

A Place at the Table:

Young people's participation in resolving disputes about special educational needs and disabilities in England



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Transforming children's rights? Dilemmas, challenges and implementation

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About the A Place at the Table project

- Origins of the project – practitioner concerns and administrative justice concerns
- Small-scale ‘knowledge exchange’ project – gathering perspectives and experiences, identifying issues and practical next steps
- Focus on England and on 16-25-year-olds as ‘rights holders’ – but with learning for and from other jurisdictions
- Focus on mediation as specific area of concern about decision-making roles – but with learning for and from tribunals and ombuds
- Roundtable discussion (June 2018) and report (August 2018)
- Final report (spring 2019)

Emerging findings

- Young people are not exercising their rights on SEND decision-making.
- Participation is both a source of anxiety and a means of empowerment.
- Parents face a significant role change as children become rights holders.
- The legal concept of mental capacity is not well understood in SEND.
- Addressing barriers may require a shift in culture and in political will.
- Insufficient data are collected by mediation providers and SEND Tribunal.
- Mediators could do more to engage with young people.
- Guidance on dispute resolution should be co-produced with young people.

‘Anecdote rich, but data poor’

- SEND data gap even more pronounced when looking at participation by children and young people in resolving SEND disputes.
- No data collected on this from mediation providers or the SEND Tribunal.
- No data collected on mediation involvement of looked-after children and young people.
- 8% of mediations in 2017 had a child or young person attending – but this does not tell us whether or how they participated.
- 13% of appeals registered in 2017-18 involved a young person aged 16 or older – but this does not tell us whether or how they participated.

Uncomfortable questions

'A key question in determining the level of a child's participation is its purpose.'

(The Voice of the Child guidelines for mediators, Shropshire Mediation, 2004)

Is young people's participation in SEND mediation beneficial, and if so to whom?

Is an approach to SEND disputes based on rights of individual young people appropriate?

Is a misunderstanding of 'mental capacity' limiting opportunities for young people to participate in decision-making on these disputes?

Background 1: Mediation in the SEND Framework in England

Part of SEND Framework since 2001, but new elements introduced by Children and Families Act 2014 include:

- A requirement for parent/young person to consider mediation before lodging appeal in SEND Tribunal – Mediation Information and Advice Session.
- New element of compulsion – LAs required to mediate if parent/young person opts to.
- LA must send rep with decision-making authority.
- LAs must provide information on mediation and pay for mediation.
- Mediation provision must be independent of LAs.
- Mediators must have knowledge of SEND legislation.

SEND mediation overview

- Increase from 75 SEND mediations in 2014 to 2,497 in 2017 (compared with 2,298 SEND Tribunal decisions in 2017-18). One-quarter are followed by appeals to SEND Tribunal (others may have gone to appeal in 2018).
- 5-6 regional providers of SEND mediation across England. One, KIDS, works with approximately one-third of English local authorities; other large providers but many are very small. Models work differently across England.
- First SEND Mediator Practice Standards published in Sept 2018.

Background 2 – Nature of ‘disputes’

Polycentricity – LA and school, family and school, parent and young person, parent and other parents – often overlapping

- Parent/YP v School – SEND Support, exclusions, communication, access to activities
- Parent/YP v LA – EHC needs assessments, EHCPs, placement; also delays, communication, transport
- LA v CCG, Social Care – involvement, provision, funding
- School v LA – funding, support, admissions
- Parent v YP – staying in education, placement, transport

Why mediation is of particular interest

- Steep increase in numbers of SEND mediations in England since 2014
- Distinctiveness of parties' decision-making role in mediation
- Ability to adapt and accommodate polycentricity of disputes
- Recent development of practice standards in SEND mediation
- Confidentiality of process raises issues of scrutiny
- Lack of published data
- Unmet potential for greater learning across mediation, ombud, tribunal

Mediation principles

- Parties are responsible for decision-making.
- Child/young person is the focus.
- Mediator must know SEND legislation and guidance.
- Mediation must be independent of LA and school.
- Discussion is confidential – if parties want this.
- Outcome is not confidential.
- Does not affect right to appeal.
- Outcomes include definitive decisions (eg to issue an EHCP), 'next steps', further information, meetings, communication issues.

Mediation approaches to 'voice of the child'

'Welfare' approach

- To enable the child or young person to provide information to decision-makers (parents, local authority, tribunal)

'Citizenship' approach

- To facilitate the child or young person's involvement in decision-making as a rights holder

'Child-focused' approach

- To include the voice, views and wishes of the child or young person

'Child-inclusive' approach

- To facilitate the child or young person's direct contribution of views and wishes in mediation

Risks of participation in mediation

- Perception that LAs prioritise young person's views over parents as a way to reduce costs
- Potential conflict between parents and young person leading to damage to relationship and trust
- Concern that a young person who is able to participate has less need of support
- Silence taken as consent
- 'Any one participant's capacity for participation has a ripple effect on all participants.' (Mueller 2007)
- Unavailability of independent advocacy

Mental capacity issues in mediation

- A presumption of capacity under the Mental Capacity Act
- But in SEND, a tendency to leapfrog straight to 'best interests'
- Approach reflects welfare approach of mediation
- Deemed to lack capacity because of not having decision-making experience
- Assessment can cause delays that threaten the statutory timeframe
- Parents' concern that young person's voice is separated from theirs
- Capacity is about a single decision, but voice is not a one-off event.
- Capacity is 'binary' (either have capacity to make a decision or not), but 'a person's understanding is a matter of degree' (Lindsey 2018).

Exploring alternatives

- ‘Legal capability’ (Watkins, Parle):
 - ‘Legal’ capacity is different from mental capacity. The law is relevant to the lives of children and young people at whatever age, and reliance on others does not imply a lack of capacity or capability but is instead a key element of it.
- ‘Relational capability’ (Herring):
 - Rights and interests are best promoted in the context of healthy, caring relationships. Decisions that consider only the young person’s interests would not in fact be promoting that young person’s well-being or welfare.
- Capabilities approach (MacAllister, Terzi):
 - Helps to overcome the antagonism between the social model and the medical model of disability. A revised concept of autonomy incorporates interdependency, relationships and care of others.

Further work

- Improving the data infrastructure
- Co-producing guidance for mediators and tribunal
- Exploring alternatives to ‘mental capacity’

Also:

- School complaints about SEND Support (and informal exclusions) are a major gap in administrative justice. Research needed to make the case for return of schools jurisdiction to the LGSCO?

UK Administrative Justice Institute

- A UK-wide network of researchers, practitioners, policy-makers
- Based at the University of Essex
- Blog and research resources on website: www.ukaji.org

