

Dispute Resolution in Additional and Special Educational Needs: Local Authority Perspectives

Journal of Education Policy, (2010) 25, 1, 55-71

Abstract

The UK Government is keen to encourage the use of mediation, rather than court or tribunal, as the best means of resolving disputes between citizen and state on the grounds that legal proceedings are costly, lengthy and stressful. The policy of proportionate dispute resolution appears to be particularly applicable to the field of special educational needs (SEN), where both mediation and tribunal are available as dispute resolution mechanisms. However, evidence suggests that very little use has been made of mediation in either England or Scotland. In order to understand this phenomenon, this paper begins by investigating the dominant policy frameworks in SEN (England) and ASN (Scotland). Subsequently, the attitudes of English and Scottish local authority officers are explored. It is argued that both countries now have an eclectic mix of policy frameworks in play, including the traditional models of bureaucracy and professionalism, and the more recent models of managerialism, consumerism and legality. In Scotland, professionalism and bureaucracy continue to dominate, and this is associated with more restricted access to and less use of all forms of dispute resolution, in particular the tribunal.

Dispute Resolution in Additional and Special Educational Needs: Local Authority Perspectives

Introduction

As part of its public service reform agenda, the Government signalled its desire to move away from the resolution of civil (rather than criminal) disputes through courts and tribunals, seen as expensive, inefficient and stressful, and make greater use of alternative dispute resolution mechanisms, such as mediation (DCA, 2004). The White Paper on reform of administrative justice, now enacted under the terms of the Tribunals, Courts and Enforcement Act (TCEA) 2007, recommended reforms to the tribunals system and a much greater focus on mediation. 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), 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...' (Newman and Clarke, 2009: 18). Policy actors of course play a major role here, and in the case of special educational needs (SEN) in England and additional support needs (ASN) in Scotland, parents and professionals may find themselves tugging in different directions. It should be noted that SEN refers to children with learning difficulties or disabilities, whilst ASN is a much broader concept including children who have difficulty in learning for whatever reason. Paradoxically, a much higher proportion of children in England (20%) are identified as having SEN, whereas only about 6% of children in Scotland are identified as having ASN.

SEN has been identified as a field which may be particularly suited to the resolution of disputes through mediation, as opposed to tribunal (Leggatt, 2001; Gersch, 2003; Henshaw, 2003; Supperstone et al., 2006; Stiltz and Sheldon, 2007; Richardson and Genn, 2007). However, despite strong Government endorsement of mediation, this route appears to have been used very little so far (Tennant et al., 2008; name removed forthcoming). In order to understand this low take-up of mediation, this paper explores the views of local authority officers, who might have been expected to steer parents towards mediation as a welcome alternative to tribunal procedures.

The paper begins by discussing key policy developments in the field of SEN and ASN over recent years, particularly in relation to dispute resolution. The policy discourses informing different types of dispute resolution are analysed and their impact on the power dynamic between parents and professionals is discussed. Local authority officers' views of different modes of dispute resolution (low level mediation, formal mediation and tribunal) are explored. Finally, the implications of these findings with regard to the UK Government's desire to promote alternative dispute resolution are examined

Methods

This paper draws on an analysis of official statistics on the use of the Special Educational Needs and Disability Tribunal (SENDIST) in England and the Additional Support Needs Tribunals for Scotland (ASNTS). Data are also drawn from a survey conducted with English and Scottish local authority officers between May and July 2008. Because of major differences in the number of local authorities and the development of dispute resolution policies in the two countries, the questionnaire format was adapted for the particular national context. In both countries, the questionnaire was sent to the person with responsibility for ASN or SEN in all local authorities (32 in Scotland, 150 in England). Two reminders were issued, and responses were received from 27 local authorities in Scotland (an 84% response rate) and 60 local authorities in England (a 40% response rate).

The questionnaire included both open and closed questions. The quantitative data were analysed in SPSS and a thematic analysis of the qualitative data was conducted. Topics covered included the nature of disputes and the strategies used to avoid them; the range of approaches to dispute resolution employed in the authority; trends in disputes; views and experiences of the various dispute resolution mechanisms, including judgments as to their suitability. This questionnaire also asked about any particular categories of parents who might be disadvantaged by mediation or tribunal. In this paper, we focus on different assessments of mediation and the tribunal in England and Scotland. Before turning to the survey results, we first of all outline policies and underpinning discourses in the field of SEN and ASN.

Administrative justice in the field of SEN and ASN

Much previous research on administrative justice, including work specifically in the field of SEN (name removed), has used as a reference point Jerry Mashaw's work on the determination of disability claims in the US (Mashaw 1983), which can be applied to all stages of decision making. Mashaw's typology reflects different goals and 'legitimizing values' in models of administrative justice, which may compete for pole position but are not mutually exclusive. The three models are: *bureaucratic rationality*, based on the application of rules within a bureaucratic framework to produce fair, accurate and consistent outcomes; *professional treatment*, based on meeting the needs of clients through the exercise of professional judgement and discretion; and *moral judgement*, a legal model based on assessing the justice of competing claims.

Name removed (2003) maintained that all of these models were operating in the field of special educational needs in England and Scotland, but they also extended Mashaw's typology to incorporate three additional models of administrative justice: '*managerialism*' (reflected in the imposition of procedures and controls over the way that work is done, such as time limits for stages in assessment or statementing; '*consumerism*' (reflected in policies to encourage active participation by parents, including engagement with Parent Partnership Services and mediation,); and '*markets*' (reflected in parental choice, albeit that this is somewhat curtailed). It is not our aim to re-assess or extend this theoretical framework here, but we do regard it as a useful basis for distinguishing different policy approaches at play in this field north and south of the border.

SEN policy and administrative justice in England

For about a decade following the publication of the Warnock report (DES, 1978) the English and Scottish systems moved along roughly parallel lines, both emphasising bureaucratic decision-making, professional discretion and partnership with parents. However, during the 1990s, there was increasing divergence as Conservative

educational reforms were implemented more forcefully in England, aimed, broadly, at regulating public sector performance and empowering parents as consumers. The Code of Practice and the Special Educational Needs Tribunal (SENT) (DfE, 1994; DfES, 2001), implemented originally under the terms of the Education Act 1993, were particularly important in altering the balance of power between parents and professionals, whilst in Scotland the emphasis was on advice on good practice. A number of Scottish Office publications (e.g. SOEID, 1998) made recommendations to schools and local authorities about how to implement their legal responsibilities in a fair and efficient manner, but this advice was generally not enforced by legislation.

Campaigns in England and Wales by parents and voluntary organisations, driven by concerns about local authorities' under-funding of the education of children with SEN, precipitated a tighter legal framework under the Education Act 1993. All state schools were obliged to have regard to the *Code of Practice on the Identification and Assessment of Special Educational Needs* (DfE, 1994) and publish information about their policies for children with special educational needs. The Code of Practice imposed stringent regulation on professionals, including tight timescales for assessment and the drafting of the statement of needs. The Commission for Local Administration in England published data on average assessment times in each local authority. Failure to comply with these timescales might justify a complaint of maladministration being lodged with the ombudsman. The 1993 Act also established a parent's right to take a case to the SENT. The aim of the SENT, operational from 1994, was to act as final arbiter where consensus had broken down between parent and the local education authority. The numbers of appeals received and registered increased significantly over the period 1997/98 to 2002/03, before starting to decrease in 2006/07 (see figure 1). The most common reasons for appeal concerned a local authority's refusal to assess a pupil or the contents of the statement, and many appeals were settled before a hearing.

Figure 1 about here

Appeals, the grounds for which are now contained in the Education Act 1996, have been unevenly distributed throughout the country, with London boroughs having the highest rates of appeal. There were also relatively high rates of appeal in the south east and pockets in the north-west. Of the cases heard and decided on in 2006-07, 80% were upheld and 20% dismissed. Disability discrimination cases were heard by the tribunal, renamed SENDIST following the extension of its jurisdiction under the Special Educational Needs and Disability Act (SENDA) 2001: to date 489 complaints have been lodged and 358 registered.

In terms of comparisons with other educational appeal bodies, the SENT represented a 'significant development in education dispute resolution in England and Wales' (name deleted, 1997: 228) in part because it was the first such body required to have a lawyer chair and two specialist panel members and to be governed by detailed rules of procedure. In November 2008, SENDIST was abolished and its jurisdiction was transferred to the Health, Education and Social Care Chamber of the new First-tier Tribunal (FTT) established under the TCEA 2007. There has been no change to the composition of the tribunal at the hearing, namely a legal chairperson and two specialist members who have knowledge and expertise of children with special educational needs. The tribunal attempts to be user friendly (name removed, 1997; Evans, 1998; 1999), although it may not necessarily be experienced in that way by parents (Runswick-Cole, 2007). In comparison, exclusion appeals run by local authorities tend to proceed in a somewhat rigid and un-user unfriendly manner (name removed, 2000), and similar criticisms have been made of exclusion appeal committees in Scotland (Council on Tribunals, 2004), which were found to lack both

independence and expertise. It might be argued, therefore, that the FTT, like its predecessor, provides access to a superior standard of justice than routinely encountered within the education system. On the negative side, it has been seen as a weapon of the middle classes, thus undermining the local authorities' attempts to ensure equity of resource allocation (name removed, 1997).

The SENDIST Annual Report for 2007/08 reveals that a quarter of parents have legal representation at hearing, compared with 10% of local authorities (although of course local authority officers will have access to in-house legal support). Twenty nine per cent of parents are supported by another representative, normally a voluntary organisation. Legal aid has not been available to parents bringing cases to the tribunal. Many parents (around a third of parents in the days of the SENT) present independent assessments as evidence to the tribunal and these appear to influence the outcome of the appeal in favour of the parent (name removed, 1997). The advent of the SENT was indicative of the growing importance of the legal and consumerist policy frameworks in England, with individual parents empowered to seek justice from an impartial body.

It is important to recognise that particular policy frameworks have both positive and negative trade-offs. The greater emphasis on consumerism, legality and markets in England during the 1990s meant that parents were able to exert more control over the services on offer. However, this produced a number of pressures within the system, not least on professionals who regarded themselves as increasingly under scrutiny (Vincent et al., 1996). The Green Paper *Excellence for All Children: Meeting Special Educational Needs* (DfEE, 1997) drew attention to the rapid acceleration in the number of children with statements in mainstream primary and secondary schools and the pressure on resources which this produced. It was suggested that the number of statements should be reduced and ultimately the system should be scrapped, although this produced an outcry from parents' groups and voluntary organisations. The DfES, and now the DCSF, have nevertheless remained intent on reducing reliance on statements and increasing rates of inclusion (Pinney, 2004; Audit Commission, 2002; House of Commons Select Committee Report, 2007). The number of statements being opened by local authorities has in fact declined of late.

In relation to resolving disputes, efforts have also been made to encourage parents to use mediation rather than the tribunal. In England, under the terms of SENDA 2001, a duty was placed on local authorities to ensure that parents had access to advice and information on SEN matters on the basis of central guidance which, in the form of the Code of Practice (DfES 2001), emphasises the role of Parent Partnership Services (PPS). An evaluation conducted by Rogers et al. (2006) indicated that PPS-run local mediation services were greatly valued by parents, although in smaller authorities resources were limited, restricting the range of possible activities. Tod (2003) adopted a rather more critical stance in relation to PPS, noting that conflicts in the assessment of SEN really need to be resolved between the school and the parent, and introducing the PPS as an additional and more distant element may actually complicate rather than resolve difficulties. SENDA also placed a duty on local authorities to ensure that parents had access to arrangements for the resolution of disagreements through independent providers; the Code emphasises that this essentially means ensuring provision of mediation services. These services might be provided by the PPS as long as 'independent persons' were involved, or by external mediation providers. Although mediation is premised on the understanding that the parties agree to abide by any settlement reached, the legislation in England makes it clear that these arrangements for dispute resolution do not prejudice the parent's right of appeal to the tribunal, which makes a legally binding decision.

ASN policy and procedural justice in Scotland

Whilst the Education Act 1993 ushered in a ferment of activity in England around SEN, with many innovations geared towards empowering parents and regulating professionals, in Scotland things were relatively quiet. However, in 1999, Children in Scotland received funding from the Scottish Executive Education Department to provide a national advice and information service (Enquire) which was intended to operate impartially but not to advocate for parents. As in England, Part 4 of the Disability Discrimination Act (via SENDA, 2001) placed a duty on the Disability Rights Commission (now Equality and Human Rights Commission) to provide conciliation services, although these were very rarely used. Of far greater influence has been the Education (Additional Support for Learning) (Scotland) Act 2004 (the ASL Act), which broadened the definition of additional support needs (ASN), abolished the record of needs and established a new document, the coordinated support plan (CSP), for recording the needs of children with multiple, complex and enduring difficulties requiring significant multi-agency support. The ASL Act also put in place a number of new ways of resolving disputes, discussed below.

The establishment of the Additional Support Needs Tribunals for Scotland (the ASNTS), more than a decade after the SENT in England, is a major new development. Parents can make a reference to the ASNTS on a number of grounds, including failure to conduct a statutory assessment, failure to open a Co-ordinated Support Plan (CSP), the CSP's contents and the school named. However, the qualification criteria for accessing the ASNTS are very high, since only those who already have a CSP, or who can make a reasonable case that they meet the criteria for such a plan, are eligible to make a reference. This automatically rules out the vast majority of children with ASN, since, in practice, only a tiny number are judged by local authorities as meeting these criteria (0.4% of the school population, compared with 2% of children who previously had a Record of Needs (HMIe, 2007)). Unlike England and Wales, where the SENDIST hears disability discrimination cases, in Scotland these are still heard by the Sheriff Court, although this is set to change under forthcoming single equalities legislation.

In England, cases in the first year of SENT were threefold greater than expected. In Scotland, because of the very stringent qualification criteria, the reverse is the case and the number of tribunal references is much lower than expected. Seventy six references were made to the tribunal during the period April 2007 to March 2008, and these were concentrated in a small number of local authorities (see figure 2)

Figure 2 about here

Seventeen of these were placing requests and 59 related to CSPs. The majority of parents were represented by one voluntary organisation (ISEA, Independent Special Education Advice) at the tribunal with a much smaller proportion having legal representation. Just over half of the cases represented by ISEA at reference were withdrawn, 12 led to a hearing and a further 6 were still to be heard. Whilst the number of cases where parents had legal representation was low, a relatively smaller proportion of these were withdrawn. References made by parents without any representation were about as likely to be withdrawn as those represented by ISEA. Just over half of the Scottish local authorities were legally represented at the hearings, a much higher proportion than is the case in England, although the numbers are very low. Of the ten cases with legal representation, six used in-house legal teams and four used counsel. The tribunal upheld the parent's reference in 15 cases (ten of these without an oral hearing) and the local authority's case for 7 of the

references. Twenty-two of the cases were dismissed and of these, 21 had been withdrawn by the parents before an oral hearing. There is quite a wide regional variation in the number of references to the tribunal, but thirteen authorities have not been subject to a single reference and this includes Glasgow City Council in spite of having the largest pupil population and a high proportion of children living in poverty. Eilean Siar (the Western Isles), with one of the smallest pupil populations, has a relatively high number of references.

Parents whose children have ASN but who do not meet the criteria for a CSP (the vast majority) may request independent adjudication if there is a dispute with the local authority. Adjudicators are appointed by the Scottish Government and make decisions on the basis of written documents submitted by the local authority and the parents. There is no hearing and no record of cases is maintained, possibly leading to questions about its transparency and independence. To date, it appears that there have been very few requests for adjudication (name removed, 2009), although potentially, there could be far more cases requiring adjudication compared with the number of cases which are likely to meet the criteria of the ASNTS.

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

To summarise, the educational reforms of the 1990s in England, which drew strongly on policy discourses of managerialism, consumerism and legality, tilted the balance of power in the direction of parents, making professionals far more accountable, opening up accessible appeal routes and allowing parents opportunity to influence process (name removed, 2003). In Scotland, the ASL Act was implemented more than a decade after SEN reforms in England, and increasing parents' legal rights, specifically through the creation of new appeal routes, was one of its prime objectives. It also sought to increase parents' voice through mediation. Whilst the Code of Practice was intended to regulate the actions of local authority staff, a number of statutory duties were removed such as the requirement to open Records of Need and undertake future needs assessments. In Scotland, therefore, some aspects of the ASN reforms boosted professionalism and bureaucracy, whilst others were rooted in managerialism, consumerism and legality.

Having outlined these policy shifts, we now examine local authority officers' views of the nature of disputes, ways of avoiding disagreements and the pros and cons of different dispute resolution methods, specifically mediation and tribunal. Adjudication is not discussed here because it applies only in Scotland. The underpinning approaches to procedural justice evident in English and Scottish local authority officers' accounts are also discussed.

Local authority officers' views of dispute resolution

The nature and extent of disputes

Scottish officers believed that disagreements were rare, and when they arose, were likely to focus on access to classroom support and issues around opening and managing CSPs. This view was reinforced by a survey of Scottish parents (Weedon and Riddell, 2009 forthcoming) which revealed that the largest number of disagreements centred around additional educational support followed by assessment by educational staff. One respondent noted that there had been an increase in parental expectation of one to one classroom support and there were disagreements over what constituted 'significant input' from other agencies. A number of respondents felt that the ASL Act did not fully stress that problems and conflicts should be resolved at the local level wherever possible. The provision of a number of new routes of redress was believed to have contributed to a far more confrontational approach, damaging Scottish traditions of consensus and collectivism:

This education authority has a history of having been able to resolve most disagreements at school level and having very few formal disputes such as referrals to Scottish Ministers. Disputes have escalated since the ASL Act came into force. Securing an active commitment to dispute reduction from advocacy organisations would help. (SLA 5)

Whilst the new legislation has the 'right to complain' (etc.) properly built in, there is some evidence to support the idea that vexatious support for complainants by interest groups (which is not in the best interest of specific young people but may be of value for 'the cause'), has significantly increased. The 'cost' is often the service itself which cannot sustain the work it does in relation to children and young people. (SLA19)

Scottish local authority officers were asked to comment on the actions they were taking to reduce the number of disputes. Some officers indicated that they had taken steps to improve communication with parents as the best means of preventing disputes arising in the first place:

We always aim to have zero disputes as a target. The focus has been on building better partnerships with parents and other agencies e.g. through the use of Person Centred Planning. (SLA 12)

Better communication and understanding between home and school (SLA 14)

There was clearly little sympathy with the idea that services might improve by listening to the voices of consumers:

Parental guidance might place more emphasis on the fact that going to Tribunal is a very poor way of seeking the best educational outcomes for their child. Parental guidance might discuss the possibility that CSPs actually

change nothing if practice is already good. (SLA 13)

In England, thirty nine per cent of the local authorities believed that disputes had increased over the past two to three years, as opposed to twenty four per cent believing it had decreased. Those who believed there had been an increase tended to blame parents' greater awareness of their rights and tendency to be adversarial, encouraged by voluntary organisations and solicitors:

We have a significant number of parents who adopt a consumerist/ I know my rights attitude, they approach the LA expecting conflict and it is very difficult to communicate with them. (ELA 89)

Parents are more aware of options open to them; there is constant pressure on special school placements; parental willingness to resort to litigation; solicitors actively advise parents against disagreement resolution. (ELA 114)

English respondents explained the measures they used in order to avoid or resolve disputes, which generally involved instigating meetings with parents and encouraging their involvement with Parent Partnership Services, which were seen as very important in terms of defusing conflict :

There is a Named Case Officer for each case who will meet with parents and schools at an early stage to resolve concerns. Full contact details are provided on all correspondence. The SEN Team attempts to resolve all concerns/differences before a more formal stage. There is a Parent Partnership Service which provides free and independent support to parents, and has a liaison role with the SEN Team/ schools. Parents are also given information about Dispute Resolution. (ELA 90)

The LA officers always offer to meet with parents to discuss issues and encourage schools to do the same. We also have a good relationship with the PPS. (ELA 130)

Local level informal resolution of disputes in this way predominates across the local authorities surveyed and is perhaps symptomatic of a greater willingness on the part of the authorities to engage with parents, often with the underlying objective of avoiding the potentially negative consequences (in resource terms) that might result from a tribunal decision. Yet ironically many LAs in fact saw *formal* mediation as crucial to resolving disputes, even though a high proportion of them had not been involved in any such mediations over the past few years.

Use of independent mediation services

All local authority officers were asked to identify the mediation service with which they worked. In Scotland, twelve mediation services were referred to, with one organisation working with seven authorities. Two authorities did not have a contracted mediation provider and one used in-house provision. Four respondents declined to provide an answer, perhaps indicating that they had not established a contract with a mediation service.

In England, sixteen organisations were named, with four organisations handling the majority of cases. Following the implementation of SENDA in 2002, Parent Partnership Services established regional partnership arrangements so that

independent mediation would be available immediately. The expectation was that over time, local authorities would develop relationships with other independent mediation providers, but the bulk of mediation services were still being provided by these organisations. In both England and Scotland, the majority of local authorities had service level agreements with mediation providers, although in some cases they paid for mediation on an ad hoc basis.

Experiences of mediation

Since mediation had only been in place for a relatively short time in Scotland, respondents were asked to comment on the number of mediations in 2006/07, effectively since the enactment of the legislation in November 2005 (table 1). In England, where mediation became more established following the implementation of SENDA in 2002, the data gathered were for the last three years (see table 2).

Tables 1 & 2 about here

In both countries, most authorities had had very few mediations, with a small number of outlying authorities having a high number. A smaller proportion of Scottish local authorities had no cases of mediation in 2006/07 (18% as opposed to 46%). In England in 2005-06, 82% of local authorities had 0-2 mediations, and in 2006-07 and 2007-08, this proportion rose to 86% and 93% respectively, suggesting that the number of mediations is actually falling slightly. Of the 55 local authorities responding to the question, only seven had experienced an increase in mediations over the last three years, and the increase was usually very small.

In both England and Scotland, although mediation was very little used, it tended to be regarded positively, particularly in Scotland. Just over a third of English respondents (37%) and half of Scottish respondents (52%) felt that it resolved disputes quickly, and it was also seen as less stressful for parents than the tribunal (77% of English respondents and 85% of Scottish respondents expressed this view). The ability of mediation to increase all parties' understandings of each others' positions was seen as an advantage by 82% of English respondents and 85% of Scottish respondents. Almost half of English respondents (47%) felt that the fact that mediation outcomes are not binding may be a disadvantage for parents. Although the Government's aim in establishing mediation in this context was to reduce resort to appeals, additional comments by local authority officers in England indicated that mediation might be used by parents as a rehearsal for SENDIST, did not appear to prevent appeals and was costly for local authorities.

Figure 3 summarises officers' level of satisfaction with mediation, which in Scotland was very high (92% were either satisfied or highly satisfied), despite the fact that it had not been greatly used. In England, by way of contrast, a somewhat lower proportion of officers (67%) were either satisfied or highly satisfied with mediation.

Insert figure 3 about here

Comments from Scottish respondents generally reflected this positive assessment:

[The largest mediation provider] is very approachable by parents and always communicates very effectively with all participants. Mediators are very well trained and mediation sessions very productive. Cases which are not suitable for mediation are recognised and alternatives suggested. (SLA 23)

If conducted appropriately, it will be fair, as will adjudication or tribunal. Less

formal than a tribunal, less emphasis on rules and procedure. Generally it is more efficient in use of time and resources. It is also more conducive to consensus and compromise and supports positive and sustainable relationships. (SLA 27)

Mediation is more in the spirit of the Act to resolve matters without going to the law. (SLA 9)

There were also a few negative comments including the following:

Mediation, like dispute resolution (adjudication) and the tribunal system appear to be a costly system established for little reason and less purpose.... the introduction of adversarial approaches into Scottish education was and remain unwanted and unnecessary. This Council, for example, spends £6,000 per annum as a retainer for mediation services which have never been used. (SLA 25)

Our experience to date is that mediation has not satisfied the parents who generally go on to seek redress/continue their complaint. (SLA 7)

As [Council X] has not yet had a mediation case, it is an expensive service to offer. (SLA 4)

Concerns about the demand for mediation services was also evident in the comments of English respondents, who were inclined to believe that their Parent Partnership Services were able to undertake mediation effectively and an additional service was unnecessary:

[It is] ridiculous that LAs are contracting with mediation services given the extent to which these services are used. (ELA 33)

As we have not used SEN Mediation Service for over 5 years, it is difficult to comment on its usefulness. All I can surmise is that the negotiation skills of LA staff meets parents' needs in dispute resolution – those parents who chose to appeal to the Tribunal declined the offer of independent mediation. (ELA 101)

One reason for this very low use of mediation might be related to parents' access to information about their rights in this regard. In England, the legislation requires information about mediation to be provided to the parent by the local authority when it informs him or her about its decision and provides the required notification of the right of appeal to the tribunal. The parent must at the same time be informed that their right of appeal is not affected by using mediation. Not surprisingly, therefore, it appeared that written information was given to parents of children with statements, but not to other parents of children with SEN. Similarly in Scotland, written information about mediation was given to parents who had requested a CSP and subsequently made a reference to the ASNTS, but not to other parents of children with ASN. In neither country was information on mediation routinely available on council websites for general access.

Respondents' views of the SENDIST and ASNTS

As noted in the previous section, SENDIST, with 0.4 appeals per thousand pupils in 2007, is used far more extensively than the ASNTS (0.1 references per thousand

pupils). Figure 4 summarises English and Scottish local authority officers' level of satisfaction with the tribunal, and shows that, in both countries, it was considerably less popular than mediation.

Figure 4 about here

However, Scottish local authority officers were more critical than their English counterparts, with 56% regarding it as unsatisfactory or highly unsatisfactory, compared with 43% of English officers. By way of contrast, almost half (46%) of English officers regarded the tribunal as satisfactory or highly satisfactory, compared with 40% of Scottish local authority respondents.

Comments from Scottish officers indicated that they saw the ASNTS as unfairly weighted against them and in favour of parents, and there was an implicit defence of the discourse of professionalism and bureaucracy, whereby benign professionals should be left to make decisions in the best interest of their clients, supported by administrators applying principles of fairness:

The tribunal process is adversarial. Assumption that local authority does not act in best interests of child. Assumption that parent knows what's best regardless of professional view/ expertise. No emphasis on/ recognition of the rights of the professional. No requirement that parent is able to show they have a case at point of referral. Where a further referral is made no requirement that parent can show that a change has occurred. Parent could, in theory, make an annual referral. (SLA 23)

There was particular criticism of a voluntary organisation offering lay support to parents making references to the ASNTS, and a law centre offering legal support in a small number of cases:

A less combative approach from independent organisations such as [advocacy organisation] and [law centre] might be more helpful in developing LEA practice/interpretation of the Act, and improving council/parent joint working. (SLA 13)

The process is time-consuming, stressful and adversarial. Influence/ role of [advocacy organisation] is not helpful for parents or local authorities. (SLA 6)

Our experience of the ASN Tribunal has led to no change in provision for the children. It has reinforced the power of [advocacy group] to unnecessarily challenge the authority - where resolution could have been made amicably between authority and parent. (SLA 9)

There is some irony in these criticisms, since, as noted earlier, Scottish local authorities were much more likely to have legal representation at tribunal than were Scottish parents or English local authorities.

Comments by English LA officers also reflected a perception that the tribunal's approached favoured parents, in particular those who were articulate and were able to afford legal backing:

Percentage of cases won by parents means it is biased in favour of parents who can afford legal reps or ALL LAs must be getting it wrong. (ELA 63)

Tribunal can be variable, depending on the panel and the chairman, outcomes can be influenced by the ability and resources of the parents. (ELA 124)

It is not a fair process. It works to the advantage of articulate, able parents who can afford time/ legal representation, LAs are usually fair, tribunal decisions skew resources in the direction of pupils whose parents are articulate and engaged with the process. (ELA 134)

I believe that the presumption of the tribunal is that the parents are likely to be right, and this places a higher burden of proof on the LA. (ELA 146)

The English local authorities thought that disputes between schools and parents were the least suitable for the tribunal, since they tended to concern 'trivial matters' (ELA 52). A few authorities thought that the involvement of the tribunal might damage relationships between schools and parents. School placements were seen by authorities as unsuitable for mediation on the basis that there is little room for negotiation in such cases. Disputes about whether there should be a statutory assessment were considered to be most unsuitable for mediation; as the issue was 'black and white' a tribunal decision might be needed.

Summary and conclusion

As discussed earlier, in both England and Scotland, the field of SEN has always been informed by policies rooted in professionalism and bureaucracy. From the 1990s, onwards, England diverged from Scotland, with a growing emphasis on managerialism, consumerism and legality, reflected in the Code of Practice and the SENT. In Scotland, the older policy models (professionalism and bureaucracy) were dominant for a decade longer, but the ASL Act, with its Code of Practice and new dispute resolution routes, ushered in more diverse policy models, including a much stronger emphasis on legality, managerialism and consumerism. At the same time, the traditional policy frameworks of professionalism and bureaucracy were not abandoned, and were in some ways strengthened.

Looking at the dispute resolution models that have been introduced over the past decade and a half, it is evident that the SENDIST, underpinned by the discourse of legality or rights, has been used extensively, with appeals gradually rising over a ten year period. The ASNTS, by way of contrast, has been used relatively little. This is almost certainly as a result of the extremely high qualification criteria which were set by the Scottish Government in response to active lobbying against its inception by Scottish local authorities. Mediation, underpinned by a discourse of consumerism rather than rights, has been used very little in either country, despite the fact that it is regarded as a more satisfactory form of dispute resolution by local authority officers, particularly in Scotland. Despite this approval, it appears that local authorities north and south of the Border do not go out of their way to encourage parents to use mediation. Access to information appears to be particularly limited for parents whose children have ASN but who do not have a statutory plan and therefore receive official letters as a matter of course. Some officers questioned the necessity and cost of independent mediation, when local authority officers and, in England, parent partnership officers were well equipped to do this job. Tribunals, by way of contrast, were regarded less favourably than mediation in England and Scotland, although English authorities, with far more experience of tribunals, were less critical.

Local authority officers' comments reveal a great deal about the policy models which underpin their practice. In Scotland, and to a lesser extent in England, there appeared to be some hostility to the idea of parents having rights which might be legally enforceable. In particular, there was resentment that parents were being supported by advocacy organisations at ASNTS, despite the fact that Scottish local authorities were making increased use of legal representation and were always supported by in-house legal teams. There was also a degree of bafflement that parents might question professionals' decision. One officer commented:

Parental guidance might emphasise the fact that professional educationists are likely to know more about education and how it works than a lay person – and need not always be suspected of preferring the cheapest option. Parental advice might usefully discuss the possibility that "taking the views of parents and pupils into account" does not mean the LA must do whatever they wish'. (SLA 13)

Particularly in Scotland, it seemed that mediation, underpinned by a consumerist model, whilst not regarded as an unalloyed good, was seen as less pernicious than the tribunal, underpinned by a discourse of legality and rights.

Following the creation of the Scottish Parliament in 1999, commentators have questioned the extent to which policy is converging or diverging north and south of the Border (Mooney and Scott, 2005). This research suggests that in the field of additional support needs, Scotland has inched closer to England in adopting a diverse policy framework, in which professionalism, bureaucracy, legality, managerialism and consumerism co-exist (with marketisation also present, but less obvious due to restricted parental choices). However, in Scotland, the drafting of the legislation in such a way as to exclude most parents from accessing the tribunal indicates a deep discomfort with the discourse of rights, which has established deeper roots in England. In both countries, there is a gap between rhetoric and reality in relation to mediation. Whilst it is seen as 'a good thing', its existence is kept hidden, leading to very low uptake. Parents who are able to use their social and cultural resources to access dispute resolution mechanisms seem to prefer the type of justice available through the tribunal. So although Scotland and England may in some respects have been edging closer together, the distinctiveness of the Scottish educational tradition is still underpinned by the dominance of professionalism and bureaucracy, accompanied by a distrust of parental rights which are seen to challenge collectivism. .

References

- Audit Commission. 2002. *Statutory assessment and statements of SEN: in need of review?* London: Audit Commission.
- Council on Tribunals. 2004. *Annual report 2003/04 HC750*. London: Council on Tribunals.
- Department of Constitutional Affairs (DCA). 2004. *Transforming public services: complaints, redress and tribunals*. London: The Stationery Office.
- Department for Education and Science. (DES). 1978. *Special educational needs*. (The Warnock Report). London: HMSO.
- Department for Education (DfE). 1994. *Code of practice on the identification and assessment of special educational needs*. London: DfE.
- Department for Education and Skills (DfES). 2001. *SEN code of practice on the identification and assessment of pupils with special educational needs*. London: DfES.
- Genn, Hazel. 1999. *Paths to justice: what people do and think about going to law* Oxford: Hart Publishing.
- Genn, H. 2008. Lecture 2: ADR in civil justice: What's justice got to do with it? *Hamlyn Lectures 2008: Judging Civil Justice*. Edinburgh.
- Gersch, A. 2003. Introduction. In *Resolving Disagreement in Special Educational Needs*, ed. I.S. Gersch and A. Gersch, 1-10. London: Routledge Falmer.
- Gersch, A. 2003. Ethical issues and dilemmas. In *Resolving Disagreement in Special Educational Needs*, ed. I.S. Gersch and A. Gersch, 194-205. London: Routledge Falmer.
- Henshaw, L. 2003. Special educational needs and the law: some practical implications. *Education and the Law* 15, no.1: 3-18.
- HMIe 2007. *Report on the implementation of the Education (Additional Support for Learning) (Scotland) Act 2004*. Livingston: HMIe.
- House of Commons Education and Skills Committee. 2007. Special educational needs: assessment and funding. Tenth report of session 2006-07. HC 1077.
- Kirp, D. 1982. Professionalisation as policy choice: British special education in comparative perspective. *World Politics* XXXIV no.2: 137-174.
- Leggatt, A. 2001. *Tribunals for users - one system, one service*. London: The Stationery Office.
- Mashaw, Jerry. 1983. *Bureaucratic justice: managing social security disability claims*. Newhaven and London: Yale University Press.
- Mooney, Gerry and Gill Scott (eds.) 2005. *Exploring social policy in the 'new' Scotland*. Bristol: Policy Press.

Newman, John and Janet Clarke. 2009. *Publics, politics and power: remaking the public in public services*. London: Sage.

Pinney, A. 2004. *Reducing reliance on statements: an investigation into local authority practice and outcomes*. DFES Research Report 508. Nottingham: DfES.

Richardson, G. and Genn, H. 2007. Tribunals in transition: resolution or adjudication? *Public Law*, Spr: 116-141.

Rogers, R., Tod, J., Powell, S., Parsons, C., Godfrey, R., Graham-Matheson, L., Carlson, A. and Cornwall, J. 2006. *Evaluation of the special educational needs parent partnership services in England RR719*. Nottingham: DfES Publications.

Runswick-Cole, K. 2007. The tribunal was the most stressful thing: more stressful than my son's diagnosis or behaviour: the experiences of families who go to the Special Educational Needs and Disability Tribunal. *Disability and Society* 22, no.3: 315-328.

Scottish Executive. 2005. *Supporting children's learning: code of practice*. Edinburgh: The Stationery Office.

Scottish Office Education and Industry Department (SOEID). 1998. *A manual of good practice in special educational needs*. Edinburgh: HMSO.

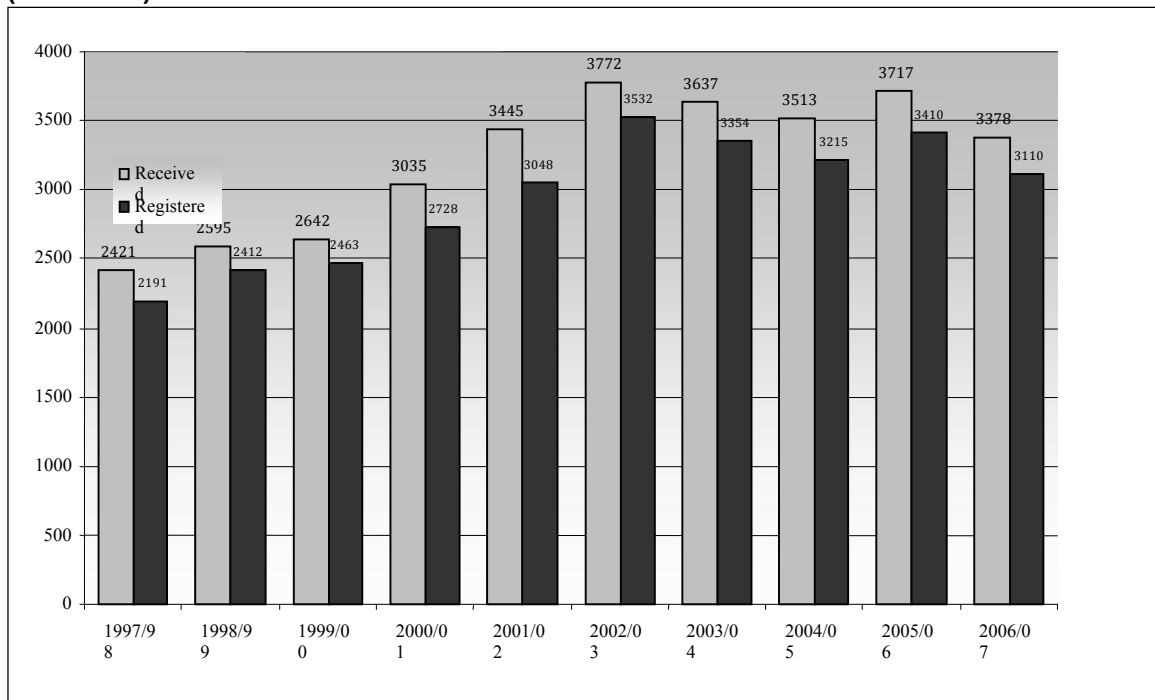
Stilitz, D. and Sheldon, C. 2007. Meeting education disputes. *Education Law Journal* 8: 165-173.

Supperstone, M., Stilitz, D. and Sheldon, C. 2006. ADR and Public Law. *Public Law Sum*: 299-319.

Tennant, R., Callanan, M., Snape, D., Palmer, I. and Read, J. 2008. *Special educational needs disagreement resolution services: National Evaluation Research Report DCSF-RR054*. London: Department for Children Schools and Families.

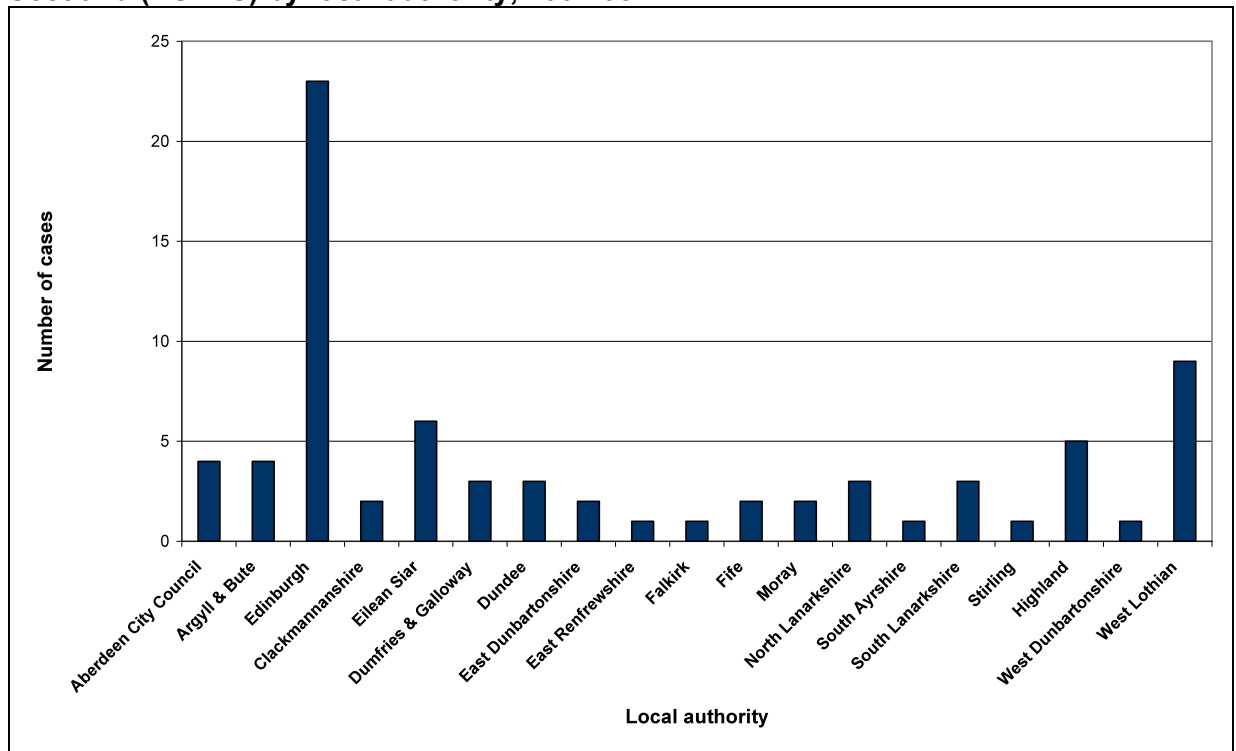
Tod, L. 2003. Disability and the restructuring of welfare: The problem of partnership with parents. *International Journal of Inclusive Education* 7. no. 3: 281-296.

Figure 1: England – Total number of tribunal appeals received and registered in the last 10 years by the Special Educational Needs and Disability Tribunal (SENDIST)



Source: SENDIST, 2008

Figure 2: Scotland: Reference to the Additional Support Needs Tribunals for Scotland (ASNTS) by local authority, 2007-08



Source: ASNTS, 2008

Figure 3: English and Scottish local authority officers' accounts of levels of satisfaction with mediation (%)

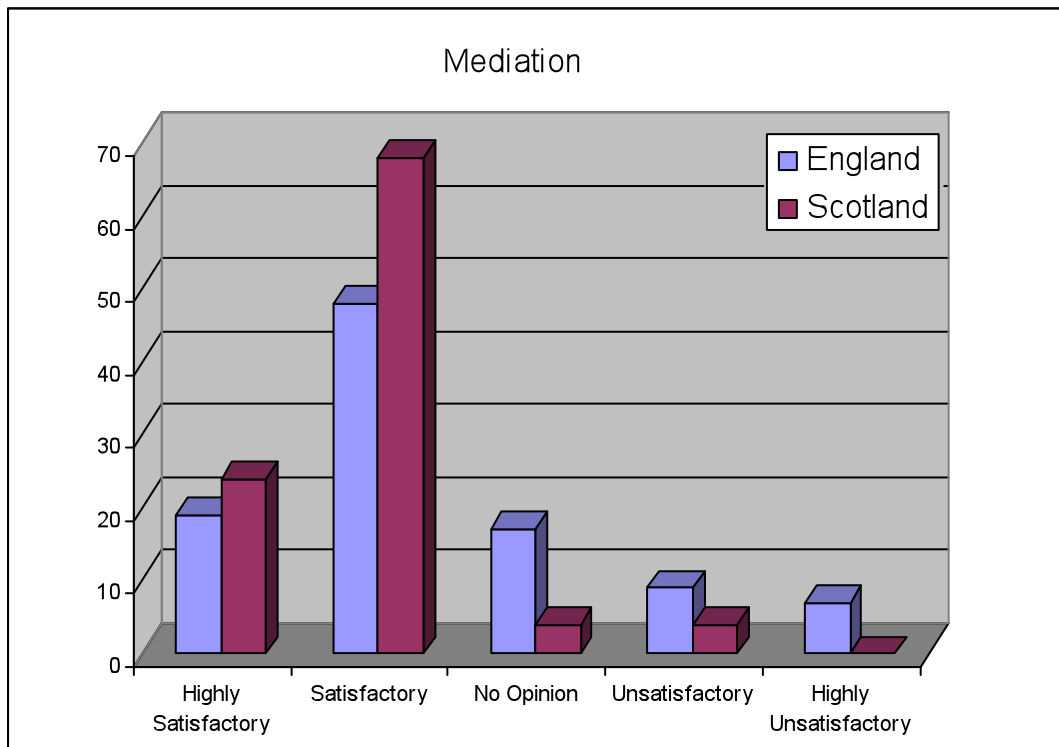


Figure 4: English and Scottish local authority officers' levels of satisfaction with the tribunal (%)

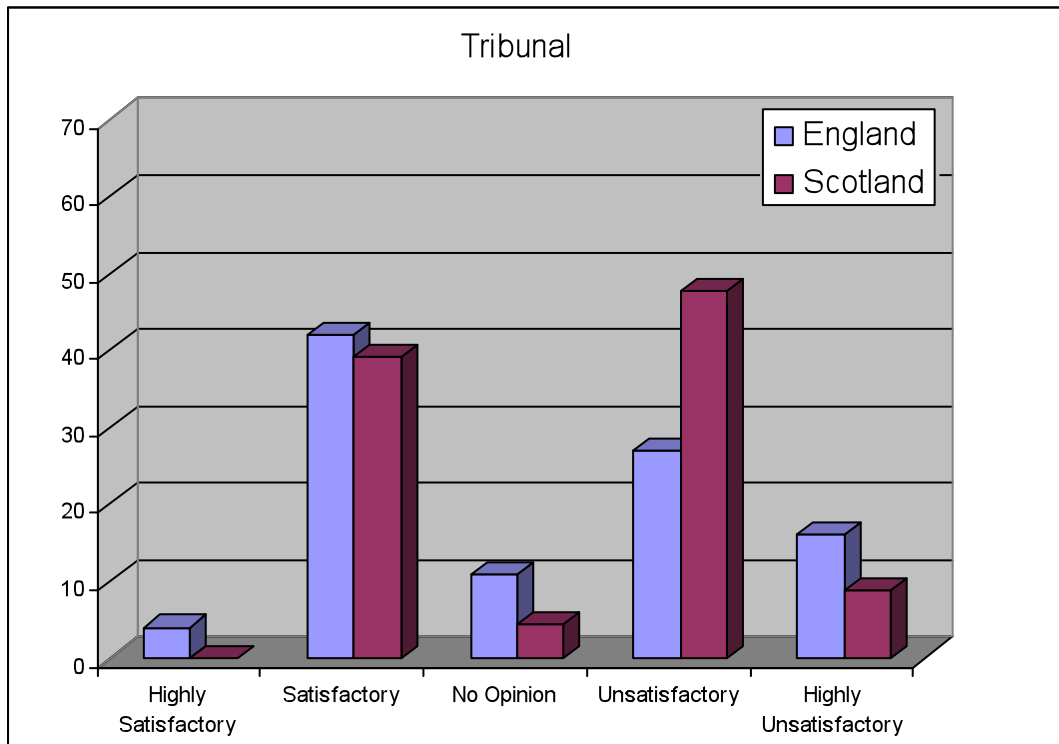


Table 1: Number of mediations reported by Scottish local authority officers, 2006-2007

Number of mediations	Frequency	%
None	5	18
5 or less	15	56
Between 6 & 10	6	22
Between 11 & 20	1	4
Between 21 & 30	0	0
Total	27	100

Table 2: Number of mediations per year reported by English local authority officers (2005/06 – 2007/08)

Number of mediations	05/06		06/07		07/08	
	Frequency	%	Frequency	%	Frequency	%
0	24	49	25	46	33	60
5 or less	23	47	27	50	20	36
Between 6 & 10	1	2	1	2	1	2
Between 11 & 20	0	0	1	2	1	2
Between 21 & 30	1	2	0	0	0	0
Total	49	100	54	100	55	100