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CREID BRIEFING 23

Dispute Resolution and Avoidance in Special and Additional Support Needs in England and Scotland (RES-062-23-0803)

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Summary of findings

Government policy is to encourage the use of 'proportionate' methods for resolving citizen v state disagreements, particularly alternatives to courts and tribunals, such as mediation. These alternatives are depicted in policy documents as less stressful for participants, quicker and more cost effective. In the field of special and additional support needs, parents have a right to select either mediation or an appeal, or both processes, to resolve their dispute. In Scotland only, there is also a separate process known as adjudication. It was found that professionals in both countries regarded mediation services more positively than tribunals, perceiving the former as less adversarial. However, local authorities resented having to fund the services and they were not well publicised. Parents, often influenced by advisers or peers, were sceptical about the value of mediation, questioning its independence and the extent to which agreements would be honoured. As a result, particularly in England, they were much more likely to make a tribunal appeal, since they believed that, although the process might be stressful, it offered a better chance of achieving their desired outcome. Professionals, contrastingly, particularly in Scotland, saw the tribunal as biased in favour of parents, insufficiently responsive to local authority resourcing dilemmas and stressful for all. Overall, independent mediation (and adjudication in Scotland) have not been as successful as the Government hoped in both jurisdictions, partly because of a lack of promotion by local authorities, but also because of parents' doubts about the ability of alternative dispute resolution methods to deliver justice and because of the role played by informal negotiation in achieving a settlement.

Aims and objectives

The project's overall aim was to examine how local authorities are attempting to avoid and resolve disputes in the field of special educational needs (SEN) in England and additional support needs (ASN) in Scotland, to assess the effectiveness of the approaches they are using and to consider the extent to which the underlying policy objectives are achievable.

The objectives were:

- To identify the strategies used at school and local authority level to avoid disputes arising in the first place, and to assess the effectiveness of these strategies.
- To identify the types of alternative dispute resolution (ADR) services available in England and Scotland, the number of cases dealt with through ADR in specific local authorities and the ways in which different dispute resolution mechanisms (e.g. mediation, conciliation, adjudication) are experienced by different actors (parents, local authority officers, children).
- To assess whether there is evidence indicating that the development of ADR has reduced the number of cases referred to court or tribunal.
- To identify the circumstances which lead parents to bypass ADR and seek redress through a court or tribunal.
- To consider the implications for procedural justice of the new emphasis on dispute avoidance and resolution via non-traditional forms of legal redress.

Methods

An analysis of official statistics and a literature review were conducted, published as Working Papers 1 and 2 on the project web-site (www.creid.ed.ac.uk). Forty-nine key informant interviews with professionals and other stakeholders in England and Scotland (Working Paper 3), intended to assess perceptions of the nature of SEN/ASN disputes and the effectiveness of the different dispute resolution mechanisms. Interviews were recorded and transcribed. A thematic analysis was conducted.

A questionnaire survey was administered to the relevant officer in all 150 English and 32 Scottish local authorities (reminders were sent where needed). Responses totalled 27 in Scotland (84% response rate) and 60 in England (40% response rate). Results were summarised in Working Papers 5 and 6. This questionnaire included both open and closed questions. Quantitative data were analysed in SPSS and a thematic analysis of the qualitative data was conducted. Topics covered included the nature of disputes and the strategies and methods used to avoid and resolve them; trends in disputes; views and experiences of the various dispute resolution mechanisms; and the categories of parents, if any, who might be particularly disadvantaged by mediation or tribunal. In England only, a survey was administered to all 148 Parent Partnership (PP) Services, and a 56% response rate was achieved. In Scotland only, a questionnaire was distributed to 750 parents of children with ASN via three organisations: Enquire (the national advice and information service for ASN in Scotland), ISEA (Independent Special Education Advice, a voluntary sector advocacy organisation) and the Scottish Dyslexia Association. There was a 24% response rate, partly because questionnaires were sent to professionals on the organisations' databases as well as parents. Finally, forty nine case studies of individual SEN/ASN disputes were conducted in six local authorities (three in England, three in Scotland). The local authorities were selected having regard to the proportion of children with statements of special educational needs or Co-ordinated Support Plans and the volume of appeals. Other aspects of the sampling frame included geographical location and SES. In both England and Scotland, we finally selected a rural authority, a mixed urban/rural authority and a city authority.

In both England and Scotland, families were contacted via the local authority. In Scotland only, parents who completed the questionnaire were asked if they would be willing to undertake a further interview, thereby providing an additional contact point. The parent sample reflected the pattern of dispute resolution in each authority, for example, informal negotiation was common in some, whereas appeals to tribunal were prevalent in some others. Case selection also reflected diversity with regard to parental SES and characteristics of the child including their age and the nature of their difficulties.

In each case study the parent(s) and, with permission, others involved, e.g. teacher, educational psychologist, PP officer, advocacy worker or mediator, were interviewed. With parents' permission, documentary evidence was also gathered, e.g. a copy of the statement of special educational needs, records of meetings and assessment reports. Parental consent was sought to interview the child, but in all cases parents thought that an interview was not appropriate and refused. In practice the child was scarcely ever actively involved in any of the dispute resolution mechanisms. Each case study was written up and summarised.

The main research findings

Dispute trends

We found evidence that the number of SEN and ASN disputes has been increasing over the past few years, although the subject matter of dispute is unchanged: school placement, refusals to assess and educational provision at school remain the dominant issues.

Mediation

There are no national figures on SEN or ASN mediation. In England 55 local authorities supplied us with data. In total only 58 mediations occurred in 2007-08, an average of little more than one mediation per authority, compared to an average (based on national statistics) of approximately eight appeal hearings per authority. More than half of authorities (60%) reported *no* mediations that year. In Scotland, three-quarters of all authorities reported fewer than five mediations each. A few individual mediation providers have expressed surprise at our results and say that their statistics suggest rather more mediations. Even so, the general picture is that the number of disputes in which mediation is used is very small.

Several factors lie behind the sparse use of mediation:

- *Many local authorities or schools publicise or promote mediation poorly. Consequently, many parents are unaware of it.* Some authorities think that direct negotiation can achieve as much as mediation or that a case will progress to the tribunal anyway. They also cite: pressure on staff time; the cost of mediation, particularly where the authority pays per mediation case; and the lack of a specialist officer to filter cases and identify ones where mediation might help the authority.
- *Some local authorities refuse to participate in mediation in individual cases.* One in seven of the English local authorities reported that this has happened in at least one case. The main reason is doubt about achieving a settlement. Entering mediation is not compulsory.
- *Some parents doubt the value of mediation because their previous dealings with the authority suggest that officers are unlikely to be sympathetic and willing to compromise.*
- *Parents' advisers and representatives and other parents may convey negative views of the process, which influence the parents* (see [Case Study 1](#) below).
- *Some parents are so committed to following the appeal route that they have no interest in mediation.* Also, some parents think that they will 'show their cards' by participating in mediation, thereby prejudicing their chances of success at the tribunal.

Notwithstanding this picture, there were strong views that, where it occurs, mediation brings the claimed-for advantages noted earlier in addition to being less stressful to parents than using the tribunal. While some parents appear to have concerns about how fairly mediation will operate, they tend to be satisfied by what occurs in practice. Professionals indicated that mediation was particularly useful where relationships between schools or authorities and parents had broken down or the dispute was deadlocked. However, a willingness to compromise was essential (c.f. [Case Study 2](#) below).

Mediation was nevertheless seen as having drawbacks: settlements are not binding; there is a greater risk that rights will not be safeguarded, with 22% of parent partnership officers reporting at least one case where they considered the mediated settlement provided less to the parent than was realistically possible; key people sometimes do not attend; the process does not facilitate the participation of the child; and mediation may not counter the inherent social disadvantages experienced by some groups.

There is a theoretical concern that mediation may place parents at a disadvantage due to an imbalance of power and the 'private' nature of the process. However, our local authority and parent partnership respondents in England mostly considered that mediation was equally fair to both parties. In particular, it allows each to express their opinion and be listened to and enables the issues to be explored non-confrontationally. However, a minority view was that parents are disadvantaged due to a lack of skills, experience or understanding.

Adjudication

This method of dispute resolution exists in Scotland only. It has been little used (only about twelve cases reported by local authorities in 2006-07). However, a law centre respondent described it as potentially very powerful, the 'sleeping giant' of the dispute resolution system. It is available to all parents irrespective of whether or not their child meets the criteria for a Co-ordinated Support Plan (CSP) and cases referred for adjudication are automatically reviewed by a senior local authority officer, often leading to an early resolution of the dispute. Downsides include the fact that a local authority is not obliged to appoint an adjudicator when requested, and is also not legally obliged to implement the adjudicator's recommendations.

The tribunal

The tribunal in England – formerly the Special Educational Needs and Disability Tribunal (SENDIST), now the First-tier Tribunal (Health, Education and Social Care Chamber) (HESC) – has enjoyed a good reputation among professionals and academics for its fairness and expertise, whilst the Additional Support Needs Tribunals for Scotland (ASNTS) have not been running for a sufficient length of time to be fully evaluated. In both countries, the tribunals' independence was repeatedly referred to by our interviewees. There is other evidence that in general parents are satisfied with the tribunal ([Penfold et al., 2009](#)). However, there have been concerns about inherent formality and legalism. The Lamb Review ([DCSF, 2009](#)) found that 'many parents are finding appeals too difficult and complex and feel unable to pursue their claim without legal support', recommending legal aid exceptional funding to support representation. Many stakeholders told us that the appeal process was rather adversarial and stressful for the parties as compared with mediation. Parent partnership officers highlighted parents' lack of prior experience and the difficulty in preparing their case and raised similar concerns to Lamb (see, e.g. [Case Study 1](#) below). However, other research confirms parents' impression that despite the difficulty and stress that preparation involves, attendance at the hearing itself is a good experience.

Local authorities tended to hold negative views of the tribunal. In England, almost half of them did not think that the tribunal made a positive contribution to dispute resolution. They did not object to the right of appeal per se, but they believed that it encouraged parental challenges to decisions or intensified disputes. They regarded the process as irksome and likely to go against them. Some thought that the tribunal was overly generous towards parents in the degree of procedural flexibility it allowed them, for example regarding time

limits, and in helping some secure a high level of resources for their child, skewing resource allocation. In Scotland, there were concerns about the tribunal's rather adversarial hearing and variable approach.

Only one-third of appeals that are lodged reach a hearing. Many of those that fail to progress to that stage are settled/withdrawn at the last minute. The Higher Education and Social Care Chamber (HESC), where the English SEN Tribunal is now located, is concerned about the resultant inefficiencies. Voluntary organisations argued that often local authorities capitulate only at the eleventh hour. We found examples of this in three of our English case studies. There was support from several quarters for building mediation into the tribunal process itself, which might help to reduce the number of last minute settlements.

Although the tribunal's decision is binding, there was evidence that local authorities sometimes fail to implement it or simply delay implementation. Voluntary sector interviewees explained that one reason that local authorities do not mind the relative slowness of the appeal process was because it may delay the need to commit resources if the parents succeed.

Assistance for parents

Various sources of advice and representation are available to parents in England and Scotland but provision is patchy. In Scotland, assistance for parents is not strong. Use of representation by parents (mostly by ISEA, a voluntary body) is much less prevalent than in England whereas the opposite is true where representation of local authorities is concerned. Authority websites rarely inform parents about Enquire, a specialist publicly funded national advice and information service. Specialist voluntary bodies are active in advising parents, but independent advocacy services are very thin on the ground. Local authorities have a statutory duty to comply with a parent or young person's wish to have an advocate for discussions with or representations to an authority, but they are not obliged to provide or pay for such services. However, 2009 legislation has placed Scottish Ministers under a duty to secure provision without charge of an advocacy service in connection with tribunal proceedings.

In England, representation at appeal hearings is better established. Tribunal statistics for 2007/08 show that 22% of parents had legal representation compared to 17% of local authorities (up from 10% in 2006-07). A further 25% of parents had non-legal representation. Parent partnership (PP) services are also an important source of information and advice for parents in England, although not all parents use them. However, a sizeable minority of PP officers do not attend mediations or tribunals, and certainly not as a representative, nor do they normally prepare appeal documentation. Parents do however benefit from information provided by the tribunal itself. Voluntary organisations play a key support role in England, despite their variable level of resources and expertise. They are often very instrumental in the parent's choice of dispute resolution mechanism.

Case Study 1 - 'Amelia M' (Scotland)

Amelia was diagnosed with Asperger's Syndrome when at primary school. Her mother, Mrs M, did not want her to be bullied at secondary school and was concerned generally about her, so she requested a CSP assessment. When the local authority refused she made a reference to the ASNT. She was assisted by a voluntary organization, ISEA

(Independent Special Education Advice). Concerning her choice of dispute resolution mechanism, she said:

We could have gone via the mediation service but we talked to parents who'd really advised us that you get nowhere, they're just a way of placating parents... [W]e wanted to go straight ahead with the appeal.

The educational psychologist thought that if the local authority had been more communicative the appeal might have been avoided. Mrs M regarded the tribunal as friendly at one level, but like a court on another, where words could be twisted. She said that having to put her case and respond to questions was challenging:

[T]here's all these professionals...I'm a nurse myself and you just feel overwhelmed ... I felt if I'd got more knowledge I might have done better because it was like a minefield, you didn't know, it's like being in a court.

Mrs M lost her appeal but was later satisfied that the local authority wanted to ensure the success of Amelia's mainstream secondary school placement.

Case study 2 - 'David B' (England)

David B, aged 12, had dyslexia, dyspraxia and possibly Autism. The local authority refused to assess him, but the parents successfully appealed to SENDIST. However, the parents were not happy with the subsequent statement of SEN and the school provision made for David. They had meetings with the school and were promised action but none materialized. They went to mediation twice. The first resulted in a compromise involving the parents keeping the school informed about David's condition and the authority carrying out a further assessment. Subsequently there was a falling out. The second attempt at mediation failed because Mr B considered the school to be unwilling to negotiate and walked out.

Eventually the parents received independent advice that David's statement might be unlawful. They also thought that they could get an independent school placement. They arranged for a number of private reports with a full diagnosis of David's problems. They again won an appeal. David started at the independent school. In the light of his experience Mr B would not use mediation again. He said that mediation agreements were not binding; the school reneged; mediation was a 'waste of time'. However, the process seemed to be working, according to the mediator, who was 'surprised that things did not work out'.

Academic outputs

Book

Harris, N., & Riddell, S. (2011). *Resolving Disputes about Educational Provision: A Comparative Perspective on Special Educational Needs*. London: Ashgate.

Published papers

Riddell, S., Harris, N., Smith, E. and Weedon, E. (2010) Dispute resolution in additional and special educational needs: local authority perspectives, *Journal of Education Policy*, 25, (1), 55-71

Harris, N., & Smith, E. (2009). Resolving Disputes about Special Educational Needs and Provision in England. *Education Law Journal*, 10(2), 113-132.

Riddell, S. (2009). Social justice, equality and inclusion in Scottish education. *Discourse*, 30(3), 283-297.

Riddell, S., & Weedon, E. (2009). Approaches to dispute resolution in additional support needs in Scotland. *European Journal of Special Needs Education*, 24(4), 355-369.

Weedon, E., & Riddell, S. (2009). Additional support needs and approaches to dispute resolution: the perspectives of Scottish parents. *Scottish Educational Review*, 41(12), 62-81.

Papers accepted for publication

Riddell, S., & Weedon, E. (2010). Reforming special education in Scotland: Tensions between professionalism and rights. *Cambridge Journal of Education*, 40(2), 113-130.

Riddell, S., Stead, J., Weedon, E., & Wright, K. (2011). Additional support needs and social justice in Scotland. *International Studies in Sociology of Education*, 20(3), 179-199. DOI: [10.1080/09620214.2010.516106](https://doi.org/10.1080/09620214.2010.516106)

Policy and practitioner-focused outputs

Harris, N., & Riddell, S. (2010). Is Mediation in Need of Promotion? *Tribunals Journal*, Spring, 1-4. Retrieved from http://www.docs.hss.ed.ac.uk/education/creid/Projects/16xv_ESRC_Pub_MedPromo_nhsr.pdf

A summary of our research was published in the journal ADR Now, which is aimed at professional mediators: http://www.adrnow.org.uk/go/SubSection_38.html

Note: Parts of this briefing were previously published in Harris, N. and Riddell, S. (2010) [Is Mediation in Need of Promotion?](#) *Tribunals Journal*, Spring, 1-4.

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Penfold, C., Cleghorn, N., Tennant, R., Palmer I., & Read, J. (2009). *Parental confidence in the Special Educational Needs Assessment, Statementing and Tribunal System* DCSF-RR117. London: DCSF. Retrieved at <http://www.dcsf.gov.uk/research/data/uploadfiles/DCSF-RR117.pdf>

DCSF. (2009). *The Lamb Inquiry: Special educational needs and parental confidence*. Retrieved at <http://publications.dcsf.gov.uk/eOrderingDownload/01143-2009DOM-EN.pdf>

Further information

Further information about the project is available from Professor Sheila Riddell, CREID, Moray House School of Education, University of Edinburgh, Holyrood Road, Edinburgh EH8 8AQ, sheila.riddell@ed.ac.uk. All publications and information about this project are available at <http://bit.ly/CREID-project-dispute-res>

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