any appeal within 60 days of receipt of the appeal.

(3) If the State Board of Education does not comply with (2), the circuit court of Maryland, upon petition, shall hear and render a decision on the appeal as soon after transmission of the record as may be practicable. The State Board of Education shall comply with the ruling of the circuit court which ruling shall be enforceable by the court and subject only to the Maryland Rules of Procedure and to the provisions of § 106D (g) of this article.

(4) The time limitations imposed in subparagraphs (1) and (2) shall be extended or waived upon written request of the appellant made to the body conducting the appeal.



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