How Foucault’s Panopticon Governs Special Education In California

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Abstract
Special education laws in California function to create compliance by creating an environment of constant surveillance and monitoring from a range of perspectives. Even those who do the monitoring are themselves subject to this surveillance. This process is explained with reference to Bentham’s design of the panopticon and analyzed in relation to Foucault’s concept of governmentality. The intent here is to show how professionals’ and laypersons’ actions are governed by seeking to avoid being seen to behave incorrectly or getting caught behaving inappropriately. The governing of people’s lives is thus dispersed through professional decision-making and reporting. The intent of this article is not to single out the monitoring of special education laws for negative criticism. It is, however, the intent to open up a field of study as illustration of how governmentality functions throughout society.

Keywords
panopticon, special education, California, governmentality, monitoring, surveillance

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If you ask special education teachers or service providers (staff) why they chose to teach in special education, most would say something about a desire to help students or to make a difference in children’s lives. Few, if any, would state a desire to monitor compliance with special education laws and hold Individual Education Plan (IEP) meetings. However, for special education staff the monitoring of special education laws are a large part of their daily job, which most were not aware of when they chose to go into the field. Even though universities teach teacher candidates about special education laws, they are not told “big brother” will be watching to insure they are in compliance with these laws.

In special education, someone is always monitoring someone. This article describes the process by which this monitoring takes place and relates it to the concept of governmentality, as developed by Michel Foucault (2000). Foucault argued that in the modern world the panopticon was developed to replace more cumbersome (and more violent) methods of social control. It involves the production of designated forms of consciousness in people’s minds so that they qualify as good citizens. In special education, the monitoring starts at the federal government level and runs all the way down to the special education staff. Our intention is not to call for the rejection or displacement of all of the practices of monitoring that have developed, but to look at them critically through the lens of a Foucauldian analysis.

From here we might create a perspective which can form the basis of change where it is warranted. Without a useful analysis practices that might have worrisome side effects can simply multiply unchecked.

Teachers have been taught to work with and assist children with disabilities; in practice, however, this training translates into the need to worry about meeting the requirements of over a thousand special education compliance laws. However, the effect of the monitoring required by law can push teachers to focus more on compliance issues than on students’ educational needs. That is the place at which the analysis advanced in this article asks us to give pause and reconsider what is happening.

The neologism developed by Foucault to describe the effects of being watched is “governmentality”. It brings together the two words “government” and “mentality” to refer to the ways in which processes of surveillance are designed to effectively govern people’s lives through internalizing into them a mentality of compliance and docility. Foucault analyzed the application of this process through his examinations of the treatment of the mentally ill and the criminal (Foucault, 1978; 1988). However, this analysis can be applied much more widely in other domains of modern life. At each level of the special education monitoring process there is a variety of ways to monitor compliance. At various times during the school year, strategies are used to monitor and check for compliance. Teachers are not always aware of when they are going to be monitored so they need to be in constant compliance with
providing services, conducting IEP meetings and writing up their IEP paperwork. This practice of not revealing exactly when a person’s behavior is being monitored is a practice of governing the mentality of an individual. It elicits self-regulation by special education staff, school districts and the state department of education, causing each level to act as if they are being observed all the time (McKinlay & Starkey, 1998). Within the different levels of special education, a panopticon effect develops and school districts and the state department of education develop means to respond to the “constant pressures to be mindful of performance indicators” (Morgan, 2005, p. 333) through self-monitoring.

Who is Watching Who?

The concept of the panopticon was first developed in the 17th century by the philosopher Jeremy Bentham (Foucault, 1978). Bentham designed this concept for the modern prison, which became, for the first time, a place for the correction of inmates, rather than a place where prisoners were housed and often tortured before being put to death. In Bentham’s design a prison tower with a 360 degree view of the prison cells surrounding the tower held the central place. Many prisons still use this design, now with twenty-four hour electronic monitoring in place. The purpose of the design was to allow the guards to see all the prisoners; however, the prisoners were not able to see where the guards were looking (McKinlay & Starkey, 1998; Monk, Winslade, & Sinclair, 2008; Morgan, 2005; Strub, 1989). It was based on the idea of “eyes that must be seen without being seen” (McKinlay & Starkey, 1998, p. 135). If a prisoner were caught doing something that was not permitted he or she faced a severe consequence. Between not knowing where the guards would be looking and not wanting to face severe consequences, the prisoners started to self-regulate their behavior out of fear (McKinlay & Starkey, 1998; Monk, Winslade, & Sinclair, 2008; Morgan, 2005; Strub, 1989). This style of prison was called the Panopticon.

The advantage of the panopticon concept is that it allows for many to be governed by a few (McKinlay & Starkey, 1998, p. 174) and does not require the demonstration of overpowering force. A panopticon uses “more subtle social techniques” (Peters & Besley, 2007, p. 37) and governs through constant supervision, controls, and corrections, which influence the way people behave (Dean, 1999). The social techniques used are correct training, hierarchical organization, surveillance, normalizing, sanctions and examination (Peters & Besley, 2007, p. 138). Surveillance, for example, was not to be heavy and noticeable; however its presence was to be felt by the individual (McKinlay & Starkey, 1998) and it would thus create a more efficient expression of power than would be required by outright physical domination (Morgan, 2005).

Another aspect of the panopticon was the implementation of the sanctions needed to make it work (Morgan, 2005). Sanctions are the potential negative consequences administered if the rules or laws are not followed. These consequences are not so punitive as torture or execution; however they are enough to have a strong impact on the person either financially or socially. An example of a sanction is the fee charged by banks when a checking account is overdrawn. The consequence is not life threatening; however, society frowns on bounced checks and the extra fee is added to the deficit to discourage non-compliance with the norm. Through the use of such a fee, banks may be said to govern the financial behavior of account holders. It is worth noting that, in the modern world, the functions of government are not completely centralized in the state but are dispersed through a range of social institutions. Often the processes by which people are governed are anonymous and abstract, such that there is no obvious person to rebel against or directly protest to.
WISDOM IN EDUCATION – VOL. 5, ISS. 1

The pressure generated from within the culture and society to obey the law and avoid consequences (sanctions) creates self-monitoring (Dean, 1999; Morgan, 2005). Self-monitoring is another form of disciplinary power (Foucault, 1978). It was called disciplinary because of its effect of disciplining the individual to be a docile, law-abiding citizen but also because of the role played by academic disciplines, particularly by psychology, in developing the descriptions of normal or abnormal behavior, against which a person could be measured to determine the need for sanctions. According to Foucault, disciplinary power is a sophisticated technique that operates inside the person’s head causing him or her to monitor himself or herself (Monk, Winslade, & Sinclair, 2008). McKinlay and Starkey (1998) believe the push is for people to do what is right all the time without the need to use force to make them do so. Foucault referred to this kind of expression of power as positive rather than negative, in the sense that it aimed, not so much to repress, as to produce a mentality inside a person. From its beginnings in the prisons, Foucault argued that this approach to power was soon transferred to all the other new institutions of modern life: the factory; the school; the hospital; and the military barracks. In each case what was needed was to define a population, designate what would be called normal behavior (preferably through the “objective” methods of the new social sciences) and then to apply processes of surveillance to ensure that people were trained to behave in docile and correct ways.

This paper will apply Foucault’s analysis of power based on the panopticon to the various levels of monitoring compliance embodied in the federal special education laws. It will review what is expected by the federal government from each state in the union. It will focus on how California responds to these expectations and in turn monitors school districts, by collecting data from each school site, teacher, and individual student on an IEP. This creates a hierarchical panopticon effect, where one group watches another group, which watches another group, which watches another and so on. Such a system of monitoring creates a need to put in place more and more administrators in order to have enough eyes to assist with the surveillance. The structure of a hierarchical panopticon supports a strong, constant surveillance, where each portion of the special education system is being monitored at any given time.

Federal Government
At the top of the hierarchical panopticon is the Office of Special Education Programs (OSEP) which represents the federal government. OSEP is the office where the monitoring originates. However, OSEP does not directly obtain information from school-level special education staff. Through the Continuous Improvement and Focused Monitoring System (CIFMS) OSEP periodically conducts verification reviews of each state department of education, and requires annual reporting. According to Alexa Posney, former Director of OSEP, the purpose of site visits and data collection is to monitor how each state uses their general supervision (which is the system the state uses to monitor and whether this system does what it is set up to do) and state reported data collection to improve state performance and to protect the rights of the children and their families (Posney, 2007). Every February, OSEP collects data from each state through the State Performance Plan (SPP). The SPP consists of 20 items, which OSEP uses to determine whether the state is in compliance or not with their obligation to provide special education services to students with disabilities. The twenty items on the SPP are as follows: graduation, dropout, statewide assessments, suspension and expulsion, least restrictive environment, preschool least restrictive environment, preschool assessment, parent involvement, disproportionality overall, disproportionality of disability, eligibility evaluation, transition from infant program to

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preschool program by age three, secondary transition goals and services, post-school outcomes, general supervision, complaints, due process, hearing requests, mediation, and state-reported data.

The California Department of Education (CDE) collects individual student data to develop the SPP report. Even though CDE collects the information at the student level, they do not identify individual students and/or special education staff in the report sent to OSEP. Every individual is left to imagine that he or she is the one being spoken about. This appears to be a subtle form of surveillance. OSEP’s collection of reports is similar to the purpose of the prison guards in the tower (Monk, Winslade, & Sinclair, 2008) since the districts and school sites do not know what data will be pulled and reviewed. This random factor creates a panopticon effect forcing special education staff to self-monitor their implementation of special education laws.

In 2006, OSEP visited CDE as part of the CIFMS. Prior to the visit, OSEP reviewed numerous documents submitted by CDE and held conference calls with stakeholders within the Special Education Division (SED) (Posney, 2007). The verification review included an analysis of policies, procedures, the monitoring system and how data was collected (Posney, 2007). To understand the scope of the OSEP review, a closer look at CDE’s monitoring system is necessary (see Figure 1. below).

California Department of Education and Special Education Local Plan Area (SELPA)
The next entity in the hierarchical panopticon is the California Department of Education (CDE). California’s school system (using 2014 figures) is made up of 58 county offices of education, 1,028 school districts, 10,366 schools, 1,125 charter schools and four special state programs. In order to monitor the compliance with special education laws, CDE/SED is broken into five units, which are responsible for specific portions of the state. These monitoring units are called Focus Monitoring and Technical Assistance (FMTA). The FMTA consultants are assigned geographically. They are responsible for coordinating all monitoring and technical assistance activities by providing information, and facilitating access to technical assistance related to program monitoring and program implementation for the districts and Special Education Local Plan Areas (SELPA) in their assigned counties (California Department of Education, Special Education Division, 2008).

To monitor how school districts implement and remain compliant with special education laws, the FMTA consultants work closely with 122 SELPAs.

CDE/SED with the support of FMTA consultants use a variety of tools and techniques to ensure that the state is in compliance with special education laws. Many of these techniques are similar to those used by OSEP. The difference between the state level and the federal level of monitoring lies in the frequency of the monitoring (usually every four years for state review and every four to six years for federal review). There is also variety in the ways school districts interact with the monitoring system detailed below. Reviews and data collection are two techniques used by CDE/SED. The following is an explanation of both processes and how each is accomplished.

Reviews
There are two types of reviews CDE/SED used to monitor compliance in the school districts. One is a Verification Review (VR) and the other is a Special Education Self-Review (SESR) (California Department of Education, Special Education Division, 2008). VRs are conducted by CDE/SED who sends FMTA consultants to the school district to perform the review. The SESR is completed by a district team using the same process FMTA consultants utilize during a VR. The SELPA is expected to assist with the SESR and VR process. CDE/SED conducts twenty VRs per year and
the SESR are conducted on a four-year cycle (Posney, 2007).

Both reviews consist of developing a monitoring plan which pulls in historical information from the last three years (California Department of Education, Special Education Division, 2009). This information includes various “compliance” reports submitted by the districts to CDE, as well as due process filings, complaints status and parent input. This data is entered into software provided by CDE/SED (Posney, 2007) which formulates a unique monitoring plan for each district being reviewed.

Even though the SESR is designed for the district to self-monitor, the monitoring plan generated from the software must be verified and accepted by the FMTA consultant and the local SELPA. The requirement of having the monitoring plan certified by the FMTA and SELPA amounts to surveillance within surveillance. The purpose of certifying the monitoring plan is for CDE to verify that school districts are reviewing what they want examined. Even though SESR is not completed by CDE directly, they still have control over what is being reviewed by the district, the same as when they were conducting the VR.

The next step of the VR and SESR is the review of the students’ special education files. In both reviews student files are selected randomly so it is not known in advance which files will be selected. This is a prime example of the panopticon in action. The staff does not know which files will be selected or when, so all files need to be perfect. Based on the monitoring plan, the software generates the forms the review team uses. On these forms are definitions of the law and the information the review team needs to look for to verify compliance (California Department of Education, Special Education Division, 2009). During the file reviews, over 1000 federal and state regulatory items are reviewed for compliance (California Department of Education, Special Education Division, 2009; California Department of Education, Special
The number of files reviewed is based on the district’s size; however, typically it ranges from 50 to 100 student files.

The SESR teams consists of district special education staff. Peers are thus reviewing peers’ work. At this point the functioning of the panopticon dispenses with hierarchical surveillance. Peers review each other’s work in order to anonymously influence each other to do what is correct (McKinlay & Starkey, 1998). The pressure on the rest of the school staff to want to be compliant helps to generate the similar expectations of others. However, without the monitoring and review, individuals could avoid participating in the process of normalizing judgment. Unannounced periodic reviews and the existence of sanctions is what really enforces the individual to follow the laws.

Five of the files reviewed by peer review are also selected to have an IEP Implementation review conducted. In other words, the surveillance mechanisms are themselves placed under surveillance. The purpose of this level of the review is to determine whether special education services are provided in the manner listed on the IEP. The IEP Implementation reviewer goes to the school site to review service logs, and to interview both school personnel and students and their parents regarding the provision of special education services.

Five files, either the same or five different ones, undergo an educational benefit review. Educational benefit is the threshold of services the United States Supreme Court identified in the 1982 Rowley Decision (Stavis, 1982). The Supreme Court stipulated that schools are required to provide appropriate (just enough) services to allow students access to the general education curriculum and/or environment with no guarantee the student would be successful (Stavis, 1982). This decision placed the threshold level at ‘appropriate’ rather than ‘optimal’. So this portion of the review is to determine whether appropriate services are being provided to the student to meet their individual needs and to ensure ongoing progress.

The procedure for educational benefit review requires that a file of a student who has been receiving special education services for at least three years be used. The educational benefit reviewer analyzes the assessment reports and IEPs from the last three years to determine whether all areas of concern were addressed and monitored. As part of the analysis, the educational benefit reviewer determines whether the child received appropriate services in order to make progress from year to year.

The last stage of the review process is the Policy and Procedure Review and Local Governance Review (Posney, 2007). The purpose of the Policy and Procedure Review is to determine whether school districts and SELPAs have the necessary policies in place to ensure that special education services are provided in compliance with the federal and state special education laws. The Local Governance Review focuses on verifying that SELPA is implementing the required components and the submission of appropriate data reports (listed below under Reports), which is part of CDE’s scope of surveillance. In addition, a “fiscal review” is conducted to monitor the appropriate use of special education dollars.

After all the reviews are completed, the next step is to identifying areas of non-compliance. The data gathered from the reviews is inputted into the software and a list of non-compliant findings is generated. The system creates two lists, one for student level non-compliance and the other is school district level systemic non-compliance. Student level corrections need to be completed within 45 days of non-compliance being found and evidence of the correction has to be available for review by the FMTA consultant. District level systemic findings of non-compliance need to be corrected within three months and evidence has to be on file for review by the FMTA consultant.
Items are determined as non-compliant based on California Code of Regulations Sections 3088.1, substantial noncompliance, defined as:

An incident of significant failure to provide a child with a disability with a FAPE (Free And Appropriate Public Education), an act which results in the loss of an educational opportunity to the child or interferes with the opportunity of the parents or guardians of the pupil to participate in the formulation of the individual education program, a history of chronic noncompliance in a particular area or a systemic agency-wide problem of noncompliance.

(BARCLAYS, 2009)

The law was written to force the state to monitor school districts for non-compliance. When the review process is dissected, the alignment between the process and this law can be seen. Such laws prompt school districts and their special education staff to act accordingly. However the reproductive effect of this law is limited to enforcing the compliance on its own. Even though social movements, such as the disability rights movement, can be shown to influence the choices one makes and to shape behavior (Crossley, 2003), it is the thought of being watched that most powerfully influences the behavior. On their own initiative, a district might not adhere to the laws, if not required to submit periodic data reports.

Data Reports

Throughout the school year, school districts and SELPAs are required to submit data. As stated above, one of the ways CDE/SED monitors compliance is through data gathering. CDE is required to monitor whether school districts are in compliance with various special education law, and, once a year, their findings are reported through the SPP to OSEP. As mentioned above, districts do not go through a review each year. Still, CDE/SED needs to collect the data for the SPP. Throughout the school year, therefore, CDE/SED requires the following reports to be submitted: Annual Service Plan (ASP); Annual Budget Plan (ABP); Personnel Data Report; Maintenance of Effort (MOE) and the California Special Education Management Information System (CASEMIS) report.

The data collection is done through the SELPA. The SELPA works with school districts to gather accurate data and is expected to submit this information in a timely manner. Also, the SELPA reviews school districts’ data, as submitted to CDE, to ensure it is accurate. To complete this process, the SELPA typically requires school districts to submit their information early. If the district’s data does not appear correct, the SELPA will request more information to make the appropriate correction. This is another example of the panopticon eye subjecting people to the ongoing gaze of surveillance.

One of the main ways CDE/SED collects data is through the California Special Education Management Information System (CASEMIS). This system monitors every student receiving special education services in California. The data gathered is extremely detailed. Examples of the data collected by CASEMIS are the student’s name, school of attendance, disability, type of services received, and the frequency and location of the services. The system also monitors special education timelines. This information is uploaded to CDE two times per year; once on December 1st and the other on June 30th. As the data is gathered throughout the year, the SELPAs and school districts monitor the same information.

As mentioned above, the State Performance Plan reports on twenty items to the OSEP. Ten of the twenty SPP items come directly from the CASEMIS data. They are: suspension and expulsion, least restrictive
environment, preschool least restrictive environment, parent involvement, disproportionality overall, eligibility evaluation, disproportionality of disability, transition between infant programs to preschool programs at age three, secondary transition goals and services, and post-school outcomes. This puts a lot of pressure on the SELPAs and districts to make sure the information submitted to CDE is accurate. Since SELPAs have the data available all year long, different reports are generated to monitor whether districts are maintaining special education timelines. This requirement produces another occasion for the special education personnel to be randomly monitored. The reports are provided to each district’s special education director to make the appropriate corrections and follow up with personnel as needed.

Since the CASEMIS data covers many of the SPP items and needs to be accurate, the CDE has a vested interest in ensuring the accuracy of the data. Approximately one month prior to the submission dates, CDE releases the CASEMIS software. The purpose of the early release is so that SELPAs can test their data with the CASEMIS software to identify which students have non-compliant areas. This allows districts time to correct problems prior to submission on December 1st and June 30th. CASEMIS also has a feature that will not allow the SELPAs to submit data if there are any errors. CDE wants error-free data for their report for OSEP. To obtain such data they encourage the SELPAs and districts to monitor the data and work with the special education staff to make the appropriate corrections. Again self-monitoring behavior is produced.

To help districts ensure staff know what to do, the SELPA provides trainings regarding special education laws. This form of training provides staff with the knowledge needed to do their job correctly (in Foucault’s terms, to become docile citizens). The poststructuralist argument is that, if the staff knows what to do, they will usually do it, when provided the opportunity. Sanctions exist mainly to deal with the rare occasions when people become non-compliant. With reinforcement through practice and discourse, a solid norm of compliant behavior is established. To support this norm, the SELPA holds trainings throughout the school year on numerous topics. Many of the trainings focus on teaching school staff about compliance and empowering them with tools to meet the laws. This effort to produce compliance aligns with what Foucault calls a positive effect of power. Given the strongly embedded system of surveillance, the emphasis on positive training can have a shaping effect, and successfully elicit desired forms of behavior from both professionals and students (Monk, Winslade, & Sinclair, 2008).

However, the trainings alone do not seem to impact the desire to behave. The staff do not always seem to have the motivation to ensure that the IEPs are correct and all laws are complied with, until the awareness sinks in that special education timelines are being watched and there are sanctions if these are not met. It is often just the idea of surveillance rather than the experience of it that causes the voices in the head to start saying, “Watch out!” and to initiate self-monitoring.

School Districts

In the organization of the panopticon, school districts are close to the bottom of the hierarchy. School districts have many eyes watching them and are pressured to ensure staff are in compliance with the law. School districts may request reports from SELPA to ensure that timelines are met. Another way districts self-monitor and watch staff is through the review of IEP paperwork. This review of IEPs is another example of the layers of monitoring.

School districts do all the primary work of ensuring compliance. If a non-compliant area is identified, they need to ensure staff makes the correction. The goal of
the school district is to create within the teacher the ability to self-monitor regarding special education compliance. To manage people’s actions, the system works like a machine, techniques, apparatuses and communication of expectations become engrained, so people self-impose the rules, removing direct power from government (the district, SELPA, CDE) and replacing it with individual self-governance (Morgan, 2005).

Sanctions

Since the imminent peril of facing a negative consequence exerts a large influence on the desire not to be caught doing wrong, sanctions should be addressed. All of the sanctions hanging over the various levels have to do with funding. If the state does not meet OSEP’s expectations, then the money the state receives from the federal government to provide special education services will be held back in whole or in part. This would be extremely costly for the state and create hardship as the provision of education is a function of the state. Therefore, even if the federal government holds back money, the state will still be required to provide the services.

Following the same pattern, the state uses similar sanctions with SELPAs and school districts. After CDE develops the SPP for OSEP, they then develop the Annual Performance Report (APR) for each school district and SELPA. This report focuses on the ten areas of the SPP that come from CASEMIS. If a district or SELPA does not meet the requirements, they need to make appropriate corrections. If the problem is chronic and is not corrected after several years, the state can withhold the money. According to Posney, CDE has a standard letter with which to threaten districts with impending sanctions. This again suggests how powerful the panopticon effect is on the behavior of school districts to ensure they are compliant with special education laws.

Conclusion

The general belief most people share is that the modern democratic state provides citizens with a context of freedom from the coercive power of either the medieval centralized power of the sovereign or from totalitarian versions of the same kind. We are generally satisfied that we live in a more civilized world that does not put people to death or torture them at anywhere near the same rate as do regimes in which power is centralized.

However, Foucault’s analysis showed that citizens in the modern world are often no less free of the effects of power in the shaping of their lives. Freedom is curtailed in much more subtle ways than in the past and we are often scarcely aware of the reach of power into our mentality. The power and the effects of the panopticon are strong. If people believe they are being watched and monitored, yet do not know when, they will start to self-monitor and perform in line with an established norm.

This paper has sought to illustrate how the technologies of the panopticon operate within the domain of special education in California. The intent of this analysis is not to single out special education for special attention, or to claim that it is especially problematic. Other domains of the modern world can also be analyzed in the same way. Nor is the intent to rage against the role of state or federal government. It is clear that, in many aspects of modern life, the government of citizens is undertaken by private and non-state entities. The analysis of governmentality makes this clear.

Nor does this paper question either the accuracy of the data that is collected within the monitoring systems documented or the effectiveness of the education provided to special education students. These have not been the focus. The intention here has been to bring into view systematic processes of monitoring and control which impact in powerful ways the lives of students, teachers and administrators. If we are happy to perpetuate such a system and surrender various degrees of freedom, so be it. If there
are places where we want to challenge the pervasiveness of these technologies of surveillance then we need this kind of analysis to understand what we are up against.

It may indeed be argued that the panopticon system is preferable to one based on physical coercion. On the other hand, there may be places where the system operates to exclude and marginalize some individuals, or where the functioning of the technologies of surveillance is problematic. In such instances, it is useful to have a clear understanding of how the system works and how pervasive the role of surveillance is. When challenges to a system are necessary, when innovation is required, or when injustice needs to be addressed, there will always be a need for resistance to what is. Such impetus for change has to start within what is now a tightly controlled process of production, maintained by multiple technologies of surveillance, and engineered to produce compliance above all. However, compliance is not always an optimal goal and its production should not be over-determined. There are times for resistance and we need to be equipped for these through a thoughtful analysis of how a system functions. It is our hope that this analysis equips those with ambitions to bring about change with a few tools for such resistance.

References


