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ABSTRACT

Legal aspects relating to the application of procedural due process safeguards to special education are surveyed, the requirements of P.L. 94-142 are pointed out, state response to these safeguards are described, and the extent to which the adversarial hearing system has facilitated appropriate education is reported. Particular emphasis is placed on the landmark consent decrees in the federal cases of Pennsylvania Association of Retarded Children v. Commonwealth of Pennsylvania and Mills v. District of Columbia Board of Education which provided for extensive and detailed procedural safeguards to protect the rights of children being classified on the basis of mental, physical, or emotional handicaps. Among the requirements listed for P.L. 94-142 are written notice of the procedural safeguards available to the parents or guardians fo the child, the right to an impartial due process hearing, and the right to an independent evaluation. It is reported that the most typical state system includes notice to parents that their child has been referred for an evaluation, provision of an impartial hearing officer, and independent evaluation prior to the initial due process hearing. The bulk of the document is devoted to the findings of a study on perceptions of Massachusetts hearings participants (parents, lawyers, hearing officers, and school staff) involved in cases where parents have refused to sign educational plan prepared for their children. Findings are seen to indicate that although the intent of the hearing is to provide an informal forum in which parents and schools can discuss the child before an impartial hearing officer, the adversarial hearing structure tended to reward behavior characteristic of a formal court hearing; i.e. the party which maximized the behavior which characterizes a formal proceeding increased their chances of winning the case. It is suggested that special education staff be taught to be specific in their statements regarding the child's needs and the prescriptive services required, and that they learn to describe objectives for the child in real terms rather than in mystifying "lingo". (SBH)

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Procedural Due Process: Its Application to Special Education and Its Implications for Teacher Training

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Of the principles enunciated in the quiet revolution in special education, those which mandate the application of procedural due process to special educational practice provides a formal avenue by which parents (and the adolescent student) can exert their right to question the appropriateness of the proposed educational plans and programs proposed for children with special educational needs. In the past, educators have provided programs to handicapped children, often without the advice, consent, and sometimes, even the knowledge of the parents. Diagnostic labels and program placements have been assigned without systematic analysis of the child's educational status and his/her needs. One of

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the initial questions put by the court to local school administrators during the PARC suit concerned how decisions to exclude the plaintiff children from an education were made. The school officials replied that such decisions were often made on the basis of hearsay evidence, sometimes without having seen the child. Understandably, the court was incredulous (cf. Weintraub and Abeson, 1976).

This paper will be in two major parts: The first section will survey the legal aspects relating to the application of procedural due process safeguards to special education, indicate the requirements of P.L. 94-142 in this area, and describe how the states have tended to institutionalize these safeguards in response to the requirements embodied in P.L. 93-380.

The second major portion of the paper reports, summarily, how participants in an adversarial hearing system, which is functioning in one state, perceive the role and react to their involvement. The intent of the study is to determine the degree to which the intent of this legal reform has been satisfied; namely, whether the parents of handicapped children have found an avenue by which to exert their right to a free, appropriate education for their child. The interviews with the participants in the system highlights problems and ambiguities in the application of the adversarial hearing model to the types of decisions relating to special educational practices.

The last section will present some implications of the concerns reflected in the application of due process safeguards to special educators.

Due Process and Its Application to Special Education

In general terms, the concept of procedural due process embodies the principles of orderliness, fairness and respect for the rights of the individual. More specifically, due process requires that an individual faced with state action which threatens a basic right has the right to be informed of the imminence of such action ("the right to notice"), to have assistance in defending against such action ("the right to counsel"), to present evidence and to question persons presenting evidence regarding such action ("the right to a hearing" including, "the right to confront and cross-examine adverse witnesses") and to have an impartial review of such action ("the right to an appeal").

The due process clause derived from the Fourteenth Amendment provides that, "No state shall...deprive any person of life, liberty, or property, without due process of law." The basic meaning of this clause is that fair procedures must be followed before a state can deny certain "important" interests of individuals. In a substantial number of decisions, the Supreme Court has indicated the kinds of interests which it considers important enough to invoke the protection of the Due Process Clause. The Court has also specified the nature of those protections in various contexts. The Supreme Court decisions most relevant to the application of due process to special education have been discussed by Kotin (1976).

Although certain traditional procedural safeguards have come to be associated with the concept of due process, that

concept does not have a fixed meaning. As with other personal rights protected by the Constitution, the right to due process is premised upon a normative, philosophical idea--that of procedural fairness--but its practical application requires that it be a flexible concept, adaptable to each new context to which it is applied. Thus, for example, it must be sufficiently flexible to be applied to the diverse interests of individuals faced with a criminal or juvenile accusation, discharge from government employment, suspension from public school, revocation of a motor vehicle license, denial of a welfare benefit, attachment of property or some other loss of an important interest defined by the Supreme Court as within the meaning of "life, liberty, or property."

All of these areas of due process application share three common elements. The first is that the state is taking an action against an individual or class of individuals; the second is that the action of the state threatens to deny an individual's interest in "life, liberty, or property;" and the third is that there is a dispute between the individual and the state concerning the validity of that threatened denial.

The purpose of the application of the due process clause is not to prevent the denial of individual interests by the state. Rather, it is to insure that such denial will occur only after rational criteria are applied in a tional manner to facts which are proved through a process which guarantees

to the individual whose interests are threatened, a reasonable opportunity to challenge adverse evidence and to argue that the interest involved should not be denied.

Some of the traditional elements of due process are the right to notice that one's interests are threatened with denial, an opportunity for a hearing on such threatened denial, an opportunity at that hearing to be represented by counsel, to present evidence, to call witnesses, to confront and cross-examine adverse witnesses, to have an impartial decision-maker and to have a specific decision based upon the application of known criteria to the facts which have been proved. In addition, there are a variety of other procedural safeguards which are associated with due process and which apply in specific contexts, such as the right of an indigent criminal defendant to a free trial transcript for purposes of appeal.

Many federal cases which were litigated on the issue of the exclusion of children from either a public school or a publicly financed education for reasons of "mental, physical, or emotional" handicap have included in the remedies, the application of procedural due process. For purposes of illustration, I will focus only on the landmark consent decrees in Pennsylvania Association of Retarded Children v. Commonwealth of Pennsylvania (PARC) and Mills v. District of Columbia Board of Education.

The PARC case was a class action brought on behalf of

all mentally retarded children in Pennsylvania who were excluded from a public school education because they were determined by Pennsylvania school officials to be "uneducable and untrainable."

The PARC consent decree embraced three different types of educational reform. It affords all retarded children the right to a free public education and requires the state to identify and locate all previously excluded children. It also recognizes that potentially serious harm can come to children who are misclassified or misplaced. In order to protect them from such harm, the decree required that local districts undertake thorough, systematic medical and psychological evaluation of excluded children as well as re-evaluation of those already in special classes. In addition, the decree seeks to ensure that the content of programs for properly evaluated children is appropriate to each child's needs and abilities. While it does not define appropriateness, it does declare that regular or special class placement in schools is preferable to other approaches such as institutionalization and homebound instruction. That is, it specifies the principle of a placement involving the least restrictive alternative for the child.

The Mills case was brought on behalf of seven handicapped children who represented a broader range of excluded children than those in the PARC suit. They included students barred from school as incorrigible discipline problems and those

denied an education because of physical, mental, or emotional handicaps by the Washington, D.C. School Board. The Mills attorneys sought to broaden application of the principle that all children, regardless of their disabilities or behavioral symptoms, are constitutionally entitled to publicly supported schooling suited to their special needs.

In both cases, the plaintiffs alleged a denial of rights guaranteed to them by the due process and equal protection clauses of the Fourteenth Amendment. In both cases, the federal courts approved consent decrees which acknowledged such denials and specified elaborate procedural protections to govern the placement or denial of placement of the plaintiff-children into educational programs.

Of particular relevance are the extensive procedural safeguards provided for by the consent decrees in both cases. With minor differences between them, the Courts required the following procedural protections to be offered to the parents and children prior to the placement or denial of placement into educational programs: (1) notice of the proposed action; (2) the right to a hearing prior to final action; (3) the right to counsel at that hearing; (4) the right to present evidence; (5) the right to full access to relevant school records; (6) the right to compel attendance of, confront and cross-examine officials or employees who might have evidence on the basis for the proposed action; (7) the right to an independent evaluation; (8) the right to have the hearing open or closed to the public,

at the option of the parent; (9) and the right to an "impartial hearing officer." (See 343 F. Supp. 279 at 303-305; 348 F. Supp. at 873-876). In addition, the decrees required that the hearings be held at a place and time convenient to the parents, that the hearing be recorded, transcribed and made available to the parents, upon request; and that the decision of the hearing officer contain specific findings of fact and conclusions of law.

In summary, the consent decrees in PARC and Mills provided for extensive and detailed procedural safeguards to protect the rights of children being classified on the basis of mental, physical or emotional handicaps. Most of these safeguards are familiar to courts and have been applied in other contexts. Others, such as the right to an independent evaluation and the right to access to school records, are of particular relevance to the public school setting.

The basic elements of due process delineated in PARC and Mills gradually began to be recognized in other states through federal court decisions or through state legislation, but the great impetus for the application of due process to special education has come through the requirements of federal legislation.

The Procedural Safeguards in P.L. 94-142

Passage of Public Law 93-380 in 1974, and Public Law 94-142 in 1975, ensured the application of the procedural safeguards of due process to all parents and their handicapped children. Public Law 94-142, which is more comprehensive in scope,

spells out the requirements made of state and local education agencies who are in receipt of federal funds under the surveillance of the state educational agencies.

Under these requirements, each state seeking funds under the Act must submit to the United States Commissioner of Education a state plan which contains "procedures for insuring that handicapped children and their parents or guardians are guaranteed procedural safeguards in decisions regarding identification, evaluation, and educational placement of handicapped children." These procedures must include many of the provisions specified in PARC and Mills including provisions for (1) prior notice to parents or guardians of a change in the identification, evaluation, and educational placement of the child in the native language of the home unless unfeasible to do so; (2) written notice of the procedural safeguards available to them in their native language, (3) the right to an "impartial due process hearing;" (4) the right of access to all relevant school records; (5) and the right to an independent evaluation. In addition to being required in the state plan requirements, these basic procedural protections are set forth as mandatory provisions of the Act itself. A surrogate parent must be appointed to act on behalf of the child when the child is a ward of the state who cannot be an officer or employee of the local school district from which the action was initiated. Parents are accorded the right to appeal to the state educational agency, when the initial due process hearing has been conducted by the local education agency rather than by the state. Furthermore, the Act specifies the detailed format of the hearing requiring that any party to the hearing 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 . . . [§ 615(d)]

Finally, the Act provides for review of final administrative decisions "in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy." Thus, the Act establishes a basis for cases of exclusion or misclassification of students on the basis of "mental, physical or emotional handicap" to be heard by the federal as well as the state courts.

The cumulative effect of the federal litigation and legislation described above is a great deal of activity at the state level in requiring local educational agencies to implement due process procedures in their special education programs. This activity at the state level will be discussed in the next section.

State Response to Federal, Judicial, and Legislative Requirements in the Area of Due Process in Special Education

At the time the Education Amendments of 1974 (93-380) was signed into law, the Council for Exceptional Children estimated that twelve states had legislation containing references to due process requirements in special education and that thirteen states had regulations containing such requirements.[1] A review of state legislation and regulations

[1] "State Policy Regarding Due Process and Mainstreaming," Council for Exceptional Children (Oct. 1, 1974).

in Spring, 1976, reveals that twenty-three states now have statutory special education due process provisions[1] while virtually every state has due process requirements for special education specified in state regulations, binding state plans submitted under the 93-380 state guidelines or proposed regulations or guidelines which are in various stages of the state administrative process.[2]

The following section will provide an impressionistic overview of the kinds of due process requirements for special education which are being developed by the states. Because these state requirements have been developed so recently and at such a rapid pace, because they are in various stages of completion, and because it is unclear in many states whether or not what has been developed is legally binding or is merely advisory in nature, it has been impossible to secure and to present a precise and detailed description of the special education due process system in each state. For this reason, the following analysis uses the material which has been received

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[1] A chart on state statutory provisions for due process in special education is available upon request. These provisions give some indication of the due process systems in each of the states listed, but, in general, must be read together with state regulations, guidelines, and state plans in order to provide a full description of the system which is in effect in a particular state.

[2] For purposes of this article, references to the special education due process provisions in the various states will not differentiate between statutes, regulations, guidelines or state plans. Rather, the reference to a state system of due process in special education or to a particular part of that system will be a composite reference to the combined effect of the various sources from which the information was derived.

from the various states only to indicate trends which appear to be developing.

General Trends of Due Process Requirements

The most typical state system for due process in special education is one which begins with a notice to parents that their child has been referred for an evaluation. Frequently, this notice contains a requirement of parental consent to the conduct of the evaluation. In many states, if the parent refuses to consent, the local educational agency may appeal such refusal to the state education agency. The implication of this appeal right is that the state education agency has the authority to affirm or reverse the parental decision, but the type of state action which, in fact, may be taken, is generally unspecified.

Assuming the receipt of parental consent, the next place where the parent is involved in the typical state system is after a decision has been made by an "evaluation team" of educational and other professional diagnosticians about a proposed placement for the child. At this point, the parent is sent a notice of the decision and of their "due process right" to contest that decision at a formal hearing.

In the usual case, such hearing is provided at the local level. It is typically presided over by a designee of the local education agency. In many states, provision is made for an "impartial hearing officer"--i.e., a person who is not an official, employee, or agent of the local educational agency which made the original placement decision.

Most states provide for the full range of procedural protections at the hearing. For example, most systems allow the parents to be represented by counsel, to have full access to all relevant school records, to present evidence, to compel the attendance of, confront, and cross-examine persons who were involved in making the placement decision and to have the hearing recorded.

The typical state system provides for an appeal to the state education agency from the decision of the local hearing officer. Usually, the scope of review at this appeal is limited to the record that was made at the initial due process hearing, although the state appeals hearing officer is frequently given the authority to require the production of more evidence if the record is inadequate for a decision to be made on the appeal.

Most states provide for the parent to have the child "independently" evaluated prior to the initial due process hearing. Usually, this independent evaluation is available at a state facility or at state expense. The responsibility for payment is frequently unspecified.

The due process provisions which have been developed by the states to meet federal statutory and judicial requirements are most notable because of their similarity to each other and their adherence to the traditional, judicially-created due process model.

The Human Response to the Procedural Due Process System: Or, Does the System Work as Intended?

Under a grant from the Bureau of Education for the Handicapped, we have been studying the operation of the due process system in Massachusetts, a state with radical new legislation which reorganized the delivery os special education services, effective September 1, 1974. It had come about through the active efforts of citizen advocates, professionals, consumer groups, parents, and concerned legislators, who were extremely dissatisfied with the existing traditional system of special education that was unresponsive to the particular needs of children, much less respectful of the rights of parents. Massachusetts had a categorically-based system, with largely separate resources for children in special educational need and few formal diagnostic requirements for placement in a special education program. The process that led to the passage of Chapter 766 in 1972, and its principal provisions have been described elsewhere (Budoff, 1975).

The active involvement of parents and advocates in the passage of the law resulted in considerable pressure for immediate and total implementation of the act, and almost immediately, recourse to the procedural due process system specified in the regulations. Since September, 1974, over 500 cases of parents who have refused to sign the educational plan prepared for their children have been recorded and over 250 hearings have been held by the Bureau of Special Education

Appeals (BSEA), which is charged with responding to the parents' appeals of their child's plans.

In Massachusetts, the refusal of the parents to agree in writing to the educational plan automatically starts the appeals procedure. If, after the 30 days allowed for informal negotiation, the parent(s) still do not agree with the plan, hearing officers of the BSEA can review the case, and can render a judgment based on the documentation submitted by the school. In practice, this procedure has not been followed. Rather, presumably within 60 days after the parent requests it, a formal hearing is to be scheduled. In this hearing, parents and the schools have a right to counsel, to call witnesses, and to cross-examine each other's witnesses. The parents can appeal the hearing officer's decision, which is due within 30 days, to the State Advisory Committee for Special Education and either party can appeal it to the courts for administrative review. The child's placement in school cannot be changed during this interval, unless it can be shown by the school officials that the child will endanger the health and safety of the other children or substantially disrupt the educational program. With some exceptions, and the required written concurrence of the parents (or adult-child) with the plan as a condition, the Massachusetts regulations follow the general directions provided by P. L. 94-142.

As a first step in this study, we have been conducting a "Rashomon" of the process. That is, we have been studying

the perceptions and responses of all the kinds of participants in a due process adversarial hearing. We chose to study the hearings process prospectively. After obtaining parental consent, we attended the actual hearings, interviewed the parent , and many of the participants in the hearings, conducted since January, 1976. We have data that is still in process relating to parents, lawyers, (parents and town counsel), hearing officers, and school staff. We have interviewed some advocates but have not found any intense involvement from this class of persons, with the exception of one person who worked with over 45 parents during the first 18 months after the law became effective. In this next section, I will report the highlights of our findings from persons in each class of participants so as to provide you with some more personal and human flavor of what it means to become involved in a hearing.

A sample of more than 50 user-parents has thus far formed the basis for intensive interviews. The following discussion is based only on the first 25 interviews. These interviews were designed to explore the prehistory of the families' relationship with the school, the expectations held by parents when they heard about Chapter 766, those leading up to the hearings, the hearing itself, and its aftermath. It was also intended to discover characteristics of families who used the system and the types of experiences which lead families to avail themselves of the appeals process. From these interviews a distinct picture is beginning to emerge.

Our underlying hypothesis is that parents who use the hearings process exhibit a set of characteristics based on the interaction between some characteristics of parents, some characteristics of school behavior, and the quality of communication between the two. For example, there might be two sets of parents with the same characteristics which we hypothesize would prompt parents to request a hearing. If the communication with school personnel has been nonadversarial and open, and if the school has done a quality evaluation and program prescription, those parents will not request a hearing because they will be able to work in cooperation with the school to develop an appropriate program for their child. If communication with the school becomes highly charged and adversarial, and if the school has not done a good evaluation or developed an adequate program based on that evaluation, parents with similar characteristics will request a hearing. Under these circumstances, we expected parents with high socio-economic status to be more likely users of the hearings process. We expected high SES to be a predictor of a higher level of education, more money to spend on independent evaluations or other appropriate testing, on the services of an attorney or other counsel, and expert witnesses to represent them at a hearing. We also expected that parents with a higher educational level would be better able to understand or to know where to seek knowledge of the subtleties of the law, their child's handicap and the position of the school in relation to their diagnosis and program prescription.

Other parent variables were designed to deal with the parents' belief system. We asked what the parent thought his/her child's needs are and what the expectations were for that child. We asked what parents saw as the future possibilities for the child and what they expected would happen to the child in his/her current educational placement. These variables were designed to test the hypothesis that parents holding high levels of expectation regarding the quality of education offered by the public schools would make greater demands on the school and be more likely to request a hearing if their demands were not met.

Finally, we asked a series of questions designed to determine the psychic and dollar cost to parents of their experience with an adversarial due process system.

As perceived by the parents, we considered the following school variables: quality of the evaluation, development of an educational plan which followed from the evaluation, the quality of communication, including the process of information dissemination, the steps from child evaluation to hearing, the attitudes of the school displayed toward the child and parents, and the schools' intent to comply with Chapter 766.

Key communication variables between school and parent considered were ease and number of opportunities for communication between parent and school, shared perception of the child's needs and definitions of adequacy for programming.

Based on the above model, we would predict that parents who are high on all the parent variables will request a hearing if there is low quality of communication between them and the school, and if the school is low on the variables outlined for schools.

I shall report some particularly interesting highlights of these interview data to convey to you some of the factors of most concern to us, particularly the parent-school interaction, and the economic and psychic cost to the parents who utilized the appeals procedures on behalf of their children. A more complete presentation of these preliminary data are available in Mitchell (1976).

Seventy five percent of the parents felt that the schools' response to Chapter 766 had been a negative one. More specifically, they felt that schools tried to ignore the law, were purposefully in non-compliance, misinformed parents or withheld information altogether. Eighty five percent of the parents experienced delay tactics on the part of the school which meant non-compliance with the timelines set by the regulations. Parents relate a series of delaying and manipulative tactics on the part of schools which they felt were consciously engineered to discourage them from pursuing their requests. Although schools had a year to "gear up" before implementation of their new programs, many parents who had requested child evaluations in the spring of 1974, had not received educational plans by the time their child was to

begin school that fall. All parents experienced trouble in the evaluation team meeting--meetings scheduled at times when it was impossible for them to attend, meetings changed at the last minute by schools, not once, but many times. Often parents changed long-standing family plans or returned from vacations only to find the school postponing the core meeting yet another time.

In all but three cases, the school's behavior at the team meeting discouraged parent participation. Parents were made to feel they were not qualified to help in developing an educational plan, or that they might just as well not have been at the meeting at all. The other three said that, although the school did let them participate, it was largely a matter of courtesy. When they received the completed educational plan, their suggestions had been ignored. Every parent felt that he/she was qualified to participate at that meeting, 80% of these feeling that they had specific knowledge of their child's needs which would uniquely qualify them to help in drawing up the educational plan. These parents had taken specific steps to gain expertise in the area of their child's special needs. These included extensive reading of books, taking courses, and being active in local chapters of parent groups. Three of these were employed as experts prior to the meeting in the area of their child's special needs.

Until the evaluation team meeting, all parents expressed strong hopes of being able to work with the school in developing an adequate educational program for their child. Even after all the negative experience with the school, all parents but one felt that they would much rather have negotiated with the school than gone to a hearing. The one exception was a parent who had had eleven years of negative adversarial experience with the school personnel.

Parents stated that they only requested a hearing after they had received a plan which did not contain those components they had felt should be contained in the plan, and which they had expressed to the school. Some parents stated that they had continued attempts to negotiate, in a few instances requesting help from an officer from the State's regional office. When these attempts failed, they felt compelled to request a hearing, although no parent did so except as a stated "last resort."

Thirty three percent of parents felt that the hearing centered around a single issue, this being the school's unwillingness to admit that their own programs were inadequate, and the school's expressed refusal to pay for private placements in adequate programs. Other parents viewed the hearing as centering around a composite of issues including the school's unwillingness to develop adequate programs for special needs children, school and parent disagreement about the nature of this particular child's special needs, and the fact that the

child was getting older and the parent could no longer wait for the school to try to develop a possibly adequate program.

Going into the hearing, all parents felt nervous, scared, and apprehensive about the nature of the hearing. Only two parents stated that they felt determined to win; one parent was sorry at the last minute that he had gone as far as a hearing. All were unsure about the character of the hearing they were about to attend. In 67% of the cases, at the hearing itself, the hearing officer succeeded in making the parties feel more comfortable and at ease; in 33% of the cases, they felt nothing happened to change their initial feelings of fear and apprehension. These same 33% also stated that the school was belligerent and the hearing officer seemed incapable of controlling the hearing. All of the parents stated that the school's testimony differed in some way from what they had expected. In 85% of these instances, the differences included the school changing the plan presented at the hearing, claiming a loss of evidence, or bringing in or presenting new evidence previously unknown to the parents. In 25% of the cases, the school was said to have falsified the progress of the child. In 25% of the cases, the school acted considerably more belligerently at the hearing than the parents had anticipated, for example, by being rude to parents and calling them liars. Other examples are illustrated by the following quotations:

"All of a sudden at the hearing the school said all her [the child's] problems were caused by our [the parents'] unwillingness to send her to public school. They ignored all the tests saying that she had severe brain damage--suddenly, it was us against them."

"The director of special education laughed in my face and said you haven't read my published materials when I asked her what the qualifications of the different teachers were."

"The school's attorney argued that we wanted our child in a private school for social prestige even though he knew that we had five other children in public schools."

The school had told parents in 20% of the cases that the hearing was to be informal, but when the parents came to the hearing without counsel or witnesses, prepared for an informal discussion, they found the school armed with town counsel and a battery of witnesses prepared to argue the case in the most legalistic manner. In the parents' view, the two most difficult obstacles to overcome in the school's presentation were the fact that the school had the money and resources to bring in counsel and as many witnesses as they wanted to, and schools very early learned to write plans that were in compliance on paper, but which the parent was convinced either did not fit the child's need, or were impossible for the school to deliver. One parent, an experienced businessman and president of a company, who

was led to believe that the hearing was to be informal, stated afterwards, "The state's not in your corner either. Here's the lonely citizen fighting a lonely battle. The school brings in all its big guns, and the hearing is so disorganized an average lawyer can't do his job."

In terms of financial cost to parents, 85% of the parents stated that this was a costly procedure, quoting figures up to $4,000. Costs incurred included attorney fees, paying for independent evaluations, paying for expert witnesses to appear at the hearing, time lost from jobs, duplicating costs, and long distance telephone calls. Fifteen percent of parents spent a moderate amount of money.

Without exception, all parents related massive psychic cost to themselves and their families. Twenty-five percent complained of excess nervousness, severe anxiety attacks and enormous disruption of normal family routines; another 25% from excess nervousness and disruption of family routine; and 35% complained of one of these two factors. In 15% of the families, one or more family members became physically ill as a result of their nervousness and anxiety.

When asked what specific changes occurred in the family as a result of this experience, we coded the following responses: 80% underwent a process of self-education related to their child's special need, and also became involved with

other parents, either by joining or starting chapters of consumer groups, or by becoming advocates for other parents. One quarter of the population stated that they had quit their jobs--one man lost a job he had held for the previous 17 years--because their involvement with the process came to completely dominate and consume their lives. Two previously non-working parents took jobs in order to pay the expenses incurred in the process. Twenty percent stated that their children's attitude towards schooling deteriorated during the process.

Finally, when asked whether they would repeat the process, 55% said they would go through it again, half of those because they won their case, the other half because they felt a social commitment to going through it, or that their experience may be of benefit to other children. The other 45% felt the experience had been so traumatic that they would not go through it again under any circumstances. They also felt that it was impossible for a parent to win because the schools had learned to manipulate the law to their benefit without making any productive changes in special education.

Parents did express very strongly in all but two cases that they felt a negotiation process would be of great benefit in neutralizing the adversarial buildup between themselves and the school and help to clarify issues. They also felt an extension of state funding would make the schools more agreeable to developing innovative and adequate programming

for special needs children. The other two families felt that nothing would improve until school personnel radically changed their attitudes and approaches to the education of special needs children.

From this initial set of interviews of parents in Massachusetts, a distinct picture is beginning to emerge. Although the sample is still relatively small, our initial hypotheses seem to have been borne out by our data. We may have erred in assuming high SES to be an indicator of attitudes, but the variables which we proposed as salient in parents who asked for a hearing have been accurate. The composite picture indicates that the parents' view of educational goals for the child may vary, but all parents felt that the schools had a definite responsibility to fulfill the goals they held for their own children, whether it be job preparation or higher education. The attitude of these parents is that the schools are not providing the adequate programming their child needs. enactment of Chapter 766 merely exacerbated the problem because it fostered the expectation that schools would finally be forced under the law to program more appropriately for their children.

Parents who continued their appeal through the hearing itself consistently expressed a strong feeling of personal efficacy, although they felt drained by the process and weren't sure they would be willing to go through it again. Parents also, either through prior knowledge, self-education

or courses, made themselves technically competent to challenge the school's position. Parents also expressed a great empathy towards other parents with special needs children and a desire to help them, which was expressed in a variety of ways from returning to school, to becoming a trained parent advocate, to starting a local parent group.

As perceived by the parents, the schools involved in the hearings process were ones who had been low on the variables for schools we had selected. The parents felt they had provided low quality evaluations, had communicated poorly or in a manner which often obfuscated and/or resulted in withheld information. The child's needs identified by the school differed from the parent's view of their child. The attitudes and behaviors displayed by the school towards parents were consistently negative, including rudeness, lying, and generally treating parents like troublemakers or unqualified intruders. More seriously, parents expressed grave doubts about the school's serious commitment to work at developing appropriate programming for their own children or for special needs children in general.

Above all other elements, the quality of communication between parents and schools was consistently bad, and deteriorated druing the process. It became more negative, highly charged and adversarial. Parents consistently pinpointed the evaluation team meeting as the turning point in their attempts to deal positively with the school. From that

point on they felt communication had broken down so severely that their only recourse was to request a hearing.

We intend to interview a sample of parents who have accepted an educational plan, but who express dissatisfaction with it but have not appealed to identify the characteristics of these persons. Our tentative hypotheses are that parents who score low on the parent variables we have examined will not request a hearing and will accept inadequate educational plans --especially if the communication between school and parent is of poor quality, for example, if the school uses "cooling out" tactics with parents. With few exceptions, the preponderant mass of 250 parent users has come either from suburban communities; only four have been from urban Boston.

Another component of our research involves interviews of school personnel on a case-by-case basis which will develop an overall picture of the similarities and differences in the perceptions of the process from the perspective of schools and parents.

We have begun talking with school systems who have participated in hearings to gain some sense of the degree of congruence between their and the parents' perception of particular cases, the schools' sense of the process more generally, and its effect on their systems. In general terms, school systems that have poor communication with parents, and that tend to minimize the importance of parent-school communication in practice, as opposed to their rhetoric, do

experience more hearings when the demographic composition of their community is middle class. Though we know that urban schools also often have difficulties communicating adequately with the parents of their students, these parents do not utilize the due process option when they are dissatisfied with their children's educational plan because the actual dollar cost is considerable, and their excess psychic energies for these activities are limited. One should recall that one of the parents we interviewed said he lost a job he had held for 17 years because of the family's consuming involvement in the adversarial process on behalf of their child. What is required to make the appeals system available to low and middle income and/or minority group parents are active, knowledgeable advocates who would provide the knowledge of the system, and the support necessary to allow these parents to stand up to "all those experts from the schools." Neither the Massachusetts nor the federal law specifies that legal services to the parents are reimbursable; most recommendations seem to recommend use of public defenders or other public interest lawyers.

In one instance, we can trace the evolution of a completely changed stance in a suburban community as a result of early involvement in hearings by parents. The director of pupil personnel services, who was appointed at the time the law became effective, realized early that the communication between parents and school was very poor, and there was a

narrow range of special educational services available within the community. During the first year the law was effective this community was involved in four different hearings. The four hearings created considerable negative visibility for the schools since the parents were seeking considerable sums of money to have their children educated in private schools due to the lack of suitable local programming. This director was able to mobilize support for his position that special education required a considerable infusion of new monies to develop the missing program options. Simultaneously, he started working with his staff around the issues related to more effective communication with parents. The result was much better defined educational plans, more satisfaction expressed openly by parents that they were being talked with and listened to by school personnel, a broader range of programs being available, and no subsequent appeals by parents. In fact, the parents who appealed in some instances are now considering returning their children to the public schools and in one case, have already done so during the second year.

The pupil personnel services director sees the impact of the appeals process very positively. The negative visibility within a suburban community mobilized new resources more rapidly than they would have become available, even with the new legislation. The resort to a hearing, with the acrimony this tends to engender so upset his staff that they were amenable to reconsidering their prior style of operation.

They so re-oriented their practices that parents who had previously been very disgruntled over many years, now appear to view them positively, and to work constructively with them.

Other school personnel, especially those from communities which had well developed special education services, have not perceived the appeals system so positively. A large proportion of the cases which were appealed in the first effective year of the Act concerned suburban children with learning disabilities whose parents had already placed them in private schools because they had not been offered the services they felt were appropriate for their children. If the educational plan or a hearing officer's decision recommended a private placement, the town is responsible for payment of the tuition costs. Some of the communities with the best developed special education services, serving the most sophisticated parents often were the object of these appeals. The parents felt that even these schools were not offering the programs most suitable for their children. Since the schools were just gearing up for a radically new system, and not yet ready to respond to the requirements of the new law, many of their educational plans were faulty, and their available services insufficiently attuned to the needs of particular children. The schools lost the appeals, and were forced to pay for the private tuition costs. While the state education department did permit, informally, a time line for total compliance, this was not formally specified, and hearing officers viewed the schools'

early educational plans as inadequate and often awarded parents their request for a private school placement.

The experiences of this first year in these communities badly colored the views of school personnel regarding the thrust and intent of the appeals procedures. The schools simply felt they were being "ripped off." Some school districts have refused to pay the costs and are suing or being sued in court. One must be aware that the Massachusetts law has an anti-school bias. For example, parents can appeal decisions of hearing officers directly to the state advisory commission, but schools cannot. They can go to court only under the Administrative Procedures Act. Schools have definitely felt "under the gun" in trying to respond to the very detailed maze of procedural requirements required to be in compliance with the act. The personnel in these more responsive communities resented the sense of distrust and antagonism they felt was symbolized in the adverse decisions of this first pool of hearings.

How do lawyers for parents perceive this process? We interviewed four lawyers who had been most actively representing parents. They felt that the greatest impact on the decisions came from parental testimony and records of the child's evaluations at different stages on the case. Although the attorneys did not feel that they contributed very much to the case in a substantive way, they did recognize the psychological advantage of their presence. The attorneys saw themselves as

facilitators, helping to bring out the relevant testimony in an orderly fashion and asking the opposing party the necessary questions to hone in on the points of disagreement between the schools and the parents.

They saw themselves as protectors of the parents against the sometimes overwhelming number of participants brought by the schools. The presence of an attorney for the parents prevented procedural incursions on the parents' rights and gave them the needed confidence and advance information about the hearing to make it possible for them to participate fully and in an organized manner in a strange and somewhat frightening procedure. One attorney commented that he felt his presence was most necessary when the hearing officer was not an attorney.

While the attorneys agreed that the due process hearing was the only way to make the schools responsive to the demands of parents, all uniformly agreed that its value is enhanced by a substantive and active negotiation process, since this allows the outstanding issues to be clarified and, most often, resolved. One attorney has participated in negotiations in about 40 cases and felt that compliance was greatly enhanced in the negotiation in contrast with the hearing process. All the attorneys felt that the due process hearing should be resorted to only after all possibility for negotiation had been exhausted. One attorney recommended that an outside person be brought in to "bring the parties and information together . . . thrash it out freely and

and openly." They all felt that negotiations could effectively reduce the number of cases that actually reached hearing and even in cases where issues could not be resolved wit out a hearing, the negotiation would help to bring some focus into the hearing and reduce the number of issues in contention.

The hearing officer is obviously a critical figure in this appeals process, once the proceeding is launched. One of the ambiguities, perhaps an eternal one for the complex considerations at issue in special educational decisions is the definition of the role of the hearing officer. This role is critical in the conduct of the hearing and in formulating the subsequent decision.

The regulations for Chapter 766 merely specify that the state education agency shall "designate an impartial hearing officer to conduct the hearing." This language is very similar to that contained in 94-142, except the designation may also be made by the local district. In Massachusetts, no clear standards were enunciated to guide the hearing officers in conducting hearings, in defining issues relevantly addressed at a hearing, or the manner in which they should or could control the hearing so as to elicit the relevant facts. They were left with the broadest possible interpretation based on personal attitudes, individual competence, and style.

We have interviewed hearing officers recently to determine how they have come to define their responsibilities and their role in the conduct of the hearing. In addition,

we sought to discover what kinds of testimony or evidence might most convincingly influence hearing officers, how they consider and assess the evaluations and educational plans presented at hearings, what they consider relevant issues, and possibly most importantly, how they have come to define the standard by which to judge the educational plan presented. A summary of the hearing officers' responses will help convey the problems inherent in the role of a hearing officer.

The interviews were conducted with twelve hearing officers, all of whom had conducted at least four hearings. Of these, six are permanent staff members, while six had been hired as consultants to help handle the backlog of cases that had been built up during the previous two years. The six permanent hearing officers included two lawyers, two who had worked in areas of child welfare and family services, one who had been a school teacher, and one who had been a hearing officer for a rent control board. The consultants were all attorneys. None of the group of hearing officers had been on the staff from the inception of Chapter 766 hearings. They all felt strongly that their role lacked definition, and that they had had virtually no training in assuming it.

All the hearing officers understand the ambiguous context within which they have been forced to operate, and many have felt distinctly uncomfortable. As stated by one: "I was

flying by the seat of my pants, I had no idea what to do in a hearing. I felt very alienated and frightened to have had to decide on the future of a child, when I didn't even know what was going on."

Most of the hearing officers define their primary function at a hearing as that of fact finder. They feel that they have been mandated to determine simply whether or not the educational plan presented by the school is adequate. Challenged to a definition of adequacy, most say that they would define it as being not the best plan, but something better than average. We can see this definition being applied operationally in the following remarks:

"The issue is first the educational plan, past history is not relevant, and I will not focus on it. I only focus on the educational plan. If the educational plan looks valid, then the parents have the burden of proof, if not, the school. In a situation where it is close, the school has the benefit of the doubt."

From another hearing officer: "If the plan looks good to me, then the case is over. My job is to rule on the plan. I don't expect that any child in public school can get as much as he would in private school, so if the parents are asking for the best possible placement, and the school can offer something, though it is not the best, I will go for the school."

Finally, "It is a question of luxury versus adequacy,

luxury. If the parents want it, fine, but it's not what the schools are supposed to provide under 766."

This group of hearing officers feel their responsibility extends no further than to weigh the evidence presented, not to probe to bring out anything either party fails to mention, no matter how crucial that might be in rendering a fair decision. Because these hearing officers primarily view their role as a passive one, they feel the presence of attorneys or other representatives for either parents or schools benefits the hearings. As an example: "I rule on the evidence I have; I try to bring out all the facts, but I do not feel that I should be the one trying to make a case for the parents. Parents often forget. They have to prove the plan is inadequate; if they don't they can't expect that I have the expertise to prove that for them. A lawyer helps to present the case concisely and takes some of the burden of cross-examination off the hearing officer." Although this group of hearing officers felt that they sometimes make concessions to parents who they feel need to vent emotions, they do not allow these sentiments to influence their decisions.

A second, much smaller group of hearing officers perceived themselves as being primarily advocates for the needs of the child. They interpreted their role at a hearing as an active, service-oriented role in which they attempted to determine first the child's needs, and from this baseline

viewed the appropriateness of the educational plan for the child. This group also felt that an essential aspect of their role was to work to re-establish damaged communication between parents and schools. One of this group describes how she sees her role at a hearing as follows:

"The first thing I almost always do is to send the plan back to the school. I tell them I want it clear which it usually is not, more concise, which it usually is not, and the best they can come up with. The family background and the history of the case are important. I try to listen to the parents' main concern and then separate the parental issues and the educational issues. Then I feel ready to be able to depolarize the hearing.

"The key to depolarizing is getting the school to consider all the issues, all the parents' concerns. When I end a hearing I feel like I have to take everything into account, the kid's history, what chances he has to succeed in either placement, how I feel he can best be aided, given his home situation, friends he has, school situation, and then I tell the parties what my decision will be and get their feedback."

This latter group of hearing officers, in addition to cross-examining the participants at the hearing, said they often make site visits to the school, request particular witnesses and documents they consider relevant to formulating their decisions, and often talk to the parents at their homes.

The contrast between these two groups of hearing officers illustrates very different definitions of the hearing officers' role. The first group models their approach after a courtroom proceeding in which the judge mainly listens to the evidence presented by the parties to the dispute. In this model the hearing officer assumes a passive role, and formulates his decision on the basis of the quality of the presentation by either side. This group of hearing officers correctly pinpoint the critical role of an attorney in helping present an organized presentation because they do not conceive their role as facilitating the presentation of all relevant facts. The second group conceives their role as one in which they work with the clients to elicit the perspectives and facts in relation to the child's special needs and relate these facts to the educational program appropriate to the child. The first group seems to judge the merits of the case mainly on the adequacy of the school's plan without probing actively to ascertain whether the plan fits the child's needs, or whether the school can, in fact, implement it. This leaves an opening for school systems to learn to write plans which conform with the regulations, but which bear no necessary relation to subsequent implementation. The second group of hearing officers feel compelled to probe beyond the plan itself to the total context in which they feel appropriateness of the plan should be determined, including

aspects of the child and family's social situation, an evaluation of the diagnosis in relation to the specified needs and program proposed, and the capabilities of the school to carry out the plan.

The evolving policy of the state bureau concerned with the appeals procedure has been to consider issues broader than the educational plan, e.g., the school's capability to deliver the proposed services, the prospect of the kind of progress the child can be expected to make in the proposed program, and the views of experts regarding the appropriateness of the plan. But this requires expertise in special educational practice which is not readily apparent in the background and experience of the hearing officers.

Finally, while our own data describing the interactive dynamics of a hearing are not yet available, data from the first post PARC year in Pennsylvania are available (September, 1972-December, 1972; N. 79). The analyses were done from verbatim transcripts of the hearings, hence much of the real life flavor is not available.

In their conclusions (Mitchell, 1975) they indicate that although the hearings are supposed to be informal, once the procedure is initiated, it was virtually impossible for the hearing to remain informal. The structure of the hearing designates a hearing officer as "judge," permits counsel, witnesses, and cross-examination; all elements of a formal adversarial hearing. Those who used these

elements to greatest advantage had the greater likelihood of winning their cases. Thus in a multiple regression analysis, in which win/lose was the dependent variable, the largest proportion of the variance associated with parent winning their appeal was accounted for by the quality of the parent presentation (39%). The variable which correlated most highly with parents' presentation was quality of the cross-examination (.80). These parents were generally represented by a lawyer, presented a large number of exhibits, and had consulted and received evaluations from experts.

Although the intent of the hearing is to provide an informal forum in which parents and schools can discuss the child before an impartial hearing officer, the adversarial hearing structure tended to reward behavior characteristic of a formal court hearing. The party which maximized the behavior which characterizes this formal proceeding increased their chances of winning their case.

Implications

The intent of the due process safeguards are to ensure that parents can be informed of, and question the appropriateness of the educational plan proposed by the school. While the right to notice is certainly being followed, the universal adoption of the adversarial hearing model as the primary vehicle by which parents may question the appropriateness of the proposed plan, appears not to fulfill the intent of this safeguard, when viewed from the perspective

works in a [illegible] period of time [illegible] decision to [illegible] this process [illegible] occur before [illegible] because attorneys, parents, and [illegible] strongest, most effective cases and often take considerable preparation time. Requests for continuances occur frequently, requested by both sides. When this time period is added to the time required to evaluate and prepare an educational plan for a child, the time required for referral to implementation of the educational [illegible] since the child's placement cannot be altered during pendency of the [illegible] up whether the [illegible] either.

The high [illegible] confronting the array of experts which schools can mobilize on their behalf, the loneliness of the confrontation, and the increasing risk that one will lose anyway causes almost all parents to settle for less and avoid the exercise of their right. Even those parents who are willing to confront the schools have come to feel the system has been rigged against them. They recognize that schools have learned to write acceptable educational plans but because the schools are not pressed to

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