



# **SPECIAL EDUCATIONAL NEEDS (ENGLAND) AND ADDITIONAL SUPPORT NEEDS (SCOTLAND) DISPUTE RESOLUTION PROJECT**

## **Working Paper 1:**

### **LITERATURE REVIEW**

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**PART 1**  
***INTRODUCTION: THE BROAD CONCEPTUAL  
LOCATION OF THE STUDY***

This project aims to assess the role and effectiveness of early and alternative dispute resolution (ADR) in one of the most conflict-producing areas of educational provision and decision making - special educational needs (SEN) in England or additional support needs (ASN) in Scotland. Its comparative approach extends to the different statutory and judicial frameworks and legal and policy cultures in England and Scotland. Its focus is primarily empirical, looking at the factors that influence settlement of disputes without recourse to the formal processes of an appeal to a statutory tribunal. It is considering the 'justice' — procedural and substantive — inherent in the cases that are resolved in this way. It aims not only to assess the effectiveness and inherent fairness of the approaches to dispute resolution and avoidance that are being adopted in each jurisdiction but also to gauge the extent to which the underlying policy objectives to them are realisable. The UK Government has made clear its preference for approaches to dispute resolution which obviate the need for relatively expensive and long-drawn-out court and tribunal hearings (Department for Constitutional Affairs, 2004). However, there is concern that conciliation or mediation may be inherently inappropriate in some or all citizen-versus-state disputes because of the imbalance of power.

The research is located within the wider context of efforts on a number of fronts to promote what has been described as the 'modernisation of welfare' agenda. This draws on discourses of the market on the one hand and social justice on the other, emphasising the need for flexible and individualised services which are delivered by a range of providers in a mixed economy of welfare. Whereas the post-war welfare state has been characterised as providing 'one size fits all' services, the idea of the modern welfare state is that the individual should be actively involved in identifying the services they need to achieve their goals, and that professionals should be working with them across service boundaries as supporters. Embedded within this view of the world is that, just as professionals need to be regulated, so service users need access to forms of redress. However, as noted above and explored in more details elsewhere in this review, questions have been asked about the future role of courts and tribunals, with a growing emphasis on local and immediate forms of dispute resolution. Questions have also been asked about whether the role of service consumer is appropriate for all, for example Clarke and Newman (1997) and Newman (2001) have pointed out that, for those experiencing social disadvantage, a group which is likely to include many parents of children with additional support needs, the role of service consumer may fit uneasily with their resources and identity.

## **PART 2**

### ***THEORETICAL CONTEXTS***

#### **2.1. Grievances and Disputes**

This research is concerned with disputes about SEN or ASN and provision. Disputes in the field of children's education may originate from dissatisfaction with particular decisions or treatment or due to the impact of general policies affecting an individual child. The precise meaning of the term 'disputes' has been considered by researchers, in the wider context, in part because of the policy push towards finding the most appropriate way of resolving disputes through proportionate means (eg DCA 2004a; 2004b) (see below). Disputes are seen to arise out of grievances which in turn stem from perceived threats to the party's interests. A 'naming-blaming-claiming' model has been developed by Felstiner et al (1980-81), under which an 'unsatisfactory experience' may be identified ('naming') as a problem caused by another, attracting 'blame' ('blaming'); the problem may become a 'grievance' which may lead to a claim ('claiming'). If contested, the claim gives rise to a 'dispute'. Grievances that remain unresolved give rise to a dispute. Genn (1999: 10) urges caution though, because the model does not fit every situation: for example, '[t]hose who claim may not blame and those who blame may not claim.' Moreover, not everyone is interested in the pursuit of a legal remedy.

The seriousness of the grievance, or rather the perceived seriousness of the grievance on the part of the parties in question, may be crucial factor in relation to whether a dispute occurs. Factors influential to that perception might include the potential consequences for the party concerned; the degree of risk of being unsuccessful; or, particularly where a dispute arises, the extent to which the outcome may set a precedent for other such cases. Adler et al (2006: 44) found that public perceptions of seriousness would hinge more on its effect on the individual and their family as well as the scale and immediacy of the consequences. Some disputes in the area of education were identified as potentially serious. This research therefore confirms the importance likely to be attached by parents to decisions and general treatment of both themselves and their children in the context of education.

Adler et al attempt to construct a typology of administrative grievances via a 'top-down' approach, which makes reference to for example their amenability to individual redress or the extent to which they arise from a decision based on law or discretion and is based on distinctions made in the academic literature. The distinctions made may not, however, accord with the member of the public's perception of their grievance (Adler et al 2006: 17-18), which they work into their model as a 'bottom up' approach. Their preferred model combines both elements but is primarily based on top down approach, so that grievances are defined with reference to their identifiable characteristics, such as whether they are concerned with a decision considered 'wrong' or 'unreasonable' or based on inadequacy of resources. The research does not show how particular forms of grievance should be dealt with, particularly in cases where more than one type of grievance might have occurred.

Not all education disputes in which people can become involved will be capable of being characterised as what Genn (1999: 12) refers to as a ‘justiciable event’ – a matter which raises ‘legal issues’, regardless of how perceived by the claimant and whether or not any potential remedy would involve any part of the justice system. However, in the field of education there are very many justiciable events and a wide range of mechanisms has been developed to deal with them. We know a certain amount about how these various mechanisms operate (eg Harris and Eden 2000 on exclusion appeal panels; Colron et al 2002 on admission appeal panels; and various studies on special educational needs appeals discussed below). But the policy has shifted towards alternative dispute resolution (ADR) and ‘proportionate dispute resolution’ within the field of administrative justice (based around the idea of avoiding legal disputes in the first place, but, where they occur, to ensure that they can be resolved ‘as quickly and cost effectively as possible’ via ‘tailored dispute resolution services’, including mediation and conciliation (DCA 2004: 2.2, 2.3 and 2.11)). This has involved a significant push towards the use of mediation (NAO 2005: 27) and other processes such as ‘early neutral evaluation’ (currently being piloted in disability living allowance and attendance allowance appeal cases, initially in Southern England) (Tribunals Service, 2007: paras 88-96). To date, ADR schemes of the kind now being promoted in education, especially mediation, have not been properly assessed through empirical research, a gap which is sought to be addressed by the research.

One of the concerns about ADR approaches generally and in public law disputes is that hindering access to courts or tribunal might prejudice the human right to a fair determination of a legal dispute before a judicial body (Le Sueur, 2002). The substantive rights of the citizen may suffer by the undermining of their proper declaration and enforcement (Adler 2006a) – ‘the vindication of individual rights’ (Supperstone et al 2006). The risk is that in mediation or conciliation citizens might end up settling for less than their true entitlement (Adler 2006b). There is also concern, which our research aims to explore, that mechanisms such as conciliation and mediation may not be appropriate for citizen v state disputes because of the inherent imbalance of power between the parties as they enter the process: the inequalities ‘would take a very skilled mediator to deal effectively with them’ (Adler 2006b: 977-978). The authors’ research aims therefore to assess the risks and whether dispute avoidance or resolution through mediation in particular affords compensatory benefits not merely in terms of efficiency but also in terms of fairer outcomes and greater levels of satisfaction.

## **2.2. Education rights**

According to Richardson and Genn an important question is whether the role of the dispute resolution mechanism in the citizen v state conflicts should be about seeking to ‘*resolve* the dispute to the satisfaction of the parties’ or ‘*upholding* the entitlement when it is made out and to *denying* it when it is not’ (Richardson and Genn 2007: 133). They identify three types of case that tribunals dealing with citizen v state disputes deal with: (i) those concerning fundamental rights; (ii) those concerning entitlement to material

benefits; and (iii) those involving entitlement to an assessment or consideration. Cases falling within (iii) involve social rights, including education rights, which by their nature are highly conditional, resource-dependent, contingent on wider policy goals and normally difficult to enforce (Harris 2007). O'Mahoney (2008a) takes the view that the right to education, particularly as applied to children with special educational needs, is a fundamental right connected to human dignity, but Richardson and Genn (2007: 140), would place it within (iii). Alternative forms of dispute resolution may be needed for such cases, although tribunal hearings before the Special Educational Needs and Disability Tribunal (SENDIST) would still be needed for 'intractable' cases (ibid); but it can also be argued that the fallback of a tribunal hearing also recognizes the importance of the rights at issue.

One reason why the presumption that ADR mechanisms may be appropriate for many SEN cases needs to be questioned is that there the interests of the child may not be adequately protected. Such interests may influence SENDIST, but the tribunal is not required to attach primacy to them (cf Children Act 1989 and Art.3. of the UN Convention on the Rights of the Child). Another is that ADR may be subject to the same inherent inequalities as more traditional dispute resolution mechanisms in tending to disadvantage those from less privileged backgrounds (Harris 2007: 348-357).

### **2.3. Administrative justice**

Much previous research on administrative justice, including work specifically in the field of SEN (Riddell, Adler, Wilson and Mordaunt 2002), has used as a reference point Jerry Mashaw's work on the determination of disability claims in the US (Mashaw 1983), which can be applied to all stages of decision making. Mashaw's typology reflects different goals and 'legitimizing values' in models of administrative justice, which may compete and are not mutually exclusive. The three models are:

1. '*Bureaucratic rationality*' – the application of rules to the claim within a bureaucratic framework of decision making, where the legitimating goals are that of accuracy and consistency, but efficiency would also be an important aim (to maximize the resources that can be applied for other purposes). In the context of SEN, this would involve attempts to adopt a common approach to assessment and a consistent policy of placement, albeit that parental preferences will to some extent need to be accommodated (Riddell et al 2000).
2. '*Professional treatment*' – focused on meeting the needs of the client through the exercise of professional judgment and discretion. The legitimating goal is that of service. This was the prevalent policy model for SEN in the past, and to some extent survives in the scope for professional judgment over aspects of the statementing process and more particularly in the arrangements for unstatemented children. But generally speaking this model as seen as having given way under a much tighter legal framework, facilitating enforceability of rights (via the third model, below).

3. *'Moral judgment'* – a legal model that is used for the resolution of conflicts, with a legitimating goal of fairness. Mashaw's assumption is that this will involve an independent system in which rights may be enforced and competing values may be resolved, the paradigm being a court or tribunal (such as the SENDIST). There may be questions as to whether mediation or conciliation fall within it since arguably they are less directly concerned with the determination of rights.

Researchers in general find that within the SEN field in England and Wales the bureaucratic rationality model is a dominant feature of the framework for decision-making, in combination with the legal (moral judgment) model for parental rights-based challenges to decisions and the testing of professional discretion (Blair (2000); Riddell et al (2000)), whereas in Scotland the professional judgment model is more dominant, although that may be changing. Buck et al (2005: 220) observe a similar shift towards bureaucratic rationality model in the social security field (Buck et al 2005: 220).

Riddell (2003) and Adler (2003) have also extended Mashaw's typology to incorporate three additional models of administrative justice: *'managerialism'* (reflected in the imposition of procedures and controls over the way that work is done, such as time limits for stages in assessment or statementing, and with the legitimating goal of increased efficiency); *'consumerism'* (reflected in policies to encourage active participation by parents, with the legitimating goal of consumer satisfaction); and *'markets'* (reflected in parental choice, albeit that this is somewhat curtailed, also with the legitimating goal of improved efficiency). It is likely that mediation or conciliation may fit better into the consumer model rather than legal/moral judgment model. But it is important to stress that these models merely describe broad types of administrative justice arrangements and help us to understand how the arrangements of particular types differ from one another. They also help us to see how far there is a fit between the kinds of decisions these bodies have to make and their characteristics and overall goals. Adler (2003), Riddell (2003) and Riddell et al (2000) have discussed the Mashaw typology or a developed version of it specifically in the context of special educational needs in England and Scotland. Riddell et al (2000), for example, explain that the development of parent partnership schemes as in part an 'attempt to control pressure for further moves towards a legal policy framework'. The development of dispute resolution services, in which PPS are important agents, may also be considered as in furtherance of this aim.

### **PART 3** ***THE POLICY CONTEXT (1)*** ***SEN/ASN FRAMEWORKS***

#### **3.1. Developments between 1945 and 1978**

Riddell (2006) includes a more detailed account of the development of SEN/ASN policy and legislation in Scotland. The Education (Scotland) Act 1945 placed a general duty on

education authorities to provide education for children which was suitable to their 'age, aptitude and ability'. In addition, there was a specific duty to establish which children, as a result of 'disability of mind or body', required 'special educational treatment' at school, including junior occupational centres, and which children were too handicapped to benefit from any form of education or training. To achieve this, parents could be required to submit their children for a medical examination (from 1969, extended to a psychological examination as well). Parents could appeal against a medical certificate which showed their child required special educational treatment and to the sheriff court against being refused permission to withdraw their child from special school. Education authorities were empowered (after 1969, required) to provide child guidance services and to provide 'special educational treatment' for children who were diagnosed as having one of the nine legal categories of 'handicap' for which special educational provision should be made. These were deafness, partial deafness, blindness, partial sightedness, mental handicap, epilepsy, speech defects, maladjustment and physical handicap. The categories did not include children with milder learning difficulties, nor those whose difficulties stemmed from such factors as absenteeism or frequent change of school. Very limited provision was made for children with profound and complex learning difficulties. From 1947, children described as 'ineducable but trainable' were placed in junior occupational centres where they were trained by instructors. Following the Report of the Melville Committee and the provisions of the Education (Mentally Handicapped Children) (Scotland) Act 1974, the centres were renamed schools and teachers were appointed in addition to instructors. The 1974 Act also gave local authorities responsibility for the education of children described as 'ineducable and untrainable'.

Arrangements in England differed in detail, but the broad principles were similar. Clearly, parents were accorded little power in the ascertainment process, being compelled to present their child for assessment and having, in some cases, to accept that their child was ineligible for education. Limited rights of appeal were available in relation to ascertainment, but in general the views of medical officers, teachers and, once the profession was established, educational psychologists, held sway.

### **3.2. The Warnock Report (1978) and the idea of partnership with parents**

The Warnock report (DES, 1978) has been seen as a watershed in thinking about provision for disabled children. Before 1978, children were 'ascertained' by medical officers as in need of 'special educational treatment' if they were deemed to fit into one of the nine legal categories of 'handicap' described above. There was growing dissatisfaction with the medical view of a fixed 'disability of mind and body' and the Warnock report suggested a new and all-embracing category of 'special educational needs' to replace the former statutory categories of handicap. Whilst recognising that about 20% of children experienced learning difficulties at some time during their education, Warnock suggested that the 2% of children with the most significant difficulties should be assessed by a multi-disciplinary team and their special educational needs recorded formally, along with a legally binding statement by the authority of how it intended to address these needs. These recommendations were incorporated into the



Education (Scotland) Act 1980. The formal document was called the record of needs in Scotland and its English equivalent was termed the statement of needs.

A major theme of the Warnock report was the need for partnership with parents and a number of measures were put in place to try to ensure that this happened in practice. For example, in Scotland, parents were permitted to have a Named Person as a supporter in connection with the record of needs to ensure that their views were taken into account. In both England and Scotland, parents were given the opportunity to provide an account of their child's needs on the record or statement of needs and were required to sign off the document indicating their agreement.

### **3.3. Implementation of post-Warnock legislation in England and Scotland**

The development of post-Warnock policy in the field of SEN and ASN is discussed more fully in Riddell et al 2000; Riddell et al 2002; Riddell et al 2003; Riddell, 2003. A comparison of policy developments in Scotland and the US is to be found in Lange and Riddell, 2000). Following the publication of the Warnock report (DES, 1978), for about a decade the two systems moved along roughly parallel lines, both emphasising professional discretion and partnership with parents. However, during the 1990s, there was increasing divergence as Conservative educational reforms were implemented more forcefully in England (Riddell and Brown, 1994), aimed, broadly, at regulating public sector performance and empowering parents as consumers. The Code of Practice and the Special Educational Needs Tribunal (DfE, 1994; DfEE, 2001), implemented under the terms of the Education Act 1993, were particularly important in altering the balance of power between parents and professionals, whilst in Scotland the emphasis was on advice on good practice. A number of Scottish Office publications (SOED, 1994; SOED, 1998) made recommendations to schools and local authorities about how to implement their legal responsibilities in a fair and efficient manner, but this advice was generally not enforced by legislation.

Parents' organisations in England, arguably stronger than their Scottish counterparts, played an active role in driving forward the reforms of the 1990s. It was believed that some local authorities were failing to put enough funding into the education of children with SEN, and as a result voluntary organisations, including the Council for Disabled Children, campaigned for a tighter legal framework. From September 1994, all state schools were obliged to have regard to the *Code of Practice on the Identification and Assessment of Special Educational Needs* (DfE, 1994) and publish information about their policies for children with special educational needs. Each school's governing body had to include a named individual with particular responsibility for special educational needs provision.

The Code of Practice's requirements necessitated the identification of a Special Educational Needs Co-ordinator (SENCO) or co-ordinating team in each school and in many schools a new appointment had to be made. The Code laid down very strict time lines for the completion of the various stages of assessment and statementing. The

Commission for Local Administration in England published data on average assessment times in each local authority, and failure to comply with these timescales might justify a complaint of maladministration being lodged with the ombudsman. In addition to describing how assessment and statementing should be conducted, the Code also specified criteria for triggering an assessment and opening a statement in relation to the following categories: learning difficulties, specific learning difficulties (for example dyslexia), emotional and behavioural difficulties, physical disabilities, hearing impairments, visual impairments, speech and language difficulties, and medical conditions. This might be interpreted as a move away from the anti-labelling approach advocated by Warnock in favour of a recognition of types of impairment and attendant educational difficulties.

As noted above, the 1993 Education Act also established a parent's right to take a case to a Special Educational Needs Tribunal (SENT), set up in 1994 and hearing its first cases in 1995. The aim of the SENT was to act as final arbiter where consensus had broken down between parent and the local education authority. From its inception, there was an annual increase in the number of appeals referred to the SENT. Appeals were unevenly distributed throughout the country, with London boroughs having the highest rates of appeal. By 2007 the tribunal (including the SENDIST in Wales from 2003) had received approximately 34600 appeals and registered approximately 31500 appeals: some appeals are not registered because they are out of time or outside the SENDIST's jurisdiction. Disability discrimination cases have been heard by the SENDIST following the extension of its jurisdiction under the Special Educational Needs and Disability Act (SENDA) 2001: to date 489 complaints have been lodged and 358 registered. Further statistics on SENDIST appeals are provided in Working Paper 2.

The grounds of appeal by parents to the SENDIST are contained in the Education Act 1996 and cover such matters as a refusal to formally assess a child's special educational needs or to make a statement of SEN, a decision to cease to maintain a statement, or any disagreement with any of the contents of a statement, including the choice of school for naming in a statement. The grounds also extend to cases where an existing statement is amended. Many appeals by parents concern the nominated school or the level of resources specified in the statement.

In terms of comparisons with other educational appeal bodies the SENDIST represented a 'significant development in education dispute resolution in England and Wales' (Harris, 1997: 228) in part because it was the first educational appeal required to have a lawyer chair and two specialist panel members and to be governed by detailed rules of procedure. On the panel at the SENDIST tribunal hearing is a legal chairman and two specialist members who have knowledge and expertise of children with special educational needs. Latest figures from the SENDIST website show that of the 60 legal chairmen, 35 were female, and of the 123 specialist members, 68 were women.

The Annual Report of the SENT for 2000 indicated that legal representation was used by about 11% of parents and 14% of parents made use of lay representation, often provided by the Independent Panel for Special Educational Advice (IPSEA) or a voluntary

organisation such as the British Dyslexia Association. Legal aid was not available to individuals bringing cases to the SENT. About a third of parents presented independent assessments as evidence to the Tribunal and these appeared to influence the outcome of the appeal in favour of the parent (Harris, 1997). The advent of the SENT was indicative of the growing importance of the legal and consumerist policy frameworks in England, with individual parents empowered to seek justice from an impartial body.

Recognising the danger that a rapid swing towards a legal policy framework might lead to escalating and unmanageable costs, the DfEE (now the DCSF) progressively extended the availability of funding for Parent Partnership Schemes. The main objectives were to encourage active partnership between parents and professionals with a view to minimising conflict and reducing the number of statutory SEN appeals. Wolfendale and Cook (1997) undertook a generally positive evaluation of PPS on behalf of the DfEE and Vernon's (1999) NCB-funded study highlighted good practice. Whilst attempting to smooth relationships between local authorities and parents to avoid escalating conflict, the Department also signalled an intention to reduce reliance on statements (Pinney, 2004; Audit Commission, 2002; House of Commons Select Committee Report, 2007). Abolition of the statement has been resisted thus far but may be firmly on the policy agenda soon., although the number of statements being opened by local authorities has in any event declined (see Working Paper 2).

It is important to recognise that particular policy frameworks have both positive and negative trade-offs. The greater emphasis on consumerism, legality and markets in England during the 1990s meant that parents were able to exert more control over the services on offer. However, this produced a number of pressures within the system. The Green Paper *Excellence for All Children: Meeting Special Educational Needs* (DfEE, 1997) drew attention to the rapid acceleration in the number of children with statements in mainstream primary and secondary schools and the pressure on resources which this produced. It was suggested that the number of statements should be reduced and ultimately the system should be scrapped, although this produced an outcry from parents' groups and voluntary organisations.

The SENT (now SENDIST) also had identifiable pros and cons (Harris, 1997; Evans, 1998; 1999). On the positive side, it was seen as non-intimidating, user-friendly and impartial. On the negative side, it was seen as 'a weapon of the middle classes', thus undermining the LEAs' attempts to ensure equity of resource allocation. There have always been concerns that some parents are much more able than others to adopt the role of the critical consumer, with few appeals being made from people living in socially disadvantaged areas and from minority ethnic families (Harris, 1997). In addition, although this is not necessarily a criticism of the SENT, there may be unfairness in relation to the particular redress mechanism to which a parent has access. Harris and Eden (2000) noted that exclusion appeals run by LEAs tend to proceed in a somewhat rigid and un-user unfriendly manner compared with the SENT, and similar criticisms have been made of exclusion appeal committees in Scotland (Council on Tribunals, 2004). Given that parents of a child with special educational needs might use either appeal mechanism, there are strong arguments for a greater degree of uniformity of

approach.

There have been recent signs of some loosening of professional regulation in England. The revised Code of Practice (DfES, 2001) reduced the process of assessment to only two stages. In addition, it required authorities to 'set out' rather than 'specify' the provision to be made to meet children's special educational needs. Resources to purchase additional classroom assistants were given directly to schools, with no guarantee that they would be used for this purpose. The strategy for special educational needs (DfES, 2004) underlined the Government's commitment to inclusion in the context of the inter-agency strategy set out in the Green Paper *Every Child Matters* (DfES, 2003), but recognised the need for much greater consistency in the quality of inclusive practices.

Whilst the Education Act 1993 ushered in a ferment of activity in England around special education needs, with many innovations geared towards empowering parents and regulating professionals, in Scotland things were relatively quiet. However, in 1999, Children in Scotland received funding from the Scottish Executive Education Department to provide Enquire, the national advice service for additional support for learning in Scotland. Since 2004, Enquire focused on maintaining and developing the telephone advice and information service for parents, families and carers of children and young people with additional support needs across Scotland and for children and young people themselves. It also implemented a publicity programme, revised and expanded its publications, developed an outreach programme for children and young people and improved its monitoring and evaluation systems. An evaluation by Riddell et al (2006) indicated that parents welcomed its support, although local authorities did not go out of their way to inform parents of its existence and many had only alighted on it by chance. Some felt that, in addition to advice and information, a stronger advocacy service was also required.

To summarise, in England during the 1990s a range of measures increased opportunities for parents to make a formal complaint or appeal with regard to special educational needs services. The Code of Practice regulated performance, and by specifying actions and timescales, the grounds on which parents might lodge a complaint or appeal were clarified. Parents were encouraged to take a more active role in the process of assessment and statementing, and to appeal if dissatisfied. Local authorities were obliged to make parents aware of the choice of school and other types of provision available to them, encouraging the operation of a market in the field of SEN with parents, at least in theory, having more opportunity for choice and control over services. In Scotland, apart from the establishment of a national advice and information service in 1999, there were few major policy changes during this decade.

### **3.4. DDA Part 4 in England and Scotland – key differences in 'fit' with existing educational framework.**

The Disability Discrimination Act 1995 was extended to education under the terms of the SENDA 2001 (referred to as DDA Part 4) with the aim of prohibiting discrimination

against disabled children in the field of education. The disability measures in SENDA applied across GB, but the SEN measures only applied to England and Wales. To avoid the possibility of clashes between different bodies of legislation, it was decided to dovetail the new legislation with existing education legislation. As a result, DDA Part 4 has been applied differently in England and Scotland, with different implications for redress systems amongst other things. These differences are briefly reviewed below.

*Provisions of Part 4 of the DDA in England and Scotland*

The legislation placed new duties on education providers (referred to in the Act as ‘responsible bodies’). The responsible body is defined differently in England and Scotland and in the state and independent sectors (see table below).

Table 1: Responsible bodies for school education in England and Scotland

Type of school (England)	Responsible body (England)	Type of school (Scotland)	Responsible body (Scotland)
Maintained school	The governing body	School managed by an education authority	The education authority
Pupil referral unit	The local education authority	Independent school	The proprietor
Maintained nursery school	The local education authority	Self-governing School	The board of management
Special school not maintained by LEA	The proprietor	Grant-aided school	The managers of the school

In maintained schools in Scotland, the education authority is the responsible body whereas in England, the governing body carries overall responsibility for educational services.

The two key duties placed on education providers under the terms of the DDA were the following:

- Not to treat disabled pupils/prospective pupils less favourably; and
- To make reasonable adjustments to avoid putting disabled pupils at a substantial disadvantage.

The second duty was limited in the following ways:

- Reasonable adjustment duties do not require the responsible body to provide auxiliary aids and services;
- Reasonable adjustment duties do not require the responsible body to make alterations to the physical features of the school.

Auxiliary aids and services were exempt because it was assumed that these would be provided through the existing special educational needs frameworks. However, in

Scotland Circular 4/96 (SOEID, 1996) stated that records of needs did not have to stipulate resources and services to be provided. In England, case law established that statements of need should be specific about resources to be provided to meet children's assessed needs, but many LEAs continued to write statements in vague and unspecific terms. The fact that the Act only covered policies and procedure, limited its potential to have a major impact on teaching practices. For example, adapted materials were regarded as falling under the heading of auxiliary aids and services, and therefore making teaching materials accessible was not required under the Act.

### *Planning duties*

As noted above, auxiliary aids and services were not covered by DDA Part 4 and the additional planning duties imposed by the SENDA 2001 were seen as the means of ensuring increasing access to all aspects of school life for disabled pupils. Since planning matters are devolved to the Scottish Parliament, the planning duties within the SENDA 2001 did not apply to Scotland. However, the Education (Disability Strategies and Pupils' Educational Records) (Scotland) Act 2002 placed a duty on responsible bodies to publish and implement accessibility strategies for the school(s) for which they have responsibility. Accessibility was defined broadly, covering the physical environment, the curriculum and communication methods. From September 2002, local authorities and schools were expected to anticipate and plan for the needs of disabled pupils, rather than operating in a reactive mode.

Local authorities in Scotland have traditionally enjoyed greater autonomy than their counterparts in England (McPherson and Raab, 1988) and retained more powers during the Conservative government's educational reform programme of the 1980s (Adler, 1997). In view of these differences, it would be interesting to compare the way in which the planning duties for disabled children have been put into practice north and south of the border. Evidence from Scotland suggests that local authorities have much better knowledge and understanding of the legislation than parents (Riddell, 2008 forthcoming).

### *DDA Part 4, redress and conciliation*

A parent or child who believed that discrimination had occurred was encouraged to complain to the school and/or the local authority so that, if at all possible, the problem could be ironed out at an early stage. They were also able to contact the Disability Rights Commission for help and advice (from October 2007, the Equality and Human Rights Commission (EHRC) took over this function). If the matter could not be resolved through conciliation, a case might be brought to the Sheriff Court in Scotland, or to the SENDIST in England. The Disability Rights Commission hoped to bring a number of test cases in Scotland to establish legal precedents, but in the event very few requests for conciliation were made.

In England, under the terms of the SENDA 2001, a duty was placed on local authorities to ensure that parents had access to Parent Partnership Services which, as noted above, were originally established in 1994. An evaluation conducted by Rogers et al (2006) indicated that, in line with the findings of Wolfendale and Cook (2002) and Wolfendale

(2002), PPS mediation services were greatly valued by parents, although in smaller authorities resources were limited, restricting the range of possible activities. Tod (2003) adopted a rather more critical stance in relation to Parent Partnership Services, noting that conflicts in the assessment of SEN really need to be resolved between the school and the parent, and introducing the PPS as an additional and more distant element may actually complicate rather than resolve difficulties.

To summarise, the exclusion of auxiliary aids and services from DDA Part 4 reduced considerably the power of the Act to enhance the rights of disabled children and their families, restricting the grounds under which they might seek redress. As a result, few cases were referred to the DRC conciliation service and fewer appeals than expected were made to the SENDIST. Furthermore, research conducted on behalf of the DRC in connection with the discrimination law review indicated that education professionals in Scotland felt that DDA Part 4 was far less relevant to them than the forthcoming reform of education legislation (see below). The extent to which mediation services, expanded in England under the SEN measures of SENDA, have increased activity in this area is the topic of this research. Overall, like other parts of the DDA, it is quite possible that the measures applying to education were more important symbolically than in practice.

### **3.5. The Education (Additional Support for Learning) (Scotland) Act 2004**

Whilst the extension of the DDA to education promised a greater focus on the rights of disabled children and their parents, the Education (Additional Support for Learning) (Scotland) Act 2004 is likely to have a far greater influence on educational practice north of the Border. Earlier legislation defined a child as having SEN if he or she had much greater difficulty in learning than most other children of their own age, or suffered from a disability or handicap preventing them from being educated with their own peer group. The law, however, did not cover children or young people who had difficulties arising from other factors, such as being taught in a language they did not speak at home.

The new definition of additional support needs (ASN), as specified in Section 1 of the Education (Additional Support for Learning) (Scotland) Act 2004, is much broader:

“A child or young person has additional support needs for the purposes of this Act where, for whatever reason, the child or young person is, or is likely to be, unable without the provision of additional support to benefit from school education provided or to be provided for the child or young person.”

The definition thus covered disabled children as well as those who were looked after by local authorities, Gipsy and Traveller children, those with English as a second language, children of refugees and asylum seekers children whose parents abuse drugs or alcohol and children living in extreme poverty. The report accompanying the draft bill noted that children in particular groups should not be seen in isolation from each other (e.g. a looked after child may have learning difficulties). The Act abolished the Record of Needs and established a new document, the Co-ordinated Support Plan, for recording children's difficulties in learning and specifying the support to be given.

Qualification criteria for a Co-ordinated Support Plan were tightly specified. According to the Code of Practice *Supporting Children's Learning* (Scottish Executive, 2005), a child should have a Co-ordinated Support Plan if he/she had additional support needs arising from one or more complex factors or multiple factors, and if they required additional support to be provided by the education authority and by one or more appropriate agencies. Under the definition, a child who was blind and had additional learning difficulties would not qualify for a Co-ordinated Support Plan unless another agency (e.g. health or social work) was also making a significant contribution to their support. A child who was only receiving services from education, no matter how significant their impairment, would have their needs assessed and recorded in some other document, such as an Individualised Educational Programme. However, unlike the US Individual Educational Program (Florian and Pullin, 2000), Scottish IEPs did not have to specify additional resources, were not legally binding on the school or the local authority and did not have a route to legal redress. They were also unlikely to involve multi-disciplinary teams (Kane et al, 2003).

#### *Assessment of children with ASN*

Under the 1980 Education (Scotland) Act (as amended), local authorities had a duty to identify children with special educational needs and a formal assessment with a view to opening a record of needs had to include a multi-disciplinary assessment. The ASfL Act was less prescriptive about the way in which the assessment of additional support needs should be conducted. According to the Code of Practice, "The Act does not prescribe any particular model of assessment or intervention" (Scottish Executive, 2005, p 26). Appropriate agencies (e.g. health, social work) have a duty to assist an education authority in assessment, intervention, planning, provision and review, unless this is prejudicial to the agency's other function. Although no systematic research on the nature of assessment for additional support needs has not taken place, it seems likely that assessment now less formal and is more likely to depend on the discretion of the local authority and the school. In most cases, the responsibility for assessment is likely to lie with the learning support teacher, but knowledge of diagnostic assessment techniques is likely to vary greatly between schools. Given some parents' desire to have very specific psychological or medical assessments conducted, this would appear to be an area where conflict might arise and dispute resolution might be required.

#### *ASfL Act : rights of appeal, adjudication and mediation*

The establishment of a tribunal in Scotland, more than a decade after the SENT in England, is a major new development. Parents can appeal all aspects of the co-ordinated support plan (CSP), including provision, decisions to draw up or not to draw up a CSP, to discontinue or not to review a CSP and delays in drawing up or not drawing up a CSP. However, the qualification criteria for accessing the ASN Tribunal are very high. Only those who already have a CSP, or who can show that they have a reasonable case for arguing that they meet the criteria for such a plan, are eligible to make a reference to the tribunal. This automatically rules out parents whose children have very significant disabilities, but are receiving all their services from education. There is thus a potential



Catch-22 situation: only those who qualify, or believe they qualify, for a CSP may make a reference to the tribunal, but the qualification for a CSP have been set so high that only a very small proportion of children actually qualify (see statistics on number of references and oral hearings). Unlike England and Wales, where the SENDIST hears disability discrimination cases, in Scotland these are still heard by the Sheriff Court. In England, when the SENT was introduced in 1994, cases in the first year were threefold greater than expected. In Scotland it appears that the reverse is the case and the number of tribunal references is less than expected.

Parents whose children have additional support needs but who do not meet the criteria for a CSP may request independent adjudication if there is a dispute with the local authority. Adjudicators are appointed by the Scottish Executive (now Scottish Government) and make decisions on the basis of written documents submitted by the local authority and the parents. There is no hearing and the process might be criticised for lacking transparency and independence. To date, it appears that there have been very few requests for adjudication, although potentially, there could be far more cases requiring adjudication compared with the number of cases which are likely to meet the criteria of the ASN Tribunal.

Another important measure in the legislation is the requirement for local authorities to have independent mediation schemes in place to provide advice and support to parents and to help resolve disputes between parents and local authorities. Whilst such schemes may empower parents, there is no requirement on local authorities to provide access to advocacy services. As a result, some people may be prevented from using mediation services effectively because of their own disadvantage or disability. The success of mediation schemes, particularly in reaching socially disadvantaged and excluded parents, therefore needs to be monitored.

#### *Evaluation of the early impact of the ASfL Act*

An evaluation of the early impact of the ASfL Act was undertaken by HMIE (HMIE, 2007). The report made the following points:

- Authorities varied in their effectiveness of implementing the Act, and needed to develop better monitoring strategies, with more robust quality assurance mechanisms.
- There needed to be a greater focus on exploring the impact of the Act on the educational experiences of children and young people and the wider social experiences of their families.
- Education authority staff were generally well-informed about the concept of ASN, but health and social work staff were less well-informed.
- Whilst generally feeling well supported in school, children and young people and their parents were not well informed about the new concept of ASN and their rights

within the new legislation to be involved in making decisions about the education provided.

- Parents felt confused about the status of non-statutory support plans introduced by some, but not all, authorities and IEPs.
- Parents were unclear about the alternative planning mechanisms used in a few authorities to establish whether a child or young person met the criteria for a CSP.
- Interpretation of the term 'significant' in the context of eligibility for a co-ordinated support plan varied greatly among education authorities.
- Arrangements for resolving disputes between authorities and families were well established in most authorities, and all had identified independent mediation services. However, analysis of disputes was not used to inform strategic planning and contribute to quality assurance. Where families had used mediation services, both they and key staff in authorities felt that intervention had been effective and helpful in resolving the dispute.
- Most authorities included information about the ASN Tribunals for Scotland in leaflets to parents on their rights under the Act.

The report highlights confusion amongst local authorities about the criteria for the opening of a CSP, wide variation in practice across local authorities with regard to the proportion of children with a CSP and discrepancy in knowledge and awareness of the ASfL Act between professionals and parents, which accords with earlier research findings about knowledge of educational legislation. Overall, far fewer children and young people have a plan according them statutory rights than was the case under earlier educational arrangements, so it might be concluded that specifically in relation to accessing a formal appeal mechanism, parents' rights have actually decreased.

### **3.6. Partnership, consumerism and managerialism: implications for parents**

The position of professionals and parents in education is interactive; changes in the position and identity of one group have inevitable knock-on effects on the position of the other. National and local policies provide the framework in which these positions are negotiated, but are interpreted differently by individual parents and professional actors.

The position of parents as consumers of education featured prominently within the previous Conservative government's agenda of marketisation and managerialism, and has resurfaced in New Labour's agenda of individualisation (Tomlinson, 2001). School choice policies allowed parents to exercise the power of exit, described thus by Hirschman:

“The availability to consumers of the exit option and their frequent resort to it are characteristic of normal competition...the exit option is widely held to be uniquely powerful by inflicting revenue losses on delinquent management.” (1970: 210)

The power of parental exit has had a strong influence on the composition of schools, leading to greater social polarisation in urban areas (Adler et al, 1989; Gewirtz et al, 1995). Schools have sought to attract high achieving pupils by focusing on their public image and the improvement of performance measured by national tests and examinations, and have made great efforts to avoid middle class attrition. The extent to which parents of children with SEN and ASN have been able to capitalise on a marketised system is a moot point, since children with moderate learning difficulties and/or social, emotional and behavioural difficulties have tended to be regarded as unattractive customers with potentially little ‘market value’ (Riddell, 2003).

Another mechanism by which consumers can influence services is by using the power of voice. Hirschman described this mechanism in the following way:

“To resort to voice, rather than exit, is for the customer or member to make an attempt at changing the practices, policies and outputs of the firm from which one buys or the organisation to which one belongs. Voice is here defined as any attempt at all to change, rather than escape from, an objectionable state of affairs, whether through individual or collective petition.” (1970: 30).

Whilst schools have had to respond to the pressure posed by exit and voice, Vincent (2000) commented that this does not necessarily lead to greater parental involvement in the day to day educational processes, although a number of measures, such as the creation of governing bodies (England) and school boards (Scotland) gave them new means of doing this. Vincent considered the extent to which parents were adopting the position of active citizen, exploiting opportunities for engaging in deliberative democratic processes within Parent Centred Organisations. She concluded that such ‘little politics’ challenge existing power relations to some extent but are unlikely to bring about radical social change because of the limited range of parents they attract and the difficulty of focusing on general rather than individualised issues. Vincent (2000) identified the following three positions which parents might adopt in relation to state education: partner/client, consumer or citizen. Most current education policies recognise that parents have a distinctive role to play in their children’s education and seek to develop partnerships. However, according to Vincent, the notion of partnership should be treated with caution since it implies an equal relationship, when in fact parents’ relationship to education is structured by social class, gender and ‘race’. Mordaunt (2001) also casts doubt on the idea of equal partnerships between parents and professionals in the field of SEN. In this sense, the idea of partnership may be used as a legitimating device by schools to justify their aims and practices.

Harris (2005) identified two separate discourses surrounding the involvement of parents in their children’s education. The first, drawing on consumerist and liberal rights based notions, is characterised as the ‘parent power’ discourse. This particular discourse is

based on an assumption that, as tax payers and consumers of welfare services, parents are entitled to expect a degree of choice and participation in their children's education. An alternative discourse, that of home-school partnership, suggests that both parents and schools have obligations to support each other in realising children's potential. Overall, Harris suggests that parental rights to choice in education are extremely limited, and even the presumption of inclusion may limit the extent to which free choice is possible (see also Riddell, 2000, on tensions and contradictions between policies of inclusion and choice). Harris noted that whilst parents' rights to choice in education are limited, children's rights are even more so (see separate section).

Just as social class is a key variable influencing parents' ability to take an active role in school choice (Ball, 2003; Power et al, 2003), in the arena of SEN and ASN social class may also be an important variable. For example, Riddell et al (1994) highlighted the power of middle class parents in the field of specific learning difficulties to challenge professional discourses in order to secure a particular diagnosis and, thence, capture additional resources for their children. Professionals preferred the term 'specific learning difficulties' and viewed these difficulties as lying along a continuum with other types of learning difficulties. They believed that classroom-based assessment and support were the most effective ways of supporting children with specific, and other types, of learning difficulty. Parents and voluntary organisations, on the other hand, were keen that the term 'dyslexia' be used. They viewed the condition as discrete and essentially different from other types of learning difficulties, being caused by genetic or neurological factors. Expert psychological assessments were seen as essential, and particular teaching methods were preferred, possibly taking place in special schools for children with dyslexia or in classrooms staffed by teachers with knowledge of, and preferably a specialist qualification in, dyslexia.

One of the interesting features of the literature on SEN and ASN is that there is a relative dearth of material on parents' involvement and the factors which make them challenge or seek redress. Riddell et al (2003) identified four particular 'types' of parents on the basis of their relationship to SEN frameworks. These were termed parent as tentative consumer, the disengaged parent, the parent as uneasy client and the transgressive parent. The case studies revealed the relationship between the parent's social class position and the repertoire of identities available to them as users of SEN services on behalf of their children. The identity of challenging consumer was relatively rarely adopted, and many parents regarded the expectation that they would be able to enter into an equal relationship with professionals as extremely oppressive. Using Foucauldian terminology, Vincent and Tomlinson (1997) suggested that the expectation of partnership could be experienced by some parents as a 'disciplinary mechanism'.

### **3.7. Partnership, consumerism and managerialism: implications for professionals**

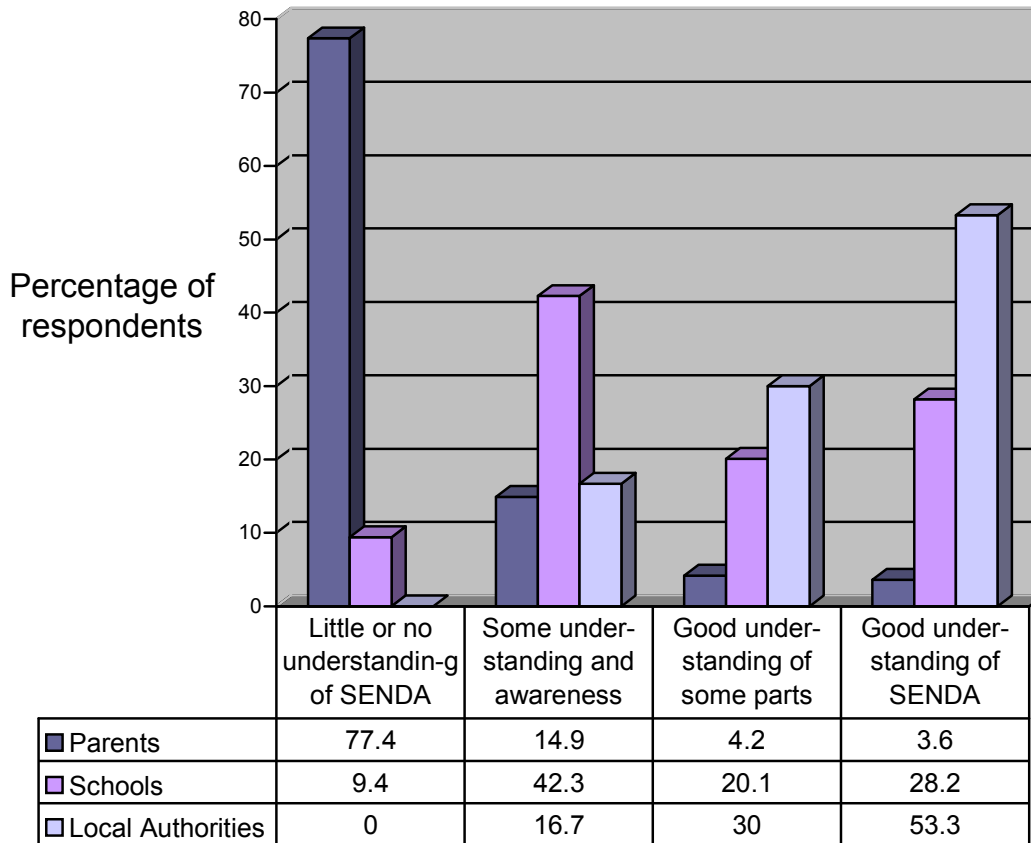
The position of professionals in the field of SEN/ASN, and their relationship with parents, has to be understood in the context of the expansion of the welfare state after World War II which produced a growing number of public sector workers. The role of

such professionals has traditionally been to both work for the greater social good and deliver efficient public services (Cole and Furbey, 1994). McPherson and Raab (1988) argued that professional autonomy was greater in Scotland than in England because Scottish semi-independence rested on the autonomy of its professionals. Before devolution, the Scottish Office acted as the central state in Scotland, especially in areas such as education where Scotland has traditionally been most distinctive. According to Humes (1986) and McPherson and Raab (1988), the agenda of Scottish education in the twentieth century was set by Scottish Office officials who enjoyed a particularly powerful position. Professionals were able to defend this power on the basis that they were the bulwark against creeping anglicisation. In Whitehall, the presence of Ministers prevented professionals from occupying such a dominant position, although they were still expected to fulfil the potentially conflicting tasks of achieving social amelioration whilst at the same time delivering services in a dispassionate manner.

One of the problems of bureaucratic systems pointed out by Weber was that, whilst there is a need for professional expertise, there is a danger that they will become ungovernable and self-serving. During the 1970s and 1980s, attacks on professionals came from two distinct quarters. Those on the left suggested that, whilst pretending to operate as benign agents, professionals were reinforcing social inequalities and extending their empires (Weatherley and Lipsky, 1977; Wilding, 1982). The benign humanitarianism of professionals was subject to particular criticism by those working in the field of special educational needs (Tomlinson, 1982; Armstrong, 1995). However, an even stronger attack was mounted by those on the right, who wished to reduce expenditure on welfare. Adopting the arguments of the left, it was suggested that professionals, far from being neutral, were driven by ideology and self-interest. Not only providing poor value for money, it was suggested that their system of self-regulation resulted in corruption and inefficiency (Deakin, 1994). To bring these wayward professionals into line, it was argued, they needed to be subjected to the disciplines of managerialism and the market. Within the context of the market (Le Grand, 1991; Glennerster, 1991), professionals should be responsive to rational client choices and should adapt their services to meet client needs. Managerialism dictated that professional performance should not be judged by internal standards, but by externally imposed and objectively measured targets. As the collection of papers edited by Exworthy and Halford (1999) demonstrated, the response of professionals to managers and managerialism has varied, and in different contexts there is evidence of collaboration, co-option and resistance.

An important feature of the inter-relationship between parents and professionals in the field of ASN is that, despite considerable efforts to inform and empower parents, the balance of power still rests with professionals. This emerged clearly in a study of parents' knowledge and understanding of key pieces of education legislation, which was commissioned by the DRC in Scotland and conducted by Cogan et al (2003). The figure below summarises self-reported levels of knowledge and understanding:

**Figure 1: Parents'/Carers', schools' and LAs' levels of understanding of SENDA (Part 4 of the Disability Discrimination Act), Scotland, 2003**



Source: Cogan et al, (2003)

### 3.8. Conclusion to part 3

This part of the review has sketched the provisions and implications of various policy and legislative developments in England and Scotland in relation to SEN and ASN during the post-war period, focusing on the balance of power between parents and professionals. It is evident that there has been a gradual increase in the emphasis on partnership with parents and a growing focus on parents' rights to involvement in decision-making on their child's education, including the ability to challenge professional judgements and seek redress through courts, tribunals or through alternative dispute mechanisms. The position of parents and their relationship to professionals is complex, and it would be a mistake to present a simple picture of a route to empowerment. For example, recent legislation in Scotland has provided access to a tribunal service for parents, but because of restricted qualification criteria very few parents are able to access it. Similarly, it is evident from the English experience that parents have welcomed the opportunity to bring cases to the SENT/SENDIST, but many parents experiencing social disadvantage reject the role of critical service consumer, finding it impossible to fulfil this role in the midst of stressful and

chaotic living conditions. With regard to mediation, the literature is thin on the ground. Whilst some parents may have had positive experiences dealing with mediation services in Scotland and Parent Partnership Services in England, it is unclear whether they prefer mediation to more formal redress mechanisms. In addition, the extent to which socially disadvantaged parents may prefer mediation to more formal redress systems is unclear.

A number of questions arise which will be investigated in the empirical part of the study. These include the following:

In England, compared with Scotland, there has been a much greater tendency to bring a case to tribunal. What is the reason for this? Possibilities include the following:

- Access to the tribunal system is straightforward, the process is user-friendly and the chances of winning are reasonably good, thus encouraging appeals.
- Parents in (parts of) England are more dissatisfied than those in other regions and in Scotland.
- The practice of stipulating resources on the statement of needs encouraged parents to appeal because it provides absolute clarity on the measures to be taken at the school level.

In England, the increase in number of cases referred to the SENDIST has slowed, and a slight decrease in the number of cases coming forward has been noted. One of the possible reasons for this is that local authorities and schools are getting better at defusing conflict, assisted by the requirement to arrange mediation services under SENDA. Another is that a decrease in the number of statements opened in England has made it more difficult for parents to appeal because there is less clarity with regard to resources.

In Scotland, parents have never been keen to take cases to court and there have been relatively few references to the ASN Tribunal. This might be because local authorities and schools are good at defusing conflict and parents are generally happy with provision. Another factor is that parents have lacked easy access to formal complaints or appeals mechanisms – records of need have generally not specified resources and qualification criteria to access the ASN Tribunal have been set very high.

## **PART 4**

### ***THE POLICY CONTEXT (2)***

### ***DISPUTE RESOLUTION***

#### **4.1. The Leggatt Report (2001) and beyond**

Since 2001 there has been a Government policy push towards alternative dispute resolution (ADR) in administrative justice as an additional option to taking disputes to

tribunals (for a discussion on the rise of ADR in other jurisdictions and other areas of justice in the UK see below). Sir Andrew Leggatt in 2001 reported on his review of the tribunal system. As the title of the report *Tribunals for Users. One System, One Service* suggested, Leggatt's review was concerned that the users<sup>1</sup> of tribunals were not the priority of the current service, mainly as a result of the development of tribunals in an ad hoc manner. Leggatt (2001) envisaged a system where –

- tribunals are independent of their sponsoring departments;
- tribunals are administered under one unified tribunal service to guarantee independence and also to improve efficiency, especially in relation to the venues for hearings;
- the training of chairmen and members in interpersonal skills is improved, which in turn may lead to a better experience for users; and
- unrepresented users are enabled to participate effectively and without apprehension.

Leggatt (2001) also highlighted the importance of active case management with a view to decreasing the amount of time cases take up and to ensure that cases are well prepared in a “framework which is as simple, proportionate and flexible as possible” (8.4). Leggatt (2001) also asserted that active case management would provide the opportunity to identify cases which might benefit from ADR. Introducing the notion of proportionate dispute resolution (PDR), Leggatt cautions that ADR is only appropriate in certain areas of jurisdiction and for certain individuals and therefore recommends that the President of each chamber of the proposed tribunal service (see below) explores appropriate forms of ADR.

It has been widely remarked that that the DCA White Paper *Transforming Public Services*, while embracing and being compatible with the ideas of Leggatt, actually went further than Leggatt (See for example Adler, 2006a). This was due to a belief that tribunal reform cannot stand alone but the whole administrative justice system needs improvement (DCA, 2004).

The DCA provided more evidence about why changes to the tribunal system were needed, because of what potential users wanted from such a system: independence; reduced waiting times as “tribunals may be dealing with cases where a quick decision is vital”<sup>2</sup> (DCA 2004: 21); cases resolved without formal hearings where possible; better accessibility to hearing centres;<sup>3</sup> increased accessibility to information about the process; hearings which are not daunting or legalistic (MORI, (2001) found high levels of

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<sup>1</sup> Adler (2006) notes that Leggatt and the DCA White Paper (DCA 2004) only focus on citizens as users and ignore public bodies and employers who will also use tribunals.

<sup>2</sup> This is important in the area of SEN as the longer the decision takes the longer a child may be without suitable provision or without education at all and decisions are often needed before the start of a new school year (Leggatt, 2001).

<sup>3</sup> It seems that this is a particular issue within SEN tribunals as they only have permanent accommodation in London whereas elsewhere in the UK they often use hotels which do not provide hearings with suitable facilities/ atmosphere that purpose built accommodation provides (Harris, 1997; Leggatt, 2001; Genn *et al*, 2006).



satisfaction with treatment by tribunal staff but users were less satisfied with willingness to explain complex issues and the degree to which they felt the tribunal understood their case); highly skilled judiciary; authoritative, consistent and comprehensible decisions that command the respect of those affected; and a cost efficient service (DCA, 2004).

Leggatt (2001) was keen for users to be able to come to tribunal without legal representation. The DCA (2004), however, argues that representation is important in certain cases but there will be a reduced need for legal representation by virtue of more cases being resolved through ADR and by improved advice and assistance for preparation of cases. While Leggatt wanted to increase the amount of unrepresented users of tribunals he also stressed the importance of impartial, professional advice so that expectations were realistic.

The DCA White Paper also further developed the idea of PDR based on a range of policies and services that help people to avoid disputes in the first place, but where they occur, to ensure tailored solutions to resolve the dispute as quickly as possible (DCA, 2004). Therefore, at the same time as developing mediation and other dispute resolution mechanisms, administrative systems would be improved to make better decisions (for example, by increasing feedback from tribunals to departments), more information and advice would be provided to the public especially when problems arose, and tribunals made more efficient for the cases where a hearing is the best option (DCA, 2004). Two key issues underline these changes: firstly what the user wants in terms of outcome and process; and secondly the fact that people's disputes are complex and current routes to redress do not take people's problems as a whole but break them down into types (DCA, 2004). Under the pre 2007 system people had to analyse the sort of redress they wanted and then choose the appropriate route, a process which is thought by Adler (2006a) to be bound to result in errors. Adler (2006b) comments that the White Paper's approach to PDR, by tailoring policies to the needs of individuals through consideration of the types of disputes people have, the outcome they want and the options for resolving disputes and their effectiveness, is a sophisticated one. In terms of what people want, some might merely want an apology whereas some will want an authoritative decision; and some will want formal resolutions, while others have a preference for informal resolutions (DCA, 2004).

The NAO's (2005) findings support government proposals to increase information available to the public about dispute resolution strategies available to them. The NAO found that most users access information through the internet but that the quality of information and ease of access across different departmental websites tends to be patchy. Another finding was that nine out of ten people would push for redress but only three quarters of them could come up with a useful suggestion of how to go about this (NAO, 2005). DCA (2004) also estimates that around one million problems go unresolved each year because people do not understand their basic rights or know how to seek help.

This policy push towards ADR is underpinned by a range of arguments, some related to the processes and some related to the parties. In terms of the former, ADR may reduce the caseload of the courts, and cases that do go to court will be better prepared and the

dispute more likely to be settled (Boyron, 2006). There is also the perceived advantage of savings in time and effort. However, Boyron (2006 and 2007) asserts that in England the main justification for ADR is cost cutting, both for the parties and the judicial system. The NAO estimated in 2005 that the annual bill for handling appeals was approximately £366 million and that appeals and tribunals accounted for half the cases in the administrative justice system, but three quarters of the total costs (NAO 2005). The Government reported that in 2006/2007 ADR had been used in 331 cases with 225 leading to settlement, a costs saving estimated at £73.08 million (Tribunals Service, 2007).

Another justification for ADR lies in avoidance of stress for the many citizens who find courts and tribunals daunting and legalistic, although Vernon (2008) argues that while the increased legalism and judicialisation of the tribunal system have increased formality in tribunals, there has been a necessary emphasis on ensuring a fair process, a principle embedded in Art.6 of the ECHR. Boyron (2006) argues that mediation introduces some flexibility and helps parties stay open-minded. It counteracts the adversarial nature of the courts and some tribunals and there is a wider range of solutions available. Bondy (2004) acknowledges that ADR should not simply be seen as a cost-cutting exercise, it must also be about obtaining better outcomes for the parties.

The NAO (2005) proposes that the policy push towards mediation in administrative justice is necessary to shift the public perception of government departments away from seeing them as 'passive-defensive'. The public think that government officials will close ranks to protect their colleagues whereas policy now recognises that this is no longer appropriate and staff are expected to be pro-active.

The NAO (2005) distinguishes between complaints and appeals<sup>4</sup> but cautions that this separation leads to two distinct systems of redress which can be confusing to the user. Some SEN disputes, particularly those that lie outside the grounds for appeal to the SENDIST, may be dealt with via the internal complaints department of LEAs or through the Local Government Ombudsman (LGO). The LGO's annual report for 2006/2007 records that of the 18,320 complaints received, 8 per cent related to education (1448 complaints). This was a reduction of 12 per cent from the previous year; however, the report states that this overall fall includes a reduction of nearly 18 per cent in complaints specifically about schools admissions. During the investigations of complaints by the Local Government Ombudsman approximately 28 per cent of cases came to a local settlement whereby the local authority will taken action or agrees to take action that the LGO feels is a satisfactory response to the complaint. According to Abraham (2008), ombudsmen do not follow similar approaches to the courts or tribunals and do not engage in mediation per se. Abraham (2008) argues that the fact that the LGO can appoint a mediator shows that these ombudsmen are not mediators.

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<sup>4</sup> Complaints are taken to refer to any expression of dissatisfaction with any aspect of agency/ departmental conduct, while appeals concern dissatisfaction with decisions.

#### **4.2. The Tribunals, Courts and Enforcement Act 2007**

The Tribunals, Courts and Enforcement Act 2007 incorporated many of the recommendations from Leggatt (2001) and the White Paper (DCA 2004). So far as mediation is concerned, the Act provides in section 24 that a person exercising their power to make tribunal procedure rules/practice directions on mediation must have regard for the fact that taking part in mediation must be consensual on the part of both parties and that when mediation fails this does not affect the outcome of proceedings. Section 24 also enables tribunal members to act as mediators in disputes. ADR is also mentioned under section 2(3)(d) which states that the Senior President of Tribunals is to have regard to “the need to develop innovative methods for resolving disputes that are of a type that can be brought before tribunals”. Nevertheless, it is suggested that the Act is facilitative rather than promotional of mediation. Its provisions “do not reflect anything like a commitment to mediation in tribunals” (Vernon 2008: 22). The House of Lords Select Committee on the Constitution had argued that a mediation clause should be included for reasons of accountability, the Rule of Law and access to justice. ADR is said to increase access to justice but at the same time there needs to be assurance that appellants will not be pressurised into ADR when what they seek is a hearing before an independent tribunal (House of Lords, 2006).

The Tribunals Service has reported that the policy push, reflected in the 2007 Act, towards ADR is not happening on the ground and that despite being on the agenda since 2001 “the development of alternatives to present ways of resolving disputes is in its infancy” (Tribunals Service, 2007; 54). Many tribunals, according to the findings of a survey commissioned by the Council on Tribunals in 2006, do not believe that ADR is suitable for their jurisdictions, including the SENDIST, which reportedly stressed that its role was one of “decision-making rather than brokering a compromise between parties” (AJTC 2008). With a few exceptions, such as the Private Renting Housing Panel for Scotland, and in two other jurisdictions where pilot projects are in operation,<sup>5</sup> mediation and other types of ADR are not under active consideration for adoption in tribunals.

Much of the 2007 Act is concerned with the reform of tribunals. Tribunals have developed in an incoherent manner over the past 60-plus years and at the time of the structural changes under the Act there were over 70 tribunals in operation. Post 2007, as Leggatt (2001) and the DCA White Paper (2004) envisaged, many key tribunals, including the SENDIST (but not any other education appeal bodies such as school admission appeal panels or exclusion appeal panels) are administered under one unified Tribunal Service (established in April 2006). This Tribunal Service is an executive agency within the Ministry of Justice (formerly the Department of Constitutional Affairs). There is a first-tier tribunal with an upper tribunal above it, overseen by a Senior President of Tribunals (Lord Justice Carnwath is the first appointee). This structure is

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<sup>5</sup> One of these pilots is around participating in judicial mediation in employment tribunals. The other is an evaluation of an early neutral evaluation scheme in social security and child support appeals.

established under the 2007 Act. The first-tier tribunal is the first instance tribunal for most jurisdictions and is divided into chambers, each of which has a Chamber President, which bring together a number of tribunals that carry out similar work. It is envisaged that there will be five chambers: Social Entitlement; General Regulatory; Health, Education and Social Care; Taxation; and Land, Property and Housing. SENDIST is in the Health, Education and Social Care chamber. The Upper Tribunal's three chambers will be Administrative Appeals; Finance and Tax; and Land. The new system aims to ensure the effective deployment of resources without losing the expertise that defines tribunals. Most judges and members are likely to begin with the types of cases that they previously dealt with but will then be given a 'ticket' by the Chamber President to be able to sit in other jurisdictions; this is to ensure that the right judge is matched to the appropriate case.

The Upper Tribunal aims to synchronise the varying appeal routes that previously existed across different tribunals (Tribunals Service, 2007). Appellants can appeal from the first-tier tribunal to the Upper Tribunal only with permission and normally on a point of law and the Upper Tribunal can have judicial review jurisdiction if approved and exercised by High Court judges (Tribunals Service, 2007). Prior to these structural changes an appellant can appeal from the SENDIST to the High Court without requiring permission, but the 2007 Act replaces this with a system where the appellant can appeal on a point of law only with permission, to the Upper Tribunal (Tribunals Service, 2007).<sup>6</sup> One of the main advantages of the new system, according to the Tribunals Service (2007), is the greater consistency (particularly given the Act's provision for a Tribunals Procedure Committee that is aiming to design common procedures as far as possible), common terminology and common pathways through the process, while at the same time maintaining the specialised nature and needs of individual jurisdictions.

A consultation exercise was completed in February 2008 and a summary of the responses to specific consultation questions together with the Government's response to the views expressed was published in May 2008 (Ministry of Justice/Tribunals Service 2008). The basic changes and proposed structure was generally favoured and no significant amendments are planned. A few of those who responded were concerned about the placement of SENDIST, as it is seen as dealing with different issues and clients to the tribunals such as the Mental Health Review Tribunal, but the Government did not consider the case to be persuasive. The Government was also unimpressed by the suggestion that there should be a discrete Children Chamber, including the SENDIST, since such a chamber would also need to deal with children cases allocated to the Social Entitlement chamber.

The Tribunals, Courts and Enforcement Act 2007 has also established the Administrative Justice and Tribunals Council (AJTC) in place of the Council on Tribunals. The AJTC has a wider remit than its predecessor. It includes keeping the administrative justice

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<sup>6</sup> There are also three distinct pillars, one for employment tribunals, one for the Employment Appeal Tribunal and the other for the Asylum and Immigration Tribunal. One reason for this was the fact that there were criticisms following Leggatt from those associated with employment tribunals about the different nature of such tribunals being more akin to the civil courts: Adler, 2006b.

system as a whole under review. Consistent with the duty placed on the Senior President of Tribunals under the 2007 Act, the Tribunals Service (2007) stated its commitment to pioneering new ways of providing justice. And as Leggatt (2001) recommended, the role of ADR will be kept on the agenda by the AJTC by virtue of its new remit.

### **4.3. Debate on applicability of ADR to public law disputes**

Debates around the applicability of ADR to public law disputes have in the past focused on its appropriateness in judicial review cases rather than on tribunal appeals. However, in 2001 the Government pledged to resolve disputes involving its departments and agencies through ADR in all suitable cases, which acknowledges that “there may be cases that are not suitable for settlement through ADR, for example, cases involving intentional wrongdoing, abuse of power, public law, Human Rights and vexatious litigants” (Tribunals Service, 2007). The Government reports on the effectiveness of this pledge every year, but as Boyron (2006: 343) says, these reports create “more avenues for research than they really settle” because they do not give detail on the type of cases solved in this way nor the categories of parties concerned, nor the procedures followed; and there is no breakdown between different Government departments. ADR is identified in the literature as being particularly suitable in cases where parties are likely to have a continuing relationship (Leggatt, 2001) and many authors speak of this as being especially important in public law and education disputes (Stilitz and Sheldon, 2007; Richardson and Genn, 2007; Supperstone *et al* 2006; Buck, 2005).

However, various questions have been raised about the suitability of ADR in public law cases. Many of these stem from the fact that ADR processes such as mediation have confidentiality and privacy at their heart and are therefore non-public processes. Buck (2005) suggests that one disadvantage of ADR is that its confidential nature offends notions of transparency and fairness. Supperstone *et al* (2006) think that as mediation cases are confidential they do not have a high public profile so people do not get to hear about successful cases. There is, in any event, a line of reasoning that cases which involve public interest should be heard in the public domain. Supperstone *et al* (2006) argue that third parties may benefit from a definitive judgment, while outcomes available through mediation may serve the public interest as well as those available through the courts, while in any event courts often do not determine points perceived to be of public interest.<sup>7</sup>

It is also argued that ADR is not appropriate in cases concerning fundamental rights, including human rights (Richardson and Genn, 2007). Hunter and Leonard (1997) state that this is because public hearings are an important source of information on human rights legislation and mediators may fail to convey the underlying legislative purpose. Supperstone *et al* (2006) think that with the use of a skilled mediator these issues can be

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<sup>7</sup> See also Stilitz and Sheldon (2007) for similar justifications as to how arguments against the use of ADR in public law disputes can be countered.

overcome. A further factor is that mediated settlements tend not to be enforceable, or at least can be difficult to enforce.

Although in *R. (on the application of Cowl) v Plymouth CC* (2001), the court showed a commitment to ADR, there is an argument that cases which raise points of law (as is often the case in public law disputes) should be determined in a court of law (Buck, 2005; Adler, 2006). *Cowl* was a case where no legal principles divided the parties and the claimants could not have received a better result through litigation than what was offered to them by defendant (Supperstone *et al*, 2006). Buck (2005) notes that cases which raise points of law are particularly unsuitable for non-public ADR when issues are in debate that need the establishment of a precedent and a public hearing to deter violations. But, as Supperstone *et al* (2006) argue, by settling through mediation parties avoid risking an adverse outcome by the courts. Buck (2005) argues that even if cases get to ADR, those where there is a strong public interest or which concern important questions of legal principle may arrive at an appropriate court forum at which an authoritative determination can be made.

There are strict time limits for applications for judicial review which could cause difficulties if ADR is attempted. There would only be a small window in which mediation, for example, could be commenced and concluded. However this problem could be overcome if mediation was used after the commencement of judicial review proceedings (Supperstone *et al*, 2006).

One further area of debate on the applicability of ADR to public law disputes is around whether cases that involve the use of discretionary powers are suitable for mediation. Boyron (2006) states that the German administrative law system regards such cases as suitable whereas in France it is considered that such cases do not have scope for negotiation. Niemeijer and Pel (2006) found that in the Netherlands there was no difference in success rates for mediation, as between civil and administrative cases, which they say proved wrong an assumption that administrative cases will have a lower success rate as government bodies are bound by legal rules and there is less room for negotiation. Therefore they conclude that a lack of room for negotiation is not as big a factor in preventing successful mediation as first thought and that it is often a lack of communication or misunderstanding that is at the core of disputes (Niemeijer and Pel, 2006).

Richardson and Genn (2007) discuss how the use of ADR and the changes to the structure of the tribunal 'system' may challenge the traditional perceptions of tribunals as being independent and routinely using oral hearings. They note that internal review as a form of ADR may call into question institutional independence, however other forms of ADR, for example mediation, keep the independent element which advocates of tribunal reform value highly (Richardson and Genn, 2007). With regard to the use of oral hearings, the 2004 DCA White Paper advocated reduced reliance on formal oral hearings through its promotion of PDR.

Richardson and Genn (2007) think that the place of ADR depends on the type of dispute in question. It may not be appropriate in cases of great importance to the individual (e.g. cases concerning fundamental rights), but could in disputes about issues that are resource dependant and where there is no single accurate outcome to be imposed. Supperstone *et al* (2006) and Stilitz and Sheldon (2007) also argue that disputes concerning resources rather than points of principle may well be very suitable for mediation. In cases concerning entitlement to a material benefit, ADR is often not an appropriate goal because cases often concern eligibility, in respect of which there will be only a very limited range of alternatives, while any issues of quantum will give little scope for compromise (Richardson and Genn, 2007). Adler (2006b: 978) concludes that “the scope for conciliation/ mediation...in a system of PDR for administrative justice would seem to be rather less than the White Paper envisages”.

One of the more fundamental concerns about ADR is that it may not adequately address the *justice* in a dispute, as people might settle for less than they are entitled to, for convenience, compromising on their legal rights (Adler, 2006b; Buck, 2005). This will be an important issue for the research to test. Concerns are raised therefore about substantive outcomes from mediation and ADR in general as well as the procedural justice arising the way it is conducted, when viewed in contrast to independent judicial processes. Adler (2001) has explored the relationship between procedural justice, in terms of the inherent fairness of the decision-making process at whatever level (from initial decision to appeal), and substantive justice, in terms of the outcomes, and has found that there is no essentially causal relationship between the two. His work was focused on social security, but there are parallels between some parts of the social security system – in particular the discretionary social fund – that Adler talks about and the field of special educational needs.

Previous research concerning special educational needs assessment has concluded that the introduction of the appeals system, involving the SENDIST, in England acted as a positive force for procedural justice by shifting the balance of power to wards parents and children (Riddell *et al.* 2002). The question then arises as to how far a shift towards ADR will undermine this benefit. As noted above, there is a general perception with regard to the use of ADR for cases concerning administrative disputes, of an imbalance of power between citizens and the state, especially because government is a ‘repeat player’. However, it has been argued that the imbalance may be corrected by the use of a skilled mediator and by virtue of the fact that appellants might be more familiar with the case than officials (Adler, 2006b). Moreover, these concerns about imbalance of power are also relevant to tribunals, especially as government departments will be better able to afford good legal representation. It takes a well trained judiciary to even out this imbalance (Genn *et al.*, 2006).

#### **4.4. Public perceptions of disputes**

Two major studies of disputes are Adler *et al*’s (2006) research on the nature of administrative grievances and Genn’s (1999) work on how people view civil disputes and

barriers to seeking redress. Adler *et al* developed categories of grievance in part from people's reports of the grievances they had had with public bodies. They included delays; problems with information and communication; decisions and actions perceived to be unfair; administrative errors; inappropriate staff manner and attitude; problems with access to services; poor quality of services; and the deleterious impact of policy in their case. Genn (1999) suggests that non-trivial justiciable problems are a feature of life, with many people experiencing the same problem more than once and many experiencing multiple problems.

One issue Adler *et al* (2006) found prominent in their research was the confusion people experienced over what a public body was and in identifying specific public bodies. For example, there were people who could identify the body but had no notion of the name e.g. knowing in education disputes that schools were the responsibility of local rather than central government but not using/ knowing the term 'LEA'.

According to Adler *et al* (2006) factors that affect propensity to seek a resolution include: how serious a grievance was perceived to be; the expected outcome of an attempt at resolution; what people knew about how to seek resolution; the accessibility of the mechanism for resolution; and the resources available to support attempted resolution. People had to have the motivation to seek redress but also the means, including information, to be able to follow the resolution through. Genn (1999) also found that access to information on how to resolve disputes was crucial to how people viewed disputes. Adler *et al* and Genn also highlight the importance of motivation and persistence as personal attributes associated with an attempted resolution. Other research has examined propensity to complain, where a range of motivational factors influence propensity to seek redress, ranging from 'anger' to a desire to contribute to the common good (ie benefiting others by preventing repetition of bad practice etc) (including Wallace and Mulcahy 1999; Cowan and Halliday 2003; Gulland 2007 and 2008).

The significance of seeing a dispute as serious cannot be overstated and Adler *et al* (2006) found that the factors influential in that perception included the potential or actual impact of the grievance, the scale and immediacy of consequences and the person who was most affected by the problem, in that problems were, for example, viewed as more serious if they affected someone vulnerable or close to the person in question, for example, their children, rather than themselves. On that basis, Adler *et al* identify certain education matters, including SEN, as likely to be considered serious by the people affected.

People adopted different strategies to resolve disputes according to the Adler *et al* study, but it was clear that strategies were more effective when different ones were used in combination. Genn (1999) found it was rare for people to do nothing at all in response to a problem and if they did this was because of a belief that nothing could be done, or they did not view the dispute as important, or they thought some harm might flow from taking action. The principal way in which people responded to problems was to go straight to the opposing side rather than seeking legal redress. Genn also found that many people resorted to self-help strategies rather than use outside advice when they had a dispute, but



after doing so often gave up because of lack of information and/or fear of legal costs. Even when disputes were taken to advisers there were varying degrees of success, with one in three remaining unresolved and one in three going to court or tribunal. But in general there is not a 'rush to law'. It is clear from Genn's (1999) findings that strategies used and the success of strategies depends very much on the type of case. She said it was clear that people simply wanted to solve the problem rather than secure any punishment, revenge or an apology and so they wanted routes to redress that were quick, cheap and stress-free. Gulland similarly found that in Scotland some people bring a complaint in respect of their community care (there being no appeal route as such) with reluctance, hoping their problem can be sorted out with minimum of fuss.

#### **4.5. ADR within civil justice post-Woolf and elsewhere**

In the UK ADR has been utilised in certain fields (e.g family law (see below)) and in various forms for a number of years, but it was not until Lord Woolf's *Access to Justice* report of 1998, where he advocated litigation as a 'last resort', that ADR began to 'constitute a significant part of dispute resolution' (Supperstone *et al*, 2006: 301). Subsequently the Civil Procedure Rules 1999 and case law promoted the use of ADR in civil law disputes further. Case law between 2001 and 2003 appeared to take a very positive view of ADR by suggesting that even if a person was successful at trial, if they unreasonably refused to enter mediation it could lead to adverse cost consequences: see *R. (on the application of Cowl) v Plymouth CC* (2001); *Hurst v Leeming* (2001); *Dunnett v Railtrack plc* (2002); *Leicester Circuits Ltd v Coates Brothers plc* (2003); *Royal Bank of Canada Trust Corporation Ltd v Secretary of State for Defence* (2003). However, *Halsey v Milton Keynes General NHS Trust* in 2004 seemed to take a more cautious line as it was held that departure from the general rule that costs follow the event and the losing party should pay the costs of the winning party should only happen when a party had unreasonably declined to mediate. Reasonableness was said to depend upon whether the successful party reasonably believed they would win, cost-benefit analysis, and whether the unsuccessful party could show that mediation had a reasonable prospect of success (Genn *et al*, 2007). Reid (2004: 8) refers to *Halsey* as a "victory for common sense" as it recognises there are both advantages and disadvantages to ADR as opposed to standard court processes and therefore there should not be a presumption in favour of mediation; and this ruling reasserts the public's right to a fair hearing. (For a more detailed description of the development of ADR principles in civil justice and case law see Genn *et al*, 2007.)

In terms of the development of ADR in other jurisdictions much of the literature focuses on Europe, America and Australia and to some degree on Canada. Boyron (2006) observes that while many countries in Europe started to consider ADR at similar times, the different administrative backgrounds, organisation and environments influenced the main justifications for, as well as the success and uptake of, ADR in administrative justice.

Germany traditionally has a high regard for formal litigation and it also has a very effective internal review system which reduced the need for the development of ombudsman and other mechanisms for handling public law disputes and therefore Germany lagged behind in adopting ADR (Boyron, 2006; Buck, 2004). The administrative courts in Germany, whilst dealing with many cases, are relatively well staffed, and therefore the main justification for mediation is merely a better experience for the claimant. In Germany individual members of the judiciary were the instigators of mediation in administrative law, which Boyron (2006) claims means that use of mediation is unlikely to become systematic. There is legislation in Germany's Civil Law for states to introduce mandatory court-connected mediation. However an over-legalistic approach was originally taken; mediation sessions focused on the clarification of the facts and many of the benefits of mediation were not reaped, including the negotiation of mutually beneficial outcomes (Buck, 2004).

In France, unlike in Germany, the mediation movement began by statute. However, there was what Boyron (2006) describes as a "missed opportunity", in part because there was no training of mediators or judges, whose attitudes towards mediation were therefore not altered. Because of this mediation is rarely resorted to in France and so the caseload of administrative courts has not been reduced, which had been the main justification for introducing ADR. Judges are the mediators in the French system but Boyron (2006) recommends a shift to professional mediators and reliance on judges as mediators only in the large, complex repeat cases.

In the Netherlands there is a relative unwillingness of citizens to go to court to resolve administrative disputes. Moreover, under the 'notice of objection' procedure there is a comprehensive requirement for administrative agencies to review their own decisions; therefore many disputes are solved through internal review (Buck, 2004). Mediation began to be adopted in the Netherlands in the 1990s initially in the private sector but currently administrative courts can refer parties to mediation. It has developed in particular policy sectors and is most successful where the number of parties is limited and the parties are identifiable, which is often not the case in Dutch administrative disputes (Buck, 2004). Niemeijer and Pel (2005) evaluate a court annexed mediation scheme and say that because in the Dutch system parties take part in a settlement conference before a judge which focuses on settling the legal issues at stake, this makes the idea of mediation easier to integrate into the legal system. The use of a settlement conference could call into question the need for mediation, however the fact that mediation has been successful where settlement conferences have not, as well as the intrinsic benefits of mediation (below), show that there is a place for both (Niemeijer and Pel, 2005).

Similarly in Canada, judges are used to employing mediation techniques and holding settlement conferences, so mediation fits in more easily (Prince, 2007). Prince (2007) reports that in Ontario, since the early 1990s, there has been an ADR element in mainstream civil justice, but in 1999 mandatory mediation was introduced for all civil cases. At the same time, case management was introduced so that judges became responsible for managing the pace of litigation to encourage settlement at the earliest opportunity. However, since then government policies have changed from a concern

about user satisfaction to those which are cost-neutral. Therefore it is likely mediation will continue on a voluntary footing. There was also an attitude in Ontario at the time that many cases settle over time in any event, so there was little point wasting resources on something they would do anyway. (See further on mandatory mediation below.)

In Norway there is resistance to formal litigation and also no discrete system of administrative law, the need for which is thought to have been avoided by a very accessible ombudsman system (Buck, 2004). Buck (2004) notes that the proposed Dispute Act in Norway contains integral ADR features.

The European Union has also promoted the use of ADR through its Code of Conduct for Mediators; however this is concerned with civil and commercial legal disputes and appears to exclude administrative disputes (Boyron, 2007; Buck, 2004). The Council of Europe in 2001 issued a recommendation for ADR in disputes between administrative authorities and private parties but at the same time found few examples of alternative methods being used generally in the administrative law sphere except in the case of Lithuania (Buck, 2004).

In Australia the government's approach to ADR has spanned three major strands: mainstreaming ADR within the federal civil justice system; assisting with customising ADR solutions for particular jurisdictions, such as human rights and family law; and a commitment to promoting and engaging in ADR processes when it is itself a party to a dispute (Mack, 2003). Buck (2005) says that the tribunals in Australia have developed in an ad hoc manner, but there is evidence of the use of mediation within them, with some having legislative mandate to make use of mediation and one having issued guidance on the use of mediation.

Research in other jurisdictions on how they deal with administrative disputes suggests that where there are already good dispute resolution mechanisms in place, for example ombudsmen and internal review systems, there is perceived to be less of an imperative to develop ADR mechanisms. The use of ADR is also influenced by legal cultures. ADR has originated in civil law disputes in Europe as in England. Partington (2004) questions why England and the UK have not taken bolder steps to promote the use of ADR as they have in jurisdictions such as Canada and Australia.

#### **4.6. Evidence on the user/professional experience of ADR, for example in family mediation.**

Mediation has been a feature of family law dispute resolution for a number of years in the UK. For example, the Bristol Family Mediation scheme has been in operation since 1979 (Westcott, 2004). The push towards mediation in family law was in part as a result of changes in the attitudes of the courts from seeing their primary aim as the preservation of the institution of marriage to looking at the social consequences of divorce (Westcott, 2004). But in England mediation increased in prominence as a result of the Family Law Act 1996.

Part II of the Family Law Act provided for the attendance of one of both parties to a divorce at an 'information meeting' and a 'period for reflection and consideration', the idea behind this, although not explicitly mentioned, was for the information meetings to encourage people to go to mediation (Walker and McCarthy, 2004). Walker and McCarthy (2004) evaluated the information meeting pilots and found a low take up of mediation (only 10 per cent of couples) mainly because it required both parties to agree and often only one was willing to attend. Only 25 per cent of couples resolved all the issues on which they were divided. As Fisher (2001) states, it is often in respect of issues around children that agreements are reached, whereas in finance and property cases agreement is less likely. Walker and McCarthy (2004) report that 38 per cent of people were dissatisfied with the mediation because: the agreement was unenforceable; they felt pressured to reach an agreement; they received insufficient advice; or they had not found solutions to their problems. Also many users did not feel that they had achieved the wider benefits often associated with mediation. As Walker and McCarthy state, many people who had gone through mediation still found the divorce process distressing, there was no increased communication between partners, and conflict was not reduced. Walker and McCarthy suggest two reasons for this: first, a shift in mediation practice with increased public funding leading to increased emphasis on settlement-seeking, rather than therapeutic goals; and secondly, that couples were using mediation when it was not necessarily appropriate for them to do so.

Because of these and other findings Part II of the Family Law Act 1996 was not implemented. However Part III was implemented and this also included benefits for mediation and is seen as a 'milestone in the history of family mediation' (Parkinson, 2004). This part allows for individuals with insufficient income who wish to use mediation to do so with public funds. Davis (2004) conducted some research into s 29 of the Act, which is within Part III and stated that before securing legal aid for lawyer representation applicants have to attend a meeting with a mediator. This research found that while many were satisfied with the mediation process, with 86 per cent finding it 'helpful' or 'fairly helpful', it was not cost-effective because 'the non-legally aided person can undermine mediation in a way that he or she cannot undermine participation in legal proceedings because the latter are unashamedly coercive' (Davis, 2004: 67).

The importance of solicitors in divorce has been highlighted. Davis (2004) found solicitors received significantly higher ratings from parties than mediators, which he surmises may be due to lawyers' wider remit and the value separating couples place on the authority of a lawyer. However Davis comments lawyers and mediators should not be seen as alternatives but as parallel services. In the USA, Kelly (2004: 29), in general found higher levels of client satisfaction with mediation as opposed to lawyer action via the legal process in family cases, especially when an agreement was reached; this was because clients "felt heard, respected, given a chance to say what is important, not pressured to reach agreements, helped to work together as parents, and felt that their agreements would be good for their children". Kelly also found that whilst mediation does not improve psychological adjustment there are other benefits which are long-term, for example, there was decrease in conflict, couples were more cooperative and more

supportive as parents and there were increased levels of communication. Parents were less happy with rushed or coercive mediation, inept mediators and when they did not get the outcome they expected or wanted. Kelly also found higher rates of compliance among fathers who participated in mediation.

There are two issues frequently debated in the family mediation literature that are also applicable to mediation in the SEN area.<sup>8</sup> The first is participation of children, which is discussed further below; and the second is power imbalance between the parties, which in family mediation is between male and female participants. According to Tilley (2007) there has been no evidence to support feminist claims that women are disadvantaged by mediation; in fact, the opposite may be true in that mediation produces benefits to women which may be regarded as perhaps even more important than obtaining a fair share of matrimonial assets, for example, being able to have their say and gaining confidence from this. Tilley's research found that women may be disadvantaged but only because they often do not consider their own interests in the negotiation, but rather give priority to their family's interests and especially those of their children, and feel guilt at taking too much. This evidence from family mediation cases that gender does influence the approach adopted by a participant could have implications for SEN mediation, whose principal focus is meant to be focused on the needs and interests of the child rather than on the wishes of the parent, although they will be a consideration.

#### **4.7. Different forms of mediation and types of mediator**

One of the issues that the present research is considering is whether, regardless of its independent role in SEN cases, mediation should be built in the tribunal process. In Europe mediation seems to be strongly linked with the courts with the use of court annexed mediation and judges as mediators, which is not the case in England. Buck (2005) argues for the use of both court officers and external providers for mediation to allow for greater flexibility to fit the circumstances. In both Germany and France mediation is placed within the court structure with a judge as mediator: the courts are inquisitorial and so mediation fits within the system, and there is a belief that "only someone with expert knowledge of principles, policies and decision-making procedures can achieve a successful mediation" (Boyron, 2006: 11). The courts will then bring in a different judge if mediation fails.

Wood (2004) identifies four types of mediation styles: negotiator; facilitator; counsellor; and the democratic. Each of these has a different view of mediator neutrality, how active the mediator role should be, and what the experience of mediation should be for the user. Moreover, they have different strategies and goals. Wood highlights previous research

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<sup>8</sup> Other issues discussed in the literature on family mediation are the effect of domestic violence on couples mediating and whether mediation focusing on all of the issues surrounding divorce or mediation or just on children is more effective. However these have less relevance to the current topic. For more information see Kelly (2004), McCarthy *et al* (1996).

which has shown that the directive/leadership style of mediation is more effective than a therapeutic, passive mediation style.

There seems to be lack of research and literature on different mediation models (e.g. facilitative, transformative) and different procedures (including tactics, strategies and interventions). There is not all that much substantive evidence on the effectiveness of particular models and procedures for particular types of disputes and disputants and on the factors which lead to a successful mediation (see eg Kelly, 2004; Buck, 2005; Genn *et al*, 2007; Reiman *et al*, 2007; Tilley, 2007). Although there is a lack of research on mediators and mediator styles many authors have stressed the importance of having a skilled, experienced and trained mediator (Kelly, 2004; Supperstone *et al*, 2006; Genn *et al*, 2007). Training of mediations may need tighter control as it lacks accreditation, according to Evans, who also reports on the development of a mediation service for higher education disputes (Evans 2004 and 2005).

Lawyer involvement can have both positive and negative effects on mediation, depending largely on the lawyers' attitudes, knowledge and skills (Mack, 2003). It may make the process more adversarial and reduce parties' feeling of empowerment; but at the same it may be vital in reducing power imbalances (Niemeijer and Pel, 2006). Whatever lawyers' effect on the process it is recognised that for ADR to become common practice the support of the profession is required (Partington, 2004; Niemeijer and Pel, 2006; Genn *et al*, 2007). Gersch (2003: 200) reports that lawyers tend to be excluded from SEN mediation, although he questions whether this is compatible with human rights.

#### **4.8. Evidence on the efficacy of mediation**

Mediation is reported to have high success or settlement rates (Mack, 2003; Genn *et al*, 2007), higher compliance rates and lower re-litigation rates (Mack, 2003; Niemeijer and Pel, 2006). Mack says that research is inconclusive about the link between type of case (e.g. family, administrative) and ADR success. User satisfaction, not surprisingly, appears to be linked to the outcome of mediation (Niemeijer and Pel, 2006; Genn *et al*, 2007). However, the value of mediation cannot be judged on outcomes alone: perceptions of procedural fairness are also important. Adler *et al* (2006) assert that people can receive favourable outcomes but still remain dissatisfied and Tyler (2000) claims that their perception of the degree of procedural fairness affects whether people adhere to agreements. Tyler identifies as the characteristics associated with procedural fairness: opportunities for participation, neutrality of the forum, trustworthiness of the organisers, and treatment with dignity and respect.

The perceived advantages of mediation, and of ADR more generally, seem plentiful and are listed below:

- Greater user choice will tend to make an agreed settlement more likely (Buck, 2005)
- Cost savings and reduced delays (Buck, 2005)

- Increased sense of ownership and control of the process, the ability to be heard and participate in developing the outcome (Buck, 2005; Niemeijer and Pel, 2006)
- Potential to maintain relationships and communication between the parties (Buck, 2005; Richardson and Genn, 2007; Niemeijer and Pel, 2006; Supperstone *et al*, 2006)
- The participation of a party or representative with authority to settle or be bound by any outcome (Mack 2003)
- Provision of solutions outside the legal framework (that may be interest based rather than rights based) (Niemeijer and Pel, 2006)

Referring specifically to the use mediation of mediation in SEN disputes, Gersch (2003: 9-10) asserts that it

- ‘works for a variety of reasons – including the fact that it
- Allows communications to take place freely
  - Overcomes deadlock
  - Assists negotiations
  - Focuses on important issues and needs
  - Gets the right people and information together at the same time
  - Makes everyone part of the solution
  - Rebuilds trust
  - Restores and safeguards relationships
  - Explores options for mutual gain’

Mediation of disputes involving children or adults with autism also has the benefit, according to a recent work, to facilitate ‘often more complicated and subtle settlements than could normally be achieved by going to a court or tribunal’ (Graham 2008: 128).

Buck (2004) argues that a further advantage of ADR processes is that their flexibility means they can be adapted to accommodate ethnic and cultural differences and also that providing users with a sense of control over the process is especially important in relation to ethnic and cultural differences. ADR processes are regarded as particularly suitable in cases looking at multiple issues, or where there is a genuine concern for children, or which involve on-going relationships (Mack 2003), all of which, especially the last two, characterise SEN disputes.

There is also the important issue of the timing of mediation within disputes, as Buck (2005) acknowledges there is no optimum time for referral to mediation. It has been widely observed that if mediation occurs too early then parties may not be ready to settle: the dispute has to be “ripe for resolution” (Buck, 2005: 49) and if it comes too late parties may have become too entrenched in their arguments to compromise.

Section 24 of the Tribunals, Courts and Enforcement Act 2007 acknowledges that people should not be compelled to participate in mediation. There is some evidence that when ADR practices are an automatic element to court/ tribunal procedure they may add a further procedural hurdle and increase the time taken and costs of a dispute (Buck 2005). Genn et al compared a mandatory and a voluntary mediation scheme in the civil courts

and found that the mandatory scheme actually turned out to be voluntary as people were allowed to opt out and they did so in such high numbers that the scheme was in reality voluntary. The voluntary scheme, on the other hand, became in effect mandatory because of court rulings in *Cowl* and *Dunnett v Hurst* whereby successful parties could not claim back their costs if they had refused mediation; thus people in the voluntary scheme felt compelled to try mediation. Genn et al are against mandatory mediation, saying that voluntary schemes have higher rates of settlement; the motivation and willingness to compromise are crucial to successful mediation. They conclude that mediation policy should be about facilitation, education, encouragement and possibly incentives but not threats. Prince (2007), however, argues lawyers are unlikely to consider mediation unless forced to, and that parties rarely opt into mediation but also tend not to opt out (in the Canadian scheme the opt out rate was negligible).

#### **4.9. Evidence on the effectiveness of SENDIST**

The effectiveness of SENDIST as a dispute resolution mechanism hinge on its accessibility and the extent to which it is utilised by parents (Harris 1997). Leggatt (2001), whose report is concerned with these matters across the entire tribunal ‘system’ found that users were often not aware of SENDIST and its jurisdiction. However, the accessibility of the tribunal is enhanced by the provision of information, including a video, on what the tribunal hearing would be like (Leggatt, 2001; Genn *et al*, 2006). Appeal rates vary across different LEAs. Evans (1999) concluded that this was due to a complex interplay between various local factors some of which are influenced by the LEA (for example, good relationships with parents, schools, voluntary organisations, and the approachability of staff) and others which cannot be affected by LEAs (for example, levels of affluence – in general, the more socially deprived an area the fewer will be the number of appeals – ethnic and minority language speakers, and pressure group activity).

Genn et al (2006) looked at the experiences of Black and Minority Ethnic (BME) tribunal users as compared with White users across three tribunals, one of which was the SENDIST. Parents became aware of the right of appeal to SENDIST mainly from the decision letter from the LEA (which is statutorily obliged by the Education Act 1996 to inform parents of this right when notifying certain decisions). The afore-mentioned video helped to frame parents’ expectations. Genn et al (2006) conclude that more needs to be done to prepare people for hearings. They also recommend that attention should be paid to features which contribute to perceptions of fairness, for example, the importance users attached to feeling that they have been listened to and heard and that their case is being taken seriously. Genn et al also conclude that whilst being from a BME background does not affect the outcome of tribunal cases there are other factors (language, literacy, culture, education, confidence and verbal fluency) which cut across ethnicities and which affect people’s abilities to present their case. As a result, the judiciary needs the appropriate skills to play an enabling role in assisting people to present their case, but this may not always be possible and so legal representation may in some cases be crucial to substantive and procedural fairness. But legal representation (used is around one quarter



of cases) tends to be opposed by those who wish to ensure that tribunal processes are kept as informal as possible and that litigiousness is avoided.

So far as gender is concerned, it is more frequently mothers that take on the major role in appeals, by liaising with professionals, and exercising an 'extended caring' role in supporting other parents preparing for tribunal. Fathers on the other hand are often brought in for the 'biggies' like the tribunal hearing although their role here is often silent as they often do not have the knowledge to contribute (Runswick-Cole, 2007).

Parents can find going to the SENDIST costly in terms of money and emotional demands, especially as these families are often already more financially disadvantaged and emotionally stressed because of their child's needs (Runswick-Cole, 2007). The cost of hiring a lawyer (as legal aid is not available for tribunal proceedings) and of commissioning an independent specialist report on their child can contribute greatly to these costs, putting families from less advantaged backgrounds at a disadvantage. Evans (1999) shows that taking part in a tribunal can also have personal and emotional costs for officials who feel that their professional judgement is being challenged; and it can take up a disproportionate amount of staff time.

Runswick-Cole (2007) identifies positive effects of the tribunal for parents. Many find the experience empowering and therefore while parents are critical of the system (especially the time and skill and determination needed to prepare a case and the lack of monitoring of orders), they do not want the system abandoned as it gives them an opportunity to voice their views. However, Henshaw (2003) finds that having an informal, parent-friendly ethos in the SENDIST is difficult given the extensive regulations about conduct, practice and procedure. At the same time, Leggatt (2001) reported that there was no formal hearing structure in SENDIST hearings which meant that people often did not know when to speak and that there was concern about consistency of decisions. A further criticism of the tribunal process is that it may have a narrow focus around the legislative duties. King (2006) thinks that placing cases involving children with autism into the legal framework to get a 'right decision' may leave unresolved issues concerning a child's education because of a concentration on what is lawful/not lawful rather than what is best for the child. He states that the affect of the legal framework is to "simplify, reduce, distort and filter psychological and educational information" (King, 2006: 13).

Evans (1999) also finds that tribunal decisions can have a positive impact on LEA policies and practice by encouraging more rigour in their decision-making, making LEAs aware of the need for closer relationships with parents, schools, voluntary organisations and statutory agencies, and ensuring awareness of a need to monitor the quality of SEN provision. They also highlight where provision needs to be developed and staff training improved. However, tribunal decisions are seen as creating difficulties for LEAs, in that some decisions affect resource allocation significantly; tribunals only take into account individual circumstances and not the LEA's wider remit of providing support to all students. Tribunal decisions may also conflict with the policy aims of an LEA e.g. to

reduce the number of statements (Evans, 1999). In any event, parents sometimes find it difficult to get LEAs to implement tribunals' decisions (Runswick-Cole 2007).

#### **4.10. Resolution of SEN disputes in the USA, including use of mediation**

The United States has probably the greatest involvement in mediation of SEN disputes outside the UK. Formal mediation was introduced in 1997 through the Individuals with Disabilities Education Act (20 USC §1401 et seq) due to a recognition that less adversarial dispute resolution approaches were needed. Congress articulated that “[p]arents and schools should be given expanded opportunities to resolve their disagreements in positive and constructive ways” (cited in Russo and Osborne 2007: 245). Parents may request mediation in lieu of adversarial proceedings in any case where they disagree with the decisions of ‘individualized education program’ teams or school board officials over special education matters. Mediation is not integrated with other dispute resolution approaches and in over one third of disputes parents follow more than one line of dispute resolution (Schrag and Schrag 2004). Parents often have the option of a formal due process hearing, before an impartial third party, but Reiman *et al* (2007) report that disputes are often resolved prior to hearings whether mediation takes place or not. A major factor is likely to be that within 15 days of a request for a due process hearing school officials must meet with the parents in “mandatory resolution sessions” to discuss the disagreements, and if they reach concurrence a legally binding agreement enforceable in the courts must be entered into (Russo and Osborne 2007).

Social class affects the choice of procedure in special education cases. Parents from lower socio-economic groups more frequently go to mediation whereas parents with higher socio-economic status tend to use formal processes involving appeal hearings (Reiman *et al* 2007). At hearings parents of higher socio-economic status seem to be more likely to withdraw their case than receive a decision whereas the opposite is true among the other social class groups.

Schrag and Schrag’s (2004) research on the use and effectiveness of mediation in special education cases revealed that 51 per cent of mediation cases reached an agreement. However, one third of parents said they would not use mediation again because solutions worked out in mediation agreements were ineffective or were not implemented and parents felt that agreements did not enhance their child’s education. Schrag and Schrag state that mediation being confidential can work to the disadvantage of parents and children with SEN when schools do not follow through on an agreement. This is because confidentiality makes it difficult to challenge such a failure through legal action etc. Nowell and Salem (2007) also found that many mediation agreements were not implemented and state that –

”most disempowering at all may be instances in which parents leave the mediation perceiving that they were able to have an influence in crafting a mutually agreed-upon resolution, only to have that resolution not carried out in the way they expected” (at p.313).

Repeat use of mediation is lower than with other forms of dispute resolution in the USA, mainly because if an agreement was not implemented parents were more likely to try another form of dispute resolution (Schrag and Schrag, 2004).

On the positive side, mediation was found to be cost effective both in terms of monetary value and in emotional costs (Schrag and Schrag, 2004; Reiman *et al*, 2007). According to Reiman *et al* (2007) parents are generally more satisfied with mediation than due process hearings.

Research by Nowell and Salem (2007) concentrated on the perceived advantage of mediation as improving relationships between schools and parents. Yet they found that while for some mediation did improve relationships for others such relationships actually worsened. Key to the effect on relationships was who was present during the mediation, as schools tended to bring to sessions people whom parents had never met before. Thus to improve relationships Nowell and Salem point to the importance of including those involved with parents on a day-to-day level into mediation. They also found that better interpersonal relationships after mediation often came from the fact that there was less need for parents to interact with school personnel rather than improvement in the quality of such interaction. D'Alo (2003) found that mediators often miss opportunities presented during mediation to work on improving relationships and trust between parties. Also key to good relationships following mediation was the parent's view of their ability to have an influence on the decision (Nowell and Salem, 2007).

Those who found the mediation experience positive felt that mediation created an emotionally supportive environment and that they were treated with respect. This is supported by Reiman *et al* (2007) who found that certain characteristics essential for a positive experience of mediation were: dignity, thoroughness, fairness, progress towards resolution, and adherence to procedural justice.

#### **4.11. Participation of children**

Article 12 of the UN Convention on the Rights of the Child 1989 states that –

“ Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law”

The failure of the education system to uphold the basic principle in Article 12 has long been a criticism, articulated by the UN Committee on the Rights of the Child as well as numerous academics (eg Meredith 2001; Fortin 2003; Harris 2007; O'Mahoney 2008b).

While opportunities for consultation of children for their views to be taken into account in various decision and policy making processes has been increased in recent years, for example by the consultation duty in s 176 of the Education Act 2002, the rights of individual children in this regard in respect of decisions specifically about their own education remain relatively neglected.

Lundy (2008) proposes a new model for conceptualising Article 12, to ensure its successful implementation and which also gives consideration to other human and children's rights provisions. This model includes four factors which need consideration: space, voice, audience and influence (the first two conceptualise the right to express a view and the latter two the right to have views given due weight). In terms of space, adults need to take proactive steps to encourage a child's input and this space should be safe as many children fear rebuke. For example, in the school setting children expressing their views are perceived to be challenging teacher's authority. This should happen without discrimination and so the space "must be inclusive" (934) and therefore be available to children with disabilities, amongst others. The voice factor is not dependent upon their capacity to express a mature view only on their ability to form a view, but they should be able to voice these views freely and, if needed, help should be given to children. The audience factor requires that views are listened to (not just heard) and for this to happen there needs to be an identifiable body with the responsibility to listen so that children's views are communicated to the people who are in a position to give them effect. The fourth factor, influence, is restricted by age and capability, which is dependent on adult's perceptions, making it a very complex area. Lundy (2008: 938) argues that to apply Article 12 "in the spirit and context in which it was drafted would require an interpretation that is generous and child-empowering". This fourth factor is needed so that child participation is not tokenistic (Lundy, 2008). Lundy's views have been informed by empirical research she and others have conducted in Northern Ireland in which children were interviewed about their rights in relation to various aspects of their lives including education (Kilkelly et al 2005).

Where children with SEN are concerned, the UN Convention on the Rights of Persons with Disabilities, which was opened for signature on 30 March 2007 but has yet to be ratified by the UK, has particular relevance, since it incorporates (in Art 7(3)) the basic participatory right in Art 12(1) of the UN Convention on the Rights of the Child (above) in relation to children with disabilities but adds that disabled children are to enjoy that right "on an equal basis with other children, and to be provided with disability and age-appropriate assistance to realise that right". Compelling arguments to support such participation have been advanced, in relation to its benefits both for the child (including enhancement of the child's esteem and confidence) and for decision making itself (in terms of ensuring that decision makers are better informed about the child's difficulties and possible ways of overcoming them) (see Logan 2008).

The SEN Code of Practice (DfES 2001) attempts to encourage the giving of value to the views, wishes and feelings of children with learning difficulties, taking into account their age and understanding. Obviously, determining the wishes of children creates issues in SEN cases as it may be problematic to information from a child with severe

communication difficulties, however where this is not possible the Code of Practice suggests there be interpretation of the child's responses and advice from professionals who have worked with the child (Soar *et al*, 2005). However, UK adults in general have a poor record of listening to children (Soar *et al*, 2005; Parkinson, 2006).

Children are not party to proceedings in a tribunal, and children rarely attend SENDIST hearings (Harris, 1997). There are acknowledged difficulties in child participation: the child may hear things which might be psychologically damaging; the child might appear more intellectually capable and well behaved and so there will not be an accurate portrayal of SEN to the tribunal; and with the length of many SENDIST hearing children may get bored (Harris, 1997). Harris (1997) did find that there was no attempt by tribunals (similarly to LEAs discussed below) to obtain the views of children and that often the tribunal got bogged down with the question of the availability of resources rather than focussing on the interests of a child. However, Harris (2000) observed changes in the regulations governing SENDIST procedure to facilitate a degree of child participation. These and the above mentioned amendments to the Code of Practice in 2001, noted above, were apparently (see DfEE 1999: 2) intended to bring the law into line with the Children Act 1989, which (in s.1(3)(a)) incorporates a specific duty on a court to have regard to "the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding)", which is broadly equivalent to the Article 12 UNCRC requirement noted above. However, the Code's contents are merely matters to which regard must be had, while the tribunal regulations contain no equivalent duty, merely a right for the child to attend and a power for the tribunal to hear from him or her (SENT Regs 2001, SI 2001/600, reg.30).

In terms of the views of children being taken into account in SEN mediation, Hall (1999: 7.14) found that children were "not usually involved in discussions between their parents and their school or LEA" and were not involved in mediation meetings, although were consulted "as and when required". Hall regarded it as important to involve children, by talking to them, in order to "ensure that the child's needs remain at the fore of the discussion". Where that does not occur the discussions "are not very productive". The SEN Code of Practice (DfES 2001, section 2) states that LEAs should try and ascertain the child's view before mediation. However the literature suggests that if the child's views are ascertained by the LEA this occurs indirectly (for example, from educational psychologists) but not directly from the child; there is in fact a huge discrepancy in practice across different LEAs in how the child's views are ascertained (Soar *et al*, 2005; Soar *et al*, 2006). Soar *et al* (2005) found evidence that often as a preparatory measure mediators will seek the views of the child in person or via the parent, but this occurs independently of the LEA. But, on the other hand, professionals often viewed it as inappropriate and not helpful for the child, but advocated indirect involvement (Soar *et al*, 2005; Soar *et al*, 2006). Parents did not bring their child to mediation because of "implicitly conveyed 'shouldn't attend' signals" (Soar *et al*, 2006: 153).<sup>9</sup>

One reason for hearing from the children themselves is that the parents' perception of their child's wishes is not always accurate (Soar *et al*, 2005; Soar *et al*, 2006). Involving

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<sup>9</sup> Harris (1997) found similar signals in relation to bringing children to tribunals.

children in mediation can help parents to listen to and understand their child's point of view. Reasons put forward for not involving children directly include that it is the parent not the child that has the dispute with the LEA and that children are not always right (Soar *et al*, 2005), but these are far from convincing arguments. Parkinson (2006) talks about children's involvement in family mediation and says that while there are many reasons for not involving them (e.g. burdening them with inappropriate stress and responsibility) children report a positive experience when they do take part and are subsequently less anxious about being caught between parents and having to, or being seen as, taking sides. If children take part in mediation separately to their parents because of the confidential nature of mediation there needs to be an agreement on what mediators can report back to parents (Parkinson, 2006). Mediators need additional training on managing children's participation ( Soar et al, 2005).

#### **4.12. Suitability of ADR for education, including SEN, disputes**

Many authors have argued that SEN disputes are particularly suitable for resolution via mediation (Leggatt, 2001; Gersch 2003; Henshaw, 2003; Supperstone et al, 2006; Stilitz and Sheldon, 2007; Richardson and Genn, 2007). Richardson and Genn (2007: 139-140) describe how cases concerning entitlement to an assessment or consideration, like those dealt with by the SENDIST (see below), are suitable for ADR because

“the extent of the material benefits lying at the heart of the dispute can be highly contentious and resource dependent. There is often no single accurate outcome to be identified and imposed through adjudication by one tribunal” (139).

As noted above, they recognise that not all cases will be resolved this way as some parents will be unwilling to compromise and in those cases there will need to be adjudication, not least because “the issues are of considerable importance to the parents and the child and possibly to future potential beneficiaries of the LEA's special needs budget.” Similarly, Supperstone *et al* (2006) and Stilitz and Sheldon (2007) argue that disputes concerning education (including disputes around SEN, school admissions and exclusions and disputes in the higher education sector) may well be very suitable for mediation because finance is often at the heart of the dispute rather than points of principle.

SENDIST cases are regarded as providing opportunities for mediation, for example the 30 day case-statement period, and opportunities for negotiation on SENDIST premises (Leggatt 2001; Henshaw 2003). The high number of appeal withdrawals, many of which occur at the last minute, in fact suggests that there are opportunities for negotiated outcomes. It is common in the period between the initial statement and tribunal hearing for relations between LEA and parents to break down and the meeting on the day of the hearing is often the first opportunity for negotiations to resume; consequently many appeal withdrawals occur on day of the hearing.

The SENDA 2001, s.3, has required LEAs to establish arrangements with a view to avoiding/resolving disputes with parents and to appoint an independent person with the function of facilitating this. This did not oblige parents to use such arrangements nor did it affect parental right to appeal. This requirement is also included in the Special Educational Needs Code of Practice (DfES 2001, section 2). The parliamentary debates surrounding this section on resolution of disputes centered on: the need to ensure that the independent person is genuinely independent; the importance of ensuring that the independent person has the appropriate knowledge and qualities; the need to ensure disputes are resolved quickly; access to the service; whether the clause would apply to independent schools (confirmed as being only if the child had been placed there under a statement); the resource implications; and a concern that such arrangements may delay parents' appeal to a tribunal (it being decided that LEAs must inform parents of statutory timeframe for appeals and that dispute resolution can run alongside an appeal) (Gillie and Allen, 2001).

Section 3 has also introduced a requirement that these arrangements must be made known to all relevant people including parents. This is important when we consider what the DCA (2004) said about the large number of people who do not understand their basic rights or know how to seek help when they have an administrative grievance. Prior to this the tribunal was the only procedure for dispute resolution. As a result of this LEAs set up regional partnerships with independent SEN mediation providers. Parents can go to mediation on issues eligible for tribunal decision but also in relation to other issues that do not come under the grounds for appeal. Stilitz and Sheldon (2007) state that in this area mediation has failed to develop to the extent that was anticipated.

Mediation may also be suitable in other areas of education disputes, for example higher education disputes (Stilitz and Sheldon, 2007). Graham (2004) argues mediation is suitable for disputes around school exclusions and will benefit both the pupil and the school as time will be saved and the school will be involved in the process. There may be some difficulties, such as getting around procedures for recording exclusions in school files and confidentiality (as it may be tempting for head teachers to use the mediation as proof of an exhaustive inclusion strategy), but these are not insurmountable (Graham, 2004). Mediation may not be suitable for school admission disputes as sometimes schools are genuinely full and mediation is also not appropriate where decisions impact on whole communities, for example, school closures and reorganisations (Stilitz and Sheldon, 2007).

## **Part 5** ***CONCLUDING COMMENTS***

The length of this literature review testifies to the wide range of issues that are necessarily within the scope of this research. It is important for the research to engage with both the wider policy issues surrounding SEN and ASN, including the power dynamics and balance of rights and duties within the developing relationships between interested parties. It is also imperative to consider the theories, empirical evidence and



policies surrounding disputes in general and their resolution, spanning a wide range of decisions and actions, particularly in the public law area, and not merely those confined to the discrete areas of education that are the ultimate focus of this research.

It is not really feasible in this concluding section to summarise what we have learnt from such a wide-ranging literature review. However, we can say that the literature review has confirmed the need for our research, especially in order to ascertain whether the benefits attributed in the literature to ADR, and especially mediation, are materialising in the fields of ASN and SEN (and if so, whether differently in each jurisdiction). In particular, we need to establish whether ADR is making a valuable contribution to the realisation of the goals of justice and fairness in these fields and, if its potential is to some extent unrealised, to identify not only the reasons why but also the barriers that need to be overcome and how that might be achieved.

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