

SCOTLAND: KEY INFORMANT INTERVIEWS

WORKING PAPER 3

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INTRODUCTION

This research explores experiences of alternative dispute resolution (ADR), especially mediation, in the field of special educational needs (SEN) in England and additional support needs (ASN) in Scotland, both of which are the subject of tribunal and court jurisdictions. The policy drive towards the greater use of alternatives to courts and tribunals for the resolution of disputes between the citizen and state agencies is clearly articulated in the Department for Constitutional Affairs' White Paper (DCA, 2004). A number of research studies have demonstrated that significant numbers of individuals do not seek redress through tribunals or courts when they could (Genn, 1999; Adler and Gulland, 2003; Genn et al., 2006). The White Paper not only recommended reforms to the tribunals system itself, but also suggested that there should be a new emphasis on 'proportionate dispute resolution' (below), on the basis that most people questioning decisions would prefer to have their concerns resolved as speedily, consensually and with as little stress as possible. Genn (1999) documents the growing use of mediation since the 1990s and notes its advantages over courts in terms of affordability and speediness of dispute resolution. In family law divorce/separation cases, where it has been piloted, mediation has been described as symbolising 'an alternative version of empowerment to that represented by lawyers and courts – one that rests on participation and engagement' (Davis 2004). In Scotland, the Crerar Review (Scottish Government, of the scrutiny sector and complaints handling systems in Scotland concluded that despite an extremely cluttered landscape, the engagement of service users was limited and the extent to which service users and the public were truly benefiting from external scrutiny was uncertain.

Reflecting this wider policy context, the ASL Act introduced a number of alternative dispute (ADR) measures, including mediation and adjudication. At the same time, going against the grain of policy more generally, the Additional Support Needs Tribunals for Scotland, referred to in this paper as the ASN Tribunal, were also introduced. In all arenas, questions remain about the popularity of alternative dispute resolution approaches with service providers and users. This paper draws on key informant interviews in Scotland to examine: (1) the low-level intervention strategies used by schools and local authorities in Scotland to prevent disputes arising in the field of additional support needs; (2) the ADR mechanisms in place, specifically mediation and adjudication; and (3) the new ASN Tribunal. In relation to each method of dispute resolution, we examine the way in which it is viewed by a range of stakeholders, with comparisons made between the different approaches.

THE SCOTTISH POLICY CONTEXT

In Scotland, whilst partnership with parents has featured in policy rhetoric since the Warnock Report (DES, 1978), routes of redress have received scant attention until relatively recently, but, as noted above, have been considerably strengthened under the terms of the Education (Additional Support for Learning) (Scotland) Act 2004 (the ASL Act). This legislation placed a duty on local authorities to establish and publicise procedures for identifying and meeting the needs of children requiring additional support for education, whilst underlining parents' right to be assisted by a supporter or advocate. The new legislation applies to children requiring additional support in order to benefit from education for any reason, a much wider group than those previously designated by the term 'special educational needs'. Co-ordinated Support Plans (CSPs) must be provided for those who require significant support from services outwith education as a result of long-lasting needs or needs arising from complex or multiple factors. The ASN Tribunals for Scotland were established in 2004 to hear cases pertaining to CSPs, including refusal to open a

CSP and its content. Placement requests involving children with CSPs are also considered by the Tribunal, although, unlike the English tribunal, the ASN Tribunals for Scotland do not deal with disability discrimination cases. At the time of writing (August 2008), 120 references had been made to the ASN Tribunals for Scotland, with a much smaller number proceeding to a hearing. This was a considerably lower number than had been anticipated when the Tribunal was set up initially. Other dispute resolution mechanisms established by the ASL Act, adjudication and mediation, are discussed briefly below.

The new system of independent adjudication did not feature in the original legislative proposals, but was introduced at a later point to provide routes of redress for parents whose children had additional support needs but who did not qualify for a CSP, and therefore would be unable to make a reference to the ASN Tribunal. Criteria for a CSP are much more stringent than those pertaining to a Statement of Needs in England, so that in Scotland, a child with very significant disabilities would not qualify for a CSP unless they were receiving significant input from services outwith education, such as health and social work. The system of independent adjudication was designed to address the concerns of parents who believed that the local authority or school was not meeting their child's additional support needs, whether or not these were set out in a CSP. A request for adjudication is made to the local authority, which, if it considered the request to be justified, would formally request Scottish Ministers to appoint an adjudicator to look at both the parents' and the local authority's case. The adjudicator would submit their findings to the local authority, which would then communicate their proposed course of action to the parents within a specified timescale. It should be noted that the recommendations of the adjudicator are not binding on the local authority, but are there for them to consider.

A duty on the local authority to provide an independent mediation service was also established under the terms of the ASL Act. There has recently been a great deal of interest in mediation to resolve disputes in a range of social arenas, including the resolution of disagreements between families including divorce procedures, dealing with community conflicts, certain types of criminal cases and international conflicts. In schools, the Scottish Government has funded pilot projects on restorative practices (Kane et al., 2007), which have used both formal and information mediation approaches to resolve conflicts and disagreements between children and adults and to promote a harmonious educational environment. Most ASN mediation in Scotland is provided by two organisations, which in some cases have established service level agreements with local authorities, or otherwise respond to individual requests for mediation services. There is no centrally gathered data on the number of requests for mediation and the number of mediations which have actually taken place, although our informants believed that about 100 formal mediations had been carried out since the implementation of the legislation in December 2005. All participants have to agree to participate, and may withdraw at any time, and the outcome of a mediation is not binding.

To summarise, the ASL Act 2004 increased the redress mechanism available to parents of children with additional support needs. Whilst low level negotiation at school and local authority level was encouraged, parents were also given the opportunity to use the ASN Tribunal, adjudication and mediation. If dissatisfied with these remedies, routes to higher courts and complaints procedures were available (see Figure 1). These routes are not only extremely complicated, but are also likely to be costly, since legal aid would be unavailable in most cases. As indicated above, the aim of this paper is to understand the ways in which different types and levels of dispute resolution, ranging from low level and informal to high level and formal, are understood by different actors.

PROPORTIONATE DISPUTE RESOLUTION AND PROCEDURAL JUSTICE

Assessment of the impact of the ADR mechanisms needs to be located within theoretical frameworks on procedural justice. Following Mashaw (1983) and Kirp (1992), research (Riddell et al., 2002, 2003) identified six models of procedural justice (professional, bureaucratic, legal, consumerist, managerial and market) operating within the Scottish SEN context, each with its own mode of decision-making, legitimating goal, mode of accountability and characteristic remedy (see

Table 1). These models operated alongside and in a state of tension with each other, with each having advantages and disadvantages for particular actors. Generally, it was found that the professional and bureaucratic models of procedural justice remained dominant in Scotland, whereas in England a more diverse range of models was operating. Recent developments in Scotland, outlined above, suggest that there may be a rapid growth in the legal and consumerist models of procedural justice there, with both positive and negative trade-offs. The extent to which such changes move the Scottish system closer to the English is discussed.

METHODS

The methods used in the research include the following:

- Literature review of approaches to dispute resolution (Working Paper 1)
- Statistical review of children identified with SEN (England) and ASN (Scotland) (Working Paper 2)
- Questionnaire surveys of local authority officers in England and Scotland, and parent partnership officers in England
- Key informant interviews in England and Scotland
- Case studies of parents who have experienced different approaches to dispute resolution in England and Scotland

This paper reports on key informant interviews for Scotland. Twenty eight interviews were conducted with a range of informants reflecting different perspectives. These included respondents from Scottish Government (3); local authorities (6); the Additional Support Needs Tribunals for Scotland (2); mediation services (2); independent adjudication (1); advocacy (1); law centre (1); government-funded advice and information service (1); voluntary sector (5); parent activist (1); schools (4). The interviews were conducted by telephone or face to face, and were recorded and transcribed. They focused specifically on the respondent's views of the new routes of dispute resolution put in place by the Additional Support for Learning legislation in Scotland. The analysis presented below draws out the contrasting perspectives of actors with particular positions and interests in the system. In the conclusion, these different positions are discussed in relation to the theoretical framework presented in Table 1, which outlines different approaches to procedural justice.

FINDINGS

Low level dispute resolution

The Code of Practice (Scottish Executive, 2005) makes clear that 'most disagreements will be resolved at school and education authority level with only a small number going to formal review procedures'. Whilst it was clear that all actors endorsed this approach, local authority officers were particularly keen for disputes to be resolved at this level.

All of the local authority officers stated that they had a commitment to developing 'customer focused services', and believed that approaches to additional support needs should reflect this changing service ethos. Three of the local authority authorities had been involved in the Scottish Executive's restorative practices initiative, and low level conflict resolution in the field of additional support needs, with a focus on communication and negotiation, was seen as a reflection of an authority-wide approach:

We will also encourage schools to adopt ...a solution-oriented approach to things, so that would mean we would say 'Well OK, what is the difficulty, how do we go, what are we

trying to achieve?' ...The more we build in that kind of dialogue, discussion, openness, listening to people, hearing what parents have to say, not necessarily agreeing but hearing what they have to say, the better it's going to be. Because often parents, as with all human beings, often the key thing is they want to be heard and once they have been heard that releases them to begin to look in a slightly more critical way, ...in terms of critiquing their own view as well as the views of others. So it's that key sense of developing, building partnerships, working at trust, listening to people...(LA5).

For one local authority, the 'formalised processes' put in place by the new legislation did not fit well with 'the local process that the schools and the education officer locally for that area engage in' (LA4). Another local authority officer stated that he was aware that 'you could argue that Scottish education has been complacent or relied in a kind of covert authoritarianism'. However, he strongly believed that '...we should try and work at the lower levels to try and resolve matters rather than escalating things' (LA6). One authority had instigated an education advice and information service prior to the ASL Act, including an information line, and believed that all education disputes should be dealt with by means of normal complaints procedures rather than through separate ASN mechanisms. Local authority respondents spoke about their commitment to taking parental complaints seriously, but at the same time emphasised that many parents were angry and upset about their child's impairment and might on occasion turn this anger onto the education service.

Other respondents endorsed the local resolution of disputes, although they tended to be less confident than local authority respondents that the culture of schools and local authorities made them readily approachable by parents. Mediation service respondents emphasised that school staff and parents often lacked accessible information explaining the legal framework and their rights and responsibilities, and this lack of clarity made it more likely for disputes to arise in the first place. In addition, school staff were often not well trained in communicating effectively with parents. To remedy this situation, mediation services had been offering local authorities a number of training days in low level dispute resolution as part of their service level agreement on topics such as de-escalating conflict and managing meetings effectively. Two local authorities (LAs 3 and 4) had offered dispute resolution training to all staff as part of their restorative practices initiatives, to help staff in dealing with parents who might be upset or angry.

However, the advice and mediation service interviewee, who undertook some work with school staff on low level dispute resolution, felt that there was still a tendency amongst school staff to regard parents as 'a problem' if they demurred at all with professional judgements:

One thing that we talk about quite a lot is not tarring parents with the problem parents' brush, so I think occasionally there might be one or two parents who don't want to participate and who are going to cause issues, but they are a tiny tiny minority of people and you know, we quite often hear about parents being referred to as this sort of generic mass of problems, problem-causing people, whereas obviously at the end of the day all they want is what's best for their children. ...Suggestions we would have are just really to work with parents, to involve parents, if parents aren't involved, not consulted, not notified of any changes, they can get frustrated and that kind of leads onto problems happening later on. So I think it's a sort of basic communication strategies that you would hope are in place. ...so it's about communication and training and ethos really I would say (A&I1).

Parents and voluntary organisations also endorsed the view that disputes would be resolved, wherever possible, at local level. However, for this to happen they felt that teachers needed far more training in relating effectively to parents and in conflict resolution. The primary and secondary learning support respondents said that they had received training in relation to the new legislation, and made every effort to deal with parents sympathetically. However, they did not routinely inform parents of the new dispute resolution procedures, and these had not been used. The primary learning support teacher said that her own memory of CSP and dispute resolution procedures was somewhat vague, and no child in the school had a CS, although one was pending. The school was moving children on to additional support plans rather than IEPs or CSPs, since the former did

not require any formal review meetings with parents to be set up, and were therefore easier to manage for the school.

Formal mediation

Local authority officers were guardedly welcoming of the new emphasis on formal mediation, although most had found that over the first two years of the ASL Act it had been relatively little used. One officer, in an authority where formal mediation had not been used at all, explained that it had been offered, and rejected, on two occasions:

...it was not unreasonable for the parent to refuse it in that the positions were fairly incompatible and neither party really intended to make much of a shift so I'm not critical of the parents for refusing it...(LA6).

Another officer, in an authority where formal mediation had been used only twice, compared mediation favourably with the tribunal:

My anxiety about a tribunal is almost that whatever the outcome is, you've then got a huge bit of repair work to do around relationships and I think mediation potentially offers you a process which allows you to ...maintain a relationship and still get an outcome (LA4).

In LA6, involving an independent third party in mediation was seen as useful 'if there are issues around mixed or missed messages or personal kind of feelings'. However it was clear that, even though formal mediation was supported in principle, it was recognised that it was often unsuccessful in resolving disputes because individuals had already adopted rigid positions:

The three cases that I know of, they had axes to grind with the authority, and I think the mediation was kind of doomed because parents had come into it, and may be even schools, ...[with] entrenched positions. And it wasn't really an issue that was resolved by mediation, people had decided in advance that they were going to get their own way one way or the other and I think that's the difficulty is that if we don't get these things started soon enough in a general sense, people do end up in entrenched positions (LA3).

Another local authority (LA2) was providing mediation through their in-house information and advice service, although they were aware that this had caused some parents to question the independence of the service.

Mediation service providers recognised that there had been a relatively small number of requests, but saw this as a result of local authorities' reluctance to inform parents of their rights in this respect. One service provider, who worked for twelve authorities, said that there had been seventy requests from mediation over the thirty month period since the implementation of the legislation, with about sixty of these progressing to a face to face meeting. She commented:

I think mediation at the moment is still very very low priority albeit that it's in legislation. I mean it's slightly two-fold because we're encouraged and told to sort it at local level and in an ideal world everything would be sorted at local level but it isn't and trying to get that through to [the local authorities] that they have to have the contingency for the things I've sorted, but they're still not good at putting in money. (ME1)

Another mediation provider (ME2) spoke of her excitement when commissioned to produce a DVD on mediation by one local authority, however, the project ended in disappointment when the local authority decided not to use it as a training tool, so that no head teacher or school had ever seen it. Her service, which also had contractual arrangements with a number of authorities, had conducted six mediations over the 30 month period.

Interesting points were made by ME2 about the type of cases which could be successfully dealt with by mediation. Whereas local authorities, in general, wanted disagreements to be resolved through low level dispute resolution, she pointed out that some cases, for example, placing requests where the parent and the local authority clearly had different views on the right outcome, were better dealt with through a more formalised and impersonal process:

So we have to mediate within the law, we can't mediate away somebody's legal rights or somebody's health and safety issues (ME2)

In addition, mediators were clear that unless both parties wanted to sit down and negotiate a resolution, mediation could not work. With regard to the downsides of mediation, service providers recognised that the outcomes were not binding on either party, and this could be a source of frustration:

Well some people don't like it, it's not legally-binding so any agreement relies on goodwill and if there hasn't been any, how realistic is it for a 2 or 3 hour meeting to change all that? So it's the mediator's job to check that any agreement reached is workable and realistic, and people think they can stick to it but it is quite depressing when people go away and can't manage to, and things break down. Most, I'd say, again it's not huge numbers, but more than 50%, maybe 70-80%, who have got an agreement can manage to work it out, but there are the ones that break down very quickly and that's sad but it's not the mediator's job to make it stick, it's the people who made the agreement. Again that's not so good for parents who are wanting some figure of authority to tell the school or local authority what they've to do. What we do is we go back after 3 months just as a paper exercise and say 'Are the agreements you reached holding or not?' (ME2).

Mediators believed that advocacy organisations discouraged parents from using mediation because of its focus on compromise rather than remedy, and, whilst the value of mediation in dealing with 'personality clashes' was acknowledged, it was seen as unhelpful in other matters, such as resolving placing request disputes, where it might simply be used by the local authority to 'talk the parents round to their way of doing things' (ADV2). This respondent noted:

[Mediation] is not something that we're involved in very often but in fact we have been involved in advising some parents who have not found it to be particularly helpful and my general impression, based on admittedly a fairly small sample size, is that in relation to kind of big questions of placement or resources or exclusion, it's really not a great deal that it's adding (ADV2).

The feedback we're getting from the parents who have accessed it, or we've been with them, is it's a waste of time. Our feeling is that these cases are so complex and it's not about having an hour or half an hour meeting with the mediation person, it's about them having the full facts and the background to it and that takes a long time to build that up and parents feel it's quite rushed and although all the parents have reported that they felt the person was independent and even-handed, they usually weren't satisfied with the outcome (ADV1).

However, it was acknowledged by one of our advocacy service respondents that, even though the tribunal was better at producing an unequivocal outcome, it was inevitably confrontational and challenging:

...it ought to be possible to do mediation ...in an amicable way, but it's very difficult to take somebody to court or tribunal in that kind of way. So if your complaint is with the school or school personnel, ...and you're looking for your child to continue attending that school, then it has the advantage that you've got the prospect of walking out the other side still speaking to each other and I think that it's probably particularly useful where there has been some kind of breakdown of communication or misunderstanding or something of that sort that's led to difficulties impacting on the child's education (ADV2).

As a result of low take-up, local authorities were reviewing the service level agreements they had with mediation organisations, raising concerns that mediation services might not be financially viable in the future. However, it was evident that in most authorities little had been done to inform parents of children with additional support needs of their right to request formal mediation. Leaflets given to parents requesting a CSP routinely mentioned mediation, but the vast majority of parents of children with ASN did not routinely receive information from the local authority about their right to request mediation. Our review of web-based documents also indicated that most authorities did not make information on mediation available electronically. Our parent respondent, who was also a tribunal and voluntary organisation member, commented:

I've just been horrified by either the lack of information, the wrong information, or the cavalier attitude to information from some local authorities...' (VO3)

Adjudication

Adjudication was generally regarded more favourably than the tribunal by local authorities, since it was less adversarial, although most authorities had only experienced a very small number of requests for adjudication. Downsides of adjudication noted by local authority staff were the tight response deadlines, which placed school and local authority staff under pressure. One education officer also objected to the fact that the authority had to pay to have an independent adjudicator appointed (about £250). Whereas the formal request to Scottish Ministers came from the authority, in reality it was the parents who initiated the process and therefore the cost should fall to them. One respondent noted, somewhat magnanimously, that the local authority was advantaged over the parents in terms of having resources to prepare the necessary paperwork. In recognition of this, the authority had engaged a local parent activist to act as a parent advisor, since it was not in the local authority's interests to 'to have the parents' view inadequately or not fully represented' (LA6). Despite these positive intentions, the parents' advisor had never been called upon to help prepare a case due to the small number of requests for adjudication.

One local authority respondent noted that there was considerable ambiguity with regard to qualification criteria for adjudication, and was currently asking the Scottish Government for advice on the competence of a particularly complex case. The officer in this authority said that he was puzzled as to why parents would prefer adjudication over mediation, although he did recognise that in some cases there might be a desire for 'something that's more formal because they don't want to be involved in face-to-face discussion about it' (LA2).

Mediation provider interviewees recognised that adjudication might be useful to provide a different perspective on some disagreements, but noted that parents were sometimes sceptical about its efficacy and independence because the initial request had to go to the local authority, which had discretion over whether to request Scottish Ministers to appoint an adjudicator.

A far more positive view of adjudication was expressed by the advocacy service providers. One respondent, who worked in a law centre, described it as 'the sleeping giant' of the new redress system, with considerable potential to be used more widely in the future. Whereas an independent adjudicator had only been appointed on 28 occasions over a thirty month period, many more cases had been resolved as soon as the parent approached the local authority with a formal request:

I think it's great, it's really good, it's the sleeping giant of this legislation. Really I didn't have very high hopes for it at all, just in the abstract reading the regulations and so on, but it's working really well. I think the thing that makes it work well is that it carries with it this obviously quite powerful factor of bringing in external scrutiny to the authority and also it flags things up in quite an immediate way at a high level within the authority which often isn't the case. Obviously parents may be dealing with a school directly or a junior education officer or something like that, and may find it quite difficult to get through to anyone with any decision-making powers, whereas this as I say cuts through all that... It's pretty speedy, if it is resolved in the first case, and even if it goes the whole distance,

it's timed and the deadlines are all there so you know it's not going to rumble on indefinitely. It's also very user-friendly, more so perhaps than mediation even, where there's a formal meeting and you're sitting down, and there's people on the other side, and you may feel that you would want somebody along side you. Or it's quite difficult to talk about your own child on the spot like that, whereas with adjudication you're writing letters so you can take your time, put all the facts down, and so on. So I think it's reasonably user-friendly (ADV2).

The Additional Support Needs Tribunal

Whereas there was some degree of ambivalence with regard to mediation and adjudication, local authority interviewees all expressed the view that their staff had experienced the tribunal process as extremely daunting and challenging. The interviewee in LA2, with a relatively high number of tribunal references and hearings, contrasted the tribunal and adjudication:

...the experience of tribunals to date is that they have been very time-consuming, that overall they haven't been terribly constructive, it's a kind of zero sum kind of gain, either you win or you don't and in the process relationships can be damaged whereas with adjudication ..., the process itself is perhaps more neutral, less charged than a tribunal (LA2).

Interestingly, this respondent had been told by colleagues who had worked down south that 'the tribunals in England have been more focused, don't take so long to hear, there's a clearer sense of what's in and what's not in'. He believed that tribunals in Scotland were becoming longer and more legalistic, and more cases than expected had been referred to the Court of Session because of lack of legislative clarity. LA 2 had initially decided that it would not be legally represented at tribunal unless the parents were bringing their lawyer. However, they had recently revised this policy because of the serious financial implications of losing a case:

We started with the view that if the parent wasn't legally represented then we wouldn't be legally represented. We then had one significant case where at the last minute the parents brought in a senior lawyer and the authority was not allowed to have an adjournment to bring in a lawyer... The lack of clarity as to what was considered to be appropriate and inappropriate evidence and argument has led us to the position where we now have taken the view that this is a legal process and that in order to do justice to that process, given the complexity of the legislation, given the unpredictability of the process, where there are potentially significant resource implications or far-reaching policy implications, that we would always consider whether it would be prudent to be legally represented (LA2).

This is in line with trends emerging from ASN Tribunal statistics, which show that in 55% of cases, local authorities have legal representation, and in 40% of these cases they are represented by an advocate. By way of contrast, parents are likely to be supported by an advocacy group, and only rarely have legal representation. Overall, the LA2 respondent believed that both for the parents and the professionals, the tribunal was 'a deeply unsatisfying and in many instances distressing experience, one which in many cases leaves a legacy of damaged relationships'.

In LA6, where there were also a relatively high number of references, the respondent said that his first experience of the tribunal was traumatic, but that later experiences had been less so and much depended on the convenor's skill in establishing a user-friendly atmosphere, a view which was strongly endorsed by one of the advocacy groups:

Having had a fair bit of experience, my view is that it's hard to reach a general view, because the experiences have varied widely. The first tribunal that I went to, I was shattered is not too dramatic a word. I have to say that the convener of the tribunal took

the view that his job was to test the local authority's case and structures which was really not what fitted with the publicity, which was that it was an informal inquisitorial process, rather than being put through a mill. So that was a very difficult experience, although at the end of the day the tribunal found in our favour, which was unanticipated. But other tribunals have not been like that, they haven't been adversarial, there have been very good tribunals... I think it depended heavily on the convener, the convener has been very clear about the process and everybody getting their say and how it will work and how the process operates. I have some familiarity with it now and it may be I would understand it implicitly but I think being very explicit and clear about that is very helpful. Other conveners, I think some have not entirely grasped that this is not a legal setting and you do need to say to people this will happen now, this will happen next, so on the whole they've been relatively user-friendly but they are challenging experiences. Certainly I've found that the length of time allocated to them has expanded as time has gone on. The most recent tribunal that I was involved with took us three days which was certainly not the anticipated timescale. In fact I've had two that have been three days long (LA6)

Whilst recognising that presenting a case at the tribunal could be stressful for a local authority officer, this respondent believed that it was better than using a lawyer, who might not understand the local authority's mode of operation. He also commented that the tribunal was infinitely preferable to the Sheriff Court, where the sheriff might have little knowledge of the education system and the arena was clearly adversarial. A previous case involving a placing request for a child with additional support needs had taken two years to resolve in the Sheriff Court, involving enormous investment of time and money. The respondent also believed that there was a need to re-examine the type of case going to the tribunal. Whereas the tribunal might decide 'high level' issues such as whether a child should attend a specific residential school or not, 'lower level' issues such as the content of a CSP should be decided by adjudication. Finally, he noted that whilst the authority had to abide by the tribunal's decision, it appeared that if parents did not like the decision they simply 'refused to play ball'.

Despite the local authorities' view that the tribunal was too expensive and adversarial, and was taking Scotland towards a conflictual model which tended to characterise the English system (LA4), there was a recognition from three local authority respondents that an effective appeals process was playing a part in changing local authority culture for the better:

This may sound like a paradox but I actually think that the existence of an effective appeals process has been helpful. I think the fact that there are clear processes in place and it's not on a grace and favour basis and parents have the right in law to request to proceed to [the tribunal], I think it has been helpful and I think probably locally it has been a factor in sharpening up our practice in this area. I would value that on reflection (LA4).

Local authority respondents agreed that one of the major problems with regard to the tribunal related to the access criteria. As noted above, the ASN Tribunals for Scotland deal with matters relating to the CSP, and qualification criteria for a CSP relate not only to the severity and complexity of the child's needs, but also to the need for significant input from other agencies. As noted by HMIE (2007), local authorities interpreted the term 'significant' in different ways, with some employing extremely stringent criteria, so that very few children would be deemed to be receiving significant input from other agencies. The respondent in LA6 believed it was a mistake to make the issuing of a CSP, which in turn gave access to the tribunal, conditional on the input of other agencies:

I have to say, I have a bit of a feeling that the CSP is a dog's breakfast, I think it was a compromise and I think the fact that it's predicated on significant involvement of another agency, and to use that as a criteria for access to a tribunal, is not sensible. (LA6)

Parents found it difficult to understand why a child with moderate difficulties might qualify for a CSP on account of multi-agency input, whilst another child with much more significant difficulties, but whose needs were being met entirely through the education budget, did not.

Mediation interviewees were also somewhat sceptical about whether the tribunal approach offered value for money compared with mediation:

Again, I think it has its place for specific issues. ...This will probably sound like sour grapes, but it was set up with a lot of government funding, and you could argue that perhaps more funding needed to be directed to school level and mediation resolving disputes before they escalate, higher up the tree. I know that the tribunal likes to see itself as not sort of the end of a spectrum in severity, but I think it is seen that way and because the chairs are legally trained, it does seem to be quite a formal process despite trying not to be if you see what I mean (ME2).

ME2 was also critical of lawyers' focus on winning cases, and wondered if this were an appropriate approach in the field of additional support needs, where professionals were working with 'kids' best interests at heart', although they clearly had a different perspective from parents. Both mediation service respondents and an advice and information provider noted that the legal nature of the tribunal meant that it was likely to be a stressful experience for parents, who were likely to be disadvantaged because, whereas the local authority was increasingly likely to have legal representation, parents were very unlikely to be represented by a solicitor. A Tribunal User Group had been set up to consider the user perspective, and the President was aware that the legalistic nature of proceedings was a concern to users, whichever side they were on. However, she believed that in the past there had perhaps been too great an emphasis on cosy resolution:

I've always been totally in favour of cases that are capable of being settled, or agreement between parties and all the rest of it, and being worked out of any sort of hearing context, because I think hearings are stressful, however user-friendly you try and make them, they are stressful and I think that it's healthy that you should try and avoid that but I also think that you have to accept that some cases just cannot be settled in that way. My sense is at the moment, there is far too big an expectation of things settling out of court in a cosy agreement type environment. (TO1)

Strong endorsement of this view came from voluntary organisations. A parent member commented:

We're a small country and whatever we do has to be fairly standardised across the board...I do think it is important that there is a legal framework and there is a legal recourse so that parents can go to a tribunal and that it has legal standing. (VO3)

She recognised the problem that parents were making references which did not fit the criteria, but. Like other voluntary organisations, felt the solution was to widen the Tribunal's terms of reference.

THE NEW LEGISLATION AND DISPUTE RESOLUTION

Educational planning mechanisms and routes to redress

Many of our respondents felt that too many different types of planning arrangements were specified in the legislation, with different access criteria and redress routes attached to each. Local authorities had compounded this difficulty by putting in place additional plans, sometimes substituting locally devised documents, such as multi-agency support plans, for the statutory planning mechanisms stipulated in the Code of Practice. In its evaluation of the legislation, the proliferation of planning mechanisms was strongly criticised by HMIe (2007), as was the wide variation in the proportion of children receiving CSPs in different authorities.

A number of our respondents believed that CSPs were particularly problematic because of their dual qualification criteria. As noted earlier, to qualify for a CSP, it was necessary for a child to have severe and complex additional support needs, which involved a significant input from

agencies other than education. Eligibility for a CSP, therefore, hinged critically on the contractual arrangements with social work and health entered into by different schools and authorities. For example, some independent schools engaged their own health and social work practitioners, so that children in such schools, irrespective of the complexity of their needs, might be deemed not to qualify for a CSP. In addition, the qualification criteria for a CSP might discourage local authorities from involving other agencies, running against the emphasis on inter-agency working. Since CSPs are statutory documents, involving multi-disciplinary assessment and planning, parents tended to regard these as the 'gold standard', despite local authority assurances that they should not be seen as a means of obtaining preferential treatment or better access to resources. Respondents from a wide range of backgrounds felt that it was problematic to make access to the tribunal contingent on having a CSP, which ultimately depended on local service delivery arrangements rather than the extent of a child's difficulties:

...the CSP is still seen, and in fact in practical terms still is, a route to resources, I think you would be naïve to think that wasn't the case, despite assurances that are made that you still have rights, even if you don't have a CSP.... but because of the differential in the rights that flow from having a CSP, compared to not having one, it highlights the kind of peculiarity in the way the criteria are identified and certainly it's true to say that there are children who get CSPs who, were they in a different authority area, they would never in a million years get one (ADV2).

Many of our respondents believed that the qualification criteria for a CSP, and thence access to the tribunal, should be revised, and that subsequently this section of the Code of Practice should be redrafted. However, they clearly disagreed on the changes which were needed. Local authorities were generally opposed to the existence of CSPs, with one authority in particular pointing out that the CSP did not sit easily with the idea of having a single plan for children with exceptional needs, as recommended by the Getting it Right for Every Child (GIRFEC) initiative. Other authorities felt that all children should have Personal Learning Plans, and there was no need for any child to have a higher level plan or access to any redress mechanism other than the standard local authority complaints procedure.

Competition between different dispute resolution routes

It was evident from the interviews that, whilst many respondents recognised the different merits of various dispute resolution mechanisms, they tended to favour one route over another, in accordance with their own location within the system. Thus local authority respondents favoured low level dispute resolution at school and local authority level, using informal negotiation and, if necessary, the standard local authority complaints procedures. The main benefit of informal negotiation and mediation, according to service providers, was its focus on achieving a consensus, with both partners agreeing to accommodate and shift from their original position. A tribunal representative, on the other hand, felt that the emphasis on resolution at school level could be counter-productive, since many schools supported parents in their argument over resources with the local authority. Putting schools in the front line was therefore deflecting attention from the local authority, with whom the parents were actually in dispute. Advocacy providers also questioned the emphasis on negotiated settlement within informal negotiation and mediation. Whilst this might be appropriate if a personality clash was the root of the difficulty, in other cases there was a danger that parents might be persuaded to negotiate away their rights, particularly when faced with better informed professionals. Local authorities questioned the utility of independent formal mediation on the grounds that it was usually requested after a dispute had become entrenched, so that much earlier informal negotiation within the school or local authority was preferable.

Adjudication was strongly promoted by parent advocates because a parental request normally prompted a senior officer in the authority to review the case, usually leading to a rapid resolution of any difficulty. Whilst mediation service workers and local authority officers saw the lack of an oral hearing as a disadvantage, particularly for parents with literacy difficulties, this was seen as an advantage by advocacy services, who felt that providing a written case was less stressful for parents than an oral presentation to a panel which might be required in a formal mediation context.

The tribunal was seen as highly stressful and costly by local authority staff, who were generally critical of an adversarial approach to the resolution of disputes in education. A few, however, despite reporting some bruising experiences, felt that a final decision by an independent body was to be welcomed and that the tribunal had a wider beneficial effect in tightening up local authority procedures and shifting cultural expectations of passive and compliant parents. Advocacy groups felt that the tribunal was essential in terms of underpinning parents' rights, but agreed with the local authorities that convenors varied in terms of their skills in encouraging a user-friendly atmosphere.

It is evident that parents are receiving very different messages about the merits and demerits of different redress mechanisms, which are promoted by different actors within the system for different purposes, and it is therefore unsurprising that considerable confusion should result.

The balance of power between parents and professionals

A clear aim of the new legislation was to enhance the rights of parents and to make local authorities more accountable for service provision in the field of additional support needs. The Code of Practice lists new rights accruing to parents and young people, including enhanced redress mechanisms. However, the extent to which parents are actually able to use these rights is currently uncertain and access to advice and information and advocacy services is crucial here. There is a legislative requirement for local authorities to inform parents of their additional support needs policy, including rights to redress through mediation, adjudication and the tribunal. However, it was evident that the majority of local authorities did not have information for parents available on-line, and parents were only told of their appeal rights in the context of the official letter concerning the authority's CSP decision. Local authority web sites rarely informed parents of the existence of Enquire, the national advice and information service for additional support needs funded by Scottish Government. The vast majority of parents of children with additional support needs therefore lacked information about their rights to access a range of redress mechanisms.

Although local authority staff firmly believed that the balance of power had shifted in favour of parents, mediation and advocacy services pointed out that outcomes of mediation and adjudication were not legally binding, and local authorities could refuse to participate in mediation or to appoint an independent adjudicator. The tribunal was therefore the only independent redress mechanism which local authority staff were obliged to engage with. However, the restrictive criteria for accessing the tribunal meant that this route was only available to a small minority of parents of children with additional support needs.

Furthermore, even if parents believed that their case met the criteria for accessing the tribunal, making a reference and going through the process of a tribunal hearing was an extremely daunting prospect which deterred all but the most determined. Independent advocacy services were extremely thin on the ground, with no services funded directly by Scottish Government. ISEA, a voluntary organisation with short-term funding from charitable trusts, often provided non-legal representation for parents at tribunal. However, in June 2008 their funding came to an end, and they were obliged to suspend their services. Govan Law Centre was funded by Scottish Government to provide a legal advice service, but not to represent parents at tribunal. A solicitor from this law centre sometimes represented parents in order to clarify particular legal points, but this was generally unfunded work. Since legal aid was not available, parents rarely had legal representation at tribunal. Local authority representatives explained that initially they had only arranged legal representation when parents were being accompanied by a lawyer. However, it appeared that local authorities were increasingly likely to have legal representation, thus shifting the odds of winning cases in their favour.

Despite the evidence that in practice parents had difficulty in effectively utilising their new rights, some professionals believed that parents were unduly privileged. A speech and language therapist, who was also a tribunal member, commented:

I'm not so sure that I always agree with the parents' rights bit when they don't have all the responsibilities going along with it. Sometimes it feels like parents have an easy ride and we have all the bother as a professional (TO2).

CONCLUSION

In Table 1, we summarized the different models of procedural justice identified by Riddell et al (2002) in earlier work on SEN systems in England and Scotland. We argued that in Scotland the post-war frameworks of bureaucracy and professionalism tended to hold sway, whereas in England the provisions of the 1993 Education Act, in particular the Code of Practice and the SEN Tribunal, had led to a more diverse approach to procedural justice, with greater emphasis on legality, managerialism and consumerism. In Scotland, it would appear the ASL Act has also moved the policy framework in this direction. Timescales have been placed on local authorities in relation to the production of CSPs, and in managing adjudication and tribunal procedures. The rights of parents have certainly been enhanced, with greater routes to legal redress, and the consumer voice is heard more clearly through mediation and adjudication procedures, as well as via the more formal setting of the ASN Tribunal. In addition to strengthening the legal policy framework, the principles underpinning adjudication draw on the post-war bureaucratic framework, with independent appointees ensuring that local authorities are fulfilling their legal duties according to the rules.

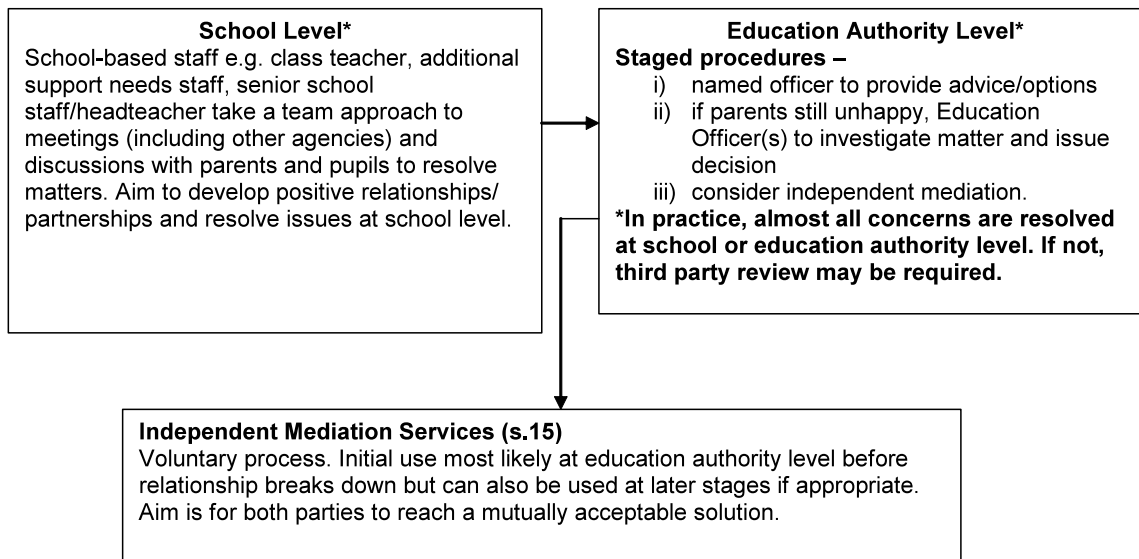
However, it is clear that despite the shifts in policy frameworks, achieving change on the ground is much more difficult, with street level bureaucrats having great power to subvert the intentions of the legislation (Lipsky, 1980) by failing to act within its spirit or by withholding information from parents. Amongst local authority officers, resistance to some of the changes was evident, and in some accounts there was the suggestion that parents who exert their rights are misguided or angry. Harris (2005) has suggested that across the UK, social rights such as those in education tend to be weak, and concludes that over the past 25 years little has been ceded to parents, and where concessions have been made, these have been a form of 'technology of citizenship (Vincent and Tomlinson, 1997). However, a number of local authority officers maintained that according parents greater rights to challenge decisions in the field of additional support needs was likely to produce a more efficient, accountable and transparent system with benefits for all. Finally, there is a clear sense from all respondents that whilst a diverse range of dispute mechanisms is now available, parents have great difficulty in mustering the material, social and cultural resources to make full use of these, and greater access to information and advocacy is likely to be very important in leveling the playing field further. The next stage of the research, case studies with parents, will illuminate their perspective more clearly.

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Framework for resolving disagreements

PARTIES REACH AGREED OUTCOME AT LOCAL LEVEL



THIRD PARTY REVIEW AND RECOMMENDATION

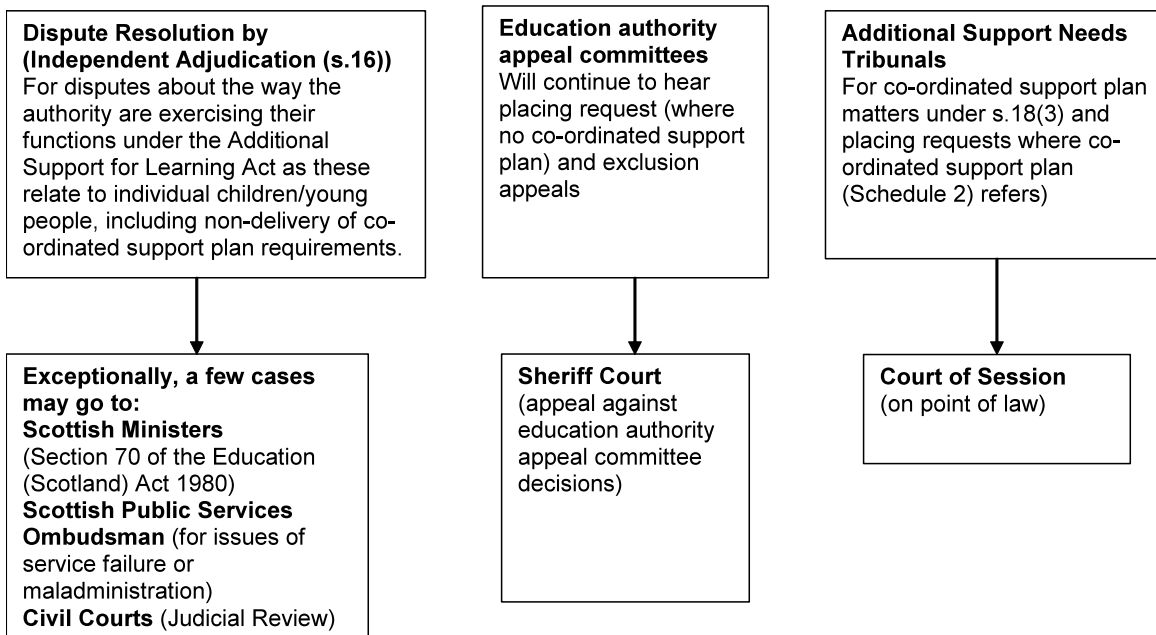


Table 1: Six Normative Models of Procedural Justice

Model	Mode of Decision Making	Legitimizing Goal	Mode of Account-ability	Characteristic Remedy for User
Bureaucracy	Applying rules	Accuracy	Hierarchical	Administrative review
Professional-ism	Applying knowledge	Public service	Interpersonal	Second opinion: complaint to a professional body
Legality	Weighing-up arguments	Fairness	Independent	Appeal to a court or tribunal (public law)
Managerial-ism	Managerial autonomy	Efficiency gains	Performance measures	Management sanctions Complaint to ombudsman
Consumer-ism	Active participation	Consumer satisfaction	Consumer charters	'Voice' and/or compensation through Charter
Markets	Price mechanism	Private sector-profit Public sector-efficiency	Commercial viability	'Exit' and/or court action (private law)