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FOCUS ON EXCEPTIONAL CHILDREN

Procedural Due Process and The Education of Handicapped Children

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The essence of fairness is procedural due process — the right of a citizen to protest before a government. In the case of the handicapped child, that means having the right to protest actions of the state education agency (SEA) or the local education agency (LEA). For those who pioneered the right-to-education doctrine, the procedures for implementing the right were as crucial as the right itself. Without a means of challenging the multitude of discriminatory practices that the schools had habitually followed, the children would have found that their right to be included in an educational program and to be treated nondiscriminatorily (to receive a free appropriate education) would have a hollow ring. Procedural due process — the right to protest — is a necessary educational ingredient in every phase of the handicapped child's education.

It also was seen as a constitutional requisite under the requirements of the Fifth and Fourteenth Amendments that no person shall be deprived of life, liberty, or property without due process of law. In terms of the education of handicapped children, this means that no handicapped child can be deprived of an education (the means for acquiring property, "life," and "liberty," in the sense of self development) without exercising his right to protest what happens to him.

The success of the right-to-education interests reaffirmed a belief widely held by lawyers — namely, that fair procedures will tend to produce acceptable, correct, and fair results. Due process took many forms in the right-to-education cases.

COURT DECISIONS

Notification

A person who is adversely affected by the action or inaction of SEA or LEA is helpless to protect himself from the agency or to protest the decision unless he has adequate prior notice of what the agency proposes to do and for what reasons. The notion of *prior notice* clearly applies when a handicapped child is actually involved with an agency — when he has applied for admission to a program; has been

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placed or refused placement; has or has not been identified as handicapped; or has or has not been evaluated as handicapped. All of these actions can occur only after the child comes to the school's attention.

However, many handicapped children have been totally excluded from the schools, and often parents (or guardians) have been unaware of their child's right to an education. In the earliest right-to-education cases, *Pennsylvania Association for Retarded Children (PARC)* v. *Pennsylvania*[1] and *Mills* v. *D.C. Board of Education,*[2] an initial issue for due process consideration was parental ignorance of a child's right to an education. In response, *PARC* ordered local school boards to conduct door-to-door canvasses and directed the Department of Public Education and other state agencies serving children to comb their records for names of handicapped school-aged persons. *Mills* ordered the D.C. Board of Education to locate all handicapped children and advise them of their right to an education. In addition, *Mills* required that a notice be published in D.C. newspapers stating that all children, regardless of their handicap, have a right to publicly supported appropriate education. The notice informed parents of procedures for enrolling children in appropriate educational programs. *Mills* also required the school board to arrange for presentation of information on local radio and television stations.

Notice of the right to an education is related not only to the notion of fairness, but also to the principle of *zero-reject*—the idea that all handicapped children have the right to a free appropriate public education, *without regard to the nature or severity of their handicaps.* It is one thing to notify a child or his parents of legal rights; it is quite another to deal fairly with the child once he is enrolled in the public schools. Procedural due process speaks to both issues.

[1]334 F. Supp. 1257 (E.D. Pa. 1971) and 343 F. Supp. 279 (E.D. Pa. 1972).
[2]348 F. Supp. 866 (D.D.C. 1972).

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Evaluation and Placement

After the handicapped children were located, schools were required to evaluate them and place them in appropriate educational programs. The first detailed set of requirements for placing a child or changing his placement was provided in *PARC*, but these requirements applied only to the evaluation and placement of mentally retarded children. *Mills* extended basically the same procedure to all handicapped children. Later cases included the same procedural requirements.[3] The cases are unanimous in requiring three basic procedural safeguards.

First, the child's parent or guardian must be notified in writing. There are special provisions, not specified in the orders, for parents who cannot read English or who cannot read at all. The notice must describe the action the school proposes to take, the reasons for it (including references to the results of any tests or reports on which the action is based), and available alternative educational opportunities.[4] The right to a hearing prior to educational evaluation or placement includes the right to a conference before the school evaluates or places a child.[5] It is logical for a conference to precede formal notice of proposed action or inaction because the development of a child's individualized education program in the requisite conference also becomes, at the least, the basis for the child's placement.

In a natural extension of the principle of notice prior to

[3]LeBanks v. Spears, 60 F.R.D. 135 (E.D. La. 1973), Quadalupe Org. vs. Tempe Elem. School Dist., Civ. No. 71-435 (D. Ariz. 1972), and Larry P. v. Riles, 343 F. Supp. 1306, *aff'd* 502 F. 2d 963 (9th Cir. 1974).
[4]Doe v. Kenny, No. H-76-199 (D. Conn. 1976).
[5]Cuyahoga Ass'n. for Retarded Children and Citizens v. Essex, No. C74-587 (N.D. Ohio, 1976).

placement, notice must be given prior to reassignment as well[6] since both the initial placement and any subsequent placement affects the child's right to an appropriate education. The notice must inform the parent of the reasons for the proposed action and of his right to object to the proposed action, to receive a hearing on his objection, and to obtain free medical, psychological, and education evaluations.[7]

One of the purposes of written notice is to give actual notice—to inform the parent of the proposed action—and it is doubtful that actual notice can be conveyed without a detailed explanation of what the school proposed to do and why. A statement of proposed action is meaningless unless the action is fairly described, unless the details of the action are clearly set forth. Likewise, a statement of proposed action is meaningless unless the reasons for the proposed action are fully described. The formality of notification is constitutionally insufficient; it is the reality of the notice—the *details* of proposed action and the *reasons* therefore — that is constitutionally required.

Second, if a parent requests a hearing, it must be conducted by a hearing officer independent of the local school authorities, at a time and place convenient to the parent. The hearing must be held within a specified period after the parent requests it, and is generally closed to the public unless the parent requests otherwise.[8]

Procedural due process not only allows a potentially adversely affected person to protest proposed governmental action; it also furnishes him with a forum where he can present his objections and have them heard and ruled on by a disinterested party. The parent is not just entitled to a hearing; he has a *meaningful* right to have the hearing before an impartial tribunal and at a time and place convenient to him. Justice delayed is justice denied, and the right to a reasonably prompt hearing is a prerequisite to any procedural safeguard.

And because the hearing may involve evidence that divulges highly personal aspects of a child's or his family's life (e.g., whether he is emotionally disturbed or why he is physically disabled), the notion of a *right to privacy* permits hearings to be closed to the public unless the parent does not object to open hearings.

Third, the hearing must be conducted according to due process procedures. The parent must be informed that he has the right to be represented at the hearing by counsel, to present evidence and testimony, to confront and cross-examine witnesses, to examine school records before the hearing, to be furnished with a transcript of the hearing if he wishes to appeal the decision of the hearing officer, and to receive a written statement of the findings of fact and conclusions of law.[9] Under the *Cuyahoga* decision, he also has the right to be assured that the evidence he presents will come before the hearing officer,[10] that it will be considered by the officer, and that no evidence *not* offered by him or the school will be considered.

The results of a hearing significantly affect a child's right to an appropriate education and thereby affect his explicitly guaranteed constitutional rights of liberty and property as well. Sometimes (although not necessarily), due process hearings take on the aspects of an adversarial hearing. However, the hearing is governed by rules of procedure that offer each party in the hearing equal opportunity to present his "case." In a proceeding of such importance, an absence of legal counsel makes a mockery of the concept of fairness and due process; parents must be made aware of their right to counsel.

The right to present evidence and examine and cross-examine witnesses is the foundation of the right to be heard. Moreover, the right to call expert witnesses speaks directly to the issue that is often the very reason for the hearing—namely, the evaluation and placement of the handicapped child. Access to school records is part and parcel of the right to examine and cross-examine witnesses.

The right to appeal, to a record of the hearing, and to a statement of the hearing officer's decisions and reasons are indispensable in assuring a parent that arbitrariness will not govern the hearing and its results; that is, the hearing will have both the appearance *and* the reality of fairness.

Periodic Reevaluation

Another important requirement from the cases is that student assignments must be reevaluated periodically. *PARC* required automatic biennial reevaluation of any educational assignment other than to regular class;

[6]Doe v. Kenny, *supra* n. 4.
[7]Mills v. Bd., *supra* n. 2, Cuyahoga Ass'n. v. Essex, *supra* n. 5, and Doe v. Kenny, *supra* n. 4.
[8]LeBanks v. Spears, *supra* n. 3, Mills v. Bd., *supra* n. 2; *contra, PARC v. Pa., supra* n. 1.
[9]Cuyahoga Ass'n. v. Essex, *supra* n. 5.
[10]*Id.*

annual reevaluation was available at the request of the child's parent. Prior to each reevaluation, there was to be full notice and opportunity for a due-process hearing. *Mills* also required periodic reevaluation of the child's status. Without mandatory periodic reevaluation and notice thereof to the child's parent, the opportunity for protest (i.e., the opportunity for due process) might be effectively lost, since it is unlikely that schools would encourage parents to exercise their due process rights. Some parents, having been put off by their first hearing—not having achieved a decision they wanted, or having "learned" not to challenge the professionals—would not continue to assert their child's rights without the enforced reevaluation.

Misuse of Disciplinary Procedures

In the past, some disciplinary procedures were misused to exclude handicapped children from the public school. Subsequent court decisions have prohibited the application of those procedures in such a way as to exclude handicapped children from education. *Mills* directly addressed the problem of misused disciplinary procedures by setting out in detail the procedural safeguards to be used in any disciplinary proceeding.[11]

Mills required that the District of Columbia schools "shall not suspend a child from the public schools for disciplinary reasons for any period in excess of two days without affording him a hearing pursuant to the [due process] provision . . . and without providing for his education during the period of any such suspension."[12] The provisions for notice and hearing in disciplinary cases were much like those that apply to placement, transfer, or exclusion. The essential elements were *notice* to the parent of the action to be taken and the *reasons* for it, and the procedural *rights* of the parent, including the right to an evaluation and to examine the school records.

Classification Criteria

A different type of concern for the procedures used in placing children within the school system was shown in the cases challenging the use of various evaluation and testing materials and procedures for purposes of determining intelligence and student tracking. At issue was the validity of the criteria used in evaluation and placement—the alleged linguistic and cultural bias of the materials. In the leading cases where classification was an issue, procedural due process became an essential element to safeguard the child against discriminatory classification.[13]

Expunction or Correction of Records

Mills provided for the expunction from or correction of records of any handicapped children with regard to past expulsions, suspensions, or exclusions, through either academic classifications or disciplinary actions, that violated their rights. If a child is incorrectly placed in a program for the mentally retarded, his records can be examined and, if found in error, they must be corrected.[14] Only then can the effects of an incorrect record be ameliorated.

It is not surprising that the case-law requirements of due process are reflected, almost in perfect mirror image, in the applicable federal statutes.

FEDERAL LEGISLATION

P.L. 94-142

In order to receive the formula grant authorized by P.L. 94-142 for the education of handicapped children, the SEA and each public agency must give assurances to the Federal Office of Education that they have adopted appropriate due process procedures [Sec. 612 (5) (A) applicable to the SEA; Sec. 614(a) (7) applicable to the LEA and IEU; and Sec. 615, applicable to all three]. The requirement of *procedural safeguards* is consistent with the intent of P.L. 94-142 to assure that the rights of handicapped children and their parents and guardians are protected [Sec. 601 (c)]. The due process guarantees must include, but need not be limited to, the following elements [Sec. 615].

Access to Records

A child's parents or guardians must have an opportunity to examine all relevant records relating to the child's identification, evaluation, or placement, and the provision of a free appropriate public education for him.

[11]Mills v. Bd., *supra* n. 2.
[12]*Id.* at 882-3.
[13]Diana v. State Bd. of Educ., C-70-37 F.R.P. (N.D. Cal. 1970, 1973). LeBanks v. Spears, *supra* n. 3, and Larry P. v. Riles, *supra* n. 3.
[14]Mills v. Bd., *supra* n. 2.

Evaluation

The parents are entitled to an independent (non-agency) educational evaluation of their child. Sec. 121a.500 defines evaluation as "procedures used to determine whether a child is handicapped and the nature and extent of the special education and related services that the child needs." This refers to procedures used selectively with an individual child and does not include basic tests administered to or procedures used with all children in a school, grade, or class. Sec. 121a.503 defines who may make an independent evaluation—namely, a qualified examiner not employed by the public agency responsible for educating the child. A qualified person is one who has met certification, licensing, registration, or other such requirements of the SEA in the area in which he provides special education or related services [Sec. 121a.12].

Sec. 121a.503 also provides that public agencies must, upon request, give parents information about where they may have independent educational evaluations made. Under some circumstances, the independent evaluation must be made at public expense; the public agency either pays for the full cost of the evaluation or insures that the evaluation is otherwise provided to the parent without cost to him. A parent has the right to an independent evaluation at public expense if the hearing officer requests one for use in a due process hearing or if the parent disagrees with the evaluation made by the public agency. However, if in a due process hearing that it initiates, the agency can prove that its evaluation was appropriate, the parent may be required to pay for the new evaluation. When a parent obtains an independent evaluation at his own expense, the agency must take it into consideration as a basis for providing the child with an appropriate education or as evidence in a due process hearing, or both [Sec. 121a.503].

The parent's consent must be obtained for pre-placement evaluation and for the child's initial placement in a special education program [Sec. 121a.504(b)]. Consent, in this context and in all others, means that (a) the parent has been fully informed in his native language, or in another suitable manner of communication, of all information relevant to the activity (e.g., evaluation) for which consent was sought; (b) the parent understands and agrees in writing that the activity may be carried out; (c) the consent describes the activity and lists the records (if any) that will be released and to whom; and (d) the parent understands that he gives his consent voluntarily and may revoke it at any time.

If a parent refuses to consent when his consent is required, the parties must first attempt to resolve the conflict by complying with any applicable state law. If there is none, then the agency initiates a due process hearing. Should the hearing officer rule in favor of the agency, the parent's refusal will be overruled and the agency may evaluate or place the child, notifying the parents of its actions so that they may appeal [Sec. 121a.504 and .510 through .513].

Surrogate Parents

Sec. 615 and Sec. 121a.514 require the SEA to insure that the rights of a child are protected if his parents are unknown or unavailable or if he is a ward of the state. (The child's rights are not the responsibility of the SEA when his parents are simply uncooperative or unresponsive.) The SEA may comply with this requirement by assigning a parent surrogate. There are other ways, but Sec. 615 and Sec. 121a.514 mention only this one. If the SEA goes the route of parent surrogates, it must devise methods for determining whether a child needs a surrogate and then for assigning one to him. The regulations give no guidance on the methods; they do, however, set out the criteria for selecting a surrogate—primarily, there should be no conflict of interest and the individual should have the skill to represent the child. A superintendent or other employee of an institution in which a child resides may not serve as a surrogate for him. If there is a disagreement about who the surrogate will be, the conflict may be resolved by a due process hearing. The regulations also make it clear that a person paid by a public agency solely for the purpose of being a surrogate does not thereby become an agency employee. The surrogate may represent the child in matters affecting his identification, evaluation, and placement, and his right to a free appropriate public education.

Notice. The agency must give prior written notice to the parent, guardian, or surrogate whenever it proposes to initiate or change, or refuses to initiate or change, the child's identification, evaluation, or placement or the provision of a free appropriate public education to him [Sec. 615(b) (1) (C) and (D)]. Sec. 121a.505 requires the notice to contain:

(1) A full explanation of all the procedural safeguards available to the parents . . . ;

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

(3) A description of each evaluation procedure, test, record, or report the agency uses as a basis for the proposal or refusal; and;
(4) A description of any other factors which are relevant to the agency's proposal or refusal.

It also requires that the notice be:

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

If the native language or other mode of communication of the parent is not a written language, the SEA or LEA must take steps to insure:

(1) That the notice is translated orally or by other means to the parent in his or her native language or other mode of communication;
(2) That the parent understands the content of the notice; and
(3) That there is written evidence that the requirements (of oral translation and parent understanding) have been met.

Complaints and Due Process Hearings

The agency must give the parents, guardian, or surrogate an opportunity to present complaints relating to any matter concerning the child's identification, evaluation, or placement, or his right to a free appropriate public education [Sec. 615(b) (1) (E)]. If the parents or guardian file a complaint with an agency, they are entitled to an opportunity for an impartial hearing conducted by the agency, as determined by state law or the SEA. The agency must inform the parents about any available low-cost or free legal aid in the geographical area [Sec. 121a.506].

The right to a due process hearing is not limited to consumers. Under Sec. 121a.504 and Sec. 121a.506, an agency may also initiate a due process hearing on its proposal or refusal to initiate or change the identification, evaluation, or placement of a handicapped child, or the free appropriate public education provided to him.

Unless the parties agree to an extension, the hearing must be held and a final decision reached within forty-five days after the hearing is requested, and a copy of the decision must be mailed to the parties. (The hearing officer may extend this deadline.) The time and place of the hearing and each review involving oral argument must be reasonably convenient to the parents and child.

Each agency must keep a list of the hearing officers and their qualifications. The hearing may not be conducted by an employee of the agency involved in educating or caring for the child [Sec. 615(b) (2)]. Sec. 121a.507 prohibits a due process hearing from being conducted by any person having a personal or professional interest that might conflict with his objectivity in the hearing. A person who otherwise qualifies to conduct a hearing is *not* considered an employee of the agency solely because he is paid by the agency to serve as a hearing officer.

At the initial hearing and on appeal, each party has the right to be accompanied and advised by an attorney and by other experts (persons with special knowledge or training with respect to the problems of handicapped children); to present evidence and confront, examine, cross-examine and compel the attendance of witnesses; to make written and oral argument; to receive a written or electronic verbatim record of the hearing; and to receive a written account of findings of fact. No evidence may be introduced by any party unless it was disclosed at least five days before the hearing. The parents must have the opportunity to have their child present and to have the hearing open to the public [Sec. 615(d) and Sec. 121a. 508]. The decision must be sent to the state advisory panel established under Sec. 615(a) (12).

Unless a party appeals from the initial hearing or begins a court action after the appeal, the decision of the initial hearing is final [Sec. 615(e)]. If the hearing is conducted by an LEA, an aggrieved party may appeal to the SEA, which is required to conduct an impartial review of the hearing, reach a decision, and send a copy of the decision to the parties within thirty days. The hearing officer on appeal must make an independent decision after reviewing the matter [Sec. 615(c)].

Persons who are aggrieved by the findings and decision in the initial hearing but who do not have the right to appeal to the SEA (the act and proposed regulations do not say who these people may be) and persons who are aggrieved by the findings and decision on appeal (that is, any party in the appeal) may file a civil action in either a state court or a federal district court. (For the purposes of the federal suit, the jurisdictions' rules about dollar amounts in controversy do not apply.) The court, whether state or federal, is to receive the records of the administrative proceedings, hear additional evidence if offered, and, on the basis of the preponderance of the evidence, grant appropriate relief [Sec. 615(e) (2) and (4)].

During the initial hearing or appeal, the child remains in his current educational placement unless the SEA or LEA and his parents or guardian agree otherwise. If he is

applying for initial admission to school, he will be placed in the public school program, if his parents or guardian agree, until all the hearings (including appeals) have been completed [Sec. 615(e)(3)]. The agency may of course use its normal procedures for dealing with children who are endangering themselves or others.

The right of the parent or guardian to have a hearing with respect to the provision of a free appropriate public education for a child is quite broadly stated. In the view of Senator Williams, one of the principal sponsors of the act, the right to file allows them to question important matters related to the child's individualized education program. The definition of "free appropriate public education" includes special education and related services provided at public expense, under public supervision and direction, without charge, or within the SEA's standards, as well as an appropriate preschool, elementary, or secondary school education in the state provided in conformity with an individualized education plan [Sec. 602(18)]. Senator Williams also contends that a parent or guardian may present a complaint alleging that an SEA or LEA has refused to provide services to which a child may be entitled—a complaint of equal protection or substantive due process—or that it has erroneously classified him—a complaint of substantive due process (*Cong. Rec.*, Sen., Nov. 19, 1975, pp. S20432-3).

Sec. 504

The Sec. 504 regulation (Sec. 84.36) provides that an SEA or LEA may satisfy Sec. 504 due process requirements by complying with the procedural safeguards of Sec. 615 of P.L. 94-142. The alternative, and minimum, requirements for the SEA and LEA are to furnish notice, to make the child's records accessible, to guarantee an impartial hearing, to afford the right to counsel, and to assure an impartial review.

IMPLICATIONS FOR PUBLIC SCHOOLS

Practically everything a school might do concerning a handicapped child's education can be "tested" or challenged in a due process hearing. To have established this much is to have recognized that the implications of due process hearings for schools are massive. It is important for schools and consumers to understand why recent cases and current federal legislation are so concerned with due process; if they understand the reason, they will more readily accept its use.

Due process is an indispensable technique for fairness: a fair process of governing people (in this case, a fair way of dealing with handicapped children in the public schools) is more likely to produce fair and acceptable results than an unfair process. The due process hearing requirement is the vehicle by which the law puts the principle of fairness into effect.

Due process in the public education of handicapped children also underscores the notion that those children are not to be treated any differently than employees of the schools they attend and non-handicapped children. The states have seen fit, for various reasons, to guarantee teachers and nonhandicapped students due process rights with respect to their employment and education in the public schools. The right-to-education cases and legislation simply carry forward that notion of fairness and extend it to handicapped children, emphasizing their essential equality, at law, with those who serve them and with their nonhandicapped peers.

Due process hearings can also highlight the contrast between the noble ideal and the primitive reality, showing the alarming gap that exists between the rights that are legally granted and the rights that are in fact available to handicapped children.[15]

Major implications of due process for the public school include:

1. due process' relationship to the function of education;
2. the application of due process and its "uses";
3. due process as a new forum;
4. other benefits of a due process hearing;
5. the logistics of due process hearings; and
6. central reporting of due process results.

The Relationship of Due Process to the Function of Education

The function of a public school system is to educate all children, to create opportunities for them to receive a free public education regardless of their handicaps. The zero-reject principle (education for all handicapped children) demands no less. But the principles of nondiscriminatory

[15]P. Roos, "Reaction Comment," in M. Kindred et al. (Eds), *The Mentally Retarded Citizen and the Law*. New York: The Free Press, 1976.

evaluation, appropriate and individualized education, and least-restrictive placements demand that the public school system educate handicapped children appropriately by taking their handicaps into account, not so that they may be excluded from a public eduction but so that they receive a meaningful education.

To aid in accomplishing both objectives, the cases and federal legislation have given schools and consumers a way to "test" whether a handicapped child is, in fact, receiving an appropriate education: the due process hearing. The hearing is a forum for determining whether the child is receiving an appropriate education, for focusing on the child's needs, and for providing school officials with information on whether they are accomplishing what they are required to accomplish.

In brief, due process is a technique for accountability, a means of assuring that the educational system will do or become able to do what it is designed and required to do.[16] It provides school administrators and consumers with information on whether the LEAs are doing what they can and must do, and enables educators and consumers to correct illegal or legally inadequate practices. Moreover, it is a technique for child-centered education. Due process harmonizes the separate but similar interests of educators and consumers: both are concerned about actual compliance with legal requirements and due process allows them to act on their concerns.

Recent federal legislation has also attempted to redress the balance of power between the previously powerful school officials and the previously powerless consumers. It reflects a new principle in the education of the handicapped child—"shared decision-making." The due process hearing can be a tool for advancing this principle if both school administrators and consumers see it as a vehicle for accomplishing mutually consistent goals (appropriate education of handicapped children). Under this view, the due process hearing becomes a forum in which both parties can take a non-adversarial approach to a common interest, appropriate education. If the two parties treat the due process hearing as an adversarial confrontation, it is highly unlikely that due process will demonstrably contribute to the advancement of shared interests. Hearings will not always be "friendly," but the potential for shared decision-making through due process is there.

[16]A. Abeson et al, "Due Process of Law: Background and Intent," in F. Weintraub et al. (Eds), *Public Policy and the Education of Exceptional Children* (Reston, VA: Council for Exceptional Children, 1976) and H. Turnbull, "Accountability: An Overview of the Impact of Litigation on Profesionals," in F. Weintraub et al. (Eds.), *Public Policy and the Education of Exceptional Children* (Reston, VA: Council for Exceptional Children, 1976).

Application of Due Process and Its Uses

P.L. 94-142 is a carefully constructed procedural approach to the free appropriate public education of handicapped children. It provides procedures to be followed in advance of school actions that may affect a handicapped child. The planning, full service (dates-certain, ages-certain), and child census requirements are intended to support the zero-reject policy. Nondiscriminatory testing procedures, requirements for an individualized educational program, and the "least restrictive alternative placement" mandate are couched in procedural terms and are designed to furnish appropriate education and safeguard against functional exclusion. The provisions on parent access to records, public notice and public hearing on SEA and LEA plans, and the creation of advisory panels made up of representatives of handicapped children are intended to carry out the principle of shared decision making (participatory democracy).

All of these procedures tell SEAs and LEAs what they must do or may not do; due process asures that they will comply or be asked why they have not. If a school fails to carry out the procedures, another procedure—a due process hearing—can correct the situation. In short, although other sections of P.L. 94-142 provide "input" safeguards, the due process section provides "output" safeguards. The other sections are concerned with what the schools must do to guarantee free appropriate public education to a handicapped child; the due process safeguards deal with what consumers can do if schools fall short in complying with the other requirements of the act.

Of course, due process rights can also be exercised by an LEA if consumers object to LEA action or withhold their consent to evaluation of their children. From this viewpoint, due process safeguards speak to what can be done when educators believe that the parents have failed in meeting their obligations to their children. Everyone involved in the educational process needs to understand this use of due process, because the procedures shape the substance of the legislation.[17]

[17]Kirp, Buss, & Kuriloff, *Legal Reform of Special Education: Empirical Studies and Procedural Reforms,* 62 Cal. L. Rev. 40 (1974), and H. Turnbull, *Legal Aspects of Educating the Developmentally Disabled.* Topeka: National Organization on Legal Problems of Education, 1975.

Due Process as a New Forum[18]

The traditional forums for debating legal and educational policies concerning the education of handicapped children have been the classrooms, the courts, and the legislatures. The due process hearing is one more place for educators and representatives of the handicapped to have their say. It allows educators to demonstrate what their needs are and to develop the evidence that will convince policymakers and funding sources that their needs are indeed real and immediate. It allows them to defend their professional judgments and gain support when they make the "right" decision concerning a child's educational needs, particularly when objections or questions have been raised by the child's parents. It also allows them to resolve problems in such a way that later litigation against them, particularly on grounds of professional negligence is held to a minimum. A favorable due process ruling does not exactly create a situation of res judicata (a final decision on a particular point of law in the same factual context, which prevents later litigation), but it is at least highly persuasive evidence if the educators are later sued on the same issue. It enables them to defend on the grounds of "good faith"—having been fully justified in their course of conduct because the decision of the due process hearing required them to follow that course.

Some commentators have suggested that the due process hearing may not bring forward all the relevant facts when decisions are made concerning a child's classification, and they may be correct.[19] Why is that so? Granted, a due process hearing may be friendly or adversarial, but in either case there is nothing to prevent all the relevant facts from being presented and explored. Indeed, a skillfully conducted due process hearing is more likely to develop those facts than not. Other commentators have said that the due process hearing provides consumers with a golden opportunity to challenge educators' domain and their authority.[20] They argue that due process makes educators practice "defensive" education, which undermines their professional judgments and status. Such criticisms are invalid because, as pointed out earlier, the due process procedure can do distinguished service for both educators and the representatives of handicapped children; it provides both with an opportunity to have their say on concerns of mutual and divergent interests.

Other Benefits of Due Process

The due process forum not only helps all parties achieve mutual goals and enables educators to indicate why they can or cannot do as they are asked, it also has "process" functions. It facilitates the process of educating handicapped children in many ways.[21] For example, it legitimitizes educational decisions and can legitimatize the process by which those decisions are reached. It is a process for assessing the school's needs as well as the child's. It provides consumers and educators with feedback on whether their interests are mutually consistent. When consumers are backed by expert witnesses, the due process hearing enables them to achieve at least temporary parity with educators, thus advancing the principles of shared decision making and providing all parties with an opportunity to address the child's needs. By increasing the potential for communication between educators and consumers, due process offers the possibility of decreasing the misunderstandings that exist now or that might develop in the future. In addition, due process will serve to increase the competence and impartiality of the decision making process, to make long-range planning more accurate, and to boost public confidence in the public schools.

The Logistics of Due Process Hearings

There are some real problems in administering the due process requirements. For instance, who will develop the list of "surrogate parents" and what process will they follow? What will qualify a person to serve as a surrogate

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[18]T. Gilhool, "The Right to Community Services," in M. Kindred et al. (Eds.), *The Mentally Retarded Citizen and the Law* (New York: The Free Press, 1976); and A. Abeson et al., "Due Process of Law: Background and Intent," in F. Weintraub et al. (Eds.), *Public Policy and the Education of Exceptional Children* (Reston, VA: Council for Exceptional Children, 1976).

[19]N. Hobbs (Ed.). *Issues in the Classification of Children* (2 vols.) San Francisco: Jossey-Bass, 1975.

[20]*Id.*

[21]M. Sorgen, "Labelling and Classification," in M. Kindred et al. (Eds.), *The Mentally Retarded Citizen and the Law* (New York: The Free Press, 1976); and A. Abeson et al., "Due Process of Law: Background and Intent," in F. Weintraub et al. (Eds.), *Public Policy and the Education of Exceptional Children* (Reston, VA: Council for Exceptional Children, 1976); and T. Gilhool, "The Right to Community Services," in M. Kindred et al. (Eds.), *The Mentally Retarded Citizen and the Law* (New York: The Free Press, 1976).

parent, and who decides on the criteria? Shared decision making on such issues should assure that the list of surrogate parents consists of legally and functionally qualified persons. With representatives of the SEA or LEA and state or local consumer groups suggesting criteria and proposing qualified persons, the surrogates will be legally independent of the SEA and LEA and will be able to carry out the responsibilities assigned to them.

And what about the costs? With so few dollars available (even from federal sources) to enable the schools to provide a free appropriate public education to handicapped children, where will the money be found to pay for independent evaluations, hearing transcripts, counsel fees, the wages of hearing officers and surrogate parents, or the expense of appeals? It is an unhappy fact that funds for the education of all children are short. Of the meager dollars available to SEAs and LEAs for all purposes, the funds for educating handicapped children are particularly scarce. Due process can play an important role in guiding additional local and state funds to the right areas. It functions as a check on potentially illegal or legally inadequate school practices, and its costs should be planned for and treated on the same basis as other "overhead" costs, such as salaries, equipment, personnel development, and administrative expenses. The handicapped child, short-changed for many years, surely deserves to receive the full benefit of one of his most important safeguards—the due process hearing.

Other issues surround the hearings: when will they occur; where; and how often? What effect will after-school hearings have on matters like personnel assignments and regulations, union or teacher association contracts governing the terms of teacher employment, the availability of all interested parties and their counsel and witnesses, and convenience to hearing examiners? If the hearing is held during the day, what about release time and teacher substitutes or aides? And what about compensatory pay if they are held in the evening? School days are often arranged to accommodate a host of other "nonclass" events of significantly less importance than a due process hearing; rearrangements of the school day, flexibility for teacher workdays and release time, and regularly set hearing dates can all contribute to reducing the personnel "costs" of the hearings.

Another potential problem is the selection of suitable hearing officers. It is crucial that they be impartial as well as qualified in other respects. The regulations only set minimum standards, requiring that the officer not be an employee of the SEA or LEA involved in educating or caring for the child and eliminating persons who have personal or professional conflicts of interest. There are several good rules of thumb for selecting hearing officers who are likely to be unbiased: (1) the SEA or LEA should ask consumer organizations to nominate persons as hearing officers, (2) the SEA and LEA should give those organizations the right to approve or object to persons selected as hearing officers; (3) hearing officers should be professionally unaffiliated with the agency involved in the due process hearing or with a consumer agency (for example, school employees from one LEA should not serve as officers for LEA-level hearings although they may preside in hearings involving state or local mental health services or institutions in other jurisdictions); and (4) hearing officers should not reside or work in the jurisdiction involved in the hearing. These rules are designed to assure that, in general, the list of hearing officers will be prepared in such a way as to eliminate the more obvious objections to an officer's impartiality. Some other procedures that might be even better would involve the SEA and consumer organizations with the state or local bar association's young lawyers' section as a source for names of lawyers who would serve. They might also hire labor arbitrators or other persons experienced in hearing procedures; enlist the services of faculty in community colleges, technical institutes, and institutions of higher education; or seek out locally distinguished citizens to "ride circuit" and hear cases in jurisdictions where they do not have professional or personal interests.

There is no substitute for well-trained hearing officers. When they are thoroughly schooled on the procedures to be followed in the hearings, the substance of case law, the statutes and regulations, the nature and organization of the LEA involved in the hearing, the general characteristics of various handicapping conditions, and the general abilities of educators to respond to those disabilities, they will be likely to make more informed and more correct (less reversible or objectionable) decisions with less deliberation. It may well be that interdisciplinary training of hearing officers (by "school" and "legal" experts) will become necessary.

Because hearing officers usually have other obligations, the problem of when to hold hearings and how to keep a backlog of cases from developing requires careful attention from the SEA and LEAs. The techniques of judicial administration that help process cases rapidly through the trial courts may be useful to SEAs and LEAs.

Regularly scheduled hearing dates, pre-hearing conferences between the parties and the hearing officer, easy access to school records and evaluations by LEA and consumer expert witnesses before hearings, pre-hearing stipulations of facts and issues of law, flexibility in granting a limited number of postponements, and the willingness of the parties to use affidavits in lieu of live testimony can all contribute to regularized, efficient hearings.

Central Reporting of Due Process Hearing Results

It is rare, as a matter of state law, for SEAs to require LEAs to report the frequency of, the reasons for, and results of due process hearings. Yet such a requirement is set out in the proposed regulations under P.L. 94-142 [Sec. 121a 408(d)] and should have great value to the SEAs and LEAs. Requiring the LEAs to report to the state advisory panel [Sec. 121a.550-552] provides the SEAs with a data bank that should enable them to make more informed judgments in areas like whether to require LEAs to consolidate applications for funds under Part B of Education of the Handicapped Act, whether LEAs are complying with individualized educational plans, when and why technical assistance is appropriate, where more hearing officers are needed, and whether existing hearing officers are adequately trained. The increased information flow will enable the SEAs to help schools implement the rights of handicapped children and to better monitor school compliance or noncompliance with applicable laws. Central reporting of due process hearings should also help the SEAs in their annual requests for additional federal and state funds.

IMPLICATIONS FOR HIGHER EDUCATION

Colleges and universities with schools or departments of education (especially departments of special education) can also play a useful role in implementing the judicial and legislative requirements of procedural due process. This role consists of three components: (1) training; (2) service; and (3) research.

Training

In their traditional role as trainers of future teachers, resource consultants, school administrators, and educational policy makers, colleges and universities should recognize the significance of the due process hearing and the increasingly important part it will play in the professional lives of their students. By focusing on the judicial and legislative requirements of procedural due process and its uses in courses on school law, school administration, special education administration, organizational theory and behavior, school psychology, and parent training (to name but a few of the courses that might appropriately include due process in addition to the usual course content), they can introduce students to the importance of due process considerations. For example, in courses on school or special education administration future administrators could learn how to avoid unnecessary due process hearings, what the procedures of a due process hearing are, how to behave when faced with a request for a hearing, how to participate in or conduct one, and how to prepare the record of the case for appeals. Courses in school psychology should present the due process issues as they relate to the school psychologist's record keeping, testing and evaluation procedures, and documentation of evaluation results and recommendations. They should also learn about their role as an expert witness. Courses in parent training or parent counseling should concentrate on how to make parents aware of their due process rights and how, when, and why to exercise them. Preservice training in the relevance of due process to future professionals will not only prepare them to carry out their future responsibilities more effectively, but also make the due process hearing a more effective device for accomplishing its diverse goals.

Many colleges and universities provide inservice training programs as well as preservice education. If they teach their inservice students about the aspects of due process that are covered in their preservice training, they can make an additional positive contribution. For many inservice students, due process carries negative connotations only; they see the objections, problems, and criticisms, and few are aware of the positive aspects of due process. The unfamiliar (due process for handicapped students) is often frightening simply because it is unknown; by instructing inservice students on due process, colleges and universities can change attitudes, making inservice students more effective professionals, and thus making it more likely that due process will serve its purposes.

A potentially useful role for colleges and universities is the training of future hearing officers. The training of hearing officers is sometimes done—and done well—by the SEA. But it has also been done poorly in some cases: the attitudes of SEA employees may not be as impartial as those of college and university faculty members. The

psychological set or negative attitude that they may convey in training can undermine any of the good work they do. Moreover, SEA employees may not have the requisite expertise (such as a law professor's legal knowledge) to make their training as helpful as it could be. Interdisciplinary training of hearing officers by schools of education and law is one of the unique contributions that colleges and universities can make.

Colleges and universities also can work through their schools of education and law (in conjunction with SEAs and state or local bar association representatives) to prepare guidelines for the use of LEAs, consumer groups, hearing officers, and courts. When college and university faculty consult with consumer groups about the education of handicapped children, they have an ideal opportunity to discuss due process and its many facets. Many consumers (particularly parents of handicapped children) need and want training in child development and child management; they also need and want information about their children's educational rights, including their rights to procedural safeguards. Adding due process to parent training and consultation efforts can significantly enhance the parents' effectiveness with regard to the schools and would allow them to contribute to making due process meaningful for all concerned.

Services

Colleges and universities have traditionally furnished educational services to state and local educational agencies, and they will continue to do so. With the advent of right-to-education cases and federal legislation requiring handicapped children to be educated, however, the nature of those services has changed and will continue to change. Faculty members have begun to serve as expert witnesses in right-to-education cases; they have also begun to make the independent evaluations of handicapped children that Sec. 615 entitles parents to have. Finally, they have started to serve as hearing officers for the SEAs and LEAs. Two of these new roles—expert witness and hearing officer—provide faculty with actual experience that will benefit their inservice and preservice students who will one day work in similar capacities.

There are promising areas of research—made possible by centralized reporting of due process results—that faculty members can investigate. What is the effect on the nature and result of a due process hearing when the parents are represented by counsel and produce testimony of expert witnesses? Is the hearing more adversarial than it would be otherwise? Is the result more likely to be in favor of the parents? If the legal result favors the parents, does the school then take informal sanctions against the child? Why did the parents exercise their due process rights? The answers to these questions should provide valuable information for teacher preparation, inservice or parent training, and other aspects of college or university training and service.

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