

IS MEDIATION IN NEED OF PROMOTION?



Neville Harris and **Sheila Riddell** have sought to find out how two parallel routes to redress in cases regarding the special educational needs of children in England and Scotland work alongside each other.



THERE ARE two principal dispute resolution mechanisms for parents who are in conflict with the relevant bodies over decisions concerning special educational needs (SEN) in England or additional support needs (ASN) in Scotland. One is mediation and the other is appeal to a tribunal. Although they are separate routes, there is now a link in England, due to rule 3 of the Health, Education and Social Care Chamber (HESC) Rules, that requires the First-tier Tribunal (FTT) to consider bringing any alternative dispute resolution mechanism to the parties' attention, where appropriate.

Mediation has come to the fore in the drive for an administrative justice environment based on 'proportionate dispute resolution'. To its proponents it offers a speedier process and a less adversarial environment to courts or tribunals. It is seen as conducive to better communication and long-term relations between the parties. It facilitates consideration of a wider range of issues and is thus better able to identify the true nature of the dispute. However, there are concerns that the citizen may settle for too little, negotiating away entitlement through ignorance or lack of skill, and that mediation fails to make public authorities accountable in the way that judicial scrutiny can.

Our findings are derived from nearly 50 interviews with key professionals and other stakeholders, and questionnaire replies from nearly 100 local authorities across the two jurisdictions and more than 80 parent partnership officers in England. In addition, we carried out 49 detailed case

studies in three Scottish and three English local authority areas, interviewing the parents and others.

Mediation and the right of appeal

Nearly one in five children in England has special educational needs. Local authorities are required¹ to make arrangements involving 'independent persons' for the avoidance and resolution of 'disagreements' between parents and schools or local authorities, but these arrangements do not replace or supplant the right of appeal to the FTT.

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In Scotland, only one in 20 children is categorised as having an additional educational need. Local authorities are required to make arrangements for 'independent mediation services' and the Additional Support Needs Tribunal (ASNT) deals with 'references' to it concerning coordinated support plans (CSPs) or 'placing requests'.²

The ASNT had 76 references in 2007–08 compared with more than 3,392 SEN appeals in England.

Dispute trends

We found evidence that the number of disputes has been increasing over the past few years, although the subject matters of dispute are unchanged. School placement, refusals to assess and educational provision at school remain the dominant issues.

Mediation

There are no national figures on SEN or ASN mediation, although the general picture is that the number of disputes in which mediation is used is very small. In England, there was

an average of little more than one mediation per authority in our survey, compared with about eight appeal hearings. More than half of authorities (60 per cent) reported *no* mediations that year. In Scotland, three-quarters of the authorities reported fewer than five mediations each. A few individual mediation providers have expressed surprise at our results and say that their statistics suggest rather more mediations.

Several factors lie behind the sparse use of mediation.

- Many local authorities or schools publicise or promote mediation poorly. Consequently, many parents are unaware of it. Some authorities think that direct negotiation can achieve as much as mediation or that a case will progress to the tribunal anyway. They also cite: pressure on staff time; the cost of mediation, particularly where the authority pays per mediation case; and the lack of a specialist officer to filter cases and identify ones where mediation might help the authority.
- Some local authorities refuse to participate in mediation in individual cases. The main reason is doubt about achieving a settlement. Entering mediation is not compulsory.
- Some parents doubt the value of mediation because their previous dealings with the authority suggest that officers are unlikely to be sympathetic and willing to compromise.
- Parents' advisers and representatives and other parents may convey negative views of the process, which influence the parents (see Case Study 1).
- Some parents are so committed to following the appeal route that they have no interest in mediation. Also, some parents think that they would 'show their cards' by participating in mediation, thereby prejudicing their chances of success at the tribunal.

Notwithstanding this picture, there were strong views that, where it occurs, mediation brings the claimed-for advantages noted earlier, in addition to being less stressful to parents than

Case Study 1 – 'Amelia M' (Scotland).

Amelia was diagnosed with Asperger's syndrome when at primary school. Her mother, Mrs M, did not want her to be bullied at secondary school and was concerned generally about her, so she requested a CSP assessment. When the local authority refused, she made a reference to the ASNT. She was assisted by a voluntary organisation, ISEA (Independent Special Education Advice). Concerning her choice of dispute resolution mechanism, she said:

'We could have gone via the mediation service but we talked to parents who'd really advised us that you get nowhere, they're just a way of placating parents . . . [W]e wanted to go straight ahead with the appeal.'

The educational psychologist thought that if the local authority had been more communicative the appeal might have been avoided. Mrs M regarded the tribunal as friendly at one level but like a court on another, where words could be twisted. She said that having to put her case and respond to questions was challenging:

'[T]here's all these professionals . . . I'm a nurse myself and you just feel overwhelmed . . . I felt if I'd got more knowledge I might have done better because it was like a minefield, you didn't know, it's like being in a court.'

Mrs M lost her appeal but was later satisfied that the local authority wanted to ensure the success of Amelia's mainstream secondary school placement.

using the tribunal. While some parents appear to have concerns about how fairly mediation will operate, they tend to be satisfied by what occurs in practice. Professionals indicated that mediation was particularly useful where relationships between schools or authorities and parents had broken down or the dispute was deadlocked. However, a willingness to compromise was essential (see Case Study 2).

Drawbacks

Mediation was nevertheless seen as having drawbacks: settlements are not binding; there is a greater risk that rights will not be safeguarded, with 22 per cent of parent partnership officers reporting at least one case where they considered the mediated settlement provided less to the parent than was realistically possible; key people sometimes do not attend; the process does not facilitate the participation of the child; and mediation may not counter the inherent social disadvantages experienced by some groups.

There is a theoretical concern that mediation may place parents at a disadvantage because of an imbalance of power and the 'private' nature of the process. However, our local authority and parent partnership respondents in England mostly considered that mediation was equally fair to both parties. In particular, it allows each to express their opinion and be listened to and enables the issues to be explored non-confrontationally. But a minority view was that parents are disadvantaged due to a lack of skills, experience or understanding.

The tribunal

The tribunal has enjoyed a good reputation among professionals and academics for its fairness and expertise. Its independence was repeatedly referred to by our interviewees. However, there have been concerns, as in the recent Lamb report,⁴ about inherent formality and legalism; the appeal process is seen as rather adversarial and stressful for the parties as compared with mediation. Parent partnership officers highlighted parents' lack of prior experience and the difficulty in preparing their case (see Case Study 1), although other research has shown that parents consider attendance at the hearing 'a good experience'.

Local authorities tended to hold negative views of the tribunal, believing that it served to encourage parental challenges or intensified disputes. They regarded the process as irksome

Case Study 2 – 'David B' (England)

David B, aged 12, had dyslexia, dyspraxia and possibly autism. The local authority refused to assess him, but the parents successfully appealed to the tribunal. However, the parents were not happy with the subsequent statement of SEN and the school provision made for David. They had meetings with the school and were promised action but none materialised. They went to mediation twice. The first resulted in a compromise involving the parents keeping the school informed about David's condition and the authority carrying out a further assessment. Subsequently there was a falling out. The second attempt at mediation failed because Mr B considered the school to be unwilling to negotiate and walked out.

Eventually the parents received independent advice that David's statement might be unlawful. They also thought that they could get an independent school placement. They arranged for a number of private reports with a full diagnosis of David's problems. They again won an appeal. David started at the independent school. In the light of his experience, Mr B would not use mediation again. He said that mediation agreements were not binding; the school reneged; mediation was a 'waste of time'. However, the process seemed to be working, according to the mediator, who was 'surprised that things did not work out'.

and likely to go against them. Some thought that the tribunal was overly generous towards parents in the degree of procedural flexibility it allowed them, for example regarding time limits and in helping some secure a high level of resources for their child, skewing resource allocation. In Scotland, there were concerns about the tribunal's rather adversarial hearing and variable approach.

Only one-third of appeals that are lodged reach a hearing. Many of those that fail to progress

to that stage are settled or withdrawn at the last minute. HESC is concerned about the resultant inefficiencies. Voluntary organisations argued that often local authorities capitulate only at the eleventh hour. We found examples of this in three of our English case studies. There was support from several quarters for building mediation into the tribunal process itself, which might help to reduce the number of last-minute settlements.

Although the tribunal's decision is binding, there is evidence that local authorities sometimes fail to implement it or simply delay implementation. Voluntary sector interviewees explained that one reason that local authorities do not mind the relative slowness of the appeal process was because it might delay the need to commit resources if the parents succeed.

Assistance for parents

Various sources of advice and representation are available to parents in England and Scotland but provision is patchy. In Scotland, use of legal representation by parents is much less prevalent than in England, whereas the opposite is true where representation of local authorities is concerned. Scottish authority websites rarely inform parents about Enquire, a specialist publicly funded national advice and information service. Specialist voluntary bodies are active in advising parents, but independent advocacy services are very thin on the ground. Local authorities have a statutory duty to comply with a parent's or young person's wish to have an advocate for discussions with or representations to an authority, but they are not obliged to provide or pay for such services. However, 2009 legislation has placed Scottish Ministers under a duty to secure provision without charge of an advocacy service in connection with tribunal proceedings.³

In England, representation at appeal hearings is better established. Tribunal statistics for

2007–08 show that 22 per cent of parents had legal representation compared to 17 per cent of local authorities. A further 25 per cent of parents had non-legal representation. Parent partnership services are also an important source of information and advice for parents in England, although not all parents use them. However, a sizeable minority of parent partnership officers do not attend mediations or tribunals, and certainly not as a representative, nor do they normally prepare appeal documentation. Parents nevertheless benefit from information provided by the tribunal itself. Voluntary organisations play a key support role in England, despite their variable level of resources and expertise. They are often very instrumental in the parent's choice of dispute resolution mechanism.

Conclusion

Mediation has clearly not taken off in the way that was intended in this field. If it is going to have a meaningful role in the future it will

need to be better promoted. Local authorities should be held accountable for failures to provide clear information about it. In any event it should be made available as a stage in the appeal process itself, provided: it has not already been tried and failed, it does not unduly lengthen the process as a whole, and there is early identification by the tribunal of cases in which it might be beneficial. This could initially be done on a trial basis and an assessment of its effectiveness and cost implications should be carried out.

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¹ Education Act 1996, as amended, s332B.

² Education (Additional Support for Learning) Act 2004.

³ Education (Additional Support for Learning) (Scotland) Act 2009 inserting s14A into the 2004 Act (above).

⁴ Brian Lamb, *Lamb Inquiry. Special Educational Needs and Parental Confidence* (DCSF, 2009).