DIGITALCOMMONS @WAYNESTATE

Sociological Practice

Volume 10
Issue 1 *Conflict Processing*

Article 8

January 1992

Power Imbalance within the Setting of Special Education Mediation: A View toward Structural and Organizational Factors Influencing Outcome

Jennifer Adams Mastrofski

Power Imbalance within the Setting of Special Education Mediation: A View toward Structural and Organizational Factors Influencing Outcome

Jennifer Adams Mastrofski

ABSTRACT

Research on mediation as a means of dispute resolution has alluded to potential injustices that may emerge from the process when conflict occurs between persons of unequal status. An example of such inequity would be when one party in the dispute is an individual who is somehow dependent on the second party (who may represent an organization or institution).

In a recent evaluation of special education mediation services, structural and organizational factors were identified that could influence the impact of power imbalance between disputants (parents and school personnel) independent of the mediation session itself. This paper examines these factors and proposes that future research broaden its perspective on power-imbalance theories associated with mediation. In particular, the present examination brings into question the sufficiencies of claims that mediation is procedurally *inappropriate when an inherent power imbalance exists in conflict situations.*

Introduction

Alternative dispute resolution (ADR) refers to innovative approaches to ending conflicts which are usually less formal and costly than traditional litigation. Such approaches can include conciliation, arbitration, or mediation, and recently have been advocated, particularly when disputants anticipate long-term future relationships. Thus, conflict between family members, school personnel, and parents, and between landlords and tenants are especially suitable to ADR processes.

While numerous arguments have been established in favor of ADR, literature is also replete with arguments against its use in certain conflict situations. In particular, concern is raised that ADR may be inappropriate when power disparities exist between disputants (Goldberg 1989; Levine 1986; Marks, Johnson, & Szanta 1984). One example of this condition would be when one party in dispute represents an institution and the other party stands alone as an individual.

The concept of power imbalance within ADR forums is not uncommon, but *how* the concept is operationalized and applied varies by context (Goldberg 1989; Marks, Johnson & Szanta 1984; and others). With variation, the impact of power imbalance on conflict resolution changes (at least theoretically) as well. In divorce mediation, for instance, unequal economic bases (resources) represent one form of imbalance; differential status within the family system symbolizes imbalance at the interpersonal level. In landlord/tenant negotiations, legal authority of one party may place that disputant in an "advantageous" position for winning in mediated sessions, which may change by the nature of the dispute (Folberg & Taylor 1984).

Special education mediation represents the unique situation wherein power imbalance between disputants could occur at a number of levels. The parties may have a history of differential status in that parents generally follow the guidance and expertise of educators. Educators have resources with which to teach special-needs children (symbolizing an "economic" advantage); and, finally, educators employ legal authority (primarily from Public Law 94-142—see Handler 1986) to allocate these resources for special education needs.

The concern with power imbalance has been applied to special education mediation services (SEMS) over the last few years. Several states have adopted voluntary mediation services as an alternative to due process (formal, adversarial proceedings) when disagreements emerge between parents and school personnel over educational services for students with special needs (Goldberg 1989; Folberg & Taylor 1984).

Many states use employees of their educational system to serve as mediators (Goldberg 1989; Singer & Nace 1984); thus, in this forum for ADR, school parties in disputes are seen as more powerful than parents at the onset. Imbalance is exacerbated by direct administrative links between mediation services and the institution or school represented in the dispute.

The Impact of Power Imbalances in Special Education Mediation

According to The National Survey on Special Education Mediation Systems, 35 reporting states had a SEMS in place by 1989; another 10 reporting states were developing SEMS at that time (Sykes 1989). The earliest reported SEMS was established in 1972; the most recent were established the year of the report.[1] Evaluations of SEMS since inception have occurred on a state-by-state basis.

Assessments of school-administered, special education mediation have been mixed, but the theme of power disparities lies at the root of both positive and negative conclusions. Singer and Nace (1984) contend that school-based mediation is very successful despite acknowledgment of power imbalance expressed by some participants. Goldberg (1989), on the other hand, maintains that true mediation is infeasible when services are provided by an institution for that institution and an individual disputant's benefit. The issue of power imbalance between disputants in this situation is critical to his belief:

> State sponsored [special education] mediation also fails to compensate (or may exacerbate) the inherently unequal position that exists between parents and school officials....Considering the power that school officials have in terms of experiences, training, familiarity with jargon, and potential future decisions, it is absurd to suggest that parties could ever be equal mediation partners. (452)

Common questions raised within most discussions of power-imbalance theory in special education mediation, thus, relate to whether justice can be served, given predetermined inequality of disputants (i.e., will the outcome be fair to both parties?) and whether mediators can manipulate (i.e., equalize) such inequality by virtue of behavior within the mediation session itself (Simkin & Fidandis 1986). Within this narrow framework, parties appear satisfied with mediation, regardless of their symbolic positions as

institutions or private individuals (Singer & Nace 1985). In fact, such evidence may be shortsighted insofar as researchers conclude that if the process itself can adjust for power imbalance (vis-a-vis behavior of the mediator), further concern over disparities is unfounded.

This article argues that the mediation session is only one of three key junctures in dispute resolution. During mediation, mediators clearly do have obligations and capabilities to equalize negotiations as well as formulating mediated agreements. Nevertheless, mediators are limited in their potential to modify the effects of power imbalances before and after mediation. The claim here is that power imbalance may influence disputants at each of these main junctures (points at which mediation is mutually agreed upon, mediation occurs, and outcome is implemented) and does so with a domino effect. In other words, with each conflict-resolution encounter between unequal parties, during which the outcome consistently reflects positive reinforcement for one party more than the other, imbalance is perpetuated and, in fact, exacerbates the potential for unequal outcomes over time.

In a recent evaluation of special education mediation, specifically, findings reveal that unequal status may account for the following differences across the three junctures: (1) service provisions leading to mediation; (2), opinions of parties about the sessions held; and, (3) equitability of outcome post-mediation.[2] While the focus of this evaluation was not to test the hypotheses just outlined, data provide ingredients for postulating a domino-effect theory in conflict-resolution settings involving parties of unequal status. A brief summary of this evaluation follows.

Evaluation of Special Education Mediation Services

Overview

The data summarized below were collected as part of a year-long evaluation of one state-administered special education mediation program. The program had been in existence for almost three years at the point of evaluation and had trained over 40 mediators during that time. Mediators for the program come from a variety of professional backgrounds across the state. Each mediator was trained by a highly reputed national training center and is compensated on a case by case basis. A few mediators have bilingual ability. Mediators are not state employees intentionally, so that disputants will not perceive them as biased toward the state's education department. Most mediators had negotiated one or two cases each at the time of the evaluation. Mediation is a voluntary alternative to due process

when both parties agree to have their cases mediated. Either party in dispute can initiate a request for mediation.

Cases Mediated

During the evaluation period, all forms used by the state program were reviewed and revised, existing data were analyzed, and a follow-up survey of parties and participants was developed and disseminated by the evaluation project.[3]

At the time data collection ended for the evaluation project, the program had received 216 requests for mediation. Of these, 127 were initiated by parents and 32 resulted in agreement for mediation. Eighty-nine requests were initiated by school parties and resulted in 47 agreements for mediation. Thus, the majority of cases mediated were initiated by requests from school parties.

From available information on mediated cases, parties who had initiated a request for services had typically heard of mediation from pamphlets and other written materials, followed by personal communication.[4] The SEMS processed requests of one party (usually a phone request) by contacting the second party (by phone or letter) and establishing whether both parties agreed to try mediation for their dispute. At the point of agreement, SEMS staff proceeded to identify and retain a mediator, choose an acceptable mediation site, and schedule the session. Confirmation of mediation was prepared in writing for parties and participants. Mediation was not scheduled if a previously agreed upon plan for due process was scheduled within five days of the request for mediation.

At the time request for mediation was initiated, parents were more likely than school parties to list multiple issues in dispute. For instance, almost 75 percent of parents listed at least two issues, while about 56 percent of school parties listed the same number. There was general agreement on what issues were being disputed, however. Thus, issues presented by each party individually coincided with final issues to be mediated in the vast majority of cases.

Both parents and school parties listed the same top three issues in dispute first, over all other issues in dispute: (1) placement, (2) program, and (3) testing or evaluation classification. Under placement, there was a dispute as to whether the student should be receiving services within a regular placement, a special education setting such as an intermediate unit, private or home schooling, a special preschool program, or other placement options. Within programming issues, parents and/or school parties were in disagreement over specific aspects of the educational program the student

was receiving, especially delivery and quality of services, adequacy of teacher training, and program content. Finally, testing or evaluation classification referred to disputes over the validity and reliability of evaluations, the implications of classification categories for educational services, and concerns over changes in classification.

When parties mediated their disputes through SEMS, there were at least two issues in dispute for 71 percent of the cases; at least three issues in dispute for 30 percent of the cases, and at least four disputed issues between parents and school parties in 7 percent of the cases.

Analysis of issues in dispute, by cases resulting in agreement and those terminating without agreement, revealed little variation between the groups in the final issues mediated. Placement was identified most frequently as the primary issue in dispute, whether or not agreement was reached. In addition, program, individual educational plans, test/evaluation, and classification were cited as issues in cases reaching agreement. A similar pattern of concerns was identified for cases terminating with no agreement (except for program issues, which were mentioned less frequently).

Seventy-one mediations were held during the evaluation period; sixty-one of these reached agreements between the disputing parties (representing an 86 percent rate of agreement). Mediation sessions from evaluated cases lasted as little as one or two hours to more than eight hours. The majority of sessions lasted three to five hours; however, about one-third of all sessions lasted six to eight hours. Mediators are deliberately given only general information about the issues in dispute—as documented by both parties—along with the necessary background information. Special education mediation, as most mediation forums, are formatted to incorporate fact finding into the multiple stages of the mediation process (see Folberg & Taylor 1984, 38-72); therefore, elaborate details of the disputed issues are reserved for the mediation process proper. [5]

Typically, students whose special educational needs were being mediated were males (51 out of 71 cases involved males) between the ages of 10 and 11, were multiply handicapped, and were being served within a regular school setting at the time of mediation. Mediation occurred primarily in non-neutral sites (buildings owned or administered by schools) 31 days after a request for mediation was initiated.

Short Term Satisfaction of Parties and Participants

The majority of parties and participants were satisfied with services rendered and the immediate outcome of mediation, although school parties expressed higher levels of satisfaction than parents. Moreover, mediators were generally viewed as impartial, knowledgeable of the problem, and highly regarded for their role in dispute resolution.

Participants tended to represent more extreme negative perspectives than any of the other groups, although such views represent a minority of all participants. In particular, participants were more likely to criticize technical aspects (scheduling, location) of mediation and the mediator.

Long Term Implementation of Agreements

Parents and school parties had very different perspectives toward implementation of mediated agreements. Parents felt less involved with implementation than school parties and also believed that less of the agreement was implemented in the long term than school parties. Most parents and school parties felt there was nothing else they could have done to carry out mediated agreements.

Mediators

Mediators felt adequately trained for their responsibilities in facilitating dispute resolution and compared their training with the program favorably with other training experiences. In most cases, mediators felt positive about some aspect of mediation regardless of final outcome. Nevertheless, almost all mediators felt disappointment over some component of mediation, such as an individual's behavior or poor physical setting. Further, they expressed a sense of being constantly challenged with mediation due to some need—such as for more knowledge in a particular area or for experience in dealing with unpredictable circumstances.

Strengths and Weaknesses of Mediation

Over time, parents, school parties, and participants for both sides believed that mediation's greatest strength lies in the mediator's role as a neutral third party in dispute resolution.[6] Most parents stated that mediation's greatest weakness is associated with difficulty in putting agreements into action—a view expressed by some parent participants as well. (Recall that parent participants are invited to mediation by parents to provide advice, input, or emotional support to the parents.) Parent participants commented as frequently, however, that mediators cannot make unwilling parties compromise. Most school parties and school participants also believed that mediation's greatest weakness lies in the limitations associated with disputants' unwillingness to compromise.

General comments of parties and participants several months after mediation reflected mediation's assets for saving money, effectiveness in coming to agreement during mediation, and the competence of mediators.

Negative comments focused on lack of enforceability, lack of progress post-mediation, and a sense of coercion sometimes perceived in mediation. Some comments indicated that agreements were actually ineffective or meaningless some months post-mediation.

Less than one-half of parents and school parties stated they would definitely use the program again for a future problem. Of persons who stated problems recurred since mediation, very few have turned to special education mediation to resolve the new dispute.

Opportunity to Assess Power Imbalance over Time

Findings from this evaluation provided the opportunity to assess theoretically the impact of power imbalance within the context of special education mediation over a period of time pre- and post-mediation. Hypotheses have been subsequently generated to reflect how unequal status of disputants may influence final resolution. These hypotheses are framed within the context of the three junctures of dispute resolution described earlier. Specific research questions that should be addressed in future studies are then formulated.

Power Imbalance at Three Junctures: The Domino Effect

The First Juncture—Who Chooses Mediation?

In most cases where requests for mediation are made by one party in the program just described, mediation did not occur for a variety of reasons that have not been systematically documented, including request withdrawals, conciliations, or refusal of the other party. (Other critical issues related to rejection of mediation were also unavailable, such as demographic characteristics of parents in cases not mediated as compared to those mediated and perceptions of issues in dispute.) Requests were made almost three times more often than cases were actually mediated. And the vast majority of all requests were initiated by parents, as noted earlier.

Technically, each party has the power to reject mediation, but school personnel refused an offer for mediation far more often than parents for reasons unknown. When school parties did agree to mediate, parents were quite likely to agree to it than vice versa. When cases reached mediation, then, they had usually been initiated by school personnel rather than by parents. Consequently, special education mediation in the program evaluated serves schools' requests (the institution) more than parents' requests for services.

Two hypotheses are proposed to account for these differences, and both are tied directly to theories of power disparities introduced earlier.

First, school parties are more highly informed of their rights and stance with regard to disputes; thus, they can better pick and choose a dispute resolution forum that corresponds with this knowledge base. Further, alternatives to mediation such as due process do not carry the same financial burden for school parties as they do for parents. At the point of deciding whether or not simply to attempt mediation (the first juncture), then, school parties are equipped with greater knowledge and freedom from financial considerations in making that decision.[7]

Second, when parents are offered mediation, they are in a far weaker position to turn it down because of the ramifications associated with such refusals. At the very base, school personnel are equated with authority that must be adhered to. Sense of responsibility to children and costs of alternatives are further incentives unique to parents for agreeing to mediation.

The first research question to pursue, therefore, (and not available at the time of evaluation), is what accounts for this differential choice of mediation by parents and school personnel? Such data could certainly reveal whether power of school personnel at the onset provides these parties with greater options and awareness for choosing a particular dispute resolution forum. If empirical evidence emerges to support the hypotheses outlined above, *then power imbalance between disputants has influenced dispute* resolution before mediation has begun.

The Second Juncture—Mediating on School Turf

The study of special education mediation services also concluded, recall, that parents and school parties feel differently about the mediation process itself, although both groups are generally positive. One possible explanation for differences might be unequal treatment in mediation, but this conclusion is not supported at present. A second hypothesis is more logical from the standpoint of power-imbalance theories (Goldberg 1989).

Greater satisfaction levels expressed by school parties could very well reflect the function of their role in initiating mediation, enhanced by comfort with the mediation setting (90 percent of all mediations in the evaluation were held in school-affiliated sites). In contrast, lower satisfaction of parents can reasonably be the result of reactive, rather than proactive, roles in the dispute resolution process (based on statistics cited earlier), exacerbated by institutional settings for reaching dispute resolution. Mediation is equated with "the school" because that is where mediation most likely

takes place, and because "the school" most likely initiated a request for mediation when it occurs.

In order to test the hypothesis that increasing power at the point of mediation initiation (the first juncture) impacts parties' assessment of their experiences during mediation (the second juncture), analyses of outcome that controls for the variable of initiating party should be pursued. (Again, such analysis was not possible within the constraints of the state evaluation.) In particular, the following question needs to be addressed in relation to the impact of power disparities on satisfaction with mediation: Do differences in satisfaction with mediation between parties dissipate when the percentages of actual mediated cases initiated by school parties and parents are equalized?

Without such information, there is no way of ascertaining whether lower satisfaction ratings of parents are linked to their reactive (i.e., subordinate) rather than proactive (i.e., superordinate) roles in the dispute resolution process, exacerbated by non-neutral the settings of most mediations.

The Third Juncture—Who is Responsible?

Finally, as described earlier, the special education evaluation revealed that school parties believed they are responsible for some or most of the implementation associated with mediated agreements. In contrast, parents felt less responsible for implementation generally. Further, school parties rated implementation higher than parents, and parents exhibited more uncertainty about implementation overall.

At the last phase of dispute resolution, then—implementation of mediated agreements—parents exhibit the most concrete evidence of powerlessness. The school (institution) ensures resolution of disputes; thus, it has ultimate symbolic power to effect mediation "success." (Not surprisingly, schools report more positively than parents that long-term success—implementation—is accomplished.) Parents have lesser roles in monitoring or bringing about success. As a result, parents are more likely frustrated and less satisfied with the process over time.

Research on power imbalance in ADR cannot ignore this critical period, because it is intimately linked with long-term satisfaction of mediation as well as long-term success of mediation. Based on the evaluation of special education mediation, I hypothesize that parental dissatisfaction with the process over time would be lessened if parents were actively involved in all components of implementation and were consulted by school personnel throughout this period. Whether or not schools must actually formalize the majority of mediated agreements, the sense of powerlessness felt by parents

is most likely a function of their interactions (or lack thereof) with school parties at this crucial juncture of dispute resolution. To test this hypothesis in depth, investigations into events taking place during implementation are called for. Qualitative assessment of inequitable outcome for parties of differential status should reveal whether role in implementation does influence outcome over time. This ideology is not dissimilar from the rationale for mediating disputes, generally, and for self-determination over traditional adversarial dispute resolution processes.

Broadening the Scope of Power Imbalance Theory

Theory associated with dispute resolution in the face of power disparities has a strong conceptual base backed by limited empirical data. In order to understand the full impact of power imbalance in dispute resolution processes, researchers must recognize and examine organizational and structural dynamics that can either aggravate or mollify inherent differentiation. With data that test the hypotheses proposed within this article, the possibility exists for intervention at key junctures in ADR which could produce more equitable outcome for disputants, regardless of their relative status. Perhaps researchers and critics of ADR in situations of imbalance have placed far too much of the burden on mediators to make negotiations "right" in these instances.

This article formulates a theoretical model for assessing precisely how the existence of disparities may influence dispute handling from onset to final resolution. Future research should enhance our knowledge about extraneous influences on mediation outcome at multiple points and/or whether intervention can curtail this domino effect on the total dispute resolution process. Power imbalance may best characterized as a "condition" in dispute resolution. Increased knowledge is needed about behavioral consequences of this condition in order to understand its true influence over equitable outcome for disputants of unequal power.

NOTES

1. Massachusetts was the first state to provide SEMS; Indiana and New Mexico developed SEMS as late as 1989.

2. Specific identification of the evaluation site is omitted to ensure confidentiality.

3. Parties were comprised of one or both parents and a school administrator with authorization to commit resources. Participants were made up of a limited number of persons invited by parties to support their respective cases. All parties and participants were asked to

evaluate mediation immediately after the session using questionnaires designed by the mediation program. Mediators completed separate questionnaires at this time. Parties were also asked to complete additional evaluations at 10-days and 3-months post-mediation.

4. Data were missing in almost one-third of the mediated cases.

5. Mediators in this SEMS were trained to caucus with parties as part of overall mediation process. Thus, parties initially meet with the mediator and participants to set forth perceptions of the dispute after which time each party has the opportunity to meet privately with the mediator. Negotiations and agreement-writing stages follow the caucusing period.

6. These data were collected from a follow-up survey during the evaluation period, a minimum of six-months post-mediation.

7. This situation is quite different from Goldberg's (1989) attention toward school personnel's expertise once they engage in the process of ADR.

REFERENCES

Folberg, J., & Taylor, A. (1984). *Mediation.* San Francisco: Jossey-Bass Publishers.

Goldberg, S. (1989). The failure of legalization in education: Alternative dispute resolution and The Education for All Handicapped Children Act of 1975. *Journal of Law and Education, 18*(3), 441-454.

Handler, J. F. (1986). *The conditions of discretion: Autonomy, community, bureaucracy.* New York: Russell Sage Foundation.

Levine, M.I. (1986). Power imbalance in dispute resolution. In J.E. Palenski & H.M. Launer (Eds.), *Mediation.* Springfield, IL: Charles C. Thomas, Publisher, 63-75.

Marks, J.B., Johnson, E., & Szanta, P.L. (1984). *Dispute resolution in America: Processes in evolution.* Washington, DC: Corporate Press.

Simkin, W.E., & Fidandis, N.A. (1986). *Mediation and the dynamics of collective bargaining.* (2nd edition). Washington, DC: The Bureau of National Affairs.

Singer, L.R., & Nace, E. (1985). *Mediation in special education.* Washington, DC: National Institute for Dispute Resolution

Sykes, D. (1989). *National survey on special education mediation.* Columbus, OH: Center for Special Needs Population, Ohio State University.