DUE PROCESS UNDER LAW: WHERE DOES THE SOCIAL SERVICE CLIENT STAND?

by

Stephen Wittman

Can a welfare agency cut off aid to an unmarried woman who has a child or conduct midnight raids to see if she has a man in the house? Can public housing project managers use confidential police and financial records to check on the moral character of prospective tenants? What are the rights of a student facing expulsion from public school? The growth of an enormous social services bureaucracy with great administrative discretion and a highly dependent clientele has raised grave issues of legal rights and consumer protection.

In *Protecting the Social Service Client,* Joel Handler explores, clearly and concisely, with a wealth of concrete examples, the delicate relationship between an agency's legitimate needs for flexibility and discretion, and a client's equally legitimate constitutional protections.[1] Too often, he shows, the relationship is an adversary one, and too often the client's rights are inadequately respected. Handler discusses the history of due process protection in this area; he suggests legal and structural remedies for the existing system, and examines those reforms that have been instituted over the last decade. Extending and completing the studies presented in *The Deserving Poor: A Study of Welfare Administration* (with Ellen Jane Hollingsworth) and *The Coercive Social Worker: British Lessons for American Social Services,* this volume is addressed not only to advocates for social service and welfare clients, or to those who must deal with health agencies, but also to social workers and other professionals in those agencies, and especially to those who make policy.

Procedural Rights Versus Substantive Rights

To explore the legal rights of the client of social services we must first distinguish between administrative or procedural justice, on the one hand, and substantive justice on the other. The former is the concern of Handler's study:

> The Due Process Clause [of the Constitution] grants certain kinds of procedural rights to protect the legal interests of life, liberty, and property, but the clause itself does not establish these substantive interests; they must be found in other provisions of the Constitution or . . . in statutes.

What does this distinction mean, in the context of social services? Very simply, the substantive right of a citizen to financial aid in time of need is established in welfare and social security legislation, but those acts do not necessarily guarantee that any specific individual will obtain his or her substantive rights. Due Process only guarantees that individual citizens will be treated fairly in their efforts to maintain—or obtain—these rights.

The watershed case for social service clients was *Goldberg* v. *Kelly* (1970), in which the Supreme Court ruled that the Due Process Clause applied to welfare hearings, and that a welfare recipient was entitled to a fair hearing before, rather than after, benefits were terminated. A procedural right was thus established, complementing the substantive rights dictated by the Social Security Act that created Aid to Families with Dependent Children (AFDC). The ruling was at first hailed as a milestone in the struggle for legal protection for those dependent on social services. It was followed, however, by an enormous increase in all conflict-resolution systems within the social services. AFDC has had an eightfold increase in hearings and other agencies have experienced similar increases since the *Goldberg* decision. The administrative difficulties later caused the Supreme Court to retreat from their earlier position and reduce the procedural formality necessary in social welfare hearings.

The states, too, have demanded that the Department of Health, Education, and Welfare relax its hearing rules, and Congress has called for a reexamination of Social Security Administration hearings as well as those in other regulatory agencies.

There is presently general dissatisfaction with existing methods of client protection; at the same time, impending reform in a number of existing social welfare programs (e.g., Food Stamps, public employment and wage subsidy programs) and new legislation in areas such as national health insurance and income maintenance have been proposed. It is thus timely to review the complex of issues concerning client protection in social welfare systems and suggest new approaches to the problem. Handler uses as a focal point Title XX, the federal social services program enacted in 1975, but the issues apply more generally to numerous social welfare programs.

The Implications of Title XX

The enactment of Title XX represents the culmination of nearly 20 years of amendments to the Social Security Act[2]—amendments that embodied changing and at times contradictory philosophies and goals of social services as much as they represented efforts to reform delivery of those services.

The stated goals of Title XX reflect compromise among several political groups, social service agencies, and professional groups, Handler relates:

> (a) the hard-line congressional goal of 'achieving or maintaining economic self-support to prevent, re-

PROTECTING THE SOCIAL SERVICE CLIENT: LEGAL AND STRUCTURAL CONTROLS ON OFFICIAL DISCRETION

by

Joel F. Handler

Academic Press, $13.00 ($6.00 paper)

duce, or eliminate dependency;' (b) the proposed (1970) Title XX goal of 'preventing or remedying neglect, abuse, or exploitation of children and adults unable to protect their own interests;' and (c) the traditional social work goal of 'preserving, rehabilitating or reuniting families.' Other goals include preventing or reducing 'inappropriate institutional care,' securing referral or admission to institutions, and providing institutional services.

Title XX's broadly stated goals and authorized services—services that are both public and private—create a huge amount of administrative discretion. Succinctly stated, discretion gives officials choices; it is the opposite of fixed, clear-cut rules and conditions. In the context of Handler's study, it "refers specifically to the conditions imposed by social workers upon the recipients of social services."

To be sure, discretion is a double-edged tool, as Handler is quick to point out. Consider the case of public housing, which can be allocated either on the first-come, first-serve basis, within measurable limits of eligibility (e.g., family income level and family composition) , or as part of a general "family rehabilitation" plan. The first method, because it employs relatively concrete, objective rules, involves a minimum of discretion. The latter scheme is likely to involve loose goals, such as preventing family stress or arresting family disintegration, that are subject to individual interpretation; discretion is thus maximized. But at the same time special conditions of hardship can be taken into account—for example, families facing discrimination in the private housing sector because one or more members are disabled, or because the head of household has a work history of frequent layoffs.

Routinization can unintentionally affect client behavior in undesirable ways. A cut-and-dried income requirement for public housing may prompt an applicant to decrease earnings; eligibility based on family composition may induce a shifting of adults and children within and among families that is often socially undesirable. Another example is the current welfare system, with its numerous incentives for families to split up and poor, female-headed households with children to be created.

SELECTED PAPERS

Ronald P. Hammer and Joseph M. Hartley, "Procedural Due Process and the Welfare Recipient: A Statistical Study of AFDC Fair Hearings in Wisconsin," Institute for Research on Poverty Reprint no. 320.

Irving Piliavin, Stanley Masters, and Thomas Corbett, "Administration and Organizational Influences on AFDC Case Decision Errors: An Empirical Analysis," Institute for Research on Poverty Discussion Paper no. 542-79.

Discretion and Due Process Protection

What, exactly, is the social services claimant entitled to? What are his legal rights under the law as it now stands? The law, Handler concludes, has established that the claimant is entitled to be treated "fairly"—a slippery term—and that he has certain procedural rights. To these we will turn shortly. What he does not have, Handler stresses, are substantive rights that attach to him as an individual. He should be treated equitably in seeking public housing, for example, but if there are no units left, he still does not get one. Similarly, a great many Title XX benefits are scarce; if they are to remain real benefits, they cannot be infinitely divided. Discretion enters as the agency sets policies for allocation. An individual's claim cannot be considered a right if it is subject to a discretionary decision.

Where opportunities for official discretion exist, potentials for abuse and unequal treatment of clients abound. And as Handler makes abundantly clear, discretion exists at every point in the complex social services structure. As one moves from enabling legislation through the three- and four-tiered bureaucracy to the caseworker level, informal discretion builds on formal, legally delegated discretion, becoming ever more pervasive.

Administrative behavior is not completely unfettered, of course. Agencies must pick and choose among programs to be funded. Administrators, supervisors, and caseworkers have professional and bureaucratic norms; they have their own sense of what is lawful and proper under the laws and regulations. But such constraints on discretion arise, for the most part, outside of the legal framework: They are matters of administrative grace, not imposed by law, and therefore they will not serve as legal protections for aggrieved clients. Except for gross maladministration, the reviewing courts will not correct agency decisions because there is very little in the statutory framework that says what the agency or the caseworker is doing is out of bounds.

Problems with the Fair Hearing System

Under the system as it now exists, therefore, almost the entire burden of protecting clients' rights falls upon the fair hearing system; yet there are severe constraints on this form of protection. It is most successful in protecting the individual, Handler says, when the client has information about his rights and the resources to pursue them, but most clients lack one or both. The client is also likely to be most successful when his problem is a short-term one that does not require continuous monitoring or repeated discretionary decisions. If he has to maintain continuing relations with welfare officials, then the *fear* of retaliation—of having services withheld—may chill the pursuit of justice.

Moreover, concessions granted by a social service agency to one client do not set precedents for other clients. As a result, the fair hearing system allows the agency to respond to those complaining clients who are most able to help themselves—at the expense of those who may be in greater need of help.

What routes can HEW and the state Title XX agencies take to improve client resources and enhance client protection?

Strengthening Fair Hearings

First, Handler suggests, they might strengthen the fair hearing process. Title XX funds could be used, for instance, to strengthen the capacity of the Legal Services program which, despite its serious caseload problems, could be used in test-case litigation, in service cases, and to train paralegal or lay advocates for social service clients. A related possibility is to make greater use of the Judicare program, under which private attorneys take cases for the poor and are paid by the government according to fixed schedules. The private bar can also be utilized for "*pro bono*" activity—or legal work for a reduced or no fee. Law school clinical programs, citizen information centers, and education programs are yet more ways to "democratize" legal knowledge.

Alternatives to Adversary Representation

Is adversary representation the only route? Handler believes that it is not. As an example, he examines the role of the Wisconsin AFDC State District Director System, which existed until 1968. One of the weaknesses of the fair hearing system is that it lays sole responsibility for developing a claim on the welfare client. Under the district director system, in contrast, the government supplied the resources for investigating the factual and legal matters of the dispute that resulted in informal mediation. This form of investigative mediation has also been used in a variety of other contexts; the ombudsman system, for instance, is used to investigate all kinds of citizen complaints. Mediation and arbitration lend themselves to a variety of settings and might be especially effective as supplementary mechanisms for settling disputes between social services and their clients.

Legal and quasi-legal remedies are but one approach to client protection. Closer to the core of the problem are efforts to improve quality control and to strengthen management supervision, and these should be encouraged as a means of controlling discretion. Management's interest in ferreting out and correcting violations serves to vindicate client rights as well. In practice, however, there are severe problems in devising and implementing effective management and quality control systems within the social service context, and Handler notes that these problems pose significant dangers to clients. The two chief difficulties are devising accurate standards by which to measure the performance of an agency, and gathering the information necessary to find out whether the standards are being met. The vague, rehabilitative purposes and objectives of Title XX and other social service programs make them difficult to gauge. Moreover, determinations about the kind of information needed are themselves discretionary, and how this information will be used and disseminated is also at the discretion of administrative officials. The issue becomes one of an invasion of the client's privacy as well as that of the client-caseworker relationship.

Structural Alternatives

Rules and the organization of services also affect discretion. Vague statutory language creates discretionary authority. Although clearly stated rules may reduce much discretion, at the same time they can work against clients. The client's case may not fit the rule; more loosely drawn language allows for greater flexibility. Formulating specific rules is not an easy task, and it may not be appropriate or feasible for many social services. Nevertheless, Handler argues that there is far too much discretion created in many of the social service rules.

Organization and Delivery

Organization of the social services delivery system—the extent to which various agencies are coordinated or integrated—is another area where Handler suggests changes might be made to protect the client. Title XX avoids the issues of centralization versus decentralization by leaving the matter, at present, up to the discretion of the states and HEW. But the call for integration continues, particularly as the result of the recommendations of the National Conference on Social Work Task Forces on the Organization and Delivery of Human Services in its 1976 report, *Current Issues in Title XX Programs*. The task force envisaged a system under which a "case manager" would be the principal eligibility officer, receiving and evaluating applications, designing and managing the case plan, arranging for its delivery, and then evaluating the results. But, Handler warns, if this scheme is implemented, the case manager will have enormous discretionary power, and the client family will be extremely dependent on him.

No Easy Solutions

Problems of contolling discretion and protecting dependent clients are not readily amenable to simple solutions. Little is known about the motivations of field-level officials or of the feelings and perceptions of their clients. A high degree of discretion will always be useful if social service programs are to function compassionately on behalf of their consumers. Therefore, in Handler's words, "the challenge is to avoid simplistic approaches and to try to experiment with flexible alternatives that seek to adjust conflicting interests and needs." Opportunities now exist for both government officials and client advocates to make sensible and meaningful reforms in client protection.

Poor people are more reliant than the rest of the population on social service agencies, and so the problems of administrative justice are especially acute for them. But the issues addressed in this study have much wider applicability. Veterans, Social Security recipients, taxpayers, students—all of us, in fact—are likely to find ourselves at one time or another confronting a representative of a government agency who has the discretionary authority to grant or withhold benefits. ■

---

[1]Joel Handler is Professor of Law at the University of Wisconsin and a Fellow of the Institute for Research on Poverty.

[2]Amendments were passed in 1956, 1962, 1967, and 1970.