

**Dispute Resolution and Avoidance in Education:
A Study of Special and Additional Support Needs
in England and Scotland**

Final Conference Briefing Paper

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1. Introduction

Background

1.1. As part of its public service reform agenda, the Government signalled its desire to move away from the resolution of civil disputes through courts and tribunals, seen as expensive, inefficient and stressful, and make greater use of alternative dispute resolution (ADR) mechanisms, such as mediation, guided by the principle of ‘proportionate dispute resolution’ (DCA, 2004). 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. However, she has also questioned the nature of justice it delivers, and notes that “without the background threat of coercion, disputing parties cannot be brought to the negotiating table” (Genn, 2008: 19). The administrative justice reform agenda is highly relevant to the field of special educational needs (SEN), since both tribunal and mediation are employed in the resolution of disputes. However, the best laid plans of policy makers are rarely transferred smoothly into action. As noted by Newman and Clarke (2009: 18), it is very important to look at

“how grand designs get translated into politics, policies and practices. In such processes we may begin to see the contradictory and antagonistic effect of different social forces, different problems to be overcome or accommodated, different local or national contexts that bend strategies into new forms...”.

1.2. SEN has been identified as a field which may be particularly suited to the resolution of disputes through mediation, as opposed to tribunal. This is an issue which this research has examined, as discussed in this paper. One thing this research has, however, found is that, the mediation route appears to have been used very little so far. In this paper we also attempt to explain why the Government’s official endorsement of mediation has not led to much greater uptake by parents. The paper provides an overview of the policy and legislative underpinning of mediation, the way in which mediation is perceived by key informants and local authority officers, and most importantly of all, the views and experiences of parents.

Research questions

1.3. The overarching research questions addressed in this research were the following:

How are local authorities in England and Scotland attempting to avoid and resolve disputes in the fields of special and additional support needs, how effective are the approaches they are using, and how realisable are the underlying policy objectives?

1.4. Sub questions include the following:

- What strategies are used at school and local authority level to avoid disputes arising in the first place and how effective are these strategies?
- What types of ADR services are available in England and Scotland, how many cases are dealt with through ADR in specific local authorities and how are different dispute resolution mechanisms (particularly mediation) experienced by a range of actors (parents, local authority officers, children)?
- Is there evidence to suggest that the development of ADR has reduced the number of cases referred to court or tribunal?
- Under what circumstances do parents decide to bypass ADR and seek redress through a court or tribunal?

- What are the implications for procedural justice of the new emphasis on dispute avoidance and resolution, as opposed to more traditional forms of legal redress via court or tribunal?

2. Methodology

The following methods were used:

2.1. *Policy, legislative and literature review* (see Working Paper 1 on project website www.creid.ed.ac.uk/adr)

2.2. *Key informant interviews* (see working paper on project website www.creid.ed.ac.uk/adr)
We conducted 30 key informant interviews in England and 27 in Scotland. Interviewees included: mediation providers; tribunal chairs; an adjudication official (Scotland only); Government officials; voluntary sector staff.

2.3. *Local authority questionnaire survey*: a questionnaire survey was administered to the responsible officer for special/additional support needs in all English (150) and Scottish (32) local authorities. The response rate in England was 40% and in Scotland 84%. The survey explored the strategies used to avoid disputes arising, the range of approaches to ADR used in the authority, the agencies employed and the number of cases dealt with. Data on the number of cases referred to courts and tribunals were sought and the effectiveness of dispute avoidance and resolution in reducing the number of cases dealt with by courts and tribunals were considered. Questions were asked about the types of cases dealt with through ADR and whether these differed from those referred to courts and tribunals. A mixture of closed and open-ended questions was used, and the data were analysed in SPSS.

2.4. *Parent partnership services (PPS) questionnaire (England)*: a questionnaire was administered to all 148 PPS in England. The response rate was 57%. This explored, among other things, the organisation and resources of PPS; the role of PPS in supporting parents generally and in connection with dispute resolution specifically; their experience and views on child participation, mediation and the appeal system and the suitability of particular mechanisms for specific types of case. A mixture of closed and open-ended questions was used, and the data were analysed in SPSS.

2.5. *In-depth case studies of local authorities and parents in conflict with education providers over SEN/ASN*: The questionnaire surveys were used to identify 6 local authorities with different policies and practices in relation to dispute avoidance and resolution and with high or low use of tribunals. In addition to analyzing a range of policy documents and indicators (e.g. numbers of referrals to formal mediation or to tribunal), interviews were conducted with senior officers, staff in PPS (England), managers of in-house and external mediation services, local voluntary organizations, head teachers of primary, secondary and special schools and other relevant bodies in each authority. A case study of each authority was written up.

2.6. Having gained permission to conduct the research in each of the six local authorities, the original plan was to invite 8 families in each LA to participate, allowing us to conduct an interview with them and with key individuals who had worked on their case. Letters were sent out by the local authorities to parents who had been involved in a dispute, asking parents to contact the research team if they would like to contribute to the research. The response was very variable across the local authorities, and as a result, the case studies (49 in total, 25 in England

and 24 in Scotland) were somewhat unevenly distributed, ranging from 11 to 6 per authority. In Scotland, an additional method was used to contact parents who had been in dispute with the LA. A questionnaire was sent out to parents on the data base of the Scottish Dyslexia Association, Enquire (the national advice and information service) and ISEA (Independent Special Education Advice). The questionnaire asked parents about their experiences of ASN services, whether they had been in dispute with the LA, what type of dispute mechanism route they had chosen and whether they would be willing to be interviewed about their experiences. The response rate to the questionnaire was about 30% and the majority of parents who responded agreed to participate in the research.

2.7. The aim in each local authority was to work with two parents who had used *negotiation* (sometimes called ‘informal mediation’) at school level, two parents who had used *formal mediation, adjudication or conciliation* and two parents who had used a *tribunal or court*, whilst recognising that these mechanisms were not mutually exclusive. In the event, relatively few parents who had used formal mediation were among our participants, reflecting the fact that this type of dispute resolution has been very little used. A larger number of parents who contacted us had used a tribunal to resolve their dispute, and the largest group, reflecting practice on the ground, had used informal negotiation at school level. In fact, in many of our case studies individual parents had in fact used several of these mechanisms during the course of their dispute. Our selection of cases therefore reflected this pattern.

2.8. The aim of these case studies was to identify the dynamics which prompted parents to seek a particular type of dispute resolution or legal redress, their experience of the process and their views on the extent to which a satisfactory outcome was achieved. We had also intended to interview children where this was appropriate, however it became clear that children were not involved in dispute resolution, since disagreements were regarded as concerning the parent and the local authority and the involvement of children was not generally seen as helpful by those concerned.

2.9. For each case study, interviews were conducted with parent(s) and up to four significant individuals, such as the learning support teacher, head teacher, mediation worker, parent partnership officer, educational psychologist. The aim of these interviews was to obtain multiple perspectives on the dispute avoidance/resolution or court/tribunal process, parent satisfaction, children’s participation and the impact on service provision. Some parents were happy for us to contact a range of individuals involved in their case, whereas others feared that further discussion might ignite the dispute yet again and therefore did not give their permission for additional interviews to be carried out.

2.10. Please see our separate **Case Studies** paper for the profiles of our six local authorities and details of a selection of parent case studies.

3. The legislative frameworks

England

3.1. The dispute resolution arrangements are part of the framework for decision making in respect of children with “special educational needs” (SEN), as defined in the Education Act 1996 (1996 Act) (s.312), who represent just under 20% of all pupils. These are children with a “learning difficulty” (ie a relatively greater difficulty than other children or a disability hindering

use of standard educational facilities) giving rise to a need for special educational provision – provision additional to or otherwise different from that made in school for children of the child’s age group generally.

3.2. Since 1994 parents have had a right of appeal to an independent tribunal in SEN cases. Originally the Special Educational Needs Tribunal (SENT), the tribunal was re-named the Special Educational Needs and Disability Tribunal (SENDIST) in 2002 by the Special Educational Needs and Disability Act (SENDA) 2001, which extended its jurisdiction to include complaints of disability discrimination in schools. On 3 November 2008 SENDIST ceased to exist and its work transferred to HESC - the Health, Education and Social Care Chamber of the new First-tier Tribunal (FTT), established in the reform of tribunals under the Tribunals, Courts and Enforcement Act (TCEA) 2007. Wales and Northern Ireland have their own SENT.

3.3 Appeal lies to the tribunal in respect of a decision by a local authority: (a) not to make a statement of SEN; (b) to make, amend or not to amend a statement; (c) refusing to comply with a parent’s request for new assessment of a statemented child; (d) refusing to comply with a parent’s request that non-statemented child’s needs be formally assessed; (e) refusing to comply with a request for the naming of a different school in a statement; and (f) ceasing to maintain a statement. There is a prescribed procedural framework.¹

3.4. There is a high rate of withdrawal – in many years it is above the 40% mark – and only approx one in three appeals that are registered results in a hearing. After steady annual rises, appeal numbers levelled off from 2001/02. In 2007/08 the total was 3,392.

3.5. Prior to SENDA parent partnerships services (PPS) were already playing an important role as mediators in England (Hall 1999). PPS provision is related to the duty SENDA (s.2) has placed on LEAs to make arrangements for parents of children with SEN “to be provided with advice and information relating to those needs” and to publicise such arrangements. The SEN Code of Practice (DfES 2001), which under the 1996 Act LEAs, schools and the tribunal must take into account, gives PPS a role in disagreement prevention.

3.7. SENDA brought in a duty for local authorities to make arrangements for dispute resolution and avoidance and publicise them. They must
“make arrangements with a view to avoiding or resolving disagreements between authorities (on the one hand) and parents of children in their area (on the other) about the exercise by authorities of their functions under [part IV of the 1996 Act]” (s.332B).

There is also a similar duty in respect of disagreements in schools between parents and the schools’ proprietors. “Independent persons” must be appointed to facilitate such avoidance or resolution.

3.8. Three models of “independent mediation” are countenanced: (i) establishing a panel of trained mediators, affiliated to a recognised body, from whom mediation could be bought-in as required; (ii) funded expansion of existing dispute resolution services to incorporate special educational needs expertise; and (iii) the establishment of regional panels, to be funded by a cluster of local authorities, giving access to a pool of mediators. The Code of Practice (DfES 2001: 2:29-2:30) places a particular emphasis on the value of using outside organisations and

¹ See the First-tier Tribunal (Health, Education and Social Care Chamber Rules) 2008 (SI 2008/2699) and the Health and Social Care Chamber, *Practice Direction, Health and Social Care Chamber, Special Educational Needs or Disability Discrimination in Schools Cases* (2008)

recommends that authorities should work in partnership with such organisations in developing their services.

3.9. Post SENDA, mediation was initially provided through the nine Regional Partnerships, bodies set up in the late 1990s to improve regional co-ordination of SEN services (Fletcher-Campbell et al 2006). For two years central government funding covered the costs. Subsequently many local authorities opted for alternative arrangements. The picture today is rather complex. Some authorities (65% of our surveyed local authorities) use the same providers as under the initial Regional Partnership arrangements, but in some regions local authorities have separate contracts with individual organisations.

3.10. In most cases mediations are funded on a case inclusive basis under service level agreements. The local authority meets the administrative costs and pays for a set number of mediations up front. Some local authorities, however, use their PPS as a dispute resolution service and some enter into reciprocal arrangements with other authorities. A further group of authorities draw on mediation provision from other fields, that they have previously used, for example, family mediators.

3.11. The mediator's role is to engineer a settlement not to decide the dispute. A "structured process" for disagreement resolution is advocated (DfES 2002). For the mediation process, a 'shuttle' service, moving between the two parties or bringing the parties together in face-to-face meetings, is recommended. In London mediation starts with a plenary session with all interested parties present (Ruff 2004). Legal representation per se is discouraged (DfES 2002), but having support, including a lawyer, present is not. Parents may in any event receive help from an 'independent parental supporter', introduced to them by PPS.

3.12. Dispute resolution under the SENDA reforms complemented rather than replaced the existing appeal arrangements. The two processes may run alongside each other. The dispute resolution arrangements made by local authorities "cannot affect the entitlement of a parent to appeal to the Tribunal" (1996 Act s.332B(6)). Parents have a choice of redress mechanism but can use both.

3.13. The rules governing HESC procedure include the following provisions:

- 3.—(1)** The Tribunal should seek, where appropriate—
- (a) to bring to the attention of the parties the availability of any appropriate alternative procedure for the resolution of the dispute; and
 - (b) if the parties wish and provided that it is compatible with the overriding objective, to facilitate the use of the procedure.

The 'overriding objective', in rule 2, is to 'deal with cases fairly and justly' and 'includes' various matters in the handling of the case:

- (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;
- (b) avoiding unnecessary formality and seeking flexibility in the proceedings;
- (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
- (d) using any special expertise of the Tribunal effectively; and
- (e) avoiding delay, so far as compatible with proper consideration of the issues.

We in fact found evidence that even before the new rules came into being tribunals were becoming keen to encourage agreement between the parties.

Scotland

3.14. In Scotland, instead of ‘special educational needs’, there is the broader concept of ‘additional support needs’ (ASN), under the Education (Additional Support for Learning) (Scotland) Act 2004 (2004 Act). ASN are defined (s.1) with reference to a child’s need “for whatever reason” for additional support in order to be able to benefit from school education. Additional support for this purpose is defined in similar terms to “special educational provision” in England, namely provision which is “additional to, or otherwise different from, the educational provision made generally for children” in the area (s.1(3)).

3.15. Only about 5% of pupils in Scotland are classed as having ASN. There is no direct equivalent to the English ‘statement’. A child whose ASN last for at least a year and arise from “one or more complex factors” or “multiple factors” and whose needs require “significant additional support” may be the subject of a ‘co-ordinated support plan’ (CSP) (s.2). There are forthcoming amendments (Education (Additional Support for Learning) (Scotland) Act 2009 s.8); eg a child looked after by a local authority will automatically be classed as having ASN.

3.16. The ASN Tribunal (ASNT) was established under the 2004 Act. Its jurisdiction is narrower than HESC. Parents or (unless they lack capacity) “young persons” may (subject to certain qualifications) make a reference to the tribunal over a range of matters concerned with CSPs (s.18), including whether a CSP is required; whether a time limit for preparing it was breached; whether the authority’s statement conclusions of the contents of a CSP are sound; whether a CSP should be reviewed; and where, in certain circumstances, a ‘placing request’ (PR) (relating to the school where the child or young person is to be placed) made in respect of the child or young person has been refused. The 2009 Act will extend the jurisdiction to include references concerning failures to obtain information or elicit parents’/children’s/ young people’s views regarding post-school transitions.

3.17 The ASNT received 25 CSP references and 10 PR references in 2008-09, compared with 59 CSP references and 17 PR cases in 2007-08 (Burns (2008) and (2009) Appx 2). These numbers small, but only 2,694 or about 0.4% of children of school age in Scotland have a CSP (Scottish Government, 2009: 2.1, 2.5), although there is a wide variation across the authorities (HMIe 2007: pt 6).

3.18 Amendments to the Act enable the President to monitor the implementation decisions and to refer any case to the Scottish Ministers where it appears the decision is not being complied with. The Scottish Ministers have a power to issue a binding direction to the local authority in such circumstances (Sch 1 para 11A).

3.19 There is an independent adjudication procedure for the resolution of disputes arising from the education authority’s exercise of its 2004 Act functions (s.16). This right therefore extends beyond CSP cases to all ASN cases. It does not affect any right to make a reference to the ASNT. Disputes are to be referred to an “independent adjudicator” nominated by the Scottish Ministers from a panel.² The adjudicator’s decision is not binding and there is no right of appeal from it.

² Additional Support for Learning Dispute Resolution (Scotland) Regulations 2005 (SI 2005/501).

3.20 A review by the inspectorate in 2007 revealed that independent adjudication has been sought in only a few Scottish authorities and that “Most parents and a few school-based staff including headteachers were unclear about the role of independent adjudicators”. It recommended that education authorities should raise stakeholder awareness of independent adjudication (HMIe 2007: pt 8).

3.21. Individual education authorities must also make appropriate arrangements for the provision of “independent mediation services for the purposes of seeking to avoid or resolve disagreements”³ between parent/young person (16-plus) and authority about the authority’s exercise of (or failure to exercise) its functions under the Act. If the young person lacks capacity to express a view or make a decision for those purposes the parents alone have the right to mediation (s.15(1) and (4)). Mediation cannot be compulsory, must be free of charge and, as in England, does not affect entitlement to refer a matter to the ASNT (s.15(3)).

3.22. Under the Code of Practice (Scottish Government 2005: ch 7) an education authority may use as mediators, its own staff members, if not directly involved in the particular case or school, or those from outside the department who provide education services or make decisions relating to ASN. Alternatively, the authority may employ a freelance mediator on a case-by-case basis, or contract with a provider using a service level agreement. A further alternative is to enter into a reciprocal arrangement with another authority. In our survey, almost all mediation services were bought in from up to twelve mediation providers under service level agreements. Some providers provide services for more than one authority. A few authorities do not have a contracted mediation provider.

4. Dispute Trends

4.1. We found evidence that the number of disagreements or disputes has increased in both jurisdictions in recent years, even though this is not reflected in the appeal or mediation statistics. We believe that more disputes than previously are being resolved informally such as through direct negotiation.

4.2. An increase in SEN disagreements or disputes in England over the previous 2-3 years was reported by 39% of authorities, against 24% reporting a decrease and 32% reporting no change. A higher proportion of PPS, often the gatekeepers for disputes, reported an increase: 53%, with only 9% reporting a decrease and 22% no change. Approx. two-thirds of these responses were based on actual figures, the rest on estimates. The survey data from Scotland were more limited, but key informants indicated an upward trend in the number of disputes.

4.3. Given the overall increase in disagreements or disputes, the fact that there has been no increase in either the number of mediations or appeals over this period suggests that a higher proportion of parent grievances may be being resolved via local negotiation. This is consistent with our general finding that such negotiation has become a dominant aspect of dispute resolution or avoidance.

4.4. Explanations for this upward trend varied, but among PPS in England the changes in local authorities’ policy and practice, for example delegation of funding to schools and pursuit of central government policy to reduce statementing, were prominent. Local authorities, on the other

³ 2004 Act, s.15(1). ‘Mediation services are independent...if the person providing the services has no involvement in the exercise by or on behalf of the authority of their functions...’ (s.15(2)).

hand, cited greater parental awareness of their rights and propensity to challenge decisions, often encouraged by voluntary organisations and solicitors. There was no change in the main areas of disagreement between parents and schools or local authorities: school placement; decisions on whether to assess a child; and provision at school level.

4.5. In terms of the kinds of SEN or ASN of the children whose parents were engaged in a dispute, autism was the most common, followed by behavioural, emotional and social difficulties and specific learning difficulties (dyslexia) and/or language difficulties. The two most commonly mentioned areas of disagreement in England were school placement and refusal to assess; the level of provision at school level was also prominent. In Scotland, they were access to classroom assistants or other personnel and the resources specified in a CSP.

5. SEN Dispute Resolution in Practice

How much use is made of mediation?

5.1. English local authorities confirmed that take up of mediation for the resolution of SEN disputes is very low. There is no evidence that its use is increasing; rather, it seems to be falling. In the years 2005/06, 2006/07 and 2007/08 the proportion of our surveyed local authorities (n=55) in which there were *no* special educational needs mediations was 48%, 46% and 60% respectively. In 2007/08 only one in seven of the authorities had three or more mediations and only two authorities had four or more mediation cases. Altogether, there were in 2006-07 only 72 mediations across 54 respondent authorities and in 2007-08 there were 58 mediations across 55 authorities, an average each year of little more than one mediation per authority compared with around 20 appeals per authority nationally. Note that local authorities and schools may also refer a case to mediation, but this hardly ever occurs.

5.2. There are also wide variations across local authorities in the ratio of mediations to appeals to the tribunal, as in the examples shown in table 1.

Table 1: Number of referrals for SEN mediation compared with number of SENDIST appeals lodged, 2006-07, in four English local authorities

Local Authority	No of referrals for mediation	No of referrals per 10,000 of school population	No of SENDIST appeals lodged	No of appeals lodged per 10,000 of school population
A	5	0.28	83	4.7
B	21	4.22	15	1.9
C	9	2.47	17	4.3
D	2	0.16	3	0.61

5.3. The scale of mediation is also low in Scotland. Our key informants estimated that around 100 formal mediations had taken place since the arrangements had been implemented in December 2005. The figures for 2006-07 reveal that 74% authorities had either no or not more than 5 mediations.

What factors affect the use of mediation?

5.4. The following factors emerged from our surveys, interviews and case studies:

- A general failure by local authorities or schools to publicise or promote mediation and, consequently, a lack of awareness of it among parents.

5.4.1. Under the Code of Practice in England (DfES 2001: 2:25, 7:29), parents, schools and others should be informed about dispute resolution arrangements when a statement or amended statement is issued or, for example, when a decision refusing formal assessment of a child is communicated. Most of the English local authorities in our survey (80%) considered that parents would know about mediation, primarily from such decision letters. However, decision letters do not concern specifically school level issues of disagreement; consequently parents may not know that mediation is also available for school-based disputes.

5.4.2. Mediators told us that the degree of prominence given to information on dispute resolution varies greatly from one authority to the next. In Scotland they said that some local authorities have not shown the commitment, nor put in the resources, to support mediation properly. Indeed we found that most Scottish authorities had done little to inform parents of their right to request formal mediation. Leaflets provided when parents request a CSP routinely mention mediation, but most other parents of children with ASN do not as a matter of course receive information about it. Moreover, web-based information is also limited. A parent referred to being “horrified” by either the lack of information or its inaccuracy. The somewhat patchy picture was confirmed by parents in our three case study local authorities in England, where information is provided but is not always clear.

5.4.3. We examined the reasons why authorities fail to promote mediation. A number of reasons were identified:

- Some authorities perceive that independent mediation is not needed because discussions can take place and agreement reached via the authority or PPS (see also Tennant et al 2008: 3.1.2).
- The general pressures on local authorities at a time when integrated children’s services have been established.
- The effect of contractual arrangements between the local authorities and mediation providers. Case exclusive provision, involving a cost per actual mediation, discourages authorities from promoting mediation. Contesting appeals uses resources, but authorities do not pay for the tribunal’s operation.
- Specialist knowledge is important: if the authority has a ‘tribunal officer’ who can judge when an appeal is likely to be lost he or she may promote mediation as a better alternative for an authority.
- The authority’s overall views on dispute resolution. Some of our case study authorities in England and Scotland do not regard mediation as particularly useful because a dispute can be resolved by negotiation or will need to go to the tribunal (or in some cases in Scotland, adjudication) for a definitive ruling.

5.4.4. Schools’ failure to invoke mediation for disagreements with parents seems attributable to poor awareness of it as well as wariness towards outside intervention. Schools also prefer early compromise to the loss of staff time for attendance at mediation

meetings. Schools tend not to be a source of information for parents about dispute resolution. In “Sea City” in Scotland schools were reportedly wary of advising mediation to parents because of their (schools’) negative experience of it. In “Coalside”, we were told that some head teachers regarded negotiation and mediation in very negative terms, as a sign of failure.

- Some local authorities refuse mediation in individual cases

5.4.5. Participation in mediation is voluntary. Local authorities occasionally refuse to take part, thereby denying the parent the mediation route. In a dispute in “Northborough” about an independent school placement the authority said it would not go to mediation because it was reviewing its policy. In “Southside” an authority wary of the cost of mediation and mindful that the disagreement was only at school level refused mediation. One in seven of the English respondent local authorities stated that they have refused mediation in at least one case. The principal reason for refusal was that mediation was thought not likely to succeed, for example because the law or the authority’s policy left no scope for settlement.

- Parents do not understand mediation

5.4.6. Mediators told us of cases where parents go all the way to the tribunal without being aware there is a mediation service or they have “no idea what it is or where it is”. Some parents think they have been to mediation they have not. In “Northborough”, two of our case study parents were not aware of mediation as an option and one thought that local level meetings were formal mediation. Another parent in this authority, whose case went to mediation over statement contents, thought the mediation was the tribunal and was confused about the two processes.

- Some parents doubt the mediator’s independence

5.4.7. Some parents think that mediation is not truly independent. In “Sea City” in Scotland, the service is provided in-house and local advocacy organisations said that parents question its independence.

- Negative experience of dealings with the authority deters parents

5.4.8. Recent research (Penfold et al 2009) has described how parents’ relations with local authorities are often tense and difficult and that negative emotions are possibly reinforced by messages given out by schools and others that the local authority may not be sympathetic to parental wishes. That experience may cause parents to perceive that an appeal to the tribunal is the best option. We found a similar picture. For example, in “Northborough” some of the parents had found local level meetings intimidating because they were with professionals and it was difficult to question the local authority’s perspective. They also experienced what they saw as intransigence or aggressiveness by the authority or its reliance on budgets, policies or comparison with arrangements for other children.

- Advisers, representatives and other parents are often dismissive of mediation

5.4.9. Several interviewees reported that areas with high interest group activity have fewer mediation cases as interest groups, which play a key role in this field (Boyle and

Burton 2003: 22-33), tend to promote the appeal route. In “Glenside” an advocacy services interviewee’s negative view of mediation was borne out of the experience of observing parents going through mediation. Mediators in Scotland felt that parents were discouraged by advocacy organisations from using mediation because of its focus on compromise rather than remedy. We also heard that some parents, especially those in self-help groups, may be influenced by the other parents’ negative perceptions. An English case study parent had been told by another parent that mediation was a waste of time; and one of our Scottish parents said that other parents had advised her that mediation was “just a way of placating parents....we just felt we wanted to go straight ahead with the appeal.”

- Some parents want their ‘day in court’

5.4.10. Many interviewees told us that some parents will always want to utilise their right of appeal, regardless of alternatives. One suggestion we heard is that middle-class parents are the most likely to be unwilling to try mediation; certainly, there is wider evidence that social and educational advantage is associated with a greater propensity to appeal. Parents’ social backgrounds are further considered below.

5.4.11. “Southside” authority told us that many parents seem reluctant to opt for mediation because they do not want to lay their cards on the table in case it might hamper their chances of winning their appeal. “Middleshire” told us that there are some cases which inevitably end up at the tribunal because they involve parents who are not prepared to negotiate. “Glenside” said that parents tend to prefer “a panel of external people telling the authority what they have to do”.

- In general, low level disagreement resolution obviates the perceived need for formal mediation

5.4.12. In England, PPS are envisaged by the Code of Practice as being the “main approach to preventing disagreements from arising” (DfES 2001: 2:22), while in Scotland, the Code suggests that “most disagreements will be resolved at school and education authority level with only a small number going to formal review procedures” (Scottish Executive 2005). Nearly two-thirds of PPS respondents in England said that a majority of the disagreements/disputes they handle are resolved. The role of PPS is regarded by local authorities and PPS themselves as the most significant factor limiting option for mediation in England.

5.4.13. In Scotland, local level resolution is seen by local authorities as consistent with an ethos of customer-focused service and, as one authority put it, “building partnerships, working at trust, listening to people”. Indeed, another officer commented that the more formalised process set in place under the 2004 legislation did not fit in well with the local process involving schools and education officers for resolving disagreement.

5.4.14. Interviewees outside the education authority sector were less confident about the effectiveness of local resolution although were broadly in favour of it. The main concern was that schools and authorities are not always approachable nor communicate well with parents. In England, PPS, notwithstanding their value to parents, were described as being of uneven quality. Research has found that the interpretation of the minimum standards including the establishment of protocols and mechanisms for referring parents to

disagreement resolution varies widely, largely the result of the diverse staffing and budget levels (Rogers et al 2006).

- Schools' involvement can prevent disagreements or lead to early settlement, obviating need for dispute resolution services

5.4.15. Schools' support for parents can help to resolve disputes between the latter and local authorities. Several schools were willing to get involved in this way. Separate research suggests that parents disadvantaged due to social deprivation or language, are particularly likely to benefit from such support (Page et al 2007: sect 3). The quality and in particular the closeness of the relationship between the school and the local authority are important. A factor identified in Scotland was whether schools are approachable partners for parents. Relationship building may be more difficult in areas of social disadvantage where parents lack the interest or skills to engage with their children's education or are mistrustful of schools due to their own negative experiences of education or their child's exclusion. Independent special schools in England were regarded as less likely to intervene, as they have a financial incentive to stay on good terms with authorities.

What kinds of case are suitable/unsuitable for resolution via mediation?

5.5. There has been much academic discussion of the suitability of mediation for citizen-v-state disputes. Bondy and Mulcahy (2009), eg, have doubts about its potential value in judicial review cases, yet acknowledge that it may be beneficial as an alternative route to settlement where negotiations have broken down or become impossible. Richardson and Genn (2007), on the other hand, have argued that ADR may only have a role to play in particular categories of dispute. SEN cases tend to be about entitlement to an assessment or to consideration for a particular outcome. Rights are conditional and resource-dependent, and are contingent on wider policy. Consequently, Genn and Richardson see SEN disputes as more suitable for ADR than formal adjudication, which is needed for fundamental rights cases or cases involving yes/no questions of entitlement to material benefits, such as social security. (See also Stlitz and Sheldon 2007; Supperstone et al 2006.) We see a case for mediation in SEN/ASN cases but believe it would be most effective if linked to the right of appeal (see below).

5.6. Many people working in this field (but not mediators) regard mediation as more suitable for some types of case than others. In particular, some, albeit a minority of PPS in England and local authorities in both jurisdictions, regard it as less suitable where the substance of the dispute makes for only limited scope for compromise, eg school placement, making a statement of SEN, or CSP decisions. A decision on whether to assess provides less scope for compromise. The English case studies included three refusal to assess disputes which went to mediation; only one of them was resolved through this means. Two other mediation cases concerned the contents of statements and led to an agreement.

5.7. In both England and Scotland it was felt by key informants that mediation might not be successful where individuals have fixed positions and where parents' attitudes or propensities, such as unwillingness to negotiate, aggressiveness or refusal to communicate, made it unlikely mediation would succeed even if agreed to. Local authorities in Scotland considered that informal negotiation was preferable because mediation was usually requested after a dispute had become entrenched. Where the relationship with the authority has broken down and the parents lack trust in the authority the parents are more likely to want to appeal.

Pros and cons of mediation

5.8. The mediation model received much support from local authorities and professionals. In England, 67% of the authorities were satisfied or very satisfied with mediation. In Scotland that figure was even higher, at 92%. The wide-ranging literature on mediation⁴ suggests that on the whole it is likely to result in the permanent settlement of a dispute and that it is generally valued by users. Compared to court or tribunal processes mediation is seen as cheaper; faster; better for participation and communication; providing more control or sense of ‘ownership’ for the parties; better for maintaining good relationships and communication long-term; and offering interest based rather than purely rights based outcomes, often more “subtle and complicated” (Graham 2008: 128).

5.9. Our evidence confirmed such advantages, but also found a number of problems.

Advantages of mediation

■ Mediation facilitates better mutual understanding of parties’ perspectives

5.9.1. Better mutual understanding was confirmed by 87% of the English local authorities. This may be regarded as a pivotal benefit of mediation. It can aid compromise and improve relations. Parents may be able to understand the reason why the local authority feels unable to accede to their wishes, while the authority may appreciate the precise circumstances of the child and family. Eg, in one of our cases in Northborough, the diagnosis of the boy’s condition was clarified at mediation, leading to the authority increasing the hours of support for the child.

■ Mediation may get to the heart of the dispute due to its broader focus

5.9.2. A number of mediation providers and a DCSF representative in England suggested that mediation enables a broader approach to be adopted so that underlying issues can be considered. This may be important because some of the grievances are not directly tied to the statutory grounds of appeal. In one of our cases in Middlesbrough, for example, the mediation meeting revolved around a teenage boy’s non-attendance at a school where he was bullied.

■ Mediation fosters better long term relations and communications

5.9.3. We were told that mediation is a process which, because it is less adversarial, is more conducive to better long term relations between the parties. As a representative of a Scottish authority said: “mediation potentially offers you a process which allows you to ...maintain a relationship and still get an outcome”. In England, a number of mediation providers and voluntary organisations indicated that mediation is conducive to keeping communication open.

■ Mediation may lead to an earlier resolution of the dispute

⁴ See N.Harris, S. Riddell and E. Smith, *Special Educational Needs (England) and Additional Support Needs (Scotland) Dispute Resolution Project, Working Paper 1: Literature Review* (2008), at http://www.creid.ed.ac.uk/adr/pubs/adr_workingpaper1.pdf

5.9.4. Many appeals are withdrawn, usually due to settlement which often occurs at a very late stage in an appeal. An English mediation provider said that mediation forces parties to confront the issues together earlier than would occur in the case of an appeal. However, English local authorities had mixed views on whether mediation tended to resolve disputes quickly: 28% thought it did, 40% thought it did not and 31% were unsure. A greater proportion of the Scottish authorities (52%) indicated that mediation leads to a quick resolution of a dispute.

5.9.5. As to whether mediation reduces the likelihood of an appeal, 31% English authorities agreed but 50% disagreed.

- Mediation may be less stressful than an appeal for the parent

5.9.6. Most of the local authorities in England and Scotland (83% and 85% respectively) believed that mediation was less stressful for parents than going to the tribunal. However, while 63% of the Scottish authorities also thought it would be less stressful for their officers, that view was taken by only 41% of the English authorities. However, in one of our case studies in Middlesbrough, about refusal to assess, the parent said that they felt intimidated during the mediation.

- Mediation is less costly to the parties in time/resource terms than an appeal

5.9.7. A majority of local authorities (54% England, 63% Scotland) considered that mediation was less costly to them, while fewer (39% (E), 56% (S)) thought that was the case for parents. 12% of authorities in England considered that mediation would take up more staff time per case than an appeal. Nevertheless the cost to the authority of buying in mediation services was considered unjustified by several local authorities: eg “Mediation is an expensive service that isn’t getting used...it is wasting £6000 a year” (English authority); “Mediation... appears to be a costly system established for little reason and less purpose” (Scottish authority).

Drawbacks of mediation

- Mediation settlements are not binding

5.9.8. Around half of the English local authorities, but only one-third in Scotland, highlighted the non-binding nature of mediation settlements as a disadvantage for either party. We heard of cases in England where the mediated settlement was not honoured by the local authority, although “Northborough” told us of cases where the parents changed their mind after the mediation.

- Mediation might not occur because the local authority refuses

5.9.9. This was discussed earlier. Clearly it is not possible for the authority to refuse to participate in an appeal, although it could decide not to contest it. In a parent case study in Southborough, the authority refused mediation. The dispute was about the school’s abandonment of the child’s IEP. The authority refused because the dispute did not involve the authority. However, mediation arrangements are also supposed to cover parent-school disputes.

■ Mediation is less effective than an appeal at safeguarding legal rights

5.9.10. It was not possible for us to judge objectively whether legal rights are denied as a result of mediated settlements. What was clear, however, was that some local authorities (31% in England) considered that this was a potential disadvantage for parents. However, only a small minority of the authorities (7%) considered that there were cases where parents settle for less than they may have secured for their child as a result of an appeal, although 33% were unsure.

5.9.11. A majority of PPS in England did not know whether they had ever had a case where an outcome agreed at mediation offered the parent less than a tribunal decision might have given them. However, a significant minority, 22%, answered in the affirmative.

■ The local authority's representative may not always be able to confirm agreement

5.9.12. Key informants in England mentioned that the local authority's representative does not always have the authority to settle on the authority's behalf on the day. However, both the English and Scottish authorities almost unanimously disagreed that this scenario occurs.

■ The effectiveness of mediation may be affected by the non-attendance of key people

5.9.13. A minority of local authorities (27% England, 11% Scotland) considered that there may be such non-attendance. In England we were told, for example, that school representatives do not always attend mediations.

■ The mediation process does not facilitate the participation of the child

5.9.14. Neither mediation nor the tribunal have a good record in facilitating the participation of the child. In all our surveys we found almost universal agreement that the child's views are important and should be taken into account and that, wherever possible (bearing in mind the child's age, understanding and vulnerabilities) the child should be heard and listened to. Several key informants in England referred to cases where the child's presence at the mediation or tribunal had made a positive difference to the outcome. In England, local authorities have a duty to try to ascertain the child's view when a disagreement goes to the tribunal. A SENDIST representative said it "was more honoured in its breach than in its observance". Authorities often record that "it was not possible" or "not appropriate" to ascertain the child's view.

5.9.15. For mediation there is no requirement to seek out the child's view, but mediators in England claimed to make an effort to do so, usually at pre-mediation meetings. However, few local authorities (4% England, 37% Scotland) considered that mediation made it easier for the child's views to be taken into account.

■ Mediation may not be equally accessible to all

5.9.16. Unequal access was regarded by English local authorities as less severe vis-à-vis mediation than tribunal cases. One third of authorities thought that some minorities were at a disadvantage in tribunals, while one quarter considered that to be the case in

mediations. We examine the issue of ethnicity and other social characteristics of complainants below. (See also Genn et al 2006.)

The tribunal

5.10. There was strong support among English local authorities for the principle that parents should have a right of appeal. Only 5% disapproved of this right. Advocacy groups in Scotland felt that the role of tribunal was essential to underpin parents' rights. In both England and Scotland approx. 40% of local authorities thought the tribunal was satisfactory (only a fraction thought it very satisfactory), whereas 40% in England and 50% in Scotland regarded the tribunal as unsatisfactory, including 15% in England and 8% in Scotland which found it very unsatisfactory. With regard to the advantages of the tribunal and its contribution to administrative justice, the following issues were tested in our research.

- The right of appeal encourages parents to challenge authority decisions

5.10.1. A large majority of local authorities in England (85%) considered that the existence of the appeal system itself encourages or intensifies disputes. A majority agreed strongly that that was the case.

- The appeal process makes a positive contribution to dispute resolution

5.10.2. The tribunal has a good reputation. Parents are in general very satisfied with it and regard it as offering a "good experience" (Penfold et al 2009: 52-53). Nevertheless, some parents find the process antagonistic, while many local authorities regard it as irksome and likely to go against them. Many authorities told us that the tribunal helps parents secure a high level of resources for their child, skewing resource allocation. Among English local authorities, 47% did not think that the tribunal made a positive contribution to dispute resolution; 36% did.

- Although the tribunal's decision is binding local authorities sometimes fail to implement it or delay doing so

5.10.3. Failure to implement some decisions was referred to by several voluntary sector and other interviewees in England, although this failure was becoming less common. A minority (16%) of English authorities acknowledged the difficulty faced by parents in enforcing the tribunal's decision. In two of the parent case studies in England the parent had won the appeal but the local authority only implemented the ruling in part or significantly delayed its implementation. Failure to implement the tribunal's decision was also a problem in Scotland.

- The tribunal's independence is seen as a particular strength

5.10.4. The tribunal's independence was referred to in positive terms by several interviewees.

- The appeal process is inefficient because of wastage due to withdrawal or settlement, often at a very late stage

5.10.5. The inefficiency resulting from the low proportion of appeals in England which progress to a hearing was mentioned by the tribunal chairs we interviewed. Voluntary

organisations pinned the blame on local authorities which only acknowledge an indefensible position in a case and make a concession late in the day. We found examples of such concessions in three of our English case studies. However, one local authority blamed parents for exercising their right of appeal without entering into discussions with the authority.

5.10.6. There was support for building mediation into the tribunal process rather than it being independent of it. It was thought that this could help to reduce the number of last minute settlements. One interviewee mentioned two cases in which the tribunal made a costs order against the local authority because the tribunal felt the dispute should have been settled earlier. However, there were doubts about the tribunal's willingness to promote mediation and a concern (expressed pre- the new rules) that mediation within tribunal procedures would cause further delays.

- The appeal process is too slow

5.10.7. Appeals may take several months to reach a hearing and some respondents considered the delay in finalising the arrangements for the child unacceptably long. In England 78% of local authorities saw the timescale as disadvantageous to parents. Mediation is seen as resolving the matter far more quickly. Some voluntary sector interviewees considered that local authorities like the delay because it may deter appeals or expenditure consequent on a tribunal's decision.

- The appeal process and hearing are stressful and too adversarial

5.10.8. Many key informants thought the appeal process was rather adversarial and stressful for the parties as compared with mediation. Very many local authorities (95% England, 74% Scotland) also regarded the appeal process as stressful for parents and a majority thought it was stressful for the local authority personnel as well. However, it was generally felt that while parents did not enjoy a tribunal hearing they regarded it as worthwhile if (as 60%+ of appellants do) their appeal succeeds. We were told that hearings in Scotland are lengthening and becoming more legalistic, with more referrals to the Court of Session.

- The appeal process has a positive influence on local authority practice

5.10.9. One of the advantages of processes for redressing grievances should be that it highlights deficiencies in the practices of decision-makers and precipitates changes. Three local authority respondents in Scotland referred specifically to this factor, while 43% of English authorities thought that the tribunal's scrutiny of their decisions was advantageous to the authority (although 53% did not).

Independent adjudication (Scotland only)

5.11. As discussed above, adjudication has a potentially very broad remit, but has not really taken off. There were fewer than five requests for adjudications in all of the surveyed authorities. Nine authorities had received no requests for adjudication.

5.12. Authorities prefer adjudication to the ASNT, because it is less adversarial. On the other hand, it imposes pressures on them, such as from tight response deadlines. The cost of adjudication (£250 in one case) was also considered disadvantageous.

5.13. The benefits to parents of adjudication were to some extent doubted. However, one local authority officer said that a parent may prefer a form process to a “face-to-face discussion”. One comment was that making a case on paper might well be less threatening and emotionally charged for parents, especially if they were given some assistance. Mediation provider interviewees noted that parents were sometimes sceptical about the efficacy and independence of adjudication.

5.14. Advocacy service providers were more positive about adjudication. One, from a law centre, described it as “the sleeping giant” of the redress system, with considerable potential. It was beneficial that the parent’s request often resulted in an early settlement because the case would be immediately referred to a senior officer for review. In two of our case studies in Scotland adjudication had been requested (although only occurred in one case).

5.15. Around half the surveyed Scottish local authorities considered that the main benefits for parents from adjudication were that it provided an independent view (two-thirds of authorities said this) and was available for cases outside the tribunal’s remit. They thought the fact that arguments had to be in writing (thought to be disadvantage for parents) helped local authorities to improve their practices. There was concern that adjudicators lack educational expertise.

Fairness and justice: how do mediation and the tribunal compare?

5.16. Among the concerns about mediation for education cases are whether (i) it fails to acknowledge the public interest in such disputes; (ii) prevents the ‘vindication of rights’ (Supperstone et al 2006; Adler 2006b); (iii) the interests of the child will be adequately protected; (iv) it will accentuate or reduce the inherent inequalities and imbalance of power between the parties; (v) it will operate under a fair procedure; (v) it may negatively affect the ‘justice’ of outcomes to disputes, in that citizens may end up settling for less than their true entitlement (Adler 2006a). However, these same concerns can equally be applied to negotiated settlements of SEN disputes, which is the way that most disputes are resolved.

5.17. We found some evidence that when some parents are given the option of mediation they are concerned about how fairly it will operate, although in the eventuality they have no complaint about it. Local authorities in England (63%) and Scotland (77%) on the whole considered that the parties benefited equally from mediation, but a minority considered that the parent and child benefit most.

5.18. The tribunal is seen by local authorities as being of even greater benefit to parents, at least in terms of the outcomes. Only a small minority of our authorities thought that the tribunal was advantageous to the local authority.

5.19. Both the local authorities and PPS officers in England regarded the mediation process, with a skilled mediator, as having a more equalising effect on the parties than the tribunal. PPS comments included: “all parties are equal”; “mediation is designed to be neutral”; “parents are clear from the outset that both sides will have an equal chance to put point of view”; “every effort is made to redress any imbalances of power”. Local authority comments included: “it offers a forum for discussion, shared understanding and exchange of information”; “everyone has an equal opportunity to express their view”; “both sides of the case are heard”.

5.20. A theoretical concern is that mediation may place parents at a disadvantage due to an imbalance of power and the 'private' nature of the process. The prevalent view across the English local authorities (89%) was that mediation was equally fair to both parties. In particular, it is seen as allowing both parties to express their opinion and be listened to and enables the issues to be explored in a non-confrontational way. Although 69% of the English PPS took a similar view another 28% felt that the parents or carers were at a comparative disadvantage due, for example, to their lack of skills, experience or understanding.

5.20. Another theoretical concern is that parents may settle for too little and that as a result the 'justice' in the outcome may be in question, as compared with the outcome of a reasoned tribunal based on evidence and law. We regard this as a very difficult matter to test. The outcome of a decision is partly based on evidence and perceptions that come to light during the proceedings. Determining what the optimum outcome might have been for the parents and child is problematic when all the circumstances are not known. Furthermore, the 'justice' in a decision may reflect local authorities' need to meet the child's needs and uphold the parents' wishes without compromising its fulfilment of its duties to other children and the proper allocation of resources, as recognised by the law (Harris 2007: ch 6).

5.21. However, we did find evidence that mediation is perceived as sometimes resulting in parents securing less than the tribunal can offer them. Advocacy providers in Scotland, for example, questioned the emphasis on negotiated settlement because of the danger that parents might be persuaded to negotiate away their rights by better informed professionals. Among local authorities and PPS in England only 7% of the former, although 22% of the latter, confirmed that they knew of at least one case where parents accepted a mediated outcome that was likely to be less advantageous to them than they might have obtained at tribunal.

5.22. One of the reasons that parents may not settle for less at a mediation is that they do not have to; parents can simply press ahead with their appeal if compromise involves going too far. This happened in several of our case studies in England.

5.23. With regard to the fairness of the appeal process the majority of local authorities in England thought that the tribunal process advantaged parents, at least in terms of the outcome, with parents achieving high success rates. Only 30% thought that the appeal process was equally fair to both parties, as compared to 89% thinking this in the case of mediation. Almost half of the local authorities (49%) felt that that mediation and the tribunal were likely to lead to an outcome favourable to them, but quite a large minority (36%) considered that mediation led to a more beneficial outcome for authorities. This is likely to have influenced authorities' overall assessment of the tribunal: while a large majority of local authorities in England and Scotland thought that mediation worked satisfactorily, only 46% in England and 39% in Scotland thought that of the tribunal.

5.24. In England 55% of local authorities considered the tribunal to have a bias in favour of parents (in terms of case outcome and procedure, such as showing more flexibility over time limits). Tribunals were also said to emphasise the interests of the appellant's child over those of other children. Authorities nevertheless acknowledged that parents fared better if they could afford legal representation and had the necessary personal skills to cope with the process. PPS, however, saw less advantage to parents within the appeal process than the local authorities. They highlighted parents' lack of prior experience; the difficulty for many in preparing their case, including evidence from witnesses; and the formality and complexity of the process. In Scotland, the principal concerns with the tribunal seem not to be a bias in favour of parents but rather an adversarial hearing and the tribunal's variable approach.

Assistance in using forms of dispute resolution

5.25. Representation is generally it is seen as advantageous for appeal hearings. Legal representation seems to be increasing in cases in Scotland, but it is still the case that few parents have it (although are often assisted by a voluntary organisation). In the Scottish survey of authorities, 26% said that shortage of representation services was a disadvantage for parents. Generally, assistance for Scottish parents in challenging an ASN decision is not strong. We even found that local authority websites rarely informed parents of the existence of Enquire, the national advice and information service for ASN funded by Scottish Government.

5.26. Scottish local authorities are required by the 2004 Act (s.14) to comply with a parent or young person's wish for to have an advocate to conduct discussions or make representations to an authority. Authorities are not obliged to provide or pay for such services, but they are funded (along with a helpline) by "Sea City". There are specialist voluntary bodies active in advising parents, but independent advocacy services are very thin on the ground and none were funded directly by Scottish Government, although it has announced an intention to provide grants to Govan Law Centre and to the voluntary organisation ISEA.

5.27. Following the 2009 Act Scottish Ministers will have a duty to secure provision to parents and young people, free of charge, of an advocacy service in connection with tribunal proceedings.⁵ In any event, there seems to be some divergence of views on how existing advocacy services conduct their role. We found evidence in one of our case study authorities that their approach is confrontational and inflames the dispute, although the advocacy services claimed to try to "smooth things down". These services do not generally represent at mediations or tribunal.

5.28. In England, representation at appeal hearings is better established. SENDIST statistics show that in 2007/08, 22% of parents had legal representation at tribunal hearings, compared with 17% of local authorities (although of course local authority officers will have access to in-house legal support). A further 25% of parents had non-legal representation. This means that about half of parents were not represented at the hearing; 48% of the respondent local authorities considered that difficulty in ensuring representation was a disadvantage for parents. The previous year (2006-07) authorities were legally represented in only 10% of cases: thus, as in Scotland, authorities are increasingly using legal representation.

5.29. PPS are an important source of information and advice for English parents, although not all parents use them. However, a sizeable minority of our PPS do not see their role as extending to attendance at mediations or tribunals. Such attendance as occurs tends to be in the capacity of adviser or supporter rather than representative. Less than 50% would advise on which dispute resolution option(s) to select; and only 44% would advise on the likelihood of an appeal succeeding.

5.30. A majority of our respondents confirmed the uneven quality of PPS. In the SEN Code of Practice there are minimum standards for PPS, which include protocols and mechanisms for referring parents to disagreement resolution. However, there are wide variations in their interpretation. There is a danger for some parents who rely exclusively on PPS that they may be less well prepared for mediation or the tribunal: for example, they may not receive any help in

⁵ Education (Additional Support for Learning) (Scotland) Act 2004, s.14A, inserted by the 2009 Act, s.10.

preparing documentation. PPS may lack legal expertise (Penfold et al 2009: 50), but parents do nevertheless derive benefit from information provided by the tribunal itself (ibid).

5.31. As in Scotland, voluntary organisations play a key role in supporting parents in England (Boyle and Burton 2003). The level and kind of assistance provided varies due to these organisations' diverse levels of expertise and human and other resources. Many are over-stretched. Parents regard bodies such as IPSEA as more independent and expert sources of help than PPS (Penfold et al 2009: 51).

6. Conclusions

- Mediation has not taken off in the way that was intended. It is not widely used – hardly at all for parent-schools disputes – because of factors including lack of information for parents on mediation, some local authorities' failure to promote it, weak support for it from parental advisers, and parents' strong preference for a determination by the tribunal.
- Mediation does not appear to have led to a reduction in appeals in either Scotland or England. Particularly in England, where the tribunal's jurisdiction is quite wide, many parents persist with an appeal whilst negotiating, often settling at the door of the tribunal.
- The need for mediation is not generally accepted, although it is seen as having value in cases where relationships between schools or authorities and parents have broken down or the dispute is in deadlock.
- Disputes are mostly resolved through local negotiation, often aided by parent partnership or other forms of support. It is unclear whether mediation is able to achieve any better result in the majority of cases.
- Where it occurs mediation is generally quite highly valued by participants and advisers. It brings benefits in terms of better relations between the parties and a wider focus to the resolution of the dispute. However, there remain concerns about independence, the lack of a legally binding outcome, and the uncertain expertise of mediators. Moreover, mediation is regarded as lacking the straightforwardness, informality and immediacy of advocacy and negotiation, assisted perhaps by PPS and voluntary organisations, but at the same time it is seen as less expert, independent and authoritative than the tribunal.
- There is a fairly widespread belief that in some cases parents may settle for less at mediation than might be achievable at an appeal. But it seems probable that this occurs in only a small minority of the relatively few mediation cases.
- The appeal tribunal in both jurisdictions is regarded as operating in an at times adversarial way, which is stressful particularly for parents. Local authorities regard it as too generous to parents. But the fairness of its procedures and the value of its expertise are widely acknowledged.
- The evidence suggests to us that if mediation is going to have a meaningful role in the future, it should be better promoted but should be available as a stage in the appeal process itself, provided it does not unduly lengthen the process as a whole.
- In general, both of the chief dispute resolution mechanisms tend to be utilised more by middle class parents more than less advantaged parents.

- Child participation in the processes is supported in principle but rarely delivered, largely because of a generalised assumption that it would be problematic in many cases.

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