Schools, Communities, and the Courts: A Dialogic Approach to Education Reform

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Dissatisfaction with student achievement, problems of educational governance, and value clashes in schools have embroiled students, parents, and educators in controversy and confrontation in recent decades. Many of these conflicts have been brought before the courts, and some have resulted in extensive judicial intervention in educational affairs. This intervention has had mixed results because courts often cannot provide effective, long-lasting solutions to deep-rooted educational controversies.

The difficulties that afflict schools today stem in large part from the lack of a commonly held vision of public education's purpose and mission. A critical preliminary task for school reform, therefore, is to reconstitute schools as effective communities. Such communities must accept the diverse cultures of their constituents, while simultaneously promoting a core of common educational values.

Adopting the creation of effective school communities as an overarching goal, this Article proposes the adoption of a community oriented consensual dispute resolution procedure, the community engagement dialogic model (CED) for resolving major educational policy and values controversies. The CED model can either avoid altogether the need for judicial intervention in many situations, or where such intervention is necessary, its adoption as a judicial remedy can enhance the likelihood of a successful resolution of the underlying controversy.

Part I of this Article discusses the need for education reform, the difficulties in achieving it, and the reasons why many past court interventions have not proven successful. Part II sets forth the proposed CED model, which seeks to unite all the relevant stakeholders in a principled process of discussion, deliberation, and reevaluation of fundamental policies and values. Part III discusses specific examples of how the model can be applied in the areas of sex

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education, special education, and fiscal equity reform. The concluding Section
reconsiders the CED model in light of these examples and questions posed by
a panel of judges, educators, and parents who participated in a symposium at
the Yale Law School in April, 1995.

I. THE PROBLEM

A. The Need for Educational Reform

In the early 1980s, a slew of commission reports warned of a "rising tide
of mediocrity"\(^1\) in American education which was undermining the nation's
ability to compete in the global economy. One commission estimated that 23
million Americans, including forty percent of all minority students, were
functionally illiterate.\(^2\) Comparative international assessments have repeatedly
revealed poor performance by American students in science and math,\(^3\) and the
United States Department of Education's National Assessment of Educational
Progress surveys have indicated that few American students "show the capacity
for complex reasoning and problem solving . . . ."\(^4\)

These concerns about the declining level of academic excellence in
America's schools are paralleled by a growing awareness of the academic
impact of the inequitable resources available to many minority and low-income
students.\(^5\) The current sense of crisis in American education is also heightened
by Americans' belief that schools can solve a host of social problems created

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1. THE NAT. COMM. ON EXCELLENCE IN EDUCATION, A NATION AT RISK: THE IMPERATIVE FOR
EDUCATIONAL REFORM (1983) [hereinafter NATION AT RISK]; see also CARNEGIE FORUM ON
EDUCATION AND THE ECONOMY, TASK FORCE ON TEACHING AS A PROFESSION, A NATION PREPARED:
TEACHERS FOR THE 21ST CENTURY (1986); THEODORE SIZER, HORACE'S COMPROMISE: THE DILEMMA
OF THE AMERICAN HIGH SCHOOL (1989); TWENTIETH CENTURY TASK FORCE ON FEDERAL

2. NATION AT RISK, supra note 1, at 8. According to former Secretary of Education William
Bennett, fewer than 40% of young people can read well enough to understand a newspaper article.

3. See NATIONAL ASSESSMENT OF EDUCATION PROGRAMS, AMERICA'S CHALLENGE: ACCELERATED
ACADEMIC ACHIEVEMENT (1990); see also Robert L. Linn & Stephen B. Dunbar, The Nation's Report
Card Goes Home: Good News and Bad About Trends in Achievement, 72 PHI DELTA KAPPAN 127, 131

4. INA V.S. MULLIS ET AL., NAEP 1992 TRENDS IN ACADEMIC PROGRESS 4-5 (1994); see also
America's Schools are not developing the skills and knowledge that today's students need to compete
in a globally competitive economy).

For example, in New York City in 1992, 40% of third grade pupils scored below the state reference
point (SRP) for reading, compared to 11% in the rest of the state, and 19% of the City's third-graders
scored below the math SRP, compared to 2% for the rest of the state. Nevertheless, New York City's
per capita student spending is less than half of that of Great Neck, Scarsdale, and other nearby affluent
suburbs and the amount of state aid received by New York City's public schools is more than 12%
below the state average. Michael A. Rebell, Fiscal Equity in Education: Deconstructing the Reigning
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by disintegrating families and communal institutions, even though the schools themselves seem overwhelmed by the magnitude of this task. 6

As a result of these concerns, the nation has been engaged for the past decade and a half in an incessant and often contradictory process of school reform. In the “first wave” of reform, most states enacted extensive reform laws which have imposed more rigorous academic requirements on students and higher certification standards on teachers. For example, between 1980 and 1986, forty-five states increased their requirements for earning a standard high school diploma, and most states now require teachers to pass a competency examination before certification. 7 Paralleling the trend toward more pervasive state requirements has been the enactment of the federal “Goals 2000: Educate America Act” 8 which codified eight national educational goals and created a new federal agency, the National Education Standards and Improvement Council (NESIC). NESIC’s dual responsibilities are to establish voluntary national performance and opportunity-to-learn standards, and to certify, for federal funding eligibility purposes, that state standards are consistent with the national criteria.

These regulatory reforms have reduced the discretionary decision-making authority of local school boards and administrators, and some believe that it has led to an unacceptable degree of “mechanization and routinization of teaching.” 9 Many states have responded to this criticism by adopting a “second wave” of reform which emphasizes more decision-making at the local level.

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6. See, e.g., Larry Cuban, Reforming Again, Again, and Again, 19 EDUC. RESEARCHER, Jan-Feb. 1990, at 3. Cuban notes that schools tend to be the focal point of reform efforts in times of turmoil for two main reasons: a) focus on slow improvement through the schools districts, attention from the deeply rooted structural ills in terms of poverty, racism, drug addiction, and environmental destruction which, if addressed directly, would lead to grave economic, social, and political upheavals; and b) the enduring faith that Americans have placed on schools as engines of social and individual improvement. Id. at 8.

7. Charles F. Faber, Is Local Control of the Schools Still a Viable Option?, 14 HARV. J. L. & PUB. POL’Y 447, 450 (1991). These reforms appear to have led to more students taking rigorous courses like math, science, and foreign languages, higher teacher salaries, and a slight increase in state achievement tests and SAT scores. Michael W. Kirst, Recent State Education Reform in the United States, 24 EDU. ADMIN. Q. 319, 321 (1988). Recent data on these trends is summarized in JEFFREY R. HENIG, RETHINKING SCHOOL CHOICE: LIMITS OF THE MARKET METAPHOR 26-52 (1994); DIANE RAVITCH, NATIONAL STANDARDS IN AMERICAN EDUCATION: A CITIZEN’S GUIDE 98-134 (1995). The degree of progress has not, however, been considered commensurate with the huge increases in spending on education over the past two decades or to have brought most American schools to a level that parents and citizens at large consider satisfactory. See Deborah A. Verstegen, Efficiency and Equity in the Provision and Reform of American-Schooling, 20 J. EDUC. FIN. 107, 108 (1994) (finding that school aid from all sources increased ninety percent in real dollar terms in the 1960s, 12% in the 1970s and 28% in the 1980s).


greater professionalism for teachers, and more accountability for improvements in student learning. As part of these second wave "restructuring" reforms, many states have adopted school-based management (SBM) initiatives. Under SBM plans, decision-making authority in areas such as budget, personnel, and curriculum, traditionally the domain of the local school board, is delegated to councils of teachers, parents, and administrators at the local school level. The basic principle behind this system is that empowering parents and teachers with greater control and influence over their own affairs will motivate them to create stronger educational programs to improve student performance and provide greater satisfaction among school personnel and constituents. This movement is said to represent a "paradigm shift" away from hierarchal, bureaucratic control and toward partnerships between parents and teachers.

The present system of local governance of education has been challenged in other ways as well. There have been calls for: (1) broad-based use of vouchers which would allow parents to obtain public funding to enroll their children in private schools; (2) public "charter schools" that operate independent of many state regulations and generally report directly to state authorities; (3) privatization contracts in which local school boards turn the

10. The variety of "second wave" restructuring approaches is discussed in detail in RESTRUCTURING SCHOOLS: THE NEXT GENERATION OF EDUCATIONAL REFORM (Richard F. Elmore & Associates eds., 1990) [hereinafter RESTRUCTURING SCHOOLS: THE NEXT GENERATION]. For an overview of the results to date and implications of both the first wave of centralized state level reforms and the "second wave" of decentralization reforms, see William L. Boyd, Local Role in Education, in ENCYCLOPEDIA OF EDUCATIONAL RESEARCH 753 (M.C. Alkin ed., 1992).

11. Under the SBM scheme in Kentucky, for example, each school must, by July 1, 1996, establish a council generally consisting of the principal, three teachers, and two parents. The councils are authorized to select principals from those persons recommended by the superintendent, and make decisions on curriculum, instructional, student assignment, and discipline policies. KY. REV. STAT. ANN. § 160.345 (Michie/Bobbs-Merrill 1994). As of 1994, 805 of 1375 schools in the state had state-approved councils. KENTUCKY GENERAL ASSEMBLY, OFFICE OF ACCOUNTABILITY, ANNUAL REPORT 233 (1994).


13. Joanna Richardson, Next Generation of Effective Schools Looks to Districts for Lasting Change, EDUC. WEEK, Apr. 12, 1995, at 8; see also David S. Seeley, A New Paradigm for Parent Involvement, EDUC. LEADERSHIP (Oct. 1989), at 46 (arguing for a new paradigm of emphasis on parent involvement, consistent with enhanced teacher professionalism).


15. For a discussion of the history and contemporary functioning of charter schools, see Patricia Wohlstetter, Education by Charter, in SCHOOL-BASED MANAGEMENT: ORGANIZING FOR HIGH PERFORMANCE 139, 139-64 (Susan Albers Mohrman et al. eds., 1994). In the past three years, twelve states have passed laws authorizing such schools and 96 charter schools have opened nationwide. Colorado has enrolled the most students in charter schools, over 3500. Peter Applebome, Some Educators See Experimental Hybrids as Country's Best Hope for Public Education, N.Y. TIMES, Oct. 12, 1994, at B7. Massachusetts in 1993 adopted the most extensive charter law to date under which the Secretary of Education is authorized to approve charter applications from businesses, parents, teachers, and colleges, bypassing local school boards. MASS. GEN. LAWS ANN. ch. 71, § 89 (West 1994).
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operation of public schools over to management consultant firms,16 and (4) the total elimination of local school boards.17

The contemporary maelstrom of educational reform appears to reflect an historical pattern of oscillation between centralizing and decentralizing governance reforms in American education.18 Reform initiatives like SBM often amount to "symbolic responses" that resolve the immediate political pressure, but not the underlying substantive problems. A recent analysis of SBM describes this pattern:

... when systems are confronted by multiple, complex and competing demands, they naturally and necessarily seek responses that can quell conflict and restore confidence, responses that can foster stability and establish legitimacy. ... Under these conditions, responses are kept ambiguous so that they can embrace diverse and competing interests and absorb concerns regarding a variety of pressing problems. An available response is often selected not so much because there is evidence that it can solve any of the problems to which it has been attached, but because there is reason to believe it will enable the system to survive the stress. ...19

The authors reached this conclusion after undertaking an exhaustive review of the literature on SBM which suggested that "[t]here is little evidence that school-based management alters influence relationships, renews school organizations, or develops the qualities of academically effective schools."20 They viewed SBM practices, therefore, as prime examples of "symbolic responses" which have great economic and ideological appeal because "they can foster stability and reestablish legitimacy without imposing new financial burdens on the system."21 Most of the other recent research on the implementation of SBM confirms that "the political rhetoric is running far ahead of the evidence" of successful accomplishment.22

16. In recent years, both the Minneapolis and Baltimore school boards have signed agreements that have turned over management of some or all of their schools to private consulting firms. Six more school systems, including Milwaukee, San Diego, and Washington, D.C., are reportedly investigating the possibility of doing the same. More Districts Explore Privatizing Schools, SCHOOL BOARD NEWS, Feb. 1, 1994, at 1.
17. See, e.g., MYRON LIEBERMAN, THE FUTURE OF PUBLIC EDUCATION 34 (1960); Chester E. Finn, Jr., Reinventing Local Control, EDUC. WEEK, Jan. 23, 1991, at 40.
18. See Cuban, supra note 6, at 3.
20. Id. at 289.
21. Id., at 326; see also DALE T. SNAUWAERT, DEMOCRACY, EDUCATION, & GOVERNANCE: A DEVELOPMENTAL CONCEPTION 102 (1993) (asserting that SBM involves "illusion of power" and "democratic veneer").
22. JOSEPH MURPHY, RESTRUCTURING SCHOOLS: CAPTURING AND ASSESSING THE PHENOMENA 74 (1991); see also HARRY P. HATRY, ET AL., IMPLEMENTING SCHOOL-BASED MANAGEMENT 58, 148 (1994) (concluding through study of SBM in 19 schools in 12 districts that SBM has not significantly affected parent involvement and has not been shown to be linked to any student outcomes); Jane L. David, School-Based Decision-Making: Kentucky's Test of Decentralization, 75 PHI DELTA KAPPAN 706,
B. Citizen Participation

Seymour Sarason, in a book which he has aptly entitled The Predictable Failure of Educational Reform, argues that not only SBM, but all current attempts at school reform, are superficial and not likely to result in meaningful change because they do not alter power relationships and fundamentally change the schools' "accustomed practice and organization." Sarason believes that significant change can occur only if the entire school culture is transformed in a manner which responds to the felt needs of its constituents and focuses on the individual learning needs of all students. Meaningful parental participation in school governance is critical to this type of transformation because:

"[W]hen a process makes people feel they have a voice in matters that affect them, they will have a greater commitment to the overall enterprise and take greater responsibility for what happens to the enterprise. Second, the absence of such a process ensures that no one feels responsible, that blame will always be directed externally, that adversarialism will be a notable feature of school life."

This emphasis on broad, extensive citizen participation in educational governance is, of course, not new. Sarason's call for new, radical approaches to parental participation, like the emphasis on grassroots participation in many
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SBM schemes,27 constitutes an attempt to revitalize citizen involvement in educational decision-making at the local level. This is an approach that has always been a central aspect of the American educational system, which emerged out of the participatory democracy practices of the early colonies.28 In modern times, American schools, despite increasing state and federal control are still perceived as largely locally governed and subject to extensive citizen control.29 In reality, however, little effective citizen participation appears to occur. Both the “quantity and quality of citizen participation are low” as few Americans avail themselves of the opportunity to influence local school district agendas.30

How can this disparity between the rhetoric and the practice of citizen participation be explained? One answer is that the image of local school governance is overly historical and nostalgic: it overlooks significant centralizing developments implemented by reformers to promote higher quality education,31 such as the consolidation of small school districts into larger central school districts which began in the nineteenth century,32 the professio-

27. The need for extensive organizational changes that permit stakeholders at the local level to have “power to influence decisions about work processes, organizational practices, policies and strategies” is emphasized in Susan A. Mohrman, High Involvement Management in the Private Sector, in SCHOOL BASED MANAGEMENT: ORGANIZING FOR HIGH PERFORMANCE 30 (Susan A. Mohrman & Priscilla Wohlstetter & Associates eds., 1994). Arguing for the application of high involvement management techniques from private industry such as “quality circles” and other types of participation groups, the editors stress that SBM must be seen as a challenge of “organizational design for high performance,” and not merely an issue of governance. Id. at 4.

28. In colonial New England, committees of selectmen were appointed by colonial town meetings to study and supervise the town schools. In time, these communities separated out from the town government and became distinct governing bodies. Other states adopted this system of educational governance which eventually became the predominant pattern throughout the United States, except for in the South where the basic unit of school governance, being closely tied to the organization of the church, was the county. Faber, supra note 7, at 448. For discussions of the early history of local school boards, see RONALD F. CAMPBELL ET AL., THE ORGANIZATION AND CONTROL OF AMERICAN SCHOOLS 110-24 (1990); EDWIN G. DEXTER, A HISTORY OF EDUCATION IN THE UNITED STATES 182-206 (1904).

29. The United States Supreme Court has noted in this regard that: “In an era that has witnessed a consistent trend toward centralization of the functions of government, local sharing of responsibility for public education has survived . . . direct control over decisions vitally affecting the education of one’s children is a need that is strongly felt in our society.” San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 49 (1973).

30. HARVEY J. TUCKER & L. HARMON ZEIGLER, PROFESSIONALS VERSUS THE PUBLIC: ATTITUDES, COMMUNICATION, AND RESPONSE IN SCHOOL DISTRICTS 229 (1980) (noting that only a “small minority of citizens vote in school district elections and attend public meetings”). Tucker and Zeigler’s conclusions were based on extensive analyses of the functioning of twelve school districts of various size and from various geographic areas in the country. See also John M. Evans, Let Our Parents Run: Removing the Judicial Barriers for Parental Governance of Local Schools, 19 HASTINGS CONST. L.Q. 963, 964 (1992) (“[L]ocal school reform does not empower those who have the most important stake in improving education—the parents.”).


32. Consolidation of school districts has reduced the number of school districts in the continental United States from 127,531 in 1930 to 12,000 in 1993, and the estimated number of school board members from 765,186 to 72,000 during that time. R. FLINCHBAUGH, THE 21ST CENTURY BOARD OF EDUCATION 1-2 (1992).
nalization reforms that took hold at the beginning of the twentieth century, and the growth of teacher unions in the 1960s.

On the other hand, these centralizing and bureaucratizing trends have repeatedly been countered by renewed citizen participation initiatives. Thus, the professionalization movement of the early twentieth century was followed by the progressive movement of the 1930s and 1940s led by John Dewey and his followers, which sought to promote "democracy in the schools" and relate life in the schools "to the life in the community around it." An even more explicit call for a return to full participatory democracy was made by political activists in the 1960s and 1970s, who advocated community control and school decentralization, and dramatically changed the educational governance structure in cities like New York and Detroit in their wake. More generally, the "Great Society" initiatives of the Johnson Administration promoted the active involvement of community organizations in the management of its anti-poverty and education programs. Statutes such as Title I of the 1965 Elementary and Secondary Education Act required extensive consultation by educational planners with parent committees, and the proliferation of requirements for public hearings and open meetings.

These statutory initiatives did not, however, result in a lasting increase in meaningful citizen participation in education. Generally speaking, the statutory requirements were implemented in narrowly procedural or technical ways—as a means of complying with the law or of granting necessary concessions to organized interests, rather than as an expression of fundamental democratic values. Mandated councils have tended to be run by small, self-perpetuating...
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groups which are not representative of the full parent body;\textsuperscript{40} agendas tend to be defined by school professionals;\textsuperscript{41} and pursuit of particular interests, rather than broad communal decision-making, seems to occur at most meetings.\textsuperscript{42}

The lack of effective citizen participation is related to a marked change in the role of elected school boards. In contrast to their traditional image as representative bodies that formulate policies reflective of broad community concerns, school boards today are seen as being “factious and increasingly politicized,”\textsuperscript{43} suffering from a lack of consistent leadership resulting from tremendous board member and superintendent turnover,\textsuperscript{44} and tending to concern themselves with “trivia.”\textsuperscript{45} Boards appear to have abandoned their role as community trustees and now organize around narrow interests which compete to influence policy and try to deflect initiatives adverse to their special interests.

In sum, despite its origins in the civil right movement and its ideological resonance with the mythology of American education, the contemporary citizens’ participation movement has not altered power relations in a way that gives citizens meaningful involvement. On the contrary, the operation of statutorily mandated parent councils and of the elected school boards

\textsuperscript{40} There has been a clear tendency for higher socioeconomic groups to dominate the citizen advisory councils and other forums for citizen participation. See Edward P. Morgan, Technocratic Versus Democratic Options for Educational Policy, in Citizen Participation in Public Decision-Making 177, 187 (Jack Desario \\& Stuart Langton eds., 1987); see also Lester W. Milbrath, Political Participation in America: Political Democracy and Social Equality (1972).

\textsuperscript{41} Marilyn Gitte,l Limits to Citizen Participation: The Decline of Community Organizations 242 (1980). Gitell also notes: “This dependent relationship with the schools deters organizations from becoming involved with substantive school issues. Mandated organizations legitimate official school policy. . . . Contact with this type of organization for most people does not provide an exercise in the democratic practice of decision-making.”

\textsuperscript{42} “While many groups may be represented, each is usually playing an advocacy role, and trade-offs between groups are usually not considered.” Kweit \\& Kweit, supra note 38, at 30.

\textsuperscript{43} Lynn Olson, School-Chief Woes Spur Call for Change in Big-City Boards, Educ. Week, Jan. 30, 1991, at 1. Olson attributes much of the shift to a trend toward ward-based, rather than at-large elections — often stirred by demands of minority or unrepresented groups. The result is that board members see themselves as being responsible only for “their particular group or constituency,” and consensus-building and conflict resolution do not occur. See also Twentieth Century Fund Task Force on School Governance, Facing the Challenge (1992) (calling for creation of local educational policy boards that would limit their role to broad, district-wide policy concerns rather than day-to-day administrative and political matters); Oliver S. Brown et al., Urban C.E.O. ’s Untangling the Governance Knot, Educ. Week, Mar. 13, 1991, at 38 (advocating corporate model in which the board sets broad comprehensive educational strategy and appoints superintendent as C.E.O. to carry it out); Jacqueline P. Danzberger, Governing the Nation’s Schools: The Case for Restructuring Local School Boards, 75 Phi Delta Kappan 367 (1994); Phillip C. Schlechty, Deciding the Fate of Local Control, Am. Sch. Board J., Nov. 1992, at 27 (arguing that interest group politics and bureaucratic strictures cause system gridlock).

\textsuperscript{44} Lewis W. Finch, A Need for Consistent Leadership, Sch. Admin., Feb. 1993, at 12. According to Michael D. Usdan, President of the Institute for Educational Leadership, “the turnover rate for board members nationwide is now approaching 25%, with many members only serving one term.” Olson, supra note 43, at 16.

themselves indicate that the goal of effective communal decision-making focused on an articulated and accepted sense of the common good remains elusive.

C. Values Confrontations

A major reason for the impasse in achieving meaningful education reform is that in recent decades the values consensus which many local American public school communities arguably forged in the nineteenth century has disintegrated. Schools today have difficulty addressing substantive values issues because modern school districts bring together a range of diversity in ideas and in student populations that did not exist in—or were excluded from—nineteenth-century American schools. In contrast to the values consensus reflected in nineteenth-century school curricula, twentieth-century schools are marked by pervasive values clashes, resulting from an ethic of rights-based individualism and ethnic group assertiveness:

An old consensus which established non-denominational and non-dogmatic Protestantism as the country’s dominant value system, has broken down under the weight of real social diversity. Classroom teachers feel these conflicts keenly in their efforts to deal with questions of value and moral choice in this pluralistic context. Even those who teach in relatively homogeneous classrooms must ask how they can treat the variety of cultural heritages, values and moral expectations encountered in daily experience without encouraging either amoral indifference or aggressive zeal.

Values clashes are behind many of the power conflicts that inhibit effective school reform. A recent study of educational reform conducted by the Public Agenda Foundation in four “average to good” school districts in various parts of the country concluded that:

In each district, what started as a good-faith effort to work together on school reforms became a tug of war over turf. We observed poor communication,

46. For an historical overview of the socialization function of American schools and the values consensus achieved by the nineteenth-century common school movement, see Michael A. Rebell, *Schools, Values, and the Courts*, 7 YALE L. & POL’Y REV. 275, 278-82 (1989) [hereinafter *Schools, Values, and the Courts*].

47. Although the leaders of the common school movement thought that their “natural theology” approach to religious values would satisfy all sects, both Orthodox Protestants and Catholics strongly objected. When attempts to negotiate methods that would allow public schools with Catholic majorities to assert their own religious perspectives failed, Catholic leaders decided to establish a separate parochial school system. See *Ravitch, The Great School Wars*, supra note 31, at 27-28; *David B. Tyack, Turning Points in American History* 90-91 (1967).


49. *See Parental Involvement*, supra note 25, at 28 (suggesting that power conflicts are often undiscovered or dealt with gingerly); Larry Cuban, *Why Do Some Reforms Persist?*, 24 Educ. Admin. Q. 329 (1988) (arguing that repetition of educational reforms reflects persistent dilemmas involving hard choices between conflicting values).
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widespread suspicion and outright anger among the factions. Parochialism prevailed. Because this pattern of behavior was so consistent in all four of these diverse school districts we can only conclude that it was not the individuals but something about the system itself that encouraged conflict, not cooperation.\footnote{50}

Apprehension about conflict resulting from values clashes induces many schools to avoid taking stands on controversial issues. As one principal put it: “Schools cannot impose duties on the students. Students come from different backgrounds.”\footnote{51} The result of this value-neutral approach to education, according to some critics, is that the schools have become “bland, homogenized, ethically numb . . . . In this marketplace of ideas, the shelves are stocked mostly with pabulum.”\footnote{52}

Aware of the difficulty of teaching values in a heterogeneous setting, but recognizing nonetheless that “schools cannot be ethical bystanders at a time when our society is in deep moral trouble,”\footnote{53} educators in recent years have brought a number of new approaches to values education into the classroom. The three primary techniques implemented to date have been values clarification,\footnote{54} cognitive moral development,\footnote{55} and character education.\footnote{56} Each of these approaches has spawned extensive controversies among educators.\footnote{57} The first two have been questioned on pedagogic grounds because of their failure to articulate a clear set of values beyond individual preferences. Character education does attempt to inculcate substantive societal values, and in many situations it succeeds in strengthening adherence to broadly accepted values like honesty, tolerance, industry, and respect. Character educators do not generally, however, probe the deeper, often controversial dimensions of these seemingly universal values, nor do they tend to consider how to address situations of value conflict.\footnote{58} All three of these approaches fail to address directly the issue

\footnotesize{50. \textit{PUBLIC AGENDA FOUNDATION, DIVIDED WITHIN, BESIEGED WITHOUT: THE POLITICS OF EDUCATION IN FOUR AMERICAN SCHOOL DISTRICTS} iv (1993).}
\footnotesize{52. Stephen Arons, \textit{The Myths of Value-Neutral Schooling}, \textit{EDUC. WEEK}, Nov. 7, 1984, at 24.}
\footnotesize{53. Thomas Lickona, \textit{Educating for Character: How Our Schools Can Teach Respect and Responsibility} 5 (1991).}
\footnotesize{54. See, e.g., Louis E. Raths et al., \textit{Values and Teaching: Working with Values in the Classroom} (1966).}
\footnotesize{55. See, e.g., Lawrence Kohlberg, \textit{The Psychology of Moral Development} (1984).}
\footnotesize{57. A more detailed discussion of these three techniques and the controversies they have engendered is contained in Rebell, \textit{Schools, Values, and the Courts}, supra note 46, at 284-89.}
\footnotesize{58. Some character education programs do, however, include community involvement techniques similar to the dialogic approaches being advocated in this Article in initiating projects in new communities. See, e.g., Amitai Etzioni et al., \textit{Character Building For a Democratic, Civil Society: A COMMUNITARIAN POSITION PAPER} (1994). See also \textit{BALTIMORE COUNTY PUBLIC SCHOOLS TASK FORCE ON VALUES EDUCATION AND ETHICAL BEHAVIOR, HOW TO ESTABLISH A VALUE EDUCATION PROGRAM IN YOUR SCHOOL: A HANDBOOK FOR SCHOOL ADMINISTRATORS} (1991).}
of how common values can be articulated and transmitted in a diverse, heterogeneous society which appears to be a fundamental barrier to effective school reform.

D. Judicial Interventions

The combination of strongly perceived needs for educational reform and extensive values clashes in the schools has caused parents and other citizens increasingly to look to the courts for solutions to educational controversies. In recent years, in addition to the desegregation initiatives spawned by Brown v. Board of Education, the courts' docket of school cases has encompassed such matters as selection of library books, student discipline, academic and athletic opportunities for female students, mainstreaming or inclusion programs for students with disabilities, bilingual/bicultural programming, equalization of state aid allocations, meetings of religious clubs, and the distribution of condoms in high schools. The explosion in litigation involving children and schooling has been dramatic: during the decade from 1977 to 1986, there were 2605 education cases in the federal courts, compared with 729 in the decade from 1957 to 1966, and 67 in the decade from 1927 to 1936.

The courts' involvement has spawned substantial controversy. Initially, the main concern was with the legitimacy of the courts' taking on responsibilities which some critics thought belonged more properly to the legislative or executive branches. In recent years, however, the courts' activist role has become widely accepted, as the concepts of legal entitlement and rights

64. See, e.g., Castaneda v. Pickard, 648 F.2d 989 (5th Cir. 1981).
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assertion have become central to the American political culture.70 Conservatives and liberals alike now look to the courts for endorsements of their educational reform agendas.71

Contemporary concerns about judicial intervention have tended to focus on the results of the courts' involvement. Simply stated, it is not clear that judicial intervention has resulted in meaningful reform. For example, in a recent survey, almost sixty percent of a group of attorneys involved in desegregation litigation expressed general dissatisfaction with the results of litigation, and almost half of the plaintiffs' attorneys expressed frustration with the results in their own cases.72 Some educators also claim that recent judicial involvement in educational affairs has become so extensive that it has "legalized the schools"73 and is "frustrating the schools' educational goals."74 Although

70. See, e.g., Lawrence M. Friedman, Total Justice (1985); Jethro K. Lieberman, The Litigious Society 112-46 (1981). For a discussion of dramatic changes in the practices and procedures of the federal courts that have accompanied these trends in the political culture, see Abram Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281 (1976).


74. Joel Henning et al., Mandate for Change: The Impact of Law on Educational Innovation 231 (1979); see also David Neal & David L. Kirp, The Allure of Legalization
many of these criticisms seem overstated, especially since they omit a comparative institutional perspective on the functioning of the executive and legislative branches at both the state and federal levels, it is clear that court involvement rarely provides a fully satisfactory solution to complex educational controversies.

Courts can clarify principles, marshal resources, and compel compliance with stated goals, but they lack the educational expertise and the staff resources to monitor closely implementation of systemic reforms. In order to implement their remedial decrees, they frequently solicit the active participation and resources of the parties and other affected institutions and individuals. The fact that judges understand the need to use the resources of the parties and other actors does not, however, mean that they are currently using these resources in the most appropriate and effective manner. Professor Susan Sturm, after analyzing judicial remedial actions in prison reform and other institutional contexts, concluded that “courts frequently adopt approaches that are not well-suited to . . . formulating and implementing a remedy.” Arguing that the unique demands of the remedial phase of institutional reform litigation require more attention, she posits a need for “a coherent normative theory of public

Reconsidered: The Case of Special Education, in SCHOOL DAYS, RULE DAYS: THE LEGALIZATION AND REGULATION OF EDUCATION 343, 344 (David L. Kirp & Donald N. Jensen eds., 1986).

75. Overall, it seems fair to conclude that the case studies “suggest a richer, more complicated picture, one that provides ammunition for all sides of the debate over judicial competence.” ROBERT H. MNNOOKIN, IN THE INTEREST OF CHILDREN: ADVOCACY, LAW REFORM, AND PUBLIC POLICY 517 (1985).

76. See REBELL & BLOCK, EQUALITY AND EDUCATION, supra note 73, ch. 9 (comparing the performance of courts, Congress, and the federal Office of Civil Rights in school based civil rights activities); see also Robert A. Kagan, Regulating Business, Regulating Schools: The Problem of Regulatory Unreasonableness, in SCHOOL DAYS, RULE DAYS 64, 65 (David L. Kirp & Donald N. Jensen eds., 1986) (arguing that a broad regulatory environment and not judicial activism causes “legalization”); Ann Swidler, The Culture of Policy: Aggregate Versus Individualist Thinking about the Regulation of Education, SCHOOL DAYS, RULE DAYS 91, 96 (“Legislators just want to know ‘what works,’ and few administrators have a mandate to think comprehensively about education.”).

77. An empirical study of court intervention in 65 education cases, conducted by one of the present authors, concluded in regard to the implementation of remedies that [in those cases where extensive reform decrees were issued, defendants or relevant public agencies participated substantially in the formulation of the policy content of the decree. We found only one clear instance of a judge, alone, drafting an extensive reform decree. As a practical matter, this participation meant that the staff resources and other implementation tools of the parties automatically became available to the court. . . .

EPAC, supra note 69, at 211. A recent survey of 29 judges who had been involved in desegregation cases largely confirmed these conclusions. When asked how the remedy was devised, 25% of the judges said they devised it alone, 46% worked with the attorneys for the parties, 29% with the parties, 18% with a Master, and 18% with a task force. Barbara Flicker, The View from the Bench: Judges in Desegregation Cases, in JUSTICE AND SCHOOL SYSTEMS 365, 377-78 (Barbara Flicker ed., 1990).

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remedial process."^79

As a first step in this direction, Sturm has proposed a specific model of public remedial decision-making built on three "general process norms": participation, impartiality, and reasoned decision-making.^80 She notes, however, that these general process norms need to be shaped and given concrete content in specific settings, since each "particular institutional context presents special demands, limitations and potential for judicial intervention . . ."^81

We agree with Sturm that meaningful remedies in complex social policy cases must involve courts in deliberative processes that include broad participation by all affected groups and individuals,^82 and that fit the needs of the particular institutional context. A remedial decision-making model that is responsive to contemporary needs for education reform must respond to the problems of educational governance, lack of citizen participation, and values clashes. A decision-making process that could meet these needs must encompass institution-building mechanisms for school communities that go beyond resolving an immediate legal dispute. Indeed, an effective remedial model that promotes citizen participation and resolves values clashes would, in many cases, obviate the need for judicial intervention altogether.

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80. Id; see also Ralph Cavanagh & Austin Sarat, Thinking About Courts: Toward and Beyond a Jurisprudence of Judicial Competence, 14 LAW & Soc'y REV. 371, 373 (1980) ("Thinking about competence in terms of the ability of courts to reach and enforce decisions misses perhaps their most important function: providing a framework within which parties negotiate and bargain."); Robert D. Goldstein, A Swann Song for Remedies: Equitable Relief in the Burger Court, 13 HARV. C.R.-C.L. L. REV. 1, 72-78 (1978) (calling for emphasis on appropriate process in appellate review of district courts' exercise of equitable power in fashioning remedies in institutional reform cases).

81. Sturm, Prisons, supra note 27, at 810; see also Susan P. Sturm, The Legacy and Future of Corrections Litigation, 142 U. PA. L. REV. 639, 645 (1993) ("[T]he potential and role of litigation varies in different organizational settings, and . . . it is a mistake to ignore these organizational differences in assessing and planning the future role of litigation.").

82. Deliberative processes in many current institutional reform litigations involve a limited number of people who do not represent the full community and whose interest in promoting reform is questionable at best:

... [I]nstitutional powers of the judiciary usually limit the courts' selection of who implements the judicial policy, how it is done, and with what resources. Thus, the judiciary is for the most part forced to work with existing implementation groups. To compound the problem, the groups that implement the policies are frequently parties to the decision. If the implementing group loses its case, then it must immediately execute a decision against which it fought for weeks, months or even years.

JOHNSON & CANON, supra note 73, at 79.
II. A PROPOSED SOLUTION: THE COMMUNITY ENGAGEMENT DIALOGIC (CED) MODEL

A. Community and Public Dialogue

A successful conflict resolution mechanism must involve a substantial degree of institution-building. A concept of community that relates realistically to contemporary problems cannot, of course, replicate a nineteenth century consensus model. Substantive values can only be harnessed to promote educational reform in an individualistic, multicultural society through a communal structure that embraces rights assertion and cultural diversity. This means that in promoting the common good, ways must also be found to respect important individual rights.

Many contemporary communitarian theorists believe that such a reconciliation of communal and individual goals can be achieved through "public dialogue" and a "dialogic community." Empirical sociological research

83. "A very important—probably the most important—segment of a school's culture is the degree to which all its inhabitants... experience a sense of community." THOMAS B. GREGORY & GERALD R. SMITH, HIGH SCHOOLS AS COMMUNITIES: THE SMALL SCHOOL RECONSIDERED 50 (1987); see also HENIG, supra note 7, at 45 ("[S]ome of the public's receptivity to the claim that there is an education crisis similarly reflects undifferentiated concerns about unraveling social values.").


85. Contemporary sociologists have modified traditional definitions of community to include not only the traditional, all-encompassing communal structures, but also partial communities, layers of communities, and "crisscrossing" communities. These latter communities allow people to develop significant shared experiences with others, but on limited, variable, and intersecting bases. See ETZIONI, supra note 58, at 32; see also ROBERT B. FOWLER, THE DANCE WITH COMMUNITY: THE CONTEMPORARY DEBATE IN AMERICAN POLITICAL THOUGHT 142-61 (1991) (articulating notion of "existential community" which inspires individuals to work together in concrete ways at local level to achieve their ideals).

86. See ROBERT N. BELLAH ET AL., HABITS OF THE HEART 218 (1985). Civic Republicanism, which began as a movement to emphasize the importance of classical republican concepts, such as participatory democracy, to the drafters of the Constitution, see, e.g., GARRY WILLS, INVENTING AMERICA: JEFFERSON'S DECLARATION OF INDEPENDENCE (1978); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787 (1969), has recently developed into a broader political-legal perspective that "embraces an ongoing deliberative process... to arrive at the public good." Mark Seldenfeld, A Civic Republican Justification for the Bureaucratic State, 105 HARV. L. REV. 1511, 1528 (1992); see also Frank Michelman, Law's Republic, 97 YALE L.J. 1493 (1988) (arguing that civic republican constitutional theory can inspire stronger protection of individual rights than do competing theories); Cass R. Sunstein, Beyond the Republican Revival, 97 YALE L.J. 1539 (1988) (contending that republican ideas suggest reformation of various current areas of modern public law).

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confirms that “when citizens are engaged in thinking about the whole, they find their conceptions of their interests broadened, and their commitment to the search for common good deepens.”88 Open, honest interchange leads to new understandings, not only of the opponent’s position, but also of one’s own.89 People often discover that competing doctrines contain the same basic values, but differ only in the weights and priorities that they give to certain aspects of these values.90 Even if a full consensus is not achieved, well-organized community dialogues often result in people finding that they agree on many more issues or aspects of issues than any of them had originally understood. Where disagreement remains, participants often formulate working positions that all can endorse, or at least accept, without feeling that they have abandoned their own basic beliefs.91

The critical question, therefore, seems to be how to create an institutional structure that will promote this potential. As Amitai Etzioni has suggested, the question is not only how rational people are, but also how rational are the social collectives in which they function.92 Few of the contemporary communitarian thinkers, however, confront the key question of how the kind of dialogic community processes which they advocate can be implemented and sustained in practice. We intend to do so by proposing a conflict resolution model that will promote public dialogue to resolve pressing educational controversies.

The local school district remains one of the few places in contemporary America where individual citizens can deliberate face-to-face on issues of profound public significance,93 and thus provides a logical locus for the


89. See Martha Minow, Forward: Justice Engendered, 101 HARV. L. REV. 10, 72 (1987) (discussing need to take perspective of person you have called “different”).
90. ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 42 (2d ed. 1991) (“In many negotiations . . . a close examination of the underlying interests will reveal the existence of many more interests that are shared or compatible than ones that are opposed.”).
91. See Seidenfeld, supra note 86, at 1539 (“The process of deliberation . . . frequently enables society to come close [to consensus] in the sense of arriving at a set of principles to which most citizens would agree. Moreover . . . [the] call for persuasion of others as the goal of the deliberative process is likely to discourage adoption of egregiously coercive principles.”); SNAUWAERT, supra note 21, at 82 (“Dialogue is transformative for both the oppressed and the oppressor. Through genuine acts of communication . . . inherent differences between individuals can be bridged and used as a means to solidarity rather than exploitation.”).
93. “As neighborhoods, churches and even nuclear families have become more ephemeral and less significant in the lives of children in the United States, there are fewer and fewer places where the continuous and close relationships that characterize well-functioning communities can be encountered in our common life.” Gregory A. Smith, Introduction: Schools and the Maintenance of Community, in PUBLIC SCHOOLS THAT WORK: CREATING COMMUNITY 1, 7 (Gregory A. Smith ed., 1993). On the importance of face-to-face interchanges for the functioning of participatory democracy, see BENJAMIN
balancing of individual rights and group decisions. The school setting is institutionally committed to rational discourse and promotes positive ideals. The significant overlapping consensus among teachers, parents, and other local citizens of diverse backgrounds on the importance of educating the community's children allows these parties to moderate their personal interests and political differences in the pursuit of transcendent common goals.

An example of the possibilities in this regard is provided by the experience of Curtis Berger, a Columbia Law Professor who served as a special master in a New York City desegregation litigation. Berger described how candid dialogue with concerned African-American parents changed his mind about the integration approach he had been pursuing:

This is one of the ironies about integration of which few whites seem aware. Too many assume that blacks welcome the chance to attend all-white schools and to reside in all-white neighborhoods and that those blacks who break the color barrier gain only benefit in doing so. We do not see the sacrifice involved in leaving congenial neighbors or the emotional trial that often accompanies minority status. In the name of racial desegregation, whites expect blacks to accept permanent minority status; yet few whites are willing to accept that same status for themselves or their children. . . . Social scientists may easily explain this white man's double standard, but it took this session [with black parents] to force me to see it through the black man's eyes.

The possibilities for community-building are being recognized by an increasing number of educators and school board members. The trend toward school-based management reflects new efforts to promote citizen participation by involving parents in policymaking and managerial decisions together with teachers and administrators. Proposals for turning school boards into "local education policy boards" also call for "strategies for improving school operations by convening community forums on major educational policy issues."

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95. JOHN RAWLS, POLITICAL LIBERALISM 133-72 (1993); see also MICHAEL J. PERRY, LOVE AND POWER: THE ROLE OF RELIGION AND MORALITY IN AMERICAN POLITICS 85 (1991) (arguing that prerequisite for community is "underlying grounds of political judgment . . . which citizens, qua members of a judging community, share, and which serve to unite them in dialogue, notwithstanding their (sometimes radical) disagreements").
96. Curtis J. Berger, Away from the Court House and into the Field: The Odyssey of a Special Master, 78 COLUM. L. REV. 707, 718 (1978); see also PARENTAL INVOLVEMENT, supra note 25, at 58-59 (recounting personal experiences of changing positions on critical tenure decisions based on departmental dialogues).
97. TWENTIETH CENTURY TASK FORCE REPORT, supra note 44, at 10.
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Recognition of the need for community and calls for structural changes in governance mechanisms will not, however, transform the culture of the schools. If deep-rooted value conflicts are to be confronted, and the contemporary culture's orientation to promote particular, rather than public, interests is to be overcome, a systemic mechanism for building a spirit of community in the schools must be put into place.

Alternative dispute resolution (ADR) techniques, which utilize neutral third parties to reach negotiated settlements, provide a useful starting point. ADR techniques are widely used in commercial disputes and, increasingly, with disputes in the public sector. They seek to reorient relationships among individuals and groups "not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitude and disposition toward one another." A variety of ADR techniques have also been used in recent years in school-based controversies. For example, one of the authors of this Article served for over six years as a Special Master in Boston's special education class action litigation, Allen v. Parks. During that time, the parties negotiated an extensive series of substantial compliance standards and, later, a comprehensive educational plan for reforming the special education system endorsed by both sides. Large school districts such as those in Baltimore County, Maryland, Dayton, Ohio, and Washington, D.C. have brought diverse groups of students, parents, and other citizens together to agree on extensive values education and

98. ADR techniques have been used most extensively in labor/management and individual family disputes. In recent years, innovative ADR techniques have also been used to build consensus on public policy issues and to avoid lengthy, expensive litigation in other situations. The type of disputes which have been resolved range from the siting of public housing, to reducing the level of tensions in racial conflicts, to resolving controversies between governmental agencies. See generally JONATHAN B. MARKS ET AL., DISPUTE RESOLUTION IN AMERICA: PROGRESS IN EVOLUTION 36-37 (1984); LINDA R. SINGER, SETTLING DISPUTES 131-64 (1990). In addition, some statutes specifically encourage the use of ADR techniques to resolve public sector disputes. See, e.g., Americans with Disabilities Act, 42 U.S.C. § 12212 (West 1993) ([T]he use of alternative means of dispute resolution...is encouraged to resolve disputes arising under this chapter.").

The most extensive public sector mediation efforts have been in the environmental field, where it has been reported that close to 80% of early disputes submitted to mediation resulted in a consensual resolution. SINGER, supra, at 142. See generally ALLAN R. TALBOT, SETTLING THINGS: SIX CASE STUDIES IN ENVIRONMENTAL MEDIATION (1983). The Environmental Protection Agency, the Federal Aviation Agency, and other federal agencies have also experimented with ADR-type rule-making procedures, in which groups with differing positions on proposed regulations attempt to reach agreement on their content before they are promulgated formally. Id. at 145-52.


100. A history of the litigation and a discussion of some of the ADR techniques used are discussed in Michael A. Rebell, Allen v. McDonough: Special Education Reform in Boston, in JUSTICE AND SCHOOL SYSTEMS 70, 70-107 (Barbara Flicker ed., 1990).
school change programs. The school districts in Harpersville, New York and Bolivar-Richburg, New York have used ADR techniques to resolve sex education and school district consolidation controversies. In Alabama, plaintiffs, defendants, and representatives of non-party school boards and other interests reached consensus on a far-ranging plan to restructure the entire state educational system through an ADR process facilitated by a court-ordered mediator.

These school-related conflict resolution experiences have typically been ad hoc responses to an immediate political crisis or to a judicial mandate. They have utilized a range of techniques and have had varying degrees of success. Those experiences which have proved successful have not, however, generally been replicated within the district or beyond. Thus, although these experiences illustrate the potential for successful use of conflict resolution techniques in education controversies, they also demonstrate the need for a systematic ADR model geared to the schooling context. To meet this need, we propose a school-based Community Engagement Dialogic model consisting of six basic stages: participation, agenda setting, discussion, notification, implementation, and evaluation.

While such a model cannot resolve all educational controversies, it can make a major difference in a wide range of disputes. A community which uses these techniques can both resolve certain immediate problems and create permanent community-building mechanisms that may avoid or limit future conflicts. Where community-generated processes do not succeed, or where a dispute has been brought before the courts for resolution, the CED model in modified form can be implemented by the judge to promote settlement or to devise a lasting, workable remedy.


102. These were among the examples discussed by school district representatives participating in the session on Empowering Local Educational Communities conducted by the Center on Values, Education, and the Law at the 1994 Summer Academies of the New York State School Boards Association on July 17 and September 11, 1994.


104. The highly-touted Alabama agreement, for example, appears to have broken down in political controversy as the newly-elected Governor has renounced his predecessor’s consent to the accord and has even made a motion to the Alabama Supreme Court that claims that the Circuit Court has no subject matter jurisdiction over the issues. 23 School Law News, Mar. 24, 1995, at 3.
B. The Voluntarily Initiated CED Model

The CED model requires the active involvement of a skilled neutral individual to convene, organize, and promote the process. Typically, the third party convener in an ADR process is a facilitator who arranges meetings, moderates the discussion, and assists in the exchange of information. She can also be a mediator who carries out these tasks, and guides the discussion to help the parties develop clearer statements of their positions. In order to be effective, a mediator must be aware of the dynamics of the process, take steps to reduce the level of emotion, and prevent loss of face by one or another party. The mediator may occasionally need to propose new options or new negotiating concepts.

Because of the sensitivity of this role, it is generally believed that mediators must act with strict neutrality. In order to retain the trust of the parties, especially when receiving confidential information regarding each side's "bottom line" concerns, the mediator must be perceived as having no preferred position or personal stake in the outcome.

Some commentators have argued, however, that the traditional notion of strict neutrality for mediators must be modified in certain public sector consensual dispute resolution situations. Lawrence Susskind, based on his extensive experience with mediation of environmental disputes, advocates a "non-neutral role" for environmental mediators. Instead of accepting as a given the parties' definition of the issues and decisions on who to invite as participants, an environmental mediator, according to Susskind, should ensure that unrepresented groups are included and that spill-over effects on the general public and long-term impacts upon future generations are taken into account.

105. See generally Lawrence Susskind & Jeffrey Cruikshank, Breaking the Impasse: Consensual Approaches to Resolving Public Disputes 152 (1987); Lawrence Susskind & Connie Ozawa, Mediated Negotiation in the Public Sector, 27 AM. BEHAV. SCI. 255, 256 (1983). An arbitrator, the third category of alternate dispute resolution professional, acts in a quasi-judicial capacity. His or her responsibility is to hear the facts and positions of the parties and make a decision which usually is binding on the parties. The roles of the facilitator and arbitrator are often mixed in various forms and combinations in practice. See Howard Raiffa, The Neutral Analyst: Helping Parties to Reach Better Solutions, in NEGOTIATION STRATEGIES FOR MUTUAL GAIN 14-15 (Lavinia Hall ed., 1993) [hereinafter NEGOTIATION STRATEGIES].

106. Barbara Ashley Phillips & Anthony C. Piazza, The Role of Mediation in Public Interest Disputes, 34 HAST. L.J. 1231, 1237 (1983) ("The intermediary permits the parties to explore possible resolutions without either party giving up its litigating stance or revealing confidential information to other litigants.").

107. Sometimes, however, a mediator whose biases have been disclosed can still be accepted. See Christopher Honeyman, Bias and Mediator Ethics, in NEGOTIATION THEORY AND PRACTICE 429 (J. William Breslin & Jeffrey Z. Rubin eds., 1991).

108. Lawrence Susskind, Environmental Mediation and the Accountability Problem, 6 VT. L. REV. 1, 44-47 (1981); see also Susskind & Ozawa, supra note 105, at 257 (arguing that public sector disputes differ from conventional two-party disputes in that they involve choices with substantial spillover effects
Critics deem Susskind's approach problematic because it abandons the ethic of strict neutrality and thereby risks undermining the trust that is essential for mediation to succeed.\textsuperscript{109} Whatever the validity of these criticisms in the environmental context, they are of less relevance in the educational domain. The issues under consideration and the motivations of the groups and individuals involved in educational policy conflicts differ from the typical participants in environmental disputes.

Educational interest groups consist primarily of teachers, administrators, parents, and students. In collective bargaining and other contexts, each of these will assert vigorously their own personal, economic, or professional concerns.\textsuperscript{110} Beyond these private interests, however, they share a collective interest in the students' welfare that changes the nature of the discourse and requires "the argument that each participant offers on behalf of his or her favored interpretation of the common good [to] be framed not in terms of private interests, which may diverge from those of the community, but in terms of the interests of the community itself."\textsuperscript{111} Thus, emphasis on public interest concerns by a non-neutral intermediary in the educational context stimulates acknowledgment of an underlying common interest which does not exist in most other public policy dispute settings.

An active, "non-neutral" intermediary is beneficial in school disputes for another reason. It is generally acknowledged that "win-win" dispute resolution situations are achievable when: (1) the stakes are high for producing a mutually satisfactory solution; (2) the interests of both parties are mutually interdependent; (3) the parties are free to cooperate and to engage in joint problem solving; (4) a future positive relationship is important; (5) both parties are or externalities that often fall on hard-to-represent groups, such as future generations).


\textit{110. A variety of business, civic, religious, and other groups should also participate in a CED process. These groups are less likely to have a direct economic or professional interest in the issues being considered. Although they will have differing substantive positions, they will tend to be open to public interest-oriented approaches to the issues. In addition, the broad range of participation in the CED process in-and-of-itself will help provide public interest perspectives.} \textit{111. Anthony T. Kronman, The Lost Lawyer} 33 (1993). Singer notes that there is "a community of interest between the disputants [in individual special education mediations]: the education of a child who has needs with which all the parties can sympathize." \textit{Singer, supra} note 98, at 159. According to Sheldon Hackney, Chairman of the National Endowment for the Humanities, "[t]wo things are required if each of us is to be willing to subordinate our individual self-interests on occasion to the good of the whole: we must feel a part of the whole, and we must see in that whole some moral purpose that is greater than the individual." \textit{Sheldon Hackney, Toward a National Conversation}, \textit{Responsive Community}, Summer 1994, at 8.
assertive problem solvers; and (6) the parties are not engaged in a power struggle.\footnote{112. See Christopher W. Moore, The Mediation Process: Practical Strategies for Resolving Conflict 67 (1986).}

The first four of these conditions tend to prevail in most school-based disputes, but the last two typically do not. Not all school people are assertive problem solvers, and controversial values issues often precipitate or are linked to larger power struggles. An ADR model applicable to the school setting must respond to these realities and provide specific mechanisms to insure that all participants have sufficient training and resources to take assertive positions and to avoid power struggles. In many instances, a knowledgeable intermediary can undertake these critical functions.

In sum, the intermediary in educational controversies is well-situated to play a dual role—maintaining strict neutrality in relation to the particular positions of the individual participants, while also taking responsibility to ensure that the public interest is given proper consideration throughout the proceedings. Because the traditional term “mediator” does not accurately describe this unique public-interest-oriented role, we suggest the use of a new name. “Community dialogue organizer” (CDO) describes the individual who plays the central organizing role in a Community Engagement Dialogic process. The individuals selected for this crucial assignment should be both experienced in conflict resolution techniques and knowledgeable about the substantive issues involved in the particular educational controversy.

1. Participation

In order to establish the degree of trust necessary to reach substantive decisions on controversial issues, a community dialogue process must be perceived as fair. It must consider and reflect the diverse views of all individuals and groups in the community and assure that majoritarian preferences will not dominate or stifle minority expression or important individual rights.

In the school setting, this means that not only traditional stakeholders (students, parents, teachers, administrators, and school board members), but also representatives of the civic, religious, and business life of the community-at-large should be represented on the panels, working groups, and other mechanisms that carry out the CED process.\footnote{113. “Our experience suggests . . . that perceived fairness depends on participation. Those who participate feel that they ‘own’ the agreement, and are therefore more likely to support its implementation.” Susskind & Cruikshank, supra note 105, at 27.} For example, in a dispute on school discipline codes, participation in a CED process should extend to include religious leaders, police representatives, advocacy groups like the ACLU, and older taxpayers without children. In other words, all individuals...
and groups who have a personal stake in, or opinions on, how schools should influence the behavior of adolescents should participate.

Assuring full participation by such a range of interested parties is not an easy task, especially in large school districts. The CDO must pro-actively identify the range of diverse views that need to be represented and assure that spokespersons for each of those views are included. Combinations of such techniques as demographic analysis, community surveys, outreach to identifiable organizations, and self-identification should be used. Limited inclusion strategies used in other contexts, such as inviting anyone who is powerful enough to block the agreement to participate,114 would not be sufficient here. In assuring full and fair representation, the CDO must also be sure that all racial, religious, and cultural groups in the school community are fairly represented, particularly those groups that have been excluded or felt excluded from educational policymaking in the past.115 In order to obtain the meaningful participation of all elements of the community, the outreach effort must be accompanied by a well-conceived training component providing participants with basic information about the issues to be discussed and the dialogic process that will be utilized.116

An obvious tension exists between the emphasis in the CED process on active participation by all interested groups and individuals, and the reality that productive discussion may not be possible if the group is too large.117 When dealing with large school districts or complex controversies, it may be necessary to develop representation schemes or to delegate the initial consideration of certain issues to subgroups.118 At an appropriate point each

114. AMY, supra note 108, at 134.
115. One method that has been used for undertaking these formidable tasks is to: (1) invite all the obvious, known groups to participate; (2) publicize the community dialogue process through in-school announcements and media ads; and (3) at an initial brainstorming session, ask the participants to identify other groups and individuals who may have been left out in the initial surveys. SUSSKIND & CRUIKSHANK, supra note 105, at 103.
116. Effective training may meet the problem for civic republicanism and the dialogic process posed by Anthony Kronman, who notes that the egalitarian thrust of contemporary republicanism overlooks the role in classical republicanism of “excellence of judgment,” a trait of Athenian aristocrats difficult to reproduce in a mass democratic setting. See KRONMAN, supra note 111, at 35-36.
117. See generally Roger C. Crampton, The Why, Where, and How of Broadened Public Participation in the Administrative Process, 60 GEO. L.J. 525, 538 (1972). Indeed, one commentator has argued that fifteen participants is the practical limit for manageable negotiations. Philip J. Harter, Negotiating Regulations: A Cure for Malaise, 71 GEO. L.J. 1, 46 (1982). There is some evidence, however, that having a larger number of parties does not affect the likelihood for successful outcome to a mediation process. G. BINGHAM, RESOLVING ENVIRONMENTAL DISPUTES: A DECADE OF EXPERIENCE, quoted in S. GOLDBERG ET AL., DISPUTE RESOLUTION 405, 411 (1985); see also Natural Welfare Rights Org. v. Finch, 429 F.2d 725, 738-39 (D.C. Cir. 1970) (holding that manageability of hearings with multiple participants should be achieved, not by excluding parties, but by properly controlling proceedings).
118. The representative must simultaneously abide by the group’s general mandate and be empowered to negotiate and compromise:
   . . . the delegate, while representing the constituents’ mandate, must be given freedom to negotiate and possibly compromise. Negotiation, however, should be shaped by significant
subgroup or its representatives would bring back to the larger plenary meeting its group's positions or recommendations. With extended controversies, provisions must be made to assure continuity in the process.

2. Agenda Setting

At the outset, procedural protocols must be established for a successful CED process. These include such matters as when and where meetings will take place, how long they will continue, the order in which participants will speak, whether time limits will be placed on comments, whether minutes will be kept, and whether the CDO will periodically conduct separate ex parte meetings with the various parties. Behavioral protocols such as proscribing name-calling or walking away from the table should also be considered. In order to maximize agreement on these issues, the CDO should consider making an initial proposal regarding the procedural protocols and then invite the participants to comment and help shape their final form.

Consideration should also be given at the outset to relationships with the press. Although publicity concerning the progress of the negotiations and the content of a final resolution can be of major significance, premature leaks or one-sided revelations can undermine the entire process. Generally speaking, it is best to establish an understanding that information will be conveyed to the press only with the group's official authorization and through an established process.

Once procedural protocols are established, the agenda should be outlined. The process should begin with issues sufficiently controversial that they engage the participants' attention, but not so highly charged that they cause excessive conflict or result in embedded positions. Meaningful communal dialogues must forthrightly confront the issues that concern people, but must do so in a principled manner that is perceived as being non-partisan. The aim should not be to achieve an aggregation of all the private interests in the community,
but to ensure that appropriate public values are the focus of the discussion.²¹

It has been argued that ADR techniques cannot be effective when fundamental values, rather than economic interests, are at stake.²² Although cost/benefit compromise is easier to achieve when only economic interests are at issue, more durable consensus-oriented compromises can be achieved in disputes involving values differences when particular values are subordinated to "superordinate goals."²³ Properly presented, the mutual desire to promote the educational welfare of the community's children can constitute such a superordinate goal.

After initially emphasizing broad areas of agreement,²⁴ the focus should then shift to a balanced discussion of the specific issues in controversy. Briefing papers, written in non-technical language, should set forth objectively the pro and con perspectives on each of the issues, objective research findings where available, and a range of solutions which other communities have adopted. Such background materials provide a common vocabulary and a starting point for the discussions. Because apprehension regarding legal liability often inhibits candid discussion of controversial schooling issues, the background briefing papers should also contain a discussion of the legal mandates applicable to the controversy. Although educators often assume otherwise, court decisions on most educational issues tend to maximize, within broadly stated parameters, the scope for local decision-making in school controversies.

Federal courts, in fact, tend to articulate basic national values related to rights, but leave most other community values to local discretion. On certain constitutional issues such as desegregation and school prayer, for example, the courts have established basic substantive precepts to which all communities must adhere. With other important values issues, such as defining the content of curriculum, supervising student journalism, choosing bilingual/bicultural educational programs, and methods for providing equal educational opportuni-

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121. Cf. Cass R. Sunstein, Deregulation and the Hard Look Doctrine, 1983 SUP. CT. REV. 177, 183 (discussing tension between pluralistic aggregation of interest and public values perspectives in regard to private group representation in administrative agency decision-making processes); see also RONALD DWORKIN, LAW'S EMPIRE 199-201, 211 (1986) (arguing that genuine political community is governed by "common principles, not just by rules hammered out in political compromise").

122. See, e.g., Phillips & Piazza, supra note 106, at 1236 (arguing that many public interest disputes are "based on principles that are beyond negotiation").

123. MOORE, supra note 112, at 179; see also DEAN G. POUITT & PETER J. CARNEVALE, NEGOTIATION IN SOCIAL CONFLICT 126 (1993) (setting forth various methods for overcoming "principle-based rigidity" such as involving equally or more valid alternative principles); DONALD A. SCHON AND MARTIN REIN, FRAME REFLECTION: TOWARD THE RESOLUTION OF INTRACRABLE POLICY CONTROVERSIES (1994) (describing how seemingly intractable policy controversies can be resolved by "reframing" the issues).

124. See FERRY, LOVE AND POWER, supra note 95, at 95 ("In thus grounding and focusing dialogic efforts aimed at diminishing conflict, the indeterminacy of shared moral premises serves an essential social function: It is an occasion of the mediation of dissensus.").
ties to female students, the courts have essentially left the values preferences to local initiatives. Consequently, the nature of the values in controversy and the scope of discretion left for local decision-making will affect the way that the agenda should be structured.

3. Discussion

Although the form that any particular discussion process may take will necessarily depend on its context, a successful principled discussion process will include four basic phases. First, the CDO should establish a welcoming environment by facilitating introductions. She should then provide (or involve participants in providing) an initial overview of the substantive issues to be considered.

The second stage of the discussion process is the brainstorming phase. The participants should be encouraged to offer general reactions to the briefing materials and to identify the key issues. They should discuss their views on each issue, not only in terms of the ways in which the issue affects them or their particular constituencies, but also in terms of their views on how the issue affects the community as a whole. A primary aim of the brainstorming phase is to promote the flexible development of a range of ideas and solutions. The more options and potential solutions that can be created during this process, the less likely it is that a later impasse will occur. Brainstorming also tends to generate empathy and understanding for the views and needs of other participants.

In the third phase of the discussion process, options and directions for possible solutions need to be specified and articulated. Assuming that the earlier brainstorming stage has emphasized principled approaches respectful of the moral positions of all participants, the solutions which emerge from the discussion are likely to be integrative approaches that minimize social conflict.

125. See, e.g., Rebell & Murdaugh, supra note 73, at 155; constitutional principles themselves often contain a measure of ambiguity concerning application or implementation which needs local discussion and clarification. See Toni M. Massaro, Constitutional Literacy: A Core Curriculum for a Multicultural Nation 69-127 (1993) (discussing tension in constitutional decisions between assimilationist and pluralistic themes, and leaving their reconciliation primarily to local decision-makers); Barry Friedman, Dialogue and Judicial Review, 91 Mich. L. Rev. 577, 668-70 (1993) (discussing role of courts as shapers or facilitators of constitutional debate in "synthesizing the views of society and then offering the synthesis to society for further discussion").

126. See Fisher & Ury, supra note 90, at 61-62.

127. The CDO's function at this stage is to encourage all participants to express their views, and to ensure that focus is maintained on principled approaches to the issues. The CDO may need to float ideas on behalf of a party who is reluctant to publicly articulate a position, or she may need to assemble composite proposals from a number of abstract ideas. The CDO must also respond quickly to counterebucrionist tactics or inappropriate expressions of emotions, stereotypes, or any developing lack of trust. See generally Leland P. Bradford, Making Meetings Work: A Guide for Leaders and Group Members (1976).
and maximize consensus. The aim of such an integrative consensus is a solution, or number of related solutions, with which all participants can live, and not one with which everyone is necessarily completely happy. If an integrative solution is not forthcoming, a subcommittee should be formed to propose a range of alternate options to be brought back to the full group at a later time.

In some areas, especially those relating to matters of ultimate moral authority, full agreement of all members of the community may not be achieved. If the dialogic process has been conducted in a manner that acknowledges the moral status of the dissenters' position, however, it may be possible to develop approaches that allow the majority's position to be implemented while nevertheless retaining the integrity of dissenting views. Benjamin Barber describes the outlook of a dissenter in such a situation:

I am part of the community, I participated in a talk and deliberation leading to the decision, and so I regard myself as bound; but let it be known that I do not think we have made the right decision," says the dissenter in a strong democracy. He means thus not to change the decision this time, for it has been taken, but to bear witness to another point of view (and thereby to keep the issue on the public agenda).

Mechanisms that effectively balance majoritarian and dissenting opinions in this matter may include procedures that allow a controversial program to go forward while permitting the children of dissenting parents to participate in an alternative program. Another approach might be to present the majoritarian position on a controversial issue in a manner which includes fair consideration of the dissenters' views. Presenting positions in this way may allow the community to take stands on controversial issues, while still emphasizing respect for thoughtful dissent. It also promotes the educational process by allowing each student to formulate his or her own position based on clear understandings of how the local community, including its dissenting members,

128. See PRUITT & RUBIN, supra note 120, at 143. At this point it may be necessary to obtain additional information to conduct surveys or hold open community meetings to gauge broader reactions to the particular solutions under consideration.

129. Lawrence Susskind tells of his experience reporting to a judge who had appointed him a special master in a complex sewage district dispute:

We returned to the judge and said 'Judge, you won't believe it, but we have an agreement.' The judge called a formal hearing, invited all the parties and their lawyers, held up the agreement, and said, as I cringed, 'Is everybody completely happy with this?' They responded no! The judge turned to us and said 'I thought you said there was an agreement.' We told him there was, but that he had asked the wrong question! He should have said, 'Can everybody live with the agreement?'

Susskind, Resolving Public Disputes, in NEGOTIATION STRATEGIES, supra note 105, at 61, 74-75.

130. BARBER, supra note 93, at 192.
A Dialogic Approach to Education Reform views the issues.\(^{131}\)

Finally, after tentative agreement is reached on a solution or set of solutions for the issue at hand, the policy resolution should be set down in a written document. The draft version of the document should be circulated to all participants to ensure that it accurately reflects the overall group position. Circulation of a draft will also provide a further opportunity for any dissenters to reconsider their views and/or to propose modifications which the majority might be willing to accept in order to achieve a working consensus. The policy resolution document should also include monitoring and evaluation criteria to guide the implementation process.

4. Ratification

Because many of the individuals who participate in the dialogic process will be representatives of large groups, the policy resolution document will need to be ratified by these broader constituencies. In some cases, especially in large city school districts, the CDO and/or the subgroup having prime responsibility for the issue may decide to prepare explanatory materials describing the considerations that went into the final resolution. So that the full flavor of the range of perspectives that went into the decision can be conveyed, it may also be useful for the CDO or members of the plenary group to join constituency representatives in addressing the constituency group meeting. If the representatives kept the constituency group apprised of developments and considered their input as the dialogic process proceeded, ratification should be readily forthcoming. If, however, one or more of the constituency groups rejects the final resolution document, the plenary group may need to reconvene to consider and accommodate their objections.

Policy resolution documents involving basic legal or policy stances may require formal ratification by the local school board. The relationship between

\(^{131}\) The fact that effective dialogic processes can promote agreement among groups with strongly disparate value standards is illustrated by the recent joint endorsement of a statement of principles for addressing conflicts concerning religion in the public schools by the National Association of Evangelicals, the Christian Coalition, the Union of American Hebrew Congregations, People for the American Way, the National School Boards Association and the National Education Association, among other groups. \textit{The Freedom Forum First Amendment Center, Finding Common Ground: A First Amendment Guide to Religion and Public Education} \cite{Haynes94}; see also Shelley Burt, \textit{Religious Parents, Secular Schools: A Liberal Defense of an Illiberal Education}, 55 REV PROS 51 (1994) (arguing for political benefits of granting maximum deference to religious parents' requests for accommodations by public school authorities).

the school board and the CED process should be considered at an early stage, and the extent of policy-making authority that will be delegated to the dialogic group should be made clear in advance. If the dialogic process is to motivate people to participate extensively and effectively, substantial policy-making authority should be delegated to the CED group. When such a delegation has occurred, the board ratification process is largely an occasion for assuring that the CED process has followed proper procedures and that the final resolution document fits within the policy parameters of the delegation. If for any reason, the board fails to ratify the document, it should not modify the document itself, but instead, reconvene the CED plenary group to reconsider the issue. An additional benefit of the board ratification process is that it provides a culminating opportunity for community participation. Assuming that ratification takes place at a public meeting of the board, the ratification session will provide notice and a last opportunity for any members of the community to voice their views.

5. Implementation

Implementation of any complex social policy initiative is an organic, evolutionary process whose outcome rarely corresponds with original expectations. It is important, therefore, that the participants' policy resolution document set forth agreed assessment standards and specific procedures for ongoing monitoring. Such monitoring mechanisms may range from periodic meetings of original dialogue participants to full-time oversight by a paid staff. Implementation guidelines may give discretion to the monitors to approve variations or modifications of the operative standards, within designated parameters. Where developments during implementation call for consideration of modifications of these limits, the monitors should be empowered to convene a meeting of the full plenary group to reconsider the basic standards.

6. Evaluation/Reconsideration

After the policy resolution document has been implemented for an agreed period—presumably somewhere between one and five years — the participants in the original dialogue process or others designated to take their place should reconvene to review the implementation process and to consider whether modifications of the original policy approach are appropriate. The original community dialogue organizer or a successor should facilitate the process.


133. "If the stakeholders are truly involved in developing the assessment process, they are more likely to support the plan and make it work." Harold Patterson, Don't Exclude the Stakeholders, SCH. ADMIN. Feb. 13, 1993, at 14.
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The reconvened dialogic meeting serves several important functions. First, it provides an opportunity to modify or improve the original policy based on new facts or unexpected developments. Second, it may rekindle and reinforce community spirit. Third, periodic reconvening adds to the legitimacy of the entire process. The knowledge that a policy resolution will be reviewed in the near future, based on evaluative data, will help promote a working consensus during the initial stage among parties who have reservations about the proposed policy.

A final advantage of the reconvened dialogic session is that successful experience with one controversial topic is likely to motivate the community to undertake further dialogues on other issues. As the CED process is extended to new issues, and periodic reevaluations of those issues are undertaken, a permanent CED process will be in place and a true dialogic school community will have been established.

C. The Judicially Mandated CED Model

In many situations, voluntary adoption of a CED process is not likely to occur either because of a general disinclination to confront difficult controversies until they reach crisis stages, or because of active opposition to such an approach by the school board or by parties who believe they can win a power struggle. If the controversy persists and reaches a level of high confrontation, litigation may ensue.

When such a controversy has been brought to court, we believe that the court should give serious consideration to adopting a CED approach. The CED process would normally take place at the remedial stage of a class action or other broad-based litigation, after the judge has determined that constitutional or statutory rights have been violated by an existing policy or practice and where a remedy is not easily crafted. In certain situations, however, the parties in a class action or other case raising systematic educational issues may be persuaded to enter into a CED process before liability has been determined.

A dialogic remedy has distinct advantages for institutional reform cases involving complex schooling issues. Remedial decrees drafted by a judge, even with input from the parties or a group of experts, often lack a clear understanding of the context of needed education reform or an understanding of how the remedy to a particular problem will affect other aspects of school district functioning. The CED approach can provide such an understanding, and it can also mobilize the energy and commitment of the entire community to provide
a lasting solution to the immediate problem, and avoid future conflicts.134

The fact that most citizens perceive judges as being fair and not predisposed to a specific policy outcome establishes the atmosphere of trust necessary to encourage broad participation in a dialogic process, especially by groups historically excluded from power. In addition, the courts' inherent "staying power"135 provides a necessary degree of assurance that the process will not be prematurely terminated because of political or personality changes. Those who sacrifice short-term benefits for long-term results in the negotiating process will not thereby come up short.136

Judicial oversight of a CED dialogic process involves a focused but limited role for the court. It would promote community participation in the basic CED process through five specific judicial activities: (1) articulation of basic legal standards; (2) formal appointment of a community dialogue organizer; (3) convening of an initial community participation hearing; (4) holding a judicial ratification hearing and follow-up modification hearings; and (5) termination.

1. Articulation of Basic Legal Standards

Constitutional and statutory standards articulated by the federal courts tend to distinguish between basic national standards and parameters for local

[134] The extensive use of citizen committees to help implement school desegregation decrees by courts in the initial stage of the desegregation process provides relevant precedent for adoption of CED remedies in contemporary education cases. These committees served as a mechanism of ensuring representation of black citizens in areas where the school boards were all white and had resisted desegregation. The function of these committees was to assist in developing desegregation plans, see, e.g., United States v. Mississippi, 622 F. Supp. 622, 624 (S.D. Miss. 1985), monitor implementation, see, e.g., Pate v. Dade County Sch. Bd., 434 F.2d 1151, 1170 (5th Cir. 1970), improve community relations, see, e.g., Morgan v. Nucci, 612 F. Supp. 1060, 1065-66 (S.D. Mass. 1985), advise the judge, see, e.g., Smiley v. Vollert, 453 F. Supp. 463 (S.D. Tex. 1978), and even to serve as mediators in resolving disputes, see, e.g., Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist. No. 1, 839 F.2d 1296, 1319 (8th Cir. 1988). The committees varied in size, but they tended to range from ten to forty members and included students, parents, administrators, and representatives of the community at large.

These committees provided an important new vehicle for citizen involvement in the major educational restructurings that accompanied the desegregation, but as the desegregation process matured, courts tended to dissolve the committees. Although the committee performed a valuable function in the early stages by "facilitating community acceptance of desegregation and providing minorities a meaningful participation in implementing desegregation," in the later stages, where "differences remained as to how school desegregation should be furthered and at what pace," these matters were viewed as being "for the court, not for a committee." Tasby v. Wright, 559 F. Supp. 9, 11 (N.D. Tex. 1982). The premise of the CED model is that a properly supervised dialogic process is the most appropriate mechanism for determining all remedial policies, not merely a mechanism for carrying out the court's decisions.

[135] See REBELL & BLOCK, EQUALITY AND EDUCATION, supra note 73, at 171-96 (finding the comparative institutional strength of courts, among other things, in their significant compliance-monitoring "staying power").

[136] Cf. Sturm, Normative Theory, supra note 79, at 1436 ("[T]he deliberative model avoids many of the hazards of informality by locating the interactions of the participants within a framework of judicially established standards and oversight.").
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discretion reflecting community values. In drafting the remedial decree and setting the parameters for the CED process, the court should emphasize and delineate this distinction so that all participants understand the full extent of their responsibility and discretion.

An example of a significant judicial standard containing an implicit distinction between national and local values was the Supreme Court's formulation of the due process requirements for student suspensions in Goss v. Lopez. The Court held that a student facing temporary suspension has a constitutional right to "be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story." The national value established by Goss was the right to minimal due process prior to a short term suspension from school. Left to the discretion of each local community were the critical questions of what notice and opportunity to explain procedures would be implemented, and how these procedures would relate to the educational goals of the community. A court pursuing a CED approach should specify which major issues were left open for community decision. For example, in Goss, the court could have explicitly stated that each local school district could implement the notice and opportunity to explain requirements through a variety of procedures which could range from a short discussion with the dean or principal at the time of the occurrence to a full administrative hearing with right to counsel. Articulation of the legal options would allow participants in a community dialogue to relate each legal option to specific pedagogical or values concerns regarding school discipline.

Explicit acceptance of the national value/community value distinction in the CED context would allow courts to articulate and implement important constitutional values standards which contain open process dimensions. For example, Justice Brennan's plurality opinion in Board of Education v. Pico established a First Amendment right of public school students not to be denied access to the "marketplace of ideas" available in the school library. His standard for enforcing this right—restricting school boards from exercising

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137. See Rebell & Murdoug, supra note 73.
138. If the dialogic process is initiated at an early stage before the court has issued a liability ruling, delineation of the legal parameters would be the responsibility of the CDO.
139. 419 U.S. 565 (1975).
140. Id. at 581.
141. Deferral to local school communities to formulate local community values is consistent with the "structural due process" approach articulated by Laurence Tribe. Laurence Tribe, Structural Due Process, 10 HARV. C.R.-C.L. L. REV. 269 (1975), and the "potential" of equitable remedies urged by Roach, supra note 76; see also Stanley Ingber, Rediscovering The Communal Worth of Individual Rights: The First Amendment in Institutional Contexts, 69 TEX. L. REV. 93, 97 (1990) (arguing that courts should empower school boards and other local institutions to promote community-oriented First Amendment values by deferring to these institutions so long as they follow process with certain structural features defined by the court).
their discretion to remove books from the library "in a narrowly partisan or political manner"—was attacked as being a "standardless standard" by Justice Powell's dissent. If it were accepted that the actual implementation of student free speech rights in this context were to be determined in each community through a local dialogic process, the fact that the standard has an open process dimension at the initial judicial articulation stage would be of lesser consequence. The Court would recognize that each local community would be expected to work out a fair procedure suitable for its particular needs, subject to judicial oversight to assure constitutional acceptability.

2. Appointment of a Community Dialogue Organizer

A court implementing a CED remedy should appoint the community dialogue organizer, presumably by designating an individual as a "special master" pursuant to Rule 53 of the Federal Rules of Civil Procedure, or equivalent state statute. Payment for his or her services could be ordered as part of the remedial decree.

An official relationship with a supervising judge has two desirable effects. It enhances the CDO's prestige by bolstering the community's perceptions of the CDO as a neutral and objective individual, and it ensures an appropriate

143. Id. at 870.
144. Id. at 895 (Powell, J., dissenting).
145. The national value/community value distinction would also allow courts to give greater scope to pedagogic realities in enforcing constitutional requirements. For example, in Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058 (6th Cir. 1987), the Court of Appeals held that compelling plaintiffs' children to use reading materials containing themes inconsistent with their religious beliefs was not unconstitutional because the plaintiffs' children were not required to "make an affirmation of a belief and an attitude of mind." Id. at 1066; accord Fleischfresser v. Directors of Sch. Dist. 200, 15 F.3d 680, 690 (7th Cir. 1994). This decision ignored the pedagogic reality that exposure to values-laden materials clearly does affect beliefs and attitudes.

Judge Boggs, in his concurring opinion, recognized that exposure to ideas that are contrary to fundamental values is a significant educational and religious burden. Despite his stated "sense of sadness" at the result, 827 F.2d at 1073 (Boggs, J., concurring), he nevertheless felt constrained to agree that plaintiffs were entitled to no judicial remedy. If it had been accepted, however, that curriculum selection decisions are largely a matter of local community values, and a CED process was implemented as a remedy, a working consensus accommodating the plaintiffs' needs probably could have been fashioned, especially since, as Judge Boggs noted, the pupils and teachers had in this case actually reached a working accommodation. Id. at 1074. If such a view had been accepted by the majority, the court would need to review such an accommodation to be sure that in promoting plaintiffs' Free Exercise rights, the solution did not create an establishment of religion to the detriment of other students.

146. Although some commentators have questioned whether the language of Rule 53 provides a proper basis for the broad powers assumed by many court appointees in institutional reform cases, see, e.g., Elizabeth Montgomery, Comment, Force and Will: An Exploration of the Use of Special Masters to Implement Judicial Decrees, 52 U. COLO. L. REV. 105 (1980); Vincent M. Nathan, The Use of Masters in Institutional Reform Litigation, 10 U. TOL. L. REV. 419 (1979), the courts have been less troubled by this issue and have repeatedly made such appointments based on either Rule 53 or their inherent judicial powers. See David I. Levine, The Authority for the Appointment of Remedial Special Masters in Federal Institutional Reform Litigation: The History Reconsidered, 17 U.C. DAVIS L. REV. 753, 760-62 (1984).
degree of legal competence, supervision, and oversight of his or her activities. In making its selection, the court should consider the views of the parties to the litigation and, if feasible, those of other affected individuals and community groups, so that the individual selected will have the confidence of all concerned.

Since it is likely that final conflict resolution will be achieved through the CED process, and not by judicial action, there is less danger of a party being prejudiced by unlimited communication between the CDO and the judge than in many other judicially supervised ADR processes. For this reason, unfettered communication between the judge and the CDO can be encouraged. In any event, the judge, the CDO, and the participants should discuss this issue and reach an understanding at the outset of the proceedings.

3. The Community Participation Hearing

After the CDO has been appointed and has identified the individuals who will participate in the plenary or subgroup discussions, the court should convene a community participation hearing. The court should review the procedures followed by the CDO to verify that all individuals and groups in the community have been given an opportunity to participate, and to ensure that those selected fairly represent their broader constituencies. Notice of the hearing should be broadly announced, not only through traditional judicial notice mechanisms, but also through the local press, radio, and television. This broad notice will provide an opportunity for any excluded individuals or groups to make their presence and their interest known at an early stage in the process.

4. The Policy Resolution Hearing

After the agenda setting and discussion phases of the CED process have been completed and a policy resolution document has been adopted by the participants, the document should be submitted for approval by the court. The standard for judicial review at this stage should be: (1) Was the entire CED process inclusive and fair? (2) Does the final resolution document comply with applicable legal requirements? and (3) Are minority interests in the community adequately protected by this outcome? A policy resolution document which

147. In this respect, the hearing would be analogous to a class representation hearing under FED. R. CIV. P. 23(a).
149. A judicial review standard proposed in the context of a negotiated agency rulemaking process for environmental disputes was whether the "rule is within the authority of the agency and does reflect a consensus among the interests significantly affected." Philip J. Harder, The Political Legitimacy and Judicial Review for Consensual Rules, 32 Am. Univ. L. Rev. 471, 485 (1983).
has met with broad community approval and has been ratified by the local school board will typically gain the court's approval. If it does not, the matter should be sent back to the CED plenary group for reconsideration and revision.

Once it has approved the policy resolution document, the court may enter a formal remedial order which either fully incorporates the policy resolution document or sets forth the continuing procedural requirements for the implementation and evaluation/reconsideration stages. The latter approach is preferable, since it limits the court's substantive policy intervention and maximizes local discretion. If a reconvened plenary session held at the evaluation/reconsideration stage of the CED process recommends any major modifications, an additional approval hearing should be convened by the court to review the proposed changes. The standard of review for such a modification hearing would be the same as in the initial approval hearing.

5. Termination of Judicial Oversight

The question of when judicial involvement and oversight should terminate in institutional reform litigations, some of which continue for up to twenty-five years, includes how a "consensus" should be defined; whether a careful written record on how the "consensus" arose needs to be maintained; and whether the consensus may have been built on "political logrolling" inconsistent with the statutory purpose. Patricia M. Wald, *Negotiation of Environmental Disputes: A New Role for the Courts?,* 10 COLUM. J. ENVTL. L. 1 (1985). Because of the enhanced public interest orientation of the dialogic process and the organizer's ongoing involvement, these problems are less likely to arise with the CED process in the educational context.

150. Note in this regard the reaction of a federal district court which was reviewing a desegregation plan adopted through an effective community dialogue process: The fact that eleven citizens of the community presented a unanimous proposal to the School Board, and the School Board, after making only a few minor changes to the plan, presented to this Court a "Joint Motion to Approve 1983 Amendments to the Desegregation Plan" joined by all parties to this suit, is, in this Court's opinion, the way that our government was meant to function... Such a voluntary plan is always more commendable and more readily acceptable by the community than a plan which is created and ordered by some Federal Judge relying on desegregation "experts" from out-of-state or relying on his own limited knowledge of the intricate details by which a school system functions.

Flax v. Potts, 567 F. Supp. 859, 875 (N.D. Tex. 1983) (emphasis in original); *see also* Environmental Defense Fund v. Ruckelshaus, 439 F.2d 584, 598 (D.C. Cir. 1971) ("When administrators provide a framework for principled decision-making, the result will be to diminish the importance of judicial review by enhancing the integrity of the administrative process and to improve the quality of judicial review in those cases where judicial review is sought.").

151. If the group reaches an impasse after the remand, suggestions to move the process forward should come from the organizer after consultation with the judge, but not from the court itself. The court's role in the CED process is to promote a communal solution and to ensure its integrity, not to impose a solution on its own.

152. If the substantive aspects of the original resolution document were incorporated in a judicial order, a party with standing could trigger judicial review by making a motion to modify the decree on her own. *See* FED. R. CIV. P. 60(b). If substantial issues are raised by such a motion to modify, a judge committed to a community dialogue process could hold a preliminary conference to determine why the moving party had not sought to invoke such a process, or if the party had sought to reopen the dialogic process, why such re-opening did not occur.

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years, has been a major concern of commentators and judges. Termination is significantly less problematic with a CED remedial approach for two reasons. First, there is a clear standard for determining when judicial oversight should end, namely, when the court has approved a policy resolution document and the implementation and reevaluation period established in the final remedial decree has expired. Second, when the CED process has functioned successfully, the court will have much less involvement with substantive policy issues during the remedial process. Because the court will have restructured public institutions to secure greater compliance, the question of when or how it exits will be of considerably less significance.

If an effective CED process becomes a permanent part of the district's

153. See, e.g., Paul Gewirtz, Choice in the Transition: School Desegregation and the Corrective Ideal, 86 COLUM. L. REV. 728, 789-98 (1986); Michael A. Rebell, Allen v. McDonough: Special Education Reform in Boston, in JUSTICE AND SCHOOL SYSTEMS 70, 93-94 (Barbara Flicker ed., 1990). The Supreme Court confronted the termination issue most directly in Board of Education v. Dowell, 498 U.S. 237 (1991), a case concerning the Oklahoma City public schools that had been involved in a school desegregation litigation for almost 30 years. The Court articulated the following standard for determining when a desegregation decree should be terminated or dissolved: "whether the Board had complied in good faith with the desegregation decree since it was entered, and whether the vestiges of past discrimination had been eliminated to the extent practicable." Id. at 249-50. The Dowell holding seems to beg the critical question, however, since it does not define the "vestiges of past discrimination" to be eliminated and leaves to the discretion of the district judge the determination of what is "practicable" in regard to specific solutions. To consider whether vestiges of segregation remain, a district court must review "every facet of school operations—faculty, staff, transportation, extracurricular activities and facilities." Id. at 250 (quoting Green v. County Sch. Bd., 391 U.S. 430, 435 (1968)). In doing so, many courts since Dowell have determined that long-pending desegregation cases still cannot be terminated. See, e.g., United States v. City of Yonkers, 833 F. Supp. 214 (S.D.N.Y. 1993) (finding that vestiges of segregation remain in disparity in achievement scores between majority and minority students). Cf. Dowell v. Board of Educ., 8 F.3d 1501 (10th Cir. 1993) (upholding district court finding on remand that vestiges of segregation had been eliminated to extent practicable); Ross v. Houston Indep. Sch. Dist., 699 F.2d 218, 227-28 (5th Cir. 1983) (defining "practicability" in context of Houston’s history of desegregation); see also Freeman v. Pitts, 503 U.S. 467 (1992) (setting forth criteria for partial withdrawal of court’s supervision and control of desegregation plan); Missouri v. Jenkins, 115 S. Ct. 2038, 2055 (1995) (holding that substantial reliance on extent of improvement in student achievement is inappropriate test in determining unitary status). See generally David I. Levine, The Latter Stages of Enforcement of Equitable Decrees: The Course of Institutional Reform Cases After Dowell, Rufo and Freeman, 20 HASTINGS CONST. L.Q. 579, 625 (1993) (arguing that Dowell standards are unclear).

154. The Dowell standard may become less problematic if applied in a CED remedial process because the local community itself will define the terms “vestiges” and “practicability” in concrete terms. This will permit the court to terminate its jurisdiction when the specific actions or conditions the parties have agreed upon in their policy resolution statement have been met. A CED process also can result in agreement on remedial measures that are more extensive than those that are legally required. For example, a meaningful interdistrict city/suburban desegregation solution which could not be ordered by a court, see, e.g., Milliken v. Bradley, 418 U.S. 717 (1974), might voluntarily be accepted by all participants in a broadly-constituted CED process that included suburban representatives. Cf. Liddell v. Missouri, 731 F.2d 1294 (8th Cir.), cert. denied, 469 U.S. 816 (1984) (upholding voluntary interdistrict desegregation plan).

155. If a modification hearing indicates that serious substantive or procedural problems remain, the court can extend the reevaluation period.
policy-making and values formulation procedures, a reopening of previous cases to enforce permanent injunctions or initiation of new litigations may also often be avoided. A dialogic process initiated and maintained as a court-ordered remedy can empower a school community to find broadly acceptable and lasting solutions to an immediate controversy, while simultaneously creating mechanisms that can avoid future clashes and promote a new sense of community.

The CED process can also provide an answer to concerns about the appropriate role for the courts in the remedial stage of education reform litigation. By promoting a conflict resolution process that allows the community itself, within defined legal parameters, to create lasting solutions to major controversies, the court will carry out a role that is consistent with its constitutional and statutory responsibilities and its institutional capacities. It will articulate constitutional principles and statutory procedures, and oversee the implementation of these principles and standards by all the affected agencies, groups, and individuals.¹⁵⁶

¹⁵⁶. Owen Fiss criticized the use of alternative dispute resolution approaches to settle lawsuits because the settlements they achieve deprive courts of their opportunity and responsibility to "give force to the values embodied in authoritative texts such as the Constitution and statutes ...." Owen Fiss, Against Settlement, 93 YALE L.J. 1073, 1085 (1984). The CED model, however, allows the alternative dispute resolution techniques to be utilized without sacrificing the values dimension emphasized by Fiss. An added advantage of the dialogic model is that it is not a single judge, but rather an entire community, working under the court's auspices, that formulates and implements the important values at stake. Cf. Harry T. Edwards, Commentary, Alternative Dispute Resolution: Panacea or Anathema?, 99 HARV. L. REV. 668 (1986) (distinguishing public law issues resolved by "adjuncts to courts" from public law issues resolved by independent mechanisms).
III. APPLICATIONS OF THE CED MODEL

The preceding section has described in general terms the workings of the proposed community engagement dialogic model. In this section, we will discuss how the CED model can be applied in three particular educational policy areas which have embroiled many school communities in protracted conflicts, namely sex education, special education, and fiscal equity reform. The sex education case study will illustrate how a CED process might be initiated through state regulatory procedures, without direct judicial intervention. The special education discussion focuses on inclusion issues which might be resolved through voluntarily-initiated CED processes, but which may also require judicial intervention in some cases. In the third illustrative area, fiscal equity reform, we outline an attempt to implement a variation of the CED model on a statewide level by combining voluntary public participation techniques with pending litigation.

A. Sex Education

The onset of the HIV/AIDS epidemic, and the rise in the number of adolescents contracting the disease, have reignited the debate over the role of schools in sex education. Although most parents and policy makers agree that schools have an important role to play in conveying information on human sexuality to students, there is intense controversy about the values and pedagogic techniques which should be employed in doing so. Most of the current sex education curricula in public schools throughout the country can be classified within two basic categories—"comprehensive sexuality education" (CSE) and "abstinence only" education.

There is no universally accepted definition of CSE. Generally, comprehensive sexuality educators believe that biological information must be placed in a broad framework which "encompasses sexual development, reproductive health, interpersonal relationships, affection, intimacy, body image, and gender roles."157 Although generally encouraging abstinence among adolescents, comprehensive curricula also include information on: (1) biological facts of reproduction; (2) sexual development; (3) birth control information and information about HIV/AIDS; (4) contraceptive distribution and availability; (5) sexual decision-making and prevention of abuse; and (6) abortion.158

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157. DEBRA W. HAFFNER, SEX EDUCATION 2000: A CALL TO ACTION 2 (1992); see also NATIONAL GUIDELINES TASK FORCE, GUIDELINES FOR COMPREHENSIVE SEXUAL EDUCATION 3 (1991) (arguing that sexuality education is the "lifelong process of acquiring information and forming attitudes, beliefs, and values about identity, relationships, and intimacy").
Abstinence-only educators generally believe that sex education should reinforce traditional Judeo-Christian values which view sexuality outside of heterosexual marriage as unacceptable, and they oppose the "moral permissiveness" which they see as endemic to modern American society. Abstinence-only educators acknowledge that large numbers of teenagers engage in sexual activities, but they believe that through appropriate intervention and support, the number of abstaining students can be increased. They emphasize the limitations of contraceptives and other safe sex techniques in preventing sexually transmitted diseases and reducing teenage pregnancy.

Recognizing the intensity of the differences between proponents of CSE and abstinence-only advocates, most state statutes and regulations seek to promote broad community involvement in policy-making decisions about sex education. However, urging extensive community input does not necessarily achieve it. Statutory calls for community involvement which are not accompanied by systemic implementation mechanisms are unlikely to prove successful. New York City's attempt to implement an HIV/AIDS curriculum with condom availability in the early 1990s dramatically illustrates this point.

1. The New York City Condom Controversy

In 1988, the New York State Board of Regents enacted a regulation which seeks to balance conflicting values and interests in the area of HIV/AIDS, and which recognizes the advantages of promoting active community involvement at the local level. The regulation provides in relevant part that:

All secondary schools shall provide appropriate instruction concerning the acquired immune deficiency syndrome (AIDS) as part of required health education courses in grades 7-8 and in grades 9-12. Such instruction shall be designed to provide accurate information to pupils concerning the nature of the disease, methods of transmission, and methods of prevention; shall stress abstinence as the most appropriate and effective premarital protection against AIDS, and shall be age appropriate and consistent with community values.

By linking the emphasis on abstinence to a specific reference to "consistency
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with community values,” the regulation implies that abstinence-centered curricula can be presented in a variety of formats, incorporating a range of perspectives on sex education issues. Consistent with this flexible approach, the regulation was later amended to specify that local boards of education may—but need not—make condoms available to pupils as part of the district’s HIV/AIDS instructional program.163

In order to assure that programs are “consistent with community values,” the regulation also mandates that every school board establish an advisory council responsible for making recommendations concerning the content, implementation, and evaluation of the AIDS instructional program.164 Each council must consist of “parents, school board members, appropriate school personnel and community representatives, including representatives from religious organizations.”165

Chancellor Richard R. Green responded to statewide adoption of the 1988 regulation by requiring each secondary school in New York City to teach six lessons on AIDS in grades 7 through 12. Rather than creating a broad-based new advisory council as required by the regulation, the Chancellor continued in effect the pre-existing advisory group, which had been established to implement a prior “family living curriculum.” Because this group’s responsibilities and procedures were unclear, implementation of the Chancellor’s changes proceeded slowly and ineffectively. In January, 1990, Green was succeeded by Joseph Fernandez. Led by suggestions from the pre-existing advisory group and encouraged by vocal protests concerning the failure to initiate an effective AIDS/HIV education policy,166 the new Chancellor, after consulting exten-

163. Id. § 135.3(c)(2)(ii). The regulation further provides that boards of education which choose to make condoms available must provide each pupil receiving a condom with “accurate and complete personal health guidance as to the risks of the disease that may result from the pupil’s use or misuse of such product” and “assure that such personal health guidance is provided by health service personnel or school personnel trained and supervised by competent health professionals or health educators.” The Regents also mandated that the HIV/AIDS Advisory Council participate in the development of any condom availability plan. Id. § 135.3(c)(2)(ii)(d).

164. Id. § 135.3(b)(2), (c)(2)(i).

165. Id. § 135.3(b)(2). The balanced approach of the New York regulation contrasts with other statutory or regulatory schemes that are overly restrictive, such as La. Rev. Stat. Ann. § 17:281(A)(2) (West 1994), which proscribes curricular approaches involving “religious beliefs, practices in human sexuality, [and] the subjective moral and ethical judgments of the instructor or other persons;” see also Coleman v. Caddo Parish Sch. Bd., 635 So. 2d 1238 (La. App. 2d Cir. 1994) (undertaking line by line review of school curriculum to ensure conformity with statute). The New York regulation also contrasts with schemes that are under-prescriptive such as N.J. Admin. Code tit. 6, § 29-4.1(e) (1990), which delegates responsibility for determining the content of the HIV curriculum to local districts without providing any statewide substantive parameters. See Laura D. Muraskin, Sex Education Mandates: Are They the Answer?, 18 FAMILY PLANNING PERSPECTIVES 171, 173-74 (1986) (concluding that lack of substantive content requirements led to “nominal compliance” and little effective instruction).

sively with a board staff and receiving comments and input from a wide variety of education, child welfare, health, and community organizations, issued a proposal calling for a sex education curriculum which included a condom availability proposal involving all 120 high schools.\textsuperscript{167}

The debate over the Chancellor’s proposal quickly engulfed the entire City school district. Although 60\% of New Yorkers approved of some form of condom availability in the schools,\textsuperscript{168} a significant number of parents, teachers, activists, and religious leaders expressed strong criticisms of the Chancellor’s plan. The controversy dominated the Board’s public agenda meetings in December, January, and February. The key item of contention for those opposed to the plan was the failure to include a parental opt-out provision, which Chancellor Fernandez felt would diminish the program’s effectiveness.\textsuperscript{169}

In a dramatic meeting on February 29, 1991, the Board voted four to three to accept Fernandez’s recommendation and to permit availability of condoms without a parental opt-out procedure. The opt-out issue was reconsidered after a series of heated meetings during the summer, but the Board again rejected a proposed opt-out amendment after the last-minute change of heart by one Board member.\textsuperscript{170} The Chancellor proceeded to implement the condom availability program at local high schools.\textsuperscript{171}

The Chancellor’s plan was almost immediately challenged in litigation initiated by a group of parents, contesting the lack of a parental opt-out provision among other things. Although the trial court rejected the parents’ claims, the Appellate Division reversed and held that because of the compulsory nature of school attendance, the petitioners’ liberty interest to rear and educate their children was being violated.\textsuperscript{172} In January, 1994, the New York
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City Board of Education decided, on the recommendation of Chancellor Ramon Cortines, not to appeal the Appellate Court's decision, and to amend the plan to include a specific parental opt-out provision. Since that time, the condom distribution program has been implemented without overt controversy, although apparently fewer than 2% of the parents of New York City's high school students have chosen to opt out of the program.

2. HIV/AIDS Education Controversy in New York City

In early 1991, at the time that Chancellor Fernandez's condom availability program was being considered, the Chancellor also proposed a comprehensive K-12 HIV/AIDS curriculum and the establishment of a 26-person HIV/AIDS Advisory Council, selected under his direction, to meet the specific requirements of the state regulation. The members of this Council would be selected through an application process. The Board rejected this proposal and instead established a new council, composed of two representatives appointed by each of the seven Central Board members, plus two members appointed by the Chancellor and several non-voting members. Thus, although the new HIV/AIDS Advisory Council appeared representative of the interested segments of the community, virtually all of its members owed allegiance to specific Board members and their political interests.

In February, 1992, after nearly four months of bitter debate and arguments, the Advisory Council approved a K-6 HIV/AIDS curriculum which (with some modifications) the Board later adopted. In the spring of 1992, the Advisory Council began to consider an HIV/AIDS curriculum for grades 7 through 9. After nearly two more years of bitter arguments, the Council appeared ready to reach an agreement in December 1993 when the members' tenure expired. A majority of the Council members were replaced by a new Chancellor and several Board members had been appointed by the new Republican administra-

similar parental and religious objections.

173. In 1993, Chancellor Fernandez's contract was not renewed by the Board of Education, which then selected Ramon Cortines as his successor.

174. Interview with Erica Zurer, Member, HIV/AIDS Advisory Council, New York, New York (June 27, 1995)[hereinafter Zurer Interview]. The small percentage of opt-out rights exercised may, however, be due to the disinclination of both children and adults to dissent overtly from peer group norms. See Abington Sch. Dist. v. Schempp, 374 U.S. 203, 291 n.69 (Brennan, J., concurring).

175. Two seats would be reserved for clergy, one for a central board member, and the remaining seats would be filled by parents, community board members, and representatives of community-based organizations. Zurer Interview, supra note 174.

176. Id.

tion in the city.\textsuperscript{178} The new, more conservatively-oriented Council immediately took steps to resist early compromises and reconsider the curriculum.\textsuperscript{179}

It is clear, then, that rather than promoting greater understanding and community dialogue about difficult, value-laden issues, the Advisory Council provided a new forum for an already calcified, highly politicized debate. Indeed, as was the case with the condom availability plan adopted by the Board before it appointed the Council, the HIV/AIDS curriculum became embroiled in litigation with opponents on both sides. One suit, rejected as moot after the Board modified the curriculum to require all instructors to stress abstinence, charged that the program violated the State regulation by stressing safer sex rather than abstinence.\textsuperscript{180} The second case involved an administrative appeal, filed by a number of sex education providers, education advocacy groups, and the New York Civil Liberties Union in 1992. They challenged a Board of Education resolution which strengthened the curriculum's emphasis on abstinence by requiring that each and every lesson related to AIDS prevention devote substantially more time to abstinence than to other methods of instruction.\textsuperscript{181} The resolution also mandated that all consultants taking part in AIDS instruction in the public schools must sign a pledge to abide by these rules. The Commissioner issued a decision invalidating this regulation on the grounds that the Board had passed it without consulting with the advisory council mandated by the regulation.\textsuperscript{182}

3. \textit{Resolution through a CED Approach}

At the end of one of his administrative decisions which invalidated the New York City Board of Education's abstinence pledge policy because of its failure to adhere to the Advisory Council requirements, the New York Commissioner of Education stated:

For all the controversy surrounding AIDS instruction in New York City, the parties to this appeal seemed to be in substantial agreement. Both parties want a program that addresses abstinence, but recognize the need to provide instruction in safer sex for those who are, nonetheless, sexually active. This should not be so difficult to achieve. I urge the parties to come together to find appropriate means to carry it out, so that time and energy may be spent addressing other serious problems.\textsuperscript{183}

\begin{thebibliography}{99}
\bibitem{178} Rudolph Giuliani, a Republican, succeeded Democrat David Dinkins as Mayor of New York City in 1993. In addition to the change in Chancellors, fifteen of the original twenty three members of the Council were replaced.
\bibitem{179} Zurer Interview, \textit{supra} note 174.
\bibitem{180} Appeal of Impellizzeri and Petrides, 32 N.Y. Ed. Dept. Rptr. 295 (1992).
\bibitem{181} The measure passed, in large part, because Ninfa Segarra, a Board member who had voted with the four-person majority to approve the original condom distribution plan the previous year, realigned herself with the three opponents of the plan to provide a deciding vote on this pro-abstinence motion.
\bibitem{182} Appeal of Jane Knowledge, 32 N.Y. Ed. Dept. Rptr. 451 (1993).
\bibitem{183} \textit{Id.} at 458.
\end{thebibliography}
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Why did the Commissioner's call go unheeded? Why did the Advisory Council's operation, which was intended to promote broad community input in consensual decision-making, become polarized and contentious?

A large part of the answer to these questions is that despite recognition of the need for an effective consensual dispute resolution process by the Board of Regents and the Commissioner, their regulations lacked systematic mechanisms that could effectuate meaningful public participation. The regulations contained no requirements to ensure either that the Advisory Council was representative of the entire community, and had meaningful input into substantive decisions, or that compliance with the regulations would be monitored effectively. A regulatory approach which contained systematic mechanisms for community input might have avoided the polarization that divided New York City's educational community for more than two years.

The extent to which a systematic dialogic approach might have resulted in a very different outcome in New York may be illustrated by considering how the HIV/AIDS curriculum issue could have been approached through the CED model. A critical difference between the actual process in New York City and the workings of the CED model was the absence of a community dialogue organizer. The active involvement of an authoritative neutral figure was especially critical because of the City's confrontational history with sex education issues. Although Chancellor Fernandez went to great lengths to obtain input from a wide variety of interested groups, the process adopted by the Board was not perceived as neutral and as seeking to resolve the controversies through a principled, fully representative public participation process. If a neutral CDO had been appointed, she could have moved quickly to initiate an appropriate process built on the six-stage CED process.

a. Participation. The Regents' regulation properly insisted on a broadly-representative HIV/AIDS Advisory Council consisting of "parents, school board members, appropriate personnel, and community representatives to review any proposed curricula." But by leaving the composition of the council solely to the Board of Education's political decision-making processes, the regulation ultimately proved self-defeating. The Board's political appoint-
ment method—having each member appoint two representatives—insured that the Council would reflect the Board’s own political polarization. There were no efforts to assure that council members were representative of broader, interested segments of the community who could be motivated to support early council agreement.186 This history highlights the need for a Council that is impartially selected from all segments of the community to ensure broad and balanced participation.187

b. *Agenda-Setting and the Establishment of Legal Parameters.* A skilled CDO, at the outset, would have assured that the agenda for the Advisory Council’s discussion would include the major issues of concern to all sides, and that the final policy document would endeavor to address comprehensively curricular issues, such as abstinence and condom availability. Unfortunately, in New York City there was no such comprehensive approach to the issues.

The fact that both sides apparently agreed on the advantages of abstinence (although not necessarily on a precise definition of the term) meant that the abstinence issue should have been the initial starting point for discussion. Instead, condom availability, the most controversial aspect of the Chancellor’s plan, was the initial policy issue pursued prior to the creation of the HIV/AIDS Advisory Council. Condom availability was implemented outside of the context of the broad curriculum framework to which it should relate, and it became an immediate focus of intense controversy. Political polarization was compounded by the fact that the Board’s advisory council was only convened after condom availability was approved. As a result of the atmosphere thus created, later attempts to provide balanced background information or consider the HIV/AIDS curriculum were drowned out in highly partisan debate.

c. *Principled Discussion.* Could an integrative solution have emerged from a principled discussion in New York? Although the range of creative solutions that are likely to result from a vibrant dialogic process cannot be predicted in advance, some possibilities in this regard can be suggested. For example, an effective working agreement might have been forged around a “balanced” abstinence curriculum which would support the values perspectives of both of the competing policy perspectives.188 Assurance of objectivity and

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186. *Post hoc* administrative or judicial review of the functioning of an Advisory Council generally has little influence on the deliberative process. Thus, the Commissioner’s invalidation of the Board’s abstinence pledge policy occurred after this issue had already inflamed the political process and did little to reduce community tensions.

187. Outreach to the full community in the New York City school district would require effective participation mechanisms for each of the 32 community school districts.

188. Some legal commentators have argued that a balanced treatment approach, similar to the “fairness doctrine” that the Federal Communications Commission required of broadcasters on controversial political issues should be mandated for all controversial issues in the public school curriculum. See, e.g., Thomas I. Emerson & David Haber, *The Scopes Case in Modern Dress,* 27 U.
balance in the preparation of materials, training of teachers and supervision of
the program would be essential to the success of such an approach. A second
possible basis for an acceptable solution would be to accommodate alternative
instructional curricula.\footnote{By teaching a CSE course during religious excusal
periods, students whose parents oppose CSE could obtain religiously-oriented
sex education instruction at the same time that their peers were being instructed
on similar issues by public school personnel. Either of these approaches would
avoid the stigmatization and administrative difficulties of opt-out approaches
and would emphasize the importance of inculcating diverse values in a public
school setting.\footnote{A pilot project for such an alternative curriculum approach was in fact proposed by several
New York City Central Board members at the heated meeting in June 1991 when the abstinence pledge
policy was adopted. In the midst of the polarized debate, the full ramifications of this proposal were
never properly explored.}}

\begin{itemize}
\item[d.] \textit{Ratification.} Under the CED model, broad discussion, reflection and
compromise take place during the formative stages of a policy decision. The
school board's role is that of a policy board. It should conclude the dialogic
process by legitimizing the proposal that emerges from the council's deliberations
and bringing the entire community together to support it. The board's
review should confirm the policy's compliance with the applicable Regents'
regulations, its consistency with other school district policies and priorities, and
it's administrative feasibility. The CED approach in essence immunizes a board
of education from the intense political pressures of the early stages of attempted
conflict resolution. In the New York City example, however, the Board and
Advisory Council became politically polarized. If the CED approach had been
utilized and the Board could have played its more appropriate policy role, a
stabilizing effect might have avoided much of the ensuing litigation and
contributed to the success of the program.

\item[e.] \textit{Implementation.} The Regents' regulations specifically provide that the
Advisory Council shall be responsible for making recommendations concerning
"the implementation and evaluation of an AIDS instruction program."\footnote{N.Y. COMP. CODES R. & REGS. tit.8, § (o)(2)(i) (1994).} If
the dialogic process had produced a policy resolution document which a strong
majority of the participants could support, the Advisory Council would have

\end{itemize}
gained an important measure of credibility which it then could have carried over into the implementation phase. A broad-based agreement resulting from an impartially selected Advisory Council with greater grassroots participation and support would also have precluded the delays and ideological swings that occurred in New York, and led to more effective program implementation.

f. Modification. Since the New York City Advisory Council had little substantive role in the development of the Chancellor's condom availability plan, it was not surprising that the Alphonso court, after ruling that a parental opt-out mechanism was required, did not even consider recommending a specific remedy that would include an active role for the Advisory Committee. Chancellor Cortines also minimized the role of the Council and unilaterally advised the Board of Education not to appeal Alphonso because of his personal commitment to a parental role in the process. The Board of Education, whether because of a change in its membership or because of its desire to avoid further battles about condom distribution, quickly accepted his advice.

Neither the court's holding, nor the Board's decision not to appeal it, is likely to end New York City's condom wars. Opt-out is not a satisfactory long-term solution to intense community conflicts over sex education because neither side tends to be satisfied by this arrangement. The failure to submit the issue for reconsideration to a broadly-based Advisory Council means that the views of many stakeholders on both sides of the issue remain unaddressed. Indeed, in New York City at the present time, dissatisfaction with the Board's HIV/AIDS educational program remains rife in many quarters. Moreover, without strong community support, the effectiveness of the HIV/AIDS program remains in doubt.

B. Special Education Inclusion

1. LRE and the Inclusion Controversy

Under the federal Individuals with Disabilities Education Act (IDEA), children with disabilities are guaranteed access to a "free, appropriate public education." Such an education must be tailored to meet the unique needs of the child with disabilities by means of a mandated "individualized educational program" (IEP), and to the maximum extent feasible, children

192. Some allege that even those students whose parents do choose to opt-out would nevertheless be subjected to "a continuing flow of safe sex messages via films, posters, pamphlets, newsletters, seminars, forums, conferences, assemblies, school newspapers, school handbooks, guest speakers, special events, public announcements, and or peer leadership sessions." Memorandum of Law in Support of Petitioners' Request for Injunctive Relief, submitted by the Coalition of Concerned Clergy and Parents as Friends of the Court at 19, Alfonso v. Fernandez, 584 N.Y.S.2d 406 (Sup. Ct. 1992).


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with disabilities must be educated in regular education programs. This is a guarantee of an education in the "least restrictive environment" (LRE). This means that they may be removed from the general education classroom "only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." For children whose needs cannot be met appropriately in the general education environment, each public school system must provide a continuum of alternative places, with varying degrees of exposure to non-disabled children.

In the two decades since the IDEA was enacted, the number of students identified as being disabled has increased from 6% of the public school population to 12%. The IDEA seems also to have resulted in a substantial shift toward less restrictive placements. Currently, 34.9% of children who have been diagnosed as disabled are being served in regular classes, 36.3% in part-time resource rooms, 23.5% in separate classes within regular school buildings, 3.9% in separate schools, 0.9% in residential facilities, and 0.5% in home-bound or hospital programs. These figures show a marked shift from the pre-IDEA era, when it was reported that 70% of all children identified with disabilities were served in separate classrooms or separate buildings. Nevertheless, the fact that a substantial proportion of the special education population continues to be educated in separate settings is considered by many to indicate that the Act’s LRE requirements are not being fulfilled.

The perpetuation of a large number of separate educational placements apparently stems from difficulties in determining what is the least restrictive environment for particular children, financial disincentives created by state and

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197. The continuum must include instruction in regular classes, special classes, special schools, at-home, and in hospitals and institutions. 34 C.F.R. § 300.551 (1992). “Mainstreaming” is a term frequently used interchangeably with LRE, but it has a more limited meaning. “Mainstreaming” means placing disabled children in regular environments, together with non-disabled children for at least some of their services. The IDEA does not use this term but rather the more general requirement “that each student be educated in an environment that is the least restrictive possible and that removal from general education occurs only when absolutely necessary.” Allen G. Osborne, Jr., The IDEA’s Least Restrictive Environment Mandate: A New Era, 88 EDUC. LAW REP. 541 (1994).
200. MARY ELLEN GIZMAN, SUCCESS FOR EACH CHILD: A RESEARCH-BASED REPORT ON ELIMINATING TRACKING IN NEW YORK CITY PUBLIC SCHOOLS 42 (1992).
federal reimbursements systems, and problems in adapting the educational program of the disabled and nondisabled children involved to effectuate the change, from fundamental opposition to the basic concept of LRE. This opposition some critics claim is the primary cause of lower levels of academic, developmental, and vocational achievement of many special education students. This situation has led some advocates to conclude that the only way to assure that all children are educated in the least restrictive environment is to eliminate separate special education systems: They call for the “full inclusion” of all students with disabilities in the mainstream with appropriate supports and services.

Opponents of such “inclusion” contend that its proponents offer a simplistic answer to complex problems of children at risk of academic failure. They argue that special instructional techniques are necessary to meet the needs of


203. Alan Gartner & Dorothy K. Lipsky, Beyond Special Education: Toward A Quality System For All Students, 57 HARV. EDUC. REV. 367 (1987) (“[T]he mean academic performance of the integrated group was in the 80th percentile, while the segregated students score in the 50th percentile.”). The U.S. Department of Education’s Report indicated, however, that among students with learning disabilities, mental retardation, and serious emotional disturbances who attend their local school “absenteeism and drop-out rates were higher than for the general population of students and grades were lower.” SIXTEENTH REPORT, supra note 199, at 103.


206. The term "inclusion" is increasingly favored over the term "mainstreaming" because "mainstreaming connotes the shutting of the disabled child in and out of regular class without altering the class to accommodate the child." Abigail L. Flitter, Civil Rights—A Progressive Construction of the Least Restrictive Environment Requirement of the Individuals with Disabilities Education Act, 67 TEMP. L. REV. (1994). Some critics go so far as to claim that the persistence of a separate special education system is the moral equivalent of "slavery" or "apartheid." See Dorothy K. Lipsky & Alan Gartner, Capable of Achievement and Worthy of Respect: Education for Handicapped Students as if They Were Full Fledged Human Beings, 54 EXCEPT. CHILDREN 69, 70 (1988); Susan Stainbeck & William Stainbeck, Letter to the Editor, 21 J. LEARNING DISABILITIES 452, 453 (1988).

207. E.g., Douglas Fuchs & Lynn S. Fuchs, Inclusive Schools Movement and the Radicalization of Special Education Reform, 60 EXCEPT. CHILDREN 294 (1994) (expressing concern regarding inclusion movements’ goals, tactics, and understanding of general education reforms and calling for improved, independent special education system); James M. Kauffman, How We Might Achieve Radical Reform of Special Education, 60 EXCEPT. CHILDREN 6 (1993) (arguing that meaningful reform will come through disaggregation of strategies for difficult categories of disability, stronger conceptional foundations for intervention, and more extensive research).
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many special education students, that most general education teachers are not capable of meeting the needs of exceptional students in large class settings, and that "special services will be compromised or lost unless both funding and students are specifically targeted." Parents, especially those with severely disabled children, have diverse views on the desirability of extensive inclusion reforms.

Increasingly, the courts have been asked to resolve these inclusion controversies. Judges in many of these cases have indicated that "the mainstreaming issue imposes a difficult burden on the courts," and they have expressed frustration regarding their burgeoning special education case-loads. In one recent inclusion case, the Ninth Circuit Court of Appeals suggested that

"though the doors to federal courts are always open, the slow and tedious workings of the judicial system make the courthouse a less than ideal forum in which to resolve disputes over a child's education. This case offers a poignant reminder that everyone's interests are better served when parents and school officials resolve their differences through cooperation and compromise rather than litigation."

Clearly, there is a need for a new, more inclusive approach to the inclusion controversy that can bring the warring sides together, relieve courts of a responsibility they feel ill-equipped to bear, and allow school districts to implement more effective programs for children with disabilities.

2. Resolution Through a CED Model

Although the judicial focus on LRE issues in the recent federal cases have provided a strong impetus to the inclusion movement, thorough-going inclusion practices consistent with the standards the courts have articulated in these cases
have rarely been fully implemented. The problem here is not the courts’ lack of pedagogical expertise, since in these cases, courts defer generally to the school authorities to design and implement an educational program consistent with the legal standards. The larger issue is that LRE requires a rethinking of the entire special education system if it is to be implemented effectively, and the main decision-making mechanism of the IDEA—the meeting of multi-disciplinary staff personnel with the parent to generate an individual education plan (IEP) for a particular child—is simply not a proper setting for assessing and implementing LRE in its broader, systematic context.

Finding solutions to the problems inherent in creating an effective program requires the input and support of all the affected interests. For example, in order to determine whether reasonable efforts have been made to accommodate a child in a regular classroom setting with supplementary aids and services, consideration must be directed not only to whether the necessary resources exist in the particular general education classroom, but also to such questions as whether the general education teacher is adequately trained to deal with children with particular disabling conditions, and whether the other children in the classroom—and their parents—are supportive of the needs of the child with disabilities. The answers to these questions involve complex pedagogical, administrative, personnel, and cost factors, which have implications not only for the particular child with disabilities, but also for all children within the school system.

Identifying the impact of the disabled child’s presence on other children in the classroom is a determination that obviously depends on the learning levels, personalities, and other needs of each of these children. This issue also implicates systemic policy questions such as whether children in the regular classroom and their parents have been educated on the LRE goals and techniques and whether supplementary services can or should be made available

213. In Mavis v. Sobol, 839 F. Supp. 968 (N.D.N.Y. 1993), for example, after finding that the first part of the Daniel R.R. test had not been satisfied, Judge McCurn did not order that the plaintiff child be placed in a regular education classroom; instead, he remanded the matter “to the district’s committee on special education with instructions to develop an individualized education program for Emily Mavis which will address her particular needs and which is fully consistent with the I.D.E.A.’s mainstream requirement.” Id. at 992.


215. As Francis Stetson suggests, the success of any inclusion program depends on the “extent to which students and school personnel have been prepared for the experience.” Francis Stetson, Critical Factors That Facilitate Integration: A Theory of Administrative Responsibility in Public School Interaction of Severely Handicapped Students, in PUBLIC SCHOOL INTEGRATION OF SEVERELY DISABLED CHILDREN (Nick Certo et al. eds., 1984).

216. “[Inclusion] places a tremendous burden of responsibility on non-disabled school children to welcome and understand their disabled classmates in order to make mainstreaming work. Without a systemic program to help handle such a responsibility, disabled newcomers often experience school as an unfriendly, lonely place—or worse, as a place where they are teased or ignored by other children.” S. Bookbinder, Mainstreaming: What Every Child Needs to Know About Disabilities, 8 EXCEPT. PARENT 48-49 (1978).
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to the non-disabled students to mitigate any potential negative impacts. Of course, both of these concerns raise significant cost issues. The considerable expenses involved in teacher staff development, parent and student training, and the purchase of specialized equipment and other supplemental aids and services, cannot be attributed to a single child’s placement. These are programmatic expenses which reasonably should be attributed to all special education—and perhaps to all general education—students presently or potentially in the inclusion program.217

In short, the structured reforms required by the judicial LRE tests cannot be fully implemented in the context of a particular child’s individual program planning conference.218 For this reason, some courts, recognizing that systemic issues need to be addressed, have turned individual litigations into class actions.219 Although some special education class actions, especially in large urban school districts like Boston and New York City have formulated systemic priorities and given concrete meaning to the IDEA’s general concepts of “appropriate education,”220 the individualized procedural requirements of the IDEA complicate class action representation in the typical case, and many courts have rejected requests for class certification because there were insufficient facts and circumstances common to the purported classes because of requirements for exhaustion of administrative remedies.221

An additional impediment to solving these problems through class action litigation is that the range and diversity of interests and considerations

217. In a recent case, the school district maintained that it would be forced to pay an additional $109,000 to provide Rachel Holland with a fully inclusionary class. The district court rejected this contention, finding that nearly $80,000 of the proposed amount was to be used for teacher sensitivity training which should not be attributed solely to Rachel, since it would have a positive impact on other children. Sacramento City Unified Sch. Dist. Bd. of Educ. v. Holland 14 F.3d 1398, 1402 (9th Cir. 1994).

218. Indeed, disability rights in general might be viewed more appropriately as a question of “structural discrimination” because disabling conditions are, to a large extent, socially defined characteristics that exist, in whole or in part, only in relation to established societal eligibility standards, or because of society’s reluctance to reorder traditional practices or physical structures so as to permit access for those who are currently excluded. See Michael A. Rebell, Structural Discrimination and the Rights of the Disabled, 74 GEO. L.J. 1435, 1439 (1986).

219. For example, in Chris D. v. Montgomery County Board of Education, 753 F. Supp. 922, (M.D. Ala. 1990), individual plaintiffs filed an amended complaint requesting class certification to address the condition of similarly situated children. Id. at 923 n.2.

220. In New York City the priorities for structural reform to provide appropriate education for children with disabilities have included architectural accessibility, hiring initiatives, and the establishment of clinical teams in each school building. The priorities emphasized in Boston have included new compensatory service mechanisms and innovative monitoring and parent participation procedures. For detailed case study overviews of the Boston and New York City litigations, see Michael A. Rebell, Educational Opportunities for Children With Handicaps, in JUSTICE AND SCHOOL SYSTEMS: THE ROLE OF THE COURTS IN EDUCATION LITIGATION 23 (Barbara Flicker ed., 1990).

described above indicates that traditional class action mechanisms are insufficient for the task at hand.222 Accordingly, a broad, community-wide decision-making mechanism, like the CED process, may be necessary to accomplish successful inclusion.

Because a series of recent major cases have already defined the main

222. A major issue in this regard is the problem of assuring adequate class representation at the remedial stage of large scale institutional reform litigations. Although Rule 23 of the Federal Rules of Civil Procedure affords individual members of the class and an opportunity to comment on any settlement or consent judgment, it does not require specific notice or input on follow-up remedial developments. In fact, there are virtually no reported instances of post-judgment class representation hearings being held. See 3-B JAMES W. MOORE ET AL., FEDERAL PRACTICE ¶23-01[12-12] (2d ed. 1985) (citing only one instance of notice being given to poll members on proposed modification of consent decree); see also Stephen C. Yeazell, From Group Litigation to Class Action, Part II: Interest, Class, and Representation, 27 UCLA L. REV. 1067 (1980) (discussing inherent tension between representation of group interest and obtaining consent of those represented).

In protracted public interest litigation where the plaintiff class may contain thousands of members of varied backgrounds and interests, there is enormous potential for intra-class and class/attorney conflicts stemming from ideological, strategic, and personal differences. Even if all the members of the class agreed on the initial remedial approach, as the decree is implemented, unforeseen problems inevitably arise, new developments occur, and subgroups within the original class tend to develop new and differing positions. See Deborah L. Rhode, Class Conflicts in Class Actions, 34 STAN. L. REV. 1183 (1982).

Under present class action practices and procedures, the courts tend to rely on the attorney who has been designated as the class representative to serve as a "mediating presence" who "maintains a convenient legitimizing myth of client sovereignty." Id. at 1241; see also Nancy Morawetz, Bargaining, Class Representation, and Fairness, 54 OHIO ST. L.J. 1, 8 (1993) (noting that courts frequently defer to the expertise of lawyers once class is certified). Unless individuals or subgroups of the class actively challenge the class attorneys' positions or seek to intervene in the case, courts rarely revisit the question of adequacy of representation. Even if a subclass seeks separate representation, the courts tend not to explore sufficiently the issue of adequacy of representation during the remedial process. See, e.g., United States v. Georgia, 19 F.3d 1388 (11th Cir. 1994) (denying intervention to civic group seeking to maintain local community schools in desegregation case); Pennsylvania Ass'n of Rural & Small Schools v. Casey, 613 A.2d 1198 (Pa. 1992) (denying intervention in fiscal equity case to state teacher's union and individual school district). Moreover, no formal mechanisms exist for assuring that there is a regular flow of information between the class attorney and his or her clients, or for providing judicial oversight of major decisions made by the attorney in the course of implementing the remedial decree. Cf. Parker v. Anderson, 667 F.2d 1204 (5th Cir. 1982) (approving settlement over objections of most named class members, noting thirty contacts between attorney and class representatives during months preceding settlement).

The CED model can, however, provide a satisfactory solution to the problem of inadequate class representation during the remedial stage of large scale institutional reform litigation. The dialogic methodology is built around procedures for assuring broad, comprehensive participation of all those affected by the problem at every stage of the process. Therefore, individuals or groups who believe that they have been excluded from the plaintiff class or inadequately represented by counsel, can seek direct involvement through the CED procedures. Moreover, a court overseeing a dialogic remedy wold hold a participant hearing where the issue of adequacy of representation of the plaintiff class can be directly addressed. The CED model also avoids the problem of potentially unlimited reopenings of structural injunctions in institutional reform litigations by individuals or groups who did not participate in the initial hearing. See Martin v. Wilks, 490 U.S. 755 (1989); see also Susan P. Sturm, The Promise of Participation, 78 IOWA L. REV. 983 (1993) (analyzing Wilks from perspective of normative theory of public remedial process).
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criteria which need to be considered in a CED process, and have identified
many of the major stakeholders whose views need to be considered, inclusion
may be an area in which many school districts may be motivated to implement
a CED process voluntarily, before a litigation has been initiated to challenge
local LRE practices. If litigation has been initiated, a court at the remedial
stage of an individual or class action case centering on inclusion issues might
propose the appointment of a CDO and the implementation of a CED process.
In either event, the six-part CED process involving inclusion issues would
likely have the following general characteristics:

a. Participation. The judicial LRE standards make clear that not only
special education children and their parents but also general education students
and parents are stakeholders whose needs and views must be considered in any
inclusion decision. Thus, the participants in a CED process must include not
randomly selected “parents,” but “parents” of each of the relevant constituencies.

Identifying these constituencies in each particular community will require
sophistication and sensitivity on the part of the CDO. For example, parents of
special education students hold a diverse range of views on the advantages of
inclusion and the appropriateness of particular implementation strategies. There
will also be subtle composite positions held by subgroups such as parents of
students at risk of academic failure and referral to special education programs.
Similarly, among special and general education teachers, as well as administra-
tors and representatives of civic and business groups, there is likely to be a
range of experience and perspectives about the desirability of inclusion and
how it might feasibly be implemented. Training in this context will also be
more complex than in many other areas, since specific understanding of the
needs of different disability groups and of the range of available pedagogic
techniques will need to be conveyed. In short, inclusion is a complex concept
which invokes responses and positions that cut across traditional interest group
boundaries. This complexity may add to the flexibility of the process, but it
will also make the selection and training of participants more challenging.

b. Agenda-setting. Because there is a broad range of possible policy
approaches to “LRE,” “mainstreaming,” and “inclusion,” and because there
is much confusion about the meaning of these terms, agenda-setting takes on
added importance in the inclusion context. Preparation of briefing materials
also requires a sophisticated understanding of the pedagogic issues involved.

223. A school district may also voluntarily decide to implement a CED process after a court has
remanded a case involving an individual student for reconsideration once the school authorities realize
that a systemic approach is necessary to formulate a viable inclusion policy to cover this case and that
of other similarly situated students.
Therefore, the CDO needs to have both a solid understanding of the legal and educational issues regarding inclusion, as well as the nuances of LRE policy that are of concern in the particular setting. For example, in setting the stage for discussion, it is important to clarify whether the focus will be on full inclusion or partial inclusion approaches. Similarly, the complex issues associated with cost need to be closely analyzed since, depending on how its approached, inclusion can involve substantial additional expenditures (for supplemental aids, and for staff training) or great cost savings (reduced referrals to segregated special education settings).

c. Discussion. The complexity and subtlety of LRE concepts and the range of possible inclusion approaches is likely to make the brainstorming process a stimulating and creative endeavor. At some point, subcommittees are likely to be needed to suggest specific program or service options to the larger group. The policy resolution document which emerges from these discussions probably will include a variety of program or service options and a range of supplemental aids and services. In this process, attention also must be given to professional development and student and parent training techniques. The policy resolution document may also include techniques for providing support in general education for “at risk” children to defer or avoid the need to refer them for special education evaluation, as well as mechanisms to promote the decertification, where appropriate, of students who have made suitable progress in special education placements.

The availability of a comprehensive continuum of this type will allow for each child’s IEP conference to consider a broad range of available options, which the IEP drafters can assume with confidence will be implemented by teachers who have proper training and all the necessary supplementary aids and services. Placement of children with disabilities into general education classrooms under such circumstances is less likely to encounter resistance or backlash from general education students, parents or teachers, whose views would have been respected and considered in the design of the curriculum and whose endorsement of the specific policies now being implemented would have been obtained.

d. Ratification. A well-conceived inclusion policy in which representatives of all segments of the community have participated is likely to gain the approval of the school district’s board of education. Opposition is most likely to arise in connection with cost. For example, one result of an effective dialogic process may be that a broad policy consensus will be achieved around formulating a continuum of services that meets the needs of all concerned, but
with a price tag that the board of education considers excessive. It is, of course, entirely appropriate for a school board to consider the impact of specific inclusion initiatives “upon the education of other children in the district.” However, since the final resolution document which emerges from the CED process will have been endorsed by most, if not all, of the special and general education constituency groups in the community, there will be strong political pressure on the school board to fund the plan to the maximum extent feasible.

In any event, if the board refuses to ratify the proposal resulting from the CED process, the matter should be remanded to the CED plenary group for reconsideration. The participants will presumably attempt to modify the inclusion policy, consistent with their constituents’ needs, to respond to the constraints articulated by the board, in a manner which retains the coherence of the overall policy. If, however, this is not possible, the constituent groups retain their right to bring this issue to court, either by initiating litigation if the CED process had been undertaken voluntarily, or by bringing the matter to the judge’s attention if the CED process was implemented as a remedy in a case. If this is necessary, the litigation process will be substantially more efficient and more likely to result in meaningful, long-range reform because the court would possess a fully developed factual record, evidencing a comprehensive systematic approach to LRE issues, and a clearly defined policy to which the community as a whole is already committed.

e. Implementation. Currently, inclusion initiatives are difficult to implement because supplemental aids and services needed by particular children are often not available, general education teachers are rarely trained or motivated to deal with children with disabilities, and many general education students and parents oppose inclusion initiatives. A broadly-based CED process could mitigate or eliminate each of these problems by ensuring that systemic policies are in place to address each of these concerns. The guarantee of effective monitoring and periodic re-evaluation will further aid the implementation process. Much of the present opposition to inclusion is based on fears of parents of some special education students that they will be pressured into accepting educationally ineffective placements, or by the apprehension of some parents of general education students that the inclusion of students with disabilities will undermine the regular classroom program. A credible

224. In some circumstances administrators or school board members may view inclusion initiatives primarily as cost-saving devices. An inclusion policy that results from a CED process, however, is less likely to endorse cost savings that reduce the range of services being provided to special education students. On the contrary, since each constituent group participating in the process will have an interest in maximizing the services available to their clients, the process is likely to err on the side of over-funding rather than under-funding both special education and general education services.

monitoring effort can provide appropriate assurances to ease the anxieties of both of these groups. In order to bolster these assurances, consideration should be given to authorizing monitors to insist that specific supplemental services be provided in particular cases, that additional teacher training be undertaken, or that disputes regarding particular placements be promptly mediated.

f. Evaluation/Reconsideration. Two or three years after the inclusion policy is first implemented, a plenary meeting of the CED participants should be reconvened to review the monitoring reports and determine whether any aspects of the policy need to be reconsidered or modified. Because both the law and the pedagogic practices in this area are rapidly developing, such periodic reconsideration is especially important. Moreover, because cost factors will remain an ongoing consideration, changes in the school district's overall financial circumstances—for better or worse—may require periodic review.

Educational policy-making regarding LRE issues is a particularly difficult undertaking. There is intense controversy in the professional literature on the pros and cons of LRE philosophy and on mechanisms for implementation. There is uncertainty about the benefits of inclusionary placements among special education students, parents, and teachers. Therefore, a successful school district inclusion policy must clarify the pedagogic issues, develop workable models, and allay the anxieties of all affected students, parents, and teachers. These ambitious goals can only be accomplished by bringing together the entire community in a well-structured, systemic decision-making model that allows for thoughtful, comprehensive consideration of all the issues. In other words, the formulation and implementation of inclusion policy is an area in which the CED process is particularly well-suited—and in which it perhaps is even a *sine qua non*.

C. Fiscal Equity Reform

1. The Limitations of Current Judicial Remedies

The United States Supreme Court has recognized that “*In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.*” Nevertheless, millions of students throughout the United States currently are being denied the opportunity to receive a minimally adequate education because most state education finance systems permit wide disparities in the resources available to educate children, depending on where they happen to reside.

The Supreme Court considered this situation more than two decades ago in

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San Antonio Independent School District v. Rodriguez, a case in which a group of Mexican-American parents challenged the constitutionality of Texas's education finance system. The record in Rodriguez showed that Edgewood, the poorest of the San Antonio school districts, had an annual per capita expenditure that was only 60% of that of Alamo Heights, a nearby affluent district, even though Edgewood was taxing itself at a 24% higher tax rate.

Although acknowledging the gross inequities in the amount of resources available to the Texas schoolchildren, the Supreme Court nevertheless held in Rodriguez that education was not a "fundamental interest" under the federal constitution and indicated that the apparent need for fiscal equity reform must be addressed at the state level. Since that time, because of similar disparities between rich and poor districts all across the country, there has been extensive fiscal equity reform litigation in the state courts. The records in these cases consistently show striking disparities in the resources available to schoolchildren in different parts of the state, often with especially detrimental impacts on poor and minority students.

To date, the highest state courts in 36 states have issued decisions in these cases. Fourteen have invalidated their state's educational finance systems, fifteen have upheld them, and in seven other states the courts have issued decisions which either have led to substantial legislative reforms or have remanded the matter for further trial proceedings in the lower courts. In those states where the courts have intervened, meaningful long-term reform has often proved elusive. Although inter-district disparities have been reduced in some states, adverse results have followed some of the court interventions, and the record is disappointing overall. In some states, such as West Virginia, court orders have been virtually ignored; in others, like New

228. For citations to these cases, see Michael A. Rebell, Fiscal Equity in Education: Deconstructing the Reigning Myths and Facing Reality, supra note 5, at 692-93 nn. 2-6.
229. For example, following the California Supreme Court's decision in Serrano v. Priest, 557 P.2d 929 (Cal. 1977), the state legislature enacted a statute that provided for a uniform tax rate in every district, along with a recapture provision that transferred funds from wealthy school districts to poor ones. As a result, by the 1982-83 school year, 93.2% of the students were in districts whose per capita spending varied by no more than $100, adjusted for inflation, compared to 56% in 1974. Serrano v. Priest, 226 Cal. Rptr. 584, 613 (Ct. App. 1986). On the other hand, total spending for education, in relative terms, has plummeted. Ranked fifth in the nation in per-pupil expenditures in 1964-65, California fell to forty-second in 1992-93. Mark Schauer & Steve Durbin, "Protecting" School Funding, SACRAMENTO BEE, June 28, 1993, at B14.
230. The West Virginia Supreme Court's ambitious decisions in Pauley v. Kelly, 255 S.E.2d 859 (W.Va. 1979), and Pauley v. Bailey, 324 S.E.2d 128 (W.Va. 1984), which called for fiscal equalization and system-wide restructuring, have had virtually no follow-up in regard to equalizing expenditures in various parts of the state, although there has been some progress in other areas such as facilities improvement. See Jack Flanigan, West Virginia's Financial Dilemma: The Ideal School System in the Real World, 15 J. EDUC. FIN. 229 (1989); Margaret D. Smith & Perry A. Zirkel, Pauley v. Kelly: School Finances and Facilities in West Virginia, 13 J. EDUC. FIN. 265 (1988).
the courts have felt compelled to strike down repeatedly legislative responses which were inadequate or unconstitutional or both.

Is there any way to increase the likelihood that court decrees in fiscal equity cases will succeed in implementing successful remedies? We believe that there is. However, success in this area will be obtained only if there is a substantial change in the manner in which courts handle the remedial stage of fiscal equity litigation.

The state courts' approaches at the remedial stage of most fiscal equity situations have been highly deferential to the legislatures. In contrast with most institutional reform situations where courts tend to accept plans negotiated by the parties, the prevalent judicial approach has been to declare the existing system unconstitutional and issue a general mandate for reform, but to "stay [the court's] hand to give the [legislative department] an opportunity to act." This is especially so because of "the nexus between school finance remedies and the legislature's taxing and appropriations powers." Motivated by separation-of-powers concerns, the courts view the drafting of a new education finance scheme and/or an extensive education reform statute as a "difficult and perilous quest" that lies primarily within the legislature's rather than the judiciary's sphere of "institutional competency."

The courts' decision to defer to the legislature at the remedial stage means that plaintiffs' proposals must be considered in an institutional setting where the relationship of the remedy to the specific constitutional violations found by the court may be tenuous. In contrast to the courts' "rational analytic" mode of analysis, the legislature's "mutual adjustment" decision-making style

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232. See EPAC, supra note 69, at 62 (finding that parties negotiate details of remedial decrees in most educational policy cases).

233. Horton v. Meskill, 376 A.2d 359, 375 (Conn. 1977); see also William E. Camp & David C. Thompson, School Finance Litigation: Legal Issues and the Politics of Reform, 14 J. EDUC. FIN. 221, 237 (1988) (courts have consistently left mechanism of funding to legislature unless forced to do otherwise).

234. Note, Unfulfilled Promises: School Finance Remedies and State Courts, 104 HARV. L. REV. 1072, 1083 (1991). This article also notes that "compared to their federal counterparts, state constitutions and judges are characterized by a heightened political responsiveness" that make them less willing to persevere in implementing politically unpopular remedies. Id. at 1083-84 [hereinafter Unfulfilled Promises].

235. Dupree v. Alma Sch. Dist. No. 30, 651 S.W.2d 90, 95 (Ark. 1983). It is noteworthy, in this regard, that the Kentucky court, which issued one of the most far-reaching fiscal equity decisions, began its opinion with a statement that "[W]e [do not] intend to substitute our judicial authority for the authority and discretion of the General Assembly." 790 S.W.2d at 189. It also repeated its separation of powers concerns at least three other times in the course of its opinion. Id. at 211, 212, 214.
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emphasizes broad inputs and negotiated compromises. Given the complexity of the issues that must be considered in devising a fiscal equity remedy, the mutual adjustment mode may be desirable and even necessary to foster meaningful reform, but the legislative process in this highly charged area is not likely to be truly open to broad inputs or to result in balanced compromises. Simply stated, on fiscal equity issues, legislative decisions tend to be skewed in favor of established power interests.

In addition, left to their own devices, legislatures are not likely to enact meaningful fiscal equity reforms. In Board of Education v. Nyquist, the New York Court of Appeals held that fiscal equity reform, which it acknowledged was needed in New York, was a matter "peculiarly appropriate for formulation by the Legislative body." Several months after this ruling, the New York State Legislature disbanded the blue ribbon commission it had established after the trial court's decision in this case and ignored its recommendations. Similarly, the Wyoming Legislature ignored its State Supreme Court's declaratory call for statutory reform for nine years until the court finally issued a strong mandate. In the absence of judicial action to enforce an earlier fiscal equity decision, the West Virginia Legislature has largely ignored its state court's remedial decrees mandating thorough fiscal and education reforms for the past twelve years.

And when courts do act forcefully and place their prestige on the line, the responsive legislative action they induce, although positive, only comes as a result of extraordinary measures. For example, in New Jersey and Texas, progress has been made toward fiscal equity, but only after a lengthy series of state supreme court orders—nine so far in New Jersey and four in Texas—and credible threats to close down the entire state public school system.

236. For a discussion of the legislative mutual adjustment decision-making, see CHARLES E. LINDBLOM, THE INTELLIGENCE OF DEMOCRACY (1965). The comparative institutional functioning of courts, legislatures, and administrative agencies is analyzed in REBELL & BLOCK, EQUALITY AND EDUCATION, supra note 73, ch. 9.

237. "Of all the special interests, none are more fervently asserted nor more likely to fracture legislative accord than those based on property and wealth." Kern Alexander, The Common School Ideal and the Limits of Legislative Authority: The Kentucky Case, 28 HARV. J. ON LEGIS. 341, 347 (1991).


239. Id. at 369.

240. The New York State Special Task Force on Equity and Education (Rubin Commission) had presented its detailed report and recommendations in February 1982, four months before the Court of Appeals decision reversing the lower court's orders. See MICHAEL A. REBELL, ROBERT L. HUGHES, & LISA F. GRUMET, FISCAL EQUITY IN EDUCATION: A PROPOSAL FOR A DIALOGIC REMEDY 71-72 (1995).


242. The vehemence of these inter-branch confrontations is reflected in the following comments of the chairman of the Texas legislative conference committee:

Do you truly believe the Supreme Court of Texas has the guts to shut the school system
results of this time-consuming, politically costly process may not be fully satisfactory, as the courts themselves sometimes candidly admit.\textsuperscript{243}

The usual response of many advocates and commentators to these problems of legislative defiance or gridlock is to call for "more vigorous judicial oversight of legislative remedial effort."\textsuperscript{244} There is, however, little reason to expect that state court judges who have in the past shied away from direct or sustained confrontations with legislatures will take a harder line in the future. Nor is it likely that more confrontations between courts and legislatures will raise the caliber of legislative response. On the contrary, given the intense fiscal constraints under which most legislatures now operate, increased judicial pressure is likely to impede rather than promote effective solutions.\textsuperscript{245}

2. Resolution Through a CED Approach

Effective reform in fiscal equity situations requires not a larger dose of judicial intervention, but rather a lesser measure of politics as usual. Because the standard legislative process cannot provide the balanced compromises that are necessary to devise substantive solutions in this complex, politically charged area, what is needed is a new approach that restructures the setting for debate and frees the negotiating process from entrenched power interests.

It is not coincidental that the fiscal equity reform initiatives which have encountered the least political opposition and have brought about the most thorough change have occurred in states where broad-based citizen involvement fostered a broader, statewide agreement on educational standards and systemic reform. In both Kentucky and Washington, effective fiscal equity reform was preceded by the action of such broad-based citizens' groups.\textsuperscript{246}

down? Well, I want to state here publicly and send a message across there, I don't believe they have the guts to do it. . . . The question is whether we have the guts to challenge the Supreme Court to shut the schools down. Carrolton-Farmer's Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist., 826 S.W.2d 489, 514 (Tex. 1992).

243. In New Jersey, for example, although the court in \textit{Robinson V} upheld the 1975 Act, several justices expressed strong personal reservations about their decision. Chief Justice Hughes noted that "judicial restraint" and "accommodation to the exigencies of government" compelled his concurrence, despite his misgivings. 355 A.2d at 142-43 (Hughes, C.J., concurring). Judge Conford observed that urban children fared substantially worse under the 1975 Act. \textit{Id.} at 150-51 (Conford, J., concurring and dissenting).

244. \textit{Unfulfilled Promises}, supra note 234, at 1085.

245. Legislators "are retreating [from substantive educational policy] because they perceive it as a depressing, no-win area where they have no new programs or initiatives to distribute to constituents." Susan Fuhrman, \textit{State-Level Politics and School Financing}, in \textit{THE CHANGING POLITICS OF SCHOOL FINANCE} 53, 60 (Nelda Y. Cambron-McCabe & Allen Odden eds., 1982).

246. In Kentucky, the Prichard Committee, a non-partisan school reform group composed of 99 former governors, business leaders, civic activists and professionals initiated statewide dialogues on education reform and actively promoted the implementation of the Kentucky Education Reform Act. In Washington, the Citizens for Fair School Funding, along with other groups, played a large role in creating a consensus for the educational reforms included in the Basic Education Act of 1977. \textit{See ROBERT PALAICH, STATE LEGISLATIVE VOTING IN LEADERSHIP: THE POLITICAL ECONOMY OF SCHOOL
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These experiences indicate that a meaningful participatory process to develop agreement on the educational and underlying values issues involved in fiscal equity reform can avoid the pitfalls of the standard legislative approach and lead to significant broad-based agreement on substantive reform. Recent developments in the Alabama fiscal equity litigation further illustrate this point. There, rather than immediately remanding the matter to the legislature, the court appointed a facilitator to work with the parties on a proposed remedial order. The parties, through their attorneys, worked with a number of experts to develop a remedial plan. At the same time, a Governor’s task force heard testimony from school districts, civic and business groups, and others about a potential remedy. This process produced an impressive consensus among the parties on an extensive and ambitious proposed remedial order. Unfortunately, the lack of participation by all interested groups enabled the plan to become a partisan, hotly-contested issue in the recent state board of education elections, and according to the counsel for the plaintiffs, a focal point for opposition to education reform, especially from the religious right. Extensive litigation challenging the remedial order, the court’s jurisdiction, and legislative compliance has ensued.

What is needed now is to build on the experience of the Alabama-facilitated negotiations, and to overcome its limitations and pitfalls by expanding the deliberative process to include active participation by a much larger range of individuals and groups from all affected interests, including potential opponents of reform. The CED process can be helpful in this regard. Currently, the


247. "We need to engage in a public dialogue about why all of these innovations are necessary. We cannot underestimate the power of public discourse in convincing the citizens of our states that major systemic changes need to take place to ensure the equal educational opportunity for all children for the future of our society. Public conversations can be a powerful device to arrive at social consensus." James G. Ward, Schools and the Struggle for Democracy, in WHO PAYS FOR SCHOOLS AND DIVERSITY 241, 250 (James G. Ward & Patricia Anthony eds., 1992).


249. Details of the Alabama process are contained in a letter from Helen Hershkoff, counsel for plaintiffs, to Michael A. Rebell (Nov. 4, 1994) (on file with author).

250. The agreement is set forth in the court’s Remedy Order of October 22, 1993. It calls for all schools to be funded at a sufficient level to achieve statutory standards of adequate education and for extensive reforms of the statewide educational system, including adequate education standards, performance-based student achievement assessments, educator performance standards, school level assessments and penalties, staff development, early childhood programs, and guarantees of adequate instructional materials and appropriate facilities.


Campaign for Fiscal Equity, Inc. (CFE), a plaintiff in a fiscal equity reform case in the State of New York, is implementing a broad participation process, employing major components of the CED model to develop a remedy for the shortcomings of the present system. The group intends to do so through an intensive "dialogic process" based on a series of expanding deliberations.

CFE's present plan is to develop and test through a series of focus group discussions a number of potential reform options which will establish the initial agenda for the dialogic process. The reform options, together with appropriate explanatory materials, will then be presented to representatives of CFE's member groups at an intensive two-day conference to explore potential remedial options. Each member organization will be asked to send one or more delegates to this conference.

Drawing on the CED model, the conference will include a detailed briefing on the state aid formula, the litigation, and the range of remedial options to be considered. It will also provide an opportunity for small group discussion of the proposed options, led by trained facilitators, to promote maximum individual participation. Although the proposed options will constitute the starting point for the discussions, participants will be free to add any additional ideas they consider relevant. At the end of the conference, the group as a whole will reconvene in a plenary session and an attempt will be made to articulate a tentative working position on remedial directions.

After participating in the conference, each delegate will discuss with his or her constituent group both the working position and the goals and objectives of the dialogic process with appropriate support materials. After this deliberative process has taken place, CFE will convene one or more follow-up meetings and modify the working position in light of different organizations' concerns. If agreement cannot be reached on a remedial direction, a second conference will be organized to reconsider the policy options.

CFE's working position, which at this point may consist of two or three possible options or a single preferred option, will then be presented to a broad

253. CFE is a not-for-profit corporation whose membership consists of 14 of New York City's 32 community school boards and many of its education advocacy and parent organizations. The authors are the Executive Director and Deputy Director of CFE.

254. In June 1995, the New York Court of Appeals, in denying the State's motion to dismiss CFE v. New York, 655 N.E.2d 661 (N.Y. 1995), ruled that all children in the State of New York have a constitutional right to a "sound basic education." It remanded the case to the trial court to determine whether, as plaintiffs alleged, thousands of students in New York City are currently being denied an education that meets that standard.

255. The major difference between the CFE dialogic process and the CED model is that the authors, because of their positions with CFE, cannot claim to be neutral CDOs. Nevertheless, because neither they nor CFE are committed to any particular remedial approach and, in fact, their position is that to be effective, a fiscal equity remedy must emerge from a broad-based citizen participation process, the authors do expect to be able to maintain a high degree of objectivity in choosing participants and promoting balanced discussions, as would occur in the CED model.
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array of major education, advocacy, civic, business, labor, and other organizations from throughout New York City. These groups will then be invited to attend a second round of dialogic conferences. Careful attention will be given to ensure that there is appropriate representation of all racial, ethnic, religious, and other groups at this event.

At the end of this stage of the process, CFE expects to have developed a tentative working position on an appropriate reform proposal. The dialogic process will then be extended to the statewide level, through broad opinion surveys, discussion groups, and community forums. When these statewide encounters have been completed, the proposal for a reform initiative will be drafted in final form and presented to the court and/or the legislature for implementation. The specific remedial plan will include provisions for monitoring and re-evaluation, as called for by the CED model. If the process has successfully engaged educational opinion and interested stakeholders from throughout the State, the court should be favorably inclined toward adopting it, and to the extent that the remedy calls for specific action by the legislature, a political base will have been established which should minimize the likelihood of legislative opposition or obstruction.

CFE's proposed implementation of a variation of the CED model includes aspects of both the voluntary and the judicially-mandated CED approach. On the one hand, CFE, a community-based organization, has chosen to organize the deliberations on its own initiative and not as a result of a specific court order. On the other hand, the process is being conducted in order to devise a remedy for an ongoing lawsuit, and the incentive for many of the statewide participants to take part in the deliberations will undoubtedly stem from their expectation that since the court may issue a far reaching remedial order, their interests would best be served by having some input into its content. Furthermore, CFE expects that after the discussion phase is completed, this CED process will become a formal, court-directed enterprise, because the courts' continuing oversight will be critical to the successful implementation of any remedial plan.

IV. CONCLUSION

To avoid judicial intervention where possible, and to render it effective when necessary, this Article has proposed a new alternate dispute resolution approach: the Community Engagement Dialogic model. The CED process, which should be implemented with the assistance of a skilled community dialogue organizer, consists of six basic stages: participation; agenda setting; discussion; ratification; implementation; and evaluation/reconsideration. The model may be used by a court at the remedial stage of an institutional reform litigation, or by a school community on its own initiative, as a means of
dealing with developing controversies before they metamorphose into litigation. The potential advantages of the CED model were illustrated in the Article through discussions of controversies in three areas of current concern, namely sex education, special education inclusion, and fiscal equity reform.

On April 27th and 28th, 1995, a draft version of this Article was presented to a symposium at the Yale Law School. Participants in the symposium were a diverse group of five federal and state judges, educators, and two parents from across the country. They were joined by fifty Yale Law students, and a number of Yale University faculty.

Generally speaking, the symposium participants strongly endorsed the CED model. The parents and educators indicated that if the model had been operational and available, it could have resolved particular controversies in their communities. Most of the judges considered the model feasible and thought that it might have been helpful in particular education cases they have handled. Among the specific advantages of the CED model emphasized in the discussion and follow-up evaluation reports was that it is based on “simple notions of common sense,” it provides “a potent political alternative to school choice proposals,” and it has the potential to create a “new common school movement” premised on ideals of toleration and diversity.

While strongly endorsing the CED model, the symposium participants expressed a number of specific concerns about its implementation. These concerns largely revolved around four basic concepts: the role of the CDO; the relationship of the model to the school board; representational issues; and the limits of its applicability.

A. Role of the CDO

There was general agreement that the success or failure of a CED process in any particular situation would depend to a large extent upon the skills and effectiveness of the community dialogue organizer. The model expects the individual who fills this role to be neutral, objective, and knowledgeable about

256. Hon. Shirley Abrahamson, Wisconsin Supreme Court; Hon. Danny J. Boggs, U.S. Court of Appeals for the Sixth Circuit; Hon. Neal P. McCurn, United States District Court, Northern District of New York; Hon. Frank Thaxton, III, First Judicial District, Shreveport, Louisiana; Hon. Myron H. Thompson, United States District Court, Middle District, Alabama.

257. Mary Beth Fafard, Senior Associate Commissioner of Education Improvement, Massachusetts Department of Education; Waldemar Rojas, Superintendent of Schools, San Francisco, California; Mark C. Smith, Superintendent of Schools, Westfield, New Jersey; James A. Williams, Superintendent of Schools, Dayton, Ohio.

258. Willy Alphonso and Erica Zurer, both of whom were members of the New York City Chancellor’s HIV/AIDS advisory council.

259. In order to motivate a candid exchange of ideas, the rules of procedure for the symposium provided that no verbatim transcript would be made of the proceedings and that no individuals would be quoted directly in any future publication without their explicit permission. It was understood, however, that consensus positions and general conclusions emerging from the discussions, as well as representative, unattributed comments, would be reported.

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the issues, skilled in mediation techniques and sensitive to the specific community's politics and personalities. Do such people exist? And if they do, how can we be sure that they will be identified and appointed?

We believe that there is an available pool of people who are well qualified to serve as effective CDOs. As a result of the mushrooming use of alternative dispute mechanisms, thousands of individuals now have experience as mediators and facilitators.\(^2\) Growing use of mediation in areas like special education placement disputes has given many of these individuals specific experience with education issues.

Finding a skilled, experienced individual to serve as a CDO is less of a problem than assuring that the individual chosen is also perceived as neutral and objective by the entire community. Where a school board or superintendent initiates a voluntary CED process, there may be a tendency to sacrifice concerns about the perception of neutrality and choose a person with ties to the board or superintendent.\(^2\) The problem may be compounded by the fact that the CDO's prime initial task is to select the participants; in a sense, it might be said that she picks the community instead of the community picking her.

We suggest two possible protections to deal with this problem. First, in most instances, the CDO should be from outside the community with few, if any, direct ties to individuals or groups in the community. Second, the appointing authority should review the CDO's appointment prior to the commencement of the agenda setting stage, and consider the substitution of another individual if the participants or other community groups have raised substantial questions about the CDO's competence or objectivity.

B. Relationship to the School Board

Several participants thought that the relationship of the CED model to the local school board was ambiguous. Is the CED approach intended to be a model of how a school board should function? Is it intended to revive or replace the local board?

There is no definitive answer to these questions. The CED model's relationship to the local school board will vary substantially from case to case. Where a CED approach is judicially mandated, it is likely that the CED process will, in essence, supplant school board decision-making on the

\(^2\) The Martindale-Hubbell Dispute Resolution Directory (1995) has approximately 2,000 pages of listings of individuals and firms who are dispute resolution practitioners, a number of whom specifically list "education" as a specialty area. Most, but not all, of these practitioners are attorneys. Moreover, nearly 16 states have established dispute resolution offices charged with working with individuals in a large number of different contexts to successfully resolve disputes using ADR techniques. See Allen J. Zerkin, From the Chair, NEW YORK STATE FORUM ON CONFLICTS AND CONSENSUS (1994).

\(^2\) With a judicially mandated CED process, the selection of a neutral CDO probably would be the norm since a judge would have no reason to make any other kind of selection.
particular issue, especially where school boards have proved recalcitrant in protecting individuals’ constitutional rights. In a voluntarily initiated CED setting, by way of contrast, the school board is more likely to incorporate some or all of the CED approach into its standard decision-making procedures. In these situations, the CED model might help school boards minimize factionalism, promote broad community involvement and function as an effective “policy board.”

C. Representational Issues

The essence of the CED process, most participants agreed, is its emphasis on broad, equitable participation. However, while lauding this focus, some questioned the feasibility of its full realization. Will it be possible to include, either directly or indirectly, the full range of opinion in a community? How is the CDO to identify individuals who can represent the subtle range of opinion that exists within many community organizations? Will representatives of all racial, ethnic, or cultural groups be willing or able to step forward? How will turnover among the original participants affect the constituent groups’ continuing commitment to the process and its acceptance of modifications and revisions?

Each of these concerns is significant. Although a conscientious CDO should be able to avoid or minimize them, the representational process may be marred by an inability to overcome one or more of these problems. The CED model's shortfall from perfection in this regard, however, is not a reason for rejecting the entire model. From a comparative perspective, the CED approach, by striving to attain a very high level of broad and equitable participation, is likely to come closer to the mark than other decision-making models that do not aspire to such a representational ideal.

Of course, full participation can occur in small communities where the individuals or groups who should be included are easily identified and can be brought directly into the process. In larger school districts, or with statewide issues like fiscal equity reform, subgrouping and representational processes will be a necessity. To make these mechanisms work effectively, the CED process may need to be buttressed, as in the CFE dialogic process being implemented currently in New York State, by well-conceived opinion polling, focus groups, and public education/media campaigns. Such techniques, if used, must be pursued in an open, accountable manner.

262. A successful experience with a CED process in the remedial stage of a litigation may motivate a school board which was a defendant in that case to initiate voluntarily a CED process to resolve other community controversies.
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D. Limits to Applicability

Although convinced that the CED process would work well in many situations, several of the conference participants thought that it would not prove feasible in certain settings. Specifically, several participants opined that the CED process might not be able to resolve entrenched racial or religious conflicts. As one participant put it, “What business do racists have discussing the most effective means of implementing desegregation orders?” Or, as another noted, how can you bring the “community” together in a situation where no “community” in fact exists? A related concern was that the process might raise expectations that could not be realized, leading to greater frustration and disillusionment.

We do acknowledge that the core issues involved in desegregation and religious controversies are not appropriate agenda items for a CED process. Racial segregation and prayer in the schools, after all, have been declared unconstitutional by the Supreme Court. These definitive constitutional rights cannot be questioned in a community dialogue. Nevertheless, useful discussions can be held on procedures for insuring their implementation. Common working positions may be attainable on these implementation issues if all the participants accept the fact that, whether or not they agree with the constitutional principles involved, they will all have to live with them.

There will, however, be some circumstances in which a CED process simply will not work. No model can function as a panacea for all problems for all educational communities. For example, effective dialogue could not occur in a situation where some key stakeholders adamantly refuse to accept the legitimacy of an unambiguous constitutional principle, no matter how it is implemented. We do believe, however, that the CED model can be effective in a broad range of situations—and in more situations than many skeptics would expect. Although confrontational desegregation and religious issues present the greatest challenges to the CED approach, we are convinced that the model can be effective in some, although not all, of these situations.

The only way to know for sure how effective the CED model can be is to field test it in a variety of contexts. The consensus of the participants at the Yale symposium was that the proposal for the CED model has advanced thinking on communal involvement in educational policy making. The further challenge then is to demonstrate that the model can also advance communal decision-making and resolve important controversies in actual practice. As indicated in the previous section, the authors of this Article, who are currently involved in implementing a dialogic process using a variation of the CED model to develop a remedy for fiscal inequities in the State of New York, have accepted that challenge. We also hope that dissemination of information about the CED process will motivate other communities and courts to pilot test the
full CED model, or variations of it as appropriate, in a variety of settings. Based on these empirical experiences, we hope to reconsider and further develop the CED model in a subsequent publication.