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FILE NO. 85-005

SCHOOLS AND SCHOOL DISTRICTS:
Hearing Procedures for
Education of Handicapped Children

Honorable Arthur L. Berman
Illinois State Senator
Chairman, Senate Committee on
Elementary and Secondary Education
State Capitol Building, Room 605E
Springfield, Illinois 62706

Dear Senator Berman:

I have your letter wherein you inquire whether the hearing procedures prescribed in subpart J of the Illinois State Board of Education's rules for the administration of special education (23 Ill. Admin. Code 226.605 et seq.), as they govern the State level review of local administrative decisions, meet the requirements of section 615 of the Education for All Handicapped Children Act of 1975 (20 U.S.C.

§ 1415). For the reasons hereinafter stated, it is my opinion that the State level review procedures established by these administrative rules (see 23 Ill. Admin. Code 226.685 - 226.695) do not comply with the requirements of Federal law.

Section 14-8.02 of The School Code (Ill. Rev. Stat. 1985 Supp., ch. 122, par. 14-8.02) sets forth procedures by which, inter alia, handicapped children are to be identified, evaluated, and placed in appropriate educational programs or facilities. Included among the procedures provided in section 14-8.02, and implemented by the administrative rules in question, is a complaint process which authorizes the parents or guardians of a handicapped child, or a local school board, to appeal any matter relating to the educational placement of, or the provision of a free appropriate public education to, a handicapped student. The general provisions of the Illinois statute and administrative rules are intended to meet the requirements of section 615 of the Education for All Handicapped Children Act of 1975, which provides in pertinent part:

> "(a) Any State educational agency, any local educational agency, and any intermediate educational unit which receives assistance under this subchapter 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--

* * *

(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.

(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) of this section 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 1413(a)(12) of this title).
>
> (e)(1) A decision made in a hearing conducted pursuant to paragraph (2) of subsection (b) of this section 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) of this section shall be final, except that any party may bring an action under paragraph (2) of this subsection.
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> (2) Any party aggrieved by the findings and decision made under subsection (b) of this section who does not have the right to an appeal under subsection (c) of this section, and any party aggrieved by the findings and decision under subsection (c) of this section, 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.
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> * * * "
>
> (Emphasis added.)

It is my opinion that the State Board of Education's rules allowing the use of employees of the Board as hearing officers in State level review proceedings contravene section 615 of the Education for All Handicapped Children Act, and thus violate the substantive rights created by that statute. See John A. By and Through Valerie A. v. Gill (N.D. Ill. 1983), 565 F. Supp. 372, 379-80.

In Vogel v. School Bd. of Montrose R-14 School Dist. (W.D. Mo. 1980), 491 F. Supp. 989, the court held that section 615 of the Education for All Handicapped Children Act prohibits employees of educational units from acting as hearing officers in any due process hearing. The court, in its conclusions of law, stated, at pages 994-95:

" * * *

> 8. At the State level review hearing * * *, plaintiffs were entitled to an impartial hearing officer pursuant to 20 U.S.C. § 1415(c) and 45 C.F.R. 121a510.
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> 9. Any ambiguity in the statutory language with respect to the requirement of an impartial hearing officer at a § 1415(c) hearing is resolved by an examination of the legislative history of this section. The committee explicitly states that all review hearings pursuant to § 1415(c) as well as those pursuant to § 1415(b)(2) require, at a minimum, that the impartial individual who conducts a due process hearing may not be an employee of the State Department of Education or of any local or intermediate unit thereof.
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> * * * "

(Emphasis added.)

The court, as authority for its decision, relied upon the Senate Conference Report concerning section 615 of the Education for All Handicapped Children Act (491 F. Supp. 989, 995, n.6.) The Conference Report states, in pertinent part:

" * * *

> (a) any parent or guardian may present a complaint concerning any matter regarding the

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

(b) whenever a complaint is received the parents or guardian shall be afforded an opportunity for an impartial due process hearing, which hearing shall be conducted by the local educational agency or the State educational agency. The conferees do not intend that this provision will require changes in existing arrangements where due process hearings are conducted at the level of the State educational agency rather than at the local level. The only requirement with respect to the level of which such hearings are conducted occurs when the hearing is conducted at the local level and in such cases there is a review required at the State agency level. In addition, the conferees point out that any hearings are not conducted by the agency itself, but rather at the appropriate agency level. The hearing will be conducted by an impartial hearing officer since the State or local agency or intermediate unit will be a party to any complaint presented.

(c) no hearing may be conducted by an employee of the State or local educational agency involved in the education or care of the child. The conferees have adopted this language to clarify the minimum standard of impartiality which shall apply to individuals conducting due process hearings and individuals conducting a review of the local due process hearing;

* * *

(Emphasis added.) U.S. Code Congressional and Administrative News, 94th Congress, First Session, 1975, 1502.

The Senate Conference Report was also relied upon in Grymes v. Madden (3d Cir. 1982), 672 F.2d 321, wherein the court held that service by an employee of the Delaware State Board of Education as a State level review officer constituted a per se denial of the impartial review guaranteed by section

615(c) of the Education for All Handicapped Children Act. (672 F.2d 321, 322-23.) A similar result was reached in Robert M. v. Benton (8th Cir. 1980), 634 F.2d 1139, 1142, in which the court held that section 615 of the Education for All Handicapped Children Act prohibited employees of the Iowa State Board of Public Instruction from serving as hearing officers in State level review proceedings. See also Mayson By Mayson v. Teague (11th Cir. 1984), 749 F.2d 652; Helms v. McDaniel (5th Cir. 1981), 657 F.2d 800, cert. denied 455 U.S. 946 (1982).

In order to determine whether the Illinois State Board of Education's special education rules comply with the impartiality requirement of section 615 of the Education for All Handicapped Children Act, it is necessary to analyze those provisions with reference to the Federal courts' construction of that statute.

Section 226.685 of the State Board of Education's special education rules (23 Ill. Admin. Code 226.685) provides in pertinent part:

> "Upon its receipt of a request for a state level review, the State Superintendent of Education shall either designate from one to three professional employees of the State Board of Education to serve as the impartial state level reviewing panel or elect to conduct the review personally. The State Superintendent or the review panel shall review the transcript, records, written arguments, and other documents which have been submitted by the parties on appeal. * * *" (Emphasis added.)

Section 226.690 of the rules (23 Ill. Admin. Code 226.690) provides in pertinent part:

> "The decision of the State Superintendent or the review panel shall be issued by the State Superintendent of Education within thirty (30) calendar days of notice of the appeal. The decision of the State Superintendent or review panel shall be considered a final order which is binding on both parties unless either party requests a rehearing within fourteen (14) calendar days of receipt of the Order. * * *"

Section 226.695 of the State Board of Education's special education rules (23 Ill. Admin. Code 226.695) provides:

> "The decision of the State Superintendent of Education shall be binding on all parties. (See Ill. Rev. Stat. 1981, ch. 122, par. 2-3.38)"

The procedures governing State level review of local level hearings set out above are clearly inconsistent with section 615 of the Education for All Handicapped Children Act as construed in Grymes v. Madden (3d Cir. 1982), 672 F.2d 321, Robert M. v. Benton (8th Cir. 1980), 634 F.2d 1139, and Vogel v. School Bd. of Montrose R-14 School Dist. (W.D. Mo. 1980), 491 F. Supp. 989, because they permit the State Superintendent to designate a reviewing panel, composed of employees of the Illinois Office of Education, to conduct the hearing, or to conduct the review personally. In Vogel, the court held that the State level review of a local level decision must be conducted by an impartial person, and, thus, no employee of a State, intermediate, or local educational unit may act as hearing officer in such hearings. The requirement of "impartial review" precludes the use of employees of the State

level agency as review or hearing officers in State level review proceedings (Grymes v. Madden (3d Cir. 1982), 672 F.2d 321, 323.), and prohibits the State level agency itself from conducting the hearing. (Helms v. McDaniel (5th Cir. 1981), 657 F.2d 800, 806, n.9, cert. denied, 455 U.S. 946 (1982).) In the event of such a conflict between Federal law and State administrative rule, the Federal statute controls. Vogel v. School Bd. of Montrose R-14 School Dist. (W.D. Mo. 1980), 491 F. Supp., 989, 993.

Therefore, it is my opinion that the procedures governing State level reviews of local level decisions regarding the provision of public education to handicapped children, as set forth in the State Board of Education's special education rules, do not comply with the requirements of section 615 of the Education for All Handicapped Children Act of 1975.

I am aware that certain administrative guidelines have issued from the United States Department of Education which purport to prescribe a less strict standard for the participation of State employees in special education review proceedings than the Federal courts have applied. (See Department of Education, Office of Special Education Programs, Revised DAS Bulletin No. 107, issued January 16, 1984.) I do not, however, believe that the pertinent decisions of the Federal courts may be superseded by these administrative regulations. Further,

these guidelines have not been incorporated in the administrative rules of the State Board of Education as required by DAS Bulletin No. 107, and thus have not been implemented in Illinois. Consequently, I decline to apply the Federal administrative guidelines in preference to the judicially-developed criteria discussed herein. See Mayson by Mayson v. Teague (11th Cir. 1984), 749 F.2d 652, 657, n.2.

Very truly yours,

ATTORNEY GENERAL