

## Mediating Disputes in the Workplace: Suggestions from Procedural Justice Research about What Matters and Why

Nancy A. Welsh  
Professor of Law  
Penn State University, Dickinson  
School of Law

---

---

---

---

---

---

---

---

### Questions

- What is procedural justice?
- Why does it matter—in resolving disputes and managing people?
- Are some people more affected by procedural justice more than others?
- Where does caucus fit with procedural justice?

---

---

---

---

---

---

---

---

### A Workplace Dispute

- You've been accused of making inappropriate use of the internet at your workplace. You deny these accusations and are about to meet with your boss to discuss them and possible sanctions.
- Think about how you hope your boss will behave during this meeting. What will you watch for? Why?

---

---

---

---

---

---

---

---

Procedural Justice: Key Process Characteristics

- Opportunity for people to speak (“voice”)
- Consideration by the decision-maker (“being heard”)
- Open-minded decision-maker, trying to be fair
- Dignified treatment
- On high alert for “sham” procedure

---

---

---

---

---

---

---

---

The Influence of Procedural Justice

- If people perceive that a process was fair:
- They are more likely to perceive the outcome as fair, even if it is not advantageous
  - They are more likely to comply with the outcome
  - They are more likely to perceive the sponsoring institution as legitimate

*Relevant to a relatively flat, increasingly diverse workplace?*

---

---

---

---

---

---

---

---

But Some People Are More Influenced Than Others

- Variable of status
- Variable of individualism vs. collectivism
- “Self-other merging”

---

---

---

---

---

---

---

---

**Process matters.**

---

---

---

---

---

---

---

---

But Why?

**Theories**

- Instrumental
- Group value
- Heuristic
- Uncertainty management

**Other**

- Intergroup dynamics
- Attributions and empathy

---

---

---

---

---

---

---

---

Useful By-Products of "Transformative"  
Mediation in Some Workplaces

- Resolution
- Improved relationships
- Improved managerial handling of conflict
- More managerial listening

BUT...the dark side...

---

---

---

---

---

---

---

---

What Do *Disputants* Perceive as the "Value-Added" in Mediation?

Resolution?

Justice?

Control (a/k/a Self-Determination)?

---

---

---

---

---

---

---

---

### Seeking Disputants' Voices: Description of Research Project

- Interviews with parents and school district representatives involved in special education mediation sessions held in Nov. - Dec. 2000
- Each disputants interviewed three times: before the session; immediately after the session; 18 months after the session
- 70 interviews (14 of 17 scheduled cases)
- 8 mediation sessions observed
- Suggestive, not conclusive, due to sample size

---

---

---

---

---

---

---

---

### The Richness of Special Education Mediation for This Research Project

- Institutionalized program
- Repeat players (school district representatives) vs. one-time players (parents)
- Institutions vs. individuals
- No attorneys (not permitted in Pennsylvania)
- Tough legal issues
- Tough emotional issues
- Access to disputants

*Relevant to employment mediation?*

---

---

---

---

---

---

---

---

## Legal Context: What Must Schools Provide to Eligible Students?

- **IDEA:** Schools must provide a “free appropriate public education” tailored to the unique needs of the child by means of an “individualized education plan” (IEP)
- **U.S. Supreme Court:** “...the language of the [IDEA] contains no requirement...that States maximize the potential of handicapped children ‘commensurate with the opportunity provided to other children.’” And “...the education to which access is provided [must] be sufficient to confer **some educational benefit** upon the handicapped child.” *Board of Education v. Rowley* (emphasis added)

---

---

---

---

---

---

---

---

## What Must Schools Provide in Pennsylvania?

- **Third Circuit:** While the IDEA does not promise the “maximization” of children’s potential, Congress did not intend that “the conferral of any benefit, no matter how small, could qualify as ‘appropriate education’ under” the IDEA. As a result, it is not sufficient for schools to provide “special education designed to confer only trivial” or “de minimus” benefits. *Polk v. Cent. Susquehanna Intermediate unit*

---

---

---

---

---

---

---

---

## Context: How Much Deference Should Courts Grant to Educational Agencies?

- **U.S. Supreme Court:** “The primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child’s needs, was left by the Act to state and local educational agencies in cooperation with the parents or guardian of the child....[I]t seems highly unlikely that Congress intended courts to overturn a State’s choice of appropriate educational theories...We previously have cautioned that courts lack the ‘specialized knowledge and experience’ necessary to resolve ‘persistent and difficult questions of educational policy.’” *Board of Education v. Rowley*

---

---

---

---

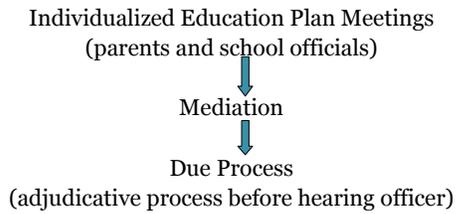
---

---

---

---

Context: Where Does Mediation Fit in the Special Education Decision Making Process?



---

---

---

---

---

---

---

---

The Data

- Pre-Mediation
- Post-Mediation

---

---

---

---

---

---

---

---

Parents' and School Officials' Reasons for Using Mediation: Similarities

- Opportunity to speak and be heard in a setting that is even-handed and dignified
- Opportunity to resolve the dispute

---

---

---

---

---

---

---

---

### Parents' and School Officials' Reasons for Using Mediation: Differences

- **Parents**
  - To make it more likely that *my* views and uniqueness of *my* child will be heard, understood and seriously considered by the school district (translator, advocate)
  - To get school officials to grant my demands
- **School officials**
  - To *hear* the parents' information, be better able to assess children's needs and arrive at more informed, substantively just decisions
  - To achieve closure consistent with relevant norms

---

---

---

---

---

---

---

---

### For the Parents: What's Not (or Rarely) There

- Mediation offers me control over the outcome
- Mediation offers me an opportunity to hear and understand the school officials
- Mediation offers me a means to negotiate or problem-solve

---

---

---

---

---

---

---

---

### Parents' Perspectives Regarding the Mediator's Value--as Translator, Advocate

- "I think after the mediator hears the facts, I think she needs to make them understand at the vo-tech that they did indeed break the law."
- "I guess just to...get the school to give serious consideration to hiring this aide..."
- "Do the talking for me. In a very PC manner."
- "I think it's important that the mediator understand what's led to the mediation and what's currently happening...I think they can probably present my goals and my perspective of the situation without the passion and the emotion that I have about it, which may make it easier for the district to understand."

---

---

---

---

---

---

---

---

## School Officials' Perspectives Regarding the Mediator's Value

- "I think just staying objective, making sure that everyone has their chance to speak, that we are uninterrupted, and that the decision that is reached at the end will be done just based on fact and not emotion."
- "I guess listen, intently listen and try to determine what it is that we are trying to accomplish for this child and see if we can propose any compromises, I guess. I mean, we feel we've tried, but didn't meet the parent's satisfaction. So if the mediator can pull something out of the dialogue between the two sides that we didn't think of, that would be great."

---

---

---

---

---

---

---

---

## One More . . .

"It doesn't matter who would be sitting in the mediator's seat or you could put a bottle of soda there. But what will happen is that the parent will state what is on their mind and what their issues are, because I really haven't heard that...why they're saying 'no.'...I'm sensing and getting the feeling that there is a lack of trust and the feeling that there is no help out there for their child, and from the school district. I want to hear whatever her position is, whatever her issues are....The second thing...is that eventually at some point...the mediator will talk with the parent and maybe draw out...some solutions...I mean a good mediator will explore all sides of something with the parent and talk to them in a way that they'll feel comfortable just putting it out there and taking some risks as to what they see as a resolution, without, if they said it to us they might feel that they were committing themselves."

---

---

---

---

---

---

---

---

## What Are These Disputants Saying About the Value of Mediation?

---

---

---

---

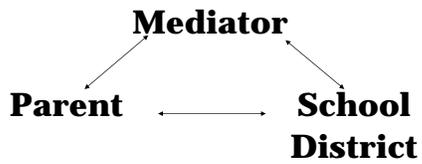
---

---

---

---

The "Traditional Picture" of Voice in Mediation



---

---

---

---

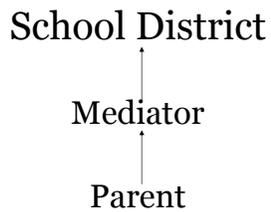
---

---

---

---

The "Contextualized Picture" of Voice in Special Education Mediation?



---

---

---

---

---

---

---

---

Pre-Mediation Perceptions Embedded in Context:  
The Value of Mediation and the Mediator

- **Parents:** Mediation is valued as
  - An improved opportunity for expression
  - An improved opportunity for consideration by the school officials
- **School Officials:** Mediation is valued as
  - An opportunity for improved administrative decision making
  - An opportunity to find where the individual fits within the system and its norms
  - A means to end the problem

---

---

---

---

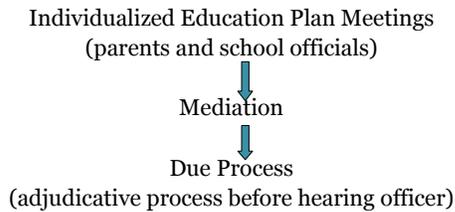
---

---

---

---

## Key Reference Points for Parents and School Officials



---

---

---

---

---

---

---

---

## Post-Mediation Perceptions: What Was Helpful?

- **The opportunity for the *parents* to be heard and understood by the *mediator***
- **Assistance to the *parents* with being heard by the *school officials***
- **Especially for school officials, hearing each other--as a result of the mediation structure and the mediator's clarification and translation**
- **Assistance with "moving the ball forward" toward specific agreements—but with some ambivalence among parents**

---

---

---

---

---

---

---

---

## Some Examples: Being Heard By the Mediator

- **Parent:** "[H]e talked personally, in a private caucus, with us and actually listened... not me arguing my side, but actually listened to what I had to say....As a parent, not as me being in there arguing for services..."
- **School Official:** "I think from the district's perspective, I don't know if it [mediation] was helpful....Maybe from the parent's perspective, but I don't know that. But I think that she had someone else to listen to her concerns. That might have been helpful to her."

---

---

---

---

---

---

---

---

## Hearing Each Other

- **Parent:** "... that was the first time I had actually utilized that process, and I really felt that it was a wonderful opportunity for both sides to voice their issues and concerns and to be respected and heard. I wish that IEP meetings could be more like the mediation process. I don't think we'd have to have so many due process hearings..."
- **School Official:** "[I]t [mediation] helped the parents and the district to realize exactly where each party was standing, and we knew how far we were willing to go."

---

---

---

---

---

---

---

---

## Helping the Parent To Be Heard By the School District

- **Parent:** "I guess the most helpful was just being able to, you know, speak my mind as to why, you know... I didn't agree... with what the district was proposing because at one point the assistant principal was at the meeting..... I think he thought maybe I was being difficult.... But sitting there, numerous times he was shaking his head to the effect that 'Now I can see where you're coming from.'"
- **Parent:** "He [the mediator] helped to make it clear to me where I needed to focus when we did reconvene as to what types of issues to address specifically with the district in order to make progress in the mediation process."

---

---

---

---

---

---

---

---

## Two More...

- **Parent:** "I think he tried to advocate a little bit for me there in the course of our conversation. And actually, that's what I was hoping for from mediation, that perhaps the mediator would also be an advocate for the child and the parent in some way without taking sides."
- **School Official:** "I think the parents needed to have that time to be heard.... I mean, they did an opening statement that was well over an hour. I mean, whew! We just needed a potty break after sitting there for a while, so they were definitely heard, okay? And I think they needed to have that."

---

---

---

---

---

---

---

---

### Post-Mediation Perceptions: What Was *Not* Helpful?

- "A result should have been achieved right then and there, and if something couldn't be achieved right then and there, then a follow through of some kind should have happened like almost immediately."
- "Basically they [the school district] said 'tough noogies.'"
- "I expected him to be, to facilitate more than he did. To, when there was a stalemate, to maybe direct or reflect back to get us guided back on track."
- "I think there should have been a time line in terms of opening statements. I think mom read a 7 or 8 page paper...[I]t certainly clarified her position but it did seem to go on a bit long. I think a person should be able to say what their position is within 5 minutes."

---

---

---

---

---

---

---

---

### 18 Months Later: The Relationship Between Satisfaction and Closure

- After 18 months, disputants' satisfaction with mediation depended very much upon:
  - Whether the dispute remained unresolved and bothersome (if no settlement was reached in mediation)
  - Whether the settlement had been implemented (if a settlement was reached in mediation)
  - If the settlement had been implemented, its degree of success (Were there continuing hassles? Did the conflict end? Did the child succeed?)

---

---

---

---

---

---

---

---

### What *Do* Disputants Perceive as the "Value-Added" of Mediation?

Opportunity for Voice and Understanding from the Mediator

Being Heard and Understood by Each Other

An End to the Conflict (Or at Least Progress Toward Closure)

---

---

---

---

---

---

---

---

## The Special Significance of Caucus

- Didn't ask about it
- Nearly *always* mentioned as significant

---

---

---

---

---

---

---

---

## Concerns About Caucus: Losing Information in the Translation

- "I don't think each party should have the right to speak on their own without the other party present....I honestly feel that if you don't know what each party is saying, how can you really hash it out?...But when you don't know what was transpired in these so-called private conversations, it's very hard I think to try to get a good resolution."
- "Well, I liked being with the representatives from the school district..... I like having a dialogue, face-to-face. I don't like....caucus very much...because you can't see into the other person's eyes; you don't get the full read...Your understanding is stilted."
- "I mean, it's always difficult to be communicating through somebody else to somebody and having that intermediate present in your argument."

---

---

---

---

---

---

---

---

## Concerns About Caucus: Losing Impartiality in Pursuing the Deal

- "I again with the caucuses I think... I get the sense that she played devil's advocate or something and that brought in a little adversarial type feeling..... That was the most uncomfortable part for me when I thought we were just misunderstanding and she still wanted to get to my bottom line..... and I just didn't feel comfortable doing it.... I think all of the good listener "stuff" skills and you know patience.... all of that was good but then I guess I sensed a little bit of impatience there at a point where it wasn't just a role she was playing, I don't know...."
- "I think the perception that she gave to us, especially during caucus, the perception that she just didn't understand why we couldn't do this for a kid... I mean, there was... we were entering into the realm of not playing devil's advocate, but being biased? Okay? You can tell me you're playing devil's advocate..... but yet at the same time it was going over the edge."

---

---

---

---

---

---

---

---

### Concerns About Caucus: Feeling Like the “Odd Man Out” --Again

- “I believe it’s somewhat unfair in that I believe decisions were made prior to this [by] [t]he school district and the mediator. Or the IU. There was definitely something going on there that we didn’t pick up on, that we couldn’t put our finger on?... They totally agreed with everything he [the mediator] said. At least in front of us. In fact, they left the room first. When we came back after we left the room, they had already made phone calls, starting the process of looking into things with the IU.”
- I don’t, I think with all of the trust issues that were brought forward initially on the table, I think one of the things that probably was not very helpful was all the time in their caucus. All the time that was given to them in their caucus and then it just, it just, in all honesty, it raised my hackles a bit because I felt more mistrusting of them. Here they go again, meeting in private about my son.

---

---

---

---

---

---

---

---

### In Praise of Caucus: Serving the Goal of Being Heard and Understood—By the Mediator and the Other Disputant

- “And when I spoke with him individually, he gave me an opportunity, as I said, to tell my side of the story. He seemed to be listening and he seemed to be sincere and have an interest in what I had to say.”
- “His ability to know when to call a caucus [was important to the mediation]...[b]ecause it stopped the typical tit for tat and round and round and round in circles...[In caucus,] [h]e helped to make it clear to me where I needed to focus when we did reconvene as to what types of issues to address specifically with the district in order to make progress in the mediation process.”

---

---

---

---

---

---

---

---

### In Praise of Caucus: Using the Mediator to Avoid the Insult of Face-to-Face Bargaining

- Well, the most helpful thing was that the mediator present..... I didn’t get into a face-to-face negotiation with the parent. But the mediator presented our proposal and came back and forth because that didn’t put us in immediate conflict. If we had been face-to-face saying, you know, well I’ll put \$3,000 on the table and no, I won’t take that; I want \$5,000 or something like that. That would have been really destructive to our relationship and we’re going to be working with the students for years.

---

---

---

---

---

---

---

---

## Did It Work?

Mother: I think when she came back with the first time with what district was for.... that she was kind of forceful in us seeing their side. Well, you see school districts don't do this. They don't. This is unusual..... Look at them..... I just didn't think it was relevant to compare it to other school districts and compare it to the norm of school districts.

Father: That sets up the argument that this is a standard procedure.

Mother: Yeah, look how easy this was. You've got \$7,500, let's get outta here. This was easy...

Father: Yeah, this doesn't happen. What do you mean? So being wrong is good? I think that's the problem..... I mean that's one of the problems that we run into...So really what we're agreeing to is that we all settle for less, so if we're settling for less for our son, then why can't we just settle for less in the educational system?... and so when she presents the school board offer, school district offer as being gracious.... and in reality it's ungracious..... It's not gracious to only get away with half..

---

---

---

---

---

---

---

---

## What Do These Disputants' Voices Say About the Training and Evaluation of Mediators?

Mediators should provide disputants with:

- An even-handed, respectful setting in which disputants have the opportunity to express themselves and to be heard and understood by the mediator, and
- Based on that understanding, assistance to the disputants in being heard by each other and achieving (or at least making progress toward) resolution

---

---

---

---

---

---

---

---

## Dual Goals

- Procedural justice
- Progress toward resolution

---

---

---

---

---

---

---

---

## Valued Second-Stage Interventions: Facilitative *and* Evaluative *and* Transformative

- Interventions focused on the opportunity to be heard and understood as means to achieve closure:
  - Uninterrupted opening statements
  - Mediator restatement, clarification, translation
  - Mediator coaching
  - Mediator “advocacy without taking sides”
  - Maintaining a focus on the key issues
- Interventions focused on finding a reason and a means for the disputants to accommodate or collaborate with each other:
  - Mediator restatement, clarification, translation
  - Mediator education of the disputants regarding reasons to negotiate—not confrontation, not just brokering a deal
  - Responsive options suggested by the mediator

---

---

---

---

---

---

---

---

---

---

## A Happy Ending: Heard and Understood, Settled, Successful, Satisfied

“He did graduate and... he actually had an individualized education program which is what the whole process was about, really... [I]t was a lot of time and energy devoted specifically to my son...I think it allowed myself and the district to present ideas and to brainstorm and have someone kind of develop those ideas more fully...I think in his [her son's] mind it made him feel valued. You know, that we were there, making an effort... not only myself but the district was there making an effort to allow him to learn to his best abilities, but I think that did kind of change his perspective. Instead of being a problem or a bother or not.... I don't know. I think it made him feel more accepted.”

---

---

---

---

---

---

---

---

---

---

## Want More? Go to

[http://law.psu.edu/faculty/resident\\_faculty/welsh](http://law.psu.edu/faculty/resident_faculty/welsh)

*Remembering the Role of Justice in Resolution: Insights from Procedural and Social Justice Theory*, 54 J. Legal Educ. 49 (2004). (Short article; overview of procedural justice and concerns about whether mediation and other ADR procedures are delivering social justice.)

*Making Deals in Court-Connected Mediation: What's Justice Got To Do With It?*, 79 Wash. U. L. Q. 787 (2001). (Long article; discusses procedural justice research and theory in detail)

*Stepping Back Through the Looking Glass: Real Conversations with Real Disputants About Institutionalized Mediation and Its Value*, 19 Ohio St. J. on Disp. Res. 573 (2004). (Long article; focuses on results of interviews with parents and school officials involved in special education mediation sessions. Strongly suggests that: procedural justice and progress toward resolution matter ;caucus matters tremendously; post-mediation success or failure in the implementation of mediated agreements matters)

*Perceptions of Fairness in Negotiation*, in *The Negotiator's Fieldbook* (Andrea K. Schneider & Christopher Honeyman, eds., 2006). (Relatively short book chapter; focuses on negotiation; discusses research showing that people's status and individualism/collectivism matter)

---

---

---

---

---

---

---

---

---

---