THE EXPERIENCE OF CLINICIAN-LITIGATORS AT IMPARTIAL HEARINGS:

AN EXPLORATORY PHENOMENOLOGICAL STUDY

WITH SOCIAL POLICY IMPLICATIONS

by

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A dissertation proposal submitted to the Graduate Faculty in Social Welfare in partial fulfillment of the requirements for the degree of Doctor of Philosophy,
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This manuscript has been read and accepted for the Graduate Faculty in Social Welfare in satisfaction of the dissertation requirement for the degree of Doctor of Philosophy

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Abstract

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This exploratory study investigated the experiences of social workers, psychologists, and educators serving as clinician-litigators representing the local education agency at impartial hearings. The role of the clinician-litigator provides a window into the conflict between the principles of ethical advocacy that inform the work of the helping professions and the principles of traditional adversarial advocacy that guides the work of the legal profession, because it requires bridging these two advocacy traditions. The fifteen clinician-litigators interviewed for this study acquired and applied legal skills in their work as district representatives at impartial hearings but also retained their traditional professional orientations toward understanding and serving the needs of students. A phenomenological, grounded-theory approach to studying the experiences of the clinician-litigators facilitated reflection on their experiences and observations of the impartial hearing process, which illuminated the ethical contradictions they encountered.

Exploring the experiences of the clinician-litigators yielded rich data on their individual performance of a heretofore uninvestigated role. It also highlighted several societal issues concerning the provision of services to special education students. The Individuals with Disabilities Education Act was intended to promote the integration of disabled students into the educational mainstream. It specified the use of impartial hearings as a mechanism of dispute resolution between parents and the local education agency with the two parties on an equal footing. Over the past two decades, impartial hearings have been increasingly used by parents to seek private school tuition, fostering a form of segregation directly opposed to the intent of the Act. The observations and experiences of the clinician-litigators revealed how this mechanism of dispute resolution increased conflict between parents and the local education agency. It undermined the efforts of educational professionals to serve the best interests of students. Further, it highlighted the tension between the forces in society that would utilize the principles of distributive justice to promote integration and create equality of opportunity and those that would promote privatization of public services and institutionalize segregation based on socioeconomic status.

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CHAPTER I: INTRODUCTION AND PROBLEM FORMULATION

Introduction

Each year, the New York City Department of Education (NYCDOE) receives more than 100,000 requests to evaluate students for special education services. A recent Mayor's Management Report indicated that during the 2007-08 school year, more than 195,000 New York City school children were enrolled in special education programs, and that their education cost more than three times his or her regular education counterpart to educate. The budget for special education is approximately twenty five percent of the overall school budget estimated at $4.4 billion, excluding pension contribution and debt service. This represents a 75% increase over the past ten years (DiNapoli, 2008). There is a national concern that educating special-needs children has become extremely costly, especially for low incidence populations (Oliver, 2006), and parents are demanding more services with greater intensity than is mandated by federal law.

The United States Constitution does not explicitly provide for the education of its citizens; instead, this responsibility is assigned to the states. The Tenth Amendment states "powers not delegated to the United States by the Constitution, nor prohibited by it, are reserved to the States and to the people." Furthermore, it is incumbent upon the states to ensure that educational opportunities are equitable (Daugherty, 2001).

The laws that govern the education for children with disabilities in New York State are in the Individuals with Disabilities Improvement Act of 2004, Section 504 of the Rehabilitation Act of 1973, and the Americans with Disabilities Act of 1990. All three prohibit discrimination based on disability. This principle is codified in Article 89 of New York State Education Law

and Part 200 of the Commissioner's Regulations. The NYCDOE is bound by a consent decree that provides a comprehensive framework for implementing standard operating procedures in the special education delivery system (*Jose P. v. Ambach*, 1987). The federal No Child Left Behind Act (NCLB) of 2001, although focusing on the general education student population, provides additional institutional accountability. The No Child Left Behind Act mandates the use of highly qualified teachers; the measurement of academic outcomes; the right of parents to transfer students from failing schools; and the use of scientifically based instructional methods, with an emphasis on reading programs. These factors could also influence the quality of education for children with disabilities (Wright, Wright, & Heath, 2004).

The struggle to achieve social, political, and economic equality for educationally handicapped children has been a slow and formidable journey (Baynton, 2001; Osgood, 2008). Their quest for undifferentiated recognition and legal entitlements poses economic challenges to an educational system that must reconcile ideals of distributive justice with fiscal constraints and bureaucratic policies. At the same time, the economic climate in the first decade of this century posed special challenges for local educational agencies that are dependent on federal, state, and city budgets drastically reduced because of the recession (Ysseldyke & Algozzine, 2006). New York State has been involved in prolonged litigation due to the legal advocacy efforts of the Campaign for Fiscal Equity (*Campaign for Fiscal Equity v. State of New York,* 2003), which successfully argued that the State's school finance system under-funded New York City public schools and denied its students their constitutional rights.

The political victories enjoyed by advocates of the disability movement have caused periods of disequilibrium and organizational change as bureaucracies have restructured to meet the needs of students (Handler, 1986). Currently, the NYCDOE must accommodate special

education students and simultaneously address the educational demands of their parents while adhering to legal mandates and compliance deadlines. This has proven a challenging proposition, given the range of disabilities, related services, specialized personnel, and infrastructure required to support the educational needs of children with disabilities (Hehir, 2005).

The civil rights and disability advocacy movements served as the impetus for legislation that led to critical changes in the laws governing education of the handicapped (Turnbull, Stowe, & Huerta, 2007). Legislation-driven institutional reform and impact litigation, such as class-action suits, were components of the early efforts to achieve equal protection public policies (Martin, Martin, & Terman, 1996). These led to changes in the due process rights conferred as part of a client's entitlement to social services (Piven & Cloward, 1971). Further, they caused redefinition of the boundaries of the basic constitutional rights of "liberty" and "property." Especially relevant was the expansion of the definition the legal notion of "property rights" to benefits provided to recipients of social welfare programs (Dickson, 1976). The right to administrative or "fair hearings" was also included as a procedural due process safeguard. Fair hearings enabled clients to challenge the denial of basic social services. Although the NYCDOE provides a broad range of educational services for students with special educational needs both within the public school system and through contracts with private special educational programs, not all parents have felt that these services address the specific needs of their children. According to federal and state regulations, when the NYCDOE and the family disagree that services offered through the public schools are not appropriate for the child, parents have the right to challenge the actions of the local educational agency by requesting an impartial hearing

(*Individuals with Disabilities Education Act,* 1990; *New York Regulations of the Commissioner of Education 8NYCRR § 200.5(i)*).

The Parent's Due Process Rights and Impartial Hearing Trends

Over the past three decades since the passage of PL 94-142, parents of educationally handicapped students have been granted a range of due process rights and procedural safeguards at the federal, state, and city levels. These due process rights, essentially the right to a fair hearing when the parents disagree with the local education agency's proposed special education program for their child, guarantee their full participation in determining their child's needs for special education services and affirms their role as equal partners with the school district in developing an appropriate educational program for their child. The parents who most frequently exercise their due process rights tend to be White, upper middle class, English-speaking, and well-educated (Choutinho & Oswald, 2006). These findings are consistent with the demographics of parents in New York City who decline public school placements and initiate impartial hearings in New York City in order to secure tuition reimbursement for unilateral private school placements and private service providers (Martinez, 2010).

Special education litigation, specifically impartial hearing requests within the NYCDOE, has increased as parents question the clinicians' professional authority and the bureaucracy's programs for the education of their handicapped child (Hehir, 2005). Being able to request a special education impartial hearing is a critical component of a parent's due process rights when there is disagreement as to what constitutes a fair and appropriate education for the child. According to yearly fiscal summary reports maintained by the NYCDOE Impartial Hearing Office, the number of special education hearings has swelled in New York City as parents have

requested more private school placements for their children and have retained attorneys to represent them (Hehir, 2005).

The number of impartial hearing requests during this decade has grown radically. In the 2007-08 school year there were over 6,400 requests, as compared with 3,348 for the 2000-01 school year. The *Comprehensive Management Review and Evaluation of Special Education Report* (Hehir, 2005) noted that there was a consistent increase in impartial hearing requests from 2000 through 2004. From 2005 through 2008, there was an upward trend, and an additional 1,200 complaints were filed in each of the last two school years. Tuition reimbursement claims are a costly and expanding category of special education impartial hearings, accounting for about half the number of all impartial hearings (Mayes & Zirkel, 2001).

Parents of a student with a disability often seek reimbursement for unilateral school placements and private services when they believe that the NYCDOE does not offer the student an appropriate public educational program. The 1986 reauthorization of the Individuals with Disabilities Education Act (IDEA) entitled parents to attorney fees if they prevailed at a hearing, augmenting the cost of litigation for the NYCDOE (20 U.S.C.§1415(e)(4)(B)). The provision of attorney fees has been a highly contentious issue (Pitasky, 1997). The cost of such high-stakes relief is exorbitant, given the high cost of private-school tuition and private, individualized services such as tutoring and applied behavior analysis (ABA) for autistic children. In the 2007-08 school year, the NYCDOE spent $89 million on private school tuition. The rejection of public school special education programs and services by parents opting for more privileged alternatives is a continuous political debate argued at all levels of government. The debate centers on applying free market principles, essentially privatization, to a system historically

grounded in public provision of public services, a major policy shift that would cause the diversion of massive amounts of money from already-strapped local educational agencies.

The current legal standard, which addresses the question of who is accountable for tuition reimbursement when a parent places a child unilaterally in a private school, is well established by a three-prong test, which was codified by two Supreme Court decisions (*School Committee of Burlington v. Department of Education of Massachusetts*, 1985; *Florence County School District v. Carter*, 1993). The NYCDOE may be required to pay for a student's unilateral private placement if the services offered by the DOE are inadequate or inappropriate (Prong I). The private services selected by the parent must be appropriate (Prong II). Equitable considerations, which require that the parent cooperate with the local education agency, must be met if the hearing officer is to find for the parent (Prong III). Once parents file a request for an impartial hearing, the responsibility for deciding whether the parties have complied with their legal obligation under the three-pronged test, lies with a hearing officer.

Introduction of Attorneys to Impartial Hearings

In New York City, the large number of impartial hearing requests has burdened the NYCDOE with providing personnel to represent the position of the local educational agency at impartial hearings. The majority of the staff representing the NYCDOE at impartial hearings are non-attorneys, including social workers, psychologists, educators, and administrators, identified in this study as clinician-litigators. However, within the last few years the Office of Legal Services has hired additional attorneys to represent the NYCDOE at a small percentage of impartial hearings. The hiring of additional attorneys was one of the recommendations of the *Comprehensive Management Review and Evaluation of Special Education Report* (Hehir, 2005) commissioned by Chancellor Klein.

The Hehir Report recommended that attorneys, not clinicians, represent the NYCDOE at impartial hearings. This recommendation was premised on the belief that non-legal personnel lacked experience about the legal aspects of the impartial hearing process, and that attorneys experienced in litigation would win more cases (Hehir, 2005). However, there was no empirical evidence to support the assumption that lawyers would outperform non-attorneys at hearings. Recently promulgated federal regulations codify the right of non-attorneys to represent local education agencies at impartial hearings (*34 CFR Part 300*, 2008). Currently, there is a cadre of clinician-litigators representing the NYCDOE at impartial hearings.

These non-attorneys have prevailed in impartial hearings and their decisions upheld at the New York State Review Office when appealed by opposing counsel. These winning decisions have saved the NYCDOE large sums of money, especially in tuition reimbursement cases where parents sought private school tuition, private related service providers, and attorney fees. The reasons for the success of the clinician-litigators have not yet been studied, but they may include attributes such as an intrinsic awareness of the clinical issues involved in providing an appropriate educational plan; a distinct problem-solving framework; and a holistic understanding of the interplay among the clinical, legal, and organizational systems. Social workers, who are one of the professions serving as clinician-litigators, are ideal problem-solvers due to their commitment to social justice, practice skills, and knowledge of the various client systems (Anderson, Barenberg, & Tremblay, 2007).

Elements of an Impartial Hearing in New York State

A special education impartial hearing is a formal, quasi-judicial, due process proceeding. The fair hearing is framed by rules of civil procedure, including formal methods of disclosure, opening and closing statements, subpoenas, documentary evidence, direct and cross examination,

and oral arguments as outlined in the New York State Regulations (8 NYCRR §200.5 (3)(xii)). An impartial hearing officer presides on a rotational basis from a list provided by the State Education Department. The hearing officer adjudicates disagreements between the parent of a special education student and the school district regarding the identification, evaluation, and educational placement or the provision of a free appropriate public education for a student with a disability; either party may appeal the decision to the State Review Officer (8 NYCRR §200.5 (3)(i)(a)).

In New York State, a hearing officer must be an attorney and cannot be an employee of a school district, school, or program serving disabled students placed by the NYCDOE. The IDEA and New York State Law allow the school district and the parents to be accompanied and advised by legal counsel and individuals with special knowledge or training about the problems of students with disabilities (8 NYCRR § 200.5 (3)(I)(a)). The proceedings are tape recorded and a court reporter transcribes them verbatim. The hearing officer ultimately renders a Findings of Fact and Decision, which may be appealed by either party to the New York State Review Office within thirty days (NYCRR § 200.5(4)(k)).

The primary objective for the litigants in this adversarial forum is to win the case. From the perspective of the NYCDOE, an ideal win is a decision in which the district representative demonstrates that the services recommended for the students meet the legal mandate of what is procedurally and substantively defined as a free appropriate public education. This establishes that the NYCDOE has met its legal obligation and nullifies the parent’s contention that their unilateral arranged services are necessary or appropriate. Conversely, a win for the family is usually reimbursement of private school services or modification of the existing educational service plan. Unfortunately to reach this objective, the school district and the parents engage in

an adversarial, competitive, polarized dispute, convinced that each has greater familiarity with the needs of the student, and that their position should prevail. The potential negative consequences of impartial hearings are rife (Budoff & Orenstein, 1982; Fielder, 2000; Handler, 1986; Harry, 1992; Kuriloff & Goldberg, 1997).

Purpose of Study

Background

The purpose of this study was to develop a deeper understanding of the participation of social workers and other clinical professionals who function as NYCDOE representatives in special education due process proceedings. Key questions include how do clinician-litigators execute their roles at impartial hearings; how are their approaches similar or different from those of attorneys; what is their experience of this new role; and how do they evaluate the impartial hearing process as a mechanism of dispute resolution in light of their professional backgrounds and experience?

Ethical Advocacy

The clinician-litigators representing the NYC Department of Education face both technical and ethical challenges when they serve as representatives at hearings, due to the conflicting professional traditions embodied in the two halves of their hybrid role. The clinician-litigator's approach to conflict resolution is often different from that of an attorney, who adheres to the principles of traditional legal advocacy. The conflict between these two approaches is encapsulated in the social work principle of ethical advocacy, defined as the attempt by social workers to ensure that client's needs and perspectives are adequately represented in ethical deliberations through their involvement in individual cases (Dodd & Jansson, 2004). In the case

of impartial hearings, the clients' needs are those of all educationally disabled students served by the NYCDOE.

The principle of ethical advocacy is supported by the belief that social workers must continue to address the compelling political issue of gaining entrée into ethical deliberations in contexts where their contributions have been curtailed and their presence diminished (Dodd & Jansson, 2004). The participation of social workers in the impartial hearing process as clinician-litigators is a novel concept, since it entails going beyond their traditional clinical duties to represent the local education agency in legal proceedings. The focus is on litigation rather than the consultative and supportive activities with family members or other clients that comprise the bulk of social workers' normal work responsibilities. Special education professionals, including social workers, psychologists, educators, and administrators, may experience conflict serving as advocates due to ambivalence about their duties, obligations, and responsibilities to both families and the organization (Fielder, 2000).

There are many questions about whether the experience of the clinician-litigators is consistent with the principles of ethical advocacy. How do representatives of the school system at impartial hearings define a winning decision? Do they experience the process as collaborative or adversarial? Do they have conflicting allegiances to the various stakeholders in the process? How do the competing forces of organizational constraints, professional responsibility, legal accountability, parental self-determination, and the best interests of the student affect them? Is it plausible for school social workers, psychologists, and educators to litigate as representatives of the organization and simultaneously be advocates for parents and students in the impartial hearing process? Does the required approach to litigation based on the principles of traditional legal advocacy handicap the thinking and behavior of clinician-litigators at impartial hearings?

How do clinician-litigators relate to parents at hearings, especially in light of factors such as social class and privilege, parental cooperation with the local education agency, and parental rights to self-determination?

The NASW Code of Ethics (NASW, 1999) states that social workers should strive to ensure access to needed information and services, equality of opportunity, and meaningful participation in decision-making. A central question for this study was whether social workers and other professionals involved in this adversarial context, where conflict and competition are the norm, employed strategies and tactics that allowed for a process that ensured justice consistent with the profession's code of ethics without compromising the goals of the bureaucratic agency. The present special education adversarial system is designed to ensure fair results; however, it requires that the parties participate in a divisive, tactical contest, one in which the perception of fairness is highly correlated with the hearing outcome for either party (Goldberg & Kuriloff, 1991).

This study was framed around three perspectives the clinician-litigators must accommodate when representing the NYCDOE at impartial hearings: the bureaucratic, the professional, and the legal. I interviewed fifteen clinician-litigators and analyzed their experiences to determine how the principles of ethical advocacy interacted with those of traditional advocacy, with an eye towards extracting lessons that might suggest reimagined approaches to dispute resolution consistent with both legal mandates and the ethical traditions of social work, psychology, and education.

CHAPTER II: HISTORICAL AND PUBLIC POLICY PERSPECTIVES

Introduction

The commitment to include disabled people in the economic and social life of the United States is enshrined in the American with Disabilities Act (ADA) of 1973 and the Individuals with Disabilities Education Act (IDEA) of 1990. The current inclusiveness stands in sharp contrast to earlier socio-political attitudes, in which individuals with disabilities were often seen as "unfit" to participate in society and not entitled to social benefits. Centuries of discriminatory policies towards the handicapped marginalized them and made them subject to infanticide, servitude, sterilization, and institutionalization (Alper, Schloss, & Schloss, 1994). Individuals with disabilities were often categorized as threats to mainstream society; they were ostracized and subjected to discriminatory policies (Alper, Schloss, & Schloss, 1994; Baynton, 2001; Francis & Silvers, 2000). Despite this shameful tradition, there were also many notable efforts to protect disabled people, provide for their needs, and recognize them as deserving of social recognition and support (Fleischer and Zames, 2001; Shapiro, 1994; Winzer, 1993).

Early Societal Responses to the Disabled

Pre-agricultural societies offered disabled individuals little opportunity for survival, since these societies relied on physical attributes such as strength, speed, and agility for their continued existence (Hewett & Forness, 1977; Winzer, 1993). The measure of an individual's worth was his or her contribution to the family unit (Alper, Schloss, & Schloss, 1994; Hewett & Forness, 1977; Safford & Safford, 1996).

Hewett and Forness (1977) identified four major determinants to explain how cultures have rationalized their understanding and treatment of people with disabilities: survival, superstition, science, and service. Both the Greeks and Romans practiced infanticide when an

individual was incapable of contributing to the family unit. The Spartans raised their young to serve in the military, and consequently, they placed a premium on physical strength and able bodies (Hewett & Forness, 1977; Safford & Safford, 1996).

Both Plato and Aristotle advocated eugenics and infanticide to address the problem of children who were a burden to their families and society. In *The Republic*, Plato noted the importance of identifying children according to their potential and advocated a society with special treatment for the most deserving and banishment for the inferior and the deformed (Hewett & Forness, 1977; Plato, 2004; Winzer, 1993). Aristotle took a similar position in *Politics,* proposing that laws should be enacted that promoted extermination of non-contributors to society, including laws imploring that no deformed child should live (Aristotle, 2005).

In Roman society, the family was the basic social unit, and children were the exclusive property of the father, who was the only individual awarded full citizenship and legal rights. Children were part of this patriarchal family. The status of paterfamilias was assumed eight days after birth, when the father formally acknowledged that he would assume responsibility for a child's care. The father maintained control of his children's destiny, and handicapped children, if not killed, could be abandoned or sold into slavery (Hewlett & Forness, 1977; Winzer, 1993). Although people with disabilities received harsh treatment, they were often used for the amusement of the privileged class (Safford & Safford, 1996).

Despite these traditions, the Greek intellectual community did propose treatment options for disabled people, and the Romans created a comprehensive classification system and enacted laws that afforded legal rights to disabled persons depending on their handicapping condition. The Justinian Code eventually incorporated the laws of different cultures throughout Europe beginning in the Sixth Century. Beyond that, it was not until a paradigm shift occurred during

the mid-eighteenth century that conditions for people with disabilities improved (Safford & Safford, 1996; Winzer, 1993).

In ancient Judaic culture, disabilities were considered to be divine punishment for wrongdoing. As a result, people with disabilities were considered cursed by God, and they were separated from society. However, infanticide was prohibited, and the emphasis was the provision of assistance those less fortunate (Barnes, Mercer, & Shakespeare, 1993). Passages in the scriptures reflected in rabbinical law supported this notion of service (Safford & Safford, 1996; Winzer, 1993). The ancient Egyptians also had a more sympathetic attitude towards persons with disabilities, especially the visually impaired and blind. They provided them vocational training in order to integrate them into society (Winzer, 1993). These attitudes towards the blind within Islamic countries continued throughout the centuries and set the example for Europe and Asia in coming centuries (Hewett & Forness, 1977).

European Responses to the Disabled

During the Middle Ages, Europeans attributed mental and physical handicaps to satanic influences, and similar attitudes were prevalent among early Babylonian, Chinese, Egyptian, Greek, and Hebrew cultures (Alper, Schloss, & Schloss, 1994). These cultures viewed people with disabilities as social deviants, and tortured, flogged, and burned them. The treatment of disabled people involved spiritual rituals such as exorcism and incantation, since the handicapping condition was attributed to supernatural forces (Barnes, Mercer & Shakespeare, 1999).

Monastic life in Europe in the Middle Ages was an opportunity for individuals to retreat into a life of austerity within the walls of monasteries and convents from an outside world characterized by social chaos and civil unrest. Cloisters functioned as self-sufficient

organizations providing institutional safe havens for handicapped individuals whose families abandoned them (Pfeffer & Salancik, 2003; Winzer, 1993). Moreover, religious sanctuaries provided individuals with disabilities a place where their souls could be cleansed, and through divine intervention, they could be cured of their afflictions (Alper, Schloss, & Schloss, 1994; Barnes, Mercer, & Shakespeare, 1999; Hewett & Forness, 1977).

The spread of Christianity throughout Europe also lead to the creation of hospices outside monastic walls, where individuals with handicaps received treatment (Winzer, 1993). During the Crusades, states established institutions designed to assist disabled military members readjust to civilian life (Hewlett & Forness, 1977; Safford & Safford, 1999; Winzer, 1993). For example, in 1254, King Louis IX founded a hospice for 300 captured French knights whose eyes had been pulled out by the Muslims. Both the church and state supported these efforts. Eventually, other institutions were established throughout Europe to address the needs of disabled veterans (Scotch, 2001).

Monks and nuns were critical in advancing efforts to address the needs of specific groups of handicapped persons. One such intervention was a program designed for aristocratic deaf and mute students, although self-interest drove this mission. Deaf-mute children were barred from inheritance claims to their family's estates and were sent to cloisters as laborers. In 1578, this prompted Pedro Ponce de Leon, a monk from Spain, to establish a special education program with individualized speech and language lessons for children of the upper classes under the tutelage of Benedictine monks (Safford & Safford, 1996; Winzer, 1993). Some scholars consider this formalized intervention the genesis of special education (Winzer, 1993).

Although there was some protection afforded people with disabilities in Christendom during the Middle Ages, they were also subject to punishment for attributes and behaviors

associated with witchcraft (Barnes, Mercer, & Shakespeare, 1999; DeRosa, 1988; Hewett & Forness, 1977; Safford & Safford, 1996; Winzer, 1993). For example, *Malleus Maleficarum,* (Hammer of the Evildoers), published in 1487, served as the legal authority for judges at trials prosecuting those accused of being witches (DeRosa, 1988; Hewett & Forness, 1977). Mentally and physically challenged individuals, newborns with congenital diseases, and anyone with unusual behaviors were considered social deviants possessed by demons. Consequently, they were tortured and burned (Barnes, Mercer, & Shakespeare, 1999). These activities persisted through the Spanish Inquisition, when many handicapped persons were subjected to false accusations and acts of violence. *Malleus Maleficarum* was reauthorized approximately nineteen times during a three hundred year period until it made its way to America with the Puritans in 1620 (Hewett & Forness, 1977).

English Poor Laws and the Disabled

The conversion of England to Protestantism in the early sixteenth century shifted political power from the Papacy to the Church of England and altered the belief system and manner in which the monarchy treated its subjects. The monasteries were annexed and the clergy, who were the principal treatment providers for residents, became accountable to the sovereign government. This ended centuries of Catholic rule (Leiby, 1978). Parliament empowered local parishes to assume responsibility for the economic well-being of all its members, which included the poor and the infirm. The framework and principles established by the Poor Laws distinguished public, local, and personal responsibility and categorized citizens according to economic viability (Handler & Hassenfeld, 1997; Leiby, 1978; Trattner, 1974).

The English Poor Laws, codified in 1601 during the reign of Queen Elizabeth I, were the first piece of legislation that made the state responsible for developing social welfare policies. It

provided economic relief to the deserving poor, which included handicapped people (Handler & Hassenfeld, 1997). These laws granted them permission to beg. Although not formally documented, the word "handicap" may have evolved from the act of begging with cap in hand, so the act of begging became aligned with being disabled (Barnes, Mercer, & Shakespeare, 1999). The Poor Laws played a critical role in shifting responsibility for disabled people from church charity to a public welfare state, where local governments managed the care and supervision of the poor. Ultimately, the Poor Laws extended into colonial America and many of their provisions provided the framework for establishing laws to serve the needy (Axinn & Levin, 1975; Leiby, 1978; Trattner, 1974).

Crosscurrents during the Enlightenment

Institutionalization increased in seventeenth-century Europe in response to the increase in unemployed adults and vagrant children; the safety of the general population became of concern to lawmakers. People with disabilities, who previously had been accepted and protected in church-run hospices, were now isolated in institutional settings. This segregated people with mental and physical deficits from mainstream society. Institutionalized inmates were often displayed for amusement. Activists during this period began to address the plight of the disabled community by providing services to people suffering under institutional care (Safford & Safford, 1996).

Throughout Europe, the period of the Enlightenment not only propelled scientific investigation of disabled people, it also emphasized humanitarian efforts on their behalf. This period marked the creation of special schools for people with specific disabilities. In late seventeenth-century Russia, Peter the Great was interested in physical deformity and promoted the field of "defectology," or special education (Hewett & Forness, 1977). In late eighteenth-

century and early nineteenth-century France, Philippe Pinel developed a case-study approach to the investigation of mental illness and advocated for more humane treatment (Safford & Safford, 1996; Hewett & Forness, 1977). In America, Benjamin Rush, a physician and signer of the Declaration of Independence, was an outspoken advocate for the reform of institutions for people with mental illness (Winzer, 1993).

Most significantly, Jean Marc Gaspard Itard, a physician in turn-of-the-century France, attempted to educate an abandoned, feral child who was deaf-mute and mentally retarded. Itard's work was the catalyst that led to special education as a legitimate field of interest. It prompted professional inquiry into the treatment and education of children with special needs, particularly those with mental retardation. As such, Itard is considered the originator of special education (Alper, Schloss, & Schloss, 1994; Safford & Safford, 1996). His work spawned a progressive movement in which notable professionals focused on the needs of children who required special education services.

Edouard Seguin followed Itard's example. In 1846, he published *The Moral Treatment, Hygiene, and Education of Idiots and other Backward Children*, considered the first thesis on the training of mentally retarded children (Osgood, 2008). Alfred Binet developed the first usable intelligence test in 1905 (Sarason & Doris, 1979). At the turn of the twentieth century, Maria Montessori designed educational and rehabilitation programs for retarded children that were replicated throughout Europe and in America (Winzer, 1993). In 1825, Louis Braille devised his eponymous code, a system used by blind and visually impaired people to this day for reading and writing (Fleischer & Zames, 2001). The education of special-needs children gained considerable ground in Europe throughout the twentieth century, and this movement was replicated in America (Osgood, 2008).

Children with Disabilities in the United States

The Colonial Period

Colonial America emphasized physical strength and self-sufficiency due to harsh living conditions and the need to build an infrastructure. Consequently, disabled persons had limited utility, and people who became disabled due to injury were often deported back to England. This action was reinforced by vagrancy statues, which imposed punishment for people who were not able to support themselves (Foner, 1998).

During the Revolutionary War, disabled veterans received pensions from the government for their services. Military hospitals built during the war to aid sick and injured soldiers became the nucleus of the Veterans Administration hospital system (Shapiro, 1993). The war veterans, who symbolized America's spirit of patriotism, were instrumental in increasing national awareness of the plight of disabled soldiers and contributed to the impetus to make medical advances in areas such as orthopedic medicine (Shapiro, 1994).

Early Responses to Children with Disabilities

The first formal efforts in the United States to educate children with special needs began in the nineteenth century. Special schools to address the needs of deaf and blind children were the first. Thomas Hopkins Gallaudet founded the American Asylum for the Education and Instruction of the Deaf and Dumb in 1817 (Leiby, 1978; Osgood, 2008; Winzer, 1993). Another pioneer in education for disabled children was Samuel Gridley Howe, who in 1821 established the first center for the blind in the United States, the New England Asylum for the Blind, (currently the Perkins School for the Blind). He later founded the Massachusetts School for Idiotic and Feeble-Minded Children and the New York Institute for the Blind. These schools were for children of wealthy families (Smith et al, 2001). Similar programs were established in

other states, as the government began to take a more active role in the creation of special schools for children with disabilities. Throughout the nineteenth century, state institutions, an outgrowth of almshouses, were established to accommodate people with physical handicaps and mental retardation (Shapiro, 1994; Silvers, Wasserman, & Mahowald, 1998; Winzer, 1993).

With the Progressive Movement of the early twentieth century, reformers such as Dorothea Dix actively opposed the dehumanizing treatment of people with mental illness and mental retardation who were often warehoused with criminals (Shapiro, 1994; Osgood, 2008). Nonetheless, the Eugenics Society was also established during the same period by leaders of the movement to control reproduction by individuals considered to be genetically impaired (Alper, Schloss & Schloss, 1994). During the 1920s, twenty-four states enacted sterilization laws, buoyed by the landmark US Supreme Court case *Buck v. Bell* (1927), which upheld a compulsory sterilization law. This affirmed the notion that selective breeding would improve the human race. Similar to other times in human history, sympathetic and punitive attitudes toward people with physical and mental impairments coexisted.

Immigration Policy in the Late Nineteenth and Early Twentieth Centuries

The population of the United States grew exponentially during the nineteenth century (Winzer, 1993). School districts became responsible for Americanizing immigrant children. For those unable to assimilate, separate classes were created to address the specific needs of students (Kauffman & Hallahan, 2005; Winzer, 1993). The dislocation and relocation of freed slaves also contributed to the creation of institutions to address the needs of a marginalized community (Foner, 1998).

During this same period, immigration policy excluded disabled persons from entering the country. The Immigration Act of 1882 prohibited entry to any "lunatic, idiot, or any person

unable to care for himself or herself without becoming a public charge" (Baynton, 2001, p. 46). Legislation passed in 1907 added "imbeciles," "idiots," and "feeble-minded persons" to the exclusionary list, and physical disabilities and medical conditions were specified as reasons for deportation (Baynton, 2001).

Special Education in US Cities

In the late nineteenth and early twentieth century, New York and other large cities experienced serious problems meeting the challenge of educating new immigrants. The problems these new students posed included lack of knowledge of English; a high rate of truancy and delinquency; delayed academic and cognitive skills; and students whose chronological age was inconsistent with grade expectations (Kauffman & Hallahan, 2005). The number of slums increased with the steady influx of new immigrants (Ravitch, 2000). Since students were unprepared for traditional academic rigor, school districts assumed responsibility for creating vocational programs and classes for students with special needs (Kauffman & Hallahan, 2005). The Smith-Hughes National Vocational Education Act of 1917 supported this plan, which provided funding for school districts to create vocational programs (Ravitch & Vinovskis, 1995). Formal efforts to provide education for special-needs students resulted in their being educated apart from the mainstream, creating a bifurcated system of instruction.

During this period, some parents who believed that their children were being deprived of a mainstream educational experience initiated lawsuits against the school districts, such as the Massachusetts case *Watson v. City of Cambridge* (1893) and the Wisconsin case *State ex rel. Beattie v. Board of Education, City of Antigo* (1919). However, these parents did not prevail in either case. The ruling in *Watson* permitted school districts to expel students for "disorderly conduct or imbecility" or for being "too weak-minded." In *Beattie,* the court found that students

with physical disabilities could be excluded from school if their presence had a "depressing and nauseating" effect on other students if they made involuntary facial contortions and sounds (Ysseldyke & Algozzine, 2006).

Addressing the Educational Needs of Children with Disabilities

Early Efforts on Behalf of Educational Needs of Children with Disabilities

During the first half of the twentieth century, few policy makers expressed concern about the needs of children with disabilities taught in segregated educational settings. Although the Progressive Movement was active in Americanizing White European immigrants and incorporating them into the mainstream, Blacks remained on the fringes of society. In the early nineteen-twenties, foreign language instruction was restricted in many states (Foner, 1998). The "melting pot" theory dominated American society; however, it excluded minorities such as African-Americans, Hispanics, Native Americans, and Asian-Americans (Ravitch & Vinovosakis, 1995).

The United States Supreme Court, in the *Plessy v. Ferguson* (1896) decision, upheld the constitutionality of the "separate but equal" doctrine, which remained in effect until the early nineteen fifties. The Supreme Court, in the landmark *Brown v. Board of Education of Topeka* (1954), rejected the notion that separate education for Blacks could be equal; it stated that segregated schools had no place in public education, because they impeded the educational and mental development of children. Following the *Brown* decision, parents began to initiate lawsuits against schools for segregating their children with disabilities, arguing that this was discriminatory.

The Council on Exceptional Children, the National Association for Retarded Children, and other advocacy groups lobbied to end the segregation of disabled students in schools.

Originally, this movement focused on the deaf and blind, but eventually it included all disability groups (Osborne, 2008). Franklin Roosevelt, himself a victim of polio, was instrumental in establishing the March of Dimes and the National Foundation for Infant Paralysis, in 1937, to address the needs of children with polio and congenital birth defects. These organizations did not garner support from conservatives, because their liberal service model did not include means testing (Fleischer & Zames, 2001).

The first American president to highlight the needs of people with mental disabilities was John F. Kennedy, who convened the Panel on Mental Retardation in 1961. This was the first time in US history that the needs of this population were broadly recognized at the federal level. This panel set in motion legislation passed during the Johnson administration, including the Civil Rights Act of 1964 and the Elementary and Secondary Education Act of 1965, which provided federal support to public schools (Leiby, 1978). However, the Civil Rights Act did not provide people with disabilities the legislative protection afforded women and ethnic minorities. Moreover, there was strong opposition to the idea that the disabled community could equate its history of discrimination to that based on race, color, national origin, sex, and religion (Francis & Silvers, 2000).

These events laid the groundwork for subsequent legislation and case law that promoted the educational rights of children with disabilities and ultimately gave parents the right to impartial hearings on behalf of their children. In the 1960s, federal legislation emerged that addressed the educational needs of special needs students. The Bureau of Education for the Handicapped, currently the Office of Special Education Programs (OSEP) of the United States Department of Education, offered stimulus packages to states, colleges, and universities to establish state agencies and resource centers to train teachers and provide technical assistance to

schools (Kauffman & Hallahan, 2005). Congress also amended the Elementary and Secondary Education Act of 1965 to include the education of students with disabilities and awarded grants to the states to develop educational programs and resources. However, they did not impose specific implementation mandates.

Two landmark cases affirming the rights of handicapped students to a public education were *Pennsylvania Association for Retarded Citizens (PARC) v. Commonwealth of Pennsylvania* (1972) and *Mills v. Board of Education of the District of Columbia* (1972). *PARC* guaranteed the right of children with mental retardation to a public education, and Mills affirmed a similar right for children with other handicapping conditions, including behavior disorders. Congress adopted a "zero reject" policy based on the Fourteenth Amendment's provision that no state may deny to any person within its jurisdiction equal protection under the law, including the handicapped (Melnick, 1994; Osborne & Russo, 2006; Turnbull & Fielder, 1985; Turnbull, Stowe, & Huerta, 2007).

PARC and *Mills* were the precursors of the landmark Public Law 94-142 of 1975, which formed the basis for current special education laws and policies. A notable component of the *Mills* decision was granting due process procedural rights to parents of special education children. A related development was the passage by Congress of the Rehabilitation Act of 1973. Section 504 of the Rehabilitation Act prohibited discrimination against handicapped persons who were receiving services from agencies receiving federal assistance (Hueffner, 2006).

Promoting the Rights of Handicapped Children

The most critical governmental response in the US to the needs of special education children was landmark Public Law 94-142, the Education for All Handicapped Children Act (EACHA), signed into law in 1975, which is currently known as the Individuals with Disabilities

Education Improvement Act of 2004 (*IDEIA*, 2004), it represents a line of demarcation in the history of educational services for students in the US (Lash, 2001). In enacting the EACHA statute, the 94th Congress found that having a disability was a natural phenomenon and should not deprive an educationally handicapped child from access to full participation in the mainstream; in addition, it deemed that academic instruction should facilitate independent living and economic self-sufficiency (IDEA, 1990). EACHA is a grant statute that provides funding to states to develop comprehensive services for educationally handicapped children (Katsivannis, Yell & Bradley, 2001). It has led to the development of a cadre of professionals educated and trained to teach students with disabilities (Hueffner, 2006).

In 1990, Congress reauthorized EACHA, and the federal special education law's name was changed to the Individuals with Disabilities Education Act (IDEA). The Act continued to require states to provide a free appropriate public education to all children with disabilities. The term "free appropriate public education" encompasses both special education instruction and related services, including transportation and developmental, corrective, and other supportive services (*Individuals with Disabilities Education Act*, 1990). IDEA was reauthorized in 2004 and renamed the Individuals with Disabilities Education Improvement Act (*IDEIA*, 2004). One of its significant features was mandating resolution meetings prior to impartial hearings, although these sessions could be waived with the joint consent of the parents requesting the hearing and the school district.

Statutory Framework of IDEIA

The following are the basic provisions of the federal law. Every special education student is entitled to a free, appropriate public education; access to a continuum of placements, including inclusion programs within the public schools; special classes in separate special

education schools or hospital schools; and home instruction. Children should receive education in the least restrictive environment consistent with their educational needs, with mainstreaming to the extent possible. In addition, families should receive an Individualized Education Program that includes a description of the student's strengths and weaknesses, a statement of the special services to be provided, and the goals of those services (Kauffman & Hallahan, 2005).

Students with disabilities are eligible for special education services in New York State when it is determined that their disability impedes their functioning to the degree that they cannot be maintained in a general education classroom without special education services. In addition, they must meet the criteria for classification with one of the thirteen handicapping conditions defined by the New York State Regulations (*New York Regulations of the Commissioner of Education, 8NYCRR § 200.1(zz)*).

Special Education Impartial Hearings

Public Law 94-142 (1975) required local educational agencies to afford parents the opportunity for impartial due process hearings and to bear the administrative costs. The local educational agency (LEA) was also mandated to provide parents information about free or low-cost legal and advocacy services, since they were not required to pay for parents' representatives or witnesses (Levine & Wexler, 1981).

Fair hearings and due process procedural safeguards have been a mainstay of social welfare, and activists use them as a vehicle for effecting social change in public welfare, social security, criminal justice, and housing (Dickson, 1976). The right to a fair hearing itself came about due to the efforts of a solidified activist movement. Legal advocacy occurred during the initial process of welfare reform, leading to considerable changes in society's views of what constituted rights subject to due process application (Piven & Cloward, 1971). Property rights

were extended to encompass benefits provided to recipients of social welfare programs; entitlements were protected under the rubric of "new property" (Handler, 1986, p. 130). This was based on the recognition that state benefits were indeed property interests rather than acts of charity, therefore entitling recipients to due process and procedural safeguard protection (Galligan, 1996). A violation of a person's property rights would be an infringement on their freedom (Foner, 1998).

The Supreme Court has stated that the "fundamental prerequisite of due process rights is the opportunity to be heard" (Dickson, 1976, p. 275). For a due process hearing to occur the aggrieved party must meet several conditions: clients must be aware that an injury has occurred; they have to think that the agency is at fault; they have to be aware of the existence of a remedy; and finally, they have to make a calculation that the benefits of pursuing a remedy outweigh its costs (Handler, 1986).

The fair hearing administrative procedures and decision-making processes that were established during the New Deal period, when the modern US welfare state was created, were embedded in the notion that administrative due process procedures were sufficient and therefore did not require judicial interference. This supposition was supported by the reputation of the Social Security Administration (SSA), one of the most respected agencies in the country. Therefore, the courts generally deferred to the agency's administrative expertise in areas of social policy (Melnick, 1994).

The defining Supreme Court decision in *Goldberg v. Kelly* (1970) affirmed this paradigm, which pertains to social welfare clients and human service organizations. The constitutional issue discussed was whether the due process clause of the Fourteenth Amendment required that AFDC recipients have an evidentiary hearing before the termination of their

benefits (Cass, Diver, & Beermann, 2002). The decision upheld the right to a fair hearing within the administrative agency prior to termination of benefits. It also incorporated critical procedural safeguards, such as timely and adequate notice, detailing the reasons for a proposed termination, and providing an effective opportunity to defend the decision by confronting any adverse witness (Handler, 1976).

In *Goldberg v. Kelly*, the court further allowed the complaining party to present his or her own arguments and evidence orally. In addition, the court specified that the hearing must be conducted in front of an impartial examiner. Finally, the right of property was extended to welfare recipients by recognizing that a claim to state-administered benefits was part of the claimant's property interests rather than an act of state-sponsored charity. Expanding the definition of private property to include welfare benefits provided critical buttressing to the right to due process and procedural safeguards (Galligan, 1996; Melnick, 1994).

Finally, in *Matthews v. Eldridge* (1976), a social security termination case, the Supreme Court established a new mechanism for adjudicating disputes about social welfare entitlements, the "local evidentiary hearing." The rationale for the new federal regulations was to provide flexibility and options to state and local governments, allowing them to create fair hearing procedures tailored to the needs of the specific populations in their jurisdiction (Baum, 1974; Cass, Diver, & Beermann, 2002).

Recent Court Rulings

Several recent court decisions have affected the balance of power at impartial hearings. The United States Supreme Court held in *Schaffer v. Weast* (2005) that the challenging party bears the burden of persuasion in a special education administrative hearing. The Schaffer decision reversed the longstanding rule in New York State, articulated in *Walczak v. Florida*

Union Free School District (1998), that "school authorities have the burden of proof of supporting the proposed IEP." Justice Sandra Day O'Connor delivered the Supreme Court decision shifting the burden of proof from the school district to the parent. She opined that school districts have a "natural advantage" in information and expertise over parents, but she also found that IDEA gives parents many procedural protections including the right to review records and the right to an independent educational evaluation, which helped to level the playing field between parents and school officials. However, on August 15, 2007, New York Governor Eliot Spitzer signed legislation that shifted the burden of proof back to the local education agency, thus placing the school representatives at impartial hearings in a defensive position.

In *Arlington Central School District Board of Education v. Murphy* (2006), the Supreme Court disallowed reimbursement for the costs of expert and/or educational consultants to parents who prevail at impartial hearings. The dissenting opinions brought attention to the fact that the IDEA principles of participatory rights and procedural safeguards could be seriously compromised if parents were unable to obtain reimbursement for the costs of their experts. Parents must now bear the costs for expert witnesses to testify, even if they prevail at the hearing.

The United States Supreme Court decided an appeal by the NYCDOE of a 2nd Circuit decision in October 2007 that parents were not required to enroll their child in a public school special education program before asking the New York City Department of Education to reimburse them for a unilateral placement at a private school. The justices issued a split 4-4 decision, letting stand the appellate court ruling in favor of the plaintiff, Tom Freston, former Viacom chief executive (*New York City Board of Education v. Tom F., on Behalf of Gilbert F., a Minor Child,* 2007). The issue resurfaced before the Supreme Court through a petition filed in

the 9th Circuit, in *Forest Grove School District v. T.A.* (2008). It addressed the question of "whether IDEA permits tuition reimbursement awards against a school district and in favor of parents who unilaterally place their child in private school, where the child has not previously received special education and related services under the authority of a public agency" (p. i). In 2009, the Supreme Court held that reimbursement was appropriate, regardless of whether the child had received services through the public school.

The social and economic implications of these decisions have been extensive. They galvanized various advocacy groups to fight for greater allocation of public funds to private school tuition. Gianesin and Bonaker (2003) describe the efforts of conservatives to pressure policymakers to institutionalize their ideology of "free choice" through creating a voucher system for private school tuition. Conservatives frame their arguments as wanting to become "equal partners" with the public school system. This has led to partisan conflict between proponents of "free choice" and defenders of public education.

Current New York City Fair Hearing Structure

New York City Department of Education impartial hearings are held at 131 Livingston Street, Brooklyn, New York. To accommodate the large number of parental requests, between ten and twenty impartial hearing officers hear cases simultaneously.

Hearings in New York City adhere to federal and state guidelines, including the following. The parent's right to file for a hearing is bound by a two-year limitation from the date the parent becomes aware of the alleged action that formed the basis of the complaint. At the hearing, the party may only raise issues raised in the complaint. A hearing officer who is an attorney adjudicates the impartial hearing. The parents have the option of representing themselves *(pro se)* or being represented by an advocate or attorney. The testimony is

audiotaped and transcribed by a court reporter; it must be maintained and made available to the parties. The impartial hearing process is guided by the rules of civil procedure, which include the opportunity for both sides to present evidence, compel the attendance of witnesses, and confront and question all witnesses at the hearing. Evidence must be disclosed to the opposing side five business days before the hearing. The parties testify under oath administered by the hearing officer. The hearing officer may limit examination of a witness when he or she determines that the testimony is irrelevant, immaterial, or unduly repetitious. Each party has at least one day to present its case; however, the average time for a proceeding is approximately four days. The hearing officer renders a Decision of Findings and Fact. Either party may appeal the decision to the State Review Office within thirty days. These procedures are codified in the New York Regulations of the Commissioner of Education (8NYCRR§200.5).

Impartial hearings in New York City differ from those in other jurisdictions in that the majority of district representatives are clinicians rather than attorneys. This is in line with federal regulations that permit representation by non-attorneys if not specifically prohibited by the state (*Department of Education: Assistance to states for the education of children with disabilities and preschool grants for children with disabilities: Final rule*, 2008).

The due process rights enshrined in the impartial hearing process are meant to permit full participation by all actors and to allow for a fair resolution to the conflict. The literature has suggested that this process has high emotional and financial costs both to parents and to school districts (Budoff & Orenstein, 1982; Fielder, 2000). The effects of participation in the hearing process have been the subject of scholarly consideration, which I will discuss in the next chapter.

CHAPTER III: THEORETICAL LITERATURE

Introduction

When professionals take on the roles and responsibilities of another profession, they often experience role discontinuity (Davis, 1966). Some portion of the role discontinuity experienced by the social workers, psychologists, and educators working as clinician-litigators lies in the ethical conflicts at the juncture of the human services and legal professions.

The ethical traditions of the legal profession, which guide professional practice in legal proceedings such as impartial hearings, are morally neutral. Lawyers are trained to advocate dispassionately for their clients and to distance themselves from their own sense of morality (Aiken & Wizner, 2003). The professional ethics of lawyers free them of the obligation to address the moral dimensions of the positions they are arguing. They only have to convince the decision-maker of the rightness of their client's position; it is the decision-maker, in this case the impartial hearing officer, who bears the responsibility for weighing the moral issues (Aiken & Wizner, 2003).

In contrast, social work and the related professions of psychology and education have explicit moral principles that guide their work. Social workers and psychologists are trained to work collaboratively with their clients on their behalf, while exercising their moral and clinical judgment when they intervene (NASW, 1996; NASP, 1997). The social work code of ethics requires practitioners to attend to the human benefits and costs of the issues to be decided in dispute resolution and specifically advises social workers not to assist clients in matters that may have a negative impact on others (NASW, 1996). Similarly, the New York State Code of Ethics for Educators (2003) specifies that educators must work collaboratively with parents and use their knowledge of students to promote the students' best interest. The NASW Code of Ethics

(1999) indicates that social workers should strive to ensure access to information, services, equality of opportunity, and meaningful participation in decision-making for all people (NASW Code of Ethics, 1999); it emphasizes the importance of protecting vulnerable and oppressed populations such as the poor, the unemployed, and those who have experienced discrimination.

In order to understand the experience of the clinician-litigators who were the subjects of this study, it was necessary to review the historical background and social philosophy of the modern special education movement, including the long tradition of discrimination and segregation that denied educationally handicapped children access to the educational opportunities that would prepare them to participate in society. Two of the key organizing principles that will guide the analysis of the experience of the clinician-litigators are Public Law 94-142 and the concept of distributive justice.

Public Law 94-142 and the Concept of Distributive Justice

The intent of Public Law 94-142, currently known as the Individuals with Disabilities Education Improvement Act (IDEIA), was to redress the inequities long suffered by educationally handicapped students and to ensure that parents work collaboratively with schools to plan for the educational needs of their children. Egalitarian in principle, it sought to level the playing field by integrating educationally handicapped students into the mainstream to the greatest extent possible, giving advocates for the rights of these students the means to secure the federal and state funds needed to achieve this goal (Wexler & Levine, 1981). According to Fraser (1995), redistributing resources not only promotes integration but also serves to erase distinctions based on socioeconomic status.

The six principles of PL 94-142 are "zero reject," specifically that every child has the right to a free and appropriate public education; the right to a nondiscriminatory evaluation that

ensures appropriate placement and services; the right to an individually determined appropriate education; placement in the least restrictive appropriate environment; procedural due process, specifically the right to challenge the decisions of the local education agency; and parent participation in decision-making. These principles elevate the ideal of inclusion to a right, and bring education policy into line with the pluralistic underpinnings of American society (Turnbull & Fielder, 1985).

The concept of distributive justice (Rawls, 1971), which guides the allocation of the benefits and burdens of economic activity in society, particularly through the redistribution of wealth, is central to PL 94-142, because it provides a philosophical rationale for reallocating society's resources to promote access to educational opportunities for a population that has historically experienced discrimination and exclusion. Because the cost of educating handicapped students is approximately double that of educating non-handicapped students, implementing PL 94-142 has required shifting resources from general to special education (Wexler & Levine, 1981). Reallocating resources to fund the education of handicapped students has been supported by the equitable considerations of the principle of distributive justice as well as by the practical argument that depriving handicapped students of educational opportunities keeps them dependent and ultimately more costly for society to maintain (Turnbull & Fielder, 1985).

Theories of Social Change

Pluralistic and Power Elite Theories

The pluralistic theory of social change has spawned effective strategies to redistribute resources, and has been an underpinning of the disabilities rights movement. It supports the idea that political power should be shared by the government and the various interest groups in

society, all of which have a claim to a share of society's resources (George & Wilding, 1976). Pluralistic ideology prescribes collective action, and average citizens are encouraged to have meaningful participation in decision-making. Pluralists attempt to shape policy through lobbying efforts, professional unions, and advocacy groups (George & Wilding, 1976; Morrow, 1990; Scotch, 2001).

From the pluralist perspective, government is an independent institution that negotiates disputes among different groups. The power of advocacy groups lies in their ability to pressure the government to bring about change for the sake of the collective good (Handler, 1986). The disabilities rights movement developed as parent advocacy groups lobbied and obtained legislation mandating the right of handicapped children to a free and appropriate public education.

The New York City Department of Education (NYCDOE) has frequently been the target of advocacy groups concerned with social policies that promote the needs of New York City special education children. Impact litigation, pursued through consent decrees and class action suits, are two of the successful power-coercive strategies these groups have used to pressure the NYCDOE to comply with federal and state laws regarding the education of the handicapped.

Power elite theory challenges the pluralistic notion of the distribution of power. It posits two groups in society; the first controls and has power over the second. The power elite includes members of the upper class who have leadership roles in the policy network (Dumhoff, 1983). They occupy key positions in government, business, and the military and dominate the American political system (Mills, 1956). Members of the power elite tend to oppose social policies based on the theory of distributive justice. Ironically, they have increasingly co-opted the pluralistic,

distributive-justice principles of IDEA, using their due-process rights to seek public funding for private-school tuition.

Moral Dichotomies and Contradictions

The fastest-growing and costliest area of litigation involves parents who pursue private-school tuition reimbursement (Zirkel, 1998). As a group, these parents tend to reject public school education and challenge the school system, utilizing power-coercive strategies to obtain public funding for a private school placement. The parents who seek this relief tend to have high socioeconomic status and are more aligned with the power elite (Budoff & Orenstein, 1982; Ong-Dean, 2009). The consequence has been to siphon off large sums of public money to support private education for a select group of privileged students, perpetuating the schism between the haves and have-nots in society. Turnbull and Turnbull (1997) posited that because parents with higher socioeconomic status tend to be more achievement oriented, they may find it more difficult to cope with their child's disability than lower-socioeconomic-status parents and consequently may feel more entitled to procure private services.

The issues of fairness and accountability are inextricably intertwined with political issues as the courts continue to reconcile the positions of the various stakeholders (Turnbull, Wilcox, Stowe, & Umbarger, 2001). These two concepts of fairness and accountability are central to the principles of IDEA, but they are interpreted differently based on the circumstances of the stakeholders. For example, it is notable that the legal standard for educational services is that they are free, appropriate, and public. The United States Supreme Court has ruled that educational services do not have to optimize or maximize a student's potential, but only have to confer educational benefit (*Hendrick Hudson School District v. Rowley*, 1982). This standard of service contributes to tensions between social policies and the expectations of clients. This

tension is highlighted when there are legal and educational requirements operating together within a rational bureaucratic, legal, and professional model.

The Roles of the Actors in the Fair Hearing Process

The Individuals with Disabilities Education Act of 1990 (IDEA) specifies that parents are equal partners with the school district in matters of educational decision-making. The expectation is that they will participate in the development of the educational plan; ensure that the plan is being implemented; request further meetings as necessary; and challenge the school district's recommendations concerning goals, placement, and services. Parents' active participation in the special education decision-making process ensures that the child's right to a public education is secure.

To that end, the school district, as the local education agency, has an obligation to work collaboratively with parents. The school district has a legal responsibility to encourage parent involvement in all stages of the referral, evaluation, and placement processes for students suspected or already identified as special needs children. In particular, school social workers, as part of their formal responsibilities, provide and explain due process rights to parents, obtain parental consent for evaluation, and provide consultative and support services to students, parents, and school personnel (*NYCDOE Standard Operating Procedures Manual [SOPM]*, 2008).

When parents challenge the school district, social workers and other clinicians are often called upon to defend the position of the local education agency at impartial hearings. Many issues arise when those serving as clinician-litigators attempt to reconcile their roles as clinicians and advocates. For example, are they to adhere to the ethical traditions of the legal profession or those of social work, psychology, and education when they enter into an adversarial relationship

with a parent? How does their assumption of an advocacy role on behalf of the local education agency affect their mission of promoting the educational rights of children? Do their clinical values differ depending on the parent's socioeconomic status and whether the parent is represented by an attorney? How is their advocacy style, including their choice of legal strategies and tactics, affected by their professional ethics?

Role Conflict

Fielder (2000) reports that many special education professionals are resistant to assume an advocacy role because of their lack of knowledge and skills and feelings of intimidation by the legal aspects of advocacy. Moreover, advocacy is perceived as non-essential and not their primary responsibility (Fiedler, 2000). This perceived role conflict is defined in the literature as "intersender conflict," which occurs when there are different expectations imposed on an individual while executing a specific function (Kast & Rosensweig, 1979, p. 277).

Role conflict characterizes the tension felt by individuals who have difficulty executing their roles (Davis, 1996), as some clinicians may feel when they represent the NYCDOE at impartial hearings. The Hehir Report (2005) stated clinicians felt inadequate because they did not possess the legal background, knowledge, or skills to prepare for a case. These feelings of unclear expectations contribute to role ambiguity (Davis, 1996). Stein (2004) states there is inherent role conflict when social workers and attorneys drift beyond the boundaries of their own professional competence.

The number of impartial hearings requests is approximately 5,000 annually (Hehir, 2005). This necessitates recruiting clinicians to augment attorneys in representing the NYCDOE at impartial hearings. This assignment requires transitioning from a familiar clinical role to an

unfamiliar advocacy role, resulting in role discontinuity (Davis, 1996). This may lead to stress, performance anxiety, or failure in the new role (Mendenhall, 2007).

A logical way to avoid this tension would be to regulate the actors' behavior by creating a common set of norms to guide their actions (Pfeffer & Salancik, 2003). If one applies this construct to the impartial hearing process, which is a quasi-judicial proceeding, the expectation would be that clinicians become socialized to the norms of the legal profession and abide by its rules and procedures. To this end, the NYCDOE hired attorneys and assigned them to the regions to guide the practice of non-attorneys serving as district representatives at impartial hearings. The extent to which clinicians have been socialized to perform legal work has not yet been studied.

Some theorists have characterized social workers as being affected by two myths, the expert myth and the myth of the powerless, which can disempower them when they are dealing with legal issues (Madden, 2003). According to these myths, the legal world is a closed system in which the only people who can function effectively are those who have been through the rigors of a proper legal education; all others are seen as ill equipped to succeed there. In contrast, Sosin (1979) argued that social workers can acquire legal knowledge and skills that they may apply when assuming advocacy roles.

Conflict Resolution Models

Conflict resolution can be achieved through positive or negative means, which Deutsch (1973) has characterized respectively as cooperative and competitive approaches. He noted that the existence of conflict does not necessarily imply incompatibility of goals, but that the approach to conflict resolution chosen by the two parties influences the likelihood of successful resolution. Deutsch (1973) argued that whereas competition entails a polarization of goals and

the establishment of a win-lose dynamic in which goal attainment by one party decreases the probability of goal attainment by the other party, cooperation can lead to a win-win solution in which the needs of both parties can be met.

The cooperative and competitive approaches to conflict resolution can be described along four dimensions: communication, perception, attitudes toward one another, and task orientation (Deutsch, 1973). In the cooperative approach, communication is open and honest, with a genuine interest in sharing information, whereas in the competitive approach, communication is either minimal or misleading and marked by an unwillingness to share information. In the cooperative approach, the two sides tend to perceive their similarities and shared interests, whereas in the competitive approach, they tend to perceive their differences as threats to each other. In the cooperative approach, the two sides tend to have a trusting and friendly attitude and a willingness to respond helpfully to each other; in the competitive approach, the attitude is suspicious, hostile, and negative. Deutsch (1973) argues that in the cooperative approach, the task orientation is to view the conflicting interests as “a mutual problem to be solved by collaborative effort [with a] recognition of the legitimacy of each other’s interests and of the necessity for searching for a solution that is responsive to the needs of all” (p. 30). In contrast, the competitive approach leads to an escalation of conflict such that all interactions, even those beyond the original area of conflict, become infused with conflict. Deutsch suggests that “the experience of cooperation will induce a benign spiral of increasing cooperation, while competition will induce a vicious spiral of intensifying competition” (Deutsch, 1973, p. 31).

In the competitive approach to conflict resolution, the parties come to believe that the issues can be settled either through a power struggle or by the intervention of a third party who possesses power greater than either of them (Blake and Mouton, 1972). They argue that in a

win-lose approach, the prospect of finding a mutually acceptable solution decreases because of the polarization of ideology and the lack of willingness to appeal to one another on the basis of reason.

Partisan Advocacy vis-à-vis Ethical Advocacy

Clinician-litigators traditionally practice according to the principles of ethical advocacy in conflict situations. However, when they assume the legal mantle, they must practice in a setting governed by the principles of traditional adversarial advocacy, which causes them to experience the contradictions between these two approaches. The following is an overview of the key aspects of the legal approach to cases, adversarial partisan advocacy, and ethical advocacy. Ethical advocacy is more consistent with the clinical approach to resolving cases. This section highlights their differences.

Adversarial Advocacy or Legal Models

The adversarial model is characterized by “partisan advocacy” (Saltzman & Proch, 1990, p. 29). In this model, opposing parties create case theories, advance their interpretation of the law at the hearing, and identify the evidence they will present. The assumption is that the material presented by the opposing sides will fully develop the relevant facts, accurately present the law, and permit the decision maker to reach an impartial and rational conclusion (Saltzman & Proch, 1990). The adversarial model is consistent with power-coercive approaches to social change, which promote conflict because they are based on a win-lose model in which the interests of only one side prevail (Bennis, 1969).

The right to resolve disputes through impartial hearings resulted from the prevailing view in Congress at the time PL 94-142 was written that an adversarial process would be the most effective mechanism for resolve disputes (Goldberg & Kuriloff, 1991). However, the adversarial

model has proven problematic in a number of ways. First, the legal system is oriented towards learning and weighing facts as opposed to determining truths based on morality and other intangibles (Rosenbaum, 2004). In addition, it prevents the parties to the dispute from speaking directly with one another (Gardner, 1998). It sows mistrust, inhibits the discretion of professionals, and heightens the adversarial nature of the relationship between the school and family (Neal & Kirp, 1983; Rosenbaum, 2001), is narrowly legalistic (Neal & Kirp, 1983), and ultimately works against the best interest of the child (Oberti, 1992).

A central component of the adversarial approach is that it undermines the ability of the parties to the dispute to maintain a relationship with each other. Neal and Kirp (1983) note that legalization of disputes increases mistrust between the parties, and Rosenbaum (2001) suggests that involving lawyers increases parental hostility toward school administrators, undermines professional authority, and causes the local education agency to incur unnecessary expense. In *Clyde K.* (1994), the court concluded that "litigation tends to poison relationships, destroying channels for constructive dialogue that may have existed before the litigation began" (p. 5) and suggests that this undermines the requirement that parents and professionals continue to work cooperatively over the course of the student's educational career. The court, in *Oberti* (1992), opined that such an outcome could only be harmful to the child.

A legalistic method of dispute resolution leads to a narrow approach and overlooks the substance of the case in deference to legal technicalities (Neal & Kirp, 1983). Legalistic approaches to dispute resolution may be inconsistent with the spirit of the law:

> Studies of the implementation history speak less of the promise of legalization and more of its pathology: compliance with the letter rather than the spirit of the law; preparation of standard form IEPs…and defensive strategies, such as the tape recording of IEP meetings, to protect the interests of the school district and teachers (Neal & Kirp, 1983, p. 33).

Adversarial approaches to conflict resolution are geared to choosing sides instead of crafting mutually agreeable solutions. Rosenbaum (2004) summarizes the problems with these approaches:

> In every legal action there is going to be a winner and a loser. That's how the combative, adversarial system is set up to work….Two parties present their cases, trying to sway, if not manipulate, the story in their direction, even as their versions may stray from the actual truth. Courts are designed to facilitate the resolution of these conflicts, to essentially pick the winners…victory is not synonymous with justice…Sometimes the outcome of a legal conflict is determined for reasons wholly apart from the truth or from what the morally correct result should have been….Winning, after all, is a contest of skill and luck, story-spinning and manipulation, and not a referendum on truth (p. 20).

Ethical Advocacy Models

An alternative approach to the adversarial power-coercive model is the cooperative normative-reductive approach to change, characterized by mutual collaboration to achieve the final goal. This approach does not involve power domination, but involves teamwork and mutual effort (Bennis, 1969).

The practice of social workers is informed by the principles of collaboration and client involvement, both of which are foundations of social justice (NASW, 1996). This approach to addressing and working through problems requires a climate of openness, trust, and candor. The work of school psychologists is also guided by the principles of fairness and collaboration (NASP, 2010), as is the work of educators. The collaborative approach empowers parents to be partners in the process of educational decision-making. The Individuals with Disabilities Education Improvement Act (IDEIA) of 2004 also encourages cooperation between parents and school districts, and it requires that the two sides attempt to reach a mutually agreeable resolution to disputes prior to proceeding to an impartial hearing.

Several researchers have argued that although a right to due process must be retained, the focus should be on finding alternative dispute resolution mechanisms that would obviate the need for formal hearings (Goldberg & Kuriloff, 1991). Their positions reflect the view that impartial hearings may not be the best mechanism for resolving educational disputes, because they intensify antagonisms between the two parties (Fielder, 2000). In addition, the win-lose model fails to take into account the moral and human dimensions of the facts under consideration (Rosenbaum, 2004). These scholars argue that a clinically informed approach to dispute resolution would extend beyond a discussion of the facts of the case and legal technicalities to a consideration of the needs of the whole child.

A common thread running through these arguments is that a professional model of dispute resolution would be superior to a legal model because it takes into account the complexity of the client. In addition, clinical judgment would be better suited to this process because it is intuitive in nature in contrast to the cut-and-dried nature of legal decision-making (Mashaw, 1981). Gardner (1998) notes that clinicians "work on the principle that all pertinent information must be brought to their attention if they are to make the most judicious decisions regarding treatment" (p. 392). Similarly, Fielder (2000) asserts that the procedural trappings of impartial hearings and an emphasis on winning prevent a comprehensive discussion of educational approaches that might be appropriate for the child. The professional treatment model is better suited to resolving educational disputes, because it seeks to ensure that the client's needs and best interests are served. In contrast, legal model maintains a narrow focus on making clear-cut decisions based on weighing the facts of the case (Mashaw, 1981).

Handler's (1986) position captures the points of view discussed above. He considers the adversarial due-process system a failure, because it increases conflict and drives the parties

further apart. He argues for replacing it with a system that repairs relationships and fosters cooperation and “sharpens rather than mutes adversarial relationships; truncates and polarizes rather than heals, and creates winners and losers rather than partners” (p. 8). Handler (1986) notes that the adversarial system “tends to cut off what is needed most, namely, ongoing communication” (p. 44), and argues for its replacement with a system that allows for shared decision-making and cooperation between the parties to a dispute.

Several scholars suggest a possible alternative to adversarial hearings might be a mediation process that focuses less on legal technicalities and more on the opinions of the professionals who work for the local education agency. Neal and Kirp (1983) argue that students would be better served by a method of dispute resolution that includes thorough consideration of the opinions of the professionals who work with the child. Presumably, they understand the possibilities inherent in the public service-delivery system better than the parent’s attorneys or their outside “experts.” Such a system would promote the development of ongoing non-adversarial relations between parents and the local education agency, with the result that parents would be more actively engaged with the school district in planning their child’s education program (Massey & Rosenbaum, 2005). Stark (1996) proposes that, a mediation clinic would foster self-help and empowerment.

In 1997, the federal government addressed this issue, although ineffectively. In an effort to stem the tide of litigation, Congress mandated that parents must have an opportunity to resolve their dispute through mediation (*IDEA Amendment*, 1997). In 2004, Congress mandated a resolution process prior to proceeding to hearing (*IDEA Amendment*, 2004). However, although both mediation and resolution must be available as options to parents, they both can be waived in

favor of going straight to hearing, which is the route most parents choose. In practice, mediation and resolution only occur in a small minority of cases, and almost never in Carter cases.

Strategies and Tactics

The majority of the cases that the clinician-litigators in this study were called upon to argue were Carter cases, which are deeply adversarial, and where attorneys almost uniformly represented parents. Formal arguments in impartial hearings eliminate the possibility for collaboration, resolution, or deviation from a strict adherence to the principles of partisan advocacy (Saltzman & Proch, 1990). They involved developing a case theory, presenting evidence, and arguing the case before a disinterested third party, the hearing officer, who would pass judgment on the merits of the case. In this model, the interests of the opposing parties are mutually exclusive. This left no ground for compromise or collaboration, which were central to the clinicians' professional roles prior to becoming clinician-litigators.

In contrast, the fundamental principle of the adversarial system is that the two parties to the dispute present their own version of the truth to the fact finder, such as a judge or hearing officer. By weighing the testimony of both sides, the hearing officer arrives at an accurate and objective truth. Central to this notion is the assumption that each of the partisan presentations will be skewed in an attempt to gain advantage in the competition (Murray, 1995).

In adversarial advocacy, lawyers learn to use a variety of campaign tactics (Brager & Specht, 1973) to shape their presentation of the facts and to discredit the presentation of the opposition. These include manipulation and persuasion and often involve telling lies of omission, slanting the presentation, and playing to the emotions of the target audience. Gardner (1998) notes that these tactics entail selecting the facts that will make the most appealing argument and withholding truths that will undermine the argument. Similarly, Rosenbaum (2004) believes that

obfuscation, presenting misleading evidence, distortion, and similar tactics produce a narrow story. These tactics contrast with the typical approach social workers and other clinicians use, which is to present all pertinent information for consideration (Gardner, 1998).

Some legal scholars assert it is impossible to obtain fair testimony from a witness when lawyers are motivated to slant the presentation of the facts (Wellman, 1997). Beyond the inherent bias in the ways that questions are posed to witnesses, they also shape and restrict how witnesses can respond. Further, invoking the rules of evidence excludes vast swaths of data about a child. This withholds information pertinent to understanding the child's educational needs and makes it difficult for the hearing officer to evaluate the local education agency's proposed placements and services.

Hearing Officer Bias

A just decision that serves the best interests of the child is contingent on a fair evaluation of the facts that come out at hearing. For this to occur, the hearing officer must be open-minded and free of prejudice. However, some question whether it is possible to have a nonbiased fact finder (Hadyock & Sonsteng, 1994). Some degree of bias in the fact finder is to be expected, given that every person's apprehension and interpretation of information is colored by his or her own history and life experience. Haydock and Sonsteng (1994) noted that fact finders sometimes have a tendency to listen to evidence selectively. Some (Budoff & Orensteirn, 1982) even assert that hearing officers may have a tendency to favor private over public schools.

Summary

The literature reveals many conflicts between the ethical traditions and approaches of the legal and human services professions, particularly in the area of dispute resolution and methods to consider the facts of a situation to arrive at the truth. Deep, and potentially irreconcilable,

conflicts exist between the combative, adversarial approaches utilized by lawyers and the more cooperative approaches favored by social workers, psychologists, and educators. These diametrically opposed systems of dispute resolution also differ because the former promotes antagonism between the parties, whereas the latter is geared toward building a long-term working relationship. Given that collaboration between parents and the local education agency is prescribed by IDEA, the appropriateness of the adversarial model has been called into question. The conflicts experienced by the clinician-litigators working in the legal arena involve straddling these two models and professional traditions are a central focus of the current study. Chapter 4 will examine the extant empirical literature in this area.

CHAPTER IV: REVIEW OF THE EMPIRICAL LITERATURE

Overview

The empirical literature in the field of impartial hearings is notable for its narrow focus on quantitative variables. It centers on statistical trends in the growth of impartial hearings, the demographic characteristics of parents who request hearings, and quantification of reasons for requesting hearings. Few studies have explored the experiences of parents and school system representatives or the qualifications and objectivity of hearing officers. There is also very little research investigating how the professional backgrounds and attitudes of hearing officers guide their decisions. Further, there has been practically no investigation of the social and political attitudes that affect parents' decisions to use the impartial hearing process to resolve disputes with the local education agency or to win tuition to private school. I present the few studies about impartial hearings below.

The primary focus of this dissertation, the experience of clinician-litigators, was never studied in depth in previous research. Very few studies have addressed this area even superficially. Although certain aspects of the experiences of school system administrators and representatives at hearings have been touched on as components of broader surveys, no in-depth phenomenological studies were previously conducted. Because there is minimal extant research to build on, analyses of studies in related areas provide the historical context for the current exploratory study.

Statistical Studies of Trends in Impartial Hearings

There has been a dearth of empirical research in education law, and most the extant research examined relatively superficial variables, such as frequencies of types of cases and percentages of outcomes in favor of the parents or the local education agency (Zirkel, 1986).

Although there has been more research in this area in the ensuing years, the majority of studies have continued to focus on the aspects noted by Zirkel (1986).

From the 1970s through the 1990s, there was a tenfold increase in the number of hearings (Newcomer & Zirkel, 1999). The authors note that the major reason for this increase was the desire of parents for a more restrictive placement. In a related study, Mayes and Zirkel (2001) found that the frequency of tuition-reimbursement cases, in which the parents explicitly sought funding for private-school placements, had increased radically from the late 1970s through the late 1990s, at both the hearing officer and judicial levels.

Trends in the hearing process found a widespread movement toward more formal hearings in which attorneys or advocates represented the parties. This reflected a trend away from informal negotiation and toward courtroom-like proceedings in which facts were presented by both sides to a third-party fact finder who would rule on the merits of the case (Zirkel, 2007). A recent study of special education directors of all 50 states and the District of Columbia surveyed key features of impartial hearings, including the volume of cases and the structure of the hearings. The findings indicated a disproportionate amount of growth in impartial hearings was accounted for by legal activity in a handful of highly litigious states, including New York. Whereas in much of the country, disputes were resolved in relatively informal, non-legalistic ways, in the litigious states, hearings were highly formal, and attorneys played a major role (Zirkel & Scala, 2010).

School psychologists involved in impartial hearings have reported that the most common issues at hearings were assessment and appropriateness of placement (Havey, 1999). When parents contested the placement recommended by the local education agency, the majority sought non-inclusive settings that were more restrictive than those that the school district

recommended. The subjects reported that, in the majority of the hearings (70%), attorneys represented both parents and the local education agency.

Several studies have examined socioeconomic status as a factor influencing whether parents use the impartial hearing process to resolve disputes with the local education agency. Sullivan (1980) and Lynch and Stein (1987) found that minority parents used the impartial hearing process significantly less than parents with high socioeconomic status. Romero (1989) studied Puerto Rican parents in an attempt to ascertain why they exercised their due-process rights less than their White middle-class counterparts. She found that her sample of Puerto Rican parents were less inclined to request hearings because they perceived themselves as politically powerless and ill-equipped to challenge the decisions of the school district. This feeling was especially prevalent among non-English-speaking parents. In a related area, welfare recipients were found to be reticent to appeal benefits decisions, using the fair hearing process at a very minimal rate, from a low of 0.29% of welfare recipients in Texas to a high of 6.8% of welfare recipients in New York (Lens & Vorsaner, 2005).

In a comparative study of the use of impartial hearings by parents across the socioeconomic spectrum, Budoff and Orenstein (1982) found that upper middle class parents of children classified as learning disabled used hearings disproportionately, and that upper class parents used hearings at a significantly greater rate than parents with lower socioeconomic status to seek tuition reimbursement for private school placements. In a related study, Kalyanpur and colleagues (2000) found that wealthier parents used hearings more than middle-class and poor parents to seek tuition-reimbursement.

In a study of why parents pursued tuition reimbursement for private-school placements, Budoff and Orenstein (1982) found that they did not believe that any public school could meet

their child's needs. Choutka (2004) found that wealthier parents who initiated impartial hearings had a hard time accepting the standard of "appropriate," as specified in Rowley (1982), as the maximum requirement for a placement provided by the local education agency. They believed that an adequate education, as defined by the school district, was not sufficient for their child, and they chose instead to seek funding for a private-school education that they believed would be optimal.

The ability to purchase strong legal representation is a factor related to socioeconomic status that has been addressed in the research. Rhen (1988) found that having legal representation was correlated with the outcome of cases. Although Rhen does not speculate directly on how this knowledge might affect parents' choices when they pursue hearings, it appears that their documentation of the effectiveness of hardball tactics identified a factor that has contributed to the increased legalization of hearings. Kuriloff (1985) performed a content analysis of the written transcripts of impartial hearing cases and found a significant correlation between strategic factors, the number of exhibits presented, the number of witnesses examined, and the quality of their preparation, and the positive outcome of the parent's case.

Experience of the Participants in Impartial Hearings

In a study of due process hearings in Massachusetts over a four-year period, Budoff and Orenstein (1982) analyzed the perceptions of parents, school administrators, and hearing officers. They found that in the majority of hearings, the school district was represented by the director of special education. Social workers or guidance counselors attended 29% of the hearings, although their role was unspecified. Parents and school officials agreed that attending hearings exacted a high cost, both financially and emotionally, and there was a consensus among the subjects that procedural issues took precedence over substantive matters.

The same study (Budoff & Orenstein, 1982) examined the experiences and perceptions of the school representatives and other clinicians who participated in the hearings. A majority of the school representatives reported feeling unprepared for their legal role and unsure of themselves when testifying under cross-examination. The staff felt disempowered by the hearing process, because their decisions were scrutinized and their professional judgment was questioned. The school staff felt unfairly criticized by the allegations that they had failed to develop an appropriate educational plan. School representatives at the impartial hearings reported feeling that the impartial hearing process damaged their relationships with parents (Budoff & Orenstein, 1982).

A survey of school psychologists involved in impartial hearings included an exploratory, qualitative component to solicit comments from the subjects about their experiences in hearings. Many of the subjects reported that hearings were emotionally and financially draining. The majority of the clinicians indicated that they felt ill-prepared for the rigors of doing battle in the legal arena, and many of them expressed a need for specialized training prior to participating in hearings (Havey, 1999).

Similarly, another qualitative study (Lake & Billingsley, 2000) consisted of interviews with school staff involved in hearings about contributing factors to conflict between parents and school districts. The majority of the school staff reported feeling frustrated and devalued by the experience. Many expressed the belief that the structure of hearings interfered with their ability to communicate effectively with parents and to discuss their clinical findings in a way that would promote understanding and acceptance. As a group, they reported feeling overpowered by the adversarial and coercive strategies brought to bear by the attorneys.

Other researchers (Goldberg & Kuriloff, 1991) have sought to understand the subjective experience of non-legal personnel participating in impartial hearings. In one study (Havey, 1999), the researcher surveyed school psychologists who participated in impartial hearings to gain an understanding of their subjective experience of participating in the legal arena. He found that the only variable associated with the subjects' having any positive feelings about the hearings was the hearing outcome, specifically whether they won the case. Other than the pleasure they experienced when they prevailed at hearings, the consensus among the respondents was that their participation was a stressful, time-consuming, and anxiety-provoking experience. Several described it as being among the worst experiences of their professional lives.

Educators who participated in impartial hearings found the process of testifying very stressful, because they feared saying something wrong would cause the school district to lose the case (Miller & Connolly, 2003). The subjects' perceptions of the hearing process led the researchers to conclude that impartial hearings should be avoided whenever possible, because they are adversarial and interfere with the ongoing relationships between the school staff and the student's parents.

Interviews with parents and school officials who had participated in the hearings found that their perception of whether the hearing had been fair was a direct function of whether they had prevailed at the hearing (Goldberg & Kuriloff, 1991). In other words, the subjects did not apply an objective standard of fairness in their evaluation of the hearings, but judged them by the subject standard of whether they had been granted the remedy they were seeking. Besides whatever positive feelings they may have experienced when they won the hearing, the majority of the subjects—both parents and school officials—found the hearings to be emotionally draining, if not outright traumatic. They described the hearings as a waste of money,

aggravating, grueling, stressful, and expensive. The researchers concluded that hearings were an unsatisfactory dispute-resolution mechanism. They suggested that schools find a way of working more closely with parents and that they utilize alternative dispute-resolution mechanisms such as negotiation and mediation. They argued that this would foster a greater sense of fairness and reduce the experience of contentiousness and emotional fatigue (Goldberg & Kuriloff, 1991).

In a comprehensive nationwide study of school district staff who had participated in hearings of tuition-reimbursement cases, the school district staff were concerned that current tuition-reimbursement remedies unjustifiably favored parents and created unnecessary financial strain for school districts (Mayes & Zirkel, 2001).

Hearing Officer Variables

Over the past several years, there has been a widespread drift toward more formal hearings (Zirkel, 2007). An aspect of this movement was an increased emphasis on hiring hearing officers with a greater knowledge of special education law and less knowledge of special education practice. In their nationwide survey of special education directors, Zirkel and Scale (2010) found that in 45 states, including New York, the majority of hearing officers had a legal background; in only five states, hearing officers had a significant background in special education. Schultz and McKinney (2000) studied the characteristics of hearing officers and found that those with a background in education rather than law were able to draw on their professional knowledge, experience, values, and opinions when deciding cases.

There has been minimal research investigating the impartiality of impartial hearing officers. Maher and Zirkel (2007) conducted one of the first such studies; it raised questions as

to what would be the most appropriate training for hearing officers to enable them to make fair decisions.

A content analysis of the written transcripts of the first four years of impartial hearings in Pennsylvania raised questions about the fairness of hearing officers (Kuriloff, 1985). The investigator looked at several factors related to the outcomes of hearings, including the relationships among several child characteristics, elements of parental behavior, and selected hearing officer variables. He expressed particular concern about the fairness of the hearing officer:

> What it took to win was somewhat different for the two parties…Hearing officers were holding [the school districts] to the letter of the new law…[and] appear to pay close attention to what the parents demanded…The results of these different attitudes toward parent and schools seem to reflect a certain tension within the law itself. A tension that at once invites parents to attack the school's position while simultaneously implying that schools, represented by professionals, should avoid an adversary stance in favor of serving the best interest of the child (p. 110).

Societal Issues Pertaining to Impartial Hearings

A related research area that pertains to the clinician-litigators' experience of impartial hearings is attitudes among the public concerning public vs. private education. In one qualitative study (Gianegin & Bonaker, 2003), the researchers interviewed thirteen leading conservatives with social-policy influence to elicit their perceptions of and attitudes about key issues in education, including the role of education in a democratic society, mechanisms for financing education, the role of the family in education and educational decision-making, the interviewees' major concerns about education, and their proposed solutions to the problems they saw in the educational system. They analyzed the responses through the application of open, serial, and selective coding, and identified themes using a grounded-theory approach. They identified several main themes, including the desire for a decreased federal role in education, promotion of

greater parental involvement in educational decision-making, and granting parents increased choice, especially through charter and private schools paid for through a voucher system. The subjects advocated a “free-market system” that would break the public school “monopoly;” they were vehemently anti-union (Gianesin & Bonaker, 2003).

These societal attitudes are clearly factors in the growth of impartial hearings as mechanisms for seeking tuition reimbursement for private schools, particularly by members of the power elite. Although these social factors are not a direct focus of the current study, they contextualize the clinician-litigators’ experience of impartial hearings. Findings such as Gianesin and Bonaker’s (2003) make clear that impartial hearings are not merely about resolving the grievances of individual stakeholders, but are also battlegrounds where greater issues of public policy and social justice are fought.

Summary

The limited research on impartial hearings has produced a number of findings concerning historical trends in the number and kind of hearings held. It also explores the experiences of participants in the hearings, views of the impartiality of impartial hearing officers, and social attitudes and public policies that inform the impartial hearing process. Because much of the research employed surveys, as opposed to in-depth interviews, it has yielded a great deal of suggestive, but superficial, data. Although these findings provide tantalizing hints of deeper issues underlying the expressed attitudes and described experiences, those conducted so far have not yet mined these areas.

The dearth of research into the subjective experience of clinician-litigators highlights the need for a phenomenological study of their sense of themselves in this new role. What the current research touches on, but does not explore systematically, is the interaction between the

experience of school system participants in impartial hearings, policy questions concerning the fairness of impartial hearings, questions about the place of public education in a democratic society, and broader social policy issues such as distributive justice.

CHAPTER V: RESEARCH DESIGN AND METHODOLOGY

The purpose of the study was to develop a deeper understanding of how clinicians serving in the role of litigators functioned as representatives of the local education agency at impartial hearings. I examined their experience from a number of perspectives, including those expressed in the following representative questions: How well did clinician-litigators adapt to the legal role after having performed the traditional job roles of social worker, psychologist, or educator? How did they integrate legal methods into their repertoire of professional skills, and how effective were they in this new role? What sorts of role conflicts did they experience? What observations did they make about the impartial hearing process and the attorneys who were their adversaries? What conflicts did they experience between the ethical principles of their professions and those of the legal profession, the latter of which suffused the structure and rules of the impartial hearing process? What lessons did they learn from their experience of bridging two different professional and ethical traditions?

The study utilized a qualitative design employing in-depth interviews with clinician-litigators about their experiences executing their roles as representatives of the Board of Education at impartial hearings. Areas of investigation included the knowledge, values, and skills of the clinician-litigators. In addition, I explored if the strategies and tactics they employed were consistent or inconsistent with the traditional legal model of adversarial advocacy. A particular area of focus was their experience of the interplay between the ethical traditions of their professions and those of the legal profession.

This study sought to increase awareness of ethical issues and conflicts experienced by social workers and other helping professionals working for the Board of Education, particularly regarding their practice as advocates at impartial hearings. A major focus of the study was to

examine the effects of the principles of ethical advocacy, defined as the attempt by social workers to ensure that clients' needs and perspectives are adequately represented in ethical deliberations (Dodd & Jansson, 2004) on their work as clinician-litigators. The clinician-litigators were serving two clients, the student who was the subject of the hearing and the Board of Education. Consequently, I examined potential conflicts that might arise between serving these two different clients and how the clinician-litigators resolved them so that they might execute their new role in a manner consistent with the ethical guidelines and traditions of their professions.

The Research Questions

This was an exploratory study; the researcher was not testing any hypotheses. The primary areas explored were how clinician-litigators executed their roles when they represented the NYCDOE at due process hearings. Specific areas examined included the knowledge, values, and skills demonstrated by clinician-litigators, including the kinds of strategies and tactics they used to win cases, and how these compared with those used by attorneys. The experiences and observations reported by the clinician-litigators were examined to compare and contrast the perspectives of traditional adversarial advocacy and ethical advocacy and to identify ways in which the principles of ethical advocacy might replace those of traditional advocacy in a re-imagined mechanism for resolution of educational disputes. The study examined the clinician-litigators' views of how the impartial hearing process impacted the implementation of the Individuals with Disabilities Education Act (IDEA) and the larger principles of public policy that form the basis of education law.

Some of the key questions investigated in the interviews included the following: How did the clinician-litigators view the actions of the litigators (both the clinician-litigators and the

opposing attorneys) as guided by the principles of ethical advocacy? Did the clinician-litigators believe that the needs of the children were adequately represented by the opposing attorneys and themselves? Did they believe that the best interests of children were served by the impartial hearing process? How did the clinician-litigators conceptualize a favorable decision? What, if any, ethical dilemmas did the clinician-litigators experience as they mediated the interests of the various stakeholders, including the child, the parent, and the Board of Education? How did they reconcile any conflicts between serving the organizational goals of their employer and the needs of children, both of which were part of their professional responsibility? Did they experience any fracturing of their traditional relationship with the parents when they became adversaries? If so, how did they manage it?

Rationale for a Qualitative Design

Qualitative research captures the essence of people's experiences. Naturalistic inquiry utilizing qualitative methodology can elucidate the workings of social systems in holistic ways; it allows for the examination of contextual factors, can facilitate the discovery of previously unarticulated experiences, and permit the gathering of data unconstrained by the rigors of hypothesis-testing (Reid, 1994; Taylor & Bogdan, 1988). Naturalistic inquiry allows the researcher to discover the multiple realities of the phenomena under investigation. It does not produce generalizable findings, only thick, descriptive data that may generate mid-range theory (Glaser & Strauss, 1964) or reveal the essence of a phenomenon from the perspective of those who experience it. This study investigated the experiences of clinician-litigators in impartial hearings. It sought to reveal the ethical underpinnings and implications of how the informants enacted their roles.

Naturalistic inquiry allows the discovery of real-world phenomena as they unfold (Patton, 2001). In order to gain a deep understanding of the clinician-litigators' lived experience, this study used qualitative methods to get as close as possible to the phenomena under investigation by allowing the subjects to describe their experiences in their own voices. I used in-depth interviews to garner rich, detail-thick descriptions of how the clinician-litigators experienced their role in impartial hearings. My personal experience as a clinician-litigator sensitized me to the experiences of the subjects and facilitated deep probing of their responses. The naturalistic approach permitted design flexibility. I could adapt the inquiry and expand the questions to follow the narrative the subjects naturally produced to elicit the sensitizing concepts (Blumer, 1969) that would further guide the direction of the inquiry. These concepts were refined through discussion with the dissertation chairperson.

Choice of Phenomenological and Grounded Theory Approaches to Inquiry

The data sought by this investigation were the reflections of clinician-litigators on their legal role. This could be best obtained through a phenomenological approach. A phenomenological study seeks to arrive at an understanding of the essence of experience through eliciting descriptions of the inner experience of the subjects (Merriam, 2009). Van Manen (1990) describes how an examination of people's lived experience is key to grasping the nature and meaning of the phenomena under investigation. According to Patton (2001), this type of research assumes that there is an essence or essences to shared experiences. The experiences of different people are analyzed and compared in order to to identify the essential characteristics or contrasting elements of those experiences. Eliciting inner experiences unexplored in everyday life reveals how people build complex meanings out of simple units of direct experience

(Merriam, 2009). This has the added benefit to the subjects of facilitating reflection on the meaning of their own experience (Patton, 2002).

A phenomenological approach carefully examines human experience (Husserl, 1970). Husserl indicated that this approach provided a means by which a person's experience of a given phenomenon could come to be known accurately, and he believed that it could accomplish this with sufficient depth and rigor to allow identification of the essential qualities of that experience (Giorgi, 2009). According to Merriam (2009), the phenomenological approach is particularly useful when exploring emotionally charged experiences.

According to Husserl, a phenomenological investigation requires that the researcher take care to "bracket," or put aside, all assumptions about the experiences under investigation. This does not entail the researcher's dismissing his familiarity with the subject matter. However, he must guard against contaminating the data obtained from the subjects with his own experience (Giorgi, 2009). This was particularly important in this study, because I also served as a clinician-litigator in fair hearings. Arriving at a clear understanding of the experiences of the subjects is contingent on accepting their descriptions with no preconceived notions as to their meanings. Husserl (1970) believed that this approach to gathering data permitted the researcher to accurately represent the essence of the subject's experience.

Phenomenological research utilizes several approaches designed to safeguard the purity of the data. One such approach is *Epoche,* in which the researcher sets aside all notions of what the data may mean and maintains openness to apprehending the meaning experienced by the informants. Another element is reflective description in which the researcher utilizes his sense of what the subject is saying to help the subject elaborate on and explicate the data's meaning (Moustakas, 1995).

Through the process of phenomenological reduction (Moustakos, 1994), I initially treated the data as having equal value (horizontalized), and then statements that were irrelevant to the topic were deleted, leaving only the “horizons,” which Moustakos (1994) defines as “the textural meanings and invariant constituents of the phenomenon” (p. 97). The horizons were then clustered into themes that captured the elements of the informants’ experiences, and these were organized into what Moustakos (1994) terms a “coherent textural description” (p. 97) of the phenomenon. The essence of the informants’ experiences, which Creswell (2007) termed the “invariant structure,” was derived from the composite of their textural and structural descriptions (Smith et al., 2001).

This study also drew on the tradition of grounded theory. Glaser and Strauss (1967) indicate that theory is “grounded” when it is derived directly from and based on the data themselves. Utilizing the grounded theory approach, the researcher develops theories, concepts, hypotheses, or propositions directly from the data, rather than from a priori assumptions, data obtained from other research, or existing theoretical frameworks (Taylor & Bogdan, 1998). Lofland and Lofland (1995) describe this type of theorizing as “emergent analysis” and points out that the process is creative and intuitive as opposed to mechanical.

Since the grounded theory approach allows the researcher to develop theories only after the data is collected, investigations must be based on the following two principles: questioning rather than measuring, and generating concepts using theoretical coding. In other words, the responses of the subjects must be analyzed and coded in order to identify the salient common elements, which then are examined to understand the meanings of the shared experience (Auerbach & Silverstein, 2003). A potential benefit of using a grounded theory is gaining detailed knowledge about both the context, in this case impartial hearings, and the decision-

making process of the actors (Laws & McLeod, 2004). The use of an inductive orientation to analysis can yield findings that are richly descriptive (Merriam, 1998).

Research Design

Sampling Strategy and Procedure for Informant Selection

The study employed a purposeful sampling method. The pool of potential interviewees was selected through criterion sampling, which included professionals who previously served as clinician-litigators for the NYCDOE, but none of whom were currently employees of the NYCDOE in any way. Further, any potential subjects who were currently working for law firms or agencies filing due process complaints against the DOE were excluded from the study to avoid any potential conflicts of interest or appearance of impropriety. The potential informants were all social workers, psychologists, and educators, some of whom had assumed administrative positions in the NYCDOE before they left the Department.

Potential informants were recruited in the following manner: I identified them through my personal, informal network and from lists of NYCDOE retirees. I sent a letter to potential informants explaining the purpose of the research, what participation in the study involved, and how I would protect confidentiality (see Appendix 1). I asked potential subjects to contact me during non-working hours to discuss their interest in participating in the study and to learn more about it. I responded to the potential subjects' expressions of interest in participating in the study both by email (see Appendix 2) and by telephone (see Appendix 3). I explained the study, screened informants for eligibility, and answered any questions they had. If the person remained interested in participating, we arranged a mutually convenient meeting time to conduct the interview. Utilizing a snowball sampling method, I also asked the potential subjects if they knew other retirees who might be interested in participating in the study. I assured all potential

participants that their participation was strictly voluntary and that they were free to withdraw from the study at any time without penalty.

Characteristics of the Sample

Fifteen informants participated in the study. The sample included three social workers, three psychologists, six educators, two speech and language therapists, and one guidance counselor. All of the subjects had at least one Masters degree and five had doctorates. Each of the informants had worked for the Board of Education for at least twenty-five years, and nine of them were clinical administrators. Representing the Department of Education as clinician-litigators at impartial hearings had been a part of their job responsibilities. Seven of the subjects were male and eight were female. Only former employees of the Board of Education could serve as subjects, which afforded them the freedom to speak candidly about their experiences without fear of reprisal. Further, using former employees who had worked for the Department of Education since the inception of modern special education gave the researcher access to informants with a broad perspective on special education law and its evolution over the past thirty years. The subjects were able to draw on their experience working with students and parents under the various iterations of special education law that have contributed to the field's becoming increasingly legalistic and adversarial.

Procedures for Data Collection

Semi-Structured, In-Depth Interviews

Semi-structured, in-depth interviews are well suited to exploratory phenomenological research because they allow the informants to describe their experience conversationally in their own words. This approach allows the subjects to express their thoughts, feelings, and reflections freely, revealing the essence of their experience unconstrained by an externally imposed

structure. The researcher identifies themes through an inductive process after the interviews are completed (Patton, 2002).

In the current study, the interview process began with an explanation of the purpose of the study. The interview proper began with "grand tour" questions (Goodman, 2001) that allowed the subjects to speak in an open-ended manner about themselves, their careers with the Board of Education, and their experiences with impartial hearings. This was ideal for a phenomenological approach because it allowed the informants flexibility to discuss their experiences free of any predetermined expectations (Moustakos, 1995). Asking the subjects about specific situations and events helped the researcher get as close as possible to their lived experience (Van Manen, 1990). After establishing rapport and gathering some preliminary data in this manner, the researcher followed the interview guide to insure that all subjects had an opportunity to discuss areas of experience common to them all. The subjects spoke openly and fully about their thoughts and feelings, which gave the researcher a rich sense of their experience.

The interview guide consisted of 25 questions designed to elicit responses concerning the knowledge, experience, and affective experience of the subjects (see Appendix 4). I asked the questions in a manner that allowed for conversational responses. Consequently, informants did not answer questions in the same order. However, I made certain that each subject touched upon each of the topics. I presented the questions in an open-ended manner, and the subjects were encouraged to elaborate freely on them. This allowed them to introduce thematic material that may have been unanticipated by the researcher. Further, it allowed the subjects to express their feelings about material that was frequently emotionally loaded (Goodman, 2001). The interviews yielded a range of responses, some of which necessitated revisiting the literature.

In order to broaden and deepen the focus of the inquiry, as I conducted the interviews, I noted topics and concerns raised by the subjects that I had not included in the original interview guide. I developed a method of keeping marginal notes and memo-writing (Strauss, 1987; Charmaz, 2006) documenting my reflections, insights, and preliminary identifications of new themes raised by the respondents. The information contained in the memos was augmented based on the deeper understanding of the themes I gained through discussions with the dissertation chair. As new concepts emerged, I incorporated them into the subsequent interviews.

The data analysis was concurrent with the data collection process. I continually refined the questions in light of the subjects' responses and re-interviewed some of the subjects to inquire about the newly emerging themes. This broadened and deepened the focus of the inquiry beyond the topics contained in the original interview guide. As such, it allowed the subjects to guide the research and increased the probability of eliciting responses in areas that they considered significant. This also necessitated immersing myself again in the empirical and theoretical literature and extracting further sensitizing concepts.

Although the overarching principle was to allow the subjects to give open-ended responses, I used my own comprehensive knowledge of impartial hearings to probe the subjects' responses and encourage them to explore the topics in greater depth. However, in order to avoid eliciting responses shaped by my own experience, I was careful to use minimal, neutral prompts, and requests for elaboration. I was alert to the ways my subjective experience influenced my understanding of the subjects' responses consistent with Auerbach and Silverstein's (2009) principle of reflexivity. I maintained a reflective journal where I recorded experiences, personal assumptions, and views, as prescribed by Grbich (2009). The intent was to insure transparency

of process and to bring the reader as close as possible to the essence of the subjects' reported experience (Grbich, 2009). I audiotaped the interviews and professional transcribers transcribed them to facilitate analysis of the data.

Analysis of the Data

Unit of Analysis

The unit of analysis was the clinician-litigator who represented the New York City Board of Education at impartial hearings. The focus of the analysis was the self-reported experiences of the clinician-litigators, especially the issues and concerns they raised and the feelings they expressed.

Process of Analysis

I read the transcribed interviews closely to identify descriptive data, which were noted through the process of open coding (Strauss, 1987; Merriam, 2009). This process was consistent with Moustakas' (1994) concept of horizontalization, wherein significant statements and identified key words. The data were grouped into themes according to the process of axial coding (Merriam, 2009).

An important aspect of the data analysis was noting the emotional tone of the informants' descriptions of their concerns. I paid particular attention to their voice, the tone, and their use of language and metaphor, to gain an appreciation for the meaning of their experience. I kept detailed notes documenting my impressions of the informants' responses, written immediately after the completion of each interview. The dissertation chair also reviewed the transcripts for additional analysis of the data and identification of significant themes.

The data analysis was a cumulative process until the informants' statements became repetitive and were fully mined for meaning. After all of the transcripts were processed in this

manner, the identified themes were grouped according to core categories and the degree to which they overlapped with or diverged from each other. This facilitated the identification of the issues that were of greatest concern to each of the informants and to the informants in aggregate.

In short, the narratives were analyzed using both phenomenological reduction and grounded theory approaches. The preliminary codes were assigned to the topics identified the raw data's units of meaning, and the researcher's reflections were documented through the process of "memo-writing" (Charmaz, 2006; Miles & Huberman, 1994). I sorted the codes to identify common elements and recurring patterns, and grouped them into overarching themes according to the procedure of axial coding (Corbin & Strauss, 2007). This process of data reduction (Miles & Huberman, 1994) facilitated the inductive process of building grounded theory (Glaser & Strauss, 1967) in which I grouped the themes to discover the conceptual areas of greatest concern to the informants. The units of data were then reexamined, both to achieve a greater understanding of these conceptual areas and to gain an appreciation for their broader social policy implications.

Protection of Human Subjects

The Hunter College Institutional Review Board (HC-IRB) reviewed and approved an application to conduct research for one year, from December 10, 2009 through December 9, 2010 (Hunter College Protocol HC-110914351). The study was exempt from review and approval by the New York City Board of Education Institutional Review Board (see Appendix 5), because the participants in this study were retired from the public school system. I made all efforts to treat the subjects ethically. The subjects were informed that their participation was voluntary and that they were free to withdraw from the study at any time. A condition of

participation was that they sign an Informed Consent Form (see Appendix 6) and an Audiotape Recording Release Consent Form (see Appendix 7).

In order to protect the confidentiality of the subjects, the transcripts of the interviews were identified by numbers and the participants' names were removed from all records of the interviews. I maintained audiotapes and typed transcripts of the interviews in a locked cabinet in my home office. Excerpts from the interviews that appear in the data analysis chapters are ascribed pseudonymously.

There were no known risks to the subjects. Potential benefits to them included the opportunity to express their thoughts and feelings about their experiences and to reflect on them. The results of this study were shared with the subjects who so desired, a benefit of which was to allow them to compare their own experiences as clinician-litigators with the experiences of the other informants. Further, they had the opportunity to learn how the experiences shared by all of the informants related to broader questions of educational and social policy. A Post-Interview Feedback Form containing several relevant references was provided to the subjects, as well (see Appendix 8).

Limitations of the Research Methodology

There were several limitations of the research methodology, some of which are endemic to qualitative research. Perhaps the greatest limitation of the study is that it is exploratory; there is very little extant theory or research on the topic. Consequently, the task was to develop mid-level theory. The data could be analyzed and sorted to create grounded theory, but the results cannot be generalized beyond the current sample (Miles & Huberman, 1994). The theory created was preliminary and is subject to modification or rejection by future research.

There were certain practical limitations to the study. The sample was small and comprised of retirees who were no longer doing the work investigated. Consequently, their responses reflected recollections of work done in years past. In addition, the law has evolved since the period during which the subjects worked. Had it been possible to interview people currently working as clinician-litigators, I might have obtained other perspectives on impartial hearings and their implications for legal, educational, and public policy issues.

CHAPTER VI: THE IMPARTIAL HEARING PROCESS: THE CLINICIAN'S EXPERIENCE

Introduction

The impartial hearing process provides a voice for parents and the school district to present their respective positions about educational plans for children with disabilities. It rests on the principle that parents are equal partners with the local education agency in designing educational programs for their children. As parents of special education children have gained greater legal standing and more due process rights, they have increasingly questioned the authority of professionals; they are holding the educational system accountable for its actions. An unanticipated consequence of "leveling the playing field" between parents and the educational system is an increase in the number of impartial hearings, which places a strain on the educational system and depletes its resources.

A central goal of this study was to gain a deeper understanding of the experiences of clinicians who served as representatives of the New York City school system in impartial hearings as they transitioned from their roles as clinical practitioners to their roles as litigators. They were school social workers, guidance counselors, psychologists, and educators. None were attorneys or had special legal training. Many of the informants indicated that this transition resulted in what Davis (1966) described as role discontinuity. For some, this change led to stress, ambivalence, performance anxiety, and feelings of inadequacy. Further, several of the litigator informants felt that their professional authority diminished at the impartial hearing. Nonetheless, some embraced their new roles.

Many informants spoke candidly about the "industrialization" of tuition reimbursement cases. The disproportionate number of tuition reimbursement claims among higher incomes families raised concerns about the relationship between socioeconomic status and the ability to

secure a private education at public expense. This issue emerged as a central theme in many of the interviews. A number of informants experienced the intensely adversarial tactics and strategies employed by the parents' attorneys in tuition reimbursement cases as assaultive. This heightened their awareness of the high financial stakes in these cases and made them realize that they would have to adopt a more adversarial style than was typical in their clinical roles. Their sense was that the parents were exploiting the system; some raised questions about what constitutes fairness and justice and deeply affected their understanding of the process.

The analytical chapters that follow present three major themes that emerged in the interviews. These include experiences of the clinicians as they fulfilled their ascribed roles as district representatives of the New York City Department of Education (NYCDOE) at impartial hearings; the ethical tensions and conflicts that emerged as a result of the execution of those roles; and an analysis of how laws and social policies influenced both the impartial hearing process and the service delivery system for all special education students. Narrative findings illustrating these themes coalesced around the following rubrics: Practice, Ethical Advocacy, and Policy.

This chapter focuses on practice issues and examines several components of the litigator role, such as role expectations, role conflict, perceptions of strategies and tactics, and litigators' relationships with parents. The clinician-litigators' experiences along these dimensions in both service-delivery and Carter cases were examined. Although these had some points of similarity, they also had dramatic differences. Whereas all cases were adversarial, service delivery cases involved differences of opinion about the appropriateness of programs and services in the public school system. Therefore, service delivery cases allowed for greater discussion, negotiation, and collaboration with parents to construct a mutually agreeable solution for both sides. In contrast,

Carter cases, in which parents sought tuition reimbursement after having unilaterally placed their child in private school, did not offer the possibility of negotiation or compromise. Parents had already chosen their course of action and had made a financial commitment, which they fought to recoup from the public school system.

Clinician-Litigator Practice in Impartial Hearings

Although non-attorneys continue to represent the NYCDOE in fair hearings, the Hehir Report (2005) determined that NYCDOE clinicians lacked knowledge of statutory and regulatory requirements, experience collecting evidence, and skill in arguing cases before impartial hearing officers. Moreover, the Report commented that since clinicians did not have a legal background, they did not have the skills and knowledge to prepare cases and to represent the NYCDOE at impartial hearings. A central objective of this study was to learn what knowledge, values, and skills these clinician litigators employed in the impartial hearing process that contributed to winning or losing cases. It sought to learn how informants bridged their professional education as clinicians with their work as clinician-litigators.

Some of the informants who represented the NYCDOE at impartial hearings became litigators by choice; others were compelled to do so by virtue of their positions. Some clinicians willingly became members of their district's impartial hearing team or volunteered to represent their district at hearings, while others, such as clinical administrators, were required to represent the district at hearings whether or not they were interested in playing this role.

The clinicians interviewed varied greatly regarding their comfort in assuming the litigator role. Several factors contributed to their feelings about participating in the process. For many, the formality of the impartial hearing room could be daunting. Representatives of the DOE sat on one side of the table, and the parents and their attorneys sat on the other. The hearing officer

presided from the head of the table. The physical arrangement underscored the adversarial nature of the proceedings. The hearing was recorded for transcription with microphones placed in front of each participant, which necessitated choosing one's words carefully. Informants reported feeling apprehensive about how their performance might be judged. All witnesses were sworn in. Alex was typical of the informants in his description of how intimidating the hearing room was for the neophyte clinician-litigators. "You know what my first reaction to the hearing room was? At the beginning, it was very intimidating, since everything was taped and recorded. You didn't want to say the wrong thing."

There was a general perception among the informants that the impartial hearing process was more acrimonious during a Carter hearing. In virtually all these cases, an attorney represented the parents, and the clinician-representative had to argue the case against a lawyer. Many of these attorneys specialized in representing families at Carter hearings. Some informants disliked the approach these attorneys took, while others learned from observing lawyerly behaviors and adopted them themselves. Robert noted that attorneys would intimidate and attack his witnesses. These witnesses were educational specialists who occupied clinical roles that were similar to those currently or previously held by these DOE representatives. They contrasted their tactics to those of the attorneys:

> The lawyers would attack their credentials and hint that these people didn't have [a sound] educational background, and that they didn't know what they were talking about. They really didn't give them a chance to explain their positions, because they would always jump in. It really became very acrimonious…The lawyer had the right to cross-examine the witnesses, but didn't have the right to browbeat the witnesses…I felt that I was a gentleman during my cross examination…I was trying to bring out issues that the private school was not appropriate for certain reasons. But I never yelled at them. I never said that the private school was not a good school, whereas I had several lawyers and parents talk about public schools like they were really terrible places.

Some informants reported that their tactics contrasted with those of the attorneys in this way. They stated that they treated the witnesses with respect, whereas the attorneys harassed them. However, other clinician-litigators reported that they adopted tactics similar to those of the attorneys when they cross-examined witnesses. Jack stated that during his cross-examination of witnesses he would try to "pin them down." This type of clinician litigator was quick to adopt the tactics and strategies they observed attorneys using in the hearings.

Nonetheless, 100% of the informants found the tone of the hearings combative, and most reported that they experienced discomfort as a result. For example, several talked about feeling "attacked." Alex remarked that attorneys were "trained to be a little cold-hearted and objective, while they're attacking you…they would never see that they're attacking you." Gayle noted that an attorney tried to "break her down" during a line of cross-examination questions and at times she was felt that her "fairly good arguments could be shot down."

Sheryl believed that when litigators presented persuasive arguments, the attorneys responded "like a ton of bricks." She stated that their behavior would include "a lot of grandstanding, emotional outbursts, and bullying." Sandy agreed that attorneys would "just look to hammer away to prove that the Board didn't do their job," and Sylvia described the process as feeling like a "tug of war." Although some informants felt defeated by aggressive strategies attorneys used, others were able to counter their style with the confidence they had in preparing their cases. Even though Donald described attorneys as coming on like "gangbusters," he felt confident in his ability to prevail at a hearing. "You know, even if the attorneys started off like gangbusters, meaning more aggressive, that frequently didn't last…because we were very prepared."

The clinician-litigators had various responses to the behaviors of the attorneys. How they responded provided insight into their perceptions of their own roles and professional boundaries. Some, such as Donald, could manage the aggressive strategies attorneys used during the hearings; others could not. When they could not, it led to a sense of incompatibility between how they were expected to act during these quasi-judicial impartial hearings and how they were accustomed to acting in their traditional clinical roles. When they experienced this role discontinuity, it made them question how well suited they were to be litigators. For example, Danielle raised concerns that the framework of the impartial hearing process was inconsistent with her professional practice as an educator with a doctorate. This caused her to feel that she was at a disadvantage in the hearing process:

> Often there was a lawyer representing the parent, and then there was me, an educator who has a Ph.D. and knows education but did not understand or know the quasi-legal process. The way you form questions, the way you ask questions; and [that] you don't bring your own opinion. Opinion doesn't have any place. Evidence and support is really what's needed, but that's not the way educators are trained. Educators are trained to look at evidence and give your opinion. And from my experience working with impartial hearings, they don't want to know what your opinions are. They want to know the facts.

In contrast, when Donald compared the roles of attorney and clinician, he noted that each role was distinct but equal within the impartial hearing context. Consequently, he was more accepting of these differences:

> It's not doing the same thing. Our roles are different. Our jobs are different. My job was to show how clinically and educationally our decision is a valid one. His job is to refute and find fault. My job is to show that he's wrong, that they're wrong, and that we're right. They're different. They're not comparable positions. And I don't think that one is necessarily subservient to the other. Both roles are valid within that setting
> .

Clinician-Litigator Role Conflict

The clinician-litigators' degree of satisfaction with their roles and its relationship to their personal values emerged as an emotionally sensitive topic. Their level of satisfaction ranged, on one hand, from eagerly embracing the position and identifying strongly with the values and principles of the lawyerly role, to on the other hand, experiencing significantly negative reactions to and rejecting the role. Those who rejected the role were uncomfortable embracing the fundamental principles of the legal profession. Consequently, the informants varied widely in their commitment to their roles as litigators and the ease with which they were able to reconcile the clinical and legal perspectives on the cases under consideration.

Two of the informants used interesting metaphors to express how they felt assuming a new role. For example, Carl, a speech and language pathologist, reported that that he was able to manage the impartial hearing process satisfactorily; he willingly adopted the litigator role, which he described using the metaphor of an "actor."

> It's like playing a doctor on television, but I'm not really a doctor. Where else can you have the freedom of playing an attorney… being an attorney, and not being an attorney? I sort of liked that. It was like experimentation with a whole new different profession and that was sort of fun.

Brette also enjoyed the litigator role and compared it to that of a "good orchestra leader" and the process as similar to a good concert:

> I bring an opening argument [and] I bring good questions, so that when my people present, they will be on key…It's up to me to make sure that their case isn't as harmonious as my case. I want a better harmony. I want to throw a little dissonance into their orchestration. I want to win this musical contest.

These metaphors may have may have facilitated informants' transitions to new roles. However, for some informants, other concerns made it impossible for them to embrace the adversarial role with enthusiasm. One such area was perceived conflicts of

interest; a number of informants found themselves confronted with ethical dilemmas around this issue. For example, Danielle rejected her role as representative and was uncomfortable being a litigator, because she felt that the impartial hearing process was inconsistent with her fundamental pedagogical values and principles. She had a strong dislike for the adversarial nature of the hearings:

> It was as awful as I thought it would be. I never liked it. It was my least favorite part of my responsibility because I felt that it was adversarial…I didn't go into law because I didn't like that, and yet I was put in an adversarial position. My training is as a teacher, and not only as a teacher but as a teacher of teachers, and that's what I was truly trained to do. As a teacher you're there to help, support, and guide. The impartial hearing process, much of it does not involve that--to support or to guide.

Sheryl, a social worker, echoed similar dissatisfaction with the role. She believed that serving as a litigator violated fundamental social work principles:

> I have certain reactions when working with people as a social worker in other situations or contexts…My feelings are not supposed to, and I try not to let them, motivate my actions. But with an impartial hearing, they're not even supposed to be relevant and they're not supposed to impact on my role as a litigator. And that's not comfortable for me. I'm much better at being able to know what I'm feeling, know what I'm thinking, think about what I'm seeing, look to what they're feeling. For me, the role of litigator is the antithesis of being able to be in a setting with somebody in a professional way that could be helpful. It's not a helpful role. It's not a facilitating role. It's not a compassionate role. It's not a role where the goal is to help the person in some way. That's not the goal of that hearing.

Alex had a visceral reaction to his role as litigator and stated that it was always a difficult experience for him. He “absolutely hated it.” He recognized that although the law provided each party an opportunity to confront and cross-examine witnesses (8NYCRR§ 200.5), that aspect of the process made him feel extremely uncomfortable. He identified strongly with the plight of the parents and the children, but he was unable to respond to their needs in this

setting. Even if he felt they were taking advantage of the system, he could not resolve the conflict he experienced in this role:

> I hated being on the spot. I hated being confrontational with the parents. I hated feeling like I was maintaining some bureaucratic recommendation that I knew the parent didn't want. And even if I felt that I was representing the correct position, it was always very awkward. We were dealing with students with disabilities; parents were generally distraught about what they were going through at home. Many of them were taking advantage of the system, I don't doubt that. But it still meant I was the arbiter, and I was somehow the person who was telling them no. And it was a very uncomfortable experience for me. I hated it.

The kind of discomfort Alex described was inevitable when there were educational and legal mandates coexisting with bureaucratic, legal, and professional models. Alex's resistance to confronting parents was antithetical to the expectations of the litigator role. Moreover, it raised questions regarding professional responsibility and ethical advocacy, such as "Who is the client?"

Gayle, an educator, spoke extensively about the bifurcation of the two roles. She perceived the clinical and legal approaches as "two interdependent forces coming together." Her conceptualization of her role in relation to the fair hearing experience resulted in a clash of ideologies, which ultimately created role strain for her. She said that she "stood on the clinical side" and questioned whether the current legal mandate was reasonable. The NYCDOE was responsible to provide an appropriate education, not the best or optimum one. She pondered whether clinicians were bound by a different standard, the ethical standard of "best interest of the child." Brette described how she resolved this dilemma by asserting that litigators should only identify with the organizational-legal position. She did this by rejecting the concept of empathy, which is a central practice stance for social workers:

> You have to say, "I'm representing the Board, and I think I have a good case." [The parent thinks that because] poor Johnny [has a disability] he should have a private school forever. Maybe you have to just put some of the empathy for the

> parent away and say, "This isn't the place that I'm going to empathize with them. They have a lawyer. They cared enough to get a lawyer. Let their lawyer represent them." Focus not on the parent. Focus on their lawyers. You have to choose. It would be a bad thing, I think, if a person is like a social worker and feels guilty about presenting a case against a parent. That would not be a good thing, because you really can't present a good case if you feel empathy with the other side. I mean, you might not question the other side as much as you should.

Although empathy was a core concept among all clinical professions represented in this study, some informants felt they had to reject empathic feelings in their roles as litigators or struggled with their impulse to be empathic toward the children and parents they encountered in litigation. When describing a case where the parent cried, Jack stated he believed a person has to be emotionally distant in order to be an effective litigator. Similar to Brette, he rationalized rejecting empathic responses when he assumed the role of litigator. "You can't let crying bother you. Don't feel too sorry for the parent. Some people would, I think. It doesn't mean you have to be a tough guy. But you have to be able to say no, or we want this, or we believe this, and stick to it."

How informants dealt with empathic impulses in their roles as litigators influenced their ability to embrace the adversarial role. For example, Brette and Alex took diametrically opposed positions regarding their feelings and approaches to litigation. Brette endorsed the legal advocacy model, while Alex rejected it. Among the informants, there was considerable variation as to how much they identified with the organization's goals, the legal framework, or the approaches typically used in their own professional practice when executing their role as litigator. At one extreme, Donald clearly identified with the organization, and adopted its position:

> I took the company line in that these were our guidelines…I don't recall feeling that there was something that I would question. I never felt the need to question [the guidelines]…Built into that company line is a whole bunch of subjective

> experience, attitude, and perception. So what one may consider the least restrictive, most appropriate environment, another may not.

Although Donald aligned himself with the organizational perspective, implicit in his statement was that the belief that the school system's guidelines were synchronic with the prevailing legal standards. He believed that clinicians should use their professional authority to make educational decisions that the law and the organization supported.

The clinicians' contrasting styles of litigating included the strategies and tactics they drew on as they prepared their arguments for presentation to the hearing officer. They all had the goal of obtaining a winning decision on behalf of the NYCDOE. The informants' statements made it clear that to "win" was a complex legal and emotional process that catapulted the litigator and the parent into a polarized struggle. For some this could produce role conflict.

Alex provided some insight into the role conflict he experienced, even when he won a case for the Department of Education. He shared his feelings about the emotional costs of winning. Ironically, he described winning as a deflating experience. From his perspective, the litigation process resulted in an emotional loss for all of the stakeholders.

> I felt like a heel and I didn't feel good about winning…I felt sorry for the families… I knew their kids had problems and I was holding the key, and it didn't feel right. I wouldn't have gone if I felt there wasn't a case, but I didn't feel good about it. You know, parents crying and you being the heavy. I wasn't trained for that. You know, that wasn't what I really wanted. Well, because when we would occasionally win a hearing and the hearing officer ruled in favor of the Board, you know we still had to contend with the family that didn't want the services or didn't want it as we want them to have it. So we didn't win anything. It was, everyone was unhappy. The family was unhappy, so I didn't feel like we won.

Brette had a background as a guidance counselor. Prior to becoming a litigator, she would often empathize with parents and advocate for students in order to ensure that they received "the best they can get." However, once she became a litigator, a "switch" occurred, and

she perceived herself as being on a “different side of the street.” She stated, “I didn’t represent the student in the same way.”

The “switch” in advocacy role that Brette referred to is consistent with the concept of role-differentiated behavior (Hegland, 1978). Hegland describes the concept, as it applied in the practice of law as follows: “I wouldn’t do that for myself on moral grounds but, as your representative; I must do it for you” (p.105). Brette was able to accept that her client was the organization and not the individual child or family member. This sort of compartmentalization kept her from experiencing role conflict.

Comparing Service Delivery Cases and Carter Cases

Informants participated in two distinct types of litigation cases where they served as NYCDOE representatives: service delivery and Carter cases. Service delivery cases were those in which the child was receiving special education services in an NYCDOE school and the parents’ due process complaint focused on their dissatisfaction with some aspect of the special education delivery system. Examples of dissatisfaction included classification, individualized educational program (IEP), or placement. In these cases, the parents were seeking remedies within the jurisdiction of the public school system. In contrast, the Carter cases involved parents who unilaterally placed their children in private schools and sought tuition reimbursement from the NYCDOE after the fact. Some of the service delivery cases were *pro se* (parents representing themselves) and some involved advocates or attorneys; virtually all Carter cases involved attorneys. The clinician-litigators reported different experiences with these two types of cases, and the most salient factor was whether parents represented themselves or had professional, generally legal, representation.

Nonetheless, the clinician-litigators had radically different experiences with service delivery cases as compared with Carter cases. They experienced service delivery cases as more collaborative, similar to what Kast and Rosenweig (1977) describe as creative conflict resolution. These cases presented the informants with the possibility for "win-win" situations, where children, families, and the NYCDOE could all benefit from the outcome. In contrast, they consistently described their experiences with Carter cases as "win-lose" situations.

Service Delivery Cases

Typical of many informants, Michelle, an educator, described her experience with some service delivery cases:

> In the non-tuition-reimbursement/service delivery cases, whether the parent had a lawyer or not, you talked. Everybody talked. I could get a parent on the phone and I could talk seriously about what was the real problem. [I could ask], "What is it that you're so opposed to?" You were able to settle things without the feeling of a contentious environment.

Similarly, Donald, an educational administrator, did not experience role conflict when he served as a litigator in service delivery cases, because he was able to assume a role similar to the one he had when discussing a student's needs with a parent in his office. Significantly, in these circumstances, he felt everyone was working in the child's best interest:

> It was generally quite calm, often there was humor. I have a sense of humor. And parents were more relaxed, and I was relaxed, and the hearing officer was, too, although every now and then there were hearing officers who were kind of hostile to the Board. I tried to establish, usually with success, a good rapport with the parents. I guess the most important part is not to turn it into an adversarial relationship. That's not how I saw it, and I did everything to avoid that. I did that by being sensitive to the parent and letting the parent know that we were working in their child's best interest. I always felt that we were—the Board, the district, our unit—we were always working in the child's best interest.

The service delivery cases had unique features that shaped the manner in which the litigators approached their tasks. One was that many of the service delivery cases involved low-income

parents; rather than hiring attorneys, they represented themselves. This was different from the Carter cases, which for the most part were brought by higher income parents who used attorneys who specialized in opposing the NYCDOE at hearings. Chris, a psychologist, characterized one aspect of the difference between these two kinds of cases:

> So here you have wealthier parents going out of their way to hire lawyers to get services for children, while at the lower socioeconomic end, they're fighting to see that kids don't get services, because they think there's a stigma. Rich parents quickly get their children evaluated and get special schools, even if they don't need it. Poor parents resist getting evaluations done because they're afraid that their children would be swallowed up in special education and never seen again.

There were differences of opinion among the clinician-litigators as to whether it was easier to win cases brought by *pro se* parents or those brought by parents who acquired legal representation. Some felt that the hearing officers were more receptive to the arguments made by the clinician-litigators when the cases did not involve attorneys. They found lawyers focused on procedural matters as opposed to weighing the clinical facts of the case. Others felt that the relative lack of focus on the finer points of law freed the impartial hearing officers to exercise their biases against the Department of Education.

Sandy, an educator, believed that she was in a better position to have her arguments accepted by the hearing officer than were the *pro se* parents, because she presented her cases dispassionately and emphasized the facts. She noted that the parents often became emotional and focused on their feelings at the expense of the arguments that might have advanced their cause. "I was unemotional, as opposed to the parent, who was emotional. I had the information of what I knew was in the case… Maintaining emotional distance [helped me] to be taken more seriously by the hearing officer." Similarly, Danielle, an educational administrator, believed that as a clinician, she was in a better position than the parents were to have her arguments accepted by the impartial hearing officer:

> I think in those [*pro se*] cases they [the hearing officers] aligned with the Board of Ed…because…you could understand the process to some degree, and know that the facts were important. And often times when the parent wasn't represented, they were doing the emotions and feelings. And that's not what the hearing officer wants to hear. They want facts and information. So, yeah, I think in those cases it was much easier to have the hearing officer side with the Department of Ed then with the parent.

Sheryl, a social worker, felt more relaxed when the parents did not have a lawyer represent them. She believed that the thrust of the *pro se* hearings was more collaborative and focused on the needs of the child instead of procedural errors. When parents hired attorneys, the lawyers highlighted procedural errors to win the cases:

> The parents came in to talk about their child. So in some ways, it was harder, because I really felt like whether we thought [the parents] were right or we thought they were wrong, they were always there because they wanted to take care of their children as they saw fit. So it felt less adversarial to me.

However, Sheryl did describe a negative aspect to working collaboratively with parents. She experienced role conflict in that when she felt an emotional connection to the parent's position. At the same time, she felt her identification with the parents could compromise the Department of Education's case. This discomfort produced two responses. She might not challenge the parent sufficiently and might not maintain an objective view of the case:

> If [the parent] is wrong…or didn't follow through properly, or whatever it was [the parent did wrong], I think the expectation was for the district representative to use the full force of those facts against the parent. So I always had a feeling about that, one way or the other. And this experience should not be about…your feelings. It was just supposed to be about, you know, prevailing.

On the other hand, Sandy explained that sometimes *pro se* cases could actually be harder for the Department of Education litigators to win, because the hearing officers would take an activist, quasi-advocating role with the parent to compensate for the lack of paid counsel:

> I think the impartial hearing officer would bend over backwards to try to help the parent present the case. They seemed to feel sorry, like here is this lone woman--most of the time it's a woman--defending her child, and she's unhappy and angry.

> And the impartial hearing officer, I feel, would try to compensate for her not bringing…an advocate. And the Board of Ed was the Board of Ed. They didn't bend over backwards for us. It was like, You present. You know what you're doing. I'm not helping. As a matter of fact, you have to double your efforts. They really would pick at the New York City Department of Ed…It just seemed that we, as the Department of Ed, were [seen as] more powerful, and these were the little guys. They wouldn't [help us], even though we are not attorneys ourselves. We are just supervisors or teachers or whatever. They wouldn't go out of their way, because we are the system. They were eliciting the information that would be beneficial [to the parent]. The parent [never brought up] information [such as] time frame or letters sent to them, the hearing officers would do it for them. They would say, "Okay, did you get this and this? Let me see the paper work." And the other half is, the hearing officer, in questioning us as representatives, would be much harsher toward to us in tone…They were quite assertive in their questioning of us, [but] not as assertive in questioning the parent. They would be asking [us] for little pieces of paper that sometimes get misplaced in files that are from three, five years ago. The parent does not have to show supporting documentation like that.

Sandy's description demonstrates how the clinician-litigators sometimes felt put into an adversarial role with the hearing officer himself. Similarly, Robert, an educational administrator, stated that he felt strongly that in *pro se* cases hearing officers were not impartial. They would use the parent's lack of representation as an opportunity to side with parents against the Department of Education:

> I do feel that there was a bias toward parents. Sometimes even on the most minor technicality, which really doesn't apply in law, they would find for the parent. They would look for a technicality…The fact that somebody forgot to put a date on an IEP page, you know, as the basis for losing a decision is ludicrous. That's what made the hearing process so frustrating, especially to Board of Ed people, is that they would present good cases…and yet they would lose, not on the merits of the case, but on a technicality. Because the Board of Education is the big, bad boogie man. There were a lot of cases that were decided not on the merits of the case, I think, but because the benefit was given to the parents.

Carter Cases

The respondents' discussions of Carter (tuition reimbursement) cases were marked by intense feelings regarding issues of entitlement, equity, and fairness. The perceived abrogation of the principle of distributive justice (Rawls, 1971) became a focal point of the interviews.

Generally, the informants felt that parents were taking unfair advantage of their due process rights in a manner that was inconsistent with the original intent of the laws. A common theme of the interviews with the clinician-litigators was that the impartial hearing process had devolved into a mechanism for unjustifiably awarding public funds to parents to finance the private school education of their children.

As a group, the informants viewed these cases as a corruption of the intent of the Supreme Court. In *Florence County School Dist. IV v. Shannon Carter*, 510 U.S. 7 1993, the Court ruled that lower courts and impartial hearing officers may order reimbursement for parents who withdraw their child from a public school that provides an education that would be considered inappropriate under the guidelines of the Individuals with Disabilities Education Improvement Act (IDEIA). The parents may unilaterally place the child in a private school egardless of whether it is state-approved, as long as it provides an education that is otherwise proper under IDEIA. Each of the clinician-litigator informants described the parents who brought Carter cases not as seeking redress for a lack of appropriate public educational services but simply as upper middle class to upper class parents who could afford to hire lawyers to obtain public funding for tuition at the private school of their choice. They expressed many feelings about how this situation related to the political movement to privatize public services and the policy implications thereof.

Carl captured the prevailing view of the clinician-litigators about Carter cases. He said that they emerged from regions of the city where wealthier parents who had access to attorneys resided. He noted that the parents lived in the more desirable neighborhoods, such as the Upper West Side, the Upper East Side, Brooklyn Heights, and Park Slope; the private schools they sought were located in these areas as well. These observations were corroborated by an

investigative report in *The Wall Street Journal* (August 18, 2010), which found that residents of the wealthiest neighborhoods of New York filed the greatest number of claims for tuition reimbursement. Carl noted that the DOE staff who handled the Carter cases dubbed these well-heeled areas of the city "Carter Country."

Carter cases presented a number of issues that affected the way the clinician-litigators viewed their roles, which heightened conflict with its execution. In contradistinction to service delivery cases, where sometimes the clinician-litigators experienced the playing field as somewhat level, when arguing Carter cases, they often reported feeling a loss of power and authority.

The sense of loss of professional authority was the central organizing principle of the clinician-litigators' experience with Carter cases. The respondents uniformly reported that the opposing attorneys' tactics resulted in arguments that emphasized procedure more than substance. They felt that of the agendas and interests of the parents, their attorneys, and the private schools shifted the focus from the best interests of the child to winning the case. This redirected the focus away from the clinical evaluation of the child to an emphasis on procedural issues. As litigators, this deprived them of the opportunity to engage in a full and nuanced discussion of the child's clinical assessments and educational needs. They felt fettered in their ability to utilize their clinical knowledge to promote the best interests of the child. In addition, it did not enable them to uphold the collaborative spirit of IDEA. Ultimately, they felt forced to use the legal strategies and tactics suited to arguing procedural issues at the expense of their clinical skills, which would have allowed them to advocate for an appropriate educational plan and address the needs of the whole child.

Doug, a clinical administrator, noted that in order to win a case, he had to give up discussing it in a clinical, holistic manner and present data selectively, skewing the picture of the child to strengthen his chances of prevailing. "I knew what to disclose. Maybe I would decide not to disclose certain documents. I would approach it [less as a clinician than] as a lawyer." Michelle, a clinical administrator, exemplified the informants' feelings of loss of professional authority; she described the process of adjudicating Carter cases as undermining her ability to work cooperatively with parents to address the educational needs of their children. Instead, she found the process characterized by suspicion and mistrust on both sides. For her, the nature of a due process complaint placed the local educational agency on the defensive. She noted several reasons for this situation. It presupposed that the organization had violated the child's educational rights; it placed the burden of proof on the school to prove otherwise; and it automatically involved a supposedly disinterested third party, the impartial hearing officer, who scrutinized the actions of the school district.

As an educator, Sandy described Carter cases as pitting the parents' interests against those of the school system and caused the clinician-litigators to lose control over the outcome of the dispute. Whereas in service delivery cases, there was some room for negotiation and compromise, in Carter cases the decision-making power rested squarely with the hearing officer, whose ruling would make one side the winner and the other, the loser.

> Impartial hearings [involving Carter cases] are very black and white. There's no color here. "We want this." "You're wrong, we're right." "Now tell us who's right." It's like Solomon. [The impartial hearing officer] can't cut the baby in half…Somebody's got to be right, and that's the decision. That's what an impartial hearing officer does, makes that decision. Very powerful.

Carter cases could make it difficult for clinician-litigators to focus on children's actual educational needs. Chris, a psychologist, described how when arguing Carter cases, he was

unable to promote the child's educational needs. Instead, he found himself engaged in legal wrangling that focused on the procedural aspects of the case. He described a case that he had lost although he had felt confident that he had presented cogent and pedagogically sound arguments. His failure to prevail at the hearing left him feeling powerless.

> I felt… as a teacher and psychologist, that theirs were lousy arguments…But I also understood that the attorneys are going to use whatever they can to win. And I felt it was bullshit, but it taught me something--that being right has nothing to do with whether you're going to win a case or not.

Others echoed this sense of futility and powerlessness. They lost cases despite the clinical and pedagogical expertise they incorporated into their arguments. Robert, a clinical administrator, described being unable to prevail based on sound pedagogical principles:

> I remember a Carter case that I lost where I thought that I had a pretty good case… [but the] hearing officer came back with another decision. I was dumbfounded that the hearing officers could actually come back with decisions that were not based on pedagogy…It's kind of interesting, an eye opener.

Numerous informants found their professional expertise devalued in Carter cases. Danielle, a clinical administrator, did not feel her qualifications as an educator carried as much weight as a lawyer's in the deliberations of the hearing officer:

> The attorneys had one area of expertise, and I had another area of expertise. The hearing officer had the same expertise as the lawyer, and I always felt that I was at a disadvantage. It was two against one. They thought the same way. They thought in terms of procedure and process, they didn't think in terms of education. They didn't think the way an educator would think, which is not necessarily in black and white. It was never going to be about substance and it had nothing to do with the academic needs of the child.

Overall, Carter cases appeared disempowering to clinician-litigators. The informants described feeling that their professional expertise carried less weight than the power of moneyed interests. They spoke about the sense of entitlement of wealthy parents who felt they could run roughshod over the clinician-litigators. They noted the gladiatorial tactics used by the parents'

attorneys. The clinician-litigators described how in Carter cases the supportive, cooperative relationship that they traditionally strived to maintain with parents was corrupted. Some were saddened by the loss of their ability to collaborate with parents. Instead, when parents retained an attorney, it precluded any direct interaction with the parents, and they could only communicate through the lawyer. Clearly, these attorneys were motivated to win rather than negotiate mutually agreeable solutions, and the clinician-litigators were forced to meet the attorneys on their terms. Rather than using their clinical skills to promote a common understanding of the child's needs, the clinician-litigators had to argue cases legalistically; they could not rely on their primary professional skills.

The uniformity of responses among the informants was striking. They felt that the Carter parents saw them primarily as gatekeepers who sought to prevent them from obtaining reimbursement for the private-school tuition they had paid. The clinician-litigators were cast in the role of obstacle, not partner. The informants felt that the parents' unwillingness to discuss matters openly with them blocked them from using their skills as negotiators and experts about learning disabilities.

Typical of the informants, Michelle had far less positive experiences with Carter cases than she did with service delivery cases. She found it demoralizing that opposing counsel in Carter cases focused on trying to trap the clinician-litigator in the minutiae of procedural errors.

> With the tuition reimbursement cases, it's totally different. They want money. You can't settle and parents are angry with you…They're always trying to catch you. If you don't respond [to a parental request], if you don't send a letter, if it's not received, if it went to the wrong address; once there's a procedural error--and through no fault of anybody's--it's "The organization did this and they did it on purpose. Therefore my child has a right to go to this highly expensive private school, and you have to pay for it." That's what's going on.

Similarly, Robert reported:

> [The] sides could not work together because the lines had been drawn. It's like the Republicans and Democrats in Washington; I mean, nobody can get together on anything. It was not a good situation. The Carter cases were more conflictual [than the service-delivery cases]. There was no room to accommodate. The decisions had been made by the parent, the parent's lawyers, and the private school that the children were attending. They were not going to let those kids go.

Several of the informants stated that, in their defense of the parents' positions, the private school representatives would often present a skewed picture of the child as being more seriously in need of specialized services or a private-school environment than he or she actually was. The clinician-litigators felt that in doing so, the private schools were encouraging both the parents and the hearing officer to disregard the clinician-litigators' professional knowledge and authority. They also felt mischaracterized as withholding needed services from the child, due either to not understanding the child's special needs or out of a motivation to save money for the Board of Education.

Robert, a clinical administrator, described the dark side of the private schools' testimony on behalf of the parents against the Board of Education. He noted that in the name of supporting the parents, they were preying on their vulnerabilities:

> They catered to parents' fears. [They would make statements such as] "Oh, the public schools are terrible. We have a program for this kid, the only program that's going to work for this kid. Trust me." You know it's not real. They take the kids and ask for tuition up front, then have the parents sue, hoping to get the money back. They have lawyers on staff or as consultants. There's something very wrong about that. It's despicable.

Some informants, such as Michelle, felt that the children caught up in these cases might be hurt:

> I'm a teacher. I'll always be a teacher and I think like a teacher…I don't want a parent to win a case and the child gets hurt. I really get angry with all of that. And when I see that, it just kills me…he lawyers are for the parent. And the parent may not see the child's real need.

In this situation, Michelle's educational perspective on the child's needs was in the forefront of her mind. Beyond her commitment to win the case, she felt a strong responsibility to the child.

Several of the informants thought that the Carter parents viewed the public school staff as professionally inferior to the staff of the private schools. They believed that the Carter parents never intended to enroll their children in public schools, and cited the Carter parents' frequent invocation of *Tom F.* (2007), in which the Supreme Court ruled that a parent does not have to first enroll their child in public school in order to obtain reimbursement for private-school tuition. The informants felt that this decision undermined the intent of IDEA, which was first to attempt to access a free, appropriate public education.

To many of the informants, this represented an economic abuse of the public system. Danielle found this situation disturbing, particularly because she thought that the Carter parents would never have sent their children to public school. "That's the part that really disturbs me…If they want to go to private school…they could just put their child in private school. It's all about reimbursement." Alex agreed with Danielle that the Carter parents were using the impartial hearing process simply to gain tuition for the private schools that they had chosen for their children:

> I think this is well known, but I'll say it...I think parents who have no intention of ever going to public school, ever, including these Yeshiva parents in my district, including the families in some of the affluent districts that I work directly with... These families had no intention of going to public school at all, and just figured out a way to get tuition picked up by the system.

Alex was typical of the informants in his views of why the Carter parents rejected public education for their children. These included the racial make-up of the public schools, snobbery, or a lack of understanding of the benefits for all children for mainstreaming with nondisabled peers:

> They think that the more instruction they get, the better off they are…These are generally White middle-class parents that are doing this. And I think it really has more to do with social strata than education…What they don't have in those programs is an opportunity for mainstreaming, which is in the federal and state law. I think they want it for snobbism, for exclusionary reasons. They obviously

> would refute what I'm saying. But that's what I see. When I went to [observe] one of these particular schools very recently--I'm not mentioning the name--there was not a Latino or a Black face in the whole building. Well maybe there was one or two, but virtually none.

A key aspect of the impartial hearing process that affected the experience of the clinician-litigators was the presence of the opposing attorneys. The presence of the attorneys was significant in two ways. It prevented the clinician-litigators from communicating directly with the parents, whom they were used to seeing as their clients, not their adversaries, and it forced them to focus on procedural issues at the expense of clinical considerations.

The clinician-litigators found the attorneys' insistence on keeping the discussion focused on procedural issues unnatural. Gayle, an educator, described the difficulty of having to shift the focus of her arguments away from her clinical understanding of the child to an emphasis on the legal technicalities of the case:

> The best thing that I brought [to my role] as a litigator [was that I was] a clinician, an educator first, an educator of children with special needs…And given my clinical background in testing, I felt comfortable with that piece…I guess the piece that was most difficult was looking at the laws that would apply or would not apply…Initially, I thought I'd go in and say, "Okay, look, it's very clear what the child needs." But how do you present the total argument, the clinical piece and the legal piece? Clinical is one thing, and then there's legal.

The presence of the opposing attorneys also caused the clinician-litigators to experience stress because it undermined what many felt to be a key aspect of their roles, mediating a mutually agreeable solution directly with the parents, because all communication had to go through the attorney. Several of them expressed sadness that this arrangement interfered with the longstanding relationships they had with some of the parents. Ironically, it prevented them from adhering to one of the fundamental principles of the law, specifically that the parents and the local education agency are required to work collaboratively to create an educational plan for the child. Michelle, a clinical administrator, described how the presence of the attorney

interfered with her ability to communicate with parents and to fulfill the requirement of her role that she help them:

> I never felt as comfortable when there was an attorney because…[I didn't] feel comfortable in the adversarial relationship that existed between the Board and the parent's attorney. Yet when I interacted directly with a parent, I really took the stance of helping the parent. You know, I didn't go in there as an adversary. I wasn't there to get my way, but to show that what we were offering…for the child, to help him or her. [If there wasn't an attorney present], I could approach the parent in that way, and it was a much more comfortable situation for me. We were trying to help the parents.

The presence of attorneys serving as intermediaries between the clinician-litigators and the parents not only blocked direct communication with the parents, but it kept the clinician-litigators from knowing what the parents really wanted or felt. They reported that parents often responded to questions in a wooden, rehearsed manner that seemed more a reflection of the attorneys' direction than a candid expression of their own opinions. Brette, a guidance counselor, noted that the coaching parents received from their attorneys contributed to the rift the clinician-litigators felt between the parents and themselves. She described how she was unclear as to whether the wording of the parents' complaints reflected their true concerns:

> I've gone to some of the workshops that some of the attorneys have given. I know what they say to the parents. They encourage parents to think that they may get private school funding if they bring [due process] complaints worded in a particular way. So very often I'm not so sure it's the parent that felt this way. But I'm certain that it was the attorney representing the parent that felt this way.

Summary

This chapter illuminated the experiences of clinicians and educators whose jobs required them to expand their role to that of clinician-litigator. In the interviews, they described the process of adjusting to their new roles, the conflicts they experienced working in the legal arena, and how they accommodated to their new role definition. Not only did the social workers, psychologists, and educators have to acquire new skills to serve as clinician-litigators, they had

to contemplate the ethical conflicts that they experienced between the values that they had developed as clinicians and educators and what they had to do when representing the Board of Education in legal cases.

Largely, the informants reported feeling competent as litigators, even if they felt uncomfortable with the combative tone of the hearing process. There was consensus that the role of clinician-litigator was not entirely alien to their values as clinicians, and there was a pervasive sense that their clinical skills and educational expertise could make them effective advocates for children, even given the adversarial nature of the impartial hearing process. They often felt their clinical skills advantaged them over opposing counsel because they had a better understanding of the students' clinical assessments and educational needs. This occurred primarily in service delivery cases, where they could use their clinical expertise and their negotiation skills for the benefit of the child. This was possible even when their position was opposed +to the parents' requests. These cases gave them the opportunity to play a hybrid advocacy role. In contrast, the clinician-litigators experienced the adversarial nature of the Carter cases as aversive. Here they experienced much greater role conflict, because they felt stripped of their ability to use their educational knowledge and clinical skills to mediate mutually agreeable solutions with parents and advocate successfully for the educational benefit of the child.

Overall, the clinician-litigators conveyed a sense that the impartial hearing process degraded the educational decision-making process, with an attendant feeling of loss of their clinical effectiveness. They were frustrated that the rules of engagement in impartial hearings required them to devote their efforts to arguing legal technicalities at the expense of a considered discussion of the clinical facts of the case. The consensus was that this was not only unhelpful to the child but it could actually be harmful. As a result, the main concern of the clinician-litigators

gravitated to ethical issues. They generally believed that the needs of children would be better served by a mechanism of dispute resolution more consistent with the professional ethics that guided their work before they became litigators. The trend of their comments was that shifting to a method of dispute resolution guided less by the principles of traditional legal advocacy and more by the principles of ethical advocacy would produce fairer and more educationally appropriate outcomes. The central question was how to reconcile their bureaucratic, legal, and clinical roles in a manner that would be consistent with their professional role-definition and the principles of ethical advocacy, which is the focus of the next chapter.

CHAPTER VII: ETHICAL ADVOCACY AND THE PRINCIPLES OF ENGAGEMENT

Introduction

The clinicians in this study described how they experienced the role of clinician-litigator. They reported numerous conflicts between the collaborative approach that guided their work with parents in the educational context and the adversarial approach that characterized their role in impartial hearings. Some found that in the legal arena they could adhere to the same ethical principles that guided their work as helping professionals in more neutral settings. However, most felt that the rules of engagement in impartial hearings constrained them, forcing them to adopt a more legalistic, combative approach. Understanding the professional milieu in which the clinicians worked and their prescribed mission in that host setting was necessary to appreciate the conflict the clinician-litigators experienced between the roles of educator and advocate.

Prior to becoming involved in the impartial hearing process, the clinician-litigators had worked as social workers, psychologists, educators, and administrators for the local education agency. Their responsibilities were geared toward fulfilling the mission of the local education agency. For special education students, this involved informing parents of their due process rights, gathering information from sources such as formal psychological evaluations, and reviewing this information. In this role, they collaborated with parents to construct individualized education programs (IEPs) designed to address the student’s needs. The clinicians described the process of planning a student’s educational program as a cooperative venture in which they worked hand-in-hand with parents to arrive at a mutually agreeable, educationally sound plan. They viewed the parents as their clients in this endeavor.

Notably, federal and state regulations guided the decisions the clinicians made about which services to provide and the proper educational setting for students with disabilities. Key aspects of this work included the individualized education program (IEP) writing process, which was the bedrock of IDEIA and the primary point of engagement between clinicians and parents. The clinicians, as members of the Committee on Special Education (CSE) review teams, developed IEPs, and the placement office was responsible for finding appropriate classes for the children. The law requires that the Committee on Special Education convene annually to create a new IEP for each child and recommend a clinically and legally appropriate service and/or placement prior to the beginning of the school year (Individuals with Disabilities Education Act, 2004; New York Regulations of the Commissioner of Education, Section 200.4).

In the Carter cases, parents unilaterally placed their children in private schools. In most cases, they had IEPs for several years, so that the annual review meetings involved parents with whom the CSE professional staff had long-term relationships. The informants felt that despite their familiarity with parents they had worked with over the course of several years, annual review meetings were often fraught with tension and posed ethical dilemmas for them. The reason was that they regarded the parents as self-defined opponents of the local education agency who were unwilling to collaborate with them in the educational planning process.

Participating in impartial hearings, whether as witnesses or as clinician-litigators, necessitated a change from the traditional relationship between clinicians and parents. As clinicians involved in the evaluation and recommendation of special education services, they strived to maintain collaborative relationships with parents, working cooperatively on behalf of the student. In contrast, during hearings they took on the role of adversaries. This forced them to abandon one of the primary components of their relationship with the parent, shifting from

working side-by-side on a common goal to working in opposition to the parents' wishes to obtain public funding for private education.

These shifts exposed multiple agendas of different actors and revealed the interplay between the various client systems involved in the outcome of a case. During the CSE review meeting, clinicians related to the parents as clients, attempting to collaborate with them to design an individual education program for the child. Even at this point in the process, some clinicians found parents to be their adversaries. They strongly believed that the parents wanted to obtain public funding to finance a private placement. This was either a hidden or an explicit agenda. Because of this split, the clinicians often focused on the child as their true client, because their efforts in designing the IEP were based on their clinical understanding of the child's needs and their mission to recommend the necessary services in the context of a free, appropriate public education.

When the parents rejected the recommendations of the CSE and initiated an impartial hearing, the clinicians who were defending the IEP, either as witnesses or as clinician-litigators, took on yet another client, namely the local education agency. Their role when parents contested CSE recommendations was to convince the hearing officer of the merits of the position of the Department of Education (DOE). However, because they were not merely advocates for a position, but were also educators and clinicians, their work was informed by an understanding of the child and their ethical responsibility as professionals to use that understanding to promote the best interests of the child. Consequently, their work was geared toward serving the needs of the ultimate client, namely the child with special education needs.

When the clinicians shifted from their traditional educational or clinical roles to that of clinician-litigator, they had to recalibrate their relationships with these various clients, the child,

the parents, and the DOE. They had to adopt the guidelines of traditional advocacy as specified by the rules of the impartial hearing process. Whereas the clinicians working as clinician-litigators proved themselves adept at functioning in the role of traditional advocates, they reported that they did so at great cost, experiencing conflicts between their professional ethics and the impartial hearing's guidelines for legal engagement.

The clinician-litigators described the ethical guidelines that inform the practices of social workers, psychologists, and educators as very different from those that guide the work of attorneys. They felt that the essential difference was that the former have a collaborative model of practice, whereas the latter have an adversarial one. In contrast, social workers and psychologists are trained to work collaboratively with their clients on their behalf, while exercising their moral and clinical judgment when they intervene (NASP, 1997; NASW, 1996). The social work *Code of Ethics* specifically advises social workers not to assist clients in matters that may have a negative impact on others (NASW, 1996). Similarly, the New York State *Code of Ethics for Educators* (2003) specifies that educators must work collaboratively with parents and use their knowledge of students to promote their best interests. Taken together, they imply that the basic difference between the advocacy of social workers, psychologists, and educators, on the one hand, and attorneys, on the other, is that the former are required to exercise moral judgment about the righteousness of the goals of the people they are serving. In contrast, attorneys are enjoined from doing so. In the context of the fair hearing, an attorney representing a parent would advocate for the parent's position, regardless of his judgment regarding its merit, whereas a social worker, psychologist, or educator would not.

The primary ethical conflict the clinician-litigators reported arose from a central aspect of the impartial hearing process. The rules of evidence, which are a direct outgrowth of legal

ethics, stand in stark contrast to the ethics of the helping professions. Central to the rules of evidence is the principle that the advocate presents information that furthers his client's cause and seeks to exclude that which might thwart it; in other words, the attorney seeks to defend his client's interest, right or wrong (Madden, 2003). This principle is in direct contradistinction to the helping professional's mandate to protect the client's best interests, which entails a full and careful consideration of all the facts, including, rather than excluding, information, and supporting a solution that promotes the welfare of the client, even if it is opposed to what the client wants (NASW, 1996). For example, in impartial hearings, the clinician's ethics would dictate seeking the most appropriate services for the child, not necessarily the services or placement sought by the parent.

Ethical advocacy, the process whereby social workers strive "to ensure that client and patient needs are adequately represented in ethical deliberations" (Dodd & Jansson, 2004, p. 1) is of central importance to understanding the role of clinician-litigators in impartial hearings vis-à-vis that of attorneys and the relative value of their contributions to the process. Deutsch (1973) suggests that social workers should seize opportunities to replace or transform existing competitive organizational norms with strategies and tactics that promote a more collaborative model; a question this raises is how might social workers and other clinicians influence impartial hearings to be more collaborative than confrontational. A further question is how the professional orientations of clinician-litigators and attorneys differ in their effects on the welfare of children.

The concept of ethical advocacy provides a framework for thinking about who is doing the advocating, how they are doing it, and what is their intent. Key concepts, such as entitlement, due process, and self-determination become relevant. What the various players

seek, particularly those in advocacy roles, affects the kinds of strategies and tactics they use. These influence the tone and direction that hearings take. Deeper questions, such as who is the client being served, what is the goal of the hearing, and how is winning defined, are central.

The term “unholy alliance” is used to characterize the three interconnected areas of entitlement, due process, and self-determination, each of which highlights ethical issues in the advocacy process (Rimer, 1989). Entitlement, in this context, refers to the right, under IDEA, of a student with a disability to receive a free, appropriate public education and whatever special education services or supports he or she may need to access that education. Due process refers to parents’ rights to seek redress through the impartial hearing process, when they believe that their child’s right to an appropriate education has been abrogated. Self-determination is the principle that parents have the right to seek the educational services that they believe are appropriate to their child’s needs.

The three elements of the unholy alliance, although superficially virtuous in their support of obtaining an appropriate education for children, contain the seeds of ethical conflict. Several ethical questions arise, such as whether it is the student’s or the parent’s rights that are paramount and which of their interests most merits advocacy. The complexities of educational decision-making give rise to the question of which approach, the clinical or the legal, is better suited to sorting out the myriad nuanced issues that these three elements of the unholy alliance encompass.

In some ways, the strategies and tactics used by the clinician-litigators were similar to those used by the opposing attorneys, but they differed in how much they were tempered by the principles of ethical advocacy. These strategies and tactics included adopting various kinds of demeanor, constructing arguments designed to persuade the hearing officer, framing the

argument to emphasize certain aspects of the case, and engaging in aggressive cross-examination. They made clear that each of these legal approaches could be used either to support the principles of ethical advocacy or to undermine them, depending on the intent of the litigator. In the interviews, the clinician-litigators described how they used these strategies and tactics. They indicated that litigating according to the principles of ethical advocacy demanded careful consideration of the questions, Who is the client?, Whose interests are being served by the litigator?, and Whose interests does the litigator see himself as serving?

Closely related to the question of Who is the client? is What is the intent of the hearing? Determining whose interests are paramount and which of their interests are to be promoted influences how one defines winning, or prevailing, at a hearing. When one adheres to the principles of ethical advocacy, arguing a case may become less about factual arguments than about actual human benefits and costs. Ultimately, these questions lead to several issues that will be considered in the chapter on policy implications, especially how the hearing process itself might be redesigned to incorporate the principles of ethical advocacy. It also contributes to understanding of the role of clinician-litigators in the impartial hearing. Imbedded in their experiences of sorting out these ethical dilemmas is the question of how they might use their unique skills to promote the welfare of children.

Who is the Client, and the Question of Self-Determination

Ethical advocacy cannot be compared with traditional legal advocacy without considering two related questions: Who is the client being served by the advocate's efforts? How does the advocate conceptualize the process of serving that client? The question "Who is the client?" might appear simple, but an examination of the impartial hearing process reveals that there is a multiplicity of ways of conceptualizing who the client actually is. Ostensibly, there are two

clients represented in an impartial hearing. First is the local education agency, which employs the clinician-litigator to defend the disputed IEP and the proposed program of educational services. This is the clinician-litigator's client of record. The second is the parent suing the local education agency to obtain a placement or services for the child other than those proposed in the IEP. This is the opposing attorney's client of record.

A fundamental issue that differentiates the role of the clinician-litigator from that of the parent's attorney is the question of interest, specifically, what does each side stand to gain from prevailing at the hearing? For the parent in a Carter case, the reward is placement in the private school of their choice, provision of the services they seek, and payment for them, as well as reimbursement of their attorney's fee. For the local education agency, the rewards are less tangible. No employee of the local education agency stands to gain materially from a decision in its favor. For the clinician-litigator, the only rewards of winning are the satisfaction of obtaining a mandate to provide a free, appropriate public education (FAPE) for the child and stanching the flow of public monies to the private sector.

Whereas the clinician-litigator does not gain materially from representing the local education agency at hearings, representing parents at impartial hearings is the attorney's source of income, and consequently he or she has an interest in participating in as many hearings as possible. In addition, obtaining winning decisions that please parents can lead to more referrals and increased income. No doubt, these factors influence the attorney's approach to cases and serving the client; this opinion was expressed by most of the clinician-litigators.

The roles played by social workers employed by educational agencies become complicated when they participate in impartial hearings, as these proceedings raise the question of who, in fact, is the client they are serving (Loewenberg, 2000).

> Traditionally, a client was defined as the person(s) who engaged the practitioner and paid her a fee. Alternatively, the client is the person…whose behavior is to be modified or changed by the professional's intervention. However, these definitions may not be entirely appropriate for most social workers, especially for those who are employed by an organization, such as a social agency, a department of government, or an institution. According to the first definition, the organization that pays the social worker's salary should be considered the client. But is the school really the client of the school social worker? (Loewenberg, 2000, p. 111).

The question of who is the client is especially relevant when there is a perception that the interests of the organization and the person being served diverge. When the two are seen as having opposing needs, social workers find themselves in a professional bind. Conversely, if the social worker perceives the aims of the institution and the person being served as congruent, he or she could serve both without experiencing dissonance-inducing role conflict.

The clinician-litigators interviewed for this study were consistent in identifying the child as their ultimate client. Taylor, a school social worker, saw the student as her primary client, both in her role as a social worker and in her role as a clinician-litigator. However, she believed that she served the student by engaging in a collaborative relationship with the parent. In essence, the parent was her secondary client. However, in the adversarial setting of the impartial hearing, she was not able to work side-by-side with the parent in this manner. Adhering to the principles of traditional legal advocacy, in which there is a winner and a loser, prevented the two sides from working together to find a mutually agreeable solution. This deprived her of the opportunity to help both the child and the parent through her interventions:

> I always perceived the child as the client, person-in-situation …but I came to the table with the belief that without the parent, without the family being on board, you'd have a hard time making and implementing an appropriate plan for a child. So prior to becoming a clinician-litigator, a major part of my role was collaborating with the parent, helping the parent to understand what services we had to offer. And I would gather from the parent the kind of information that could help us move forward with a good plan for the child. So I worked hand in

> hand with the parents. That's how I viewed my role in working for the best interest of the child.

Sheryl, a social worker, delineated the conflict she experienced between representing the interests of the formal client, the local education agency, and the perceived primary client, the student. Although she did not see a difference between the interests of the student and the school system, she described how the adversarial nature of impartial hearings forced the clinician-litigators into a stance that precluded a frank and open discussion of the educational needs of the student. Her description of her role in the process echoed the statements of several other informants:

> Your client is the Board. Your client is not the child. You're not representing the child. You're not representing the parent—although, in all things that took place before or after [the hearing], you may have had contact with the parent, and your interest is in getting the child what he or she needs. But when you're at the hearing, your client is the Department of Education.

Taylor's professional orientation aligned with the person-in-environment social work approach that specifies that children need to be viewed in the context of their family situation. This would require the worker to form a relationship with both the parents and the child (Garrett, 2005, p. 2). However, she was skeptical regarding her ability to develop a genuine partnership with Carter parents that would result in the provision of appropriate services for the child. She viewed these parents as thwarting her ability, both as a social worker and as a clinician-litigator, to advocate for the needs of her primary client, the student. She spoke at length about the distress she experienced when she could not work cooperatively with the parent on behalf of the child:

> I saw myself as an advocate for the child. And with the Carter cases, it was the first time in my career at the Board of Education that my advocacy for the child was in conflict with the parent of the child. [Before working on Carter cases], the parents and I became colleagues working together for the best interest of their child, to create the best educational program for the child. But with the Carter parents, from day one we were viewed as adversaries.

Taylor was not alone in her appraisal of how the preference for private-school education of the Carter parents affected the educational decision-making process. Alex, an educational administrator, indicated that he had always viewed parents both as clients and partners in meeting the educational needs of their children. He shared his experience of working with parents over the years to educate them about the value of special education services and to empower them to access services for their children from the local education agency. He noted that, over time, the families began to use the IEP process as a tool in their efforts to seek private-school tuition. When this occurred, he felt that it subverted the needs of the students and drove a wedge between him and the parents. In the impartial hearing process, he could no longer partner with the parents. Instead, he had to work against them to defend the interests of his primary clients, the students themselves.

> The Orthodox lived in a very tight-knit community. At the beginning of my career in that district there were very few referrals from that community. Special ed was not even discussed. And by the end of my twenty-five years in that district, the referral rate was enormous. I felt good that we had accomplished bringing the need for special ed services out into the open. The community became very trusting of what we were doing. And kids that needed services were finally getting them. But then the pendulum swung so far in the wrong direction, and they were asking for all kinds of services [and private-school placements] that were unreasonable. And we started to take some hard positions on it, and we went to hearings.

The evolution of the relationship between the parents and the Department of Education that Alex described highlighted what many of the clinician-litigators saw as the growing divergence between the desires of the parents and the needs of their children. Because Alex saw the student as the primary client, he came to see himself in his role as clinician-litigator as defending the interests of the student against those of the parent at the impartial hearing.

The growing split between the needs of the students, as understood by the clinician-litigators, and the desires of the parents was fueled by the parents' increasingly vigorous assertion of their right to self-determination. The clinician-litigators saw the parents' consistent rejection of the DOE's recommendations at odds with one of the fundamental principles of the 2004 reauthorization of IDEA, namely that partnership between the parent and the local education agency is vital to serving the interests of the students and is associated with positive student outcomes (Turnbull et al., 2006). The informants noted that as the Carter parents became increasingly demanding, they came to view the local education agency not as a partner but as an adversary. The clinician-litigators reported growing increasingly frustrated over the years as they were pulled from their preferred role as ethical advocates and pushed into an adversarial position. Sylvia, a social worker, described the change in her role:

> You try to work with the parent as much as you possibly can because we really don't want to go to impartial hearing. That is not the ultimate place that we want to be. So you try to work with the parent. You try to work with the school. But I would say that 9 out of 10 times the parents are very, very difficult. They come in with a set program…even though they know that the program will not meet the child's needs…In the long run, the child is the one who suffers.

She continued to describe how her attempts at engaging in ethical advocacy on behalf of the student were thwarted by the Carter parents' adversarial stance:

> The parent would insist, "That's where I want my child to go because the school has already told me they have accepted him." I would point out that in order to go to any of these schools, you must have an IEP documenting the student's needs. If they didn't like what I was saying, they'd say, "Well, what is the next process?" I tried to explain that the program they wanted was not recommended, because it would not meet the needs of the child. I'd show the parents the psychological [evaluation], but they'd insist on a program where the kid's needs would not be addressed. If the parent continued to insist, the only thing left was to go to hearing and let the hearing officer rule.

Similarly, Donald, a psychologist, spoke about being clear that the true client he served as a clinician-litigator was the student, and he stated that he believed that the desires of the parent

were often at odds with the best interests of the student. He saw the opposing attorney as representing the interests of the parent and not necessarily serving the student's needs:

> The attorney's goal is to represent the client—the parent—to the best of his ability, and to get the services that his client wants. My goal is to provide the services that the client's child—the student—needs. And that we are mandated to do. So our roles are related but different. Our worlds are different, and that's okay.

Taylor expressed dismay at how she felt undermined in her professional role by what she viewed as the dishonesty and gamesmanship of the Carter parents:

> In the vast majority of cases, these parents did not come to us for real educational planning. They came to us with the idea that they were going to turn around and sue us for tuition reimbursement…My efforts were being put into making plans for children whose parents were not going to permit them to take advantage of those plans. To have these parents turn around and sue for tuition reimbursement was very difficult. The challenge was that I felt I was caught up in a game, a dishonest game. They were pretending that they would accept a public school placement, and then they'd turn around and seek tuition reimbursement, stating that whatever we do is inadequate.

The Right to Self-Determination

Whereas the parent's right to self-determination is enshrined in IDEA, the federal law is not explicit as to how to determine whether the parent's wishes are consistent with the best interests of the child, nor does it examine the multiplicity of factors that contribute to the parent's position. For example, parents who are not professional educators may not be in a position to judge the appropriateness of the educational services proposed by the local education agency (Harry, 1992). In addition, prejudices against public education and in favor of private education may enter into their decision-making. Further, the clinician litigators noted that other interested parties, such as private schools that reportedly coach parents to believe that their child will fail if denied the special services they offer, often influence the positions parents take on questions of educational placement. When these forces compromise the parent's perspective, how can one be sure that representing the parent's position serves the best interests of the child?

The notion that attorneys blindly supported the parent's position that the private school was an appropriate placement resonated throughout the interviews, and the attorneys' motivation to win was perceived as self-serving and strictly financial. The clinician-litigators also felt that the presence of attorneys influenced the tone of the hearings negatively. Conversely, the clinicians described themselves as being familiar with parents from interactions with them in a variety of contexts before the hearings. They also knew the history of the students beyond the evidence directly pertinent to the case under litigation. They felt that their relationships with parents and knowledge of the students' needs laid the groundwork for ethical advocacy. Nonetheless, they were not in a position to act in accordance with the principles of ethical advocacy because of the adversarial nature of the fair hearing process.

Danielle, an educator, was concerned that the attorneys who represented the parents did not have the student's needs in focus. She conveyed a sentiment that many informants expressed: although the attorneys represented the parents' desires for self-determination, they lacked an understanding of the needs of the child. She saw a fundamental inconsistency between the attorneys' adversarial stance and the clinician-litigators' desire to meet the child's educational needs:

> I believe that educators are there to help and support the child, and as litigators, we defend the IEPs, which express our view of how can we best serve this child. And that's how I see it. I don't feel that the lawyers are coming in on that basis. They're coming in to win. And if they win, they get their fees paid by the Department of Ed.

The clinician-litigators saw a host of problems when parents exercised their rights to self-determination. In discussing the perceived divergence between the parents' desires and the students' needs, the informants identified several factors that, in their view, caused the parents' positions to be flawed. In some cases, they felt that the parents

were well intended, but misinformed about special education services. In other cases, they viewed parents as having irrational biases against public education. In some cases, they saw the parents as the unwitting agents of private schools, which manipulated parents into believing that their children would suffer horrible consequences if they were forced to attend public schools. They also saw the attorneys as encouraging parents in their adversarial positions, because this enabled them to increase their business.

A few informants believed that some of the Carter parents were exercising their right to self-determination because they truly believed that the private school was in the best interest of their child. Representing this position, Brette stated, “I do believe that the parent thinks that this is the best thing for the child. Parents do not believe that they would do anything that would harm their child.”

However, Danielle’s concerns were more representative of the informants as a whole. She was an educator and viewed the parents as lacking the specialized knowledge to make informed decisions about their children’s educational needs:

> The parent doesn’t have the same kind of expertise and knowledge base that I have. I have a broader view that I bring to the situation. I remember a parent who placed her child in a nonpublic school, and I was the expert sent to do an observation, and I remember thinking, this placement is way too restrictive. The child had a language problem and needed other children to talk to for the language stimulation, and nobody in the class was verbal. I have expertise in language development…This school wasn’t the best environment for this particular youngster.

Robert, a speech and language pathologist, shared similar observations about the Carter parents:

> My experience with Carter parents is that while most of them are fairly educated people, I think when it came to education they were really in the dark. They really didn't know much. And so they clutched at straws. And I don't know whether those straws hurt or helped their children. And in a lot of the Carter schools they probably hurt their children. I think that when you clutch at straws there's a lot of charlatans out there that are going to take advantage of you.

A much darker view of parental self-determination ran through several of the interviews. Many of the clinician-litigators saw the Carter parents as prejudiced against the public schools and desirous of obtaining public funding for their child's private education by whatever means necessary. Robert described how some of the Carter parents would manipulate the system by seeking bogus handicapping conditions for their children, which would strengthen their hand at a hearing:

> Some of the families have kids with mild learning disabilities, which may or not even be classifiable, and they make a case to get the kid classified so they can go to a particular school they had the picked out and get the DOE to pay for it. If the youngster didn't have the classification they would be paying for private school out of their own pocket. They would never be going to public school.

Taylor described how some parents would manipulate the evaluation process to make their child appear to be in need of a specialized academic setting outside of the public school system:

> They were doing awful things. We had parents who would come in and took their children off medication so that they would appear more impaired. We had parents who told their children that, if they didn't perform in a certain way when they were evaluated, they would lose funding for their private-school placement and the child wouldn't be able to go to this school.

Taylor reiterated her commitment to the student and thought the Carter parents were violating their children's rights. She believed that the overly restrictive placements they obtained for their children did damage to the child's self-esteem: "In my view, in many of the Carter cases the parents were violating their children's rights. They were placing their children in settings that were overly restrictive, that could be destructive to their children's self-esteem."

Alex, an educational administrator, noted that while some of the Carter students had no bona fide handicapping conditions, others did. In the end, he thought that the Carter parents had no intention of accessing the special education services provided by the public schools:

> There were parents that had significantly disabled students for real. And then there were families that were manufacturing [handicapping conditions]. But [even] the ones that were very significantly involved, some of these families had no intention of going to public school. And because the special ed laws say that they're entitled to a free and appropriate public education, they would go ahead and beat the crap out of the system, they'd come in with attorneys. And they would argue about why the public school system was not appropriate for their student, even though they never, ever sent the kid to public school, or any of their children to public school, in the past.

Alex also noted that some of the Carter parents sought residential placements not for educational reasons but because they could not manage their children at home:

> Then there was the type of parents that wanted [their children] to go to schools like the school up in Boston [that uses] corporal punishment. The school up in Boston, where they used pretty heavy discipline methods, and some of the families that had kids who were really difficult at home, and probably didn't qualify for special education would be suing the Department of Ed saying they wanted their kids up in that school, and they wanted their youngsters to be classified at that point in their life, and get an IEP and go there…[There were many] families that sued the Department of Ed through the years for kids who were abusing drugs—middle-class families that didn't know what to do with their kids. And they would send them to schools out in Utah, and in California, and in American Samoa, and would ask the Department of Ed to pick up the tab because their student was "disabled" and this was "the only program that was going to work." That's where the system started to get really, really, really abused. And it's really disgusting. None of us are really in a position to fight some of these families.

In some instances, the informants saw the private schools as preying on the parents' fears and encouraging them to sue for tuition. Brette was one such informant:

> They'd tell the parents, "Oh, the public schools are terrible. We have a program for this kid, it's the only program that's going to work for this kid, trust me." You know, it's not real. And I think it's despicable that they ask for tuition up front. They take the kids, ask for tuition, and then have the parents sue, hoping to get the money back. That's despicable...It's a money-making process for the owners of the schools. They're not educators. And what they do is they pander to the needs of these middle-class families who want their kids in the private school, where they have kids like their own kids there.

Alex also reported that some of the private schools were manipulating parents, influencing them to exercise their right to self-determination in a manner that promoted

the private schools' interests: "The private schools were telling parents, 'Register your kid here. We'll tell you how to beat the system. We'll tell you exactly what to do, and which attorney to call.'"

Some informants noted another factor at play that influenced how parents exercised their right to self-determination. Brette noted that several of the attorneys who specialized in representing Carter parents regularly held workshops at which they instructed parents about the impartial hearing process and encouraged them to sue the Board of Education for tuition. Brette described her experience attending one of these sessions incognito:

> They encouraged the parents to believe that the Board does not do right by their child. They explain that they can win private school funding if they bring [due process] complaints worded in a particular way. This has gotten to be a three-billion-dollar-a-year business at public expense. And it's a particular class of parents that's winning, because they can afford these attorneys. I have no qualms about defending the Board in these cases.

Strategies and Tactics

The rules of civil procedure dictate certain approaches to presenting cases and eliciting of data from witnesses in the examination and cross-examination processes. Similar to a civil trial, an impartial hearing is an adversarial process in which one side wins and the other loses. Attorneys are taught to use a variety of strategies and tactics to help them win cases, and the clinician-litigators described having incorporated several of them when they argued cases. The guiding principle was to persuade the hearing officer of the merits of one's case and the flaws of the opposing side's position.

There were several strategies and tactics that the clinician-litigators described using as they assumed their legal role. They articulated the steps required in preparing and presenting their cases. These included learning how to construct a case narrative and weave it into persuasive opening and closing statements. In order to do this effectively, they had to gain

command of persuasion theory (the deliberate construction of arguments) and script theory (learning how to frame arguments in the manner of a story-teller), and learning to use rhetoric skillfully to shape and slant an argument (Evans, 2004; Haydock, 1994; Spence, 2005). The clinician-litigators reported that they had to learn to adopt formal courtroom demeanor and play to the hearing officer's sensibilities to engage him. They became adept at asking questions in a manner that would enhance the responses of their own witnesses and trip up the witnesses for the opposition.

In Carter cases, the clinician-litigators developed the ability to utilize these approaches in a manner similar to that of attorneys. Whereas in service-delivery cases they had some latitude and flexibility in their adherence to the rules of civil procedure, in Carter cases they were required to present cases strictly according to the rules of partisan advocacy. Their greater flexibility in service-delivery cases allowed them to depart from a win-lose stance and function in a manner more consistent with the professional principles that guided their work before they entered the legal arena. However, in Carter cases, they did not have this option. Here, the rules of engagement dictated a strictly adversarial approach geared more toward discrediting the opposition than finding common ground.

The majority of the cases that the clinician-litigators had to argue were Carter cases, which were far more adversarial than service-delivery cases. These cases required that they adhere to the principles of partisan advocacy as described by Saltzman and Proch (1990), including developing a case theory, presenting evidence, and arguing the case before a disinterested third party (the hearing officer), who would pass judgment on the merits of the case. In this model, the interests of the opposing parties were mutually exclusive, leaving no

ground for the kind of compromise or collaboration that had been central to their professional roles prior to becoming clinician-litigators.

The informants repeatedly noted that the guidelines of the quasi-judicial impartial hearing process placed more emphasis on procedural issues than substantive facts, such as the appropriateness of IEP or proposed placement. In addition, they believed that the hearing process had evolved into a fierce win/lose competition that made it impossible for the hearing officer to obtain a comprehensive and dispassionate assessment of child's educational needs. The impartial hearing process required them to relate to parents in a strictly adversarial manner and to refrain from attempting to find common ground with them.

Many of the informants were able to articulate and integrate the knowledge and skills of the legal profession and use them adeptly in arguing cases before hearing officers. One such skill that is essential to winning at trial is the lawyer's ability to sway the judge, which depends on the ability to "read" the judge's personality to get a sense of what sort of presentation would move him. In the interviews, the clinician-litigators described themselves as adept at using their clinical skills to "size up" the hearing officers and figure out how to tailor their case presentations to the hearing officer's unique personality. In this regard, they were a good match for opposing counsel. According to Robert:

> One of the issues that comes up is the nature of the hearing officer. They ran the gamut. They ran their hearings differently…It was important to present the evidence in a way that this hearing officer was going to hear it. In other words, each one of them was an individual, and you tried to project your evidence toward that personality.

Another component of traditional advocacy that the clinician-litigators reported using effectively was the technique of discrediting witnesses for the opposing side during cross-examination. As Doug explained:

> During cross-examination, I would approach it as if I was a lawyer, and if I knew that person had flaws I would question that person aggressively. I would try to trip them up a little bit…I wanted to show the hearing officer that that person is not a reliable witness on the parent's behalf, not a source of reliable information, that there's nothing that person is adding to make the parent's case.

Brette described her flair for discrediting witnesses:

> Sometimes I would ask wonderful questions that make their arguments look ineffective, make them look like they're intransigent, make them look like they're not willing to experiment with other options for the child. I'd present things in a way that would show that my position was a little bit more humane, more in harmony with the child…I had no problem trying to make a smooth case for me and a little disharmony for [opposing counsel] by interpreting their arguments and asking pointed questions to discredit them.

In the impartial hearing arena, the clinician-litigators were up against attorneys with more extensive training in the strategies and tactics of litigation. Even though they reported having developed a moderate level of skill in utilizing these techniques, the informants described the opposing lawyers using them in more extreme, and potentially deleterious, ways; in their estimation, this did not serve the best interests of the student. One example they gave was the practice of cherry picking the evidence to present and excluding other evidence, which created a skewed picture of the child, the Board's services, or the proposed remedies. Similarly, by invoking technical rules, such as those pertaining to the DOE's adherence to procedural guidelines, the opposing attorneys would frequently block the Board's proposed programs and services from consideration, often in favor of less beneficial private services.

The informants noted the effects of these tactics on the cases where they represented the DOE. Michelle perceived a conflict in the traditional advocacy practiced by opposing counsel, in that representing the wishes of the parent, who is the client, may have overlooked the needs of the student. "They are representing their client, who is the parent, but the needs of the child are not foremost in their minds." Alex described attorneys as engaging in a form of legal

gamesmanship to further their own ends: “Attorneys are trained to litigate. They’re trained to be a little more cold-hearted and ‘objective’. They’re trained to use the law to manipulate the system to get what they want for their clients.” Some informants, such a Chris, a psychologist, viewed these tactics as overly aggressive: “Attorneys go for the jugular and attack the psychological.” Sheryl also had a negative view of the kinds of tactics she witnessed attorneys using in hearings: “Lawyers…trap people in their words; they’re comfortable in adversarial situations, grandstanding, bullying, coming down like a ton of bricks.” Finally, Robert described the attorneys as using tactics that he clearly felt to be inconsistent with his own values: “Lawyers would attack, intimidate, and browbeat witnesses under the guise of cross-examination, yelling. The tone was terrible, acrimonious. They made the witnesses feel that they didn’t know anything, didn’t know what they were talking about.”

Donald contrasted his sense of his own mission with the role played by the opposing counsel: “Our roles are different. My job was to show how clinically and educationally our decision is a valid one. His job is to refute and find fault.”

Several of the clinician-litigators described the opposing attorneys’ efforts to limit and shape the testimony of their witnesses to present the most favorable case, even if it meant omitting critical evidence that might have tempered their position. Consequently, the informants noted that parents appeared to follow a script they worked out with the attorney prior to the hearing. Brette’s observations were typical of the interviewees: “Most of the [Carter] parents keep their mouths shut. They have been prepped by their lawyers to say a particular thing and to present a particular view so that they can reach the aim that they have agreed they want.” Sylvia described how the Carter attorneys would also prevent their clients from responding to questions the clinician litigators posed:

> The attorney will not allow his client to answer but so much…You'll say, "Ms. Brown, but on such-and-such a date I offered you such-and-such a service, and you declined the service." And then she looks at her attorney, and her attorney answers for her. That was difficult.

Several of the clinician-litigators, despite having developed the ability to utilize lawyerly strategies and tactics effectively, expressed discomfort about using them. This was primarily because they felt that these kinds of techniques interfered with the hearing officer's ability to get a complete picture of the facts of the case in order to make the best possible decision on behalf of the child. They expressed the desire to focus less on technicalities and more on the "whole child." They expressed discomfort with the legal practice of excluding evidence, preferring to create a more inclusive picture. They expressed dislike for the legal practice of cross-examining witnesses aggressively with the intent of discrediting them, indicating that they favored an approach geared toward getting as much information on the table as possible. Essentially, they indicated that they would have preferred a hearing less focused on winning and losing, with a greater emphasis on having a balanced discussion of the facts of the case. Some tempered their approach, attempting to follow the principles of ethical advocacy in order to foster a full and unbiased consideration of the child's needs. For example, Robert would ask open-ended questions during cross-examination of the opposing witness in order to gain a fuller understanding of child's functioning in the private school. This approach contradicted a well-established principle of litigation, that during cross-examination the litigator should not ask a witness a question for which they did not know the answer.

In addition, several of the clinician-litigators reported experiencing an ethical conflict when they engaged in partisan advocacy, because this placed them in an adversarial position with the parents. Engagement in partisan advocacy also required them to discredit educational testimony on the part of the private schools, in contrast to their professional roles outside of the

legal arena, in which they would normally seek the input of all interested parties in order to gain as complete a picture of the child as possible.

Alex complained that the rules of engagement prevented him from utilizing his clinical skills: “You have to stand on the side you are representing. You can’t empathize with the other side. You present your case as aggressively as you can. But I didn’t want to confront parents. I felt like a bad guy.”

Clinician-litigators reported that they attempted to temper their approach to litigation, focusing on the child, rather than the local education agency, as their real client. Whereas some of the clinician-litigators hewed more to the principles of partisan advocacy and others held to a less adversarial, more clinical, approach, they all shared the desire to craft a hybrid approach that would both address the requirements of the law and work to meet the educational needs of the child. As a group, they favored an approach that would permit a full and unbiased consideration of the child’s needs.

Informants reported that in their case presentations, they attempted to create a narrative that would present a holistic picture of the child and convince the hearing officer of the child’s needs. They sought to include all of the facts of the case, which was a major shift from the defensive posture of simply defending the IEP against the attacks of opposing counsel. Rather than simply arguing that the IEP was legally defensible, they attempted to convey to the hearing officer that the proposed program would serve the best interests of the child.

Informants were united in the view that the child was their implicit client, even though, in fact, the DOE was their explicit client. Consequently, in their pre-hearing evaluation of cases to determine whether they were defensible, the clinician-litigators applied not just the test of whether they could win the case in a strict legal sense, but also whether winning the case would

be consistent with the ethical principle of acting in the child's best interest. They stated that they would not argue for a public placement if they did not believe it to be appropriate to the child's educational needs.

The tempered approach clinician-litigators used included a willingness to compromise, as opposed to tenaciously arguing their side of the case without consideration for the views of the other side. For example, Sheryl described how this influenced her legal arguments:

> I did not approach cases the way lawyers approach them, which is, "This is who I'm representing and I'm here to win, and I will do everything I can to prevail." I'm certainly willing to present to an impartial hearing officer in the best possible way [to win my case], but I'm also willing to consider other remedies that could be tried.

The clinician-litigators seemed freer to take a tempered approach to advocacy, partly because they had a different stake in winning than the parent's attorney; their livelihood did not depend on winning. This allowed them to do what they believed to be the right thing for children. Danielle described this position:

> Attorneys are motivated to win because…if they win, they get the money. On the other hand, educators are there to help and support kids, and the decisions they're making are not made on the basis of money. [The attorneys'] motivation is financial. Their motivation was not, as far as I'm concerned, to find the best service.

What is Winning?

Throughout the interviews, the clinician-litigators expressed the view that their intent in representing the DOE at impartial hearings was to make sure that the child who was the subject of the hearing received the appropriate educational services. They expressed frustration with the structure of impartial hearings, which was based on a legal model that they viewed as incompatible with their professional ethics. The essence of the problem, as they saw it, was that prevailing at the hearing could actually be deleterious to the best interests of the child.

The self-assessment of the clinician-litigators that their motives at impartial hearings were more beneficent than those of their adversaries ran through the interviews. They were clear that a win for them was a win for the student. They saw their primary responsibility as being to advocate for the welfare of the student. They contrasted their position with what they perceived as the frankly financial motives of the opposing attorneys. Sheryl's felt her ethical responsibility was to put the child first, a view consistent with those of all of the informants: "My role was to represent the Board of Ed, to defend its position. But I also had a personal and professional obligation not to do the wrong thing. I had a personal and professional responsibility to do the right thing for kids."

The clinician-litigators described their goal in hearings in contradistinction to that of the opposing attorneys. They felt that in the traditional legal model of advocacy, the needs of the child got lost. One informant, Danielle, observed:

> [The parent's attorney's] motivation was not, as far as I'm concerned, to find the best service…The attorney is there to win the case for his client who wants a particular placement. I don't think the question for the attorneys is, Is this the best placement for the child? I don't think that plays very much into their thinking. They're there to win the case. I don't think they would know whether one particular placement was better than another.

Similarly, Sandy expressed the opinion that attorneys do not exercise judgment about what is best for the child, merely what supports the parent's position:

> I think as a lawyer you're there to represent your client, not make a value judgment. You do the best you can to represent your client and the client's interests. The parent, I do believe, thinks that [their desired placement] is the best placement. But I do believe that the attorney is not there to make that decision. The attorney is simply there to support the parent's position.

Like many of the clinician-litigators, Alex felt that protecting the best interests of the child was far more important than winning the legal sparring-match. He framed his thoughts about this in terms of morality and conscience. This highlighted the difference between the

value-laden, clinically informed advocacy the clinician-litigators aspired to and the value-neutral style of advocacy dictated by the ethics of the legal profession: "He can go home and sleep. I couldn't. I could not be an attorney in that kind of setting. He had won the case, but, to me, he had lost the case, because you know the child was not going to [receive the proper services] because he had won the case."

In a similar vein, Donald stated: "The bottom line is [the opposing attorneys] want to win the case…I had different interests. If I wanted to win, it was really about providing appropriate services for the child." Taylor also expressed strong feelings about the difference between fighting to win a case and fighting to protect a child's interests. "For me, winning was when the kid got [the proper] services. That was the bottom line. Doing something to improve the lot of a child or the family—that's winning."

Several of the clinician-litigators expressed the concern that in the legal arena, the criteria for determining which side won may not have given due weight to the opinions of the clinicians who knew or had worked with the child. Jack amplified the same theme, noting that advocating for the parent's wish that the child be placed in a private school could be inconsistent with seeking the services prescribed by the clinical evaluation: "In my mind, winning is defined by making sure that the child receives the services that the clinical assessment says he should, which is totally different from how the attorney who was representing the mother would define winning."

Brette indicated the importance of giving more weight to the child's interests than to the parents' right to self-determination. She believed that her moral imperative was to ensure that the children receive clinically appropriate services: "Winning would be…where we really felt that justice prevailed because the parent's perception of what the youngster needed was so

outlandish that I was able to go to sleep at night and say, 'You know, we did something to protect this youngster.'"

Michelle touched upon a related theme, the ethical responsibility of clinicians to work hand-in-hand with parents to protect the best interests of the child. She recognized that winning a case in an adversarial manner could be a pyrrhic victory, because without coming together and finding common ground, the parents and the local education agency would not be able to coordinate their efforts on the child's behalf: "You want the parent and the CSE to work cohesively because even if you win…and the parent didn't approve, the parent can sabotage that decision …And then what happens? Do we go back to hearing again? Do we keep doing this to this child? That's when it becomes serious and bad."

Summary

A theme that ran through all of the interviews was the pervasive concern of the clinician-litigators that the win-lose adversarial nature of impartial hearings could cause the needs of the special education child to get lost in the morass of legal machinations. The clinician-litigators saw the problem as arising from the fundamental difference between the ethics of social workers, psychologists, and educators, on the one hand, and those of the legal profession, on the other. Whereas the clinician-litigators saw their calling to protect the welfare of the child who was the focus of the dispute, they saw their opponents motivated primarily to win, regardless of whether doing so was in the student's best interest. Throughout the interviews, the clinician-litigators reported finding themselves in the uncomfortable position of having acquired the knowledge and skills to do battle in the legal arena, but experiencing this role as inconsistent with their professional values.

The concerns expressed by the clinician-litigators raise serious questions about whether the current design of impartial hearings is the best or most appropriate model for resolving disputes about the educational needs of students. A question the informants consistently voiced was whether students' needs might be better served by an impartial hearing process or an alternative dispute resolution mechanism based not on the traditional model of legal advocacy but on the principles of ethical advocacy.

These ethical concerns have broader implications that touch on several social policy issues of today: the intent of special education law to promote students' access to a free and appropriate public education; the current movement promoting the privatization of public education services; integrated versus segregated schools; distributive justice; and the forces that undermine social solidarity. The following chapter will discuss these issues.

CHAPTER VIII: POLICY ISSUES

Introduction

The clinician-litigators demonstrated a working knowledge of the law and legal procedures and proved adept at arguing cases. In contradiction to the findings of the Hehir report (2005), they distinguished themselves as capable litigators. They demonstrated knowledge of New York State and federal regulations and the educational implications of the law for children with disabilities. They knew how to access relevant case law and described in detail the different facets of case preparation and presentation.

Despite their proven ability to represent the Board of Education and win favorable judgments from hearing officers, many experienced conflicts when adhering to the rules of traditional advocacy; they viewed this approach as antithetical to the ethical guidelines of social work, psychology, and education. They were particularly troubled by the rules of evidence, which tended to narrow rather than expand the hearing officer's understanding of the child. They also expressed concerns about the suitability of individual hearing officers to resolve educational disputes. A primary concern was that the hearing officers appeared to be biased against the local education agency. In addition, as lawyers, the hearing officers seemed more oriented toward judging compliance with laws and regulations than evaluating clinical and educational data.

The clinician-litigators saw the impartial hearing process as inherently flawed; they did not believe it was the best mechanism for resolving educational disputes to address the needs of children. Some wished there could be a system of dispute resolution that was not based on a model of traditional advocacy. Instead, they wanted a system informed by the principles of ethical advocacy. Such a system would require the hearing officer's role to shift from deciding

winners and losers to bringing the opposing sides together to discuss the needs of the child. They felt that for the impartial hearing officer to do this successfully, he or she would need specialized knowledge of clinical and educational matters beyond their legal training.

Overall, the informants believed that they were able to work on behalf of children more effectively when they did not adhere to a strictly adversarial stance. Whenever possible, they attempted to collaborate with parents to problem-solve and resolve issues. They were more able to do this when the parents' complaints concerned service delivery as opposed to private placement issues. Many informants described themselves as better negotiators than the attorneys, because they were familiar with the educational service delivery system. This helped them assist parents negotiate the various subsystems within the organization. Further, their clinical training and tradition of collaborating with parents to design educational programs contributed to their desire to develop cooperative relationships to address the needs of the children.

Nonetheless, the informants reported that they were thwarted in their desire to work supportively with parents when they represented the Board of Education in Carter cases. They described the parents who were seeking tuition reimbursement as uninterested in creative problem-solving or negotiated solutions. However, they indicated that their clinical knowledge and skills informed their work representing the Board of Education. Many attempted to argue the cases in a manner that expanded a narrow focus on procedural issues to a more comprehensive approach that addressed the nuances of the child's needs.

A prevalent theme in the interviews was that the clinician-litigators did not experience their legal role as foreign. In their previous role as Committee on Special Education (CSE) review team members, the informants were well versed in the legal requirements for developing

defensible educational programs. In addition, when conducting individualized education program (IEP) meetings, they had learned about lawyerly comportment. Several expressed the opinion that the impartial hearing process actually began during the IEP meeting, since many parents used the review process to lay the groundwork for their legal cases. Consequently, they had to learn how to avoid the verbal traps parents would set for them. They became adept at selecting their words very carefully so as not to inadvertently abrogate any of the parents' legal rights, which would have given ammunition to the opposing counsel.

Despite their ability to negotiate the legal arena and win cases, the clinician-litigators had ethical concerns about the impartial hearing process, especially its adherence to the model of traditional advocacy that focused on legal protocol and downplayed matters of substance. They perceived the rules of evidence as restricting the information made available to the hearing officer to consider. They described the traditional model of legal advocacy as geared more toward discrediting evidence supportive of the opposing side than seeking a fair and open consideration of all the data. They characterized this situation as inconsistent with their clinical traditions of seeking the richest possible understanding of the students' needs. In addition, they found that the adversarial model undermined their professional relationships with the parents, thereby preventing them from working cooperatively with them on behalf of the best interests of their children.

This chapter presents the observations and opinions of the informants in the context of the formulations of several scholars in the field of educational dispute resolution, proposing new ways of conceptualizing the dispute resolution process according to the principles of ethical advocacy. There are far-reaching implications for broad societal issues, such as the intent of the federal special education law; prejudice against public services; integration versus segregation;

privatization of education; social solidarity; and the very principle of distributive justice, which, by specifying the fair distribution of resources to ensure equality of opportunity, is the underpinning of an equitable society.

Conflicts between Traditional Legal Advocacy and Ethical Advocacy

An overarching theme that emerged from the interviews was the fundamental conflict between the professional ethics of social workers, psychologists, and educators, and the ethics of the legal profession. Clinical traditions were geared toward bringing the parties together for a full and open discussion of all the facts of the case. In contrast, impartial hearings were a contest between two competing views of the truth. The informants found themselves frustrated with how the trial format of impartial hearings restricted the range of facts they could make available to the hearing officer to consider. The central problem with impartial hearings concerned the split in the legal profession's view of the place of facts and truth in the resolution of disputes.

The fundamental principle of the adversarial system is that the opponents each present their own version of the truth to the fact finder, such as a judge or impartial hearing officer; this person considers and weighs the testimony of both sides to arrive at an accurate and objective truth (Murray, 1995). Central to this notion is the assumption that each of the partisan presentations will be skewed in an attempt to gain advantage in the competition. However, Rosenbaum (2004) argues that in considering competing versions of the truth, the legal system fails to achieve just solutions to disputes, because the discrete facts that are admitted into or excluded from testimony do not encompass the full truth of complex human situations that the fact finder is attempting to understand.

Similarly, Aiken and Wizner (2003) point out that the professional ethics of lawyers free them of the obligation to address the ethical dimensions of the positions they are arguing. They

must simply attempt to convince the decision-maker of the rightness of their client's position; it is the decision-maker who bears the responsibility for weighing the moral issues. This contrasts with the ethics of professions such as social work, which require practitioners to attend to the human costs and benefits of the issues to be decided in dispute resolution (NASW, 1996).

The amoral aspect of the lawyer's role in arguing the case from his client's perspective is highlighted by Rosenbaum (2004). The emphasis on conveying facts that bolster each side's position disregards the larger truth and results in a subversion of the moral aspects of the case. "In every legal action there is always a winner and a loser…[but] victory is not synonymous with justice" (Rosenbaum, 2004, p. 20).

The informants expressed strong opinions about how the impartial hearing process was consistent with the legal profession's emphasis on the facts supportive of the client's position at the expense of substantive, clinical matters. Many informants expressed frustration with this situation and noted the ways it undermined the fact finder's ability to get a comprehensive picture of the student's educational needs.

Sandy, an educator, questioned the value of arguing cases in terms of procedural issues, because doing so failed to consider the child's needs: "The attorney used the knowledge of how the system works, and what paperwork must be done in what timeframe, and what must be signed, and what was omitted from the IEP, looking for the little niches…[but] what was the best interest of the child?"

Others, such as Jack, lamented the lack of discussion of clinical issues, opining that attorneys emphasized process over substance partly as a way of manipulating the hearing to increase their chances of winning, and partly to avoid discussing clinical and educational matters beyond their understanding:

> We never talked about the individual child in terms of his goals. Substantive issues just did not come up. The attorneys couldn't bring them up, because they're not clinicians, like goals addressing why Johnny can't read. My primary responsibility was convincing the hearing officer that we did nothing wrong, not talking about whether Johnny is retarded or has Asperger's. They don't care about that. They're just trying to say we did not do the right thing procedurally. But an attorney and a parent are actually working at a disadvantage, because they are not clinicians. There are advantages to being a psychologist at a hearing, from the point of view of understanding what the case is really about and whether the CSE did the right thing. With my history at the Board of Ed, I know a lot.

The consensus of the clinician-litigators was consistent with Rosenbaum's position. They saw the legal approach to dispute resolution, with its emphasis on procedure over substance, as essentially amoral; it was more about winning than understanding and addressing the child's true needs. If the clinician-litigators were prevented from bringing their clinical expertise to bear on the case, it deprived the hearing officer of essential information; this ultimately hurt the child. Most advocated for a method of dispute resolution based on the principles of ethical advocacy, which emphasizes consideration of client perspectives (Dodd & Jannson, 2004, p. 459), suggesting that it would produce fairer results than the current adversarial system of impartial hearings.

The Rules of Evidence: A Problematic Aspect of Traditional Advocacy

The clinician-litigators identified several problems with the current design of the impartial hearing process. Their central concern was that the rules of evidence and the strategies and tactics utilized in traditional advocacy served to narrow, rather than expand, the hearing officer's understanding of the educational needs of the child. This was a particular problem in Carter cases, since traditional advocacy is well suited for achieving financial awards. However, the rules of evidence tended to work against efforts to better understand children's needs and determine how best to address them. The attorneys' attempts at discrediting the opposition overwhelmed the clinician-litigators' efforts to address the best interests of the child.

Tactics that utilize manipulation and persuasion to induce change have been called "campaign tactics" (Brager & Specht, 1973). These involve telling lies of omission or commission, slanting the presentation, and playing to the emotions of the target audience. Others, such as Gardner (1998), point out that an adversarial position encourages selection of the facts that will make the most appealing argument. This encourages withholding the truth. Obfuscation, presenting misleading evidence, distortion, and similar tactics produce a narrow story (Rosenbaum, 2004). Social workers and other clinicians, in contrast, were trained to follow an approach that includes all pertinent information (Gardner, 1998).

One of the main ways that the exclusionary rules of evidence affected the impartial hearing process was how witnesses were examined and cross-examined. Questions were phrased in such a way as to elicit certain kinds of responses and to exclude others. Advocates, including the clinician-litigators and the opposing attorneys, elicited testimony with a particular slant. For example, advocates would pose questions to prevent witnesses from providing answers that would go beyond narrow, circumscribed responses. The clinician-litigators frequently mentioned the difficulty of crafting questions that would help them obtain clinically relevant answers from their witnesses. Gayle remarked:

> It's how you ask the question…to get the answer you're looking for…The opposing counsel will object…So how else do I ask this question? Where's the legal way of turning this question around so I can get what I'm looking for? That's a frustration. No matter how clinically well trained I may be, there's a whole clinical piece I can't even get to present.

Similarly, Sheryl expressed concerns with the rules of questioning and answering. She believed that it interfered with getting at the truth of the matter:

> I just personally did not like to be in a courtroom situation because of the way the information had to be revealed, because of the way questions had to be answered, because you could only respond in the way the question was posed, which may or may not represent correctly what I think happened.

Danielle described the frustration of going up against attorneys who would seek to disallow her questions. This strategy kept essential facts from being introduced into testimony. As a clinician-litigator, she was enjoined from testifying directly about her knowledge of the child, and therefore was unable to make clinical data available to the hearing officer for consideration:

> I wasn't the one presenting the information. I was the one asking. And, unfortunately, you're in less control as to what [your witnesses] say and how they say it. So I may not have asked it in the right way…I might not have been able to elicit the kind of information I needed because I'm not an attorney and I didn't know how to phrase the question…So there's a difference between being an expert and knowing what to say and how to say it.

Many of the informants provided illustrations of how the legal process kept important clinical information from consideration. This situation could flummox them. As Alex described:

> It's a legal battle. I never felt it was a clinical or an educational thing. It really became, like, what was this parent entitled to, why didn't you send the letter out on time, what the parent didn't understand about her due-process rights. It never really focused on clinical stuff for the most part…Mostly it was procedural stuff…We couldn't argue some of the nonsense that was brought out.

Similarly, Sheryl felt that the legalistic, process-oriented approach prevented her from engaging in a discussion of the broader, substantive issues affecting the child's welfare: "I really had to think about…what was the right thing to do for a particular child or family. But a hearing is not really about these kinds of negotiations or considering these kinds of possibilities." Most poignant of all was when the culture of the hearing process kept informants from promoting an understanding of a child's needs. Danielle felt she lost cases based on procedure, not on her expert knowledge of a child's circumstances.

Some legal scholars assert that it is impossible to obtain fair testimony from a witness (Wellman, 1997). Beyond specifying the ways questions could be posed to witnesses and the ways witnesses could answer questions, the rules of evidence called for exclusion from

testimony of vast swaths of information pertinent to understanding a child's educational needs and the local education agency's proposed placements and interventions. This situation was most apparent when the informants argued Carter cases.

To summarize, in Carter cases the law considers three main aspects of the placement in dispute (*Burlington*, 1985). The first, Prong I, examines whether the local education agency produced a legally defensible individualized education program (IEP) in compliance with all applicable laws and regulations. The second, Prong II, evaluates whether a parent's proposed remedy for not receiving an appropriate placement from the local education agency (the private school) adequately addresses the child's needs. Finally, a third component, Prong III, assesses whether the parent followed all applicable laws and guidelines in good faith when seeking the private placement (*Burlington*, 471 U.S. 359 [1985]).

From an evidentiary standpoint, the three-pronged structure of Carter cases presented serious problems for the clinician-litigators. Specifically, if the Board of Education failed to provide an appropriate IEP in compliance with all relevant laws and regulations, the clinician-litigator or attorney representing the Board of Education would concede Prong I. In this scenario, the parent would only need to demonstrate that their proposed private placement was not inappropriate; *Carter* established a much lower standard for unilateral parental placements than for public programs. For example, the Carter placements are not required to provide individualized instruction as specified on the IEP, to group students functionally, to provide the least restrictive environment, or to provide licensed teachers.

Because of this peculiarity of the law, opposing counsel has a strong interest in undermining the Board of Education's Prong I case. This contributes to the paradoxical outcome of the parent's winning tuition for a private placement that may be inferior to the proposed public

placement. Several of the clinician-litigators noted that although a parent might have won the case and gained the right to place the child where he or she chose, in actuality the child lost. This was an unanticipated consequence of a system where the guidelines elevated the rules of sparring, including "story-spinning and manipulation" (p. 20), and devalued issues of truth, justice, or morality (Rosenbaum, 2004).

The perception of the clinician-litigators was that the three-pronged structure of Carter hearings and the rules of evidence served to manipulate, distort, and restrict the aspects of the truth made available for consideration by the impartial hearing officer. The clinician-litigators expressed concern that children were routinely deprived of the benefit of a full and comprehensive consideration of their educational and clinical needs.

Is the Impartial Hearing Officer the Person Best Suited to Resolve Educational Disputes?

Beyond questioning the appropriateness of the impartial hearing process itself, the clinician-litigators voiced doubts about whether the impartial hearing officer was the person best suited to resolve educational disputes. This concern sprang from three characteristics of impartial hearing officers. The informants thought that the hearing officers were biased against the local education agency in favor of parents and private schools. They felt this bias led hearing officers to ignore the clinical arguments that were central to the position of the local education agency. They were also concerned that, since the hearing officers were attorneys and their mandate was to adhere to the rules of engagement and referee the rules of evidence dictated by civil procedure, they were more oriented toward evaluating compliance with laws and regulations than carefully considering clinical and educational testimony. In addition, the clinician-litigators felt that the impartial hearing officers lacked the educational and clinical expertise to make sound educational decisions.

Although no fact finder can be completely objective, some fail to keep their personal biases out of the decision-making process. Haydock and Sonsteng (1994) note that "many fact finders selectively listen for evidence that supports their initial inclination or position…Evidence that does not support their position is rejected, disbelieved, rationalized, forgotten, or not even heard" (p. 18). In educational disputes, this may take the form of favoring private over public schools:

> Hearing officers too readily accept the assumption that private schools offer programs that are superior to those of the public school system…[They] tend to question the testimony of employees of the local education agency more critically than that of witnesses brought by the parents, which they seem to accept more readily (Budoff & Orenstein, 1982, p. 196).

Many informants indicated that they perceived bias in the hearing officers against the Board of Education. They reported that this made it difficult for them to advocate effectively for what they believed to be the best interests of the child. Some noted frankly derisive, demeaning behavior on the part of the hearing officers toward them. Gayle described what it was like to argue a case before some hearing officers:

> I could see the impartial hearing officer rolling his eyes as I was attempting to cross-examine. It was like, "Okay, can we get this over with so I can rule and move on to the next case?" The hearing officers were prejudiced against the Board…It would manifest in attitude, subtle and not-so-subtle…[Some] would ask very loaded questions, very hostile questions.

In a similar vein, Jack described his observation that some hearing officers failed to maintain a stance of fairness and neutrality. He noted that some of them addressed the representative of the Board of Education in a hostile, challenging manner: "Sometimes the hearing officer could be an adversary, too. Impartial hearing officers are not always impartial."

A manifestation of hearing officer bias noted by several of the informants was the failure of some hearing officers to adhere to the New York State regulation that hearing officers must

base their decisions on substantive grounds and not cite procedural inadequacies except when they impeded the parent's opportunity to participate in the decision-making process (*New York Regulations of the Commissioner of Education, 8NYCRR § 200).* They expressed concern that this caused significant testimony about children's academic functioning to be disallowed, resulting in a skewed and inadequate picture of their educational needs.

Particularly frustrating for the clinician-litigators was their view that many of the hearing officers espoused the notion that parents knew their children better than any professionals or educational experts. They saw the hearing officers dismissing or diminishing the importance of psychological tests and clinical expertise. This tendency on the part of the hearing officers violated two key principles: judicial deference and presumptive validity. According to the principle of judicial deference, judges should defer to professionals in their areas of expertise (Turnbull et al., 2001). The principle of presumptive validity, as expressed by the Supreme Court in its decision in *Parham v. J.R.* (1979), concluded that judges should consider the opinions of professionals to be presumptively valid. In *Parham*, the Court indicated that the lower court should have accepted the opinion of a psychologist that a student needed to be involuntarily committed to a mental institution for observation and evaluation:

> [There] is no reason to think judges…are better qualified than appropriate professionals in making such decisions… For these reasons, the decision, if made by a professional, is presumptively valid; liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment…

The principle of presumptive validity does not imply that the opinions of professionals employed by the local education agency are immune from scrutiny. What it does mean is that the professionals should be presumed to have rendered sound opinions about the child unless proved otherwise by the parents or their attorney. This is in direct contradiction to the

experience of the clinician-litigators, who felt they and their professional witnesses were on trial and presumed guilty of malfeasance. As Alex observed: “Most of the hearing officers seemed to come in with preconceived notions that the Board of Education was doing injustices to the kids. They were very willing to give the parents what they wanted.”

Gayle questioned whether the hearing officers had sufficient knowledge about educational or clinical matters to make fair judgments in these disputes. Many informants shared her concern: “I’m not sure if the impartial hearing officers were truly impartial. I don’t know how much understanding they had of the clinical piece.”

The qualifications to be an impartial hearing officer specified in IDEA shed light on the informants’ concerns about whether the hearing officers possessed the requisite educational knowledge or expertise. According to IDEA,

> The hearing officer must possess knowledge of the IDEA statute, regulations, and federal and state case law; possess the knowledge and ability to conduct hearings in accordance with appropriate, standard legal practice; and possess the knowledge and ability to render and write decisions in accordance with appropriate, standard legal practice (20 U.S.C. §1415(f)(3)(A)).

However, IDEA is silent on the issue of hearing officers’ need to have knowledge of educational or clinical matters pertinent to resolving educational disputes.

Societal Implications of the Adversarial Model of Impartial Hearings

The consensus of the clinician-litigators was that the impartial hearing process needs to be overhauled and restructured to align with the principles of ethical advocacy. Throughout the interviews, the clinician-litigators expressed concerns that the current system of dispute resolution causes damage to the public school system, and ultimately, to core principles that hold together the fabric of a fair and democratic society.

On a practical level, several informants expressed concerns about the fiscal damage being done to the public schools by impartial hearings, because of the high costs associated with supporting the impartial hearing process and from paying the exorbitant private-school tuition ordered by the impartial hearing officers. On a deeper level, the informants saw paying private-school tuition as undermining the principles of equity and integration; they saw the flight to private schools the result of a segregationist mentality that undermined support for the public schools as institutions designed to serve all students. They found this symptomatic of the current trend toward privatization of public services, of which charter schools are a prime example. They felt the diversion of public funds to private institutions undermined support for the principle of distributive justice, which is the basis for governmental policies designed to ensure the equitable allocation of resources in society (Rawls, 1973).

Doug described the fiscal consequences of diverting public monies to pay private-school tuition. He felt that the loss of resources would damage public programs and encourage more parents to seek placements for their children in the private sector:

> More money will have to be siphoned from general education [to pay the private-school tuition awarded by the hearing officers]. The impact will be less services for the general education students, budget cuts, and teacher layoffs. The more resources are taken from the public schools, the more the public schools will deteriorate and parents will go to bat to get their kids into private schools. Public schools will be seen as the option of last resort. Society will view public schools in a negative light.

Sheryl remarked on the loss of human capital when students from privileged backgrounds were granted private-school tuition: “Many of these kids were bright and creative, and had so much to offer the public schools. They could have made a positive contribution to the educational environment.”

The informants saw parents' attempts to win tuition reimbursement as based on prejudice against the public school system, and the belief that this prejudice justified gaming the system to win monies, even if under false pretenses. Gayle spoke for several of the informants when she described the parents using special education concerns as a cover for their desire to place their child in private school:

> These parents wouldn't have placed their kids in public school under any circumstance, so they found a way for the public school system to pay for their private school placement. They couldn't get their kids into the first-tier private schools, so they chose the second-tier schools that are known for suing the Board of Ed for tuition. And then they sued to get the public to pay for a private-school education. And these are basically general-education kids who would have had to pay out of pocket if they went to one of the first-tier schools, but their parents know how to game the system and get the public to pay.

In particular, Robert saw the Carter parents as privileged people who used their resources to hire attorneys to win public funds to pay the tuition that should have rightfully come out of their own pocket: "The Carter parents were basically upper middle class to upper class parents who had money and could hire lawyers to get their kids into whatever school they wanted to get them into." Ironically, he expressed the belief that during the current economic downturn, many parents were using the impartial hearing process to win tuition monies that they might have paid themselves when the economy was more robust. "In a recession, [tuition] monies may not have been available to parents, so I think more and more of the parents are turning to the public schools [to get money for private-school tuition]."

Sandy spoke for several of the informants when she expressed concern about the high cost to the public school system of impartial hearings:

> Impartial hearings are very, very expensive. Bringing teachers [to testify] and paying a sub is paying double. You have a day when I should be doing whatever I do as a supervisor, and I'm not doing it. My salary for the day is there [in the impartial hearing office]. The money that is being spent [on testimony could have

> been spent on] something else… The taxpayers are paying for this…unnecessarily, if we have a program in the Board.

Danielle was concerned that diverting public funds to pay private-school tuition hurt the less-privileged students who attend the public schools: "I resent it, because I know that there are a lot of kids who aren't getting things that they need in the city schools, because there are less funds to go around, and this has become a very expensive proposition."

Taylor discussed the moral issues entailed in using public funds to support competing private institutions:

> [The Board of Education] provides these services, has the monies to do so, and these parents were standing in the way of that for other children by taking money that they're really not entitled to out of the system. And to pretend that they want to use public services so that they can take the money and place their child in a private school is just so dishonest, such a violation of morality…We were part of this whole effort to combat the sapping of public monies for nonpublic schools for primarily an affluent population. That's how I saw my role, to assist the Department in freeing up some of that money to be used for children to access needed services.

Several of the informants viewed the culture of impartial hearings as validating Carter parents' prejudice that private is better than public. They saw this as part of a broader trend of eroding support for public institutions, a movement toward elitism and segregation. Alex expressed strong feelings about the motives of these parents:

> These are parents that, twenty years ago, would never have come to the DOE for services, they would have figured it out on their own. They would have sent their kids to Dalton or whatever. And the kids would have done just fine. Now they've found a way to get these kids labeled and get part of their tuition paid for, and I think it's just appalling that they do this. They place their kids in programs that have like-minded parents so it becomes a kind of ghettoized situation. These are generally White middle class parents that are doing this. And I think it really has to do with social strata more than education. Their kids are going to be in an environment where they're going to get instruction with other kids just like their kids. What they don't have in those programs is an opportunity for mainstreaming, which is in the federal and state law. So why do they want it? For snobbism. For exclusion reasons. For selectivism.

Taylor also expressed the belief that social class prejudice and racism underlay the desire of some parents to place their children in private schools:

> The children should be in a typical setting, a normal setting, interacting with their peers, unless they require separation. That's what public school is all about, interacting with a diverse group of people from our culture. These were parents who would never have placed their child in a diverse public school that included youngsters from dissimilar social and racial backgrounds.

Gayle indicated that placing students in settings that were segregated by race and social class sent a very negative message: "A big part of education is preparing students to live in society, to be able to interact with people from all walks of life. Placing them in private schools teaches them to be afraid of the masses."

Using impartial hearings to sue for private-school tuition hurt the public school system not just by taking money out of the public schools, but also by contributing to the perception that public schools were inferior to private schools. This theme ran through the interviews. The informants saw this weakening the public schools and fracturing social solidarity, creating a society segregated by class and race. Alex's observations were typical of several of the informants:

> They say the DOE programs are no good. They're pulling a lot of middle class kids out of the Department of Ed schools and putting them in private schools, which continues the perpetual separatism that goes on in big cities like New York and Los Angeles and all these big cities. It just appalls me as a citizen. It's just not right. And then the DOE gets the short end of the stick and gets beaten up all the time: "You're doing lousy, you're doing lousy, you're doing lousy." These parents aren't even willing to send their kids to DOE programs. The Carter schools pander to the needs of these perfect middle-class families who would rather have their kids in private school, with kids like their own. You know that that's true.

Several informants described how granting tuition for private schools contributed to the perception that public schools were inferior to private schools. Robert remarked: "When a

parent wins tuition, it sends the message that the public school can't meet the needs of the student." Gayle expressed frustration that this caused people to have a biased perception of the public schools that prevented the community from accurately judging the quality of the public programs: "We have wonderful programs in the public schools, and they can meet the children's needs, but the word is out that private is better."

According to the theory of organizational equilibrium (March and Simon, 1993), the survival of any organization, such as the public school system, is dependent on the continued investment of those who use the services it provides. Parents of students attending public schools have an interest in the schools' receiving adequate funding to maintain a good quality of service, whereas the parents of students who attend private schools are less likely to endorse paying taxes to support the public schools. Some of the informants expressed concern that as more and more parents, especially those of the middle class and above, were granted private-school tuition by impartial hearing officers, there would be less political pressure to maintain adequate levels of funding for the public schools, especially in an era of diminishing resources.

Impartial hearings are one of the cornerstones of the Individuals with Disabilities Education Act (IDEA), because they provide parents with a mechanism for pursuing their due-process rights. Ironically, the perceived practice of readily granting tuition for socially and racially segregated private schools caused several of the informants to view the impartial hearing officers as undermining the intent of the law they were charged with upholding. IDEA was written with the express intent of promoting inclusion, allowing handicapped children to participate in the mainstream and no longer be segregated as they had been historically. Yet the informants saw impartial hearings used as tools to remove students from the mainstream and to

segregate them, based not on educational need or clinical imperative, but on parental preference and prejudice.

The informants noted that the trend toward using impartial hearings as a way of winning public monies to pay for private-school tuition has accelerated due to two recent Supreme Court rulings, *Forest Grove Sch. Dist. v. T.A.* (2009) and *Board of Education of the City School District of the City of New York v. Tom F.* (2007). In each of these cases, the Court affirmed the right of parents to place their child in a private school without first trying a public placement. Several of the informants expressed concern that these two rulings made it easier for parents to secure private placements. Michelle described how parents would use these rulings to their advantage: "The parents have a specific school in mind, and it's not a public school. It's a private setting that they want, and no matter what you say, it doesn't matter. It's 'I want what I want, and [I'll make the case that] you're not going to be able to offer me an equal education.'" Brette noted how these rulings empowered parents to sue the DOE for private-school tuition when it was not warranted: "What these parents were asking for was not reasonable. They weren't trying remedies that could have been tried, namely public schools, before going on to more expensive options, that is, private schools."

Several informants noted that the impetus to seek public funding for private schools related to the larger issue of privatization of social services; in the educational sphere, this has led to the establishment of charter schools, which are publicly funded private schools. They remarked that charter schools, like Carter schools, take large amounts of money from the public sector and contribute to the impoverishment of public schools. They also questioned the ability of the charter schools to serve handicapped students in an inclusive manner, cherry picking their student populations, and leaving those who needed intensive services to the public schools. The

informants described the charter school movement as based on the principles of competition and choice, which served to rationalize moving money from the public sector to the private. Jack felt that using public funds to support private schools, be they Carter or charter, damaged the public schools:

> By using public monies to place kids in private school, you're creating two systems, one for [the children who attend the private schools] and one for the regular kids. We shouldn't be paying for the private schools. The emphasis should be on providing the right education, not paying the money to private schools.

The movement in the latter part of the twentieth century to pass laws guaranteeing the right of handicapped individuals to a public education was born of the principle of distributive justice (Rawls, 1971). The cornerstones of the modern special education movement, PL 94-142 and the Individuals with Disabilities Education Act, explicitly established the rights of students with disabilities to be integrated into the mainstream to the greatest extent possible. The provision of special education services in the public schools, usually in settings that permitted handicapped students to interact with non-handicapped peers, required the investment of large sums of money, some of which was reallocated from mainstream programs. The underlying assumption of these laws was that all would benefit from a more equitable and integrated system.

The clinician-litigators noted the supreme irony of parents using the impartial hearing process, a right granted by IDEA, to undermine the very intent of that law. Whereas the law was designed to permit access to educational services in the least restrictive appropriate environment, parents were using the law to seek placements in highly restrictive, segregated environments. Carl described this situation: "These Carter Country parents are out of the system. They just see the system as a way to recoup some money. Most of the Carter parents did not rely on public

education, but they are increasingly relying on IDEA—a public education law—to get them tuition reimbursement."

Although impartial hearings were established as a mechanism for resolving disputes about the most appropriate education for handicapped students, Michelle noted that many Carter parents did not engage in good-faith discussions with the DOE prior to going to hearings. She felt the Carter parents were not interested in coming to a mutual agreement about the prescription for educational services, preferring to have an adversarial impartial hearing where they could use legal maneuvering to extract financing for the private schools they had chosen for their children:

> Certain parents are not interested in having a conversation with you. They are only interested in that hearing where they get awarded their tuition. So they don't want to talk to you. They don't want to make it better. There were times when you would call the parent, not knowing that there was representation by counsel, and the parent would say, "Talk to my lawyer, don't talk to me," and then hang up. Well, who was the lawyer? They'd never even tell you who the lawyer was. Unfortunately, there's a large group of such parents.

Although IDEA established the right to a free and appropriate public education, the Carter parents were using the law to win private-school tuition. Brette spoke for several of the informants when she remarked that the impartial hearing process had contributed to the private schools' becoming increasingly dependent on public money: "Suing the Board for private-school tuition is big business now. The private schools count on the [public] money. The Board of Ed pays for their students. It's a big deal. It's outrageous, and it's also lining the pockets of the attorneys." Robert amplified this theme, noting how many of the private schools advised parents how to use the impartial hearing process to gain tuition: "These Carter schools don't operate under free and appropriate. They're private schools charging tuition, and then they tell the parents to sue to get the money back."

Summary

The observations of the clinician-litigators point up how the impartial hearing process undermines the principle of distributive justice. Their comments, often quite impassioned, bemoaned the negative consequences of the quest for private services on public education. Informants saw the ill effects on individual children who were being segregated and deprived of the opportunity to participate in the mainstream and interact with a cross-section of their peers. They underscored the destructive impact on social institutions of stripping funds from the public sector, giving voice to prejudices against public services, and undermining social solidarity. In summary they described the corrosive effect of seeking private services at public expense.

Fortunately, there has been an increase in public awareness of the costs that private schools and impartial hearings have exacted. Mayor Bloomberg, himself a proponent of privatization, especially through his effort to vastly increase the number of charter schools, remarked to WNYC (2011) that the city spends $100 million dollars annually to educate some 4,000 students in private schools. In the same interview, he noted that those students could be educated in the public system at a fraction of the cost. Similarly, articles in publications such as *The Wall Street Journal* ("Wealthy Seek Special-Ed Cash, *The Wall Street Journal*, August 18, 2010) have noted that the numbers cited by Bloomberg had more than doubled between 2007 and 2010. The article quotes Michael Best, general counsel at the DOE, as saying, "No one begrudges parents the right to send their children to private school. But this system was not intended as a way for private school parents to get the taxpayers to fund their children's tuition" (Martinez, 2010, p. A19).

The interviews with the clinician-litigators illuminated how far the public system has strayed from the original intent of the Individuals with Disabilities Education Act (IDEA) and

weakened the application of the principle of distributive justice, a cornerstone of a fair and equitable society. The study raises serious questions about the impartial hearing process. Because it rests on the principles of adversarial advocacy as opposed to ethical advocacy, it does not appear to serve the best interests of students or the social ideals that the federal special education law was intended to uphold, and encapsulate some of the key philosophical issues we are struggling with as a society today.

CHAPTER IX: PRACTICE, POLICY, AND RESEARCH IMPLICATIONS

Practice and Policy Implications

This research was an exploratory study of the experiences of clinician-litigators representing the New York City Board of Education at impartial hearings. It opened up a new area of investigation, because there are limited studies about the experiences of clinician-litigators. The research was informed by my experiences as a social worker working as a clinician-litigator, but I approached the study without any preconceived notions about where the research would lead. The only influence my familiarity with the field had was to sensitize me to the concerns raised by the subjects.

Using a qualitative research approach in the phenomenological tradition, I designed a semi-structured, open-ended questionnaire to elicit the subjects' experiences as clinician-litigators, including their opinions, conflicts, and concerns. Their responses coalesced around several themes that provided a rich picture of the informants' experiences and revealed topics ranging from ethical issues in educational advocacy to the larger social policy issues that create the context for impartial hearings.

Several key themes emerged. The clinician-litigators described themselves as able to fulfill the requirements of their role as district representatives, but they experienced role conflict when they moved away from their traditional clinical role. The most difficult aspect of this role change was shifting from working cooperatively with parents on behalf of their children to opposing them in adversarial hearings. Parents who had previously been their clients could become their accusers. The parents and their attorneys portrayed the children as victims of the school system.

The adversarial nature of the hearings prevented cooperative dispute resolution. The clinician-litigators believed that an unintended consequence of the impartial hearing process was that parents used adversarial approaches less to focus on the child's educational needs and more to win cash awards. The central problem they faced was that the principles of traditional adversarial advocacy adhered to by the legal system used legal procedure to exclude evidence that by the hearing officer could have used to reach a just conclusion about the educational needs of the child. The clinician-litigators favored a system of dispute resolution based on the principles of ethical advocacy, which would allow for consideration of all the facts of the case. This is a central aspect of the ethos of the professions of social work, psychology, and education.

In addition to identifying the problematic nature of adversarial dispute resolution, the informants also brought to light several larger social policy issues that have direct bearing on the impartial hearing process. Whereas the intent of the Individuals with Disabilities Education Act was to include educationally disabled students in the mainstream with non-disabled students, in impartial hearings parents were exercising their right to self-determination to seek tuition reimbursement for private-school placements. The informants saw this as sabotaging the students' right to participate in the mainstream and undermining principles of social justice that have been pillars of our democratic society. These included the virtue of integration and the social benefit of distributive justice, which levels the playing field and promotes equality of opportunity. The use of impartial hearings to seek private-school tuition emerged as a microcosm of the broader social debate on privatization of public services.

There was remarkable consensus among the informants about the implications for practice. Overall, they agreed that the current adversarial system of dispute resolution was harmful both to students and to society. They made a strong case for redesigning the impartial

hearing system to make it less legalistic and adversarial and more consistent with ethical advocacy. Their responses implied that clinicians should play a greater role in dispute resolution, and attorneys should play less of a role.

The problems with the adversarial dispute resolution process suggested that the impartial hearing process as currently structured is inherently flawed. The adversarial model of legal maneuvering geared toward winning or losing large cash settlements should be superseded by one oriented to a comprehensive consideration of the needs of the child and a cooperative process of determining the most appropriate educational interventions to address those needs. This would entail less focus on procedural matters and more concentration on the substantive issues of the case.

Congress enshrined in law the right of parents to utilize an impartial hearing process to resolve educational disputes. This was based on the belief that an adversarial process was the best mechanism for obtaining a fair outcome (Goldberg & Kuriloff, 1991). However, the wisdom of this choice is questionable. Throughout the interviews, the clinician-litigators expressed the concern that the rise of high-stakes Carter cases has eroded the original intent of the law, which was to provide parents of children with special education needs an equal voice to ensure their children access to public education services. Consistent with the view expressed by Neal and Kirp (1983), they expressed the opinion that hearings had devolved into “an additional weapon with which the disputants can bludgeon each other” (p. 42).

The prevailing view among the clinician-litigators was that the central problem with impartial hearings involves legalization of disputes that are essentially professional in nature. The negative effects of legalization include the financial burden on school systems; undermining the traditional role of the educational professional in determining the most appropriate services

for children; and poisoning the relationship between parents and professionals employed by the local education agency.

Impartial hearings are inflexible, with a host of procedural trappings. The high cost of paying attorneys' fees causes them to be very expensive and drain resources from the public school system. Ironically, the cost of hearings can be so great that they may be more expensive than either the public or the private placement being fought over. The clinician-litigators viewed awarding generous attorney fees as providing a perverse incentive for engaging in drawn-out, costly litigation.

Perhaps the most pernicious aspect of the legal approach to resolving educational disputes is that it weakens the influence of professional judgment in educational decision-making. Law and procedure trump substance, and undermines faith in the professional discretion of the service provider. The wisdom of imposing formalized legal procedures on the process of resolving educational disputes and minimizing the role of professional judgment is questionable.

A related problem inherent in the legal model of dispute resolution is that it undermines the relationship between the educational professionals and the parent, which prevents the two sides from working together cooperatively on behalf of the child. It places professionals in the role of defendants and inhibits their ability to discuss their opinions collegially with the parents. It creates an antagonistic situation in which the opposing parties are enjoined from speaking directly to each other. This prevents cooperative resolution of the current dispute and poisons the ongoing relationship between the parties.

In order to work cooperatively on behalf of students, parents, and school personnel must be willing to entertain each other's points of view. The legal process undermines mutual faith and trust, replacing it with suspicion of bias and incompetence. Parents are no longer receptive to

the analyses and recommendations of professionals employed by the local education agency, which causes the collaborative process to fail.

The ones who suffer most from a breakdown in communication between educational professionals and the parents are the students themselves. Students often become privy to all manner of scheming against the local education agency and may be exposed to negative judgments about the very people who are or have been their teachers. They may even have to testify in support of their parents' contentions that the professionals of the public school system have disserved them. Exposure to such contentiousness could lead them to distrust the professionals with whom they must interact on a daily basis if they are in, or are forced to return to, the public school system. This may cause students to experience emotional distress.

Beyond the flaws in the structure of the adversarial system of dispute resolution, the very ethics of the legal profession, as expressed through the actions of attorneys, bespeak a host of problems with impartial hearings. Several academic experts have observed that lawyers may not be the best people to argue the professional issues central to educational disputes for two main reasons: on the one hand, their lack of knowledge and experience with educational matters; on the other, more insidiously, their propensity to manipulate the presentation of the facts at the expense of the truth (Budoff & Orenstein,1982; Gardner, 1998, Handler, 1986).

Even more deleterious is that the ethics of the legal profession encourage lawyers zealously to defend the interests of their clients, regardless of the morality or merit of their position. This can lead them to promote an agenda that could be injurious. Manipulating the facts to persuade fact finders distorts and hides the truth. Legal tactics often involve psychological warfare, painting adversaries as incompetent, untrustworthy, or nefarious. Denigration of professional judgment increases hostility and mistrust among the parties.

The fear of being the object of such tactics in an impartial hearing causes school social workers, psychologists, and educators to practice of their professions defensively. In order to protect themselves from legal attack in the anticipated hearing, they may modify their interventions and prescriptions to make them less vulnerable to legal attack. For example, they might write IEPs using language that might be less vulnerable to legal attack. This may have the effect of degrading the quality of services delivered to students.

Clearly the legalization of educational dispute resolution and its implementation through impartial hearing process has created a situation in which the educational needs of students take a back seat to legal maneuvering in a high-stakes game. The experiences of educational professionals functioning in the role of clinician-litigator highlight the differences between the traditional approach to legal advocacy and the ethical advocacy approach. It brought to light reasons to consider replacing impartial hearings as currently conceived with a method of resolution of educational disputes more likely to produce outcomes that serve the best interests of the child.

In their discussion of social workers in hospital practice, Jansson and Dodd (2002) argue that there is an imperative for social workers to reform the system to serve patients better. They consider such work to be a form of ethical activism. There are clear parallels between the problems of hospital practice they describe and the ethical issues that bedevil impartial hearings. In both situations, the needs of clients would be better served by greater involvement by social workers, and in both situations, the institutional structure needs to permit greater clinical involvement in the decision-making process. Similar to the situation in hospitals, reform of the impartial hearing process most likely would spring from the agitation of clinicians and educators.

These efforts would most likely encounter resistance from the legal community, which has a stake in maintaining the status quo.

What form a new mechanism for resolution of educational disputes might take would have to be worked out through discussion and negotiation among the various stakeholders in the process. If codified in law, this process and would most likely face judicial tests. In order to serve the needs of students in the current system better, it would have to strengthen the partnership between parents and professionals employed by the local education agency and foster cooperation between them. The process needs to become more humane and attuned to the educational needs of the child.

A possibility that merits consideration would be to move away from litigation toward a system based on the principles of mediation, which fosters non-adversarial relations (Massey & Rosenbaum, 2005). Mediation-type approaches offer several advantages over litigation, such as a greater feeling of empowerment (Stark, 1996) and shared decision-making (Handler, 1986). The clinician-litigators themselves had some suggestions for possible changes to the system. Many of the informants felt that the hearing officer should adhere more to the role of fact finder and be less prejudiced against the local education agency; they also believed that hearing officers would be more effective if they were better educated about clinical and educational issues. Some of the clinician-litigators suggested that it might be better to utilize a panel of experts versed in the issues, rather than a single hearing officer.

Whatever mechanism of dispute resolution might be devised, the role of the hearing officer, adjudicator, or panel of experts would be different from the current structure. Rather than presiding over a battle in which advocates attempt to use rules and precedent to exclude or shape evidence, those presiding over the proceedings would work to bring the two sides together to

openly communicate information, with the goal of reaching a shared understanding of the child's needs and crafting a mutually agreeable plan to address them. To serve effectively in this role, the fact finder would have to be versed in both the details of special education law and be knowledgeable about clinical and educational matters, in addition to being a skilled as a mediator. This would entail judicial deference to professional expertise, a practice that was encouraged in the court's decision in *Youngberg v. Romero* (1982).

Although it is unclear how the system of resolution of educational disputes might be reimagined, it is clear that the current mechanism is irretrievably broken. The needs of children get lost as professional expertise and substantive matters are subsumed by an analysis of compliance with procedural rules. Attorneys with no special knowledge of educational or clinical matters argue cases before impartial hearing officers whose knowledge base has the same deficiencies. Traditional legal advocacy narrows, rather than expands, the scope of data considered, which harms the child and flies in the face of professional ethics.

The call to action issued by Dodd and Jannson (2002) must be heeded. Resolution of educational disputes could be less aligned with the principles of traditional legal advocacy and more aligned with the principles of ethical advocacy. Professionals must take on more voice in the deliberations over the most appropriate ways to meet the educational needs of children. The system would be improved by promoting cooperation between parents and professionals of the local education agency, to counter the corrosion of the public's perception of the public school system fostered by the adversarial legal system. The experiences the clinician-litigators reported made clear the deficiencies of the current system and the ways it fails children. Their reports from the field lay bare the problems that must be addressed in order to create a mechanism for

dispute resolution that better serves children and families, and strengthens the public school system.

Designing a fair system for resolving educational disputes between parents and the local education agency requires ethical activism on the part of education professionals. They must take the initiative to involve themselves in the legislative and judicial processes that will evaluate the effectiveness and appropriateness of the current system and advocate vigorously for a system of dispute resolution that gives a central role to the knowledge and judgment of educators and clinicians. These efforts would restore professionals to their rightful place in the educational decision-making process and better defend the right of all students to a free, appropriate public education.

Beyond the changes in practice, social workers, psychologists, and educators should engage in greater ethical activism and play a more active role in the social policy debates about privatization and distributive justice, so that their understanding of students' educational and clinical needs inform the deliberations of policymakers in these realms. This would extend professional influence beyond addressing how the needs of individual students, and would have profound implications for the future of the public education system and the nature of our society itself. If they feel disempowered to take on these issues, it would be important to know more about their relationship to the organizations in which they work.

Research Implications

Limitations of the Study

There were limitations to this study. As a qualitative, exploratory study, it broke new ground, because there is little empirical research about the experience of clinicians participating in impartial hearings. It focused exclusively on their experiences as witnesses; there were no

known studies of their experiences as clinician-litigators. The research that does exist is relatively superficial, so this study had a paucity of past research to build on. Consequently, the study used a phenomenological approach to identify themes. The identification of important themes might serve to formulate future investigation of the various dimensions contemplated here.

The fact that this study investigated a small sample of clinician-litigators, all of whom were retirees, in one of the most highly litigious states in the US limits the application of the findings to the rest of the country. Clearly, a larger, more varied sample would yield richer findings. It might serve to identify themes in addition to those presented here. Further, the fact that many of the subjects worked as clinician-litigators on a part-time basis meant that a large segment of the subject pool had a less-well-developed knowledge base than those who had litigated cases on a full-time basis. In addition, some of the retiree subjects had had limited experience litigating Carter cases, which was not a large segment of impartial hearings in years past. Nonetheless, the weakness inherent in the focus on New York hearings might also be one of the study's strengths. Although New York is more highly litigious than other states, it clearly is in the forefront of a trend that is sweeping the country. The issues argued bring into bold relief the social policy issues that are currently the focus of national debate.

The breadth and depth of the study's findings are also limited by the fact that the subject pool included only clinician-litigators. As an exploratory phenomenological study of clinician-litigators, it yielded rich insights into the experience of clinicians who represented the local education agency at impartial hearings. However, the study might have benefited from an exploration of the experience of the attorneys, both those representing the local education agency and those representing the parents, to obtain their views of the impartial hearing process and to

gain a better sense of their knowledge of students' educational needs and the values that underlie their work. Inclusion of these informants might have made possible a deeper comparison of the ethical-advocacy and traditional-advocacy approaches to litigation in impartial hearings.

Directions for Further Study

Themes developed in this study are amenable to further investigation, both in terms of practice and social policy. Several areas for future research would refine the admittedly preliminary findings of this study. Triangulating research approaches such as interviewing, participant observation, surveying, and reviewing transcripts of subjects' participation in impartial hearings could add depth and nuance to the data yielded in the current study.

Since non-attorneys are now an integral part of the hearing process, a closer examination of how clinician-litigators function in hearings could illuminate the interplay between what they report in interviews about their use of ethical advocacy approaches and how they actually perform in the application of these principles. This would entail including clinician-litigators currently employed by the Board of Education in the subject pool, preferably those working full time in this capacity, who have a greater breadth of experience working in the legal arena. Observing clinician-litigators in hearings and reviewing transcripts of actual hearings would allow closer examination of the strategies and tactics they use and comparison of the relative prevalence of legalistic procedure-oriented approaches as opposed to clinical substance-oriented styles of litigation. This would give a richer picture of how ethical advocacy approaches inform the work of clinician-litigators and whether they apply them consistently. Surveying the sociopolitical attitudes of clinician-litigators, particularly regarding issues such as privatization and distributive justice, could add another dimension to this investigation.

An additional area of investigation would involve applying the methods described above to attorneys representing parents at tuition-reimbursement hearings and comparing observations with those obtained from clinician-litigators. The study could be further enriched by investigating the experiences of attorneys representing the Board of Education along the same dimensions, because even though they represent the local education agency, their approach to litigation may be more similar to that of the opposing attorneys than that of the clinician-litigators. Including attorneys in future research would permit a broader, multidimensional comparison of ethical advocacy and traditional adversarial advocacy approaches in impartial hearings.

Another related area of investigation would be to compare the functioning of clinicians who work in highly litigious states such as New York with those who practice in states that rely more heavily on cooperative approaches, such as mediation. Interviewing subjects about their experiences, feelings, and concerns, and performing a content analysis of transcripts of actual dispute-resolution proceedings, is a possible approach to illuminating the relative effectiveness of the different approaches.

Because the social policy issues that create the context for hearings, they heavily influence clinician-litigators. Areas for analysis might include context for hearings, the way the various parties in hearings and their philosophical and social policy views. Applying a grounded-theory approach to all four groups of major players in impartial hearings, clinician-litigators, attorneys, parents, and hearing officers, investigating their views on self-determination, privatization, integration, distributive justice, and other key issues could help to clarify their motives. This could provide useful information for evaluating how well the Individuals with Disabilities Education Act is achieving its goals and guide refinements to the law.

The actors whose experience, knowledge base, motivations, and sociopolitical views have been least studied are the hearing officers who decide the cases. Since any potential redesign of the dispute resolution mechanism would entail redefining the role of the hearing officer, the characteristics, attitudes, and behaviors of the persons serving this function need fuller delineation. Studying hearing officers could begin with observing them in the discharge of their duties, performing a content analysis of the transcripts of their cases, and comparing the various characteristics outlined above with their actual decisions. This might yield a clearer picture of the attributes of hearing officers better suited to an alternative mechanism of dispute resolution that would both address the requirements of the law and consider the clinical and educational needs of students in a more comprehensive manner.

Ultimately, all future research in this area will have bearing on three main areas. It will provide information that could refine the way the educational dispute-resolution system functions. It will guide improvements in how parents and school systems resolve their differences, which should have a direct experience on the educational experience and outcomes of individual students. Finally, bringing to light the unspoken philosophical and social policy views enacted in the roles of all the players in the hearing process has the potential to clarify the terms of the social policy debate about what kind of educational system, public services, and society we want to have.

APPENDIX 1: Recruitment Letter for Potential Subjects

Date

Name and Address of Prospective Participant

Dear (Potential Participant):

Hello. I am contacting you to inquire if you would be interested in participating in my study. My study will focus on the experiences of district representatives at impartial hearings. [As (Referral Source) may have mentioned], I am a PhD candidate in the Social Welfare Program at the Graduate Center of the City University of New York. My dissertation is a study of the experience of social workers, psychologists, and special education teachers and administrators at impartial hearings. I am specifically interested in learning about the practice of non-attorneys at impartial hearings and how clinicians utilize their professional skills during a due process proceeding.

Your name was suggested to me by (Referral Source) as a possible informant for my study because of your previous role as a District Representative/Chairperson's Designee. I am interested in interviewing you because of your experience as a social worker, psychologist, teacher, or administrator who has also served as a district representative at impartial hearings. My sample is limited to individuals who are no longer formally employed by the NYCDOE.

Participation will consist of an initial interview, which will last no longer than 90 minutes, and a follow-up interview to be conducted after I have reviewed the data obtained from the first meeting. I will audiotape the interview with your permission, and I will have an informed consent for you to sign should you agree to be interviewed. Please be assured that participation in the study is voluntary; you may withdraw from the study at any time. The text from the tape will be kept confidential and all participants' identities and prior work settings will be disguised in my dissertation.

If you are interested in being interviewed, we will arrange a mutually agreeable time and place to meet. I will send you a letter to confirm of our meeting; please indicate whether it is best to contact you by phone, email, or letter.

If you have any questions, please feel free to contact me by email at auggie2425@aol.com or by phone at (347) 524-0255

Sincerely,

APPENDIX 2: Email Response for Potential Subjects

Hello (Prospective Participant's Name):

Thank you very much for contacting me regarding a study I am undertaking on the experiences of district representatives at impartial hearings. [As (Referral Source) may have mentioned], I am a PhD candidate in the Social Welfare Program at the Graduate Center of the City University of New York. I am specifically interested in learning about how non-attorneys utilize their professional skills when they serve as district representative in due process hearings.

Your name was suggested to me by (Referral Source) as a possible informant for my study because of your previous role as a District Representative/Chairperson's Designee. I am interested in interviewing you because of your experience as a social worker, psychologist, teacher, or administrator. My sample is limited to individuals who are no longer formally employed by the NYCDOE.

Participation will consist of an initial interview, which will last no longer than 90 minutes, and a follow-up interview. I will audiotape the interview with your permission, and I will have an informed consent form for you to sign should you agree to be interviewed. Please be assured that participation in the study is voluntary; you may withdraw from the study at any time. The transcript of the tape will be kept confidential and all participants' identities and prior work settings will be disguised in my dissertation.

Are you still interested in being interviewed? If so, we can set up a mutually agreeable time and place to meet. Would you like me to give you a call? Here is how you can reach me.

Augusto C. Quiros
PhD candidate in Social Welfare
Email: auggie2425@aol.com
Cell: (347) 524-0255

Thanks again for your interest in my study. I look forward to hearing from you.

Best regards,

Auggie Quiros

APPENDIX 3: Telephone Response for Potential Subjects

Hello (Prospective Participant's Name):

Thank you very much for contacting me regarding a study I am undertaking on the experiences of district representatives at impartial hearings. [As (Referral Source) may have mentioned], I am a PhD candidate in the Social Welfare Program at the Graduate Center of the City University of New York. I am specifically interested in learning about how non-attorneys utilize their professional skills when serving as district representative at impartial hearings.

Your name was suggested to me by (Referral Source) as a possible informant for my study because of your previous role as a District Representative/Chairperson's Designee. I am interested in interviewing you because of your experience as a social worker, psychologist, teacher, or administrator. My sample is limited to those individuals who are no longer formally employed by the NYCDOE.

Participation will consist of an initial interview, which will last no longer than 90 minutes, and a follow-up interview to be arranged at a later date. I will audiotape the interview with your permission and I will have an informed consent form for you to sign should you agree to be interviewed. Please be assured that participation in the study is voluntary; you may withdraw from the study at any time. The transcript of the tape will be kept confidential and all participants' identities and prior work settings will be disguised in my dissertation.

Are you still interested in being interviewed? If so, we can arrange a mutually agreeable time and place to meet. I will send you a confirmation of our meeting; would it be best to contact you by phone, email, or letter?

If you would like to think about it before deciding whether to participate, here is how you may reach me by email at auggie2425@aol.com or by phone at (347) 524-0255.

If you choose not to participate in the study, I thank you for taking the time to discuss it with me.

Thanks again for your interest in my study. I look forward to hearing from you.

Referral Source:____
Participant's Name:____
Professional Roles: ____
Contact Phone #:____
Contact email address:____
Initial Interview Location/Date/Time: ______________________________

APPENDIX 4: Semi-Structured Interview Guide

The following are examples of questions that will potentially be asked of district representatives during the initial interview. Questions for the follow-up interview will be developed utilizing sensitizing concepts derived from discussion and the literature on ethical and trial advocacy.

Opening Statement: Thank you for agreeing to be interviewing for this study. As I mentioned earlier I am interested in learning about your unique experience representing the Department of Education. Please feel free to ask me any questions as we go along

I. The District Representative's Role Prior to the Impartial Hearing

Topic: Scope of the Presenting Problem

Q1. What is your discipline?

Q2. How was is it decided that you were designated to represent the NCDOE at the impartial hearing?

Q3. What efforts, if any, were employed prior to the impartial hearing to resolve the matter?

Q4. What was the remedy the parents were seeking through the hearing?

Q5. Approximately how many impartial hearings have you attended?

Q6. What is your experience, if any, with testifying at impartial hearings?

Q7. What kind of preparation did you do for the hearing?

Q8. Prior to your first experience representing the NYCDOE, what did you imagine the impartial hearing would be like?

Q9. Was the parent *pro se* or represented by counsel?

Q10. What kind of exposure did you have to the NYCDOE field attorneys?

II. The District Representative Perception of the Impartial Hearing Process

Topic: The Impartial Hearing Proceeding

Q11. Could you describe the hearing room?

Q12. How did you feel about your chances about winning cases before entering the room?

Q13. What does winning mean to you?

Q14. How do you usually approach litigating cases?

Q15. Could you describe the courtroom atmosphere for the cases you participated in?

Q16. Could you describe any strategies and tactics that you utilize in presenting your position?

Q17. How do you usually approach opening and closing statements?

Q18. How do you usually approach the direct and cross-examination of witnesses?

Q19 What are your thoughts about the way you usually present your cases?

III. The District Representative's Reflections of the Impartial Hearing Process

Q20. How is the impartial hearing process different from or similar to what you may have expected?

Q21. How capable do you feel about your ability to prevail at a hearing?

Q22. Do you ever experience any conflict representing the organizational perspective?

Q23. How do you feel being in conflict with parents regarding the educational needs of their child?

Q24. How did your professional background, if at all, assist you as a litigator in the impartial hearing process?

Q25. Generally speaking, how would you describe the impartial hearing process as a conflict-resolution mechanism?

APPENDIX 5: NYCDOE IRB Response to Study

From: Gold Tom [Tgold@schools.nyc.gov]
Sent: Tuesday, October 27, 2009 7:18 PM
To: Harriet Goodman
Subject: RE: Confirming our Conversation

We would not have to review research that focuses on people no longer working in school system. However, we would have to review if he plans on interviewing current employees, even if they are no longer working in the same capacity.

Thomas W. Gold, PhD
Director of External Research, Evaluation, and Reporting
Research and Policy Support Group
New York City Department of Education
52 Chambers Street
New York, NY 10007
Tel (212) 374-3913
Fax (212) 374-5908
Email: tgold@schools.nyc.gov

From: Harriet Goodman [mailto:hgoodman@hunter.cuny.edu]
Sent: Tuesday, October 27, 2009 5:48 PM
To: Tom Gold
Subject: Confirming our Conversation

Dear Dr. Gold,

Thank you for speaking with me this morning. I understand that you sent along Mr. Quiros's draft proposal to the Conflict of Interest Unit. You are concerned about Mr. Quiros interviewing people currently employed at the DOE, particularly people who are doing the same work that he does.

Mr. Quiros tells me he would be able to develop a sample of 15 to 20 retirees who worked as chair or district representatives. He would use non-probability snow-ball sampling methods to do this. I gather that DOE has no interest in reviewing the study if all his informants are no longer employees of the DOE. Please confirm this is the case, since he would need that in writing to present to the Hunter College IRB when he submits his amended application for review.

However, apparently there are some people who are still employed at the DOE but who worked as chair or districtive representatives in the past who are no longer representing the DOE in

impartial hearings. Would he be able to recruit these people as informants? I understand if this were possible, he would need DOE IRB approval. Please let me know your thoughts.

Thank you for getting back to me so promptly. I appreciate your time and concern.

Professor Harriet Goodman
Deputy Executive Officer
PhD Program in Social Welfare

APPENDIX 6: Informed Consent Form

Augusto C. Quiros is a PhD student in the Social Welfare program at the City University of New York Graduate Center. He is conducting a study about the experiences of clinicians who represent the NYCDOE at impartial hearings in the role of litigator. The purpose of the study is to learn about your experience--the knowledge, values, and skills non-attorneys demonstrate in representing the educational interests of children at impartial hearings. There will be a series of questions that focus on your role as a clinician serving as district representative, your perceptions of the impartial hearing process, and your reflections on your effectiveness as a litigator.

One of the central questions addressed by the study is how non-attorney clinicians immerse themselves in the litigation process, and how the clinical perspective potentially affects the outcome of litigation. This analysis will be conducted within a bureaucratic, legal, and clinical framework. The legal concepts of entitlement, due process, and self-determination have been defined as an unholy alliance (Rimer, 1989), and this study will attempt to understand how you, in your role as district representative, have reconciled these elements during impartial hearings. You are being asked to participate in this study because of your previous involvement with impartial hearings as a district representative, and because you also bring extensive experience to the process from your work as social workers, psychologists, special education teachers, or administrators, which potentially will enrich the data. This study is being conducted for the researcher's doctoral dissertation.

Participation in the study is voluntary. The interview will take place in a location mutually agreed upon by you and the researcher. Individuals will not be penalized in any way for refusal to participate. You may refuse to answer any questions you wish and you may withdraw from the study at any point without penalty. There are no known risks or benefits to participation in the study.

Although the researcher will know your identity, the information you disclose will be kept confidential to the extent permitted by law. Your name will only be kept as a record of consent and no one but the researcher will have access to that information. Consent forms and names from the consent forms will not be associated in any way with the transcripts.

The researcher will digitally audiotape the interview with your permission and the tape will be transcribed into an electronic text. Any information that can identify you will be redacted from the text. The redacted text will be uploaded into a computer program that only the researcher and dissertation chairperson will know. The flash drive containing the transcribed materials will be kept in a locked file box in the researcher's office. Once the analysis is complete and the dissertation defended, all data will be erased from the computer program and the flash drive will be destroyed.

If you have any questions about this study, please call Augusto C. Quiros at (347) 524-0255 or his adviser, Professor Harriet Goodman, at (212) 452-7113. If you have any questions regarding your rights as a participant in this study or feel that you have experienced a research-related

injury, you may contact the Hunter College Office Institutional Review Board Office at (212) 650-3053.

I have read and understood the information above. The researcher has answered all of my questions about my participation in the study. I have been given (or will be given) a copy of this form. I consent to take part in this study.

______________________________	______________________________
Signature of Participant	Date
______________________________	______________________________
Signature of Researcher	Date

APPENDIX 7: Audiotape Recording Release Consent Form

Protocol# ______

Researcher: Augusto C. Quiros

Title: The Experience of Clinician-Litigators at Impartial Hearings: An Exploratory

Phenomenological Study with Social Policy Implications

As part of this research project, an audio recording will be made of the interview. The interview will be transcribed much the same way as how transcripts are generated by the impartial hearing office. Your name will be redacted in the transcription process. You have the right to listen to the audiotape prior to the transcription, after which it will be destroyed.

As a researcher, I am requesting your consent so that I may audiotape your interview for the purposes of my research investigation. ________
Initials

I have read the above description and give my consent for the use of the audiotapes as indicated above.

Printed Name:______________________________

Signature:__________________________________

Date:______________________________________

APPENDIX 8: Post-Interview Feedback Form

Dear (Prospective Interviewee's Name):

Thank you for participating in this study. The data obtained from this study will contribute to an understanding of the experience of clinicians employed as district representatives at impartial hearings. If you are interested in learning more about various perspectives on trial advocacy, the following references may be a good place to start.

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