

When Talk Works

.....
*Profiles
of
Mediators*

Deborah M. Kolb and Associates



Jossey-Bass Publishers
San Francisco

Preface *xiii*

The Authors *xvii*

Introduction

Another Way to Settle Disputes: The Practice of Mediation

Deborah M. Kolb..... 1

PART ONE

The Professionals

1. Frances Butler: Questions That Lead to Answers
in Child Custody Mediation
Kenneth Kressel..... 17
2. Patrick Davis: “To Bring Out the Best . . . To Undo
a Little Pain” in Special Education Mediation
Susan S. Silbey..... 61
3. Howard Bellman: Using “Bundles of Input”
to Negotiate an Environmental Dispute
Christine B. Harrington..... 105

4. William Hobgood: "Conditioning" Parties
in Labor Grievances
Deborah M. Kolb..... 149
5. Patrick Phear: Control, Commitment, and Minor Miracles
in Family and Divorce Mediation
Austin Sarat..... 191

PART TWO

Builders of the Field

6. Albie M. Davis: Community Mediation as Community
Organizing
Sally Engle Merry..... 245
7. Eric Green: Finding Alternatives to Litigation
in Business Disputes
Lavinia E. Hall..... 279
8. Lawrence Susskind: Activist Mediation and Public Disputes
John Forester..... 309

PART THREE

Extending the Reach of Mediation

9. Juju Atkinson: Blurring the Distinction Between Mediation
and Adjudication
William M. O'Barr..... 359
10. Jimmy Carter: The Power of Moral Suasion
in International Mediation
Eileen F. Babbitt..... 375

11. Linda Colburn: On-the-Spot Mediation
in a Public Housing Project
Neal Milner..... 395
12. Joseph Elder: Quiet Peacemaking in a Civil War
Thomas Princen..... 427

Conclusion

- The Realities of Making Talk Work
Deborah M. Kolb and Kenneth Kressel..... 459

- Index** 495



“There is a drawback with ‘mediation technicians’ wearing the techniques of mediation as a foreign appendage. One must make the skills one’s own; light your own torch from others’ candles, but make the skills fit your person. . . . Try to be whole.”

—Patrick Davis

.....

Patrick Davis
**“To Bring Out the Best . . .
 To Undo a Little Pain”**
in Special Education Mediation

I didn’t know much about Patrick Davis when I first met him for lunch on the lakeside terrace of the Wellesley College Club, in late April 1989. I was not, however, unfamiliar with mediation processes, special education programs, and, in particular, special education mediation. I had raised two children, been a veteran activist in local PTA organizations, and been elected to serve three terms on a local school board. The relations between parents and schools about children had been a large part of my life for more than a decade.

During this first interview with Davis, however, I began to realize that my usual methods of sociological inquiry might not work in this project. As I attempted to push the talk toward topics appropriate for this profile, questions about the economics and law of special education, Davis’s training as a mediator, and his goals in the cases he handled, he insisted on questioning me. He insisted on that reciprocal exchange and informational intimacy that constitutes good conversation but threatens professional distance and objectivity. This was dangerous territory. I feared being taken in, losing my critical edge. Yet I began to like this man.

In the end, I did not feel undone, but not because sociological inquiry is impervious to individual agency or resistance. Rather than obstructing my project, Davis’s persistent effort to engage me created the opportunity to experience his skill personally.

Rather than being told about his techniques and simply observing his methods, I became his subject. He helped me see that interviewing ought not be a one-way process and that it was important that we talk about ourselves together; most important, he allowed me to feel safe in this collaboration.

This first interview set a leisurely pace for the lunches we would continue to share over the next year and accustomed me to the form and tone of the mediation sessions I would later observe. More telling, however, that first lunch suggested some of the themes that would be revealed and regularly reenacted in the mediation sessions, themes of exposure, pain, and incongruity, the experiences that too frequently constitute the legacy of raising a "damaged" child. In this contested ground, Patrick Davis calmed the spirits. But perhaps I am getting ahead of the story.

.....

Mediation is an optional stage in Massachusetts' step-by-step process of determining the educational program for children identified with special needs. The process went into effect in 1974, two years after the passage of a landmark Massachusetts law popularly known as "Chapter 766," which later served as a model for the 1975 federal Education for All Handicapped Children Act. Very briefly, both of these laws (with the Massachusetts version being more inclusive and stringent) *require* states and local communities to pay for the costs of educating children with special needs.

Both the state and federal statutes were, in part, a response to the widespread and systematic exclusion of children with disabilities from mainstream schools and classrooms. Challenging conventional practices, the new laws demanded that disabled children were to be integrated with nondisabled children "to the maximum extent appropriate." To meet these goals, the federal government would provide funds to states that complied with the

provisions of the statute.

Both statutes require parents' informed consent for all decisions, in most cases ensuring parental (nonprofessional) participation directly in the education of children with disabilities. Parents must approve all aspects of the special education process: the initial identification of the child as potentially having special educational needs, referral for special assistance, administration of any tests or other evaluations, the specification of the impairment following testing and evaluation, the enumeration of behavioral and educational goals, and the design and operation of a program of instruction. Parents must accept the program of instruction, or individual educational plan (IEP), in writing before it can be implemented.

The parental role in the decision-making process is further enhanced and safeguarded by the parents' right to invoke an elaborate appeals process when they believe their child's needs are not being adequately perceived or addressed. Over forty states now include or are developing mediation as an optional step in the process for appealing and resolving disagreements that arise in the special education decision-making process. Massachusetts was among the first states to incorporate mediation into its special education system.

Although mediation is not mandated by the federal statute, the legislation reflects the general ethos behind the mediation movement. It insists that substantive rights (and better education) should be created through open, nonexpert, often informal, deliberation—exactly what mediation advocates claim it provides. In effect, the law tells parents, "We cannot say exactly what sort of education your child is entitled to, but we can ensure your right to have a say and to challenge important decisions" (Engel, 1991, p. 17). And even when the mandated collaboration and decision making fails to secure agreement among all the parties—school systems, professional educators, and parents—medi-

ation of special education disputes provides another forum to try, informally and collaboratively, to forge a local consensus about the child's needs.

Patrick Davis is one of the six full-time mediators employed by the Commonwealth of Massachusetts to mediate special education disputes. When I first began meeting with him, most of the mediators were assigned to a regional office; Davis was one of the two exceptions who shared jurisdiction for the most heavily populated region. Davis and his colleague were then each handling approximately two hundred mediation cases per year. Since the state's fiscal crisis worsened, regional offices were collected into a central state office of special education mediation.

By the time a special education case comes to mediation, the parties have usually been in conflict for months, sometimes even years. Davis confronts people who feel frustrated and powerless, sometimes angry, and often tired of dealing with each other. All other conciliatory efforts have failed, and the parties have dug in their heels. In addition to whatever constraints plague special education generally, mediation of special education disputes is made even more difficult by this personal history of disagreements and failed compromises.

Lately, the incentives to dispute and litigate have been shifted by changes in the judicial interpretation of special education legislation. New court decisions rereading the original statutes have made parents less willing to make agreements without exhausting all administrative procedures and school systems more cautious in shaping compromises. This is a domain in which the bargaining is not merely in the shadow of law, but the law and institutional practices made available by law are *actively* shaping both the mediation and the outcomes.

The cases that come to mediation are now noticeably more complex, and parties more intransigent; there are generally fewer prospects for agreement. Consequently, Davis has found mediation to be increasingly difficult. What I found remarkable was his

persistent effort where success seems to be so elusive. I realized, after a while, that the mediation process was herculean, if you regarded it *only* as a means of dispute resolution. Davis did not. He believed his job did indeed offer opportunities to reach agreement as well as "bring out the best" in children, parents, and schools, and "undo a little of the pain" along the way.

.....

It is August now and Patrick Davis and I have arrived ten minutes early for a mediation session in Greenly, Massachusetts.¹ The administrative offices of the Greenly public schools occupy a fading red brick building whose history is etched in the pediment inscribed "Thomas Lowell School." Once the home of two dozen elementary school classes, the Thomas Lowell School building is now office space for the budget manager, curriculum planners, physical plant manager, superintendent, assistant superintendent, and the system's special education director. Set among three two-hundred-year-old beech trees, a fifty-foot Douglas fir, and several acres of playing fields, the Greenly administration building welcomes visitors with a restrained exhibit of the town's particular combination of wealth and Yankee frugality.

In this pastoral setting, the town of Greenly is markedly different from its closest neighbor, Waterville, where school administrators also occupy a now-unused elementary school. However, instead of sitting on a green hill above rolling fields of conservation land, the Waterville school offices offer views of Kentucky Fried Chicken, Midas Muffler, and ABCO Carpet Sales along an aging strip of retail stores. Despite the obvious differences in the wealth and populations of these neighboring towns, the two school-become-administration buildings retain the unmistakable marks of their previous inhabitants.

Alongside offices with bright new formica desks and filing cabinets, plush carpeting, and banks of telephones are large

empty rooms with dull pastel walls, marble-chip floors, blackboards with chalk trays, and hard birch tables and chairs just slightly too low for adult comfort. Remnants of posters describing the four food groups, the metric weight system, and America as a melting pot of peoples and cultures hang precariously on abandoned bulletin boards. The corridors with yellow-tiled walls are poorly lit and cluttered with stacks of empty bookshelves. There are echoes of children everywhere, but no children. The unused classrooms feel like tombs.

The mediation session is scheduled in the administrative conference room, a spare but brightly painted and carpeted space carved out of one of the old classrooms. In the past, I have accompanied Davis to sessions in an old classroom, with parties sitting on children's chairs around a hastily constructed table. Davis does not seem optimistic about the upcoming mediation: "This is one of the more difficult types of cases," he has explained to me several days earlier. "The parents have enrolled their daughter, Heather, in the Roberts School, out in Duffield. Heather's parents, Richard and Susan Donnelly, want Greenly to pay the tuition and transportation to the Roberts School. [The Roberts School is reputed to be one of the finest private schools for learning-disabled children; it is located on the grounds of a regional public high school, making it a particularly attractive choice for many families.] Greenly's position is that the Suburban Educational Collaborative in Waterville—or SECOOP, a cost-sharing collaborative among suburban communities—is the appropriate program."

The Donnelly case, like most appeals, began with a disagreement about the IEP developed to meet Heather's "behavioral deficits and educational goals." Revised annually, such plans are the subject of discussion at the required yearly team meeting. The special education team includes regular classroom teachers, psychologists, social workers, special education specialists, and principals; they are expected to work and consult, in a group, with

parents to develop the IEP. In most school systems, the annual meeting of the team has become the central locus of school system-parent consultation.

Heather Donnelly's team met in April with the expectation that Susan and Richard Donnelly would agree to the team's recommendation that Heather would move next fall from a SECOOP classroom in Riverside, neighboring Greenly on the south, to another SECOOP classroom in Waterville, east of Greenly. The Donnellys did not agree and promptly enrolled Heather in the private Roberts School in Duffield. Whether she attends school in Waterville or Duffield, Heather will need transportation.

.....

When parents reject an IEP, the local school system is required to forward the rejected plan to the Bureau of Special Education Appeals and to the appropriate district mediator. In some cases, parents waive mediation and proceed directly to a formal hearing (Budoff, Orenstein, and Kervick, 1982). Because mediation is regarded as an optional and voluntary process, no one is required to use it, and both parties must agree to participate. However, according to the director of the state Special Education Bureau of Appeals, 90 to 95 percent of the disputed IEPs go to mediation. More than 50 percent are resolved there (Singer and Nace, 1985).

Some school districts have created additional internal responses that precede the appeal to the state process, which thus further extends the appeals process. When a parent seems about to reject an IEP, a school system special education director will often intervene to see whether some agreement between the parents and the team can be worked out. These are the school administrators with responsibility for overseeing special education programs and supervising school-based teams. The director's

intervention is regarded as part of a school system's local remedy for disputes that arise between parents and the team.

Mediation occurs late in the process for social as well as procedural reasons. Although the right and processes of appeal are clearly specified, parents are reluctant to bring appeals, even though they may disagree with a proposed IEP. The decision to appeal a local decision or education plan may mean that a child goes without services entirely. Parents are also reticent to appeal lest they end up antagonizing the people with whom they share decision-making responsibility during a child's educational career, people who must authorize continuing service and who will regularly provide direct service to the child. Retribution almost never happens, but parents still do not want to chance alienating school personnel. Other parents seem reluctant to make special claims for their child at what they perceive to be the expense of other children.² Thus, cases forwarded to the state for appeal and mediation have usually been through an unsuccessful, local dispute resolution effort. By that time, the parents have generally overcome any initial reluctance to dispute the professional assessments and recommendations made for their child. They are ready to do battle.

These dynamics obviously shape the mediation session; the mediation begins, so to speak, midstream. The participants are almost always well known to each other, yet Davis introduces them as the session begins. Moreover, their claims have been repeatedly explored in previous conversations between the parties one on one or in small groups. Davis's mission is to loosen these positions or more often, he claims, to get the parties to better understand each other's positions.

On one side of the table sits George Livingston, the special education director in Greenly; Sam Noble, representing the SECOOP in Waterville; and Joan Miller, Heather's teacher in the SECOOP class in Riverside. Richard and Susan Donnelly and Jim Carroll, the director of the Roberts School, are sitting

across from them. Davis is at the head of the table, and I am sitting off to the side. The Donnellys have brought new diagnostic reports, which Davis distributes to the school personnel. While they leave the room for a few minutes to read these materials, Davis engages the Donnellys in conversation about their children:

Susan Donnelly: If we don't get this, I'll have to go to work to get the \$23,000 for the tuition.

Davis: Yes, that's a possibility. Parents sometimes say, "We can't afford to do it and we can't afford not to do it."

Susan Donnelly: If only you could see how lonely Heather has been, and isolated!

Davis: But then again, the Collaborative would be a fresh start too; maybe she'll make connections. You never know. Both schools would be a fresh start.

Susan Donnelly: She'd be so happy at Roberts, I just know it.

The small talk continues. Richard Donnelly explains that he must be out of the meeting by noon to make it to the airport on time. Although his manner does not suggest any immediate urgency, Mr. Donnelly nonetheless announces his independence from the process by setting a time limit for the meeting. In this opening move, he reinforces the initiative that he and his wife established by enrolling Heather in the Roberts School. The Donnellys are relying on both timing and placement—the key elements in special education—to get the town of Greenly to pay for Heather's tuition at the Roberts School.

About timing: mediation of special education disputes begins when the mediator contacts the parents to explain the process and schedule a mediation session. State regulation requires the school district to report the rejection of an IEP to the State Department of Education's Bureau of Special Education Appeals within five days after the parents have rejected the plan. Within

five more days, the bureau must send the parents and the school a packet of materials describing the appeals process. The mediator then contacts the parents and the school to explain the process and schedule a parent-school conference (mediation session). At this point, the mediator may begin informal efforts toward resolution that include collecting and offering information, and clarifying regulations and confusions. If the mediation session does not result in a settlement of the disagreements between the parents and the school system and an agreed-on IEP, either party may request a full formal hearing before a special education hearing officer.

In the Donnelly case, discussions with the Greenly special education director did not change the situation. The appeal was filed. Although federal law requires a formal hearing to be scheduled within twenty days of the request being filed, these deadlines may be waived at the parents' request. Parents sometimes request a delay to obtain independent evaluations and other preparations for the hearing. Such a delay further postpones the formal hearing and any intermediate mediation if it is attempted. Often the parties already have a date set for a formal hearing—in this case, two weeks following mediation—so that no additional time will be lost.

The delay between filing appeals, arranging mediation sessions, possibly continuing on to formal hearings, and then obtaining decisions has become a regular feature of special education, with direct, often detrimental consequences for children. Although statutory protections attempt to limit foot dragging, some is initiated, as indicated earlier, by parents seeking additional evaluation and consultation about alternatives.

Other delays result simply from the rigidity with which school officials move through the academic calendar. Although time can be measured in a variety of ways, school officials assess children primarily within the confines of the academic year (Engel, 1991). Under this academic calendar, special education programs are put

into place in the fall and assessed at the end of the academic year in the spring. Two consequences follow from the need to fit the children's lives and development into calendars fashioned for other purposes. First, there often is insufficient time between the beginning of the school year and the early spring to adequately measure and assess changes in the child's performance. Thus children subject to this annual review process are often kept in situations for longer periods than are effective, to create documentation of the child's experience. Second, because the assessments and team meetings cluster in the last months of the school year, the number of appeals from rejected IEPs also cluster in the late spring and summer. In a typical year, for example, Davis's caseload went from a low of eleven cases in January and twelve in December to a high of sixty-five in July. This irregular pattern means cases sometimes cannot be resolved before the start of the next school year. Many special education students thus begin the school year without a fixed or new program, and again their movement to a more suitable situation is delayed.

About placement: the Donnellys, like an increasing number of parents who have learned how this process works, have altered the balance of power that arises from the rigidity of the school calendar and the slowness of bureaucratic procedures and appeals. It is probably worth noting that the entitlements under the special education statutes seem to have produced a disproportionate benefit for more affluent families like the Donnellys who know how to negotiate the rules and processes to obtain resources for their children. The Donnellys are unwilling to allow Heather to continue in a classroom of children whom both parents and school personnel agree she has outgrown; that would happen, nonetheless, if a new IEP were not signed. The Donnellys are equally unwilling to sign an IEP that would place her in the Waterville classroom, which the Greenly schools claim will provide an excellent program for the child. They contest the professional judgment of the Greenly schools and have enrolled

Heather in the Roberts School without waiting for the outcome of the appeals process.

More and more parents have chosen this route, and many, in the early years of both the state and federal legislation, found it a successful strategy for obtaining what they considered appropriate education for their children. With this action, the parents try to create greater leverage in their negotiations with the school system. Although it cannot be determinative, the child's existing placement is a factor in a hearing officer's consideration. If a child is functioning and progressing well, hearing officers will be just that little bit more reluctant to move the child, even if the current location was the result of a unilateral placement by the parents in a private school. A successful experience in the new placement creates evidence that the child is doing better in an alternative situation, even though the school was chosen by the parents, which makes the burden of proof for the school system a bit more difficult.

While the school personnel are out of the room reading the Donnellys' new diagnostic report, Susan Donnelly talks about her family. Her oldest child, Steven, is now twenty-two and training for the Olympic pentathlon. "He works out ten hours a day, six days a week. Steven will be going to Poland to train in fencing for three months. He is an all-around athlete," she says. Richard Donnelly worries about Steven's life after sports. The Donnellys have another daughter, Elizabeth, who is twenty, and then Heather, who is fourteen. Davis encourages Mrs. Donnelly to talk more about her family:

Davis: Is Heather into sports too?

Susan Donnelly: No, she's a great booster. Heather was a choice, you know. We waited five years after Elizabeth and we wanted her. We watched her develop and respond. We observed and watched her. We've tried to create lots of avenues for her, for all our children. She's artistic . . . musical, every medium. I used

to push athletics, but I've stopped. Right now, she's having fun learning to apply makeup.

Davis: You can't push on all fronts.

Susan Donnelly: Steven used to have special ed tutoring; he had organizational and auditory processing problems.

Davis: Ask me about it! I have another Steven and I know what your side of the table feels like! It's so much easier to talk about someone else's child. It was an eye-opener for me. . . . Some kids put so much energy into not succeeding. But the school response was amazing. I mean, they really went the extra mile. He's doing better, but it's a long haul.

Richard Donnelly: The sports is a great boost for Steven. . . .

Mrs. Donnelly seems nervous and keen to explain herself and her children. There is a defensive, guilty tone that emerges amidst her congratulatory rhetoric about the children. The professional staff return, having read the new reports. According to George Livingston, "There is nothing surprising here; it's worded differently. It was done by the head of neuropsychology at Children's, Robby Cohen's boss."

It is now 9:30, forty minutes after we arrived. The small talk is over, and the proceedings immediately take on a more formal and, to a certain degree, less anxious character. Davis speaks softly and though not slow, his cadence is measured and lyrical. His Irish brogue feels comforting. He begins by explaining to the school personnel that Richard Donnelly must leave by noon.

By announcing Mr. Donnelly's time constraint, Davis may have been simply noting a fact of life; he also reaffirmed the Donnellys' position. They would give this mediation just so much time but no more. They were prepared to go to the full formal hearing; they had little interest in compromising. By commenting that the neurological report contained nothing new, the special education director indicated that the Greenly Schools' position had also remained unchanged. His side, so to speak, affirmed its

previous position. Moreover, Livingston's reference to the head of neuropsychology at Children's Hospital, Robby Cohen's boss, created an image of wider and prestigious professional support for Greenly's position. Livingston, in effect, claimed that he is a member of the community of specialists, a relatively close-knit club who call each other by diminutive first names. The director shares some of the prestige and authority of the larger community and brings, this tone suggests, additional resources to his position. Davis explains:

Placement must be discussed within the context of two mandates. Heather is entitled to a program in the least restrictive environment—that is, the most normal educational setting. She is also entitled to a program that will provide her with the maximum feasible benefit. Whether you make the decision or a hearing officer decides, this is the context. The law and regulations place great emphasis on inclusion [Davis puts an equal weighty emphasis on each syllable of *inclusion*]; however, if the school system is satisfied that no public school program fits the bill, they must look elsewhere, and that decision is reviewed by the Department of Education, so strong is the mandate for inclusion.

Davis continues the meeting, noting that he “cannot emphasize enough the need to avoid letting your beginning positions get in the way of listening. There is ample room for differences of opinion. The special ed law is not written like an insurance policy that addresses every conceivable situation. The law is very broad.

“Also,” he says, “we are not dealing with a question of a broken, difficult, or inadequate home. We are dealing with a complexity of issues—cognitive, emotional, perhaps physical—and maybe a combination of all three. You who know Heather are in

the best position to make a sound educational judgment, and I hope that in this informal, confidential forum, we have a candid exchange, and hopefully, an agreement.”

Although Davis's few interventions until now—his informal conversation with Susan Donnelly, his reiteration of the time constraint—seemed to provide a platform for the Donnellys, these formal opening remarks emphasize the fragility of the Donnelly position. He frames the question by insisting on the necessity of review for any outside placement for Heather. He is, in effect, saying that no matter what preemptive action the Donnellys have taken by enrolling Heather in the Roberts School, that decision cannot be *the* decision.

This opening illustrates, in the context of the preliminary exchanges that seemed to bolster the Donnellys, Davis's effort to keep all parties equal players. Being equal players may require, however, giving very special attention to the absent child:

Davis: Let us begin by seeing whether we can agree on who Heather is, what are her needs and perhaps then move on to where these needs can best be met.

Susan Donnelly: It's hard to know where to begin.

Davis: Tell us the salient points . . . the highlights of the evaluation from your perspective.

Mrs. Donnelly hesitates and seems unable to begin. She breathes heavily and her hands fidget.

Davis: Mrs. Donnelly, tell us who Heather is.

Susan Donnelly: Heather is a great kid. She's our third child.

Mrs. Donnelly immediately begins describing the spacing of her children, how Heather had been planned and wanted, and is very much loved. She describes her child as she knows her and in her own words rather than the mystifying and self-consciously

impersonal language that will occupy a good part of the next few hours. On another occasion Davis has explained to me that he believes part of his job is to give parents a chance to say and hear good things about their child. Interactions between school personnel and parents about their "special" child are often suffused with anxiety and an overwhelming sense of guilt. It takes a while to realize it, Davis has said, but what parents sometimes feel as the teachers, principals, and psychologists "talk at you about your child" is that somehow the parents are responsible for this problem, this "defective" and "inadequate" human being. To respond to this experience, and perhaps to alleviate the tension, Davis will sometimes talk about his own child and how children will defeat one's best efforts.

Davis seems to have energized Susan Donnelly by the request to "tell me who Heather is." What had been nervously exposed during the preliminary chat is now legitimately exhibited. It almost seemed as if Davis had also orchestrated the revelations:

Susan Donnelly: Heather didn't speak until she was three, and we began to think that something was wrong. She was tested at four years old by the head of Children's. Maybe it was one of his protégés, whatever. But we had all three tested when we moved here. Heather, she learns slowly. She's not a slow learner; she has language deficits. She's a good storyteller, compassionate, and oh boy is she organized. She could run a house.

She wants to learn, but she learns differently, from experience, TV, and music. She's an observer; she likes to travel. We've been to Israel and to Iowa. Reading is difficult, though. She's an experiential person.

Heather spent one and half years learning at home after the third grade. She had been in a special class, but we didn't think it was going well. Halfway into the third grade, we decided she would learn better at home. After that, she began in Riverside [the SECOOP class].

Davis: Tell us more about Heather's language needs, explain more of that.

Richard Donnelly: Heather has an unusually strong interest in learning. For example, she is right now crazy about sharks and spends a lot of time on that. Compared to the other two kids, her motivation is high; she has more interest than the average kid. She also has academic interest. She does not give up. She is tenacious! Heather is not like our son, who has mild learning disabilities. Heather's teachers have also noticed and commented to us how strong Heather's interest in learning is. Heather knows she has language deficiencies and knows that she needs to have phrases repeated. Susan studied speech therapy in college and understands these language deficiencies, knows that Heather needs to have consistent use of phrases and experiential connections to language.

Davis: Jim, could you amplify on this?

Jim Carroll [of Roberts School]: I'd like to do something different. I've diagnosed and feel I know her. She does have language processing and short-term memory deficits. But I'd like to know Riverside's experience with her. That I don't have.

Davis: I'd like to get as complete a picture as possible of Heather from this side of the table before getting a reaction from Greenly. Let's have a picture of the family, of Heather's language needs, the slow learning, the interactions with adults rather than peers. Let's fill out that picture. Tell us what you do know, minus the experience factor.

Davis seems to have an agenda that he will not let the participants derail. He is trying to make more space for the Donnellys' position by calling on their "expert" to support their picture of Heather. From what has been said thus far, he has picked up that Heather may be a slow learner but that there may be some parental denial. He wants to get the Donnellys' expert to offer his professional evaluation of Heather, either to help the parents to

better accept the diagnosis or to have an alternative construction put before the school system.

Jim Carroll, however, attempts to deflect Davis's effort. Why Carroll does not immediately grasp the opportunity to talk about Heather is not clear. Although I had a sense that he was not very well prepared for the meeting, I suspect that there is something more fundamental underlying Carroll's reluctance to offer his own account of Heather. He has little experience with Heather, while the experience of the Greenly and Riverside staffs is far more extensive and of longer duration. I suspect that he is unwilling to be the first "professional" to characterize Heather, lest his lesser experience be revealed and his professionalism made suspect. While the Donnellys may be clients of the Roberts School, and Jim Carroll their professional representative, the informal alliances among professionals and their status within that community may be much more important than the relationship between client and professional.

The tension between professional and parental interests, and the tendency for professionals, even those representing opposing interests, to ally against the nonprofessional parties is, in fact, a central issue in special education. It is also one of the concerns that animated the collaborative design of the decision-making process and the legislative requirement of parental consent. As a result, both the state and federal laws specifically empower parents to share what had, until the passage of these laws, been professional prerogatives. By requiring parental involvement, the statutes specifically challenge professional claims to exclusive and expert knowledge about the educational needs and goals of children. By demanding extensive consultation and collaboration in the development of a child's IEP, the statutes empower parents to challenge the routinized application of general norms by technical experts who may have interests other than the specific needs of a particular child.

By pressing the reluctant Carroll to "fill out the picture" of Heather, Davis is attempting to interject some of this professional expertise on the Donnelly side of the table and thus possibly reduce the divide between parent and professional:

Jim Carroll: Heather is a complex child, of average intelligence but with a difference. She has special language needs. There are two areas of need. There are language deficits, and, at this point in time, there are social deficits. She has low self-esteem that was revealed in the projective tests but is apparent in meeting her. The modern world just doesn't offer the time for children like Heather; the problem is not entirely hers. With regard to language, we have to see this as three pieces: written, reading, and output of the two. Heather is able to organize the world, but not through language; she has decoding deficits and is unable to pull information from print. Therefore, her reading is seven to eight years behind, not just a year. She is reading at the third- to fourth-grade level and is thus very disabled for a fourteen-year-old. This infiltrates and frustrates all areas of learning. Content and concepts need a lot of work. Conceptually she can succeed, but we need to take into account her inability to take in information. Heather also needs work with her identity as a disabled child. We tend to judge people on reading, not ability to think. She needs to think about and assess her future and her projections for life after high school.

Davis: Jim, can you elaborate further on the issue of "average intelligence" yet seven- to eight-year reading gap? This is unusual. Are we looking at more than a problem of language?

Jim Carroll: I can only repeat: Heather is a complex child, disabled for a fourteen-year-old. She reads at the third- to fourth-grade level.

Davis: Let's have a reaction from Greenly, Riverside, and Waterville. How do you see Heather?

George Livingston [of Greenly]: We see Heather similarly. She is a language-disabled child with neurological etiology. This relationship between the nervous system and the use of language comes out in two ways. First, using language for communication and social interaction is difficult. Two, because language is such a deficit, it brings in other factors such as in reading. Heather can take in information but has trouble with inferential thinking. Language is so difficult that her thinking breaks down. However, Heather is a self-advocate; she can work with the system and get what she wants and needs. Our view is that she is a language-involved child. Thus, we have placed her in language classes, where the learning is experiential.

Davis: Is this the same as I am hearing from Mr. and Mrs. Donnelly and Jim Carroll? There is some agreement that progress has been made and will continue, within existing limitations?

Both the diagnosis, the child's "deficits," and the appropriate remedial program need to be agreed to in the development of an IEP. Here Davis is trying to sharpen the differences in the diagnosis, making the points of contention more explicit. If he can secure an agreement on the profile, he is more likely to secure consensus on the remedy. He has two goals in this profiling or specification stage. If an agreement is to emerge, there will be movement or adjustment by the parties in these framing issues. If agreement is unlikely, which is what Davis suspects, the Donnellys and the schools will be better prepared for the next stage of their appeal by having a clearer sense of the parameters of the case: the disputed diagnosis. In response to probing by Davis, the session continues:

George Livingston: No. There are differences between us on the degree of language involvement and the degree of experiential learning, reading with content, inferential thinking, syntax, semantic word retrieval. . . . We cannot see her as a third-grade

reader without these. It is very doubtful. Jim talks as if this is a matter of language delay. It is not.

Jim Carroll: No, no. We could never get this kid up to grade level. I don't see that we are speaking of that.

Susan Donnelly [directed toward George Livingston]: What do you mean by self-advocate?

George Livingston: She can pull from her environment what she needs.

Susan Donnelly: She was taught! I trained her to do it!

George Livingston: She is learning pragmatics in Riverside. She is learning to say, "I don't understand that, tell me in different words."

Richard Donnelly: But you sound like she is not learning! She has learned to use these tools in environments she feels comfortable in; she can learn.

Susan Donnelly: She needs to feel comfortable, be one of the group and secure in the group, to function. At the Roberts School, she was comfortable. She functions better where she knows why she is there.

This is a critical juncture. The Donnellys are hearing that their child is incapable, unable to learn or progress. They respond vehemently and defensively. Mr. Donnelly is adamant and appears angry. Mrs. Donnelly wants the others, who now appear as a wall of hostile forces, to see Heather as she can be seen. She wants them to understand that Heather's abilities may be related to place and pedagogy and that, therefore, the particular placement is absolutely crucial to her future. Yes, Heather *can* pull from her environment because Mrs. Donnelly has taught her to do it; the new school must also do this.

This exchange is difficult to observe passively; the Donnellys' pain and hurt is apparent. This unmasking—this revelation of personal anguish—occurs much earlier than one might expect in what will turn out to be a three-hour session, but it is not unusual

in special education mediation, in which, as I have already indicated, the parties have been involved in continuing negotiation for many months and years. In this case, the struggle between the Donnellys and the school personnel to agree on a common perception of Heather has been ongoing for nearly a decade. This familiarity contributes to the sense of artificiality of the mediation but also enables a personal confession:

Joan Miller [Heather's teacher from Riverside]: My view is not different than the consensus emerging here. It is a question of deficits versus delays. Heather has spent three years in Riverside and has made significant progress. We will miss her here; she is an appealing child and makes strong connections. The staff will miss her.

Davis: The staff?

Joan Miller: Perhaps the staff more than the students.

Davis: Is there is a general consensus on Heather's needs and that she made growth? Would you agree, Mrs. Donnelly, that she made progress?

Again, Davis is attempting to find places where shared perspective and consensus can be declared. The more the Donnellys and the staff provide consistent descriptions of Heather, the more Davis can claim a common ground.

Susan Donnelly: Yes, but her subject matter growth is slow. There have been different teachers and a lot of different structures. She does not attach to all of them. And she was out twenty-three days with medical problems. We have taken care of some of that with strong allergy shots, but there are migraine headaches. We are developing strategies for dealing with these. And there was a disruptive boy in class.

Davis: So the reviews are mixed. Would it be fair to say that, given the degree of need, mixed reviews would continue?

Joan Miller: Mixed reviews might be produced by different perceptions of the situation and the projections. I don't see her moving to a high level of inferential reasoning, as you may see her. How much more could she do with her ability? In areas of pragmatics, we taught her to adapt and use compensatory strategies. But in all subject areas, primary focus was on language; content has been relatively incidental.

Susan Donnelly: Agreed. There has been attention to language.

Davis: How about social and emotional . . . ?

Joan Miller: When she first came, almost nonverbal, we worked to get her to engage.

Richard and Susan Donnelly [simultaneously]: Any new situation is like that if it's not church or at home. That's why the Roberts School is a surprise.

Joan Miller: Maybe.

Davis: There is some consensus, but also serious disagreement on the school side about social issues, and the evaluation is vague there. Did she make as great strides socially and emotionally as she did academically?

Joan Miller: Yes. This is not to say that she is not sometimes depressed. But she is more socially adept; she was used to being alone, and more social interaction was needed.

Davis: I don't follow.

Joan Miller: She is less able to be alone now.

Richard and Susan Donnelly: She's almost fifteen; she's adolescent. Heather thinks as our whole society did thirty years ago.

Joan Miller: She's beginning to see herself next to her peers and she sees the difference. It is hard for her. I think she's making progress. I think it's depression.

Davis: Joan, are you implying that the mainstream was uncomfortable for Heather, that she feels inadequate in contrast with other kids? How was her mainstream experience at Riverside?

Joan Miller: I know the issue you raise. She certainly liked her mainstream classes; she won an award there.

Richard Donnelly: The reason she won the award, to no small degree, was because of the life skills she learned at home. She is a leader in the kitchen, to start off with.

The Donnellys sustain their conviction that Heather should be placed in the Roberts School by asserting and reasserting, as Mr. Donnelly does here, that Heather's learning is almost entirely a product of home instruction and influence. By implication, the schools have failed Heather; thus, an alternative placement is justified.

Susan Donnelly: Mainstream classes were a success, but she had no friends. These are her areas of success not because they are mainstreamed but because they are her areas. Yet she has no friends. I used to ask her to bring home a friend. I guess I pressured her, but there were none.

Davis: There seems to be some consensus that she had a good experience in Riverside. Did she know . . . ? [cut off]

Joan Miller: Yes. We'll miss her.

Richard and Susan Donnelly: Yes, yes.

George Livingston: We are addressing the issue of friendships.

Joan Miller: It is important for Heather to be in a program for kids like her. We don't have any girls next year, therefore we recommended Waterville. . . . She needs a controlled, predictable and structured environment for friends.

Davis: Friends need to be part of the program?

Davis is continuing his efforts to shore up the few points of consensus. Whenever he finds that common ground, he reiterates and emphasizes the point. George Livingston, the Greenly representative, is unwilling to acquiesce in this developing accord; as

he resists Davis's proclamation of consensus, the special education teacher, Joan Miller, attempts to offer independent support. Davis repeats that emotional development and friendships are becoming a central feature of Heather's current situation. The absence of available peers at the Riverside school justifies a move; even Greenly can agree to that. The question now is about which placement will offer the best peer opportunities.

These exchanges illustrate a piece of the painful irony inherent in the special education system. Engel (1991) points out that "it is a central irony of the [federal special education law] that each child who seeks to benefit from its 'mainstreaming' provisions must first be classified as fundamentally different from his or her peers" (p. 24). Thus, the first hurdle to being *included* within the community of all students is the requirement to be *excluded* in the category of special student.

In their effort to maintain their conception of Heather and resist the professionals' implication of her difference, her incapacities, the Donnellys are caught in this distressing contradiction. How can they find Heather a place, even in an alternative world, when there is an insistence that she be understood and measured by what she is not? Referring to Heather's need for a friend, Mr. Donnelly's response makes this contradiction and his heartbreak palpable:

Richard Donnelly: One will do it. She has no real friend, just the one in her head. She doesn't talk a lot. She's like my father, who is a farmer. We visit cousins about every six weeks, regularly. She thinks they are friends.

Susan Donnelly: When we visited the Roberts School, and also the Hallmark School, she made friends.

Davis: Clearly there are signs of consensus on that aspect of Heather's self-esteem, lack of friends. Heather has academic needs but also social needs.

Susan Donnelly [interrupting]: When we face things, we learn that we have to put some things aside and get on....

Davis: Yes, we do. Yes [Long pause]. To the degree that there is some consensus about Heather's social and academic needs, we need to turn now to the question: which program can best be tailored?

At this point, Davis begins a significant transition. He has been seeking consensus on the specification of need, and each time he states it, there is assent and then slippage as a particular elaboration is offered. Yes, she had a good experience at Riverside, but she had no friends. Yes, the school system acknowledges the need for emotional relationships and has consequently decided to transfer her to Waterville. The moments of consensus when the parties explicitly say that they see Heather similarly seem to evaporate as they keep talking. Davis now shifts the conversation by suggesting that we "seem to have some consensus on who Heather is." Nothing further seems likely to happen; he moves to a discussion of the new situation, the future. Davis opens exploration of this new placement that all agree is necessary. He inquires about the size of the class at Roberts, the composition and mix of children and needs, the staffing that will be provided.

Jim Carroll describes the program at the Roberts School. He details the teacher-student ratio, the subjects that will be covered, and the efforts that will be made to increase inferential reasoning. There is mainstreaming in physical education, in collaboration with some local public school systems who share facilities. Similarly, the school emphasizes participating in community projects with the homeless, shoveling sidewalks, and visiting the elderly in nursing homes. This sounds like a general pitch for the school, yet it does not specify the details of Heather's program. Joan Miller inquires about the training of the staff at the Roberts

School and the availability of speech therapists, language specialists, psychologists, and the particular approach that will be used in the language-centered classes. There is a fast recounting of the variety of specialists, tutors, and skill-building techniques available. Most of it is special education jargon.

Richard Donnelly seems to be losing his way in the long list of specialists, hours, techniques, and the shifting talk about disability and language deficits. Davis intervenes to resist what is beginning to sound like a technical professional debate. "I need some help here," says Davis, announcing his own incapacity and, at the same time, asserting that this distant rhetorical style needs to cease. Davis is also deferring to the public school personnel, who generally perceive themselves to be more professional and experienced in special education than private school personnel, who often have less training and certification. His interjection allows the conversation to turn to the public school programs, expertise, and services.

The conversation turns specifically to the program available at the Waterville School. Sam Noble of Waterville describes the benefits of Heather's placement in a public high school, where she can have many mainstreaming experiences. Again, the talk turns to the number of minutes per week Heather would receive language instruction, the amount of time she would spend with a speech therapist, how many staff would be shared among how many children:

Sam Noble: I concur on Heather's needs. I think we all do, and indeed there is enormous similarity in the programs at Waterville and at Roberts. We have, however, 850 students at Waterville High School—that is a small school for a comprehensive high school. But we have all kinds of students and lots of variety. We have a learning-disabled resource class where there is much attention to language processing and learning disabilities. We differentiate this from the mentally retarded and emotionally

disabled. The students in Heather's class exhibit similar need; they each have language processing difficulties, their skills are similar, but some are at a higher level.

Davis: I hear distinctions between learning disability programs versus language programs. Is there a distinction and what is it? Can we clarify the terms here? We need some help. Is it dyslexia?

Jim Carroll: We'd all give it a different definition.

Davis: One element of a program is the question of compatibility. This may be especially important, given the general consensus about Heather's feelings about herself.

Jim Carroll: You seem to suggest that Heather will be one of the more impaired in the class of eleven.

Sam Noble: She will be in the bottom third of the class; there are three or four like her. She represents a challenge, but we're prepared for it.

.....

At each stage of the mediation process, the child is being verbally constructed, known through the descriptions and words each of the speakers utter. She is understood simultaneously as an object to be educated, a vessel to be shaped and molded by expert hands, and also as an independent, acting subject of capacity, will, and emotion. Parents struggle to insist on and sustain a positive image of the child, who is perceived and regularly spoken about negatively by the professionals as a problem. The Donnellys insist that Heather has talents, interests, capacities. The professional language seems to impede their effort to talk about Heather as a person, with a fully developed personality, sensibilities, wants, desires, and identity. But sometimes professional language provides a welcome fortress against the inescapable recognition that the child is seriously impaired. Although Davis sees himself creating opportunities to celebrate

children, as he did at the outset for Susan Donnelly, he sometimes, as now, colludes in the technical talk when it seems to offer a needed shelter in an increasingly emotional atmosphere.

The talk next moves to questions about the certification of the staff, previous training, types of techniques they will use, and the amount of time devoted to each learning and social activity:

Davis: You described a learning-disabled language-based resource class, a self-contained class. Is that rather than a resource room?

Sam Noble: But for some things the kids are there only 50 percent of the time.

Davis: Is the ratio actually less than eleven to one then? Do you have other non-Waterville kids in the class? Will Heather be the only non-Waterville student?

Sam Noble: Not in this class, but in other special classes we have non-Waterville kids.

Susan Donnelly: What is the ratio of girls and boys? What was it last year?

The conversation continues on the gender ratio, which will be five girls and six boys. Susan is worried that Heather will not have sufficient opportunity to create friendships among so few students like herself and in a class where all the other children live in a different, and distant, town. Davis then calls for a break, noting he plans to caucus with the Donnellys and Jim Carroll, then meet with the Greenly Schools officials.

As the other school personnel leave the classroom to have their own caucus in the hall, the Donnellys and Jim Carroll exchange soothing words. Carroll asks Davis what the cost differential to Greenly would be if Heather goes to Roberts or Waterville. Davis says he doubts that the money is a factor but says he will ask. The mediator then lays out the case for the Donnellys as he sees it.

Clearly, there are a number of discrepancies as to how each party sees Heather. We have heard learning disabled, language impaired, differing expectations. And we have also heard pros and cons about both the collaborative program at Waterville and the Roberts program.

I see striking similarities in the physical settings and the distance. Roberts could be offering a greater intensity of teaching, Waterville some larger time in a mainstreamed environment. The case for Roberts, however, is strong because of its location on the land of a public school; you might have less of a case if you wanted a placement, for example, at the Hallmark School, where no mainstreaming is available. But with Roberts, because it is unlike the usual sharp division between public and private [the Roberts School sits on the grounds of a suburban public school], it's one of the toughest cases I've seen. Here is a private school adjacent and sharing facilities with a public school. The discrepancy I see, however, is in socioemotional development. I didn't get a picture from the schools of a sad, depressed, and isolated kid.

Davis identifies the disadvantages of the situation facing the Donnellys. Without some agreement here, they face a long, protracted, and unpleasant hearing; in that hearing they are challenging a placement at the regional collaborative in Waterville that is not all that different from the private Roberts School in Duffield. Finally, Heather does not seem so misplaced, unhappy, or depressed as a result of public placement in Riverside to justify removing her from the public system. It seems to be a difficult case because the Roberts School shares space with a public school and provides opportunities for mainstreaming, yet those features are also offered in Waterville.

Susan Donnelly is unpersuaded, unwilling to accept Davis's characterization of the similarities in the two schools; she insists that there are significant detriments in the Waterville placement. She reiterates her concerns about the transportation, too much mainstreaming, and lack of emotional support. Jim Carroll of the Roberts School reinforces her claims. The Donnellys are immovable, as Davis predicted they would be. They announce their unwillingness to compromise by characterizing the Greenly Schools representatives as intransigent.

Rather than validate the Donnellys' description of the Greenly Schools system, Davis plays it back against them by labeling them inflexible. Having acknowledged their position, and his inability to alter their position, Davis asks for their help in altering the Greenly position. He seeks their support. In so doing, however, he is nonetheless again inviting them to rethink their position, because they must once again name the advantages of a placement for Heather at the Roberts School and correlative the disadvantages of a placement at Waterville.

Davis: The bottom line is that Heather has a spot at Roberts. She is going there. You're going to work. . . . Can you give me anything to persuade them to go along?

Susan Donnelly: Quality! I've observed their program, I've checked their experience, in both schools. Waterville just doesn't have teachers that are professional enough.

Richard Donnelly: Talk about their presentation. They are unprepared and are just winging it.

Jim Carroll: The program is disjointed. They haven't a sufficient group for Heather. In our program, she will be in the lower fifth, but at least there will be a group of similar kids. And there will be more comprehensive content. They are not addressing these issues.

Richard Donnelly: They are not experienced. The program is only one and one-half to two years old.

Susan Donnelly: It is too risky. They haven't the experience. In Riverside, she had a parade of teachers in just her first three years. That is relevant to us.

Davis: You have outlined a number of points about Roberts: the mixture of kids in the class, the ratio of teachers to students, the gender division, the math issue, the concreteness of the social studies curriculum, study skills, work-study community service programs, adaptive physical education, potential for mainstreaming since Roberts is situated in a public school building. . . .

Richard Donnelly: I looked carefully at the kids in the class in Waterville. They are like Waterville. I worked there. There wasn't a kid she could relate to there. These are inner-city type kids, although they live in a suburb; they are not motivated the way she is. I can get her trained; that's not what she needs. There are educational possibilities, not to mention higher education.

Susan Donnelly: The potential involvement with other kids is important, so important for her self-esteem. There is none, zero in Waterville.

Davis: If you mentioned the issue of involvement with other kids, they would agree; they have agreed. Isolation is equally a concern of the public schools. She is going to a new placement, why rule out the possibility of friends?

Jim Carroll: He's got the salient points.

Having failed to move the Donnellys, Davis nonetheless encourages them to believe that they have had a caring audience and that he has heard their concerns (see Handler, 1986). Davis now meets privately with the school personnel and attempts to see what movement he can make in their position. He begins by acknowledging their authority and deliberation, asking what conclusion they have reached. George Livingston, the Greenly special education director, notes that the regional cooperative in Waterville is similar to the program Heather had been attending in Riverside.

Davis then reviews the case as he had described it to Susan and Richard Donnelly and Jim Carroll. He lists the virtues and weaknesses of both the Roberts School and the Waterville School. There is talk about the substantially separate classroom, its classification and Heather's.³ Does the classification of the classroom in Waterville match Heather's designation? Technical discussion begins again about the differences between neurologically language disabled versus learning disabled and the appropriateness of the Roberts placement at a school for learning-disabled children. Several school representatives jockey for authority, but Davis responds in kind.

Davis knows that the school administrators are reluctant to see the case move to the formal hearing stage. He also knows and reminds them that, although the technical discussion may suggest ambiguity, there are possibilities, in fact probabilities, of heavy costs to Greenly, in terms of both personnel time and high-priced legal services. In addition, appeals can have cost-intensive systemic consequences for the school district. An appeal lost by a school system may require a response for a whole category of cases, not merely the single child who is the subject of the appeal. If a due-process appeal is lost, the school system may be required not only to change an individual IEP but to develop a generally available program for a pattern of disability. The school system may also be required, as some observers advocate, to change the pedagogy for all "normal" children so that it is equally accessible to children with disabilities, who could then be "mainstreamed" and educated in the "least restrictive setting" (see Minow, 1990). Systemic changes and new programs mean large commitments of financial resources for school systems.

Thus, Davis knows that Livingston, the special education director, is generally reluctant to move to the due-process hearing and court review of that, where the resolution can provoke possibly far more expensive remedies. His job performance, at least in

part, is measured by his success at limiting the number of hearings and the costs.

Nonetheless, Livingston is reluctant to make concessions. Rightfully, he does not believe that Heather's case is likely to provoke a finding by the hearing officer that requires changes in Greenly schools. The stake is limited here to the cost of Heather's tuition. Had this case arisen eight or nine years earlier, Livingston knows that Greenly would have been in a more vulnerable position; now, however, Greenly—like its neighbors—has taken steps to limit its liability by developing collaborative programs.

In the early history (during the 1970s) of Chapter 766 in Massachusetts, school systems lacked internal resources to provide for the varied needs of their population (see Hausmann, 1985). Parents were regularly "winning" appeals that required services not available in schools; winning a case for a parent meant that the school system would pay the tuition for private education, often at schools with programs designed for specifically classified disabilities. The school systems found themselves with escalating budgets for private school placements. Special education directors were given explicit instructions to create programs within the public school systems. But public school systems designed to provide a standard education for normal children are often less well equipped to provide programs tailored for every child with a unique collection of impairments and needs. No one school system is likely to contain within its jurisdiction sufficient numbers of children with like disabilities. Thus, George Livingston, like most special education directors, found himself with the increasing cost of private tuition, a mandate to create programs in-house to reduce costs, and insufficient numbers of children with each particular disability with which to build a program.

As a consequence, in the late 1970s Greenly, Waterville, and a half-dozen other towns in the suburban area created a collaborative system to provide special education programs for learning

disabled children whom they could not adequately service within the separate towns but could handle collectively among the several communities. The SECOOP classroom in Waterville, to which Greenly wants to send Heather, is an example of this effort to create public alternatives to the private placements. Because of the SECOOP programs, parents have won fewer appeals, and in time the number of appeals in general has decreased. School administrators have begun to feel they have greater control over their special education budgets. Livingston believes Heather's previous placement in the Riverside collaborative classroom and proposed placement in the Waterville collaborative demonstrate appropriate responsiveness on the part of the school system and thus limit the possible effects of an adverse decision by a hearing officer or court. Between 1980 and 1987, parents in the position of the Donnellys would have been unlikely to win an appeal ordering Greenly to pay tuition at the Roberts School. Livingston knows that, and to some degree is hoping that the Donnellys also know that.

But, as Davis indicates, the law has very recently changed. "As you know," he tells the school officials, "we are now looking at a standard change. The maximal feasible benefit issue, in addition to the least restrictive environment, which is sometimes less of an issue in cases like this, makes this a difficult case." Davis describes changes in the law that have created new and serious disadvantages for Greenly. A 1987 decision of the First Circuit Court of Appeals reinterpreted the state standards and provisions, shifting the burdens of proof for the appropriateness and adequacy of IEPs. What this means is that it is no longer sufficient for Greenly and other communities to provide disabled students with an education *equal* to that provided nondisabled students. The court determined that the legislature had intended the special education law to provide not merely equal education for children with disabilities but an educational program that offered the *maximum feasible benefit* for the disabled child.

This new standard has made it less likely that Greenly will win in a formal hearing since it will have to prove not only that the proposed placement in Waterville is appropriate for Heather, offering her an education equal to that received by nondisabled students (the standard under which the cooperative programs were designed), but also that it must be the very best possible placement for her, providing the "maximum feasible benefit." This new standard fosters closer scrutiny of programs, encourages school systems to settle disputed IEPs more often, and makes the remaining cases that go to mediation the "really tough nuts," where it is difficult to resolve the remaining differences between the school system and parents.

As the talk continues, George Livingston interjects that he will offer a concession. "I will offer to monitor the situation in Waterville. That's my concession," he says. Knowing that this is Livingston's legal obligation in any case, Davis tries to pin him down about how much time he would spend each week monitoring the situation and Heather's development.

Davis: I realize that financial considerations ...

George Livingston: Money has nothing to do with this.

Davis: . . . cannot determine programs for special needs students, but sometimes public schools, sometimes in the interest of relationship, work out solutions. For example, acknowledging that both programs may meet Heather's needs, but since the parents have bought heavily into Roberts, Greenly may contribute to Roberts what the collaborative plus transportation would have cost Greenly. While you consider this, let me speak with the parents.

Davis, having provided a summary of the positions, offers a compromise that may settle the case. He drops a hint for them to pick up, a way for the costs to Greenly to remain constant and for

the Donnellys to share the expenses at Roberts. He reminds them of this piece of the agenda and returns to speaking with the Donnellys:

Davis: I'm sorry to keep you waiting. The school people had a lot to say and that is sometimes encouraging. The sense I have is that Mr. Livingston has pressures on him. . . . This often happens when a collaborative is involved. Although he didn't say it in so many words, he may have the feeling that the SECOOP program is one designed specifically for kids like Heather—low incidence....

Susan Donnelly: Low incidence?

Davis: I mean, not many students like Heather would be in any one town, so there is a collaborative. . . . We seem to be at an impasse.

As Davis communicates the possibility of the shared expenses Greenly and the Donnellys could have at the Roberts School, Susan Donnelly jumps into the conversation in mock song:

Susan Donnelly: Heigh ho, heigh ho, it's off to work I go.

Davis: Hey, maybe Susan could go into show business.... Let's take one final look at how this may evolve. For you, as you well know, there is the possibility of tuition, transportation, and legal fees. If you prevail, Greenly would be responsible, including perhaps for your legal fees. For Greenly, likewise, there is substantial cost or, if they prevail, none. Rather than continue to argue the relative merits of Roberts versus the SECOOP in Waterville, perhaps you might consider putting that aside. A possible solution which I have seen adopted in situations like this is, for example, that Greenly contributes towards Roberts what the collaborative plus transportation would cost. That may be as much as 50 percent of the Roberts School costs.

Richard Donnelly: Have you proposed that to Greenly?

Davis: I asked them to consider it, give it some thought, and I would urge you to please be sure to run it by your attorney.

Davis finds Mr. Donnelly's response encouraging and, because he is looking for a long-lasting agreement, asks the Donnellys to speak with their lawyer. He is unsatisfied with agreements that fall apart as soon as the lawyers look at them. Because they are making a major decision and committing large sums of money as well as the future of their child, Davis does not want the Donnellys to think that he misled them into thinking it was an all-or-nothing situation.

The Donnellys and Jim Carroll reenter the room, and the entire group reforms around the table. Davis then thanks everyone for their patience, and the meeting slowly dissolves in talk about the hearing date, the names of the lawyers, and which hearing officer is scheduled to hear the case. Richard Donnelly and George Livingston are separate from the group, together and speaking. Two weeks later the parties sign an agreement placing Heather at the Roberts School, with costs of transportation—which are considerable—paid by the Greenly Public Schools, while the Donnellys pay for Heather's tuition.

.....

By attending to the concerns of persons made outsiders by virtue of their differences, Patrick Davis also places himself outside. Although Davis conceives of himself as a professional mediator, he neither reads little about dispute resolution nor is involved in efforts to institutionalize mediation or the dispute resolution community. "There is no problem with studying mediation, reading the literature, being the best one can be," he says. "What are the prerequisites? Law, special education, process? There is a drawback with 'mediation technicians' wearing the techniques of mediation as a foreign appendage. One must make

the skills one's own; light your own torch from others' candles, but make the skills fit your person. That is best. Avoid compartments. Try to be whole."

Many themes animating debates about the consequences of various forms of collaborative dispute processing (such as authority and control issues) are alien and, it turns out, uninteresting to Davis. Seventeen years of experience and success at special education mediation is unique; he is reluctant, however, as he has encouraged me to be, to generalize to other mediation efforts.

Other matters that often structure the delivery of mediation services—the generation of a clientele, the maintenance of a caseload, the satisfaction and agreement of the parties—are also alien simply because of the nature of the job. Unlike other successful and accomplished mediators, Davis does not work in plush offices or with people of influence and power. Special education mediation takes place in schoolrooms and administrative offices carved out of abandoned schoolrooms. The usual settings of special education mediation are unlike the lush green lawns that formed the background of our introductory lunch, and those surrounding the administration building in Greenly. The barren classrooms, stale corridors, and child-sized furniture devoted to adult negotiations symbolize the relative lack of importance of children, particularly those with disabilities, in the general scheme of social values.

Although Davis locates himself with children, their parents, and school personnel trying to respond to children and their parents, he is a public employee, a functionary in a state bureaucracy. While he does not associate himself with power or affluence, he is part of that increasingly institutionalized environment that he sees as part of the apparatus that defines children with disabilities as a special problem. This inherent contradiction informs Davis's practice as he tries to make room for individuals in a world dominated by institutions.

If Davis cannot resolve or remedy these incongruities, or succeed in meeting the bureaucratic criteria of success-mediated agreements, then what does he do?

He attempts to bring out the best in the parties to the dispute, provide an opportunity for parents to speak well of their child, and thus undo a little of the pain. Davis wrestles with the experience of having a disabled child, of what it feels like to face others who constantly treat you as if you did something wrong, as if you yourself are profoundly defective, rather than the normally less-than-perfect. He is concerned about the parents' guilt and shame. They are the object of a poorly concealed loathing because they are in the position that every parent fears: they have an impaired or "abnormal" child. He invites parents to announce their pain, without facing an accusing authority, and to celebrate the child before a receptive, generous audience.

Thus, in this three-hour mediation session with the Donnellys and professional staff from three school systems, much of the language is about Heather's achievements, her needs, her progress. There is an implicit agreement to speak well of her; Jim Carroll, the Donnellys' advocate, referred to Heather as having average intelligence but being a complex child. It took more than two hours for me to realize that Heather was a child who was developmentally delayed, not merely one who was having reading and language-processing difficulties.

In another case, Davis described the difficulties facing special education directors, arguably one of the most difficult positions in education. Faced with decreasing or frozen financial resources and the unrelenting and often legitimate demands of parents, advocacy groups, and lawyers, these administrators are between the proverbial rock and hard place. Unlike other human service agencies, public schools cannot excuse themselves with claims that "the school committee did not appropriate the funds." So these school officials share some of the stress and pain the parents

experience and feel forced into uneasy compromises. Davis's concern is not limited merely to the formal outcome of a specific mediation. He is sensitive to the pain and stress along the way, concerned with the means as well as the ends. Davis explained this to me with a quote from Gandhi: "The means are the end in embryo."

Davis's manner is not surprising. He began his professional life preparing for the priesthood. He has done many things since then, including teaching, social work, fathering and raising children. I asked him if he would agree that there was continuity in the path he had taken. His life's work was "not the church," he said, but "some useful service." When I asked him to describe his mission, he said, "There is a continuity to it—the priesthood to mediation—in that it is aimed at alleviating a little pain somewhere." Pain, in fact, is a pervasive theme. I had considered various topics I might discuss in this profile, among them issues of concern to professional observers, promoters, and critics of mediation. For example, I had intended to write about the mediator's efforts to balance unequal power, eschew or use authority, hedge or confront issues of legal rights. I ran the transcripts of several mediation sessions through a computer program that counts words, to identify the places where parties made claims of right; arguments about law, rule, or statute; threats to turn to litigation or courts; claims of authority and expertise. I found that there were few references to law, few claims of right or obligation or related words. The most frequently used word, other than prepositions and articles, was *pain*.

Indeed, the insistent renunciation of authority stands out in my mind as I think about the interviews with Patrick Davis and the mediation sessions in which I observed him at work. He does not claim special expertise, nor does he make a display of extensive knowledge of the state bureaucracy, special education programs, or children's needs. He portrays himself as a cog in a

machine rather than an overseer of people and an important process. He identifies with all the other cogs. He talks about trying to create a balance of power and authority between the two parties, which may at times lean away from neutrality and toward advocacy, and that, he worries, may threaten mediation. But he does not seem interested in talking at length about the techniques or ideology of mediation. He is a lover of people, not processes.

Compassionate for others, Davis is, at the same time, rather hard on himself. He is not self-congratulating; he seems to be a man for whom good is never good enough. It may come from his deep Catholicism. But his Catholicism is not about the church or Catholic institutions. He is less interested in the church than in a personal spirit and a Christian formula for living. Davis seems to break everything down into smaller units, and he views those units as more important than the overall picture. It is not the institution of the church but the Christian spirit that is important, not the process of mediation but the individuals—family, school, and child—in each case.

In the end, he finds much to celebrate. For Davis, each case is child-specific, and the most successful agreements—as many as 70 percent, he believes—benefit the child in obvious, even measurable ways. In the remaining 30 percent of the cases, however, mediation may indeed produce what some of its critics suggest: another obstacle between a child's needs and an appropriate educational response. For a few minutes, however, some parents may experience a respite.

Susan S. Silbey

Notes

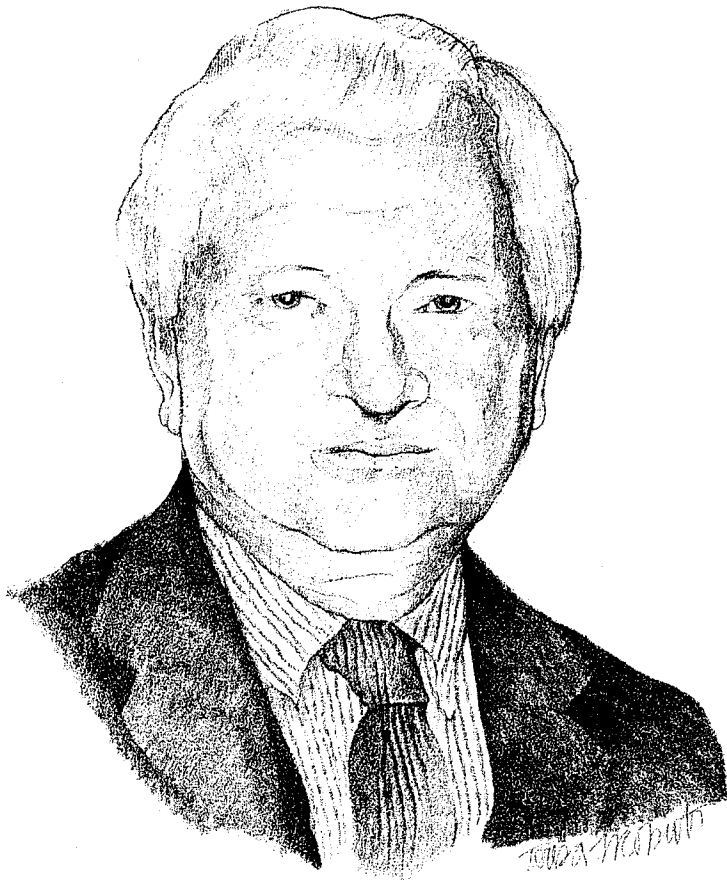
I would like to thank Joel Handler, Deborah Kolb, Sally Merry, Brinkley Messick, David Engel, Austin Sarat, Scott Saul, and Elizabeth Schuster for their generous reading and advice. I am especially indebted to Patrick Davis, not only

for allowing himself to be scrutinized and possibly misrepresented but also for trying to save me from folly and error. That I am unredeemed is none of their responsibility.

1. This name is fictitious: there is no Greenly Public School district in Massachusetts. As a condition of the permission to observe mediation sessions that I received from the Department of Education of the Commonwealth of Massachusetts, Patrick Davis, and the school officials and parents whom I observed, I agreed that no parents, school districts, or local school administrators would be individually identified.
2. David Engel (1991) identifies the reluctance of some parents to exaggerate their disabled child's difference by demanding a disproportionate share of the public resources.
3. The federal and state laws create a system of diagnostic labels for classifying special needs children by the proportion of weekly time spent in special education services. Four of the six ranks range from less than 10 percent to more than 60 percent time in special services; the fifth category defines children in out-of-district, day-school programs; the sixth category classifies children in residential, twenty-four-hour care programs.

References

- Budoff, M., Orenstein, A., and Kervick, C. (1982). *Due process in special education: On going to a hearing*. Cambridge, Mass.: Ware Press.
- Engel, D. M. (1991). Law, culture, and children with disabilities: Educational rights and the construction of difference. *Duke Law Journal*, 166-205.
- Handler, J. (1986). *The conditions of discretion: Autonomy, community, bureaucracy*. New York: Russell Sage Foundation.
- Hausmann, B. (1985). *Mandates without money: Negotiated enforcement of special education regulations*. Unpublished doctoral dissertation, Brandeis University, Waltham, Mass.
- Minow, M. (1990). *Making all the difference*. Ithaca, N.Y.: Cornell University Press.
- Singer, L. R., and E. Nace. (1985). *Mediation in special education*. NIDR Reports no. 1. Washington, D.C.: National Institute for Dispute Resolution.



*"I do what is necessary to get to my goals, not theirs.
 . . . The pursuit of closure is a neutral goal."*

—Howard Bellman

.....

Howard Bellman

Using "Bundles of Input" to Negotiate an Environmental Dispute

The Nuclear Regulatory Commission (NRC) ventured into several unknown areas when it chose to use "regulatory negotiation" instead of conventional administrative rulemaking procedures to develop a licensing procedure for the first high-level nuclear waste dump in the United States. The proposed NRC rule was, in fact, an historic event. It was an effort to invent a legal means for handling the garbage from the first generation of nuclear weapons and nuclear power plants, as well as for the second generation of these plants, now being constructed, in part, through this very rule. The rule creates a procedure to adjudicate the U.S. Department of Energy's (DOE) application for a license to receive and process high-level radioactive waste at a geological repository to be built at Yucca Mountain in Nevada.

Although it is not certain, Nevada will probably be a party in the licensing application procedure, given its substantial interest in the dump site. Yucca Mountain is a hundred miles northwest of Las Vegas, just outside the Nuclear Testing Site where atmospheric testing went on from 1951 to 1962 and underground nuclear tests are still being carried out today. It is near the California border and the Death Valley National Monument. Approximately fourteen hundred people, including a ranch run by prostitutes, live near the site.