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Reconsidering the Legalization of School Reform: A Case for Implementing Change Through Mediation

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I. INTRODUCTION

For the better part of this century, civil rights lawyers have attempted to restructure education through litigation and legislation.¹ Indeed, restructuring² - a change in a school's roles, rules, relationships, and results - has been a consequence of mandated legal change. For the past twenty years, few policy analysts would argue that perhaps the most significant change through law has come about in the area of special education.³ A major premise of this Article is that the Education for All Handicapped Children Act of 1975 (PL 94-142)⁴ initiated unprecedented change on American public education. This landmark statute embodied an ideal of equal opportunity. Its implementation and the litigation brought to enforce its mandate have resulted in substantial and unintended changes in the rules

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1. DAVID L. KIRP & DONALD N. JENSEN, *SCHOOL DAYS, RULE DAYS* (1986).
2. RICHARD F. ELMORE, *RESTRUCTURING SCHOOLS* (1990).
3. STEVEN S. GOLDBERG, *SPECIAL EDUCATION LAW* (1982); MARTHA MINOW, *MAKING ALL THE DIFFERENCE* (1990); LAURA F. ROTHSTEIN, *SPECIAL EDUCATION LAW* (1990).
4. 29 U.S.C. § 794 (1988); 34 C.F.R. § 104 (1991).

about who can attend public schools, about the relationships of parents with the schools, and about interactions between teachers and school officials.

The impetus for restructuring through litigation in special education came about as a result of an important social trend: people are classified as handicapped⁵ and their rights are defined under law and developed by the courts. Yet the courts' intentions were not to restructure schools, but to interpret the law in a particular case. Restructuring is the byproduct of the legal process, and the grudging burden of the educational system.

Restructuring that has developed from special education is external and coercive.⁶ It has been imposed upon the school over a period of years during which more conscious attempts at restructuring have been undertaken by educators seeking fundamental, internal, grassroots change.⁷ Educators have been, in fact, consciously engaged in efforts to achieve change in a way that is diametrically opposed to the methods of change undertaken by litigation. Just as lawyers and judges cannot ignore the characteristics of education that require special consideration in legal decisions, educators interested in effective restructuring cannot ignore the powerful social trends which spawned education-based litigation.

This Article explores the role of law in restructuring schools. First, we define restructuring and describe how it has been and is being considered by the educational community. Using special education as a case-in-point, we examine the nature of school restructuring from the different cultures of law and education. We then draw on the research of restructuring and of legal policy implementation to identify effective and ineffective methods for resolving educational issues that become legal cases. Finally, we suggest that a tool of conflict resolution, mediation, can be used to effectively bridge the competing cultures of law and education by developing a forum to resolve the conflict stemming from legal pressure on schools to change.

II. THE RESTRUCTURING MOVEMENT IN THE PUBLIC SCHOOLS

In recent years, the major focus of the educational community has been on restructuring schools to fundamentally redesign the ways they operate. Although restructuring takes many forms, scholars have delineated several recurrent themes.⁸ Included in the varied notions of restructuring are a decentralization of decision making and a focus on the school building level; the mandate to educate all students; an emphasis on raising and clarifying results; the involvement of parents and other educational stakeholders; and changing roles and responsibilities for educational

5. Pub. L. 94-142, 89 Stat. 773 (1975) (codified as amended at 20 U.S.C. §§ 1400-61 (1982)). (Formerly the Education for All Handicapped Children Act, Congress renamed the statute in 1990 Individuals With Disabilities Education Act. Pub. L. 101-476, 104 Stat. 1141 (1990)).

6. Richard Weatherly & Michael Lipsky, *Street Level Bureaucrats and Institutional Innovation: Implementing Special Education Reform*, 47 HARV. EDUC. REV. 171 (1977).

7. PAUL BERMAN & MILBREY W. McLAUGHLIN, FEDERAL PROGRAMS SUPPORTING EDUCATIONAL CHANGE, VOL. VIII: IMPLEMENTING AND SUSTAINING INNOVATIONS 40, 41 (1978). Milbrey W. McLaughlin, *The Rand Change Agent Study Revisited: Macro Perspectives and Micro Realities*, 9 ED. RESEARCHER, 11, 12 (Sept. 1990).

8. See, e.g., ELMORE, *supra* note 2; SCHOOLING FOR TOMORROW: DIRECTING REFORMS TO ISSUES THAT COUNT (Thomas J. Sergiovanni & John H. Moore eds., 1989).

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personnel.⁹ Basom and Crandall¹⁰ suggest that restructuring includes realigning roles, relationships, and educational responsibilities to offer new and different options to students. The educational restructuring process must involve a fundamental and comprehensive redesign of the educational modus operandi. It is characterized by a grassroots change movement rather than "bureaucratic mandates that emanate from distant places."¹¹ Elmore¹² asserts that effective restructuring must be founded on educational issues, and must strive to balance power and influence among the key constituencies: teachers, clients, and administrators.

This Article assumes the following broad definition of restructuring which bridges the wide diversity of educational thought on the subject:

A social system's structure is its pattern of rules, roles, and relationships. Restructuring, then, represents a change in these social characteristics. However, restructuring is not simply for restructuring's sake; its sole purpose is to produce substantially different results from those a district is currently producing. Thus, restructuring involves alterations in a school district's pattern of rules, roles, relationships and results.¹³

The pattern of a school district's rules, roles, relationships, and results defines such variables as the instructional technology, the role and status of teachers, and the relationship of parents to the school and the educational process. Yet it is those variables that directly affect the restructuring process. Working with these variables and with the many definitions of restructuring, Elmore¹⁴ has synthesized three distinct approaches.

The first approach emphasizes reforming the core technology of schools, that is, the content of schooling and the methods employed to deliver that content.¹⁵ This approach holds the view that relatively straightforward changes in specified practices such as use of instructional time, grouping practices, can produce major changes in student learning. Under this model, restructuring is accomplished by introducing the best available knowledge and technology and changing the structure of the schools to correspond to that knowledge. With regard to PL 94-142, this approach would focus on the individualized education plan (IEP), a legally mandated document that prescribes in detail for each student the educational content

9. GLEN HARVEY & DAVID P. CRANDALL, *A BEGINNING LOOK AT THE WHAT AND HOW OF RESTRUCTURING* 10 (1988).

10. Richard E. Basom, Jr. & David P. Crandall, *Implementing a Redesign Strategy: Lessons for Educational Change*, 69 *EDUC. HORIZONS* 73 (1991).

11. THOMAS TIMAR & DAVID L. KIRP, *MANAGING EDUCATIONAL EXCELLENCE* 507 (1988).

12. ELMORE, *supra* note 2.

13. H. DICKSON CORBETT, *ON THE MEANING OF RESTRUCTURING* 20 (1990).

14. ELMORE, *supra* note 2.

15. *Id.* at 12.

and methodology that will be employed to achieve specified educational outcomes.

Elmore's second approach focuses on reframing the occupational conditions of teaching.¹⁶ This mode suggests that schools should be organized to approximate the conditions of professional workplaces. Implementation of this mode requires a well defined hierarchy based on knowledge and competence, collegial control of hiring and firing, access to the knowledge necessary to cultivate higher levels of competence in practice, and strong lateral ties among teachers. In this mode, the teacher is the central figure in the application of knowledge, and an important figure in its creation. The central problem of restructuring under this model is the creation of an organization in which teachers will assume responsibility for cultivating their own practice and the practice of their peers. Restructuring is accomplished by changing the organization of the schools to reflect the high level of expertise and judgment embodied in teachers' work. The problem for this model with regard to PL 94-142 is its emphasis on the primacy of the teacher in decision-making and program implementation. Under federal law and regulations, special education programs are developed through a team decision making process that involves administrators, non-educators, and parents, as well as teachers.

The third of Elmore's approaches focuses on reforming the relationship between schools and their clients.¹⁷ This approach underlies restructuring approaches that give greater choice to parents and students, and that emphasize site-based management. The main difference with this approach is the role of expert knowledge and professional judgment: the educator is much the same as a market manager in a service firm. The approach emphasizes a "demand side" perspective in which knowledge is seen as the way to satisfy client need. Under this approach, restructuring consists of changing the internal structure of the school in response to changes in external incentives. The "best" or most appropriate school structure is the one that is most responsive to client needs and preferences. This model closely parallels the rights granted to students and parents under PL 94-142,¹⁸ which allows handicapped clients the discretion to participate in the development of an educational plan, and grants to them the power of approval. When the school district and the parent disagree, the parent is afforded the right to challenge through the legal system services offered.¹⁹

In articulating these major approaches, Elmore has synthesized the extant thought on effective approaches to restructuring. Effective

16. *Id.* at 15.

17. *Id.* at 18.

18. 20 U.S.C. § 1401 (1988); 34 C.F.R. §§ 300.340-300.349 (1991).

19. 20 U.S.C. § 1415 (1988); 34 C.F.R. §§ 300.500-300.589 (1991).

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restructuring requires that these three approaches be woven together effectively. An inherent dilemma in weaving these approaches together is that of balancing power. Juxtaposing these three approaches to school restructuring creates a tension among school officials, teachers, and clients. If an approach is adopted that emphasizes the power and discretion of teachers, how does it affect the status of clients and school officials in educational decision making? If an approach is adopted that imposes specific educational technology in the schools, what then becomes the role of the teacher and the client? If schools are restructured to emphasize client involvement and choice, what will be the role of teachers and school officials? In fact, PL 94-142,²⁰ through the rights it has endowed on handicapped clients, seems to pressure schools to restructure relationships between themselves and their clients. Yet it does this apparently without regard for balancing power among clients, teachers, and school officials.²¹

Whatever approach to restructuring is adopted, Elmore predicts three possible outcomes, forming points on a change continuum. At one extreme of the continuum is transformation,²² which represents the greatest amount of change. This is a massive and fundamental shift in the content, pedagogy, and technology of education from a bureaucratic approach to some, as of yet, undefined approach. This massive and rapid shift necessary to achieve transformation makes it highly unlikely. The slow pace of due process in special education, and the continually changing state of technical knowledge make transformation an unlikely outcome.

At the other extreme of the continuum is cooptation,²³ in which schools adopt the rhetoric of restructuring without making any changes in substance. Pressure from the political, social, and economic environment, the mandate PL 94-142 places on schools, and the due process rights it grants to clients make cooptation unlikely. This is because a legal mandate such as PL 94-142 reflects the political, social, and economic environment, and creates the demand for substantive change. Due process - the legal procedure parents use to challenge school officials - continually tests compliance to that demand. Thus, the movement toward increased levels of litigation makes cooptation an unlikely scenario.

In the center of the restructuring continuum is adaptive realignment,²⁴ in which schools will respond to changing political, social, and economic

20. *Id.*

21. Steven S. Goldberg, *The End of Legalization in Education: Alternative Dispute Resolution and the Education for All Handicapped Children Act of 1975*, 18 J.L. & EDUC. 441 (1989); Peter J. Kuriloff, *Is Justice Served By Due Process: Affecting the Outcome of Special Education Hearings in Pennsylvania*, 48 LAW & CONTEMP. PROBS. 89 (1985).

22. ELMORE, *supra* note 2.

23. *Id.*

24. *Id.*

conditions with substantive and significant shifts in the ways schools conduct business. Although these changes are neither massive nor swift, they will have an enduring effect on the way schools operate. Political and social forces exert pressure on schools to change, although neither the pressure nor the change is uniformly distributed among individual school settings. The dynamics of these changes are adaptive rather than transformational, and will vary from one setting to another.

The range of organizational solutions will likewise vary from one setting to another. School restructuring, then, will become a series of strategic responses to a set of pressing problems, organized around a certain set of themes, rather than a comprehensive template for the transformation of schools.²⁵

Achieving the restructuring of schools through adaptive realignment requires a broad agenda that attempts to coordinate educational concerns with social, political, and economic ones. PL 94-142 represents the opportunity for such a broad agenda. Implementing special education mandates requires a process remarkably similar to Elmore's description of restructuring through adaptive realignment, since it describes change that occurs in schools as the result of important social trends and influences without the conscious design or intervention of educators, or anyone else. Activities that occur in other spheres of human activity modify values, behaviors, or expectations, and will inevitably affect human institutions, including schools. Increased litigation in special education has, in fact, required that schools change the ways in which they do business.²⁶ These changes have been made in response to external pressure, with little deliberate thought about how those changes may affect the roles, rules, relationships, and results that characterize the public school as an institution. The change is piecemeal, and it is made under fire. The missing element is a mechanism for achieving the alignment of educational needs with social, political, and economic ones. Such a mechanism would provide a means of balancing power needs of teachers, school officials, and clients, and for designing educational strategies that are specific to situations.²⁷

III. THE LEGALIZATION OF PUBLIC EDUCATION

The notion that restructuring is closely tied to a school's particular pattern of rules, roles, relationships, and results is particularly important

25. *Id.* at 294.

26. MINOW, *supra* note 3; JOEL F. HANDLER, LAW AND THE SEARCH FOR COMMUNITY (1990).

27. SEYMOUR B. SARASON, THE PREDICTABLE FAILURE OF EDUCATIONAL REFORM (1990).

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for this discussion. As Meyer points out, modern educational systems are legally based.²⁸ Laws and regulations are highly prescriptive. They require attendance, classify pupils, and delineate not only, the credentialing of teachers, but also the curriculum and materials, and the physical conditions under which students attend schools. Meyer terms this structure "educational order."²⁹

At the same time, the legal system challenges the structure or "educational order" through the introduction of educational disorders (i.e., needs and/or rights in society that are unmet by education) into the system. He terms this process "legalization."

We mean by legalization the disorderly introduction of legal authority into the educational order; instances of the exercises of authority which violate the routinized order and chain of command, which introduce new rules without their integration into administrative agencies, or of legislative bodies creating a specific line of action outside the routinized command structure . . . the key to our definition is the lack of integration of the new rules with the main rules constituting the system, or the lack of new channels of control with the old ones.³⁰

How does education become legalized? Unmet educational needs (such as education for the handicapped) come to the attention of Congress or a state legislature which enact special programs to address these needs. Federal and state administrative agencies enact regulations for the implementation of these special programs. At each of these levels, the school, which must implement the special programs and regulations, and thus satisfy the unmet educational needs, is bypassed. Implementation of these special programs offers possibilities for claims through court action. Each of these activities - legislation, regulation, and litigation - contribute to the legalization of education. Legislation and litigation define new educational rights, without making any coherent provision for how those rights will be addressed at the local school level.³¹

The education of the handicapped, through PL 94-142³² is the premier example of such legalization, creating a set of special rules that bypass the local regular education system, and establishing educational rights that are difficult or impossible for local schools to implement without making fundamental changes in their structure and operation. The legalization of

28. John W. Meyer, *Organizational Factors Affecting Legalization in Education, in SCHOOL DAYS, RULE DAYS 256* (David L. Kirp & Donald N. Jensen eds., 1986).

29. *Id.* at 257.

30. *Id.* at 257-58.

31. Weatherly & Lipsky, *supra* note 6.

32. IDEA, *supra* note 5.

education for the handicapped has imposed a need for schools to restructure without regard for the factors that are critical to effective restructuring. The result is a blizzard of "bureaucratic mandates that emanate from distant places"³³ and which work against fundamental and effective restructuring that could result in implementation of the mandate.

The dilemma of education legalization is clear. The initial purpose of legalization is to address some social need through special education programming. Yet the process through which that programming is adopted and implemented impedes the ability of the school to integrate the new program with the existing educational structure. In the absence of effective mechanisms to bridge the gap between the "new rules" of the existing educational structure, effective school restructuring will remain an elusive goal. To the extent that schools are not successful in restructuring, and additional unmet social needs are perceived, legalization will result in new educational initiatives, which are disconnected from the existing educational structures and which promote regulation and litigation. A self-sustaining cycle of unmet social needs, disconnected initiatives, litigation, and newly defined rights is created. The critical challenge for education reformers is to develop a mechanism by which the challenging needs of society and the special programs and initiatives implemented to meet those needs can be integrated into existing educational structures in ways that effectively restructure schools; thus the needs that gave rise to the initiative are addressed. In order for educators to develop reform in the context of law, they need to examine how legalization has spurred change in education.

A. Legalization as a Force for Change

Both the restructuring movement and the legalization of education have exerted pressure on schools to change.³⁴ The change process in schools presents yet another problem for school organizations because the culture of the schools renders change a traumatic process for school organizations. This section will explore how the culture of the schools clashes with the culture of law, and by reviewing the literature of legal change, we will consider how the interplay of these incompatible cultures has a restructuring influence on the schools.

1. The Cultures of Law and Education

Culture has been defined as:

33. TIMAR & KIRP, *supra* note 11, at 507.

34. SEYMOUR B. SARASON, *THE CULTURE OF THE SCHOOL AND THE PROBLEM OF CHANGE* (2d ed. 1982).

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(a) a pattern of basic assumptions, (b) invented, discovered, or developed by a given group, (c) as it learns to cope with its problems of external adaptation and internal integration, (d) that has worked well enough to be considered valid and, therefore is (e) to be taught to new members as the (f) correct way to perceive, think and feel in relation to those problems.³⁵

Culture manifests itself through its values and underlying assumptions.³⁶ These assumptions are based on "traumatic" experiences in the organization's history (such as lawsuits) and lead members of the organization to resist similar experiences. New people are expected to adopt these old and ongoing assumptions. This is the reason that culture is difficult to change.³⁷

People who are trying to change an organization by legal means must be aware that mandates imposed by external sources - such as litigation - have been and are strongly resisted by the essentially conservative culture of the schools.³⁸ The cultural perspective underscores the divergence between the cultures of schools and of the organizations - such as law firms - that house external reformers. Essentially, members of each organization talk past each other - they have different world views. Such differences do not bode well for externally motivated change efforts. Consequently, there is something for lawyers, as well as educators, to learn from the research about how change in the schools can succeed.

2. *The Research of Legalization and Change*

Dean Mark Yudof of the University of Texas Law School³⁹ has written that the legalization of education has had an increasing impact on schools within the past twenty years. He speculated that the creation of rights allowing parents to contest actions of school officials may be positive because school policies will be more fairly applied.⁴⁰

Yet, litigators and judges may have moved into an area which is beyond their expertise. If education experts have not been able to resolve conflicts, intervention from external legal mandates may exacerbate problems, waste resources, and cause mistrust among parents, students, and administrators. Essentially, the imposition of impersonal rules in an area

35. Edgar H. Schein, *Organizational Culture*, 45 AM. PSYCHOL. 109, 111 (1990).

36. William D. Firestone & H. Dickson Corbett, *Planned Organizational Change*, in HANDBOOK OF RESEARCH ON EDUCATIONAL ADMINISTRATION (Norman J. Boyan ed., 1988).

37. *Id.*

38. *Id.*

39. Mark G. Yudof, *Legalization of Dispute Resolution, Distrust of Authority, and Organizational Theory: Implementing Due Process for Students in the Public Schools*, 1981 WIS. L. REV. 891 (1981).

40. *Id.* at 898.

where problems had been informally resolved leads "to a perception of arbitrariness which also undermines trust."⁴¹

This line of scholarship has identified a central obstacle to implementing proposed legal change: school administrators enforce legal mandates in a number of ways that undermine legislative intent and judicial remedies. School politics and resistance, as well as the reality of a school's organizational structure, often intervene to change law at the implementation site. For example, the landmark RAND⁴² studies found that a federally imposed policy is not the way to accomplish educational change; instead, local school districts are the places where change should best be initiated and implemented. Local participants must want to accomplish change because it cannot be imposed from the "top down." Local administrators must be trained; local expertise and technical assistance should guide project implementation; there must be frequent and regular staff meetings and local development of project materials; and there must be a pool of voluntary, highly motivated participants. Finally, the implementation process is one of "mutual adaptation," the policy is shaped by implementors and the behavior of implementors is shaped by the policy. That is the only way a new policy can become established in an organization. The "bottom-up" approach is antithetical to legal remedies imposed by litigation. Teachers and school administrators live in a culture where outside pressure from non-educators is resented. At the same time, the literature of restructuring reinforces the concept of "bottom-up" change,⁴³ while recognizing that perspectives of non-educators are useful for developing education programs.

Since Yudof called for empirical research to describe the imposition of law on school organizations, scholars have begun to study the legalization of education. In particular, there is an emerging line of work in the field of special education legal implementation which describes the negative assumption that educators and parents have about lawyers and the law.

In a pioneering study, Weatherly and Lipsky,⁴⁴ described how administrators responsible for implementing the law spent substantial portions of their time developing "coping behaviors" for dealing with parents. While administrators often worked overtime and with great personal commitment to the law's intent, program development became secondary to dealing with "assaults" upon their schools. The intrusion into their culture led these "street level bureaucrats" to routinize their behaviors to control parents, as well as access to the benefits they sought. Most school bureaucracies set up specialized subunits whose employees administer legal requirements.

41. *Id.*

42. McLaughlin, *supra* note 7.

43. *Id.*

44. ELMORE, *supra* note 2; Weatherly & Lipsky, *supra* note 6.

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Because school officials fear lawsuits, subunit employees are expected to settle disputes quickly to protect the time and working styles of other bureaucrats.

The literature described in the area of special education raises major questions about the culture of conflict. In education, where legal rules must be understood and accepted by all parties to be successful, the law has harmed relationships between parents and school officials, as well as within the school bureaucracy. A sense of fairness which is central to what educators believe they are doing (the essence of their own beliefs about their culture) has been undermined by law imposed on the teacher-administrator culture.⁴⁵

Legal change in education affects parents as well as people who work in the schools. Parents operate in a culture that views as undesirable the use of law to resolve education matters. As such, litigators are faced with the assumptions that parents have about the legal process. For example, when Congress allowed parents of special needs children to litigate everyday educational decisions, it assumed by passing PL 94-142 that special education programs would be implemented more fairly. By having a say, parents would trust programs administered by school officials. Yet, the legal-adversarial method may be inappropriate for resolving educational disputes. In the complex and emotional field of special education, relations between parents and administrators may have been seriously impaired in the wake of legal challenges.⁴⁶ Indeed, conflict may arise when education professionals are placed in the role of defendant, rather than their traditional self-defined role as advocates for children.⁴⁷ While the imposition of legalization may have "jolted" a previously unresponsive bureaucracy, the adversarial system causes mistrust. Thus, the law may be limited at the enforcement stage by the conflict it is bound to cause in schools.⁴⁸ Additionally, there is some evidence that the law may be inequitable in its application because parents who are especially knowledgeable about education law⁴⁹ and those with financial resources have disproportionate access to the system's benefits.⁵⁰ While better educated and more affluent

45. ELMORE, *supra* note 2; PAUL T. HILL & DOREN L. MADEY, *EDUCATIONAL POLICY MAKING THROUGH THE CIVIL JUSTICE SYSTEM* (1982); Weatherly and Lipsky, *supra* note 6; Yudof, *supra* note 39.

46. Steven S. Goldberg & Peter Kuriloff, *Evaluating the Fairness of Special Education Hearings*, 57 *EXCEPTIONAL CHILDREN* 546 (1991).

47. David L. Kirp & Donald N. Jensen, *What Does Due Process Do?*, 73 *PUB. INTEREST* 75 (1983); David J. Neal & David L. Kirp, *The Allure of Legalization Reconsidered: The Case of Special Education*, 48 *LAW & CONTEMP. PROBS.* 63 (1985).

48. Kirp & Jensen, *supra* note 47; Neal & Kirp, *supra* note 47.

49. PETER KURILOFF, DAVID L. KIRP & WILLIAM G. BUSS, *WHEN HANDICAPPED CHILDREN GO TO COURT: ASSESSING THE IMPACT OF LEGAL REFORM IN PENNSYLVANIA* (1979).

50. MILTON BUDOFF & ALAN ORENSTEIN, *DUE PROCESS IN SPECIAL EDUCATION* (1982).

parents may receive better access, at least the law establishes a dialogue for all parties.⁵¹ In any event, persons who view law negatively may think regulation is an unfair way to resolve disputes.⁵²

Jerry Mashaw of Yale Law School has examined official-citizen disputes for at least two decades.⁵³ In his study of Social Security administrative hearings, which are somewhat similar to special education hearings, he described the nature of a claimant's interactions with a public bureaucracy. Mashaw found that the hearing system is inappropriate for resolving official-citizen disputes for several reasons. First, claimants who are poor may not be able to afford counsel. Second, there is ignorance of the system's requirements. Third, there is a fear of alienating officials who can make a number of discretionary judgments in the future. Moreover, dependent persons are just not prone to "fight city hall."⁵⁴ For similar reasons, regulating education for the purpose of restructuring may not work. In both cases, the clients' culture - their basic assumptions about authority and dispute resolution - undermines the intent of those who have imposed laws to help a particular class of beneficiaries.

The research suggests that legislators' and judges' intent on restructuring education have entered an area they do not understand. Their intentions, however laudatory, may be unworkable in practice. Framed in terms of Elmore's approaches to restructuring, the results of legal policy are threefold: first, a client population is imposed on the school which requires the introduction of new instructional technologies; second, the highly prescriptive legal mandates which result from special education litigation impose changes on the conditions of the teachers' and administrators' worklives in ways which they do not control; third, the relationships between school officials and their clients are unbalanced, since the nature of litigation requires a "winner" and a "loser."⁵⁵ In Corbett's terms, the roles, rules, and relationships are fundamentally changed in ways that emphasize differences, rather than forging new rules, roles, and relationships based upon negotiated conditions.⁵⁶ Thus, litigation in special education has a restructuring effect upon schools that has little chance of being positive. Consequently, parents,

51. STANLEY HERR, *RIGHTS AND ADVOCACY FOR RETARDED PEOPLE* (1983).

52. JEROLD S. AUERBACH, *JUSTICE WITHOUT LAW?* (1983); LAURA NADER, *NO ACCESS TO LAW* (1980); Melvin Aron Eisenberg, *Private Ordering Through Negotiating: Dispute Settlement and Rule-making*, 89 HARV. L. REV. 637 (1976).

53. Jerry L. Mashaw, *The Management Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy, Fairness and Timeliness in the Adjudication of Social Welfare Claims*, 59 CORNELL L. REV. 772 (1974).

54. *Id.*

55. ELMORE, *supra* note 2, at 12-21.

56. CORBETT, *supra* note 13.

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school officials, attorneys, and judges need to think in terms of a non-adversarial mechanism which abets reform through building relationships.⁵⁷

B. *Mediation as a Way to Resolve the Restructuring Impasse*

Professor Joel Handler of UCLA Law School suggested recently that a system where all parties' concerns are openly expressed in a non-legal forum within schools may be the best way to avoid litigation and promote trust between parents and administrators.⁵⁸ Professor Stephen B. Goldberg of Northwestern Law School, along with associates of the Harvard Negotiation Project, have for some time written of the need for developing new systems for resolving disputes in organizations.⁵⁹ They have described the need to improve relationships and establish trust, so that a foundation for positive dispute resolution is set for not only current conflicts but also future ones.

In education, the need is for an alternative dispute resolution mechanism that will address the lack of communication and trust that exists among parents, administrators, students, and teachers. It must address the fact that the cultures of these groups conflict and that parties to education disputes do not want solutions imposed upon them. Alternative Dispute Resolution (ADR) has been developed in a variety of cultures.⁶⁰ It has roots in the communitarian spirit of earlier times,⁶¹ and has been accepted as a process by which neighbors could resolve their disagreements quickly and in a fashion that would result in both sides gaining something. Mediation,⁶² in particular, is a non-intrusive third party procedure which allows parties to develop their own solution.

Critically, in mediation the disputants maintain control over their dispute; when a resolution has been reached that is mutually agreeable, the prospects of enforcement are enhanced. Mediation has been used to resolve community disputes, landlord-tenant matters, labor conflicts, disagreements

57. HANDLER, *supra* note 26.

58. JOEL F. HANDLER, *THE CONDITIONS OF DISCRETION* (1986).

59. ROGER FISHER & WILLIAM L. URY, *GETTING TO YES* (2d ed. 1991); ROGER FISHER & SCOTT BROWN, *GETTING TOGETHER*; STEPHEN B. GOLDBERG, ERIC D. GREEN & FRANK E.A. SANDER, *DISPUTE RESOLUTION* (1985); WILLIAM L. URY, JEANNE M. BRETT & STEPHEN B. GOLDBERG, *GETTING DISPUTES RESOLVED* (1988); Jeanne M. Brett, Stephen B. Goldberg & William L. Ury, *Designing Systems for Resolving Disputes in Organizations*, 47 *AM. PSYCHOLOGIST* 162 (1990).

60. *See, e.g.*, SALLY E. MERRY, *GETTING JUSTICE AND GETTING EVEN* (1990); NADER, *supra* note 52 (1990); JOHN S. MURRAY, ALAN S. RAU & EDWARD F. SHERMAN, *PROCESSES OF DISPUTE RESOLUTION: THE ROLE OF LAWYERS* (1989).

61. AUERBACH, *supra* note 52.

62. JAY FOLBERG & ALISON TAYLOR, *MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION* (1984); NANCY H. ROGERS & CRAIG A. MCEWEN, *MEDIATION: LAW, POLICY, PRACTICE* (1990).

between students, and family matters.⁶³ In most states, laws and regulations providing for alternative dispute resolution in special education have been drafted.⁶⁴ Can this mechanism be used to bridge the conflicts that result when law is imposed on education?

IV. THE USES OF MEDIATION

Folberg and Taylor,⁶⁵ authors of a standard work on mediation, have written that education disputes are especially receptive to resolution by mediation because "[m]ediation can help resolve the issues in dispute by providing a neutral third party who can uncover the underlying issues as well as ensure that parents and educators are communicating in the language of mediation: movement toward an agreement."⁶⁶

Mediation has additional benefits: the cost is far less than litigation. Perhaps thousands of dollars are needed to commence a lawsuit, compared to several hundred dollars a day for a mediator. There is a lesser expenditure of time - a few days compared to the time that may be necessary to resolve litigation fully. Stress is diminished for all involved. Indeed, the mediator's special role is to diffuse tension, keep matters under control, and to create and weigh new options. Mediation also allows for the schools and their clients to mutually develop the instructional technologies and conditions under which school officials will work to meet the needs of their clients. Defining these solutions becomes a means of balancing power between parents and school officials. For these reasons, it appears that mediation could work to resolve education conflict.

In his seminal article, however, Professor Fiss of Yale Law School raises concerns with mediation that have implications for school disputes.⁶⁷ Because these procedures are usually drafted, sponsored, funded, organized, and implemented by state officials who also certify and pay mediators, they do not create an atmosphere where truly neutral third parties mediate the disputes. The mediators are essentially agents of the same education bureaucracy that must make decisions about children and fund their programs.

This form of state sponsored mediation also fails to compensate for the inherently unequal position that exists between parents and school officials. Although the mediator "encourages communication," parties must

63. LINDA R. SINGER, *SETTLING DISPUTES* (1990).

64. Goldberg, *supra* note 21.

65. FOLBERG & TAYLOR, *supra* note 62.

66. *Id.* at 197.

67. Owen Fiss, *Against Settlement*, 93 YALE L.J. 1075 (1984).

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come to a mediation on an equal power footing. Considering the power that school officials have in terms of experience, training, familiarity with jargon, and potential future decisions, it may be asking too much to believe that parents can be full mediation partners. Indeed, the type of relationship traditionally envisioned for mediations is a continuing commercial or neighborhood interaction. In some cases, parents compensate for their unequal position by bringing a trained advocate or a lawyer into the mediation. This has the effect of changing the character of the mediation so that it is more like litigation than mediation. Thus, the parent-school administrator relationship may not be helped by mediation.⁶⁸

It is possible that education is just not a setting where mediation is always useful. The late Harvard Law School Professor Lon Fuller⁶⁹ speculated that mediation can be used to work out personal disputes, but that law must be imposed on parties to remediate basic injustices.⁷⁰ In essence, civil liberties should not be compromised. Thus, mediation should not be used to resolve education matters if they are imposed by courts or legislatures to provide essential rights. To engage in mediation would undermine the reason why Congress passed PL 94-142 in the first place - to provide parents rights when none existed.

This line of argument, however, seems not to address the unique character of education, which is based on relationships.⁷¹ PL 94-142 grants children with special needs the right to access public education. However, access is not enough, and indeed, the majority of conflicts that arise under the law deal with what happens once a student is admitted to public school, not whether a student can be admitted. Litigation may provide the most appropriate vehicle for protecting a student's right to be present in a public school, but it is a poor vehicle for deciding the content of the educational program, or for establishing the school-client relationships that will weigh heavily on the success or failure of the educational experience. In addition, if the rules, roles, relationships, and results of public school settings could be fundamentally altered to accommodate the needs of handicapped children, the values and behaviors which resulted in exclusion and the need for litigation would be eliminated. The inherently unequal system would, ideally, be restructured into one in which a balance of power is achieved between the school and its clients.

State-mandated ADR raises another important concern: even though it may be voluntary, it is another obstacle placed between a child and an

68. Goldberg, *supra* note 21; Goldberg & Kuriloff, *supra* note 46.

69. Lon L. Fuller, *Mediation-Its Forms and Functions*, 44 S. CAL. L. REV. 305 (1971).

70. *Id.* at 307.

71. Goldberg, *supra* note 21; Goldberg & Kuriloff, *supra* note 46.

education placement.⁷² It allows school officials to avoid or coopt clients. Armed with an inexpensive vehicle for dealing with adversarial parents, officials can employ a "mediation" to buy time in a dispute with the hope that parents will compromise complex or expensive programs to which they are legally entitled.⁷³

Perhaps the problem is that mediation is used once relationships have already been fractured. If mediation is to be an effective tool for bridging legal mandates and school administrators' resistance to reform, it must be used prior to a dispute arising, and certainly prior to the imposition of outside mandates, because it seems to be more effective when the financial and emotional stakes are low.⁷⁴ Perhaps it could be woven into the culture of the schools as a mechanism for achieving realignment as a response to the demands for restructuring and the movement toward legalization.⁷⁵

V. CONCLUSION

There is no doubt that legalization is a powerful social force that is having a restructuring effect on education.⁷⁶ Special education is an especially powerful case in point.⁷⁷ This is because IDEA affects the rules about who can attend public schools; what will happen when they attend; the nature of the relationships among the interested parties - officials, parents, and students; and how power is distributed among these parties.⁷⁸ As a result, special education as a federal legal mandate has a restructuring effect on public schools, albeit one which is external and coercive.⁷⁹

Research, theory, and practice demonstrate, however, that successful efforts at restructuring should be internal and voluntary.⁸⁰ Moreover, the culture of the schools, in which relationships are highly valued, is

72. *Id.*

73. *Id.*; cf., HANDLER, *supra* note 26.

74. KENNETH KRESSEL & DEAN G. PRUITT, *MEDIATION RESEARCH* (1989); see generally Craig A. McEwen & Richard J. Maiman, *Mediation in Small Claims Court: Achieving Compliance Through Consent*, 18 LAW & SOC'Y REV. 11 (1984).

75. See generally SARASON, *supra* note 27; SARASON, *supra* note 34.

76. MICHAEL A. REBELL & ARTHUR R. BLOCK, *EQUALITY AND EDUCATION* (1985); MICHAEL A. REBELL & ARTHUR R. BLOCK, *EDUCATIONAL POLICYMAKING AND THE COURTS* (1982); JUSTICE AND SCHOOL SYSTEMS (B. Flicker ed., 1990).

77. Judith D. Singer & John A. Butler, *The Education for All Handicapped Children Act: Schools as Agents of Social Reform*, 57 HARV. EDUC. REV. 125 (1987); Suggestions for organizational reform are set forth in Alan Gartner & Dorothy K. Lipsky, *Beyond Special Education: Toward a Quality System for All Students*, 57 HARV. EDUC. REV. 367 (1987); Thomas M. Skrtic, *The Special Education Paradox: Equity as the Way to Excellence*, 61 HARV. EDUC. REV. 148 (1991).

78. *Id.*

79. SARASON, *supra* note 34.

80. ELMORE, *supra* note 2.

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incompatible with the culture of law, which is adversarial.⁸¹ Thus, change mandated by federal special education law is bound to generate conflict. Mediation offers the prospect of bridging these two cultures through a process which builds relationships to lessen conflict.⁸² Yet, the value of mediation in this context remains speculative; it may unbalance the distribution of power among the parties, and it may undermine relationships because parties in this context may regard it in the same light as litigation.⁸³

The problem may not be with mediation as a process, but with the mediation model currently in use.⁸⁴ As currently practiced, mediation applied to education is a transplant from more mature fields such as labor relations and divorce, as such it may fail to capture the unique needs of school settings. Research on restructuring, as well as special education mediation, are being undertaken.⁸⁵ It is now the time to integrate these two research agendas so that a model of reform that works in the schools can be developed.⁸⁶

81. SARASON, *supra* note 34.

82. LINDA R. SINGER & ELEANOR NACE, *MEDIATION IN SPECIAL EDUCATION* (1982); KATHLEEN H. MCGINLEY, *EVALUATING THE EFFECTIVENESS OF MEDIATION AS AN ALTERNATIVE TO THE SOLE USE OF THE DUE PROCESS HEARING IN SPECIAL EDUCATION* (University Microfilms ADD-88-13425 1987); JENNIFER A. MASTROFSKI, *EVALUATION OF PENNSYLVANIA SPECIAL EDUCATION MEDIATION SERVICES* (1989).

83. Jennifer A. Mastrofski, *Power Imbalance Within the Setting of Special Education Mediation: A View Toward Structural and Organizational Factors Influencing Outcome*, SOC. PRAC., (forthcoming 1992).

84. Steven S. Goldberg & Peter Kuriloff, *Does Mediation Work?* (forthcoming).

85. Goldberg, *supra* note 21.

86. See Janet Rifkin, *An Overview of Dispute Resolution in Educational Institutions*, and Charles Crowley, Al Smith & Terry David, *Illinois Mediation Model Assuages Special Education Disputes*, in NAT. INST. FOR DISP. RESOL. FORUM (Spring 1991); see generally Brett, Goldberg & Ury, *supra* note 59.

