

#243
briefs filed
in case

IN THE
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

No. 7715-80

In the Matter of the Application
of MURIEL FORREST,

Petitioner,

For a Judgment Pursuant to Article 78 of
the Civil Practice Law and Rules

v.

GORDON M. AMBACH, Commissioner of Education of
the State of New York and THE BOARD OF EDUCATION
OF THE EDMONT UNION FREE SCHOOL DISTRICT,

Respondent.

BRIEF OF AMICI CURIAE

AMERICAN PSYCHOLOGICAL ASSOCIATION
NEW YORK STATE PSYCHOLOGICAL ASSOCIATION
WESTCHESTER COUNTY PSYCHOLOGICAL ASSOCIATION

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CITATIONS	i
INTEREST OF <u>AMICI CURIAE</u>	1
ARGUMENT	3
Preliminary Statement	3
I. Commissioner's Findings that School District was in Substantial Compliance with Statutory Mandates and was not Neglecting Its Legal Duties to Handicapped Children were Clearly Erroneous	4
II. In Finding that Petitioner was not Fired for a Constitutionally Impermissible Purpose, Commissioner Failed to Consider the Application to Ethical Principles and Professional Standards of <u>Amicus</u> Psychological Association, as Ordered by this Court	6
CONCLUSION	11
CERTIFICATE OF SERVICE	12
Appendices:	
I. APPENDIX A: Affidavit of David Mills, Ph.D.	A1
II. APPENDIX B: Affidavit of Jack I. Bardon, Ph.D.	A5
III. APPENDIX C: Affidavit of Donald N. Bersoff	A10

TABLE OF CITATIONS

	<u>Page</u>
<u>Fluker v. Alabama State Bd. of Educ.</u> , 441 F.2d 201 (5th Cir. 1971)	10
<u>Forrest v. Ambach</u> , 436 N.Y.S.2d 119 (Sup. Ct. 1981)	1, 3, 6
In the Matter of Appeal of Muriel Forest, No. 10673 (Oct. 14, 1981)	<u>passim</u>

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OF THE EDGEMONT UNION FREE SCHOOL DISTRICT,

Respondent.

INTEREST OF AMICI CURIAE

The American Psychological Association, the New York State Psychological Association, and the Westchester County Psychological Association are pleased to submit this Brief Amici Curiae. Amici are voluntary, non-profit, scientific and professional organizations vitally concerned with the outcome of this case. Petitioner is a member of the Associations represented here.

This is not the first time that amici have participated in this case. When Petitioner, Mrs. Forrest, initially brought an appeal before this court in September 1980, amici were granted permission to submit a brief on her

behalf¹ and to make a statement at oral argument. Amici are gratified by the serious attention this court paid to their arguments in September 1980 and to the inclusion of an excerpt from the brief in its written decision. Forrest v. Ambach, 436 N.Y.S.2d 119 (Sup. Ct. 1981).

Amici continue to consider this case to be of significant importance to psychologists employed in public institutions and to the clients they serve. Although the American Psychological Association (APA) receives frequent requests to enter disputes involving adverse employment decisions, this case represents the first time in recent memory that the APA has entered such litigation. This case does not involve a conflict between APA codes, standards, and principles on the one hand and the legitimate policies of an employer on the other. Rather, it concerns the right of handicapped children and their parents to competent psychoeducational services and placement in appropriate special education programs and the right of a fully competent professional psychologist to deliver services in a manner that implements those rights. As we asserted in our first brief and as we will again argue, Respondent Edgemont Union Free School District [hereinafter School District or Edgemont] violated the literal language, intent, and meaning of federal and state law and thwarted Petitioner's attempts to practice within her profession's rules. Her dismissal under those circumstances thus represents an issue of national importance not only to Petitioner but to the clients she serves and the profession of which she is a part.

¹ Descriptions of each of the amicus organizations were presented in that brief and will not be repeated here. Brief of Amici Curiae at 1-3 [hereinafter First Brief]. Amici believe that the arguments presented in that brief are still relevant and wish to have its contents incorporated by reference herein.

Amici believe that Respondent Commissioner of Education's [hereinafter Commissioner] second decision, In the Matter of the Appeal of Muriel Forrest, No. 10673 (Oct. 14, 1981) [hereinafter Appeal No. 2] failed to conform to the dictates of this court. In its decision, this court ordered the Commissioner to analyze whether Petitioner "was dismissed solely due to her attempt to adhere to statutory mandates and her own professional standards as a psychologist." Forrest v. Ambach, 436 N.Y.S.2d 119, 123 (Sup. Ct. 1981). This, we believe, he failed to do. In that light, amici wish once again to present their views on matters particularly vital to their concerns and to a proper adjudication of Petitioner's claims.

ARGUMENT

Preliminary Statement

In April 1980, the Commissioner dismissed Petitioner's appeal of her termination from the School District stating that she did not have standing to challenge the School District's neglect of its duties under state and federal law regarding the identification, evaluation, and placement of handicapped children in its jurisdiction. Petitioner then sought a judgment from the New York State Supreme Court that the dismissal of her appeal was invalid. Subsequently, this court held that the "Commissioner's determination not to decide whether respondents [Edgemont] were neglecting their statutory duties regarding handicapped children result in a failure to have her grievance aired" and was thus "arbitrary and capricious." Forrest v. Ambach, 436 N.Y.S.2d 119, 122 (Sup. Ct. 1981).

The court then remanded the case to the Commissioner to resolve issues concerning the alleged neglect of the School District's statutory duties regarding handicapped children and if found to exist, whether such neglect resulted in Petitioner's dismissal for a constitutionally impermissible purpose. The Commissioner answered both of those questions in the negative, finding that Edgemont was in "substantial compliance with . . . relevant legal requirements," Appeal No. 2 at 6, and that Petitioner "has failed to demonstrate that she was dismissed solely for a constitutionally impermissible reason." Id. at 7. Amici respectfully submit that both those findings were clearly erroneous and that they were grounded in an inadequate and one-sided review of the evidence that failed to comply with the instructions of this court.

I. Commissioner's Findings that School District was in Substantial Compliance with Statutory Mandates and was not Neglecting Its Legal Duties to Handicapped Children were Clearly Erroneous.

The state and federal statutes concerning the proper identification, evaluation, and placement of handicapped children are set out in amici's initial brief. First Brief at 17-28. As a result of amici's analysis of these legislative determinations, we argued that the School District made Petitioner's continued employment contingent, as a result of its policies, on the violation of those statutory mandates. The Commissioner found to the contrary. His conclusion was based primarily (if not entirely) on his reliance on an inspection report filed by a state employee who had visited the School

District in September 1979. That report alleged that the School District was in significant compliance with applicable law.

If the September 1979 report served as the basis for the Commissioner's decision that the School District was not neglecting its legal obligations and therefore Petitioner has no cause to complain or continue to serve her clients in accordance with her profession's standards and ethics, it is unequivocally reversible error. The Commissioner acknowledges that the State of New York conducted two site visits to Edgemont, one on July 5, 1979 and the other on September 25. The Commissioner downplays the Regional Associate's report of that first visit, merely quoting that portion which indicated she had identified "several problems regarding questionable practices in the identification and classification of handicapped students" Appeal No. 2 at 5. However, he failed to cite the stronger language of the inspector who found that Edgemont was "not meeting the requirements of state and federal laws." Verified Petition in the Matter of the Application of Muriel Forrest, Appendix B (July 30, 1980) cited in First Brief at 26 n.23.

Perhaps even more significant is the fact that the second site visit was not conducted until September, five months after Petitioner was dismissed. The first and critical site visit report was written in July, soon after Petitioner's termination, and was based on facts gathered during the school term while she was still employed. Thus, there is no factual basis for the Commissioner's conclusion that the School District was not negligent in carrying out its statutory duties toward handicapped children for the relevant period of time, i.e., prior to and at the time of Petitioner's dismissal. The

second report, even if valid, is entirely inapplicable to a determination of the School District's conduct during the time at issue in this case.²

The only relevant evidence, therefore, supports Petitioner's contention that her obligation to act in a manner compatible with her professional code of ethics, professional standards, and the guidelines for the delivery of services within her own particular specialty of school psychology compelled her to resist the unlawful policies of her employer. In terminating her employment after 12 years for this resistance, the School District infringed on Petitioner's protected interests in an arbitrary and irrational manner. The Commissioner's failure to vindicate those interests was clearly erroneous.

II. In Finding that Petitioner was not Fired for a Constitutionally Impermissible Purpose, Commissioner Failed to Consider the Application to Ethical Principles and Professional Standards of Amicus Psychological Association, as Ordered by this Court.

The second issue before the Commissioner on remand was whether Petitioner was dismissed for a constitutionally impermissible purpose. In deciding against Petitioner on this issue the Commissioner took an extremely narrow view of the constitutional constraints placed on the School District by this court. The Commissioner appears to have defined constitutional protections as limited solely to Petitioner's criticisms of Edgemont's conduct. Appeal No. 2 at 7. But, Petitioner and amici herein have consistently urged that those protections be given a broader interpretation. Petitioner's protected conduct

² Commissioner's ancillary finding that at the time of both site visits there was no finding of intentional or willful noncompliance is also not pertinent. The question this court ordered the Commissioner to address was Edgemont's "neglect" of its statutory duties.

is not limited solely to critical letters to her supervisors but includes her written psychological evaluations, discussions with parents, dissents within the Learning Resources Committee and the Committee on the Handicapped, and the contents of presentations before scientific and professional societies to the extent that they are in compliance with professional standards. See First Brief at 32-35.

This court appears to agree with Petitioner's and amici's perspective on this issue. In perhaps the most relevant and significant portion of its opinion, the court stated:

While a school board is in the position of an employer, those professionals employed by a school board do have a level of professional competence and standards which must be recognized and respected, not only for the profession itself, but for the purpose of rendering the best service to the school board and ultimately to the students they serve. The ethical standards of any professional employed by a school board cannot be cavalierly dismissed as irrelevant to the employer-employee relationship, and may indeed become quite relevant in certain circumstances. Petitioner herein alleges that respondent school board required her to violate not only her professional standards and ethics, but the law as well and that when she refused to comply with the illegal and unprofessional mandates of said school board, she was summarily dismissed. These are serious allegations which warrant a complete determination. If, in fact, petitioner was dismissed solely due to her attempt to adhere to statutory mandates and her own professional standards as a psychologist, then her dismissal by said school board would be arbitrary, capricious and unconstitutional. Forrest v. Ambach, 436 N.Y.S.2d 119, 122-123 (Sup. Ct. 1981), (emphasis added).

Such an analysis is completely absent from the Commissioner's decision.

In reaching his decision that Petitioner was terminated for permissible purposes, the Commissioner relied upon the School District's bald assertions that she was fired for unwillingness to conform to altered duties imposed by

Edgemont, continuing to diagnose handicapped children's learning problems in psychological evaluations, making recommendations to parents, failing to communicate effectively with teachers, and writing reports unacceptable to her supervisors.³

What the Commissioner failed to consider is that the altered duties urged upon her by the School District were in violation of state and federal laws -- legal mandates she was ethically bound to follow. First Brief at 11-17. The School District's other complaints are equally invalid. They were effectively rebutted by Petitioner in her written arguments to the Commissioner and in affidavit presented on her behalf by the American Psychological Association in timely fashion to the Commissioner before the July 14th hearing. While the Commissioner may have the right to disbelieve these submissions, he is obligated, at least, to take them into account in his decision. However, his opinion is absolutely devoid of any reference to Petitioner's evidence or to that of the APA.

Petitioner's work, including the same sample of psychological reports referred to by the Commissioner, see Appeal No. 2 at 7, was independently evaluated by two highly respected psychologists and, as noted, affidavits

³ With regard to the latter, amici continue to assert that Respondents Larson, Shulman, or Freund, her administrative supervisors, were not properly qualified under federal law to determine the breadth and scope of psychoeducational evaluations or to restrict Petitioner's professional functioning in her area of training, expertise, and certification. Appropriate review of her work should have been undertaken by independent school psychologists qualified to assess her professional conduct. First Brief at 27.

concerning their conclusions were before the Commissioner.⁴ The first affidavit (attached herein as Appendix A) was written by David H. Mills, Ph.D., currently serving as APA Administrative Officer for Ethics and past chairperson of the APA Committee on Professional Standards, the group responsible for drafting the Standards of Providers of Psychological Services, fully described in amici's initial brief. See First Brief at 10-11, 14-16 & Appendix B. He concluded that Petitioner's conduct, though criticized by the School District and accepted by the Commissioner as permissible reasons for Petitioner's dismissal, was all within the Association's Ethical Principles, Standards for Providers, and the Specialty Guidelines for the Delivery of School Psychological Services.

The second affidavit (see Appendix B) was written by perhaps the most honored and respected member of the profession of school psychology, Jack Bardon, Ph.D. In addition to the qualifications he cites, he is the 1981 recipient of APA's award for Distinguished Contributions to Applied Psychology as a Professional Practice and the former president of APA's Division of School Psychology. As a result of his thorough review of Petitioner's reports

⁴ Petitioner sought to have these experts attend the hearing before the Commissioner and present testimony which would have been subjected to direct and cross-examination. That proffer was refused by the Commissioner. School District in its brief to the Commissioner took issue, at length, with the conclusions in those affidavits and patently misinterpreted the clear and explicit content of those affidavits. Memorandum at Law on Behalf of Respondents at 16-19. Amicus APA, whose legal representative attended the hearing, attempted at Petitioner's request, to respond to those erroneous characterizations. However, that request was also denied by Commissioner. Whatever procedural infirmities the Commissioner created by his refusal to permit live witnesses was thus compounded by his failure to permit a "complete determination" of Petitioner's allegations, as this court ordered. In that respect, then, amici contend that the entered proceeding was unlawful and should be considered null and void.

he concluded not only that they were "excellent" but "highly likely to be of use to . . . learning resources personnel in or out of the school setting." In addition, Dr. Bardon found Petitioner's suggestions for educational programming of superior quality and expected "that teachers would find her suggestions helpful and understandable" and indicative of "an unusual degree of skill and understanding of school-related problems." Affidavit of Jack Bardon at 2-3. His ultimate conclusion was that Petitioner's psychological evaluations were consistent with school psychology's ethical and professional standards and that following the School District's administrative dictates would have been "unprofessional and unresponsive to the needs of her clients." Id. at 4.⁵

Thus, insofar as the Commissioner accepts as the basis for his decision the reasons offered by the School District in its attempt to justify Petitioner's dismissal, those reasons are totally unsupported and unsupportable. If the Commissioner cannot demonstrate a factual basis for the School District's dismissal of Petitioner, "then this would tend to prove that other, constitutionally impermissible reasons motivated . . . [its] actions." Fluker v. Alabama State Bd. of Educ., 441 F.2d 201, 209 (5th Cir. 1971). Amici believe that an objective and complete determination of all the evidence

⁵ As noted, see supra. n.4, the School District seriously misconceived the affidavits of Drs. Mills and Bardon. Amici's attempt to rebut the School District's assertion was rebuffed by the Commissioner during the hearing. Thus, they were forced to submit a written affidavit on July 29, 1981, subsequent to the hearing. For the information of this court, it is included herein as Appendix C.

supports Petitioner's contention that she acted in accordance with the high standards of profession and in a manner that comported with her duty to serve her ultimate clients -- handicapped children and their parents.

CONCLUSION

Because the Commissioner failed to fully consider the entire record and all the evidence within it and violated the mandate of this court to make a complete and unbiased evaluation of petitioner's conduct, amici respectfully urge this court to reverse his judgment. Amici also believe that a second remand to the Commissioner so that he may hear this case a third time would be futile and inappropriately prolong the vindication of Petitioner's rights. Thus, if the court concludes that it may render an ultimate decision on the record currently before it, amici urge that it do so. In the alternative, amici recommend that this court, not the Commissioner, hold a full hearing, including the introduction and examination of witnesses.

As before, amici would be honored to present their views in oral argument on any issue deemed relevant by the court.

Respectfully submitted,

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February 19, 1982

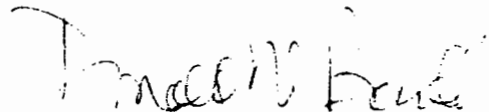
CERTIFICATE OF SERVICE

I, Donald N. Bersoff, Counsel for Amici Curiae, certify that on this day, the 19th of February, 1982, I served by mail two copies of the foregoing Brief of Amici Curiae, on:

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DONALD N. BERSOFF

February 19, 1982

APPENDICES

APPENDIX A

BEFORE THE COMMISSIONER OF EDUCATION
OF THE STATE OF NEW YORK

In the Matter of
MURIEL FORREST, petitioner

against

AFFIDAVIT

THE BOARD OF EDUCATION OF THE
EDGEMONT SCHOOL DISTRICT, et al,
respondent

District of Columbia) ss:

DAVID H. MILLS, being duly sworn, disposes and says:

I. I received my doctoral degree in clinical psychology in 1964 and am a Fellow of the American Psychological Association. I am currently serving as the Administrative Officer for Ethics of the American Psychological Association and am the past Chair of that association's Committee on Professional Standards. I will address several issues related to this case from the framework of two existing American Psychological Association policy statements, the Ethical Standards of Psychologists (ES) and the Specialty Guidelines for the Delivery of Services by School Psychologists (SG); a third document, the Standards for Providers of Psychological Services is parallel to the Specialty Guidelines in content but is generic rather than specific to School Psychology.

II. The first issue relates to the school psychologist's communicating directly with the parents of the children with whom she or he works in the school situation and making outside referral services available to them. The Preamble to the

Ethical Standards states that "psychologists respect the dignity and worth of the individual ... (and) make every effort to protect the welfare of those who seek their services..." Similarly, the Specialty Guidelines state in Section 3.1 that "The promotion of human welfare is the primary principle guiding the activity of the school psychologist and the school psychological service unit." It is clear from both the Ethical Standards and the Specialty Guidelines that, while psychologists seek to support the "integrity, reputation, and proprietary rights" of their employing institution (Principle 7.d, ES), and that they attempt to maintain a cooperative relationship with colleagues and coworkers (SG 2.2.6), their ultimate responsibility is to the user and to the provision of the best services possible to the user (ES Preamble; SG 3.10). If such provision is "responsive to the needs of the school population that is served" (SG 2.1.1) and indicates that parent contact would be necessary, then such contact must be engaged in. Further, the making of resources within the community available to these parents is congruent with both the Specialty Guidelines which dictate that school psychologists "use the network of human services within their communities in order to link users with relevant services and resources (SG 2.2.5) as well as the Ethical Code ("Psychologists ... make full use of all the professional, technical and administrative resources that best serve the interests of the consumers" (ES 7.a)). Therefore, if a school psychologist making contact with children's parents and providing them with a list of referral resources within the community is in the child's best interests, then such activities would be mandated by both the Ethical Standards and the Specialty Guidelines.

III. A second issue relates to a psychologist's responsibility to enter into consensual opinions when they may differ from her/his own. The Guidelines state that not only is school psychology an independent, autonomous profession (SG 3.2) but that the practitioner is preeminently guided by client welfare (SG 3.1). Further, the Ethical Standards dictate that the psychologist has the responsibility to "modify institutional pressures that may distort reports of psychologists findings or impede their proper use" (ES 1.b) as well as the obligation, "Where demands of an organization go beyond reasonable conditions of employment" to "clarify the nature and the direction of the loyalties and responsibilities involved" (ES 6.b). As such, then if a consensual or group decision/opinion ran strongly contrary to the psychological findings or would suggest that they might be used in a professionally inappropriate manner, the psychologist is obligated to make this clear and not to attenuate her/his basic responsibility to the user.

IV. The final issue relates to the propriety of a school psychologist making referrals into the medical community, specifically to neurologists if the psychological data suggests for example, in the case of a possible learning disability, the likelihood of neurologic impairment, organic dysfunction, etc. The initial question appears to be whether the psychologist has the skill and the knowledge to make a definitive statement in the discipline referred to, hence the referral. Psychologists are bound to represent their skills, training, and experience accurately (ES, Principle 2.a) and are mandated to familiarize themselves with the "network of human services in their communities" (SG 2.2.5). Further, the psychologist must "maintain a cooperative relationship with colleagues and coworkers" in other disciplines "in the best interest of the users" of their service (SG 2.2.6). The Specialty Guidelines, in its written interpretation of this particular Guideline further state that "School Psychologists

recognize the areas of special competence of other professionals in the school and in the community for either consultation or referral purposes (e.g., school social workers, speech therapists, remedial reading teachers, special education teachers, pediatricians, neurologists, and public health nurses)." So it would appear that neurologic and other medical referral, when in the best interest of the user, would be dictated by the Guidelines.

V. In sum, therefore, it would appear that the policy statements governing the practice of school psychology, both the Specialty Guidelines for School Psychologists and the Ethical Standards for Psychologists, strongly indicate that the school psychologist must, when a particular case seems to dictate it in the best interest of the user, be able to communicate with the user's parents and to make appropriate community referral resources (to include medical resources) available to them. In addition, the psychologist has a strong obligation not to subsume or alter the basic thrust of her or his findings solely in order to reach some team consensus unless that consensus is congruent with those findings.

Sworn to before me this _____
day of June, 1981.

David H. Mills, Ph.D.

BEFORE THE COMMISSION OF EDUCATION
OF THE STATE OF NEW YORK

In the Matter of
MURIEL FORREST,

Petitioner

File No.

-against-

THE BOARD OF EDUCATION OF
THE EDMONT UNION FREE SCHOOL
DISTRICT et al.,

Respondents

AFFIDAVIT

On Remand Following a Judgment
Pursuant to Article 78 of the
Civil Practice Law and Rules

STATE OF NORTH CAROLINA)

COUNTY OF *GUILFORD*) ss.:

JACK I. BARDON, being duly sworn, hereby deposes and says;

and a licensed professional psychologist.

1. I am a certified school psychologist. I received my doctorate in clinical psychology from the University of Pennsylvania in 1956. I am currently Excellence Fund Professor of Education at the University of North Carolina at Greensboro. I am a Fellow of the American Psychological Association: Division of School Psychology (Fellow); Division of Community Psychology (Fellow); Division on the Teaching of Psychology (Fellow); Division of State Psychological Association Affairs (Fellow); Division of Counseling Psychology; Division of Educational Psychology (Fellow); Division of Consulting Psychology. I am also a Fellow of the American Orthopsychiatric Association and am on the Policy and Planning Board of the American Psychological Association and the Board of Directors of the American Orthopsychiatric Association. My recent publications include

"School psychology in the post-Larry P. era," printed in School Psychology Review, 1980, 9, (2), 159-167, and a chapter on "The psychology of school psychology," in A handbook for the practice of school psychology, currently being published by John Wiley & Sons in New York. A copy of my Vita and List of Publications is appended as an exhibit to this affidavit.

2. I have been asked by amicus curiae in this matter, The American Psychological Association, to review samples of psychological reports prepared by Muriel Forrest, and included in the record of this proceeding as respondent's exhibits A, B, C, Y, and Z submitted to the Commissioner of Education as part of the verified answer in this case. While I cannot judge the validity of these reports, as I have not myself examined the children for whom these reports were prepared, I can say that the reports suggest to me meticulous care in examination procedures.

3. The reports I have examined are excellent technical clinical reports highly likely to be of use to psychologists, psychiatrists, and learning resources personnel in or out of the school setting; they also include detailed recommendations for educational programming and for procedures that might be useful in helping the child to solve his/her educational/social/personal problems. The fact that recommendations are made for follow-up indicates to me that Mrs. Forrest understood that her reports were part of a procedure in which other professionals and educators would be involved in making

final decisions about the education and welfare of the children involved. I think her suggestions for educational programming are excellent and would expect that teachers would find her suggestions helpful and understandable.

4. Mrs. Forrest's reports are based on extensive batteries of tests. In this respect she shows an unusual degree of skill and understanding of school-related problems. She uses not only standardized tests in common use, but specialized instruments that indicate her advanced and specialized training.

5. Had Mrs. Forrest done what was asked of her by her administrators--deleted terminology such as "learning disability" or "physical handicap" and recommendations to parents and committee members based on her findings--she would have had to act in ways that were unprofessional and unresponsive to the needs of her clients. A psychological report that presents only findings without professional judgment about the meanings of these findings, is not a psychological report, but, instead, a psychometric report. To fail to present her views based on her findings would be equivalent to a physician or a dentist, or any other professional, presenting findings without his or her interpretation of these findings. In this regard, Mrs. Forrest acted responsibly. If she had not included recommendations for education and for further follow-up, she would have been unprofessional and

also, would have failed to be in accord with the guidelines for psychological assessment intended in PL94-142.

6. My comments on the skill level of Mrs. Forrests's reports, the usefulness of her recommendations to learning specialists and teachers, her advice to parents, and her use of some conclusory language in preparing her reports, are in accord, in my opinion, with the ethical code of The American Psychological Association and The National Association of School Psychologists; the Standards for Providers of School Psychological Services of The American Psychological Association and the Standards for the Provision of School Psychological Services of The National Association of School Psychologists.

7. As a final point it must be noted that this case is an important one for the profession of psychology and especially for the psychological specialty of school psychology. School psychologists have long strived to become professional and responsible. They have struggled with the requirements imposed by state departments of education and local districts at the ^{same} time that they have tried to offer high quality service. It appears on the basis of the reports that I have reviewed that Muriel Forrest has performed her responsibilities in ways that exemplify high professional standards and adherence to federal and state laws. I personally hope

that this case can help educators better understand the value and importance of having sound professional decisions made in the schools, undiluted by matters which are unrelated to the very purposes of education--the provision of the best education possible for every child.

Jack O. Bardon

Sworn to before me

this 24th day of June, 1981.

Mazie B. Bullard

My comm. expires 2/11/85

APPENDIX C
BEFORE THE COMMISSIONER OF EDUCATION
OF THE STATE OF NEW YORK

-----x
In the Matter of
MURIEL FORREST,
Petitioner

Appeal No. 12285

vs.

AFFIDAVIT

THE BOARD OF EDUCATION OF THE
EDGEMONT UNION FREE SCHOOL
DISTRICT et al.,

Respondents
-----x

STATE OF MARYLAND)ss.:
CITY OF BALTIMORE)

DONALD N. BERSOFF, being duly sworn, hereby deposes
and says:

1. I am the General Counsel of the American Psychological Association (APA) an organization appearing in this case as amicus curiae along with the New York State and Westchester County Psychological Associations. I am also the recipient of the Ph.D. in School Psychology from New York University and a permanently certified school psychologist in New York State (Certificate No. 63P15473).

2. At oral argument in this case on July 14, 1981, Respondents referred to APA documents and to affidavits submitted by two of its members on behalf of Petitioner. They argued that the APA material was either irrelevant or contrary to law. Petitioner's attorney requested that the APA, through its General Counsel, have the

opportunity to respond to Respondent's argument. This request was denied by the Commissioner.

3. The APA believes that the Respondents seriously misconstrued and misinterpreted APA's standards and affidavits in their Brief and oral argument. This affidavit, then, serves as a rebuttal to Respondents' assertions.

4. As a preliminary matter, APA and its co-amici wish to make known that we consider this case to be of significant importance to psychologists employed in public institutions and to the clients they serve. Although the APA receives frequent requests to enter disputes involving adverse employment decisions, this case represents the first time in recent memory that the APA has entered such litigation. Amici do not view this case as one involving a conflict between APA codes, standards, and principles and the legitimate policies of an institutional employer. This case concerns the right of handicapped children and their parents to competent psychoeducational services and placement in appropriate special education programs and the right of a fully competent professional psychologist to deliver services in a manner that implements those rights. In acting as they did Respondents engaged in a concerted course of conduct that was directly antagonistic to the

civil rights of their handicapped students and their parents and to both the constitutional rights of the Petitioner and her obligation to abide by her professional associations, ethical and professional standards and federal and state law. All of Petitioner's conduct for which she was dismissed by Respondents was consistent with the ethical and professional standards of her profession and federal and state law. Respondents' conduct, on the other hand, violated the literal language, intent, and meaning of federal and state law and thwarted Petitioner's attempts to practice within her profession's rules. The dismissal of Petitioner under those circumstances thus represents an issue of national importance not only to the Petitioner but to the clients she serves and the profession of which she is a part.

5. In that context, the APA and its co-amici offer the following rebuttal to the most serious of Respondents' misconceptions and misstatements, responding to points in Respondents' Brief which were reiterated in their oral argument:

POINT ONE

Respondents' assert (p.16): "Nowhere does petitioner set forth the legal underpinning for her apparent position that a private organization has the authority to determine

the standards by which the performance on the job of a New York State school district employee may be evaluated."

The correct application of APA's applicable standards, i.e., Ethical Standards of Psychologists (revised January 1981, see 36 Am. Psych. 633 (1981)), Standards for Providers of Psychological Services, Specialty Guidelines for the Delivery of Services by School Psychologists, is stated in our Brief Amici Curiae at 10-17. In the light of those standards, the actions of Respondents became not merely the legitimate constraints placed upon an employee's functioning within an institution by superiors but a series of actions that would have forced Petitioner to violate the official policies of the APA, an integral part of which is the requirement that psychologists act in accord with federal and state laws. Lost in Respondents' argument is the fact that they made continued employment of Petitioner contingent on the violation of statutory mandates controlling the identification, evaluation, placement, and the provision of a free appropriate public education for handicapped children.

The legal underpinning for the applicability of APA standards was settled by Judge Kahn in his opinion in Forrest v. Ambach, the relevant portion

of which is quoted here:

While a school board is in the position of an employer, those professionals employed by a school board do have a level of professional competence and standards which must be recognized and respected, not only for the profession itself, but for the purpose of rendering the best service to the school board and ultimately to the students they serve. The ethical standards of any professional employed by a school board cannot be cavalierly dismissed as irrelevant to the employer-employee relationship, and may indeed become quite relevant in certain circumstances. Petitioner herein alleges that respondent school board required her to violate not only her professional standards and ethics, but the law as well and that when she refused to comply with the illegal and unprofessional mandates of said school board, she was summarily dismissed. These are serious allegations which warrant a complete determination. If, in fact, petitioner was dismissed solely due to her attempt to adhere to statutory mandates and her own professional standards as a psychologist, then her dismissal by said school board would be arbitrary, capricious and unconstitutional.

POINT TWO

Respondents assert (pp.16-18), referring to affidavits by Drs. Mills and Bardon, that APA standards require parent contact, notification to parents of community referral sources, and referral to physician. Respondents claim that those standards are contrary to state law which place the obligation for carrying out those activities in the COH, not the individual psychologist.

Contrary to Respondents' implication, the

Standards for Providers and the Guidelines for the Delivery of School Psychological Services do not mandate only one means of insuring that parents are kept fully informed of the results and recommendations derived from the provision of psychoeducational services. Direct contact by Petitioner would have been unnecessary had the Respondents not erected the barrier of the Learning Resources Committee. This entity, for which there are no state laws, regulations, or guidelines, effectively shut off Petitioner's communication with the COH and, consequently, parents, concerning her evaluations of and recommendations for handicapped children. Once that situation occurred, then Petitioner was obligated under APA standards to consult with and offer information to parents of the children she served.

POINT THREE

Respondents assert (p. 17) that Dr. Mills "maintains that the psychological findings are preeminent. . .", and that such a role is contrary to federal law.

Such an assertion is so far removed from the clear language of Dr. Mills affidavit as to cast doubt on the credibility of Respondents' submissions in this case. What Dr. Mills wrote was, (p. 3) "The Guidelines state that not only is school psychology an independent, autonomous profession (SG 3.2) but that the practitioner is preeminently guided by client welfare (SG 3.1)."

(emphasis added)

Petitioner acted within those Guidelines by performing in a professional manner for the benefit of handicapped children and their parents, and ultimately to the school system which employed her. The obligations of psychologists when confronted by employer's policies that may conflict with the welfare of their clients are described in detail in Brief Amicus Curiae at 12-13.

POINT FOUR

Respondents assert (p. 17) that Dr. Mills' affidavit implies that the psychologist is the primary diagnostician while state assessment procedures under Pub.L. 94-142 require they be multidisciplinary.

Dr. Mills' affidavit (p. 3, lines 10-14) recognize that both the assessment and the resulting diagnosis and recommendations are the result of a group decision. The issue addressed by Dr. Mills, by the APA, and its co-amici is whether the psychologist has a right and duty to dissent from that group decision or is constrained to acquiesce in a decision that he/she does not believe in. Dr. Mills' affidavit and Brief Amicus Curiae, 23-24, 28-41 argue only that psychologists do have the right to dissent from committee decisions under the federal constitution, federal law, and the state's own guidelines.

POINT FIVE

Respondents assert (pp. 22-23) that Petitioner's

dismissal was based on her inability to modify her role from that of clinician to school-based consultant and that such a broadened role was contrary to the policies of APA and one of its affiants, Dr. Bardon.

APA standards, principles, and guidelines do not prescribe any one role for the school psychologist. In fact, the Specialty Guidelines list at least seven major roles, including consultation and collaboration with school personnel. See Brief Amicus Curiae, App. at A32-33. A cursory review of school psychology publications, e.g., Journal of School Psychology, Professional Psychology, Psychology in the Schools; see especially J. Ysseldyke & R. Weinberg (eds.), the Future of Psychology in the Schools, 10 School Psychology Review (1981) reveals that the profession recommends a multifaceted school-wide role for psychologists. Dr. Bardon, as perhaps its most respected spokesperson, has been one of those arguing for such a role. See, J. Bardon & V. Bennett, School Psychology, (1974).

The question here is what ethical and professional obligations the APA deem important when a psychologist is asked to perform psychoeducational evaluations. In that role, the APA requires high level expertise, comprehensive evaluations, and the involvement of the client. In acting

as she did in this case, Petitioner performed both
competently and ethically.

Donna M. Beroff

Sworn to before me this 29th day of July,
1981.

Alice M. Whitacre

My commission expires: July 1, 1982