

RESOLVING DISPUTES ABOUT SPECIAL EDUCATIONAL NEEDS AND PROVISION IN ENGLAND

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INTRODUCTION

This article discusses the mechanisms for the resolution of disputes between parents and local authorities or schools in connection with children with special educational needs,¹ who comprise just under 20% of the school population in England.² This is an important field because alongside the only specifically education-related jurisdiction within the new First-tier Tribunal, there is an established system providing for mediation of such disputes which has been in operation for seven years and thus pre-dates the current policy push for alternative dispute resolution in areas covered by tribunals. Currently over 3000 parents bring an appeal to the tribunal each year, even though the introduction of independent mediation was specifically intended to reduce recourse to the tribunal. As we discuss, however, the evidence nevertheless shows that most disputes are resolved locally in other ways. The authors' research, on which this article draws, therefore sheds light on the ways in which rights-based claims concerning children's education are being resolved without the use of formal mechanisms traditionally regarded as important for the 'vindication of rights'.

The article draws, inter alia, on the findings from a series of interviews with a cross-section of people whose work is connected with disputes concerning

special educational needs in England. The interviews form an important part of the authors' research, funded by the Economic and Social Research Council, into dispute resolution and avoidance in special educational needs in England. The research forms part of a larger project also covering additional support needs in Scotland; that element of the research is being carried out by Professor Sheila Riddell and colleagues at the Centre for Research in Education Inclusion and Diversity at the University of Edinburgh. The research team across both jurisdictions is examining, among other things, the strategies used by local authorities and schools to avoid and resolve disputes in this field and the way that various dispute resolution mechanisms are viewed and experienced by parents, professionals and local authorities.

The interviews in England were conducted between April 2008 and March 2009 with a total of 30 key informants: an academic specialist; six independent mediation providers; two representatives from the Department for Children, Schools and Families (DCSF); a representative of each of four local authorities; two members of parent partnership services; three judicial members of what was then the Special Educational Needs and Disability Tribunal (SENDIST); six people from voluntary organisations working in the field of special educational needs; a parent advocate; and people from five different schools – two from the independent special school sector and three from the state sector. The article also incorporates some key findings from our survey of 150 parent partnership services and local authorities (85 and 60 responses respectively).

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¹ As defined in Education Act 1996, s 312, with reference to the concept of 'learning difficulty'.

² Department for Children, Schools and Families, *Special Educational Needs in England: January 2008* (DCSF, 2008).

BACKGROUND

In a field where educational provision tends to be relatively expensive, tensions are bound to arise from individual claims to particular forms of provision and the need for public authorities to meet wider, collective policy goals and allocate limited resources accordingly. For nearly 30 years, since the Education Act 1981, parents have enjoyed a range of participation and appeal rights in respect of a variety of key decisions concerning children with special educational needs. By the early 1990s special educational needs cases had become increasingly contentious³ and there was perceived to be a need for a more judicial approach that could offer 'a clear, timely and effective means of redress' for parents' grievances.⁴ The Education Act 1993 established a new tribunal, the Special Educational Needs Tribunal (SENT), to hear these appeals. It also extended the grounds on which appeals might be brought.⁵ In the ensuing years the number of appeals registered (that is, appeals accepted as falling within the tribunal's jurisdiction) grew and most years saw an annual increase (see Table 1). The tribunal was renamed SENDIST concomitantly with the extension of its jurisdiction to include complaints of disability discrimination in schools, following the Special Educational Needs and Disability Act 2001 (SENDA 2001). In the month of July 2008 394 appeals were registered.⁶ From 3 November 2008 SENDIST was subsumed into the new Health, Education and Social Care Chamber of the First-tier Tribunal, established by the Tribunals, Courts and Enforcement Act 2007 (TCEA 2007).⁷ While the procedures have to some extent changed,⁸ the grounds of appeal in special educational needs cases have not.⁹

³ Council on Tribunals, *Annual Report 1992/93* (HMSO, 1993), para 2.11.

⁴ Department for Education, *Special Educational Needs: Access to the System – A Consultation Paper* (DfE, 1992), para 20.

⁵ See N Harris, *Special Educational Needs and Access to Justice* (Jordan Publishing Ltd, 1997).

⁶ www.sendist.gov.uk/AboutUs/currentTrends.htm (accessed 26 November 2008).

⁷ See below.

⁸ See the First-tier Tribunal (Health, Education and Social

Tribunals clearly have a number of important characteristics as dispute resolution mechanisms, especially independence, expertise and the potential to make binding rulings, combined with the procedural safeguards provided by the regulations (now rules) under which they must operate and the legal safeguard arising from a further right of appeal, which is normally available (on a point of law only). While courts can deliver some of these benefits, they lack the degree of accessibility and the relative cheapness of tribunals.¹⁰ Of course, the rationale for tribunals is universally acknowledged, and debate has in recent years become focused instead on the wider issue of their role in the field of administrative justice. A critical question has become whether particular mechanisms, including tribunals, are the most suitable for particular kinds of dispute. In the analysis of this question, various commentators¹¹

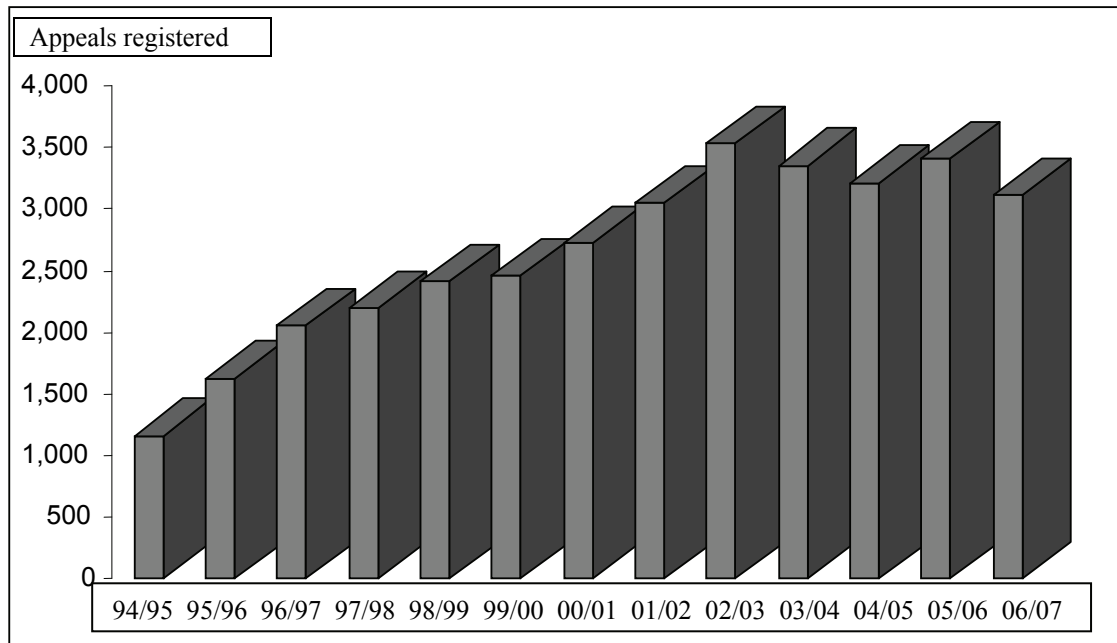
Care Chamber Rules) 2008 (SI 2008/2699) and the Health and Social Care Chamber, Practice Direction, *Health and Social Care Chamber, Special Educational Needs or Disability Discrimination in Schools Cases* (2008)

⁹ Appeal lies (under the Education Act 1996) in respect of a decision: (a) not to make a statement (s 325); (b) to make, amend or not to amend a statement (s 326) (the appeal may, for example, be against the description of the assessment of special educational needs (SEN), the specified provision or the school, if specified); not to comply with a request by a parent of a statemented child that the child be further assessed (s 328); not to comply with a request by a parent of a child for whom there is no statement, that the child's needs be formally assessed (s 329); not to comply with a request for the naming of a different school in a statement of special educational needs (Sch 27, para 8); to cease to maintain a statement (Sch 27, para 11).

¹⁰ *Report of the Committee on Administrative Tribunals and Enquiries* (Chairman, The Right Honourable Sir Oliver Franks), Cmnd 218 (1957).

¹¹ For example M Adler, 'A socio-legal approach to administrative justice' (2003) 25(4) *Law and Policy* 323; S Riddell, 'Procedural Justice and Special Educational Needs Assessments in England and Scotland' (2003) 7(3) *International Journal of Inclusive Education* 201; T Buck, D Bonner and R Sainsbury, *Making Social Security Law. The role and work of the Social Security and Child Support Commissioners* (Ashgate, 2005); R Thomas, 'Risk, Legitimacy and Asylum Adjudication' (2007) 58 *Northern Ireland Legal Quarterly* 49.

Table 1: Appeals registered with the SENT/SENDIST, 1994/95–2006/07¹²



have drawn on the work of Mashaw,¹³ who has identified three different models of administrative justice mechanism.

Tribunals are generally regarded as belonging to the ‘moral judgment’ model identified by Mashaw: this is a legal model which has a legitimating goal of fairness and involves an independent system in which rights may be enforced and competing values may be resolved. It may be distinguished from the ‘bureaucratic rationality’ model, whose legitimating values are accuracy or fairness, but where consistency is also important; this model is seen as particularly apposite to the classification and assessment of special educational needs at the local authority level.¹⁴ It may also be distinguished from

Mashaw’s third model, the ‘professional judgment’ model, which has a legitimating goal of fairness and focuses on client needs requiring the exercise of professional judgment and discretion. The moral judgment/legal model that the tribunal represents is particularly appropriate for special educational needs cases because this area of decision-making is based on complex legislation and tends to centre on evidence that is detailed, technical and yet at times of variable cogency. Nevertheless, the other models also have utility in this field.

Riddell¹⁵ and Adler¹⁶ developed Mashaw’s typology by adapting it to include an additional three models of administrative justice. The first is ‘managerialism’ and is identifiable by the imposition of procedures and controls governing decision making, such as processing time limits, which has the legitimating goal of increased efficiency. The second is ‘consumerism’, which is identifiable by

¹² Based on figures contained in the President’s Annual Report for each year, but adjusted (in the case of 1994/95 and 1995/96 only) to reflect figures cited on the Special Educational Needs and Disability Tribunal (SENDIST) website (see n 6 above).

¹³ JL Mashaw, *Bureaucratic Justice. Managing Social Security Disability Claims* (Yale University Press, 1983).

¹⁴ S Riddell, M Adler, N Farmakopoulou and E Mordaunt, ‘Special needs and competing policy frameworks in England and Scotland’ (2000) 5(6) *Journal of Education*

Policy 1621; A Blair, ‘Rights, duties and resources: the case of special educational needs’ (Year) 12(3) *Education & the Law* 177.

¹⁵ Riddell, op cit n 11.

¹⁶ Adler, op cit n 11.

measures to encourage active parental participation and has the legitimating goal of consumer satisfaction. Riddell and Adler distinguish consumerism from the third additional type, 'markets', which model is identified by a degree of parental choice and, as with consumerism, has the legitimating goal of improved efficiency. Mechanisms such as mediation or conciliation arguably fit into the consumer model rather more than any of Mashaw's original models, although they may have some features of other models, such as professional judgment; indeed, where negotiation with the aid of parent partnership services is concerned, this is particularly apt.¹⁷

Special educational needs has been an area in which there has been pressure from two directions to utilise more local and less formal mechanisms for resolving disputes, indeed for preventing disagreements from developing into full-blown disputes requiring judicial resolution. First, there is a general push towards alternative dispute resolution (ADR), in particular mediation, conciliation or arbitration, in civil cases consequent on the Woolf Report¹⁸ and, in the tribunal world, as part of the re-focussing of tribunals on the needs of their users, as advocated by the Leggatt Review.¹⁹ Linked to this is the policy emphasis on 'proportionate dispute resolution', reflected in the proposals advanced in the White Paper from the Department for Constitutional Affairs (DCA) in 2004.²⁰ Secondly, there is in the field of special educational needs a specific statutory duty on local authorities to ensure that there are arrangements for the avoidance and resolution of disagreements between parents and schools or local authorities (see below).²¹

¹⁷ See further Riddell *et al*, *op cit* n 14. See further Blair, *op cit* n 14.

¹⁸ The Right Hon Lord Woolf MR, *Access to Justice: Final Report* (Lord Chancellor's Department, 1996).

¹⁹ Sir A Leggatt, *Tribunals for users – one system, one service* (TSO, 2001).

²⁰ Department for Constitutional Affairs, *Transforming Public Services: Complaints, Redress and Tribunals* (TSO, 2004).

²¹ Education Act 1996, s 332B.

SPECIAL EDUCATIONAL NEEDS AND THE REFORM OF TRIBUNALS

The principles underlying reform

When the Leggatt Review considered the role of tribunals such as the SENT it examined them in part from a user perspective: even the review's structural focus was concerned with ways of making the system more coherent to the general public, albeit that issues of consistency and unity were central concerns. The review wanted the major tribunals to be brought together into a unified service fully independent from initial decision-making departments and with a broadly common procedural framework, although that complete harmonisation of procedures might not be fully achievable.

The focus on users²² also included proposals to improve the accessibility and efficiency of tribunals and their procedures and to facilitate self-representation (although the review's report also acknowledged the importance of impartial, professional advice so that expectations were realistic). 'Active case management' procedures were recommended, as were already in place in the civil courts, flexible and proportionate to the particular jurisdiction.²³ These are now being taken further forward under the TCEA 2007 reforms and, more particularly, the new Chamber rules, introduced in November 2008.²⁴

Leggatt argued that '[a]n important objective of effective case management is to identify those cases for which tribunal resolution may not be the most appropriate answer'.²⁵ The idea was to borrow from the powers of the civil courts to halt the progress of a case so that the parties could consider an alternative means of dispute resolution. Leggatt cautioned that ADR may be appropriate only in certain types of dispute but that, in those cases, consideration should be given by the tribunal to

²² Adler argues (see n 38 below) that Leggatt and the DCA White Paper (*op cit* n 20) only focus on citizens as users and ignore public bodies and employers who will also use tribunals.

²³ Leggatt, *op cit* n 19, chapter 8.

²⁴ *Op cit* n 8.

²⁵ Leggatt, *op cit* n 19, para 8.17.

whether the case is suitable for some form of ADR prior to a hearing.²⁶ Moreover, the report called for a particular jurisdiction's judicial hierarchy to explore forms of ADR which may be appropriate for that particular part of the system.²⁷ Leggatt referred to the fact that special educational needs cases are often settled through discussion on the tribunal premises prior to the hearing; this was seen as an example of how ADR techniques are suitable for cases where there is scope for negotiation and where the parties 'are likely to want to maintain good relations after the conclusion of the dispute'.²⁸

The reforms that have now been introduced were in fact presaged by the DCA's White Paper in 2004,²⁹ which was influenced by Leggatt. This provided further evidence about the need for reform to the tribunal system because of what potential users wanted from such a system: independence; reduced waiting times; cases resolved without formal hearings where possible; better accessibility to hearing centres; increased accessibility to information about the process; hearings which are not daunting or legalistic; highly skilled judiciary; authoritative, consistent and comprehensible decisions that command the respect of those affected; and a cost efficient service.

A strong theme in the White Paper is the need for 'proportionate dispute resolution', as noted above. This is based on an approach that in fact seeks to prevent grievances developing into disputes, but where they do, to provide tailored services to resolve the dispute as quickly as possible. Therefore the use of courts or tribunals would in theory be confined to those cases where they are needed, since those mechanisms are relatively expensive and seen as the least accessible to ordinary citizens.³⁰ More information and advice would be provided to the public, something which a National Audit Office report in 2005 supports, since it found public confusion about redress mechanisms,³¹ and tribunals would be made more

efficient for the cases where their involvement was the best option. Of course the driver for the Government's policy push is partly, or perhaps even largely, the goal of greater cost effectiveness while also ensuring that the cases that do go to court/tribunal are dealt with more efficiently and expeditiously and are more likely to be settled.³²

The Tribunals Service was established in April 2006.³³ It reported in 2007 that a movement towards greater use of ADR was not happening on the ground and that despite being on the agenda since 2001, 'the development of alternatives to present ways of resolving disputes is in its infancy'.³⁴ In fact, there was evidence that many tribunals did not believe that ADR was suitable for their jurisdictions. The SENDIST, for example, reportedly stressed that its role was one of 'decision-making rather than brokering a compromise between parties'.³⁵ With a few exceptions,³⁶ mediation and other types of ADR are said not to be under active consideration for adoption in tribunals. But this does not mean that they will not be promoted as an alternative to adjudication by a tribunal, given the provision in the new Chamber rules (below).

Citizen's Redress: What citizens can do if things go wrong with public services HC 21 Session 2004–2005 (NAO, 2005).

²⁶ S Boyron, 'The rise of mediation in administrative law disputes: experiences from England, France and Germany' [2006] Public Law 320; S Boyron, 'Mediation in Administrative Law: the identification of conflicting paradigms' (2007) 13(2) *European Public Law* 263.

²⁷ The Tribunals Service is an executive agency within the Ministry of Justice (formerly the Department of Constitutional Affairs).

²⁸ Tribunals Service, *Transforming Tribunals: Implementing Part 1 of the Tribunal, Courts and Enforcement Act 2007* (TSO, 2007), p 54.

²⁹ Administrative Justice and Tribunals Council, 'The Use of Proportionate Dispute Resolution in Tribunals' *Adjust* (AJTC, February 2008): www.ajtc.gov.uk/adjust/08_02.htm.

³⁰ Including pilots involving judicial mediation in employment tribunals and an evaluation of an early neutral evaluation scheme in social security and child support appeals.

²⁶ Ibid, paras 18.19–18.20.

²⁷ Ibid, para 8.23.

²⁸ Ibid, para 18.19.

²⁹ Op cit n 20.

³⁰ Op cit n 20, paras 2.2–2.11.

³¹ National Audit Office (Comptroller and Auditor-General),

The new system under the TCEA 2007 and Chamber Rules

At the time of the structural changes under the TCEA 2007 there were over 70 tribunals in operation. Of these, SENDIST was the only education appeal body to be brought within the Tribunals Service (Leggatt had also recommended that school admission appeal panels and exclusion appeal panels should be included³⁷). On 3 November 2008 the functions of SENDIST were transferred to the new Health, Education and Social Care Chamber of the First-tier Tribunal (FTT), one of three Chambers operative from that day.³⁸ Both the FTT and the new Upper Tribunal (UT), which hears appeals from it on a point of law, are overseen by a Senior President of Tribunals. Each FTT has a Chamber President. The UT will have three chambers, although others may be added. The Administrative Appeals Chamber of the UT³⁹ hears appeals from the FTT in special educational needs cases, in place of the former appellate jurisdiction of the High Court⁴⁰ (and may have judicial review jurisdiction if approved and exercised by High Court judges⁴¹).

In the consultation exercise prior to the introduction of the new system⁴² there was some concern about the proposed placement of

SENDIST's jurisdiction, as it is seen as dealing with different issues and clients to the tribunals such as the Mental Health Review Tribunal (MHRT), which was planned to form part of the same Chamber. However, the Government considered that the similarities between the various tribunals in the planned Chamber justified their integration. It also rejected the suggestion that there should be a discrete Children Chamber, including the SENDIST jurisdiction, because its spread would be too broad.⁴³

One of the principal and widely acknowledged advantages of the new tribunal system as a whole is the prospect of a more consistent procedural approach,⁴⁴ particularly given the Act's provision for a Tribunals Procedure Committee,⁴⁵ which has been instrumental in the development of the new Chamber Rules. Each of the Chambers has its own procedural rules, although there is much common ground between them, and the Chamber Presidents have been given a power to issue Practice Directions.⁴⁶ These Directions will be important because it seems that in order to have manageable and coherent common procedural rules, it has been necessary to omit some of the jurisdiction-specific rules that operated previously. The Chamber rules do contain some provisions that specifically relate to special educational needs (and disability discrimination) cases, including the important entitlement of the child to attend the tribunal hearing and the tribunal's discretion to permit the child to give evidence and address the tribunal.⁴⁷ But the local authority's duty to indicate in its response to the appeal the child's view of issues raised by the proceedings or the reason why the authority has not ascertained those views, formerly covered by regulations, are now in the Practice Direction for special educational needs cases.⁴⁸

³⁷ Leggatt, op cit n 19, Part II.

³⁸ See the Transfer of Tribunal Functions Order 2008 (SI 2008/2833) and the First-tier Tribunal and Upper Tribunal (Chambers) Order 2008 (SI 2008/2684). See further, Senior President of Tribunals, *Second Implementation Review October 2008* (Tribunals Service, 2008) and M Adler, 'Tribunal reform: Proportionate Dispute Resolution and the pursuit of administrative justice' (2006) 69(6) MLR 958.

³⁹ Established on 3 November 2008. See the First-tier Tribunal and Upper Tribunal (Chambers) Order 2008 (SI 2008/2684).

⁴⁰ On the contribution made by the courts in this field, see N Harris, 'Special Educational Needs: The Role of the Courts' [2002] CFLQ 137 and D Squires and D Wolfe, 'The dual role of the SENDIST: recent developments in its powers and functions' [2006] Ed Law 163.

⁴¹ Tribunals Service, op cit n 34.

⁴² Ministry of Justice/Tribunals Service, *Transforming Tribunals. Implementing Part I of the Tribunals, Courts and Enforcement Act 2007. The Government's Response* (2008): www.justice.gov.uk/docs/cp3007-response.pdf (accessed 3 December 2008).

⁴³ *Ibid*, p 11.

⁴⁴ For example Tribunals Service, op cit n 34.

⁴⁵ See Tribunals, Courts and Enforcement Act 2007, Sch 5.

⁴⁶ *Ibid*, s 23.

⁴⁷ SI 2008/2699, op cit n 8, r 24(b).

⁴⁸ Health and Social Care Chamber, *Practice Direction: Health and Social Care Chamber, Special Educational Needs or Disability Discrimination in Schools Cases* (2008).

The Chamber rules place tribunals under a duty to:

‘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’.⁴⁹

In special educational needs cases an alternative to an appeal is mediation, which (as discussed below) is well established within this field and promoted by other legislation. The TCEA 2007 provides in s 24 that a person exercising their power to make tribunal procedural rules or practice directions on mediation must have regard to the fact that taking part in mediation must be consensual on the part of both parties (reflected in para (b) above) and that when mediation fails this does not affect the outcome of proceedings. Section 24 also enables tribunal members to act as mediators in disputes. ADR is also mentioned under s 2(3)(d), which states that the Senior President of Tribunals is to have regard to ‘the need to develop innovative methods for resolving disputes that are of a type that can be brought before tribunals’. Nevertheless, it is suggested that the Act is ‘facilitative’ rather than promotional of mediation. Its provisions ‘do not reflect anything like a commitment to mediation in tribunals’ and there is ‘no place for compulsory or judicially directed mediation’.⁵⁰ The House of Lords Select Committee on the Constitution, while welcoming the inclusion of a mediation clause in the Bill,⁵¹ was also concerned that appellants should not be denied a fair hearing in the resolution of their dispute.⁵²

⁴⁹ Op cit n 8, r 3.

⁵⁰ S Vernon, ‘A Flight from Formality’ (Spring 2008) *Tribunals* 18, pp 21 and 22.

⁵¹ House of Lords Select Committee on the Constitution, First Report Session 2006–07. *Tribunals, Court and Enforcement Bill, Report with Evidence* (TSO, 2006), para 7.

⁵² *Ibid*, para 14.

In theory at least there is a potential for conflict between the Chamber rules’ ‘overriding objectives’ of avoiding delay and facilitating flexibility,⁵³ because if mediation fails to resolve the case, the parties may well have to return to the appeal process. In fact, our evidence suggests that because in special educational needs cases the appeal and mediation routes are not mutually exclusive,⁵⁴ parents who enter mediation are likely to have an appeal in progress as well. Indeed, in one recent research study it was found that some parents felt it was ‘necessary to have made an appeal to [SENDIST] before the [local authority] would actively engage in discussions with them via mediation’.⁵⁵ It works the other way as well: we found evidence that some parents enter mediation with a view to impressing the tribunal that will hear their separate appeal, believing that the tribunal will be more favourably disposed to their case if they have adopted a conciliatory approach to the resolution of their grievance. Parent partnership and voluntary organisation representatives confirmed that they tend to advise parents to enter mediation for this reason. This is curious, as the tribunal does not appear routinely to ask whether mediation has been tried.

SPECIAL EDUCATIONAL NEEDS DISPUTE RESOLUTION AND THE EDUCATION ACT 1996 (AS AMENDED)

Introduction

It is important to mention the functions of parent partnership services (PPS) in the field of special educational needs. Although they were in existence prior to 2001, they were effectively given a statutory role under SENDA 2001 by virtue of the new duty on local authorities to make arrangements for ‘the parent of any child in their area with special educational needs to be provided with advice and information relating to those needs’ and to make the services provided in furtherance of that duty known

⁵³ Op cit n 8, r 2.

⁵⁴ See Education Act 1996, s 332B(6).

⁵⁵ R Tennant et al, *Special Educational Needs Dispute Resolution Services Research Report DCSF-RR054* (DCSF, 2008), pp 52–53.

to parents and others.⁵⁶ In making the arrangements, local authorities must have regard to any guidance given by the Secretary of State for Children, Schools and Families.⁵⁷

Research by Hall in the late 1990s revealed that PPS were already playing an important role as mediators in disputes, although practice varied across local authorities.⁵⁸ There was, however, a degree of concern among Hall's interviewees that the services were insufficiently separate and thus independent from the local education authority, leading to recommendations for a variety of models for independent mediation services.⁵⁹ But there was also a strongly expressed view that access to the tribunal should not be denied and that the two processes should run side by side.⁶⁰ As noted above, that is the effect of the legislation in any event. The need for independence in dispute resolution at the local level was in fact acknowledged by the Government in its subsequent Programme of Action on special educational needs.⁶¹

The Government concurred with several of Hall's consultees that mediation (or conciliation) would have a chance of succeeding only if there was a degree of compulsion on local authorities, via a statutory duty.⁶² As a result, there is a duty enacted in s 3 of SENDA 2001, inserting a new s 332B into the Education Act 1996, requiring each authority to:

'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 Act].'⁶³

'Independent persons with the function of facilitating the avoidance or resolution of such disagreements' must be appointed under these arrangements,⁶⁴ which local authorities must take appropriate steps to make known to parents, schools and others, as appropriate.⁶⁵ Local authorities are under a specific duty, when informing parents about the authority's decision and their right of appeal, to refer to the s 332B arrangements.⁶⁶ This notification must also indicate that those arrangements do not affect the right of appeal. The intention is to make it clear that 'dispute resolution [under s 332B] can run alongside the appeals procedure'.⁶⁷ There is also a duty to make these arrangements in respect of disagreements between parents and the heads or governors of maintained (state) schools, or the proprietors of independent schools, pupil referral units and academies.⁶⁸

It will be noted that the term 'disagreement' rather than 'dispute' is used in s 332B. It might, in fact, have been more appropriate for a duty to *promote agreement* to be imposed rather than to *avoid disagreement*, especially since the Special Educational Needs Code of Practice,⁶⁹ to which local education authorities and school governing bodies must have regard in exercising their special educational needs functions,⁷⁰ indicates a preventive role for PPS in helping 'to prevent difficulties from developing into disagreements'.⁷¹ PPS in any event provide a form of 'local mediation' which, as discussed below, we have found to be the principal mechanism that avoids disputes going to the tribunal.

⁵⁶ Education Act 1996, s 332A, inserted by SENDA 2001, s 2.

⁵⁷ Education Act 1996, s 332A(2).

⁵⁸ J Hall, *Resolving Disputes Between Parents, Schools and LEAs: Some Examples of Best Practice* (DfEE, 1999).

⁵⁹ *Ibid*, p 53.

⁶⁰ *Ibid*, pp 39–40.

⁶¹ Department for Education and Employment, *Meeting Special Educational Needs: A Programme of Action* (DfEE, 1998), ch 1, paras 8 and 11.

⁶² J Hall, *op cit* n 58, p 41.

⁶³ Education Act 1996, s 332B(1).

⁶⁴ *Ibid*, subs (3).

⁶⁵ *Ibid*, subs (5).

⁶⁶ Education (Special Educational Needs) (Consolidation) Regulations 2001 (SI 2001/3455), regs 12 and 17.

⁶⁷ *Hansard, Lords Debates*, Special Educational Needs and Disability Bill, CWH 112 (29 January 2001), per Lord Davies of Oldham.

⁶⁸ Education Act 1996, s 332B(2) and (8).

⁶⁹ Special Educational Needs Code of Practice (Department for Education and Skills, 2001).

⁷⁰ *le* the functions under the Education Act 1996, Part IV, s 313.

⁷¹ *Op cit* n 69, para 2:22.

Parents of children with special educational needs also have access to a complaints mechanism at school level about the arrangements made by the governing body for their children. If the dispute concerns a complaint of disability discrimination covered by the Disability Discrimination Act 1995, there is a separate process involving the independent conciliation service run by the Equality and Human Rights Commission.

ADR is said to have the potential to 'minimise the progress of cases up the ladder of redress'.⁷² Thus a significant part of the rationale for arrangements for independent mediation in special educational needs cases is a perceived need to reduce the flow to tribunals of cases that may be capable of resolution through a process conducive to settlement. The Special Educational Needs Code of Practice refers specifically to mediation arrangements as having the potential to prevent long-term disagreements, 'reducing, in time, the number of appeals going to the SEN Tribunal'.⁷³ But it is clear from the views expressed to us that an appeal is seen as putting pressure on the local authority to concede ground, since it may be preferable to the authority to settle than to risk the tribunal giving the parents more. As we saw from the appeal figures earlier, it would appear that the introduction of independent mediation post-2001 has not been accompanied by an overall reduction in the number of appeals.

The arrangements for special educational needs dispute resolution are also aimed at providing 'quicker ways of preventing and resolving disputes'.⁷⁴ While delays in dispute resolution in general are known to generate public dissatisfaction,⁷⁵ they can be particularly damaging in special needs cases for children's educational and psychological well-being. Thus the Code of Practice places an emphasis on the forging of 'practical education solutions' on which the parties can agree 'as quickly as possible ensuring the minimum disruption to children's education'.⁷⁶

⁷² Op cit n 31, para 15.

⁷³ Op cit n 69, para 2:26.

⁷⁴ Op cit n 67, at CWH 111–112.

⁷⁵ For example Mellor *et al* (2008).

⁷⁶ Op cit n 69, para 2:26.

As noted above, the Act makes provision for 'independent persons' to be appointed under the arrangements.⁷⁷ It was always the Government's intention that they should be independent of the local authority.⁷⁸ However, independence is seen in strangely ambiguous terms in this context, since the Government acknowledged the likelihood that a mediator in a case may have had previous dealings with the school or local authority in question. In the Government's view this could not be avoided save by finding and training new people, which would represent a 'nightmare scenario'.⁷⁹ The Code of Practice reflects this ambiguity: the arrangements must involve 'an independent element' but, equally, confidence in the arrangements is likely to be maximised if they are seen as 'genuinely independent'.⁸⁰ While the SEN Toolkit guidance emphasises that an independent facilitator must not be an officer of the local authority nor have a role in decisions taken about the child or a vested interest in the outcome of the dispute,⁸¹ it is clear that mediators would not be barred by their relatively close association with authorities.

Special educational needs mediation arrangements

No particular mechanism for independent dispute resolution has been prescribed. The Code of Practice adopts Hall's three alternatives for dispute resolution with an 'independent element':⁸² establishing and using a panel of trained mediators, affiliated to a recognised body, with local authorities buying-in their services as required; funded expansion of existing dispute resolution services used by the local authority to incorporate special educational needs expertise; and the establishment of regional panels funded by a cluster of local

⁷⁷ Education Act 1996, s 332B(3).

⁷⁸ DfEE, *SEN and Disability Rights in Education Bill. Consultation Document* (DfEE, 2000), Annex B, para 5.

⁷⁹ *Hansard*, HL Deb, col 690 (20 February 2001), per Baroness Blackstone, Under-Secretary of State.

⁸⁰ Op cit n 69, paras 2:25–2:26.

⁸¹ DfES, *SEN Toolkit* (DfES, 2002), online updated version at: www.teachernet.gov.uk/_doc/4606/Toolkit%201%20Text.pdf: section 3, para 27.

⁸² Op cit n 69, p 53.

authorities (possibly representing the local authorities within the individual Regional Partnerships), giving access to a pool of mediators. The Code in fact promotes the use of outside organisations providing dispute resolution services and urges authorities to work in partnership with such organisations in developing their services.⁸³

Looking at what has transpired on the ground post-SENDA 2001, mediation was initially provided through Regional Partnership arrangements, which had been established in the period from late 1998 to spring 2000 with the aim of ensuring better regional co-ordination of special educational needs services.⁸⁴ Six mediation providers mediated for the nine regions. For two years there was central government funding for this: this was so that set-up and training costs were covered and to ensure some consistency across regions. When this funding ended, many local authorities ceased to use the Regional Partnerships.

What currently exists is a complex picture. Many local authorities are still using the same providers as under the initial post-SENDA 2001 arrangements involving regional partnerships. There could be a regional agreement between all the local authorities and the mediation provider, but in most cases there are contracts negotiated separately by each local authority. We were told that being part of a regional partnership agreement ensures quality of provision because there is funding for a post to provide feedback to local authorities to inform their practice and for mediator training and development. Another advantage is that there is more than one mediator so that local authorities are not always using the same person and mediators can observe each other to ensure quality. The length of contract is important because the longer the contract, the more infrastructure and training providers are likely to put in place. Other local authorities use their PPS as a dispute resolution service and there are inter-local authority reciprocal mediation arrangements, while others use mediation providers from other fields, for

example, family mediators. Both of these kinds of arrangements were viewed as problematic by some of the interviewees, the former because of independence issues and the latter because of knowledge and expertise issues.

Views on the need for independent dispute resolution vary. In many cases PPS, schools and voluntary organisations regard themselves as providing a form of mediation and argue that if disputes can not be resolved through them, it is unlikely they could be resolved through independent mediation. However, for a variety of reasons not all parents elicit help from these organisations. Nevertheless their important role in the local resolution of disagreements or disputes is seen as a major reason for the low incidence of independent mediation.

Local level resolution of disputes without independent mediation

Factors that enable disagreements to be resolved without independent mediation or an appeal to the tribunal include opportunities for parental communication with local authorities (despite delayed communication from authorities in some instances) and authorities' active encouragement of informal dispute resolution through negotiation. But the main factor is the role of PPS. These services are envisaged by the Code of Practice as being the 'main approach to preventing disagreements from arising',⁸⁵ but it is clear that they also *mediate* in cases where disagreements are unresolved. As one parent partnership officer told us, the role is that of:

'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.'

Parent partnership officers also help parents to prepare for meetings with the local authority and provide advice on further options.

Meditation providers told us it is better for parents for solutions to disagreements to be

⁸³ Op cit n 69, paras 2:29–2:30. See also *SEN Toolkit*, op cit n 81, section 3, paras 23–24.

⁸⁴ See further F Fletcher-Campbell *et al*, *Evaluation of the Special Educational Needs Regional Partnerships*, DfES Research Report RR724 (DfES, 2006).

⁸⁵ Op cit n 69, para 2:22.

explored through meetings and discussion with the local authority, rather than going to mediation too early. However, this form of local resolution does not work in every case, such as where the parents' ultimate goal, typically a child's placement in an independent special school (at additional cost to the authority), means they will tend to fight the authority's decision. Some parents are wary of negotiating because past experiences have made them feel they are constantly lied to and, in the words of one voluntary organisation representative, 'that the only way to guarantee a conclusion, an outcome, is to go through one of the more formal processes'. There were also cases in which some local authorities inadvisedly fail to settle. But parents are also blamed for making referrals to tribunals before all other avenues have been exhausted.

Despite the pivotal role of PPS, the majority of our respondents confirmed the uneven quality of these services.⁸⁶ There are minimum standards, in the form of 13 separate requirements set out in the Special Educational Needs Code of Practice. They include establishing protocols and mechanisms for referring parents to disagreement resolution. However, Rogers *et al* found wide variations in their interpretation, largely the result of the diverse staffing and budget levels, which our survey of PPS confirmed.⁸⁷

Voluntary organisations also play a key role in the field of special educational needs as providers of advice and assistance for many parents.⁸⁸ There is some variation in relation to the level of active assistance given to parents, due to the organisations' diverse levels of expertise and human and other resources. Some purely offer advice to parents, whereas others are active participants in meetings, mediation sessions and tribunals. Some spend a long time with parents helping them to prepare for tribunal hearings. Nationally, according to the most recent SENDIST annual reports, approximately 25%

of parents are represented at tribunal hearings by someone other than a legal representative, and it is likely that in many cases this will be a representative of a voluntary organisation. In some cases parents are referred to lawyers by such organisations.

All our voluntary organisation representatives claimed to have a positive influence on dispute resolution. They told us that they improve the communication between local authorities and parents, considered vital to resolving disagreements. 'Factual and evidence based' information about the child often persuaded the authority to 'back down', according to one interviewee. While there may be a general assumption that voluntary organisations' involvement tends to foster a more resistant approach by local authorities wary of succumbing to such pressure, thereby serving to increase the general level of tension in local authority-parent relations, in individual cases it may nevertheless have an emollient effect. However, voluntary organisations are generally over-stretched and parental access to them is somewhat uneven.

Regardless of who provides support services in this field, access to them can be hindered by social deprivation and/or language barriers. Some parents from minority ethnic backgrounds are particularly likely to be affected.⁸⁹ Researchers have argued that schools can play an important role in engaging and supporting such parents.⁹⁰ We have found that while schools tend not to be much involved in formal dispute resolution processes, they are nevertheless able to prevent possible disagreements between parents and local authorities from escalating. Where there is a well-established relationship between the school and local authority, the latter is more likely to respect the views of the former. Where staff feel strongly that it is in the child's best interests, they are likely to intervene where the authority is blocking provision. One school representative told us that the school considered it was 'part of our job then to make sure that we get that support for them'. Another told us that when a pupil was refused a

⁸⁶ As also reported in R Rogers *et al*, *Evaluation of the Special Educational Needs Parent Partnership Services in England* RR719 (DfES, 2006).

⁸⁷ *Ibid*.

⁸⁸ D Boyle and E Burton, *Making Sense of SEN* (New Philanthropy Capital, 2003), pp 22–23.

⁸⁹ See J Page, G Whitting and C Maclean, *Engaging Effectively with Black and Minority Ethnic Parents in Children's and Parental Services*, Research Report DCSF-RR013 (DCSF, 2007), section 3.3.

⁹⁰ *Ibid*.

formal assessment, the head teacher made forceful personal representations to the authority, leading to it changing its mind. Independent schools, however, find it more difficult to intervene on parents' behalf. They are dependent in many cases on placement of children with them by the local authority and are conscious of the need not to damage their relationship with the authority.

Schools also see themselves as key players in the avoidance of disagreements, which (as noted above) s 332B of the 1996 Act also covers. Tensions can be reduced or prevented by good communication between the school and parents and the role of dedicated, knowledgeable and effective special educational needs co-ordinators (SENCOs)⁹¹ who understand the child's background and can explain needs and provision to the parents and earn their trust. We in any event found evidence that schools prefer to sort out areas of disagreement with parents in-house because they do not like outside interference. Schools also prefer early compromise to the loss of staff time for attendance at mediation meetings.

It was acknowledged by some interviewees that not all schools have positive relationships with parents. For example, SENCOs who work in schools in a difficult social environment may not have the capacity to build such strong relationships with parents. Moreover, we were told that some parents do not have a positive view of schools in general after having had negative experiences of education themselves or because their child has received numerous exclusions.

Mediation of special educational needs disputes in practice

Our interviewees uniformly reported a very low take-up of mediation across England, especially for disputes at school level. Our survey of local authorities has confirmed this picture. In the years 2005/06, 2006/07 and 2007/08 respectively, the proportion of local authorities in which there were no special educational needs cases resolved through independent mediation was 48%, 46% and 60%. In 2007/08, 86% of the local authorities had no more

⁹¹ Each school must appoint a SENCO: Education Act 1996, s 317(3A).

than two mediations; and only two authorities had more than three mediation cases (eight and 20 cases respectively).

Many of our interviewees referred to a general failure to promote mediation and consequently a lack of awareness by parents of it. (Under their contracts, mediation providers are restricted from advertising their services; this is left to the local authority.) One of our local authority interviewees said that their PPS saw the mediation service as undermining their role in dispute resolution, resulting in an unwillingness to alert parents to mediation. In our local authority survey over 80% of authorities stated that parents would nevertheless know about mediation, mostly from information contained in correspondence sent to them when various decisions were made about their child, although mediators told us that the degree of prominence given to this information varies greatly from one authority to the next. In any event, we were also told that parents often fail to differentiate between PPS and independent mediation. A mediation provider commented 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.'

Another referred to cases where:

'we ring the parents and we say "we are your mediation service and ... the local authority has made a referral" and they say, "oh... we have already been to mediation", so you have to unpick this.'

Local authorities and schools, as well as parents, can refer a case to mediation, but this hardly ever seems to occur. In the case of schools, this seems to be attributable to poor awareness of mediation, as well as wariness towards outside intervention, as noted above. In the case of local authorities a lack of time, particularly at a juncture in which integrated children's services have been established, may have led to the under-promotion of mediation. Two mediation providers had been told by local authority officers that they had not considered

mediation because they were too preoccupied with responding to tribunal appeals or attending appeal hearings.

We were also told of a perception in some local authorities that independent mediation is not needed because the authority or parent partnership officer can achieve similar results and offer similar opportunities for face-to-face discussions themselves. This confirms the finding from separate research commissioned by the DCSF.⁹² Moreover, in some cases the contractual arrangements between the local authorities and mediation providers may have an influence: for example, when the contract is case-exclusive, so that the authority has to pay per mediation (as opposed to where the authority pays an inclusive rate covering any number of mediations in a given period), the authority may be less likely to encourage its use. A few of the interviewees felt that budgets were important in relation to the promotion of mediation: even though authorities incurred costs as a result of the appeal process, in terms of time and staff resources, the operation of the appeal tribunal is not paid for out of the local authority budget, whereas mediations are. One mediation provider commented: 'as long as local authorities have to pay for [it] themselves they would still rather run to SENDIST because it only costs them time, it doesn't cost them actual budget money'. The degree of local authority support for mediation is also affected by whether or not the authority has a specialist 'tribunal officer' who attends tribunal hearings: he or she can 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 interest group activity tend to have low numbers of mediation cases, as interest groups tend to promote the appeal route as the most conducive to a favourable outcome.

Another, very important, point made by almost all interviewees was that there will always be parents who want to utilise their right of appeal, regardless of the alternatives. These parents may see mediation as just 'another hoop that is there to prevent them from getting to what they want', in the words of one PPS focus group. One departmental interviewee suggested that it was more likely to be

middle class parents who are not willing to try mediation.

A final practical point concerns the timing of mediation, which is regarded by many as critical to its utility and effectiveness. Many of our interviewees thought that mediation should take place early, before views are too firmly entrenched and relationships have completely broken down and before an appeal is underway and the parties think that they might as well await the outcome of the appeal. Our research findings were consistent with those of Tennant *et al*, who report that because parents view the journey to mediation as 'frustrating and lengthy', the active use and encouragement of mediation at an early stage in a disagreement 'would appear best to fit with parents' needs'.⁹³ Other important factors *vis-à-vis* a successful mediation were the willingness of the parties to be open-minded and keen to try to resolve matters (which is surely consistent with the idea of mediation as a voluntary process); the quality of the mediators, including the extent of their specialist knowledge and their ability to create an environment that is conducive to agreement; and the suitability of the meeting venue. The importance of pre-meeting activity was stressed by the mediation providers whom we interviewed; it created opportunities for misunderstandings to be lifted, possibly facilitating resolution at that stage; it also meant that the mediator could begin to build rapport with the parties and to identify the most appropriate people to participate in the later stages.

IS MEDIATION APPROPRIATE?

The justification for a policy of seeking to divert disputes away from courts and tribunals via mediation in this field is surely dependent on both the practical effectiveness of mediation and its suitability as a model for the particular kinds of disputes that arise. Mediation has to be weighed against other mechanisms and, in particular, tribunals, given their continuing key role in this field. Richardson and Genn have argued that special educational needs cases tend to be about entitlement to an assessment or to consideration for

⁹² Tennant *et al*, op cit n 55, section 3.1.2.

⁹³ Tennant *et al*, op cit n 55, section 5.1.2.

a particular outcome – thus acknowledging that the conditionality and resource-dependency of these rights, and their contingency with wider policy goals, makes them more suitable for ADR than those where the rights are truly fundamental or the decision is concerned with yes/no questions concerning rights to material benefits, where tribunals may be particularly appropriate.⁹⁴

The literature on mediation, including its use in other spheres, generally paints a very positive picture of it (see below).⁹⁵ But mediation is still relatively untested in the public law sphere and independent evidence is relatively sparse. Among the intrinsic concerns about mediation for education cases is whether the interests of the child will be adequately protected and whether it will accentuate or reduce the inherent inequalities between the parties to these disputes. Another concern that our research has been addressing (and on which we are still gathering evidence) is that mediation may affect the ‘justice’ of outcomes to disputes in a negative way.

Advantages and disadvantages of mediation

The literature⁹⁶ shows that on the whole mediation is likely to result in the permanent settlement of a dispute and that, while acknowledging that user satisfaction tends to be linked to the outcome of mediation, it also is generally regarded well by users. Mediation is also regarded as cheaper and speedier than court or tribunal processes, offering better opportunities for participation and communication; more control or ‘ownership’ felt by the parties; improved prospects of maintaining inter-party relationships and communication; and

the possibility of interest-based rather than rights-based outcomes (in other words, ones which are not tied exclusively to legal entitlement). One commentator, writing about autism cases, has referred to the possibility of ‘often more complicated and subtle settlements than could normally be achieved by going to a court or tribunal’.⁹⁷ This may be regarded as a particularly important advantage where, as in special educational needs cases, there are multiple issues involved. Indeed, several of our interviewees told us that the cause of the disagreement stated by the parents is what will be dealt with by the tribunal, whereas in a mediation meeting *all* the underlying issues may be explored.

Our interviewees with experience of mediation were generally fairly positive about it, referring for example to its capacity to keep channels of communication open, improve relationships between the disputing parties and force parties to explore the issues earlier than any tribunal hearing. A local authority perspective was that mediation involves less preparatory work for the authority than a tribunal appeal. Various interviewees also confirmed that mediation was relatively quick and involved no real costs to parents (since they would seldom, if ever, be legally represented, indeed legal representation tends to be discouraged for mediations). Mediation was also regarded as ‘empowering’, especially since outcomes are negotiated rather than imposed, while also less taxing for parents, giving them more time to think as ‘time-outs’ were allowed, ensuring they did not have to make an immediate response to evidence presented. Although mediated settlements may not be able to be enforced (judicial review may be an option in some circumstances, but this has yet to be tested), we were told that parties tend not to renege on them, although some may nevertheless continue with their appeal, hoping for a more advantageous outcome.

Generally, voluntary organisations were less positive than local authorities about mediation. They saw the process as daunting for parents and some parents were suspicious that the mediation

⁹⁴ G Richardson and H Genn, ‘Tribunals in Transition: resolution or adjudication?’ [2007] Public Law 116. See also D Stilitz and C Sheldon, ‘Mediating Education Disputes’ [2007] Ed Law 163 and M Supperstone, D Stilitz and C Sheldon, ‘ADR and Public Law’ [2006] Public Law 299.

⁹⁵ For a more complete review, with detailed references, 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: www.creid.ed.ac.uk/adr/pubs/adr_workingpaper1.pdf.

⁹⁶ *Ibid.*

⁹⁷ J Graham (with N Graham), *Autism, Discrimination and the Law* (Jessica Kingsley, 2008), p 128.

providers are not independent and that they work for the local authority which funds them. One interviewee criticised the fact that because independent mediation providers tend to lack legal knowledge, nobody challenges the local authority's assertions even when possibly they are inconsistent with the law; and this exacerbates the imbalance of power between the parties. Another, together with a school representative, also referred to a lack of expertise among mediation providers, for example on the nature and effects of different types of special educational needs. However, all of our mediation provider interviewees said they provided training to their mediators on relevant law and procedure.

One issue that was raised was that sometimes there is no one at the mediation meeting with the power to settle the dispute on the local authority's behalf, thus undermining the mediation as a final outcome could not be reached on the day. As one voluntary organisation representative told us:

'[T]he 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.'

However, mediation providers said that they work hard to ensure that someone from the local authority with the authority to settle the dispute is present.

One theoretical concern about mediation is that parents may be settling for too little – in other words, that it can affect the 'justice' in the outcome of a dispute by denying the parents and child what their rights entitle them to and what the tribunal might have accorded them. The responses in our research indicate that this is a difficult matter to judge. Often the decision is partly based on evidence and perceptions that come to light during the discussions. Determining what the optimum outcome might have been for the parents and child is problematic when all the circumstances are not known. Furthermore, it is important to emphasise that the capacity of the local authority to deliver an

outcome that is the best for the child is limited by its need to balance the parents' wishes against the competing demands on its resources from other children's needs, something that the law to some extent recognises.⁹⁸ This means that the 'justice' of an outcome cannot always be judged simply on the benefits to the parents or individual child. While it might be seen as unjust that the outcome does not accord with parents' wishes or perceptions of need, it may nevertheless have been appropriate in wider 'social justice' terms.

The quality of the mediator and the presence of support for parents are seen as important factors in ensuring that parents do not end up settling for too little in a mediation. Interviewees associated quality with experienced mediators, mediators making the implications of decisions clear to parties, the presence of a supporter for parents and opportunities for breaks in the meeting for consideration and discussion.

Mediation and appeals to the tribunal

The majority of the interviewees considered that the impact of mediation on the number of appeals to the tribunal was minimal, mainly because there were so few mediations overall. However, one local authority reported that mediation had prevented two disputes from going to appeal or to court, and 'just for those two alone [mediation] is useful to have'. Mediation providers, moreover, felt that the majority of cases that came to them were thereby diverted away from going to the tribunal and some were angered by the suggestion in the 2007/08 SENDIST annual report that reductions in appeal numbers were not a consequence of mediation, particularly when appellants were not routinely asked whether they tried mediation or their reasons for withdrawal of an appeal. But voluntary organisations reported that most cases going to mediation also went to the tribunal. Often parents want, through an appeal, to secure a final binding decision or to simply feel that they have done everything they can for their child. Seemingly a far greater impact on the number of appeals is regarded as being caused by the

⁹⁸ See, for example *R v Surrey County Council Education Committee ex parte H* (1984) 83 LGR 219; and Education Act 1996, Sch 27, para 3.

'informal' mediation undertaken by PPS. As one representative told us:

'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'

We also elicited views on the tribunal itself, to see whether there are any pressing concerns that would reinforce the case for mediation. On the whole the tribunal has a good reputation for treating parents fairly, although many of the local authorities in our survey in fact considered that it tends to lean towards parents. Our interviewees voiced only a few criticisms of the tribunal, such as that some members had rather fixed views and that some parents felt they were not listened to. The fact that the tribunal is independent and makes a binding decision was seen as particularly advantageous. We were nevertheless told that sometimes the local authority will not fully implement the tribunal's decision, although that was occurring with reduced regularity.

Late withdrawal of so many appeals, often on the day of the hearing, was regarded by the tribunal chairs we interviewed as inefficient and a waste of time. However, voluntary organisations believed that the fault lay with local authorities which realise very late that their case is indefensible, prompting a concession. On the other hand, a local authority told us that in some cases the parents had made their appeal without first engaging in any discussions with the authority; as the authority was already sympathetic to their case the matter could have been resolved without an appeal. Indeed, it was also explained to us that the high number of withdrawals was not due to parents giving up, but rather because they obtained the outcome they wanted.

Tribunal appeals can take several months to come to a hearing. Many interviewees, from all groups, mentioned that this is irreplaceable time in a child's education. As noted above, mediation is seen as far quicker. Some of the voluntary sector

interviewees opined that local authorities see this as advantageous since it deters some parents from pursuing an appeal or, if they do appeal, delays the need for extra expenditure consequent on a ruling. Almost all the interviewees reported that although parents did not enjoy the experience of going to the tribunal and found it very stressful, it was worthwhile given the possible end result.

One suggestion made by several respondents was that mediation should be *built into* the tribunal process itself and that this could help to reduce the number of last minute settlements at the tribunal. 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, a SENDIST representative argued that mediation within the tribunal procedures could cause further delays in the determination of disputes. There is now provision within the new Chamber rules for the tribunal to suggest mediation to the parties, but not to require them to pursue it. 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.'⁹⁹

The tribunal is also required to seek to give effect to the 'overriding objective' of the rules, which includes seeking flexibility in the proceedings but, at the same time, avoiding delay.¹⁰⁰

The need for a flexible approach is reinforced by the view expressed in interviews and in our surveys of PPS and local authorities that mediation works for some types of case but is less suitable for others. In particular, mediation was considered unsuitable for disputes about school placement because there is not really any scope for compromise. Perhaps not surprisingly the mediation providers we interviewed

⁹⁹ SI 2008/2699, op cit n 8.

¹⁰⁰ Ibid, r 2.

were less doubtful that the utility of mediation was restricted to particular types of case. They felt that potentially all special educational needs disputes were suitable for mediation: only factors to do with parental attitudes, such as an unwillingness to negotiate, a threat of physical violence or a failure to engage in communication with the local authority would make it unsuitable.

PARENTAL BACKGROUND

Socio-economic and cultural background

We sought to gather views on whether parents' social background and ethnicity were likely to have an impact on access to redress. In general, socio-economic factors were regarded as influential, in that wealthier, better educated parents were considered to have an advantage. This seemed to be more marked in relation to appeals, in part because being able to afford a solicitor and pay for expert witness evidence could enhance the prospects of success, even though *all* parents would be able to secure support from PPS or a voluntary organisation in bringing an appeal. As one head teacher from a special school told us:

'they got their own solicitor on board who then took it to [a named barrister] and as soon as [that person] got involved the authority coughed up so the middle class parents know how the system works and how to deal with professionals.'

Interviewees also commented that it requires a certain literacy level to make an appeal to the tribunal as there is complex information to read and understand.

Cultural issues were mentioned as barriers to access. For example, we were told that often Pakistani families prefer to resolve problems privately, and that it runs against traditional Chinese culture to challenge decisions of people in authority. On the whole, however, the key informant responses and our surveys of local authorities and PPS indicate that ethnicity does not have a significant impact on access to or experience

of mediation or the tribunal.¹⁰¹ This is consistent with the findings of Genn *et al*'s research for the DCA, which looked at the experiences of Black and Minority Ethnic (BME) tribunal users across the SENDIST and two other tribunals. Genn *et al* found that being from a BME background did not affect the outcome of tribunal cases, but that other factors (language, literacy, culture, education, confidence and verbal fluency), which cut across different ethnicities, affected people's abilities to present their case. Part of the proposed solution to this was to ensure that the tribunal judiciary is equipped with the necessary and appropriate skills to play an enabling role towards appellants, plus facilitating legal representation in some cases. One of our local authority interviewees suggested that local cultural factors may also be important: parents in some areas are by nature or tradition less inclined to question a refusal.

Interviewees mentioned various compensatory factors as regards inequality derived from socio-economic background. They include local authorities making referrals to mediation themselves, or PPS doing so on behalf of the parents. Another factor would be the authority referring parents who need support to PPS. Properly developed access policies and clear information were also considered important. Schools also had a contribution to make by supporting parents where the local authority refused to carry out an assessment or issue a statement, if they felt it was in the best interests of the child. 'Inequality of arms' at a mediation meeting can also be alleviated through PPS or voluntary organisation attendance, although this does not occur in every case. But we were also told that some parents tend not to fight any decisions and therefore never get to the dispute stage. Those who give up tend to be the ones without any support.

Gender

There is some evidence from research into family mediation on the effect of gender on participation and power imbalances.¹⁰² One finding from this

¹⁰¹ H Genn, B Lever and L Gray with N Balmer, *Tribunals for Diverse Users* (DCA, 2006).

¹⁰² S Tilley, 'ADR professional: recognising gender differences

research is that women approach mediation in a different way to men, in that they often seem to act in a less directly self-interested way. They often do not consider their own interests in the negotiation, but rather give priority to their family's interests and especially those of their children, and feel guilt at taking too much. Given that in special educational needs mediation the principal focus is meant to be on the needs and interests of the child, the implication of these findings is that women's participation in mediation may be particularly beneficial.

As it happens, we have found that mothers are more likely to be directly involved. In our survey of PPS, 93% of the respondents said that they more likely to have contact with mothers or female carers than their male counterparts. A few of our interviewees said that this is because often children with special educational needs come from split families and the mother is generally the parent with care; others thought it was because the mother in any event tends to play the dominant parental role and to have more contact with the school. However, if the parents lived together they would both usually attend formal mediations or tribunal hearings and 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 the behaviour of men and women 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 said that the mother tended to be more emotional and the father more business-like and wanting to play '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. Several respondents commented that fathers tended to be less accepting that their child had special educational needs in the first place. Fathers were also reported to tend to want quick solutions and not to talk about the history, and so were less likely to favour a conciliatory route.

in all issues mediation' [2007] Fam Law 353.

CHILD PARTICIPATION

Children's participation in special educational needs dispute resolution raises various important issues to do with children's rights, which are explored in greater detail elsewhere.¹⁰³ Such participation is both consistent with one of the five 'fundamental principles' in the Special Educational Needs Code of Practice, that 'the views of the child should be sought and taken into account',¹⁰⁴ and of course with the child's right under Art 12 of the United Nations Convention on the Rights of the Child 1989.¹⁰⁵

In our survey of PPS, 84% of respondents indicated that the input of children's views was important or very important. Similarly, there was a similar general consensus among our key informants on this issue, but it was acknowledged that there are often difficulties in ascertaining these views due to the child's age and ability. The opportunity to express their views was considered to be valuable for children as it helped them to take ownership of decisions made about them. Children's views could also have a bearing on the likely success of implementing a decision, for example, regarding placement. As a special school head teacher told us:

'[it is] 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.'

¹⁰³ See N Harris, 'Playing Catch-up in the Schoolyard? Children and Young People's "Voice" and Education Rights in the United Kingdom' (2009) *International Journal of Law, Policy and the Family* (forthcoming); C O'Mahoney, 'Special educational needs: balancing the interests of children and parents in the statementing process' [2008] CFLQ 199.

¹⁰⁴ Op cit n 69, para 1.5.

¹⁰⁵ This provides: '1. Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law'.

One local authority interviewee also argued that consulting the child and involving him or her in plans for his/her education may contribute to dispute prevention.

We were reminded that it may be a skilled process to gain the views of the children with particular kinds of special educational needs, especially those which affect communication. Also, because of parents' ability to influence their children's views, many interviewees thought it was important that an *independent person* garner the views of children and pointed out how easy it is to lead a child's answer, especially children with autism.

Local authorities have a duty to try to ascertain the child's view when a disagreement goes to the tribunal,¹⁰⁶ however it appears that its fulfilment is variable. A SENDIST representative said that this requirement was 'was more honoured in its breach than in its observance'. It seems that many local authorities will record that 'it was not possible' or 'it was not appropriate' to gain the child's view. But it was suggested to us that tribunal members should be prepared to challenge such a statement. There is, however, no specific requirement to seek out the child's view in the mediation process. Nevertheless, the mediators to whom we spoke claimed to make an effort to gain the child's views, usually in a pre-mediation meeting for this purpose.

Mediation providers generally preferred to have the child present at a mediation meeting (usually only for part of it), but 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 special educational needs were very severe. Other means to ensure that the child's view was taken into account included video or audio recordings and questionnaires. Overall, the child's level of input into mediation was dictated by the parents. The principal advantage of children participating in mediation was seen as turning the focus back to them and their needs.

Similarly, in tribunal hearings, if children attend hearings (which happens rarely, although they have

a right to attend, as noted above¹⁰⁷), they do so only at the beginning and there are often good reasons for them not to attend: they can be disruptive; if they appear more disabled than they are, panels may 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 commented on cases they had been involved in or knew about where the child's presence at the mediation or tribunal had made a positive difference to the outcome. But there was a concern that looked after children do not feature among referrals to mediation and appeals to the tribunal even though these children may often be those most in need.¹⁰⁸

CONCLUSION

It is clear from the responses from key informants that mediation may have a role to play in the resolution of disputes about special educational needs, but that its introduction has not had the impact that may have been intended. Indeed, the responses in our survey of local authorities and PPS also confirm that mediation seems neither to have reduced the number of appeals to the tribunal, nor led to increased withdrawal of appeals in progress. The next stage of our research, involving a close examination of individual cases in three local authority areas, including an exploration of the factors that influence the choice of mechanism for dispute resolution of individual cases, will tell us more about the place and value of mediation in this field. Nevertheless, the key informant findings, along with responses to our local authority and PPS surveys, lead us to the preliminary conclusion at this stage of our research that one of the principal difficulties with mediation is how it and its role is perceived: it is regarded as lacking the straightforwardness, informality and immediacy of parental support/advocacy and negotiation as provided or facilitated by PPS and voluntary organisations, but at the same time it is seen as less

¹⁰⁶ This duty is now in the Practice Direction – see n 8 above.

¹⁰⁷ SI 2008/2699, op cit n 8.

¹⁰⁸ For discussion, see N Harris, Editorial, 'Appeal Matters: Championing "Looked After" Children' [2008] Ed Law 3.

expert, independent and authoritative than the well-established tribunal.

The evidence to date therefore suggests to us that if mediation is going to have a meaningful role in the future, it should be better promoted but should perhaps be available as a stage in the appeal process itself, provided it does not unduly lengthen the process as a whole. The list of advantages attributed to mediation is a long one and in theory it sounds the ideal forum for many types of special educational needs disputes and a more accessible

option than the tribunal. The problem for mediation is that the alternative mechanisms by which disputes are resolved are generally regarded as effective by people working in the field. These people are in a sense the gatekeepers to mediation as a form of redress, because although parents are required to be told about mediation by the local authority and can select it unaided, in practice this is a field where many parents need and rely on support in challenging any decisions about their child's education.