What does due process do?

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Among American social reformers, few instruments are so cherished as an individual's right to a fair hearing before government takes actions affecting him. Whether the good or service at stake be access to education, welfare, housing, disability payments, public employment, even a driver's license, the individual's interest in "having some say" is routinely recognized. Sometimes it is the courts, relying on the due process clause of the Constitution, that order these case-by-case determinations; indeed, the history of public law during the past decade and a half has been in no small part a history of expanding this procedural protection. But hearings are also required by statute. Scarcely any administrative action taken today may not be contested in a subsequent hearing.

This proceduralization of public policy is new. Historically, due process protections figured chiefly in criminal cases, insulating the accused from a too-vigilant state. Though the rapidly expanding reach of administrative government prompted Congress to adopt the Administrative Procedure Act in 1946, that law had little effect on agency life. Until the 1960s, government largesse was widely regarded as a privilege, not an entitlement, one to be distributed as public officials saw fit. Since there was no right to welfare or
education or housing, the argument ran, government could make these available as it pleased. Beneficiaries were suppliants, not stakeholders.

The distinction between rights and privileges was largely undone in *Goldberg v. Kelly*, the 1970 Supreme Court decision which declared that a welfare recipient could not be stricken from the rolls until offered an opportunity to be heard. Since *Goldberg* the proceduralization of the bureaucracy has accelerated, and the reasons are readily discernible. For one thing, due process is an inherently constitutional idea, a way of protecting the basic aims of the Constitution, and in this law-driven society that gives it considerable authority. Procedural fairness also promises a kind of social justice. Due process is supposed to distinguish the deserving from the charlatan, functioning as a legal analog to the scientific method. In this way, it avoids injustice by minimizing both deprivation and misallocation of public resources. Moreover, the due process hearing invites those affected by official decisions to participate in deciding their own fates, and so treats the individual not as a passive creature but as someone who deserves respect.

The claim that due process promotes both efficient decision-making and a sense of personal efficacy occupies the high ground of policy discussion. Down in the trenches, the fighting has been over the fitness of bureaucrats and professionals to manage the client state. Those who advocate an expansion of procedural justice display an abiding distrust of standard operating procedures and professional canons. In the mind of the proceduralist, bureaucrats play favorites or, worse, systematically punish the powerless or the unpopular. Due process, the argument goes, forces officials to account publicly for their actions, and so keeps government in check.

These are not uncompelling arguments, at least in the abstract. The concept of individual responsibility, which is the foundation of due process, has its roots in classic liberalism. And proceduralism proposes to make government itself stronger: By flushing out official misdeeds, administrative behavior is rendered accountable to law, and deviations from the statutory license are subjected to continuing correction. There was just enough truth in the complaints about administrative government in the 1960s for serious attention to be paid. Who could deny that welfare departments occasionally harassed their clients with midnight bed-checks, that those living unconventional lives might be booted out of public housing, that public employees who criticized their colleagues sometimes put their jobs in jeopardy?
How commonplace these horror stories were is a critical question, but one that largely went unasked. The debate over proceduralism has been an empty one because the debaters have so far refused to inquire closely into the likely effects of proceduralism; they have shared the belief that, for better or worse, a great deal of change would transpire. Critics of agency behavior insisted that bringing due process to public bureaus would radically reform the way these institutions do business. Defenders of bureaucratic discretion predicted chaos.

Defining "appropriate education"

By now, though, there is evidence in hand about the consequences of proceduralization, and while the evidence discussed here is drawn from one particular area—the education of the handicapped—the implications of that experience extend far beyond it. Policy toward the handicapped has been driven by a commitment to impose the norms and forms of law on the untidy system of American public education. The leading court case, Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania (PARC), treats the right to a hearing in disputes over the schooling of handicapped youngsters as vital in guaranteeing that such children receive an "appropriate" education. The 1974 federal Education for All Handicapped Children Act faithfully follows this logic, turning the claims of the handicapped into legal rights and specifying an administrative regime of hearings and appeals within the schools to vindicate those rights. Special education in general, and the PARC history in particular, offer a splendid example of administrative proceduralism in action.¹

What we learn from this experience strongly suggests that introducing hearings into public agencies is neither a godsend nor a disaster. The right to a hearing did play some part in convincing

¹ The PARC Consent Decree, signed on October 7, 1971, established the right of all retarded children in Pennsylvania to a free, appropriate public education. The settlement contained five major provisions: 1) The state had to develop a Commonwealth Plan for Identification, Location and Evaluation of mentally retarded children to assure that previously excluded children would be found; 2) the state had to render to those retarded children an education resulting from "appropriate" diagnosis and placement; 3) children had to be placed in regular classes, where possible; 4) a due process system was established to resolve complaints about diagnosis and placement issues; 5) the party losing at these hearings would have a right to appeal. The court appointed two masters to oversee the agreement. A Right to Education Office in Harrisburg was given the responsibility of monitoring implementation of the decree.
school officials that they should offer an education to all children, and that is clearly to the good. But "appropriate" education, the advocates' dream, has proved well beyond the reach of due process. Schools have learned to play by the new rules without much changing the ways in which they operate. By leaving a paper trail, they have satisfied the hearing officers and contained the potential threat of due process. The consequences of such containment have not been especially happy, however, either for the public agencies or for the children and their parents.

The PARC advocates hoped that the due process system would secure a vaguely-worded entitlement to an "appropriate education." The ultimate expectation reached beyond individualized justice; PARC hearings were also supposed to reshape the schools themselves. As Thomas Gilhool, one of the plaintiffs' attorneys, declared:

For the first time in American education, a mechanism is created to assure that the educational program fits the child. The mere fact of a hearing opportunity . . . will of course keep all the field professionals on their toes. There is a new instrument of accountability. The right to a hearing creates an extraordinary forum for parents and their associations to express themselves, and to organize. And it should transform education [emphasis added].

The procedural elements of PARC speak to this expectation. The due process system contemplates an administrative hearing run by an impartial hearing officer who bases decisions exclusively on evidence in the record and advances written justification. Appeals were supposed to ensure that the hearing officers would observe the procedural niceties, and to promote uniform outcomes in factually similar cases.

By itself, law cannot determine what education a handicapped child should receive; expert help is vital. Under PARC, deliberate deviations from legal formalism—most significantly, the decision that special education experts, not lawyers, would preside over the hearings—signaled that the best of the professional and legal traditions was to be preserved. Professionals would develop diagnoses and propose placements, for these were matters about which only experts could speak confidently. But the sorry history of special

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education, a story of seriously retarded youngsters warehoused in impersonal residential institutions and black students dumped into dead-end classes for the retarded, indicated that professionalism alone would not protect the handicapped. Legally-rooted concerns for reliability were meant to ensure consistency in decisions concerning diagnosis and placement, while also tempering the interest (and self-interest) of the professionals. At the state level, lawyers would decide appeals by testing the hearing record against developed standards of decision, thereby establishing a precedent-based legal system. In this forum, the rule of law, suitably tamed by legitimate professional concerns, would come to Pennsylvania's schools.

**School districts have the advantage**

The reality has been more modest. There have been marked changes in the education of handicapped children in Pennsylvania since the PARC decree was issued. The proportion of school-age children getting special help has nearly doubled, and expenditures for special education have quadrupled. Bureaucratic changes made in the wake of PARC—establishing a Right to Education Office within the state Department of Education, creating monitoring devices, and coopting community groups—have had much to do with this change. By contrast, the impact of the due process hearing and appeal system has had relatively little impact. Hearings have been few in number—fewer than 500 have been held over a period of eleven years—and highly restricted in scope. The issues have concerned individuals, not the special education system, and have largely been settled by recourse to formula. Demands that would require substantial new expenditures or structural changes (requests for wholly new programs or claims concerning newly diagnosed handicaps, for instance) have been resisted. Not much has happened as a direct result of the hearings and appeals.

The questions taken up in these hearings have consistently centered on how children are labelled and how they are treated by the schools, with the battle lines drawn in familiar ways. Parents of mildly handicapped youngsters frequently resist the label "retardate" and seek placement for their children in ordinary classrooms, supplemented with special help; school systems prefer to treat such students as retarded, placing them in already-operating classes. With the seriously handicapped, controversy focuses not on the label to be applied but on what is to be done. Parents, fearing
that the publicly-run program is inadequate, often prefer private placements, a preference that the public schools resist.

These disputes are nominally about education, though at a deeper level they reflect the conflicting needs of parents and public school systems. The schools' position has been driven by considerations of organizational maintenance and survival. While it would be nice to give each child what he truly needs, the knowledge and resources to accomplish this are not at hand. In assigning students, too much emphasis has often been placed on easily-administered IQ tests, at the expense of personal assessments drawing on a variety of courses; and for reasons of economy, assignments are made to existing programs, not newly-invented ones. Most districts are pressed for funds and have done only what they must in order to satisfy the legal mandate. Relatively few have gone further, to produce that individualized remedy, to which the PARC "appropriateness" standard aspires. Parents see their children's problems in a very different light. They concentrate on particular grievances, relying on their own observations of the children's behavior rather than on IQ tests to make their assessments of need and ability.

The very idea of due process in the schools was unsettling to teachers and counselors, many of whom regarded the law as an unwelcome intrusion into their lives. Yet they quickly accommodated themselves to the demands of a legalized proceeding. There is a growing tendency in school districts to rely on legal counsel at the hearings—in four out of every five cases, the schools retain lawyers. School districts, tutored by their attorneys, have discovered how to marshal evidence and use effective witnesses in making their case. Parents, by contrast, have used legal help less frequently; more often they have relied on professionals outside the school system, such as social workers, or have depended on laymen, friends, and neighbors.

The schools' tactics have proved highly successful. For a district to win, it has been enough to demonstrate that school personnel have followed normal evaluation and prescription procedures and have tried to place the child in the most normal setting possible. Adherence to the norms of the school, not individualized program design, has carried the day, and "appropriate" education has been equated with what is bureaucratically achievable. As schools learned this lesson, they have compiled a winning record: The schools won 62 percent of the cases during the first four years after PARC, and 96 percent of the cases in 1981.

The outcome of a due process hearing was supposed to reach
beyond particular cases, but the cases are treated as highly individualized disputes. In one hearing, the parents' lawyer tried to introduce into the record a hearing officer's decision in a similar case, but the school district successfully resisted, contending that each case contained too many variables to make comparison useful. While a system of precedent has developed in recent years, its impact has been modest, for decisions are regularly reached on the narrowest possible grounds.

If proceduralism has made much difference at the school or classroom level, the impact has been indirect. Hearings take time and cost money, and this reality has prompted school districts to settle disagreements informally. Pre-hearing conferences—conversations, actually—were held throughout Pennsylvania until 1981, when the U.S. Department of Education vetoed the practice, calling it a violation of the due process rights of handicapped children. In the eyes of the federal bureaucrats, at least, due process and nonformalism are mutually exclusive. Such bargaining in the shadow of the law, simply aimed at resolving disputes between parents and school districts, may well have made more of a difference than the formal hearings themselves.

**Real legalism**

Those unhappy with the outcome of a due process hearing may ask Pennsylvania's Secretary of Education to review the matter. These appeals were intended to develop substantive entitlements and to regulate the conduct of the hearings. In this law-like system, the administrative appeal resembles a court of appeal reviewing a trial court decision. About forty cases are appealed every year, and the opinions in those cases have improved over time. Something akin to a system of precedent has begun to emerge as legalization takes root. Yet the precedents themselves do not offer much encouragement to the reformers. The message of the appeals decisions, as of the hearings, is that the meaning of "appropriate" education for handicapped children is determined by cost and program availability.

Appeals have concentrated on two issues: the implication of the PARC mandate that students be assigned to classes as close to the mainstream as possible; and the meaning of appropriate instruction. The PARC decree specified that, all things being equal, placement in a regular classroom was preferable to assignment to a special class, and that special-class placement was preferable to institu-
tionalization. This "presumption of normality," as it has been termed, is a key element in PARC. It links principled opposition to segregation with a belief that distinguishing the handicapped from the ordinary school population is educationally damaging.

Initially, though, this bias in favor of normalized treatment did not sway the opinion-writers. In one case, a child was recommended for placement in a class of trainable retardates solely on the basis of one IQ test, and her parents wanted her placed in a regular classroom. Although the parents introduced evidence that the child's medication may have depressed her test performance, and then demonstrated substantial improvement upon retesting, the Secretary of Education was unmoved: "While we wish that Ramona would be able to participate successfully in the program for the educable mentally retarded [a higher classification], we cannot permit such a placement before she is ready to handle it—a premature placement would hurt her development. . . ." In another case, the hearing officer proposed keeping the child in a regular classroom in order to avoid the stigma of special treatment—the very value underlying the presumption of normality—while also offering supplementary instruction. When the district appealed, the Secretary of Education reversed this decision, finding that the IQ score did provide the district with a basis for assigning the student to the class for educable retardates. The concern over stigma was dismissed out of hand, and where the presumption of normality should have been in effect, it counted not at all.

The "appropriateness" slogan is meant to bring legal and professional concerns together. In theory, professional expertise would permit hearing officers to reach accurate diagnoses and placement decisions, while legal standards applied in the course of review would ensure that similarly-diagnosed pupils were treated similarly. This expectation, it turns out, postulates a higher level of professional knowledge and consensus than actually exists. Professionals simply cannot agree on what constitutes an accurate diagnosis or what a child's needs might include, let alone concur about the proper pedagogical strategy.

The appeals decisions themselves mirror this confusion. They do not specify which elements of handicap are crucial to the diagnoses and how these elements are to be ascertained; consequently, two radically different diagnoses of a child could—and often do—withstanding review. Law-like review, unable to resolve differences within and among the professions, has failed to secure consistency.

This is not a mere legal quibble. The very thing that is wrong
with so many of these opinions, their seeming arbitrariness, constitutes a challenge to the capacity of the appeals process to do its job: namely, offering guidance to concerned parents and school officials. Those cases concerning diagnosis and placement do not offer that guidance. The fault does not lie with the opinion-writers, for the problem is deeper: The due process system, embedded in the educational bureaucracy, is being pressed to answer questions to which, in truth, there are no answers—or at least no answers that an adversarial hearing is likely to turn up.

The real meaning of an appropriate education now depends on what resources are available, as appeals opinions pay heed to a school district's capacity to fund the sought-after program. In one appeal, for instance, the Secretary of Education admits that the ideal program would address both the child's retardation and his brain injury: "However, when such specialized programs are not available or are economically impracticable, the hearing officer must determine which existing program would benefit the child most." And in another case, the Secretary declared that a school district need not offer the best education possible, but only a program that satisfies minimum educational standards. Despite the stress on rights in the PARC decree, the hearings and appeals rely on cost and bureaucratic considerations, balancing rights against resources in a fashion seldomly seen in judicial opinions. This may well be sensible policy, but it is not what the advocates anticipated.

Legal and bureaucratic values now dominate the PARC due process system. Legalization is evident in the appeals, which frequently concern such procedural points as the admissibility of evidence and the timeliness of the appeals, and in the hearings, which have taken on the character of adversarial proceedings; the result is a system of decision in which professional wisdom has only a residual place. The hearing officer who is supposed to bring expert insight is hampered by an administrative rule granting less discretion than is available to a judge.

This system is profoundly conservative in its operation. It has proved incapable of adapting to the range of disputes arising in the education of the handicapped; instead, justice is increasingly routinized. Most hearings and appeals speak to the similar issues, and because these issues do not greatly affect school practice, parents' rare victories can be implemented without organizational disruption.

When novel issues are posed by groups of parents, the PARC administrative apparatus has been unresponsive, for the hearings
do not contemplate "class action" justice. Frustrated parents have taken their grievances elsewhere, usually back to the federal courts that ordered the PARC regime into operation. This re-judicialization has increased in recent years as the PARC system has grown more calcified, further diminishing the importance of PARC-mandated administrative review.

Judicial second-guessing

The PARC decision left the meaning of an "appropriate" education to be determined on a hearing-by-hearing basis. Such autonomy for the schools, comparable to that traditionally accorded to federal administrative agencies under the Administrative Procedure Act, was supposed to permit this new system to mature and develop its own expertise. But judges have been impatient with the schools, and a series of decisions have subjected the PARC regime to continuing and searching review. The cases focus on new claimants for special help and on the quality of services that handicapped youngsters receive under PARC; they have also challenged the usefulness of the due process system itself. As a result of these opinions, administrative due process is not a self-contained enterprise, but is instead routinely subject to federal judicial second-guessing.

The chief challenge to the PARC due process system, Fialkowski v. Shapp, was brought on behalf of multiply-handicapped children. The Fialkowskis had contested the school district's proposed placement at a hearing and lost. Skipping the administrative appeal, they marched into federal court and won. Because the Fialkowskis wanted not only a better education but also money damages from school officials, who allegedly had deprived them of their constitutional rights, the court heard the case—as indeed it had to, for only courts can award damages in such instances. This legal right undermined PARC: An unhappy parent can bypass the administrative process entirely, turning what PARC anticipated would be settled within the bureaucracy into a constitutional cause.

Going to court has major drawbacks, cost foremost among them, but the courts are nonetheless an attractive option for many parents, since the chance of winning there is much greater than inside the bureaucracy. Should reliance on the courts become commonplace, at least for the major policy questions, the administrative due process system would regularly be upstaged, with only the most mundane matters left for hearing officers to decide.

The PARC opinion did not foresee this development. Although
PARC's procedural protections prevent handicapped pupils from being totally excluded from school, Fialkowski concludes that they do not prevent children from being totally denied an education. The due process system had equated state certification requirements with an "appropriate" education, an approach, according to the court, that ignores what actually happens to children. "The exhaustion of state remedies by these plaintiffs is likely to be futile," the decision concludes, since the due process system can neither determine appropriate treatment nor order money damages.

Other post-PARC court cases have also rewritten the rules of the game. Frederick L. v. Thomas explicitly derided the value of the due process protections. In that suit, a class action filed on behalf of children with specific learning disabilities, Pennsylvania contended that PARC-like due process hearings would "make the program for identifying learning disabled children fully effective." The court was unpersuaded. Even if the hearings were well-run the system would still be defective, the court pronounced, because due process unfairly burdens parents by obliging them to recognize the disability, then demand that the school respond to it. Since there is a right to receive treatment, the court concluded, parents should not have to demonstrate the disability; instead, the state was required to institute a system designed to search out the learning-disabled. It is hard to imagine a harsher comment on the efficacy of due process in the context of special education. Although the Frederick L. opinion speaks only about the learning-disabled, the line of argument is readily applied to other types of handicap. If it is unfair to expect parents to seize the initiative in the one instance, why is it not equally unfair in the other?

The fact the courts can order remedies for entire classes, not just for individuals, also has powerful implications for the viability of the PARC regime. In Armstrong v. Kline, a federal judge required school officials to provide seriously handicapped youngsters with year-round instruction, reasoning that otherwise they would regress in the summer. The state's plea—that it could not afford to do so—left the court unmoved. And Armstrong has not been cheap to implement: In 1981, Pennsylvania spent $1.5 million for a summer program offered to 4500 pupils.

Even supposedly routine cases sometimes wind up in court. In Tokarcik v. Forest Hills School District, a federal judge ordered that the school provide clean intermittent catheterization (CIG) for a child afflicted with spina bifida, as a service related to the child's education. The particulars of Tokarcik matter less than the court's
view of its own role as an "external check" on the PARC due process system. This conception differs from the spirit of PARC, which left decisions about educational placement to a procedurally- and professionally-minded educational bureaucracy. The fact that federal judges are now willing to oversee the outcome of hearings like Amber Tokarcik's means that the judiciary is inclined to intervene in the PARC system whenever it sees fit.

In Pennsylvania, where the handicapped rights revolution began, the cumulative effect of judicial activity has been profound. Court opinions have influenced the nature and scope of PARC's coverage, giving a new direction to special education. No special education policy or practice, whether routine or profound, is now immune from judicial review.

The re-entry of the courts into the special education arena suggests that the judges recognize that the administrative hearing process, originally intended as a substitute for judicial review, cannot adequately fulfill that function. PARC hearings can settle standard special education disputes concerning individual students, such as the provision of transportation and the review of requests for private school placement. But substantial structural changes in educational practice, or controversies concerning a large class of students, lie far beyond the capacity of the due process mechanism.

Under PARC, fidelity to law has become transformed into legalism, overly rigid adherence to precedent, and mechanical application of rules, without continuing attention being paid to the purposes behind those rules. Hearings and appeals emphasize procedural issues, not educational ones, and technicalities often carry the day. This legalism hampers the school system's capacity to take new interests and new circumstances into account.

The emergence of the due process regime in Pennsylvania has lessened the importance of the administrative hearing as a way of securing educational entitlements. Hearings settle familiar disputes and air petty complaints, but the major controversies wind up either in the courts or the state legislature. The growing tendency for unhappy Pennsylvania parents to go to court, despite the costs, reflects deep disenchantment with the due process system, and suggests how problematic it is to legalize the bureaucracy.

The national experience

As Pennsylvania went, so went the nation: After the PARC decision, 36 cases seeking the process protections for handicapped
children were filed in 21 states. In 1975, responding to pressure from advocates' groups and financially-strapped states, Congress passed the Education for All Handicapped Children Act, which borrowed PARC's procedural requirements almost verbatim. In Washington as in Harrisburg, spokesmen for the handicapped declared that the due process hearings would ensure school district compliance with the law and offer a forum for individuals' grievances. "We thought that the law would be self-enforcing," a spokesman for the Council for Exceptional Children recalled, "because people could enforce it from the local level."

This has not happened. Studies in Massachusetts and California, as well as a nation-wide sampling of school districts, tell a consistent story: Due process hearings have not accomplished the hoped-for miracle, and have produced some unhappy, unanticipated side-effects. Patchy evidence suggests that few hearings have been held. A national sample of 22 sites found that seven had held one hearing, only four had managed more than one. Massachusetts, which had adopted its own "right to education" law in 1973, had about 60 hearings per year between 1974 and 1979. And in California just 278 hearings were held during 1978-79, affecting only .08 percent of the state's special education population. (A fraction of one percent is a tiny number, but by itself it does not tell us much. By comparison, the Immigration and Naturalization Service held hearings for .02 percent of its 700,000 applications, and disgruntled welfare recipients appeal only 2 percent of the time.) Nationally, as in Pennsylvania, hearings may have changed the ways in which schools do business, either for the better—by inviting parents to talk informally about their children's education—or for the worse—by adopting a defensive, legalistic posture.

The expectation was that due process hearings would revolutionize public education. The reality has been that hearings are most frequently requested by middle-class parents who have pulled out of the public schools, and who seek public dollars for private schooling. Four-fifths of the California hearings, for instance, focus on this issue. In special education, as in life, opportunities theoretically

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available to all are mostly used by those people who need them least.

The hearings themselves have been dominated by the legalism that has surfaced in Pennsylvania. Lawyers are everywhere. School personnel regard the hearings as expensive, time-consuming, and a threat to their professional judgment and skill. The private school placements that many parents seek are enormously costly; and directors of special education programs interviewed in Massachusetts think these parents are trying to “rip off” the school system, taking money from the children who remain in the public schools. They also complain about inconsistencies from one hearing to the next in determining what education is “appropriate.”

Those school districts that have held a number of hearings have developed an array of defensive strategies. There are reports of districts tape-recording supposedly informal conferences, tightening administrative procedures, and narrowly interpreting their legal obligations to provide “education and related services.” Elsewhere, districts have negotiated extra services with parents who dropped the threat of a hearing; sometimes school districts use the threat of a hearing to force parents into accepting what the school proposes.

The fact that the possibility of a hearing may be relied on to silence parents reveals that parents are not so contentious as might be thought. Those who participate in hearings often feel themselves blamed either as bad parents or as troublemakers. One mother interviewed in a Massachusetts study reported: “I’ve been through seizures and everything else with [my handicapped daughter] and this has been the worst affair of my life. It’s been hell—absolute hell.” Hearings, which were meant to give individuals a sense of mastery, instead provide a stage on which long-term unhappinesses between parents and schools can be played out to a new audience.

“Due process romanticism”

Skepticism about the virtues of procedural justice is not new. In a splendid study of New Haven’s petty criminal courts, Malcolm Feeley discovered that it was not the pain of penalty but instead the process itself that constituted the punishment.4 Years earlier, Joel Handler reviewed Wisconsin’s hearing-ridden welfare system and concluded that the so-called “new property” in welfare, buttressed by the right to a hearing, did not have much practical mean-

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ing. Whatever the law said, the system still held the trumps; welfare recipients had to come hat in hand to the social workers.  

The tale of special education has a similar conclusion. Due process hearings cannot assure good education or even consistent outcomes; instead, they degenerate into law-ridden affairs that often upset the participants, and, thanks to the federal bureaucrats' interpretation of the law, undermine the possibility of fruitful discussion. A decade or so ago, a different ending might well have been written. At a time when handicapped children were being denied even the rudiments of education, court decisions such as PARC put this issue on the policy agenda, and the right to a hearing might have concentrated the attention of local school officials. By now, though, the message has largely been heard. Public officials support the values underlying PARC and the federal legislation: that the handicapped are entitled to an education, that consistent and accurate diagnoses be made, that placements be as suitable as possible (given resource constraints), and as integrated as possible. In Pennsylvania and elsewhere, state agencies committed to these values monitor special education programs. It appears that the quality of special programs has much less to do with whether parents press their due process rights than with state legislation or voluntarily-enacted reforms promoted by educators themselves.

Today, the real threat to the quality of education offered to handicapped children comes not from unfair procedures but from cutbacks in funding. The federal appropriation for handicapped education has declined in real terms since 1980. At the state level, too, money is scarce. In Harrisburg, legislators who for a decade had poured substantial funds into special education now propose limiting private school tuition payments and cutting back on special school personnel. In the only Supreme Court decision interpreting the Education for All Handicapped Children Act (Board of Education v. Rowley), Justice Rehnquist gave the Court's blessing to a stricter cost accounting. The purpose of the law, Rehnquist wrote, is "more to open the door of public education to handicapped children . . . than to guarantee any particular level of education when once inside," for Congress was most concerned with establishing a "floor of opportunity" for each child. The sentiment that handicapped youngsters receive too much of a now-shrinking education pie is widely expressed these days.

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Due process hearings seem neither necessary nor adequate to meet the continuing concerns of those attentive to the interests of the handicapped. Yet the allure of due process remains strong, as the Reagan administration learned last year when it proposed limiting the right to a hearing, only to beat a quick retreat in the fare of 20,000 letters of objection.

However the fate of proceduralism in the schools is resolved when Congress next takes up the Education for All Handicapped Children Act, due process will clearly not revolutionize education. A new institutional style and better educational decisions are harder to secure by force of law than seemed possible in what Tom Gilhool, the plaintiff's lawyers in the PARC case, now calls the era of "due process romanticism." The great danger of fixating on process is the trivialization of substantive rights, as hearings divert attention from the harder and far more vital task of offering the handicapped an education that society can afford. In this context, procedural justice may be to justice as military music is to music.