

England: Key Findings from the Key Informant Interviews

WORKING PAPER 4

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I Introduction

This paper draws on research, funded by the Economic and Social Research Council, into dispute resolution and avoidance in special educational needs (SEN) in England and additional support needs (ASN) in Scotland. The research aims to examine, among other things: the strategies used by local authorities and schools to avoid and resolve disputes about SEN and ASN; the way that alternative dispute resolution mechanisms (especially mediation) are viewed and experienced by parents and local authorities; and the success of dispute resolution and avoidance approaches in reducing the number of cases referred to tribunals.

This paper presents key findings from the interviews conducted in England with 30 key informants between April and June 2008. The interviews were mainly conducted over the telephone but there were a few face-to-face interviews. These key informants came from a variety of organisations including (the total number of interviews per group is shown in brackets): independent mediation providers (6); The Department for Children, Schools and Families (DCSF) (2); local authorities (4); parent partnership services (PPS) (2); the SENDIST (3); academe (1); voluntary organisations (VOs) (including those that work with parents of children with special educational needs in general and those that target specific conditions) (6); a parent advocate (1); and schools, both from the independent special school sector (2) and state schools (3). A complete list of the interviewees is included in appendix one.

The issues explored with the interviewees included: the kinds of SEN disputes they encounter, how disputes are resolved and the interviewees' (or organisations') role; views and experiences of the various formal dispute resolution approaches available, including the SENDIST and mediation, and when each is considered most appropriate; whether there are certain types of parents who are disadvantaged by SENDIST or mediation; and their opinions on child participation in disputes.

II Local level resolution

Many of the informants agreed that the *majority of disputes are settled at the local level* – that is, outside a more formal process of dispute resolution involving mediation or the tribunal. Some informants said that this is because the local authority (LA) is open to communication, encourages informal means of mediation/ negotiation, or is proactive and contacts parents, but mainly because

of involvement from a PPS. This seems consistent with SEN legislation and policy which clearly advocates local level resolution. The SEN Code of Practice (2001) promotes PPS as the local disagreement resolution mechanism for SEN disputes.

The PPS officers that participated in interviews, as well as other respondents, likened the service PPS offer to parents to a kind of 'informal' mediation:

"it is acting as, often acting as that impartial third party who is there to make sure that everybody is communicating properly and that everybody else has understood where everybody else is coming from and that the parent feels heard" (ELA3).

Other work undertaken by PPS with parents includes: helping them prepare for meetings with the LA, discussing the next steps, and helping parents to consider all the options.

Within local procedures the key to resolving disputes is good communication, particularly in ensuring parents understand the reason for decisions. Without it, disputes may escalate:

"I would have said predominantly poor communication, sometimes long delays in local authorities getting back to parents with their phone calls, sometimes local authorities really explaining and responding to parents about the reasons why things are happening or not happening, I would have said almost always that is the case" (EMED3).

LAs themselves are considered to have a variable record of good communication, but some are "really good at having meetings with parents and discussing and trying to come to compromises and looking for ways forward" (ELA4). As there will always be parents unwilling to, lacking the confidence to, or not knowing how to make the first contact, many respondents criticised LAs for not initiating contact with parents who are likely to be unhappy with decisions.

As regards the *means* of communication, a number of interviewees, especially mediation providers and those from LAs, commented on the fact that a letter is often insufficient: parents need verbal communication about decisions. An LA officer mentioned the importance of decision letters not giving an outright 'no' but explaining why and what parents can do to remedy the situation:

"so it is not just saying an outright 'no', it is 'we are saying no for a reason but if you can provide this additional information then we can look at it again'" (ELA1).

"I've had two dads say to me this year, "oh well, if I'd known that I'd have made the decision you made as well" (ELA6)

One LA officer felt very strongly that there is a need to “personalise the decision making” (ELA6). In this LA this was put into practice by having a member of staff specifically employed to resolve disputes at the earliest level, bringing in the human aspect of understanding what parents of children with SEN go through, by making decisions quickly so parents are not left hanging around, by ensuring parents feel listened to and that their views are represented on decision making panels, as well as positive communication and explaining reasons for decisions. This LA officer also stressed the importance of following the code of practice to ensure the correct decisions are made, especially as then parents will have more trust that they are doing everything they can.

It seemed, however, that not all disputes can be settled at a local level. An interviewee from a local authority said that there is no point talking to parents who have an ultimate goal (usually a child’s placement in an independent special school) and will tend to fight any decisions. A VO informant felt that some parents are wary of negotiating with LA officers or PPS because past experiences have made them feel they are constantly lied to and “that the only way to guarantee a conclusion, an outcome, is to go through one of the more formal processes” (EVO5).

Mediation providers reported that often parents get in touch with them too early, in other words before they have tried all local level avenues and so it would always be recommended that parents try meeting with the local authority first and if that is not successful to come back to mediation. Informants from SENDIST and from mediation providers said that they saw many cases which should have been resolved earlier and felt that more local authorities “*should have known better*” (EMED3). However a LA officer pointed out that sometimes parents are too quick to make referrals to tribunals before all other avenues have been exhausted.

While PPS are the key players in the local resolution of disputes, the majority of respondents, like Rogers *et al* (2006) (who found that PPS varied as to how they interpreted minimum standards set out in the 2001 SEN Code of Practice), regarded the quality of PPS provision across the country as variable. The reasons for variability are the diverse staffing and budget levels. Nevertheless, respondents stressed that some were doing very good work in providing information to parents and explaining their rights to them, although “some parent partnership groups... don’t actually help them [parents] as much as they might” (EVO2). A few of the VOs gave examples of parent partnership services’ siding with LAs.

Quite a number of interviewees (including mediation providers and SENDIST chairs) commented that it is always better for parties to reach agreement themselves (even if that is on the morning of their tribunal hearing!):

“I would always rather they did agree because if they do agree then the future is going to be better for the child you know and everybody

concerned than it is if the tribunal has made a decision which one side isn't going to be happy with" (ET1)

One LA officer was very anti solicitors being involved in SEN disputes feeling that they create more negative relationships and get parents to refuse to have contact with LAs making local level resolution very difficult.

A. *The role of voluntary organisations in local level resolution*

The voluntary organisations which participated in the research tended to have contact with quite a large number of parents of children with SEN per year (figures given varied from 600 to 1000 parents) and interviewees felt that a high proportion of parents who made contact were in some form of disagreement over SEN (approximately 75 per cent of parents). Some of the VOs purely offered advice to parents, usually over the phone, whereas others were active participants in meetings, mediations and tribunals. There were a number of VOs who spent a long time with parents helping them to prepare for their SENDIST appeal.

By being present at meetings, writing letters, helping parents put their case in a more factual and less emotional way, ensuring parents are better informed and explaining SEN conditions to schools, VOs felt they have a positive influence in the resolution of disagreements. It was clear that they felt their role was to give parents ideas about what to try and inform them of the options available rather than telling them what to do. Again, improving the communication between local authorities and parents was seen as vital to resolving disagreements. For example, one interviewee explained that once education staff were given a clearer picture of the child's needs and their implication for learning, that could be sufficient to ensure improvements occurred (EVO2). Parents could be assisted in presenting information such as this to the LA and where this was "factual and evidence based rather than anecdotal and emotional, and many times local authorities will back down" (EVO5).

VOs felt that with their involvement the majority of disagreements brought to their attention were resolved informally:

"we hope that the majority [of calls] reach at least an interim resolution locally through negotiation or just finding out more or whatever" (EVO4)

"I think actually what we would say is we always successfully mediate or negotiate something on a statement" (EVO6).

On the other hand one VO felt that as parents contacted them at the point of desperation it was often too late to succeed at local level resolution.

B. *The role of schools in local level resolution*

Schools' involvement in the formal resolution of disputes appears to be limited, but the interviews revealed that schools tended to stop any possible

disagreements from escalating: often when they spoke to a local authority and gave their opinion, for example, on whether a child needed a statutory assessment, the LA changed its mind. The importance of relationships between school, LA and PPS staff was highlighted and it was made clear that if school staff have worked with LA staff for a long time the authority tends to respect their opinions. It appears that schools tend not to accept a 'no' from the authority if they strongly feel something is in the child's best interests and vice versa the LA can help the school see that they should be doing more to meet the child's needs:

“any kind of support that our children need, our parents need the support in helping that process to take place, yes occasionally you will get a parent who will make a request and what we will try to do is accommodate that request but by and large the drive comes from the school [...]so that is part of our job then to make sure that we get that support for them” (EMS1)

“I mean there was a situation where a young man in year 8 was refused initially formal assessment in my view there was absolutely no doubt that shouldn't have been the case so I made that point very strongly personally to the people in the local authority who I felt needed to know and we sort of got round that situation by them changing their minds” (EMS3).

“I'm quite happy to get in touch with schools on behalf of parents [...] so that if I think what the parent's asking for is perfectly reasonable or the opposite then I'm able to take that view on that and perhaps help smooth things over” (ELA6)

Where independent schools are concerned the most common disputes mentioned were ones over school placement. These schools are in fact conscious of the need not to be seen to be siding with either party due to their continuing relationship with the LA and the parents. In school placement disputes involving these schools tribunals are not common because either the LA backs down when it sees the parents are willing to fight all the way for the provision, or the child goes to another school, fails, and then ends up at the independent school a year later. Other disputes mentioned by independent schools were around provision mentioned in statements not being provided. The schools helped parents fight for this provision, which is the responsibility of the LA, or found ways to provide it themselves.

All the schools had very little experience of school level disputes. The reasons given for this were excellent communication between the school and parents, which often began before the child started at the school, and dedicated, knowledgeable and effective SENCOs who understand the background of the child and explain things well to parents and who parents trust:

“we are often seen in a favourable light by families so we are in quite a fortunate position. Having said that I think we earn it. [E]very child here has a key worker and that key worker will get to know that family fairly intimately and be trusted by them [...] communication is critical, that is the key to everything” (EISS2)

“all of those disputes are resolved in house [...] we have got a very skilful team in dealing with parents because by and large our parents trust our staff as a whole but our special needs team in particular and our inclusion team in general [...] that is not by accident, [it] is because these people are trained and they are selected on the basis of being able to relate well to people” (EMS1)

“[P]arents of vulnerable kids want to know that actually when they send their child to school that they feel that it is a safe environment and they have got someone there who is going to be sympathetic and respond to their needs [...] a personal approach” (EMS3).

It was acknowledged by the interviewees from schools that not all schools have such positive relationships with parents, for example SENCOs who work in a difficult environment do not have the capacity to build relationships with parents.

Interviewees from special schools commented that some parents have such a negative view of authority and school after perhaps having negative experiences of education themselves or because they have seen their child excluded from a number of schools that schools have much work to do to gain their trust.

Some of the mediation providers felt that schools often liked to, and thought they could, sort out areas of disagreement with parents on their own, without outside interference (“I think it is something to do with this business of ‘you are treading on my territory’” (EMED6)). PPOs remarked that schools would rather compromise than lose staff time for attendance at mediation meetings. Other mediation providers, and some VOs, commented that they were surprised at the low take-up of mediation by schools (the VOs thought mediation would work particularly well with such disputes).

One LA officer did feel that schools often lack knowledge when it comes to the SEN code of practice and of DDA and consequently a large part of their job was advising schools on things that they should have already known and if they had such disputes would have been avoided.

III Mediation of SEN Disputes

When the duty on LAs to provide an independent mediation service was introduced in 2002 under SENDA 2001, mediation was initially provided through regional partnership arrangements (six mediation providers mediated for the nine regions). For two years it was central government funded. According to

departmental interviewees this was so that set-up and training costs were covered and to ensure some consistency across regions. When this funding ended, many LAs withdrew from the regional partnerships. What currently exists is a complex picture. For example, some LAs are still using the same providers as under the initial arrangements involving regional partnerships, while in some regions all LAs have different contracts which all have to be renegotiated. It was mentioned by one provider that being part of a regional partnership agreement ensures quality of provision because there is money for: a post to provide feedback to LAs to inform their practice; mediator training and development; more than one mediator so that LAs are not always using the same person and mediators can observe each other to ensure quality. The length of contract was mentioned as being important because the longer the contract the more infrastructure and training providers are likely to put in place.

Other LAs use their PPS as a dispute resolution service and there are inter-LA reciprocal mediation arrangements involving their PPS, while others use mediation providers from other fields that they have previously used, for example, family mediators. Both of these kinds of arrangements were viewed as problematic by some of the interviewees, the former because of independence and skill issues and the latter because of knowledge and expertise issues.

Therefore, currently all LAs are meeting their duty to provide a mediation service, but the way this is done and the quality of provision varies considerably. It was suggested that there is a need for clearer standards and key performance indicators to be set in this area. One mediation provider said that some LAs are effectively failing to provide a mediation service:

“and when money is tight they will increasingly go down that line in my view unless there are some more safeguards about [it] as a service, because the cheapest way is not to have one, isn't it? The next cheapest is to have the reciprocal one” (EMED3).

Different views emerged from the interviews as to whether there is a need for independent SEN dispute resolution mediation providers. Some of the interviewees from PPS, schools and VOs thought that it was not needed because the work that they carried out was essentially mediation and if disputes could not be resolved with their input it was unlikely they would go on to be resolved with independent mediation:

“I have always wondered [about] the need for the disagreement resolution service because a lot of the work that parent partnerships do facilitates not having to go there and if you have got a local authority who are also prepared to have discussions and have communications then, you know, what does the disagreement resolution achieve?” (ELA4)

On the other hand, not all parents access PPS or VOs, either because they are not aware of them or do not have faith in them. LA and PPS informants

recognised the need for a stage between local level resolution and the SENDIST or a stage after local level resolution for those disputes over which SENDIST does not have jurisdiction. Also one LA felt it important that parents had another option:

“Even though we don’t actually use it very often it’s important to be able to offer it” (ELA6)

This LA officer also felt that it was very important that parents understand mediation as often they have the wrong expectations of it (despite what they are told) and expect it is about changing decisions when often it is about “changing the way you feel about a decision or about finding more information” (ELA6).

A. *Utilisation of mediation*

All interviewees commented that the take up of dispute resolution mediation is generally low across the country, especially for disputes at school level. Two of the mediation providers felt that 50 per cent of referrals came under the jurisdiction of SENDIST and 50 per cent were school level disputes, but the remaining four mediation providers considered that most referrals were around issues that could be taken to the SENDIST. There are also huge disparities between LAs when it came to referrals to mediation.

Diverse reasons were offered by the key informants as to why there are relatively few referrals to SEN mediation and why there is such a degree of variation between authorities. So far as take up is concerned, it seemed from a wide range of interviewees, but especially the mediation providers, that there is a general lack of promotion of mediation and consequently a lack of awareness by parents that there is a mediation service. (Under their contracts, mediation providers are restricted from advertising their services and this is left to the LA.) A number of mediation providers believed that advertisement of their services needed to be at a national level. Another factor is a lack of understanding of dispute resolution services on the part of parents, which is compounded by the fact that the services offered by PPS are assumed by many parents to involve mediation. One mediation provider said that

“some parents go all the way to tribunal without realising there is a mediation service or maybe they know about it generally as a concept but have no idea what it is or where it is” (EMED3)

Another referred to cases where

“we ring the parents and we say ‘we are your mediation service and you know the local authority has made a referral’ and they say, ‘ooh well we have already been to mediation’ so you have to unpick this” (EMED1).

According to the mediation providers there are vast differences in how LAs make mediation known to parents, varying, for example, from mentioning it in small text at the bottom of decision letters, to referring to it clearly in letters to parents.

Some include a leaflet about the service with a copy of the decision letter sent to parents. In other cases parents only become aware of mediation because the LA has referred a case itself to mediation and the parents are then contacted by the mediation provider.

We were also told of a lack of understanding by LA staff of what mediation entails. For example, one interviewee spoke of LAs thinking only parents could make referrals and another spoke of LAs not realising how little preparation work by them is needed for mediation. Mediation providers were not sure all PPS officers understood independent mediation and were worried how they explained the service to parents. There were also variable views on the part of individual LA officers as to the value of mediation, which often this hinges in part on the relationship between the LA and the mediation provider. One LA officer felt that their PPS felt very threatened by the mediation service because they felt they should be able to do everything, this impacted on their willingness to alert parents to mediation as an option.

Schools were also considered to have low awareness of mediation and this is regarded as one reason, along with a wariness of outside interference, why schools tend not to use it. One of the school informants was a deputy head and head of inclusion and was not aware of a mediation service for SEN disputes, while other school informants were aware it exists but did not know much about it and had never used the service.

Two mediation providers had experience of LA officers telling them that they had not considered mediation because they were too preoccupied with responding to appeals to SENDIST brought by parents or attending appeal hearings to think about or use it:

“some local authorities are so busy at tribunal and I genuinely I have had this put to me before, ‘I can’t possibly mediate on this case, I have no date for mediation available because I am at tribunal’ [...] too many tribunals [such] that they have got no time for mediation and not even seeing the irony there at all” (EMED2).

This was also acknowledged by a LA officer who felt that when appeals are lodged early they are so busy preparing the paperwork that it makes negotiation difficult.

With the changes in LA set-ups (especially education departments being incorporated into children’s services authorities) officers may be too busy to promote mediation. Moreover, some officers that know about mediation are changing roles.

One mediation provider (EMED1) felt that certain LAs and PPSs think they are doing a good enough job of resolving disputes and can perform mediation functions themselves, a view echoed by many interviewees across the various

groups. Moreover, differences in contracts between LAs and mediation providers affects whether mediation is encouraged, for example, when the contract is case exclusive LAs have to pay per mediation and so are less likely to encourage it. A few of the interviewees felt that budgets were important: even though appeals were expensive in terms of time and staff resources the appeal body itself, SENDIST, is not paid for out of the LA budget whereas mediations are, so this affects how much authorities encourage and promote mediation. For example: “as long as local authorities have to pay for themselves they would still rather run to SENDIST because it only costs them time, it doesn’t cost them actual budget money and that is it” (EMED1)

LA support for mediation is also affected if the LA has a Tribunal Officer who attends tribunals: his or her expertise will enable them to see when a tribunal case is likely to be lost and thus whether mediation may be a better alternative for the authority. It was also suggested that areas with high pressure group activity tend to have low numbers of mediation cases, [as they tend to promote the appeal route].

Finally, almost all respondents, across all groups, commented that there will always be parents who want to utilise their right of appeal. These parents see mediation “as another hoop that is there to prevent them from getting to what they want” (ELA4). An interviewee from English government felt that it is more likely to be middle-class parents who are not willing to try mediation.

For various of the reasons indicated above, especially to do with funding and promotion of mediation, some of the mediation providers suggested that, in a sense, their services seem to have been set up to fail as they are not on an equal footing to the SENDIST, which has central government support.

Some of the VOs interviewed commented that they had no experience of the mediation process and would appreciate it if they were provided with more information. Those VOs that had experience of mediation said that they would always encourage parents to try it as a possibly beneficial process.

B. *A successful mediation*

A successful mediation was considered to be not merely one where a full agreement was reached, but also one where a partial agreement was reached; where, whatever the outcome, there are improved relationships between the parties; and when parties are clearer about the issues in the case.

Mediation providers indicated various factors which affect the success of mediations. Firstly, the timing of the mediation seemed to be important, especially ensuring the mediations took place before views are too firmly entrenched and relationships have completely broken down, and not having the mediation too near the tribunal date (best before case statements submitted) as otherwise the parties think they might as well wait and see what happens at tribunal. Also important was the willingness of the parties to be open-minded and

wanting to try to resolve matters. The quality and training of the mediators was also seen as relevant to a successful mediation as was their ability to create an environment that is conducive to agreement. Having a venue that was not too formal and helped people feel comfortable was also mentioned as being important. The parent advocate felt that mediation works best when everyone goes through the statement together line-by-line although they had experience of LAs refusing to do that at mediation as they considered it too time consuming.

The importance of pre-meetings was stressed by the mediation providers; these created opportunities for misunderstandings to be resolved which in some cases led to disagreements being resolved; they also meant that the mediator could build rapport with the parties. They also help to ensure the most appropriate people are present at the mediation.

C. *Advantages of mediation*

Interviewees with experience of mediation generally had a fairly positive view of it. School staff and SENDIST chairs having had little experience of mediation did not feel placed to discuss the advantages of it.

One of the main advantages of mediation as seen by mediation providers and VOs is that it allows the channels of communication to be opened. Linked to this is the fact that mediation helps to improve relationships between the disputing parties.

As a number of mediation providers and an interviewee from the DCSF acknowledged, often the reason parents give for a disagreement is not in fact the main grievance. At SENDIST they would only be able to deal with the posited reason, whereas in mediations all the underlying issues can be explored. Mediation was also thought to be advantageous by one mediation provider because it forces parties to explore the issues earlier rather than waiting until the day of a tribunal hearing.

An LA officer preferred the option of mediation because it involves less preparatory work than a SENDIST appeal. Other advantages mentioned by mediation providers, VOs and the academic interviewee are: mediation is quick; there are no actual monetary costs to parents; it is empowering (especially as outcomes are negotiated rather than imposed); parties are more at ease than in SENDIST; and it gives parties time to think as 'time-outs' ensure they do not have to respond straight away.

D. *Disadvantages of mediation*

Some VOs mentioned suspicion among parents that mediation providers are not independent and work for the local authority as it is funded by them (although this is also true of PPSs).

One VO and EREP1 were very critical of the fact that because independent mediation providers tend not to know the law in the area of SEN, nobody

challenges what the LA says (when this may often be contrary to the law) and this leads to an unequal balance of power:

“What we found with the independent mediation advisors is there’s a problem in as much as they don’t know the law [...] If a local authority is saying to a parent ‘well this is the law’, there is nobody there to challenge it and say actually the law isn’t that at all” (EVO6).

“they don’t have a lot of idea of the law and what they try to do in my view and experience, is [...] almost actively trying to persuade parents to just fall in line with what the LA want” (EREP1)

Another VO and a school interviewee also suspected a lack of expertise among mediation providers, for example on the nature and effects of different types of SEN. However, all of the mediation providers to whom we spoke provided training on SEN law, procedures and processes to all their mediators.

Some of the interviewees, especially those from VOs, felt that the appropriate person from the LA with power to settle did not always attend mediations and decisions had to go back to panels which meant there was no finality to mediations for parents. One interviewee felt this disadvantaged parents who are expected to make decisions on the day of the mediation when LAs are not.

“I think the difficulty for the local authority is that the people who maybe attend the mediation are not necessarily in a position to make a decision and agree anything there and then on the spot [...] they usually have to take it back, ideas have to go to panel and so on and panel doesn’t necessarily uphold what has been recommended or suggested at a mediation meeting [...] they want a decision there and then, the local authority isn’t able to give it” (EVO5).

However mediation providers said that they work hard to ensure the right people, including the relevant person from the LA who can settle on the authority’s behalf, are present at mediations.

PPS and VO respondents stated that they advise parents to enter mediation so that when they get to SENDIST they can say that they have tried everything. They perceived that SENDIST would always approach this matter and frown upon parents who had declined to mediate. This is interesting, as SENDIST do not appear routinely to ask whether mediation has been tried. This again points to a general lack of knowledge about mediation among professionals working with parents of children with SEN.

It was also acknowledged by voluntary groups that mediation is still daunting for parents. The parent advocate interviewee also felt this feeling that LAs attend mediations heavy handed which overwhelms parents.

E. Mediation outcomes: settling for too little?

Mediation providers generally felt that the issue was not whether parties accepted an outcome in a mediation that is less advantageous than they could perhaps have achieved at SENDIST, but rather the fact that there is more flexibility so that more options are available and that often the outcome is not what either party came into the mediation wanting:

“a tribunal can only make certain decisions [...] like you know if it is about schools there has got to be a named school and a preferred school whereas in a mediation meeting because no school exactly matches a child [...] it is finding one that most appropriately matches or meets whatever that child’s overriding need, you can come up with a 3rd, 4th alternative at a mediation and in fact come up with something that is much, much more appropriate than either/ or” (EMED6).

It was also thought by mediation providers, VOs, local authorities and parent partnerships that a party might accept the other’s suggestion even though it was less favourable to them because they realised through the mediation that would be in the best interests of the child:

“I think that is about parents’ bottom line, isn’t it, and people actually understanding what it is that they would be prepared to accept in terms of what would be best for the child. I know you often get this comparison between the Rolls Royce service and the Mini, and sometimes I think what people aim for is the ultimate where actually when you talk things through with them they would be quite happy with somewhere in between because it would still be meeting the needs of the child” (ELA3).

“[I]t might not be that they get the outcome that they went in asking for [...] but sometimes going through that process can help them see that maybe the outcome they were so determined to get actually isn’t the right outcome for the young person once they actually start that communication process” (ELA2)

One of the VO representatives also felt that if a parent was offered through mediation the provision that was high on their list of priorities they would be willing to drop some of the lesser issues that would be relatively easy to get via SENDIST.

Factors that go towards a successful mediation (see above), such as having an experienced mediator, the mediator making the implications of decisions clear to parties, the presence of a supporter for parents (especially by PPS or a VO) and opportunities for breaks to discuss and think about suggestions, were all seen as important by mediation providers, VOs and the academic interviewee, in ensuring that parents did not settle for too little.

It was thought by an interviewee from a VO that parents are also unlikely to settle for less in mediation because they will feel that unless they can achieve what they want they might as well continue on to SENDIST.

F. *Mediations and appeals to SENDIST*

The majority of the respondents as a whole felt that the impact of mediation on the number of appeals to the tribunal was minimal, mainly because the numbers of mediations taking place was so low. However, the *mediation providers* overwhelmingly felt that the majority of cases that came to them were diverted away from going to the tribunal. For instance, according to one mediation provider a local authority which previously had had many tribunal cases saw a two thirds reduction through using the mediation service. Comments from mediation providers included:

“[W]hat I do know speaking to other [...] mediation providers is that we have all experienced cases where parents come to us, they have currently got an appeal at SENDIST and as a result of mediation they withdraw their appeal” (EMED2).

“most of [the] tribunal cases are cancelled” (EMED6).

There was anger among some mediation providers over the 2007/08 SENDIST annual report which suggested that any reduction in appeal numbers was not a consequence of mediation. They wondered where SENDIST got the evidence for this, as people are not routinely asked whether they tried mediation or why they have withdrawn their appeal at SENDIST.

VOs were much more sceptical about the impact of mediations on appeals to SENDIST, saying that, although they had little experience of mediation, the cases of which they were aware still tended to go on to SENDIST. Interestingly, one interviewee from the DCSF said that reducing the number of SENDIST appeals was never the purpose of introducing mediation, which runs contrary to statements elsewhere (for example, in Parliament).

A LA officer felt that mediation had stopped an appeal and a judicial review and “just for those two alone it’s been useful to have” (ELA6). It seemed from interviews with PPS officers who (as noted above) undertake a kind of ‘informal’ mediation, that their work had quite a large impact on the number of appeals to SENDIST and they were effective at ensuring disagreements did not turn into appeals:

“I think it is fair to say that we probably avoid something like half of those cases that could otherwise have gone to tribunal over refusal to assess just by spending time talking through with the parent what the next steps might be, going back to talk to the school, all those types of things” (ELA3).

G. Implementation of mediation agreements

Mostly it was only mediation providers who gave an opinion on implementation of mediation agreements, but an LA officer commented that *“there is just no point in not”* (ELA1) implementing agreements.

Very rarely were agreements not adhered to, but where that occurred it was usually because of a misunderstanding or for a good reason: for example, delaying implementation because the LA is still trying to appoint a specialist (eg therapist) or because decisions had to be taken back to the LA’s panel:

“and it does happen occasionally that things don’t get done or something doesn’t get followed up, I mean if someone moves job or they are waiting to recruit somebody else and [...] particularly [...] there are difficulties with speech and language occupational therapists because they are forever moving on and a lot of them seem to go off to Australia and New Zealand for work experience” (EMED6).

The quality of the written agreements was seen to be a factor in whether parties implemented them. If agreements are not ‘smart’ or are insufficiently precise a party can use this to avoid implementation of agreed actions:

“[I]t would seem that sometimes that the wording of an agreement could contribute to people not following through because the wording can be a bit sort of vague and woolly... it is vague enough for people to sort of wriggle out so we looked at that and now we try and make the agreements very specific so a very specific person is named is going to take action by X date” (EMED2).

The parent advocate felt that mediation agreements were merely a “record of what’s been said” and recommended parents continue with their appeal until they have received a final statement confirming the mediation agreement.

IV The appeal system: SENDIST

A. Views on SENDIST

The vast majority of key informants recognised that there will always be parents who want their dispute with the LA to go to SENDIST for whatever reason. Often they have already surmounted so many hurdles that they want a final decision; or they feel that if they do not go to SENDIST they have failed their child.

Many key informants confirmed that once a case gets to SENDIST it is likely to be settled at the last minute. It was thought that in these cases LAs (or their legal departments) did not look at the case properly until just before the hearing and then realised that they were in the wrong and so would lose:

“it is simply that the LEA waited till the very last minute before thinking about it and then thought [...] ‘we are going to lose this’ and then they

concede [...] I regard that as rather shocking in terms of the LA's approach to things" (ET3).

An interviewee from one VO suggested that LA officers work to their authority's policies but these are not always in line with the law and so the officers do not realise that decisions they have made are unlawful; it is only when the legal team looks at the case they realise it is. Alternatively an LA officer explained that often parents appeal to tribunal without first engaging in discussions with the LA and so when they see the papers they say,

"well, yeah of course we can do that. All you had to do was come and meet with me' [...] so we do quite often have appeals withdrawn" (ELA6)

This LA officer also admitted that they would never let the LA go to tribunal unless it was the right thing to do and the code of practice would not allow them to do as the parents wanted.

Last minute withdrawals lead to frustration for professionals. SENDIST chairs felt that the high number of withdrawals meant unnecessarily high administrative costs and wasted time spent reading files for cases which were not heard. VOs were also frustrated as they had to deal with similar cases time and time again, often connected to the same LA:

"and somebody from the legal department says look they are going to wipe the floor with you [...] and then they'll roll over and give that provision to that individual child and then the phone rings three weeks later and I've got another child in the same authority and they want to go through the same process again". (EVO1)

For one LA officer withdrawals were frustrating because "you get no credit for withdrawals" (ELA5): SENDIST figures for the authority only include appeals lodged. This also means that LAs are put off trying to negotiate once an appeal has been lodged.

SENDIST chairs considered that the high number of withdrawals was not due to parents giving up but rather because they got what they wanted.

There was suggestion by interviewees from independent special schools and mediation providers that some LAs in effect delegate their decision to the tribunal due to the size of their case load or because they do not want to take responsibility for potentially expensive decisions. But LA and PPS interviewees argued that LA officers would never willingly go to SENDIST because of the amount of time, preparation work and stress involved in an appeal, especially when the LA only has a small team. However one LA did admit that there are cases when the LA agrees with the parent, but cannot give them what they want so rely on the tribunal doing that for them:

"I actually agreed with the parents, it was just that the law wouldn't let us do what they wanted [...] so although technically we lost because we

ended up doing what the parent had asked I was quite happy with that” (ELA6)

SENDIST appeals can take several months to come to a hearing and many interviewees, from all groups, mentioned that this is irreplaceable time in a child’s education, whereas (as noted above) mediation is seen as far quicker.

Almost all the interviewees reported that although parents did not enjoy the experience of going to SENDIST, for many it was worth it to get the result they sought. Interviewees reported that parents find going to SENDIST very stressful.

A couple of the interviewees (one from an independent school and one from the DCSF) mentioned that parents did not feel listened to at tribunal and felt that they were talked over. The experience of SENDIST was considered to be varied as it depended on the chair and the panel at the hearing. One interviewee from a VO felt that panels sometimes had pre-conceived ideas and had heard things such as: ‘that panel member will never agree to an out of county placement’.

The main advantages of SENDIST, as seen by the majority of respondents across all groups, is that it provides a fair independent hearing leading to a decision by a third party, a decision which gives parties closure. There needs to be a final arbiter for those cases which just cannot be negotiated:

“I think from a parent’s point of view the key [advantage]... is that the SENDIST makes a decision which is binding and again for the local authority that is actually an advantage [...] so if they are ordered to send a child to the out of borough school then they can say ‘well we have been told to by SENDIST so you have got to take them sorry’. So yes I think it can be advantageous for both parties” (EVO5).

“It is clear cut, they have won or they have lost and they know somebody independent has looked at the information” (EVO3).

A cynical advantage of SENDIST for LAs suggested by some of the VO key informants was that it can actually deter parent challenges and delay expenditure on provision:

“I think the advantage to the local authority is that it takes a long time to get there and is off-putting for parents which is a distinct advantage to them because as far as I know most people who appeal who actually send off an assessment get turned down think ‘I am not going to appeal, that is too scary’, so they go away so the LEA have won by default” (EVO3).

This practice was also admitted to by one of the LA officers but in the context of having so much work to do ensuring provision for children who definitely need it that they have to leave some things to the SENDIST and saving some money is an added bonus.

The parent advocate spoke about the SENDIST statistics which suggest that the majority of SENDIST decisions go the way of the parents (a fact which many LAs use to justify that SENDIST is biased towards the parent). However a partial success counts in the statistics as a win for parents and so the parent might win on parts 2 or 3 of the statement but not get the school named in part 4 which was the main reason they went to tribunal. The parent advocate did admit that most parents do leave SENDIST with a stronger statement.

The parent advocate felt that informal hearings were better for everyone involved but it was the panel that influences the formality of hearings and panels can vary enormously.

B. *Implementation of SENDIST decisions*

It was felt by the informants that on the whole LAs do not deliberately avoid implementing SENDIST decisions. In some cases the wording of the decision may lead to uncertainty and it will need to go back to SENDIST for clarification. However, we were also given examples of LAs refusing to implement decisions, although one SENDIST interviewee felt the propensity for this to happen was reducing and that it is limited to unusual cases.

C. *SENDIST procedure*

It was suggested by many respondents that rather than independent dispute resolution services and the SENDIST running in parallel as they do currently, it would make sense for mediation to be *built into* SENDIST processes. It was thought that this could help to reduce the number of last minute settlements at SENDIST. Currently it depends on whether individual panels are pro-mediation. One interviewee mentioned two cases in which the SENDIST had made a costs order against the local authority because the tribunal felt the dispute should have been settled earlier. However, there are inherent cultural barriers to making mediation part of SENDIST processes. One mediation provider admitted that it had taken a lot of persuasion by the mediator's network to make SENDIST put information about mediation on its website. One of the SENDIST representatives felt that the two dispute resolution mechanisms should continue to run in parallel because if mediation was built into SENDIST procedures it would cause further delays in the determination of disputes.

Some of the respondents suggested that there should be opportunities for mediation *after* tribunal hearings, to repair relationships.

SENDIST interviewees spoke about the proposed introduction of case management for appeals. This should reduce the number of withdrawn cases as parties would be forced to look at their case earlier and, through better controls of late evidence, adjournments may be less frequent. It would also provide an opportunity for panels to give an indication of the likely outcome of the appeal, which may encourage parties to negotiate ("mediation is immensely empowered

if it has the knowledge of what a tribunal might do” (ET2)); and it would provide a chance for the panel to ask parties whether they have tried mediation.

V Suitability of cases for mediation and SENDIST

The mediation providers we interviewed felt that potentially all SEN disputes could be mediated. If any were not suitable it was not because of the subject matter but other factors, for example, an unwillingness to negotiate, a threat of physical violence or the parents not having tried speaking to LAs themselves.

Disputes about school placement were considered the most unsuitable for mediation, especially when involving LA policy or where a school was oversubscribed. Mediation providers acknowledged that placement disputes were often the most difficult to mediate but they could be successful when parties were given a fuller picture of the schools available and of the child’s needs:

“if we had done a statutory assessment and we have written a statement and the parent has their mind set on a particular independent school there is no point in going to mediation on that because we are not going to say yes to it... and very often in that circumstance the parent won’t want to mediate anyway” (ELA1)

“[M]y perception is that for a lot of local authorities the issues that will not be mediated are things over which they have little control anyway and areas where policy decisions may have been made that you know there will not be a placement in an independent out of county school unless there is a direction so to do in which case mediation is a waste of time really and resource” (ELA3).

VI Parents

A. *social and ethnic inclusion*

Key informants acknowledged that there were problems in ensuring all parents had access to services and used all the dispute resolution mechanisms available. However there were examples given by both mediation providers and SENDIST chairs of working with all types of parents including those with special educational needs themselves.

Cultural issues were mentioned as barriers to access. For example, we were told that Pakistani families prefer to resolve problems privately (i.e. between themselves), and that it runs against Chinese culture to challenge decisions of people in authority. One LA interviewee felt that cultural differences also exist between different areas of England: for example, in one area the residents were more accepting of a refusal.

There were, however, thought to be factors that ensure greater equality of access:

- LAs which make referrals to mediation themselves if the case involves less well-educated parents who would be more reluctant to pick up the phone.
- LAs who alert parents who will need support through the process to PPSs.
- The more disadvantaged parents are more reliant on people telling them about services and dispute resolution mechanisms as they for instance may not have access to the internet or the skills to find out for themselves – therefore good access policies ensure equality of access. However, in LAs which do not like to highlight the service there will be problems for these parents.
- Schools will fight on behalf of parents over a refusal to assess or issue a statement, if they feel it is in the best interests of the child. This seemed to be especially the case in the schools with high numbers of children with SEN, and in more deprived areas. But schools may be reluctant to get involved in disputes over placements as they cannot be seen to be taking sides.
- A good SENDIST chair and an effective mediator should ensure that anyone can appeal or participate in mediation; thus effective training is needed.
- Mediation referrals made by PPS who work with a cross-section of parents
- Where PPS staff and VOs attend mediations and speak for and assist parents, helping to even out educational and power imbalances
- A good social worker can help parents fight and can often get more involved in a case than schools are able to.

Some interviewees felt that there were some parents who will never fight any decisions and therefore never get to the dispute stage. Those who give up tend to be the ones without any support.

In relation to SENDIST it was felt that some parents have an advantage regarding access, due to their skills, money and confidence. Some can afford solicitors and expert witnesses which could enhance their prospects of success:.

“they got their own solicitor on board who then took it to Cherie Blair and as soon as she got involved the authority coughed up so the middle class parents know how the system works and how to deal with professionals” (EISS1).

On the other hand, it takes “a rare breed of parent that is able to [...] take a case as far as a SENDIST appeal on their own” (EVO1). Parents appealing to the SENDIST usually have and need support from PPS or a VO. Interviewees also commented that it takes a certain level of literacy to make a SENDIST appeal as there is complex information to read and understand. One interviewee (ET3) felt that there should be an independent freephone telephone service enabling parents to find out more about appealing, the details of which should be included in SEN decision letters to parents.

One interviewee, from an independent special school, mentioned that in general parents are more ready to take on LAs at tribunal as they are increasingly better informed.

A number of respondents (from VOs, an independent special school and the DCSF) mentioned that some parents fight “constant battles for absolutely everything” concerning their child’s education (EISS1). There are also many pressures associated with having a child who is disabled in their family. Respondents thought dispute resolution mechanisms need to recognise these pressures.

B. Gender differences

Nearly all the people interviewed said that mothers were more likely to be in touch with them/ be involved in dispute resolution than fathers. A few said that this is because often children with SEN come from split families; others thought it was because the mother tends to be the main carer, have more contact with the school, and/or have more time than the father if he is at work. If the parents were together they would both usually attend formal mediations or SENDIST hearings. Some interviewees commented that they were having contact with more fathers than in the past.

There was no consistency of view on whether there were differences in how the two genders reacted and participated in disputes. Some interviewees identified two gendered roles, the supporter and the fighter. But they varied as to which gender was in which role. Some interviewees said that the mother tended to be more emotional and the father played more ‘hardball’, but some saw it the other way around. Some considered mothers to be very clear-thinking in meetings and more able to fight for their child. It was also commented a few times that fathers tended to be less accepting that their child had SEN in the first place. It was also commented that fathers want solutions quickly, they do not want to talk about the history, and so are less likely to favour a conciliatory route.

VII Child participation

There was a general consensus among interviewees that the views of the child are important. But that there are often difficulties in ascertaining them due to the child’s age and ability. One interviewee felt quite strongly that all young people can participate and make their views known:

“all young people can participate and all young people can make choices and that might be something so simple, that might be a young person who makes choices by pointing with their eyes and it is about us facilitating that [...] and some young people communicate just by breathing [...] it is just about us learning to recognise different forms of communication” (ELA2).

Children's views were thought to be important to help them take ownership of decisions made about them. Ascertainment of children's views seemed to be particularly important when these views have a bearing on the likely success of implementing a decision, for example, in placement disputes, because the child would have to attend the school:

“obviously very important to take the child's point of view because if the child doesn't want to attend this school you are on a high road to nowhere straight away [...] if the child is not happy we won't get them over the threshold” (EISS1).

One interviewee (ELA2) felt that children should be consulted more and involved in plans for SEN in their LA, as this may contribute to dispute prevention.

It often needs skilled people to be able to gain the views of the children with particular SEN. Also because of children's nature of wanting to please and also parents' ability to influence their children's views, many interviewees thought it was important that an *independent person* was used to gain the views of children. Many interviewees pointed out how easy it is to lead a child's answer, especially children with autism. For example, if they are asked what their favourite lesson is they will say the one they have just had. There was praise for local authorities who were already using independent bodies or child advocates.

LAs have a duty to try to ascertain the child's view when a disagreement goes to SENDIST, however it appears that they vary with regard to whether this is done or how well it is done. A SENDIST representative said that this requirement was “was more honoured in its breach than in its observance” (ET1). It seems that many LAs will write “it was not possible” or “it was not appropriate” to gain the child's view. One interviewee thought the key to this was greater education of SENDIST panel members:

“we have done some training for like a national group of tribunal panel members on sort of the level of pupils' views that they can expect or they should expect, you know so it raises their expectation, so when local authorities come to them and say ‘it has not been appropriate to gain this young person's views’ they will say ‘well actually we have seen a case from [Name of LA] and they have gained the young person's views so if they can do it why can't you?’” (ELA2)

However, an interviewee from SENDIST felt that no extra training was needed as the panel has an education specialist on it who should know about these issues.

One interviewee (ELA2) found it interesting that it is not compulsory for child's views to be taken into account at mediation and so many cases can get to the tribunal stage before the child becomes involved. However, the mediators to whom we spoke claimed to make an effort to gain the views of the child involved.

The mediators said that they usually met with the child in pre-mediation meetings, in order to gain their views.

Mediation providers generally preferred to have the child present at a mediation meeting (usually only for part of it). However they felt it was not really appropriate in some circumstances: if children would see their parents upset; if they would be daunted by a room full of strangers; when it was likely there would be a focus on the negative aspects of the child's condition; or where the child's SEN were very severe e.g. the child had severe autism. Providers did use other means to ensure the child's view was taken into account: reference was made to video clips, audio recordings and questionnaires. Overall, the child's level of input into mediation was dictated by the parents. The one advantage according to a number of interviewees (from LA and mediation providers) of children participating in mediation was that it returned the focus back to them and their needs.

Similarly, in SENDIST, if children attend hearings (which happens rarely), they do so only at the beginning and there are often good reasons for them not attending: they can be disruptive; if a child appears very disabled this can influence panels to provide more than is needed; and on the other hand a child may appear, by their behaviour on the day, to have a lower level of needs than the parents are suggesting. A number of key informants across all groups commented on cases they had been involved in or knew about where the child's presence at the mediation/SENDIST had made a positive difference to the outcome.

There was a concern that looked after child are virtually unrepresented in referrals to mediation and the SENDIST even though these children may often be those most in need.

Emily Smith and Neville Harris

Manchester, September 2008

Appendix One

ESRC SEN Alternative Dispute Resolution Project: University of Manchester Key Informants (total: 27)

Interviewee	Pseudonym
English Government	
DCSF	EG1
DCSF	EG2
Local Authority/ PPS Representatives	
Local Authority assessment officer	ELA1
Pupil advocate	ELA2
Parent partnership service representative	ELA3
Parent partnership service focus group	ELA4
Local Authority officer	ELA5
Local Authority officer	ELA6
Special Educational Needs and Disability Tribunal	
SENDIST chair	ET1
SENDIST chair	ET2
SENDIST chair	ET3
SEN mediation providers	
Mediation provider	EMED1
Mediation provider	EMED2
Mediation provider	EMED3
Mediation provider	EMED4
Mediation provider	EMED5
Mediation provider	EMED6
Voluntary Organisations	
Education officer of SEN specific voluntary organisation	EVO1
Education officer of SEN specific voluntary organisation	EVO2
Representative from a non-SEN specific voluntary organisation	EVO3
Representative from SEN specific voluntary organisation	EVO4
Representative from SEN specific voluntary organisation	EVO5
Representative from a non-SEN specific voluntary organisation	EVO6
Schools	
Head teacher of independent special school	EISS1
Head teacher of independent special school	EISS2
Head teacher of mainstream school	EMS1
Deputy head teacher of mainstream school	EMS2
Head teacher and SENCO of mainstream school	EMS3
Miscellaneous	
Academic	EU1
SEN advisor and tribunal representative	EREP1