

# 'AUTHORS OF THEIR OWN LIFE STORIES'

CHILDREN WITH SPECIAL EDUCATIONAL NEEDS  
AND THEIR NEW STATUTORY RIGHTS IN ENGLAND

Neville Harris and Gail Davidge

<http://bit.ly/CREID-seminar-autonomy-rights-sen-children>

# Background: to a new vision(?)

- Children and young people to be given 'greater control... to make them authors of their own life stories' (Department for Education (DfE) 2012).
- New framework of rights for children and young people (CYP) with special educational needs and disabilities (SEND): Children and Families Act 2014.
- Education system has in general been slow to acknowledge CYP as independent actors. Tendency to give primacy to parental (consumer) rights. Child as 'object of a legally recognised relationship between the school and the child's parents rather than the subject of ... rights in education' (UN Rapporteur).

# Advancement of children's rights

- UK full party to the UN Convention on the Rights of the Child (CRC) and the UN Convention on the Rights of Persons with Disabilities (CRPD).
- Art.12 is 'linchpin' of CRC (Freeman). Child capable of forming own views has 'right to express those views freely in all matters affecting the child, the views...being given due weight in accordance with the age and maturity of the child'. Article 12 applies equally to those with/without disabilities.
- CRPD Art 7.3 – parallels Art.12 CRC and requires assistance to be given.
- Cttee RC General Comment No.12 – presumption of child's capacity.
- Cttee on RC General Comment No.9 – participation in policy making forums. Training of professionals on child participation.
- UN Cttee RC finds 'little progress in enshrining article 12 in education law and policy' in UK (2008).
- Govt 2010: will give 'due consideration to the UNCRC when making new policy and legislation'. Will consider the Cttee on RC's recommendations.
- Parliamentary JC on Human Rights (JCHR): authorities should be placed under duty to have regard to children's rights, as in Wales and Scotland.
- JCHR: Dept for Education has better children's rights record than other departments. Legislation covered by CRC impact statements.

# SEND and CYP participation

- SEND traditionally strongest area of education for recognition of CYP rights.
- *SEN Code* (2001) entire chapter on 'pupil participation' – 'about the right of children with [SEN] to be involved in making decisions and exercising choices'. Code not legally binding.
- Government proposals on SEN reform (*Support and Aspiration*, 2011) – little on CYP autonomy apart from dispute resolution.
- Launch of 20 Pathfinders (2011-2013 and 2013-2014), to test out reform principles including CYP engagement.
- Children and Families Bill – key principle to 'place the views and interests of children and young people at the heart of decision making'.
- Evidence from Pathfinders: CYP involvement at a low level; improving picture, but CYP participation sub-optimal.

# CHILDREN AND FAMILIES ACT 2014

## PART 3

- Retains definition of 'special educational needs' as 'learning difficulty or disability' calling for special ed. provision. [Children with SEN 14.4% of school pop. 2017](#)
- Assessment and support on more integrated basis (ed., health and care needs).
- CYP with needs requiring support from outside school's own resources to have an 'education, health and care plan' (EHCP). [2.8% of school pop. have EHCP \(2017\)](#)
- Age range covered by SEN legislation extended from 0-18/19 to 0-24. Legal distinction between children (0-15) and young people (16-24).
- CYP rights concern both individual and collective participation.
- Young people as independent actors contingent on 'capacity', as defined.
- Pivotal duty on LAs to have regard to CYP views, wishes and feelings and maximum participation; and the importance of providing info and support.
- Information and advice/support for parents and young people.
- The 'local offer' as an information gateway for provision.
- Personal budgets.
- Mediation promoted but appeal rights continue.

# CYP rights under Part 3 of the CFA 2014

<b>CYP participation: general</b>	LA to have regard to CYP engagement and support.
<b>Opportunity to be heard on local provision and 'local offer'</b>	LA to consult with CYP when keeping SEN provision and local offer under review.
<b>Right to advice and information</b>	Advice and information re SEN for CYP and parents.
<b>Request a needs (re)assessment</b>	YP have this right; must receive reasons.
<b>Right to be consulted over LA assessment decision</b>	YP to be consulted if LA minded to assess or school requests assessment; LA to take account of CYP's views.
<b>Rights in the assessment process</b>	CYP to be consulted; views, wishes, feelings taken into a/c; IAS for YP if necessary; YP notified of EHCP decision.
<b>Rights regarding content of EHCP</b>	YP to be consulted; right to make representations and request school naming; 'views, interests and aspirations' in EHCP.
<b>Rights regarding a cessation of EHCP</b>	YP to be consulted over it and notified of decision.
<b>Personal budget and direct payment</b>	If there is EHCP, the YP has right to have a personal budget prepared; they may also give consent to direct payment.
<b>Right of appeal (to First-tier Tribunal)</b>	YP appeal right (specific grounds); must be informed of it.
<b>Mediation</b>	YP to be informed of it. Can participate. C may attend with consent. Mediator: reasonable steps to ascertain C's views
<b>Resolution of disagreements</b>	YP (or child's parents) to be informed of these services.

# The ESRC project in England

- Online survey of all 152 local authorities (LAs)
- 56 LA responses (37%)
- 20 Key informant interviews
- 24 CYP case studies across 3 socio-economically representative local authority areas. (Work in progress.)

# Local arrangements and implementation

- Need for appropriate structures and cultural awareness for proper implementation of CYP rights on the ground.
- Only half of LAs have an official with CYP SEND participation responsibilities.
- In most LAs there has been some training on CYP SEND participation, in-house or commissioned.
- LAs report need for investment of considerable time and resources to support SEND CYP engagement.
- But almost all LAs report substantially increased workload for staff due to implementation of 2014 Act as a whole.

# Supporting CYP engagement in strategic decision-making

- Area of change compared with previous law and policy.
- Two-thirds of respondent LAs always consult with YP over local offer and local provision.
- LAs positive about benefits of consultation.
- LAs also claim responsiveness to CYP feedback.
- DfE monitoring indicates CYP engagement 'moderate' only, particularly among children.
- One-fifth of LAs and just over half of Parent Carer Forums report children's engagement poor or non-existent.

# Supporting CYP participation in EHC assessment and planning processes

- Thom et al (2015) and Adams et al (2017) for DfE reveal mixed but reasonably favourable picture of LA attempts to support CYP engagement.
- Actual participation levels less favourable: DfE Parent Carer Forum survey (2018): nearly 30% reported poor/non-existent child participation (21% iYP).
- Our respondent LAs report mostly consulting with YP about assessment, unless deemed to lack capacity.
- Mostly, YP views are presented, but fewer YP submit evidence.
- LAs do not always provide IAS to YP regarding assessment.
- YP tend not to request naming of school in EHCP. Parents tend to be involved.
- In assessment and planning most LAs will seek to ascertain child's view.
- LAs claim to attach considerable weight to YPs' views and always or usually to take a child's view into account.
- LAs: child's/young person's own views? Many YP prefer parents to decide.
- Ofsted: parents & CYP insufficiently engaged in EHC planning/reviewing.
- Few YPs request a personal budget.

# Participation in disagreement resolution, appeals and mediation

- DR, mediation and appeals are separate processes.
- Disability discrimination claim separate avenue.
- YP now hold redress rights independently: 2014 Act.
- Cullen et al (2017) and Walsh (2017) - barriers and problems.
- Lack of understanding of processes: Adams et al 2017.

## *ESRC survey*

### ■ *DR*

YPs rarely utilise it (not always informed of it)

### ■ *Mediation*

Most LAs have very few (or no) mediation requests from YP; YP do get offer of advocacy support; YP tend not to exercise right to speak.

### ■ *Appeals*

55% of LAs had had no appeals by YP in past year, 35% had had only 1-2 cases; a majority of LAs experienced difficulties in ensuring child's views are before the tribunal – lack of parental consent, question over whether parent presenting child's actual view, uncertainty over capacity of child; child's direct participation rare.

# Conclusion

- Incorporation of rights framework in the 2014 Act constitutes a significant advance in recognition of rights of CYP in SEND field.
- However, research evidence reveals uneven realisation of the new CYP rights in practice in England.
- CYP participation in EHC assessment and planning are significantly sub-optimal.
- LAs are very supportive in principle of the new rights framework.
- LAs' time/resources constraints are significant barriers in the current context of change and transition.
- More professional support and training needed by LA staff: recent DfE contract with CDC hopeful sign.
- Improvement in IAS for CYP needed to support autonomy: recent CDC contract £20m.
- Qs of capacity and how it's judged are problematic.
- Parents' agency – how to manage it, resolve parent/CYP conflict and ensure CYP autonomy.