

Autonomy, Rights and Children with Special Needs: A New Paradigm?

Working Paper 7

Analysis of Key Informant Interviews: England

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Part 1: Introduction

The Children and Families Act 2014, in combination with the Special Educational Needs and Disability Regulations 2014 (SI 2014/1530), established a new legal framework governing the role of local authorities in ensuring that the special educational needs (SEN) of children and young people in their area are properly identified and met. The local arrangements made in response to the new legislative requirements have been phased in over a period of three years and are now fully operational across England. The idea that children and young people's views, wishes and insights into their own needs should inform and influence professionals' decision-making was already well established in this field. The new legislation has now both consolidated this principle of engagement but has also, potentially, advanced it considerably by extending the participation rights of children and young people in relation to both their own education but also local policy formulation and review.

This working paper is one of a series reporting evidence gathered by the Autonomy, Rights and Children with Special Needs project on how the new legislative and policy frameworks on SEN in England and on additional support needs in Scotland, following the Education (Scotland) Act 2016, are being implemented in practice and whether either of the jurisdictions has experienced a sea change in the recognition and realisation of the autonomy and rights of children and young people. In this working paper we report on the experience of a range of professionals and stakeholders in this field in England. A separate working paper covers the Scottish key informant interviews ([Riddell et al., 2018](#)).

Methods

We interviewed twenty-one people drawn from the following groups or agencies: the Department for Education, local authorities, further education, Ofsted, the First-tier Tribunal (Health, Education and Social Care Chamber), mediation, the voluntary sector, school governors, special educational needs co-ordinators (SENCOs), the legal profession and parents of children/young people with SEN. A list is shown in Table 1 at the end of this section. Mostly we carried out semi-structured interviews lasting for between 40 to 60 minutes, predominantly face to face. A small minority were carried out by telephone. In some cases there were also email communications on specific points. The interviews were digitally recorded and professionally transcribed. In two cases we conducted a single interview with two people from the same organisation. We also had a separate meeting with officials from the Department for Education that was not recorded. We have not drawn on that meeting specifically in this paper but it has informed our understanding of the underlying policy and the Department's view of it. As in Scotland, the English key informant interviews did not include children and young people. We have, however, interviewed children and young people for our individual case studies – a discrete element of our research which is currently ongoing and will be reported on separately.

Our questions to interviewees were focused partly around their specific role or position but were also aimed at drawing out their perspectives on key issues surrounding the legislative and policy reforms and their wider implications both for their agencies or institutions and for the rights and autonomy of children and young people with special educational needs and disabilities (SEND).

To set the responses into context we have briefly mapped out in the next section the key features of the new SEN framework and, in particular, the rights of children and young people with SEND, which were at the core of our investigation.

Table 1: English Key Informants

Local Authority (LA)	LA Senior Officer
Mediation Provider	Mediator
Local Authority	SEND Strategic Lead
Local Authority	LA Parent Engagement Officer
Local Authority	LA Service Manager Vulnerable Learners
Local Authority	LA SEND Development Manager
Voluntary Sector/Independent Support Services (ISS)	Voluntary Sector ISS Provider
Further Education and Sixth Form College	Post-16 Head of SEND
Voluntary Sector	Ambassador for Children with SEN
School	Inclusion Manager Primary School
School	Chair of Governors of Primary School
First-tier Tribunal, Health Education and Social Care Chamber (HESC)	Deputy President HESC
Legal Profession	Barrister
Voluntary Sector	Voluntary Sector Organiser
Parent	Parent 1
Parent	Parent 2
School	Primary School SENCO
School	Primary School Governor (SEN)
Department for Education (DfE)	DfE Policy Officer
Local Authority	LA Principal Educational Psychologist (Principal EdPsych)
Ofsted	HMI Adviser

Children and young people’s rights and the new legal framework

Part 3 of the Children and Families Act 2014 aims to ensure that in fulfilling their responsibilities for meeting the educational needs of individual children with SEN local authorities are more sensitive to the interests of parents, children and young people. The Act seeks to promote a culture of engagement and ‘co-production’ in which there is better information and support for families and increased opportunities for them to feel involved and enjoy a degree of control over the way the child or young person is educated ([DfE, 2011](#)). Among the key measures in the Act are requirements placed on local authorities to ensure information, advice and support provision, publish a local offer indicating various educational options for those with SEND, offer parents and young people a personal budget, and consult with parents and young people over local policy. At the same time, the legislation has extended the scope of the SEN framework to include young people until they reach the age of 25, rather than, basically, under 19 under the previous legislation. It has also linked education needs with health and care needs more formally and systematically than in the past, in particular through education, health and care plans (EHCPs), which have

replaced statements of SEN. The Act also aims to make the process of seeking to resolve disagreements between families and local authorities over SEN matters relating to individual children less adversarial by promoting mediation as an alternative to an appeal to the First-tier Tribunal.

Of particular interest to this study is the policy aim, reflected throughout part 3 of the Act, of giving children and young people with SEN ‘greater control ... to make them authors of their own life stories’ (DfE, 2012). The rights through which such opportunities are established for children and young people with SEN to influence the course of their education are derived from the legislative framework summarised in Table 2 below and amplified in the relevant sections that follow. There is also a more detailed account of the background policy and the legislation in the project’s Working Paper 2 (Harris, 2018). One key point that needs to be emphasised is that the Act has effected a massive change in the status of young people (defined in the Act those as aged between 16-24 inclusive). It has conferred on them the same rights as those held by parents of children (children being those aged under 16 years). In effect, these rights pass from the parent to the young person once the latter ceases to be a child. Thus the Act recognises young people over 16 as autonomous, independent actors. However, this is contingent on the extent of their mental capacity, as determined with reference to the Mental Capacity Act 2005, as discussed below.

Table 2: Children and young people’s key rights, pt 3 Children and Families Act 2014

<p>General principles (s. 19)</p>	<p>Local authorities (LAs) must have regard to the following matters when carrying out their SEN functions:</p> <ul style="list-style-type: none"> • children and young people’s views, wishes and feelings, • the importance of children and young people participating as fully as possible in decisions, • the importance of their being provided with the necessary information and support to do so, and • the need to support them, to facilitate their development and help optimisation of their educational and other outcomes.
<p>Consultation (ss27 and 30 and SEND Regs)</p>	<p>Children and young people are to be consulted by the LA when it carries out its duty to keep its education and social care provision for those with SEN under review and when preparing and reviewing the local offer. Their comments in the local offer are to be published. The local offer must be published in a suitable format for those with SEND.</p>
<p>Advice and Information (s.32)</p>	<p>Children and young people have a right receive advice and information about SEN and disability matters under arrangements to be made by the LA. Children and young people must be made aware of the advice and information services.</p>

<p>Assessment of needs (s.36 and SEND Regs)</p>	<p>Young people (and children’s parents) have rights to:</p> <ul style="list-style-type: none"> • request an education, health and care assessment; • be informed of the decision to assess/not assess and the reasons; • be consulted when the local authority is determining if an assessment is necessary and have their views taken into account; • have advice and information on their needs sought from them by the LA; • be consulted within the assessment process and have their views, wishes and feelings taken into account (children also have these rights); • to receive any necessary information, advice and support; and • be informed of the local authority’s decision on making an EHCP.
<p>EHCP (s.38 and SEND Regs)</p>	<p>Young people (and children’s parents) have a right to consulted over the content of a draft EHCP, to receive a copy of the draft, and to be informed of their right to make representations and request that a school or other institution be named in the EHCP. The child’s and young person’s ‘views, interests and aspirations’ must be included in the EHCP. Young people (and children’s parent) have a right to be consulted over a decision to bring an EHCP to an end.</p>
<p>Personal budget (s.49)</p>	<p>Young people with an EHCP (or for the parents of children with an EHCP) have a right to have a personal budget prepared on request. A direct payment may be consented to.</p>
<p>Redress (ss 51-57 and SEND Regs)</p>	<p>Young people (and children’s parents) have rights to go to (and be informed about):</p> <ul style="list-style-type: none"> • APPEAL (HESC tribunal) (after considering or participating in mediation) re various decisions including a refusal to assess or the contents of an EHCP; • MEDIATION (children may attend with the parent’s and the mediator’s consent); • DISAGREEMENT RESOLUTION (intended to facilitate avoidance or early resolution of the dispute, avoiding the need for mediation or an appeal).

Part 2: Autonomy, voice and capacity

In this part of the working paper we discuss key informants' perspectives on the more general issues that are relevant to children and young people with SEND as actors or participants in relation to decisions about their own education and concerning educational provision in their area. We focus here on children and young people as independent rights holders and on how their capacity affects the enjoyment of their rights. We also look at how far the independent voice of the child or young person with SEND is heard and valued. Another, related, general issue on which we received a number of views concerns the extent to which the parental voice may trump that of the child, irrespective of whether there is any conflict between them in terms of their wishes and preferences. In the case of young people, the law guarantees them, rather than their parent, a right to express their views and wishes and have regard paid to them. But whose voice is actually heard by the decision-maker?

Children and young people as independent rights holders

Formal legal recognition of children's status as independent rights holders has traditionally been somewhat lacking in the UK both in relation to education and more generally. As the UN's Special Rapporteur on the Right to Education has said, the child has tended to be viewed as 'the object of a legally recognised relationship between the school and the child's parents' rather than as an independent legal party ([UN Commission on Human Rights, 2000](#)). As one interviewee from the voluntary sector told us, this characterisation stems from a cultural perception of children, including those with SEND, under a 'system that devalues, essentially, children's voice as immature or irrelevant' (Voluntary Sector Organiser). Now, however, part 3 of the Children and Families Act 2014, particularly through the provisions governing the rights of young people, changes this relationship, in principle, although in the context of a decision-making framework where both local authorities and schools are responsible for the outcomes. It has the potential to advance the participation and involvement of children and young people with SEND.

SEN is in fact a field in which practice in England has already, for almost two decades, been premised on the recognised benefits and value of engagement with children and young people. It is a practice that has, for example, received support and encouragement via the SEN Code of Practice, the pre-2014 Act edition of which contained an entire chapter on 'Pupil Participation'. Against this background, many of our stakeholder interviewees did not view the provisions on children and young people's participation in the 2014 Act as revolutionary, indeed the impression was given that the relevant provisions merely reflected what was already happening in practice, at least at the school level. See, for example, the response of one school governor responsible for SEN arrangements:

Q: [Is] there a sense in which this is a new era of children's rights and participation?

A: No, I don't think so at all ... because [we] were already involving the children in decision-making ...

Q: But you don't think that the new legislation, the new code, has really made any difference in that regard?

A: I'm not conscious of there being a sea change' (17 Primary School Governor (SEN)).

Perhaps, though, that is not surprising, since the 2014 Act is mostly concerned with the responsibilities of local authorities rather than schools. A local authority's Principal Educational Psychologist saw the Act as opening up communication with parents and reinforcing 'the need for [the] local authority to respect and engage with parents and young people' (Principal EdPsych). For schools, it is still the SEN Code that forms the basis for the expectations placed on providers to engage with children and young people's voice, albeit in more explicit and detailed terms than under the previous code.

We explored with the Department for Education (DfE) the drivers for the policy on children and young people's participation and engagement under the 2014 Act. The UNCRC was a factor – the UK has over the years been criticised over a failure to facilitate children and young people's participation in education and SEN ([Harris, 2009](#)). The policy also taps into a general professional perspective that views decisions about SEN to have an increased likelihood of effectiveness when the child or young person has played a part in them. The reason for giving a particular push to participation in the area of SEN specifically was possibly also because it was field where there has always been more of an emphasis on personalised provision and where rights have had a degree of recognition for quite a long time. However, the DfE representative (DfE Policy Officer) thought that it was significantly a political matter, namely the influence that the former Minister of State, Sarah Teather, brought to this issue on the basis of a personal commitment and belief. She was able to exert it at the time the reforms subsequently contained in the 2014 Act were first mapped out (in the Green Paper ([DfE, 2011](#))).

Voice

Children and young people's 'voice' is the central concern of the project. Article 12 of the UN Convention on the Rights of the Child, to which the UK is a signatory, sets a basic standard for the respect to be given by state agencies for voice of the child, requiring States parties to, inter alia,

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 ... being given due weight in accordance with the age and maturity of the child.

As Lundy, analysing Article 12, has explained, 'voice' should be viewed as a multi-faceted or integrated concept which based not merely on the expression of views but also on having a proper opportunity to express them, the support to ensure one is capable of doing so, and the certainty that the views expressed will be listened to and, as appropriately, acted upon ([Lundy, 2007](#)). All of these elements are relevant to the rights framework established under part 3 of the 2014 Act and we have examined them within the various sections below. Here we take a more general look at the question of 'voice' and in particular at factors affecting the opportunities for children and young people to express their views and if those views may engage decision-makers. It should also be noted here, since it is of direct relevance to children with SEND, that children's Article 12 right is replicated in Article 7.3 of the UN Convention on the Rights of Disabled Persons (CRPD). However, Article 7.3 of the CRPD also specifically requires it to be ensured on an equal basis with other children and for the provision of 'disability and age-appropriate assistance to realize that right'.

There was general support for ensuring that the child's or young person's voice be heard and listened to. For example, one school governor with special responsibility for SEN in a primary school commented:

[I]f you're talking about behavioural issues or ADHD or something like that, then the child needs to be involved in planning how that situation's going to be addressed. You can't just impose something on a child (Primary School Governor (SEN)).

But there was also a concern that engagement may be unsettling for younger children and that it should focus only on everyday matters such as whether or not they are happy at lunchtimes or during other parts of the day but not go beyond that. For example,

[O]ur children are so young ... And, you know, I'm all for pupils ... giving their opinion, their voice about what they want. Yes, I feel that's really important. But I also feel that, when they're this age ... they're still quite vulnerable ... [T]o think about the consequences of [the] decisions – you know, I think for a young child, I think that's a big ask isn't it? (Primary School SENCO).

Younger children want to express their voice, but mostly about everyday matters like 'what's happening at playtime' or 'where they sit in the lunch hall' – a different perspective to 'inclusion' than parents/adults may have (LA SEND Strategic Lead).

Schools vary in the extent of their engagement with the voice of the child or young person. As one local authority officer told us, 'some schools ... do it better than others' (LA Senior Officer). Embedding the child's voice requires a real commitment. One LA Service Manager said:

We've tried to very much embed the learner's voice in the heart of our processes and not just around EHC plans ... [Y]ou want to see that almost being the norm in everything (LA Service Manager Vulnerable Learners).

To ensure that the voice of children or young people with SEND is elicited or understood, different methods and skills may be employed:

Well, children will have their own ways of communicating. There are those who use assisted, assisted communication. There are children who, young people who might eye point ... There are ways of them making their feelings and their views known. We just need to be flexible enough to find the appropriate way to ... I wouldn't say coax it out of them. I would say invite them, encourage them to take part in a dialogue (Voluntary Sector Organiser).

[F]or some young people it's quite intimidating ... [T]hey presented their views on a PowerPoint or on a piece of paper or like a display board with lots of stickers on or whatever, pictures of things they are interested in (Voluntary Sector – Ambassador for Children with SEN).

I think the role of [EdPsych] is instrumental ... in accessing the child's views ... [I]f you ask them a question: 'Well ... do you like school?' ... their responses can be quite narrow: yes, no, single words. But what you can elicit from the child through observation, through play, through personal construct psychology, using pictures, using all sorts of visual prompts, really, to help them express what they find difficult ... what they enjoy. What would make a

difference to them ... [I]t might not mean they're actually voicing it, because they might not have the language to voice it. But what you might be seeing is distress, or complete boredom with what they're engaging in, or it just being inappropriate ... (Principal EdPsych).

Speaking to parents is likely to be a necessary element, but 'young people should be given an opportunity to speak their mind independently of their parents, if that is appropriate in their context' (Voluntary Sector Organiser). However, we heard that in the case of younger children there is often an assumption that the parents will speak for them: 'the parents are almost the pupil voice, if you like, aren't they, for younger children?' (Primary School SENCO).

There is also a concern that children's views may be difficult to ascertain. One perception is that their views tend to be constantly shifting: 'And how do you know from one week to the next what [he/she] really wants?' (LA Senior Officer). Another is that, even after the 2014 Act, the parental voice may be dominant. One case referred to by a local authority SEND leader had 'a very demanding parent. And it was all about the parent, and supporting the parent. But [the] young person got lost in that. And I think it happens too much' (LA SEND Strategic Lead). This officer admitted that the authority struggled to hear the child's independent voice:

I'm not convinced that we've managed to get much better at getting the voice of the children and the young people. I think we have definitely done that with the parents. But I do think children and young people's voice sometimes gets lost and in the experience in the work that I've seen ... in the [Information, Advice and Support] team, often when they're working with families who want to go to tribunal, one of the questions repeatedly has to be, 'But what does the young person think?' Or 'What does the child think? Did they really ...?' And often it is about school placement. And actually ... sometimes ... what the child wants is probably not the same as what the parent wants. And they're going to tribunal, so yes, that's a problem (LA SEND Strategic Lead).

One solution to this problem, in relation to those at a transition to post-16, is to hold separate review meetings, one with the child and the other with the parent (Voluntary Sector - Ambassador for Children with SEN).

In our local authority survey ([Davidge & Harris, 2018](#)), although some 90% of LAs reported that there had been staff training covering the child's/young person's voice, the responses from our key informants portrayed a rather mixed picture. One local authority Principal Educational Psychologist told us that there was no specific training on the involvement or participation of children and young people (Principal EdPsych).

Moreover, an officer from a local authority which was one of the Pathfinder areas in which the reforms were trialled said that 'there was training around person-centred ... working ... And there wasn't that much about working with children and young people and capturing their voice' (LA SEND Strategic Lead). But another LA said that in its training for schools on the new Act they had 'pupil voice on the agenda' (LA Service Manager Vulnerable Learners).

Capacity

Following on from the previous section on 'Voice', capacity can obviously be a key factor in whether the child's voice is heard. As a parent told us:

[W]hen we've tried to get her into a specialist college this last year, it's been really hard to have [E's] voice heard, because socialising and speech is one of the, probably the hardest areas for her. And a lot of the meetings are held in a room with other people who she's never met before, and it's, it's just not going to work ... [S]he always hates talking about herself ... [I]t would have been better ... to hold [the meeting] with us ... I don't think they got the best out of her on her own. (Parent 1)

There is clear recognition within the 2014 Act and SEND Regulations that the participation of young people with SEND is going to be affected by their capacity. There is provision for their rights under part 3 to be exercised through an 'alternative person' – either the young person's representative (a deputy appointed under the Mental Capacity Act 2005 to make decisions on their behalf, or someone appointed to the role via a lasting or enduring power of attorney) or if, he or she does not have one, then his or her parent. In the case of a child, the parent represents their interests and holds most of the rights of participation and choice, although should nevertheless be expected to try to ascertain and communicate the views of the child regardless of the extent of the child's disability.

The Mental Capacity Act 2005 test of incapacity is adopted by the SEN legislation. The test refers (in section 2 of the 2005 Act) to 'incapacity to make a decision for oneself due to an impairment of, or a disturbance in the functioning of, the mind or brain'. However, our survey of local authorities ([Davidge & Harris, 2018](#)) revealed that many local authorities are not always applying this test but rather adopting a looser approach in which officers (sometimes relying on schools' or parents' conclusions) make their own broader judgments about whether the child or young person is sufficiently competent to participate. The danger, however, is that there may not be adherence to principle that children's incapacity should not be presumed. Indeed the opposite presumption, namely that a child has capacity, should be made ([UN Committee on the Rights of the Child, 2009, para. 20](#)).

Examples were given by one SENCO of children with whom engagement in relation to planning was hindered by their disabilities. In the case of the first of them:

there's a lot of social and emotional and mental health issues with the child, and a lot of family problems ... He is seven ... And ... he's had a very difficult start in life, this child ... I think psychologically, for him, his head's been all over the place; and I don't think sometimes he's really known what he's wanted or what's best for him ... So actually, I'm not sure it would have been appropriate to involve him ... (Primary School SENCO)

The other child who mentioned by the SENCO was aged 10 and quite severely autistic:

And actually, he is given input into what he wants to happen and things like that, but I think there is an element of an adult has to take the ultimate sort of control over that. Because ... I don't think he has enough insight into his future and stuff like that (Primary School SENCO).

A school governor with special responsibility for SEN commented that many of the young children in her primary school have speech and language problems, and communicating their needs or wishes is problematic (Primary School Governor (SEN)).

A voluntary sector representative nevertheless stressed the importance of involving children and young people in decisions regardless of the extent of their capacity:

[T]here is some kind of perhaps underlying belief that some young people may not be able to make decisions for their own future. And my stance would be that everybody, no matter how disabled, no matter what severity of impairment, knows, has feelings, and they know, you know, what is good for them. And the question is not, 'Do we invite the views of all children, and is it sometimes inappropriate for some?' What is inappropriate is the method ... with the right amount of support, it is one hundred percent appropriate to ask everybody, you know, to make choices about their own future (Voluntary Sector Organiser).

One LA officer commented that there tends not to be any disabled children on mainstream schools' school councils (LA Parent Engagement). Yet the UN Committee on the Rights of Disabled Persons ([2016, para. 47](#)) has specifically called for participation of children with disabilities in school councils, in fulfilment of the Article 7.3 CRPD requirement noted above.

Parent's views versus child's/young person's views

The relationship between children and young people's voice and the issue of autonomy is not straightforward. It is even more complex when special educational needs and disabilities are brought into the picture, given the increased vulnerabilities and incapacities which may warrant extra paternalistic interventions. There is not the scope in this working paper to examine this issue in detail. However, the key issue is that, as discussed in the section on 'Voice' above, there is a normative assumption that to some degree all children and young people with SEND should be accorded opportunities to have their views heard and properly considered, regardless of how much reliance is placed on the parent or carer as promoter of their interests and choices.

Nonetheless, a key problem faced by local authorities is reconciling the parent's and the child's/young person's conflicting preferences or wishes, or resolving divergences between them as illustrated by these views:

[S]ometimes ... what the child wants is probably not the same as what the parent wants ... Often parents are fighting for a special school place, and actually the young person [says]: 'I want to go to school with me mates across the road. And I don't want to get on that special bus' (LA SEND Strategic Lead).

[W]hat the mum wanted and what the ... young person wanted were very different ... but the mum's view prevailed: 'I want him to go to college. That's wholesome, good' (LA Parent Engagement).

I could give you a case where ... the family wants to go further afield and [it] might be a residential placement. And the young person's saying: 'I'm happy to access the college down the road' (LA SEND Development Manager).

However, at primary school level there seems less likelihood of a divergence between the child's and parent's wishes:

Some of children have said, the more profound(ly disabled) ... 'Actually, I don't want to use a standing frame any more' ... I've never known a parent not support the child and say: 'Okay, they really don't like standing, but yes, I agree we've got to find some other way of doing the stretches' (Inclusion Manager Primary School).

It is not only a problem for the local authority. It could also create a difficulty for Information, Advice and Support Services, who often advise both the parent and the child/young person. One strategy could be to ensure that both parent and their child have separate support. One local authority appoints a caseworker, so that 'they've each got ... an advocate' (LA SEND Strategic Lead).

An educational psychologist told us about how a difference of views may manifest at the appeal stage:

I have been involved in tribunals where there's been a significant difference between what the child wants and what the parent wants ... I think we probably have [had] two or three examples of ... where the young person's views have been clear about them not wanting to continue education, and where the parent ... has wanted [them] to (Principal EdPsych).

The tribunal will have to consider how to resolve any conflict, but will have many other factors also to consider when deciding on the appeal.

Where there is a conflict in views, there seems to be a tendency to favour those of the parent over the child or young person's views. For example:

[H]e was still of school age, parents' views trumped his views. But it was his views and everybody working with him ... felt that that [i.e. what he wanted] was the best course of action (LA SEN Lead).

In the case of primary school age children, schools may consider that 'the parents' views are absolutely paramount' (Primary School SENCO).

Part 3: Key rights and responsibilities

Participation and collective voice: consultation on local policy and provision

In the past, the UK has been criticised for not affording opportunities for children to be consulted over and involved in matters of policy and provision which have a significant impact on their lives, including those concerned with education. For example, the UN Committee on the Rights of the Child observed in 2002 that ‘schoolchildren are not systematically consulted in matters that affect them’ and called for measures to ensure that there is ‘meaningful and effective participation of all groups of children in society, including schools’ ([CRC, 2002](#)). Although there has been encouragement for such involvement, at least at school level – for example, through official guidance advocating it in relation to the development of school behaviour policies and school councils – legislative reinforcement has mostly been lacking. However, a duty was placed on local authorities and governing bodies by the Education Act 2002, section 176, to have regard to any guidance issued by the Secretary of State ‘about consultation with pupils in connection with the taking of decisions affecting them’, and for any such guidance to ‘provide for a pupil’s views to be considered in the light of his age and understanding’. The guidance itself referred to children and young people as ‘major stakeholders in society with important contributions to make to the design and delivery of services they receive, including education’ ([DfES, 2004](#)). The current guidance ([DfE, 2014](#)) refers specifically to Article 12 of the UN Convention on the Rights of the Child (above) and while it evinces a government commitment to pay ‘due regard’ to the Convention itself (albeit thereby surely misreading its binding effect on States Parties), and offers a brief rationale for enabling children’s views to inform decisions, it is incredibly brief (2 pages only), offering no examples of how or in what context participation and engagement of pupils should occur. The measures in the Children and Families Act 2014 on engaging with children and young people with SEN, included in the table 2 summary above, therefore mark a significant advance, if properly implemented. They also accord with the view of the UN Committee on the Rights of Persons with Disabilities ([2016, para. 47](#)) that the equal participation of children with disabilities in their education extends not merely to ‘their own learning and individualized education plans’ but also to engagement in ‘the development of school policies and systems, and in the development of the wider educational policy’.

The extent to which local authorities meet the legislative requirements, which relate to consulting with children and young people when the local authority reviews its education and social care provision for those with SEN and when it prepares and reviews the ‘local offer’, is ostensibly assessed as part of the area inspection arrangements applied by Ofsted:

The framework and handbook for local area SEND inspections focus more sharply on the involvement of pupils in co-producing decisions about the services and support they receive (HMI Adviser).

Local area inspections are carried out under the Children Act 2004, section 20. The inspections framework (Care Quality Commission/Ofsted 2016a), which guides the inspection process, provides that adherence to the SEN Code should be among the

outcomes on which inspectors will report, including how well the local area engages with children and young people, or involves them, to inform in the strategic commissioning of services and in the process of assessing needs.

The SEN Code recommends that local authorities establish a forum or forums of children and young people for the purposes of the required consultation/engagement. Our survey of local authorities revealed that just over half had set up such a forum, but that other channels were also used such as voluntary sector bodies or surveys of children and young people ([Davidge & Harris, 2018](#)). Key informants gave us more specific examples of what authorities were doing:

[W]e have had one young people's sort of focus group where young people are committed to perhaps coming to several meetings a year ... The [age] range was from 12 to 23. And we just sent the information out through all our various channels: through SENCOs, through parents, through our youth council. And [in] one particular school ... the SENCO there really got interested in it, and I think we had three or four of their young people. So we're going to have the next meeting at [the school], because they've shown a lot of interest. But you know, we'll bus young people there; we'll get them, we'll pay for taxis to get them there if they want to come from the north – we don't want ... a barrier ... And we'd see those as a reference group of young people ... But ... they can't possibly speak for every young person. It was great that they covered a whole range of disabilities and [SEN]. It was purely happenstance that we managed that (LA Senior Officer).

This LA plans to hold three focus groups a term:

[E]very term we will commit to going out and talking to a range of young people in schools, colleges, other settings, about a particular issue (LA Senior Officer).

This authority was committed to consultation and regarded it as helpful in showing how far policy matched the preferences of those affected by it. In one sense, therefore, it had a market research function which one can regard as consistent with the consumerism paradigm linked to a regulatory environment which, since the 1990s, is intended to ensure that public service providers may be held accountable to service users ([Harris, 1993, 2005](#); [Clarke et al., 2007](#)). On the other hand, local authorities are aware of the importance of SEN provision to individual children and families:

We had a consultation around making some financial cuts to our sensory service. And the vast majority of the young people who use the sensory service are in mainstream schools ... [W]e very definitely wanted to hear the young person's views on these proposed changes ... Young people [were] saying 'Yeah, I really like my teacher. But I wish they'd stop taking me out of my maths lesson to do an hour. Why are they treating me in [a] different way?' So the young people's view was matching the council's approach (LA Senior Officer).

As to whether the child or young person's voice is actually informing the LA's practice or policy decisions – rather than the consultation exercise itself merely adding apparent legitimacy to policy-making – there was mixed evidence. For example, one local authority officer said that there had been an improvement in capturing the child's voice in individual plans, but she was –

... not sure how well [it] is influencing other things that we do ... It is their parents that are influencing ... we've got parents co-producing a lot of work with us now. And we're just about to co-produce some work on reviewing all of our pathways into SEN services. And that will be co-produced with parents and with other agencies. Which is great, but actually, nobody has mentioned, are we going to get the children and young people's voice into that? (SEND Strategic Lead).

Nevertheless, we also heard how consulting with children and young people in fulfilment of the legislative requirements had made a difference in relation to engagement:

[I]t isn't just about ticking a box and saying, 'We're doing ... XYZ with parents and carers and young people' but it really challenges you to say, 'Are they at the heart right at the design stage?' So I would say it's had a significant impact (LA Service Manager Vulnerable Learners).

Another official working for the same authority said that in relation to the local offer, 'some of the work we've done over the last year with young people has changed how we've presented it' (LA SEND Development Manager).

The importance of there being statutory requirements on consultation in relation to policy and provision is reinforced by the lack of engagement where there is no such regulation, as in feeding pupil views to policy at school level, although school councils (not a legal requirement in England) do contribute to a degree. As a chair of governors of a mainstream primary school told us in response to a question asking whether the governing body collected children's views, wishes and ideas:

I don't think there is anything specific we get ... I don't think we've ever had views of the children ... the only children's voice information that comes directly to us is through the school council reporting system (Chair of Governors of Primary School).

A mainstream primary school governor responsible for SEN matters (who is also a chair of the governing body) told us that '[i]f the school council makes a suggestion, it is brought to the governors' body. And it is listened to' (Primary School Governor (SEN)). Yet, as noted above, there is no certainty that in a mainstream school children with SEND are participating in school councils. This particular issue is one that is under-researched. Nevertheless, there is research evidence that, in some *special* schools, school councils can and do play an important role in providing opportunities for the views and voice of children with disabilities to be heard as well as contributing to their social and emotional development; but it also indicates that, more generally, pupils with SEN 'may require particular support to participate in school councils' and that 'schools may need assistance in designing provision for pupil voice that can accommodate a wide spectrum of abilities and disabilities among pupils' ([Whitty & Wisby, 2007](#), pp. 18 & 86). It is notable that in Wales, the School Councils (Wales) Regulations 2005 (SI 2005/3200) (W.236) have not only required that these councils be established by school governing bodies but that they must include representation of children with SEN. There are no legislative requirements on school councils in England.

Right to receive information, advice and support

Under section 32 of the 2014 Act, each local authority in England has a duty to arrange for children and young people, and children's parents, to be provided with advice and

information about matters relating to the special educational needs or disabilities of the children or young people concerned. Local authorities must also take such steps as they consider appropriate to make those services known to such individuals and headteachers, principals and proprietors of schools and post-16 institutions. Among the matters to be covered by these information, advice and support services (IASS), according to the SEN Code ([DfE, 2015](#), s.2), is personal budgets (see below). The SEND Regulations 2014 (Schedule 2) provide that information about information, and advice and support (IAS) must be included in the local offer information published by the local authority.

The Code envisages that local authorities will build on their 'parent partnership services', which the IAS services have replaced. It contemplates – although does not specifically recommend – that there will be separate IAS provision for young people. Such separate provision is new for some local authorities, as a representative of one told us:

For the IAS, so one of the things we looked at was ... the new duty really on information, advice and support services to work with young people, which was completely new ... And they were like, 'Ooh, you know, we don't know what to do with them. We've only ever worked with parents' (LA SEND Strategic Lead).

The Code ([DfE, 2015](#), para. 2.10) states that in the case of children, while the statutory duty (above) in effect provides for them to have access to these services, they will tend to do so via their parents. One voluntary sector manager of independent support services (ISS) told us that if the child is under 16 they will –

... initially go through the family. But we will always try to meet with the child if it's appropriate, if that parent thinks it's appropriate, if it's not going to be too upsetting for them. We've got a booklet called a 'This is Me' booklet, which is very person-centred to inform things like the contribution towards the request for an assessment (Voluntary Sector ISS Provider).

The Code provides ([DfE, 2015](#), para. 2.10) that some children – 'especially older children and those in custody' – may want to receive information, advice and support separately from their parents and says that local authorities should ensure that that is possible.

EHCP planning (including reviews and personal budgets)

Participation and engagement

The 2014 Act and regulations provide for young people to have independent rights in the assessment and planning processes. They can request an assessment and must be kept involved in and informed of the outcome of this process. They must also be consulted over the content of a proposed EHCP and provided with a copy of the draft plan. They are entitled to make representations and to request that a specific school or other institution be named in the plan. Both children and young people's 'views, interests and aspirations' must be included in the EHCP. The importance of these provisions is reinforced by the way that local authorities' performance in relation to ensuring these various forms of participation and engagement occur are among the wide-ranging matters by which they will be judged

under area inspections carried out by Ofsted (with care elements being the responsibility of the Care Quality Commission (CQC)).

The handbook prepared by the Care Quality Commission (CQC) and Ofsted for local area inspections of local authorities in their SEN role calls for the views of children and young people, among others, to be gathered as part of the inspection process ([Care Quality Commission/Ofsted, 2016b](#)). The handbook states that inspectors must address three primary questions: A. How effectively does the local area identify children and young people who have SEND? B. How effectively does the local area assess and meet the needs of children and young people who have SEND? C. How effectively does the local area improve outcomes for children and young people who have SEND? In relation to question B it requires account to be taken of 'engagement and co-production with children and young people, and their parents and carers' and satisfaction of parents/carers and children and young people. On engagement and co-production it elaborates thus:

Inspectors should evaluate how well the local area engages with children and young people in the identification, assessment and provision of their needs. Inspectors will gather information about how well children and young people understand their needs and how involved they are in setting targets for their own progress. In talking to children and young people, inspectors will test the extent to which they have co-ownership of both the process and decisions that affect how their needs are met.

The CQC and Ofsted's clear expectations on LAs to ensure that children and young people with SEND are involved in the processes leading to decisions on their education reflect the legislative requirements, summarised in table 2 above, stipulating that the views of children and young people should be considered and summarised in any EHCP plan, but also that young people must be consulted over a plan and permitted to make representations and express a preference regarding a school/institution to be named as their placement.

Our local authority interviewees claimed that local authorities were managing these processes well, particularly engagement with the child's or young person's views. For example,

all councils have made major strides around getting the view of young people into their own EHC plans (LA Senior Officer).

One example of that was given by another local authority, referring to a situation where its panel –

are being asked to look at the evidence of whether a young person should be in specialist provision, rather than mainstream. And within that process, part of the evidence has to be, what's the pupil's view? So when ... there's no evidence that the pupil's views have been sought or whatever, we don't make a decision. We say, 'We need to know what the pupil's views are' (LA Service Manager Vulnerable Learners).

However, this authority applied that practice only from the upper primary education stage, not to younger children. This was an issue of assumed incapacity at the younger age.

There was a concern, however, that local authorities had not had specific resources for proper engagement with children and young people:

only now are we getting that dedicated resource. Whereas we've had the equivalent for parents knocking about for, you know, years (LA Parent Engagement).

There is a specific point, the Preparing for Adulthood (PfA) review, where engagement may be particularly important. One LA SEND Development Manager commented that the reforms had 'really shone a light on the ... transition point, post-16, which wasn't really appreciated before' (LA SEND Development Manager). And an educational psychologist, commenting on the impact of the Act, said that –

the most important part for me has been preparing for adulthood, and focusing on that. And looking at how we are realistic about ensuring children remain in their communities, that they are able to make a meaningful economic contribution in their communities, and having goals that, you know, mean that they're aiming towards ... living in their communities and making a positive contribution (Principal EdPsych).

However, there was also evidence from a voluntary sector worker with experience of contracted mediation management that children are not always present at PfA review meetings: 'sometimes parents will say "Oh, no, it's not appropriate to bring my child"' (Voluntary Sector ISS Provider). This is also the case with annual review meetings. A SENCO told us about a 10 year old with autism whose parents thought he should not attend his annual review meeting because 'they felt he wouldn't have a deep enough understanding of the meeting and what it was all about'; yet the SENCO thought that the child should attend part of the next review meeting 'to hear what positive things everybody's got to say about him' (Primary School SENCO). Unfortunately, efforts to ensure the involvement of children and young people also seem to be hindered by the pressure on staff time and resources.

One reason for non-participation is the degree of anxiety experienced by children in review meetings, or rather the parents' expectation that their child will be too anxious. One way of managing it that has been adopted is to involve the child or young person for just part of the meeting:

At all the review meetings, she was invited, and she came along, but she would only be there for a part of it. So the majority of the meeting was about other professionals talking and us as parents (Parent 1).

Typically the child or young person will invited in only at the end of the meeting or following its conclusion. For example, the review panel may –

do a follow up session with the pupil after the review because they appreciate that ... the child is going to be a little bit anxious about all these people talking about them and they're not there ... [T]he child comes in straight after the review and they take them off and have a conversation about what we ... discussed (Voluntary Sector – Ambassador for Children with SEN).

Similarly, a primary school inclusions manager told us:

what we tend to do is, we'll have the meeting; we'll review the statement, review the [EHCP] ... And then we invite the children in for the last ten minutes. We explain to them what we've done, what we've talked about. And then we ask them if there's anything that they want us to know or ... sometimes the learning mentor might come in and you'll say, 'Right. You've been working with the learning mentor. Is there anything you want the learning mentor to tell us?' And they will have their voice there again, and that will go into the minutes ... (Inclusion Manager Primary Sch).

The EHCP has to include the views of the child or young person. The Regulations require the local authority to set out in section A of the plan 'the views, interests and aspirations of the child and his parents or the young person' (regulation 12(1)(a)). However, one interviewee confirmed what other research ([Palikara et al., 2018](#)) has revealed, that section A is sometimes written by the parent:

It's written in the first person sometimes: 'I like ... my school diners', or whatever it is. But actually, it doesn't necessarily reflect, if you ask the child, what the child might talk about or what the child feels is important in school (Voluntary Sector ISS Provider).

Indeed, we are also examining in detail up to 24 cases involving children or young people and our evidence thus far indicates that the child or young person rarely completes section A independently. More often than not either the parent or a support worker has a great deal of input into what gets written, and in some cases the parent writes it without speaking to the child. For example, a parent key informant said:

Well, I filled it in [section A], sort of on his behalf, really: just talking about things that he likes to do and, you know, things that stress him, that kind of thing. And also all about the family ... To be honest, I just filled that in for him, because... well, it would have been, it would have been a bit too much for him to do. I suppose I could have involved him ... (Parent 2).

A representative of the voluntary sector nevertheless commented that overall, 'the child's and the family's voice and views and opinions are definitely more part of the process that they were with statements' (Voluntary Sector – Ambassador for Children with SEN). SENCOs were considered instrumental in helping to ensure the child's voice is heard. The SENCO who told us about the 10 year old autistic child (above) reported that for the child's last annual review his views were recorded on the pupil voice sheet and 'they were shared at the meeting' (Primary School SENCO).

Influence of the child's or young person's input

A rather mixed picture emerged from the interviews with regard to how much influence the child or young person's view has on planning. We heard examples of cases where there was an effort to reflect the views of the child or young person in the arrangements made. In one case, the child was quadriplegic and yet desperately wanted to walk, and this was reflected in the outcomes identified by the review:

His aspiration is: that's what he wants to do. So we, that is his outcome – it's walking in a frame, but ... that is what he wants to do. And we've built in ... all the exercises, all the things that he has to do to achieve that. And that's how we've built up what he wants to do (Inclusion Manager Primary School).

This interviewee told us that one child had said she wanted to be a mermaid – ‘But we’ve built hydrotherapy into that’ (Inclusion Manager Primary School)!

However, we were also told how, despite the recording of the child’s or young person’s views and wishes in section A of the EHCP, the contents of section A may not feed into the rest of the plan and thus influence the contents, which cover matters such as the details of the child’s needs and the proposed educational and possibly health and care arrangements:

Section A of the plan is the bit where local authorities generally will put the child’s and the young parent’s voice, then the rest of the plan is like an alien concept. It’s ... totally separate from Section A. Section A is just there; that’s the child’s voice and then that doesn’t flow through the plan (Voluntary Sector – Ambassador for Children with SEN).

A SENCO similarly referred to a case where a seven year old completed the pupil voice section of the plan with his classroom teacher, but, according to the SENCO:

I don’t think his views sort of changed the outcome of the EHC [planning]. That sounds as if they weren’t taken into account. They were. But I think the sort of things that he was expressing were, you know, ‘I’d like a, you know, banana for my snack instead of an apple’ (Primary School SENCO).

Parental involvement

The above interviewee also commented that disabled pupils’ capacity levels could preclude effective engagement with the planning process (see further Capacity above). Children’s age was another factor, for example in the context of school selection at the stage of transferring from primary to secondary school. A school governor told us that it tended to be the SENCO and the parent who settled such matters: ‘Because, whilst you want the child to be involved, the child doesn’t know anything about secondary schools, and which one would be the most appropriate really’, although ‘ideally, it would be discussed with the child’ (Primary School Governor (SEN)).

We heard of a case where the parent had not told the child (aged 14 or 15) that he had an EHCP, and the parent did not want the child to attend the review of his plan:

[O]ne parent said to us, ‘My son doesn’t know he’s got one. Please don’t tell him.’ And I said, ‘Well, he’ll have to come to a review. He will be invited.’ And she said, ‘I don’t want him there ‘cause he’ll go mad that he’s got one.’ ... But his voice wasn’t heard and his wishes weren’t listened to (Post-16 Head of SEND).

At the same time, some young people at the college were fully aware of their EHCP and indeed were prepared to assert their rights to provision under it:

But we do have other young people who say, ‘I’ve got an EHCP and you’ve got to ...’ So that’s changed things for young people. It’s given them a voice, but they’re using it as a tool rather than talking to us to get things right (Post-16 Head of SEND).

Some young people feel sufficiently autonomous not to want their parents at their EHC review. Even so, the college will let the parents know that a meeting is being held, ‘because

they've got a right to know ...'; and they try to explain to the young person that it would be helpful if the parent attended (Post-16 Head of SEND). There is a sense in which parents may consider their involvement to be important in what amounts to a period of transition to autonomous rights holder post 16:

I think parents find it very difficult to let go. One parent said to me, 'But what will I do? You know, I've been there all my life, every day, for this child, and suddenly you're saying to me, you know, I need to let go. What will I do?' So then we've got the early help plans and things that try to support parents (Post-16 Head of SEND).

The SEN Code implicitly recognises that for many children and young people with SEND, reaching the age of 16 may empower them in a formal legal sense but does not remove their inherent vulnerability. It encourages continuing parental involvement in a way which is consistent with the notion of 'evolving capacities' that marks the transition to adult independence within the UN Convention on the Rights of the Child framework ([Lansdown, 2005](#)).

Personal budgets

The 2014 Act provides (in section 49) a right for young people (and the parents of a child) to have a personal budget prepared for them where there is an EHCP or one is being prepared by the local authority. Creating a personal budget means identifying

an amount as available to secure particular provision that is specified, or proposed to be specified, in the EHC plan, with a view to the child's parent or the young person being involved in securing the provision (section 49(2)).

A personal budget can include direct payments to the young person or the child's parent (see the Special Educational Needs (Personal Budgets) Regulations 2014 (SI 2014/1652)). The SEN Code ([DfE, 2015](#)) explains the potential scope of the personal budget, which will largely depend on the provision specified in the EHCP, and the mechanisms for setting it. While the Code does not strongly promote the use of personal budgets it suggests that they 'can be used to help children and young people with SEN to access activities that promote greater independence and learn important life skills' and argues that they may be useful for young people in preparing them for adulthood by giving them 'an idea of how much their care and support will cost when they enter the adult system' ([DfE, 2015](#), paras. 8.7 & 8.74).

We did not receive many comments on personal budgets from the key informants, which suggests that they are not currently regarded as particularly important in practice. A head of SEND in the post-16 sector seemed to downplay their utility:

I think for some people it's probably not worth doing. Unless it's a huge amount of money, it won't be worth doing (Post-16 Head of SEND).

In other, previous, research it was found that fewer than one in five parents and young people had been offered a personal budget and less than one-third of those offered one had taken it up; and only 5% of cases where there was an EHCP had a personal budget ([Adams et al., 2017](#), pt. 4.3). (The research report only sets out a combined result covering both parents and young people.) National figures also show a very small number of personal

budgets relative to the number of EHCPs (11,661 personal budgets in 2017 as a whole and 285,722 EHCPs at the start of 2018) We were not offered any views on the extent of young people's interest in securing personal budgets, but in our local authority survey indicated that very few personal budgets are requested by young people themselves ([Davidge & Harris, 2018](#)).

Redress

Introduction

We received comments on mediation and appeals, which comprise the two principal dispute resolution mechanisms under the 2014 Act (sections 51-56). These two processes may be invoked by young people and parents of children, and there is also the option of accessing the informal disagreement resolution service or, if discrimination is alleged, pursuing a complaint under the Equality Act 2010 (see sections 57 and 60). Appeals are heard by the First-tier Tribunal (Health, Education and Social Care Chamber). Complaints of disability discrimination involving schools also lie to the tribunal and can be pursued jointly with an appeal.

All these mechanisms originated prior to the 2014 Act. Mediation and appeal have been available since the 1990s in the field of SEN. However, previous research confirmed that mediation was greatly under-utilised in this field in England ([Harris & Smith, 2011](#)). The Act has sought to give mediation an extra push as part of a policy aimed at making the resolution of disputes and disagreements less adversarial. It provides that before an appeal can be brought the young person, or the parent of a child, must consider information about mediation and give notification that they have done so and that they have either decided not to opt for it or have taken part in it but and still want to appeal. Cullen et al. ([2017](#)) found that mediation had reduced the likelihood of disputes being taken to the tribunal. Recent DfE statistics record that of the 'mediation cases held' in 2017 (which one assumes means only those where mediation was invoked), only 25.2% were followed by an appeal to the tribunal ([DfE, 2018](#)), which indicates that this process filters out some potential appeals (whether because cases are resolved by mediation or parents or young people simply choose after it to cease the pursuit of redress).

Mediation

Our focus is on the involvement of children and young people in the mediation process, both in terms of attendance at mediation sessions but also in the extent to which their views feed into it.

We were told about one SEN mediation concerning a girl with autism and health problems as well as various social issues. The mother and an older sister of the child attended the mediation but not the child in question. There was also someone from Specialist Support Services who had worked very closely with the child. There was a sense in which the young person's views were aligned with the mother's 'to keep mum happy' while there was also a concern that the professionals involved in the case would have 'their own ... agenda' (LA Service Manager Vulnerable Learners).

A mediator explained that when there is a mediation meeting she emails the young person in advance of it, but the young person usually wants the parent to speak for him/her. She said that over a period of three years 'I've only had two [young people] who've actually participated' (Mediator). There also tends not to be an independent advocate for the child or young person. But the IASS representative is generally present also for the parent. The mediator asks the parents about the child and their likes:

I think parents do a really good job of making sure that [the] child's voice comes across. And it's part of the mediator's job, I suppose, as well to make sure that sort of thing comes across (Mediator).

A voluntary sector representative who has much experience of mediation explained that most of the young people whose cases go to mediation do not want to attend the meeting, because they see it as 'too much of a stressful situation'. And she said that the meeting seems 'quite intimidating for young people' given the professionals who may be there and the language being used (Voluntary Sector – Ambassador for Children with SEN).

Various methods are used with a view to ensuring so that the child's or young person's views can be fed into the process even if they are not going to attend:

We always talk to parents about bringing photographs, doing little video clips, you know, anything, booklets we send out to get the children and young persons to contribute to – so if they're not there, that their voice is really being heard and the meeting is about them (Voluntary Sector ISS Provider).

This service provider has a kind of pro forma for children to complete 'so that they can really have a think about their views, that anyone who knows them could help them fill in or fill in on their behalf if they're not able to do that ...'. Such advance preparation seems to be helpful towards ensuring participation and engagement:

We've had a child. I think who was about 10 – he was still in primary school – came along to the mediation. And he was there, and I think it changed the way people spoke about him a little bit, but he didn't really contribute very much, But he'd done some preparation beforehand, and he was happy to be there ... It was better than him not being there (Voluntary Sector ISS Provider).

While the child or young person's participation in a mediation session may often be highly desirable, in helping to ensure that their views form part of the discussion and that they can feel more central to the process, there can be a problem when the meeting is fairly long. A mediator told us that she warns the parents that the child will be bored, so –

[p]erhaps bring somebody else with, so that, once Freddy's had his say, if he wants to go, he can go. And actually ... we had one once ... I think he was about 12 ... And I said, 'Bring somebody else with him, so if he wants to go out, he can do.' And yes, he got bored after the first half an hour. He had enough of it ... and off they went. But he was there (Mediator).

So she thinks it best that the child is heard first and then allowed to play or go.

However, parents tend not to want their child to attend the mediation meeting, because the child's behaviour can be distracting or inhibiting:

The child will want their attention all the time, so then the parent can't concentrate ... And also, as a parent, you may feel like you don't want to say certain things in front of your child about their ability or disability or whatever (Mediator).

Moreover, incapacity can be a limiting factor, although an alternative means of participation may overcome it to some extent:

Sometimes they are completely non-verbal, they've got quite severe learning difficulties; they might have Asperger's syndrome or some sort of ... condition that will really make them feel so anxious they might not want to talk to strangers. They might [find] talking on the phone difficult. So we try as many different routes as possible. Sometimes mediators ... have had text or email conversations with young people because they [the young people] find that a less stressful way of talking (Voluntary Sector ISS Provider).

There was only one comment with regard to the issue of whether the 2014 Act had made a difference to the likelihood of children and young people's participation in mediation. It was from a local authority SEN leader, who said: 'I'm not aware that that has made any difference at all'. Furthermore, she also told us that parents were 'not happy' with the mediation push 'because they just feel like it's another layer of bureaucracy' (LA SEND Strategic Lead).

Appeals

The provision of an independent right of appeal from the age of 16 transfers to young people a right previously held by their parent. It marks a significant advance in the autonomy of young people with SEND and tackles a much-highlighted problem whereby looked-after young people were reliant on the local authority, as their legal parent, to pursue an appeal against themselves as SEN decision-maker, which in practice meant that the right of appeal was nullified. The First-tier Tribunal to which appeals lie is an independent judicial body.

Our survey of local authorities ([Davidge & Harris, 2018](#)) indicated that few young people bring appeals in their own right. The key informant interviews confirmed this picture. A lawyer who has wide experience of SEN appeals and especially cases appealed from the First-tier Tribunal to the Upper Tribunal told us:

I probably see fifty a year, [First-tier Tribunal] written decisions ... I haven't seen a single decision where the child has been, or young person has been the appellant ... I had one case last year where the young chap involved did have capacity, but it was clearly the mum [who] was running the appeal for him (Barrister).

This lawyer told us that even where young people are technically the appellant,

their parents are doing all the work ... and of the cases that I've seen the first-tier tribunals in, it's been an absolute tiny smattering where there's even any evidence of the child or young person having actually been involved in the hearing process (Barrister).

The Deputy Chamber President of the Health, Education and Social Care (HESC) Chamber of the First-tier Tribunal nevertheless confirmed that the tribunal always requires that the child's views are placed before it, although the means by which the views are obtained might vary and they may be absent in exceptional circumstances (Deputy President, HESC). The legal onus is on the local authority to ensure the child's views are available. The lawyer interviewee said that the local authority tends to treat the performance of this obligation in a rather mechanistic way (Barrister). We were also told of cases where the parent and young person's views conflict. Both sets of views will need to be considered by the tribunal, but the decision on the appeal is of course ultimately for the tribunal itself.

One might expect that the child's or young person's views may have an influence on the tribunal's decision, but interviewees suggested otherwise:

I don't recall any decisions where you would say anything turned on that ... on what the young person said (Barrister).

I'm not sure that the young person's view is feeding through ... certainly with tribunal judges. I mean, just before the new legislation, we had an horrific judgment at a tribunal ... the young person's view was trampled on, completely trampled on ... [E]verybody working with the young person was saying, 'What he's saying is he wants to live in [place name] with his parents and attend a local college'. He was just leaving school ... had significant needs; he was statemented ... Wanted to live locally. Parents' views were, 'We want a residential special school out of [place name] for our young person'. Took us to a tribunal, and the judge ruled with the parent view. Now, I would hope that wouldn't happen now. But I'm not convinced ... (LA Senior Officer).

What happens in almost all cases is that the parents bring the appeal and represent the child or young person's views before the tribunal. Generally this is because of a perception that the child or young person would not be capable of coping well with participation. In one case, where the parent brought the appeal, the girl was autistic and became particularly stressed:

I nearly pulled out because of the stress I could see it was causing [E], and I didn't want to cause her any more ... I think [the appeal] was a harmful process for her (Parent 1).

The parents in that case were told that they had to arrange for Barnardos to interview the girl to elicit her views. But the parents also 'talked to her at home about what she wanted and what she'd prefer' (Parent 1). They had wanted the girl to come to the tribunal but she had chosen not to do so.

Conclusion

The predominantly professional perspectives that have been provided by our key informants have yielded valuable insights into the operation of the new legal and policy framework in part 3 of the Children and Families Act 2014 and, in particular, on the implementation of the rights held by children and young people with SEND and the co-relative responsibilities of local authorities and schools. Several characteristics of the new system have been illuminated.

First, one sees a picture of **considerable complexity in which diverse and at times competing interests are in play**. An avowed policy goal behind the reforms is to advance engagement and ‘co-production’, which has been defined as ‘a service delivery philosophy that shifts the balance of power and control from the provider of a service to the user’ ([Paget, 2014](#), p. 50), both for children and young people as well as parents ([DfE, 2012](#)). But local authorities are in control the processes of information flow and decision making at all levels (apart from redress) as well as having a deep stake in the decisions themselves. And this is a field where the process really matters. That is why the rights of participation accorded to young people, as well as parents of children, are in principle so important. However, we have not seen much evidence that the system has opened up to ease navigation for parents in the way that may have been envisaged, and child/youth participation in this field remains far from straightforward. A parent commented on the basis of his experience with his son’s case: ‘[The] county council don’t particularly want to listen to parents; I can’t see how they would suddenly want to listen to 17-year olds’. Cultural factors influence how children and young people are perceived by the relevant agencies. Local authorities have had a long engagement with SEN provision and are accustomed to viewing children and young people as the subjects of their decisions rather than as partners or at least active stakeholders. It is not clear that children and young people have become as central to the decision-making process and able to participate in it to the extent that may have been contemplated or promised.

The new rights and responsibilities are confirmatory of an existing and fairly long-standing policy applicable both to local authorities and schools of involving children and young people with SEND in decisions about their own education – and indeed a further characteristic that we have identified is the **small degree of change to date in participation and engagement and their impact on decisions**. We have not discerned evidence of a significant shift towards the empowerment of young people, let alone children. That is not to say that local authorities do not make efforts to engage with children and young people within the key processes. We saw examples of the range of measures adopted by local authorities to elicit the children and young people’s views and wishes. Nevertheless, it was also clear from some of the interviews that **the agency of children and young people remains in general rooted in the involvement of their parents and carers**. For local authorities, realism – particularly in light of issues of capacity and, where younger children are concerned, age – seems to dictate that it should be so. It is not always easy to find out from young people, even where they do participate, precisely what their wishes and feelings are; and they are often focused on simple everyday matters that may have little bearing on the big decisions that need to be taken.

The need for support in order for children and young people with SEND to be able to participate is clearly recognised throughout the SEN Code and in the 2014 Act. Local authorities must have regard to that need when exercising their SEN functions (section 19) and also have a duty to ensure that children and young people are able to access advice and support on SEND matters (section 32). The impression gained from the interviews is that IAS support is not functioning as well as it could, or at least not in terms of supporting engagement of children and young people specifically. More value in that regard seems to be offered by the intervention and support of school staff and especially SENCOs in both ascertaining and presenting the views of children and young people and supporting assessment requests and the making of EHCPs. Although they can also be considered to be representing the interests of the school, since a plan would bring in extra resources to support the education of the child and the meeting of his or her needs, they nevertheless reflect a **reasonably strong professional perspective viewing children and young people as rights holders**, potentially able to be engaged in decisions about their education. Parents also seem more willing to rely on them than IASS, who may know their child, and understand their needs, far less well.

The Code recognises that more often than not children and young people with SEND will be reliant on their parents to participate on their behalf. Indeed, as Parkinson and Cashmore (2008, p. 63) explain, with reference to the resolution of family law disputes, children should be considered to have 'some choice about how they might be involved, including the option of not being involved at all'. Parents moreover have a moral and legal responsibility to protect their child's interests in line with the latter's vulnerabilities and incapacities, and ought to be supported to do so (Bridgeman, 2008). This can be problematic, however, when there is a **conflict between the parent's and the child or young person's wishes or choices**, as a number of our interviewees highlighted. It would appear that the parent's view may be accorded more weight than their child's. Of course, an important factor will be that the parent's views are more likely to centre on the specific issues that are central to the local authority's decision. But there remains a reluctance to give the child's view 'due weight' in the process. Regardless of that, ultimately parents or children/young people almost always have no guaranteed choices and the law for the most part gives the choice to the local authority. Even so, the authority must be able to demonstrate that it has engaged with the views of the child or young person and we saw some evidence that these views can be influential.

When it comes to redress processes, the professionals' comments do not suggest that in that context there has been much progress in bringing the wishes and feelings of children and young people to the fore and according them any greater weight than previously. Nevertheless, it is clear that, **notwithstanding the barriers to children and young people's participation in mediation and appeal processes** (including, in some cases, parental resistance), **mediators and tribunal judges are committed to engagement with their views**. A recent decision of the Upper Tribunal *St Helens BC v TE and another* [2018] UKUT 278 (AAC), summarised in Annex 1 below, offers a potent example of this commitment and perhaps represents an exemplar of how to give proper recognition to children and young people's agency that is consistent with both domestic policy and obligations under the UN Convention on the Rights of the Child, including in particular the degree of weight to be

given to views which are not only genuine but help to give a true insight into the child's needs.

ANNEX 1

St Helens BC v TE and another [2018] UKUT 278 (AAC)

This was an important recent decision of the Upper Tribunal in which the weight being attached to the views of the child was the central issue.

The facts concerned F, a 7 year old boy with autistic spectrum disorder. The local authority wanted school R, a maintained primary school, to be named in F's EHCP. His parents, however, wanted school O, an independent special school. The parents appealed to the First-tier Tribunal (FtT) which concluded that school R was unsuitable for F and that school O should be named in his plan. The FtT found that F had 'formed an entrenched and currently intractable opposition to attending [school R] or any mainstream provision'. The FtT was clear that F had not been manipulated by his parents, nor was his opposition to school R attributable to his parent's objection to it. The tribunal explained in its stated reasons that it was not permitting F a veto but felt that his 'attitude to the proposed placement is part of the complex and significant needs which must be met by the provider.' The history of provision for F had fostered his opposition to the point that his parents ceased to be able to ensure he would attend school.

The FtT noted, on the basis of his mother's evidence, that F's 'fear and anxiety about having to attend [school R] is extremely worrying and would probably and presently override any ability of a skilled parent to persuade him, or otherwise modify his decision'. It noted that 'even that school's skilful handling will not overcome [F's] opposition'. The tribunal found that F's opposition stemmed from his SEN as outlined in his EHCP, as supported by the evidence of an educational psychologist. The FtT considered that F would not be able to make a mental adjustment and that school R would be a 'failed placement' for him followed by a 'long delay' before another placement was found; and there would be a difficult process of recovery for him from a loss of self-esteem that would be involved.

The local authority appealed to the Upper Tribunal. Its counsel submitted that while a local authority had a duty under section 19 of the Children and Families Act 2014 (as did the tribunal on appeal) to have regard to the views wishes and feeling of the child and of his parent, the FtT had wrongly allowed F's views to be 'paramount'. But Upper Tribunal Judge Ward disagreed and saw no flaw in the FtT's approach:

Clearly F's opposition played a central part in the FtT's decision to reject school R, but that does not mean that the FtT misapplied s.19. Among other things, it satisfied itself as to the genuineness of those views and that they were rooted in his special educational needs, examined their genesis in his school experiences to date, and considered whether the strategies which his parents had employed, and those which school R would employ, would overcome them. In my view that is conscientiously to 'have regard' to them, as s.19 requires. As the FtT noted, the views were part of F's 'complex and significant needs' and it was on the basis of those needs that the FtT reached its decision (para [17]).

The Upper Tribunal Judge found no error of law in the FtT's decision and dismissed the local authority's appeal.

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Further information

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