

Submission to the House of Commons Education Committee by Professor Neville Harris and Dr Gail Davidge, School of Law, University of Manchester

Executive summary

- This memorandum includes evidence from recent independent research on the implementation of the participation rights of children and young people with special educational needs (SEN) under part 3 of the Children and Families Act 2014.
- The UK has obligations under the UN Convention on the Rights of the Child and the UN Convention on the Rights of Persons with Disabilities to ensure the participation of children and young people with SEN and disabilities (SEND) in decisions about their education.
- Local authorities (LAs) are sympathetic to and supportive of the principle of children and young people's engagement. But in practice they have found that competing claims on their time and resources as the new SEN framework is being implemented have hindered their ability to develop and support children and young people's participation.
- On the whole, there appears to have been greater success in involving children and young people in strategic development around local SEN provision and the local offer than in the assessment and planning of provision for the child or young person in individual cases.
- Although young people have been accorded many independent rights previously held by parents, for a variety of reasons they are mostly not utilising them. They include rights to express a preference for a school in an EHCP plan, opt for and participate in mediation or take a case to the First-tier Tribunal. Very often parents participate on their behalf.
- Questions have arisen over how the child's or young person's views can be ascertained and distinguished from those of the parent, and how conflict between parents' and children/young people's views can be resolved by local authorities.
- It is not clear that in determining young people's capacity, on which hinges their ability to utilise their independent rights under the 2014 Act, the correct legal test is being applied. Local authorities appear to be exercising their own judgment rather than looking to the Mental Capacity Act 2005. There is a need for greater clarity around this issue.
- Overall, the evidence reveals significant problems in ensuring that children's independent voice is heard and young people's autonomy is fully recognised.

Introduction

1. This submission is concerned with the participation of children (aged 0-15) and young people (16-24 years) under the new SEN framework within Part 3 the Children and Families Act 2014 (the 2014 Act). Among its various aims, the law, reinforced by the SEN Code of Practice 0-25

years,¹ reflects a policy commitment to give children and young people with SEND ‘greater control... to make them authors of their own life stories’.²

2. This submission draws on results from ongoing research in England by Professor Neville Harris and Dr Gail Davidge of the University of Manchester for a project funded by the Economic and Social Research Council (ESRC): *Autonomy, Rights and Children with Special Educational Needs: A New Paradigm?* (ES/P002641/1). Other research for the project is being carried out in Scotland, led by Professor Sheila Riddell, University of Edinburgh. The principal research aims are to ascertain how far the promise of children and young people’s rights offered by the newly implemented legislation is being realised in practice; to understand the factors influencing progress; and to make recommendations for improving participation of children and young people with SEND.

Children and young people’s rights under the post-2014 legal framework

3. LAs have a pivotal duty under the 2014 Act to have regard to particular matters in relation to children, young people and (in the case of a child), parents, when carrying out their SEN functions:
 - their views, wishes and feelings,
 - the importance of them participating as fully as possible in decisions made under part 3,
 - the importance of their being provided with the information and support necessary to enable such participation, and
 - the need to support them in order to facilitate their development and help them to optimise their educational and other outcomes.
4. LAs also have duties to engage with children and young people and ensure that their views and wishes are heard and given proper consideration – collectively when reviewing local SEN provision and the ‘local offer’, and individually, for example when reaching a decision about assessment and the content of an EHC plan. Young people have independent rights over such issues as requests for assessment of needs, selection of a school to be named in a plan, or triggering mediation or initiating an appeal.
5. Also relevant are:
 - Article 12 of the UN Convention on the Rights of the Child (CRC), requiring States Parties to ‘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’.³
 - The UN Convention on the Rights of Persons with Disabilities (CRPD) Article 7.3, imposing a similar obligation in relation to children with disabilities, and also that they be provided with ‘disability and age-appropriate assistance to realize that right’.

¹ DfE, 2015.

² Department for Education, *Support and aspiration: a new approach to special educational needs and disability: progress and next steps* (DfE, 2012), Summary of progress, para.19.

³ Note Article 2.1 of the Convention, requiring States Parties to respect and ensure all the rights in the Convention ‘to each child within their jurisdiction without discrimination of any kind’.

- General Comment (No.9) on the rights of children with disabilities,⁴ calling for the views of children with disabilities to be heard in various policy making forums and recommending training for professionals on children’s participation.⁵
- The CRPD’s right to inclusive education (Art.24) and the need for pupils to ‘feel valued, respected, included and listened to.’⁶
- General Comment No.12 on the children’s right to be heard, emphasising that capacity to form and express views should be presumed and ‘it is not up to the child to first prove her or his capacity’.⁷

Evidence from the ESRC research

6. A total of 56 English LAs completed the project’s online survey in November/December 2017. On the whole, they supported the Act’s principles on children’s and young people’s participation and some provided examples of positive changes made in practice. But there was also a wide degree of national variation in progress towards realising children and young people’s rights.

Local arrangements

7. The incidence of appropriate structures and cultural awareness within LAs to support children and young people’s engagement varies.
8. Only just over half of the LAs reported having an officer with a specific role in the participation of children and young people with SEND.
9. In a large majority of LAs, staff with SEND responsibility have received some training on children and young people’s rights, but there was little uniformity in terms of its type, extent and source. Some is ‘in-house’ but it is often commissioned from a wide range of external specialists. Statutory training on matters such as safeguarding often takes precedence.
10. LAs were very clear about being insufficiently well resourced to implement the policy fully, especially given the significant increase in their workload post the 2014 Act, due to factors such as the introduction of education, health and care (EHC) plans, a need for greater inter-agency cooperation and collaboration, higher volumes of assessment requests, and the inclusion of young people until age 25.

Supporting children and young people’s engagement in strategic decision-making

11. Most LAs always consult with children and young people when keeping local SEN provision under review and when reviewing their local offer. Some LAs viewed consultation as a burden on time and resources, although most found it useful for refining policy and practice, identifying gaps in provision and enabling children and young people to influence agendas for change.
12. LAs also claim to be very responsive to feedback from children/young people on the local offer. If this is correct it could suggest an improvement from the pathfinder position.⁸ Nevertheless,

⁴ Committee on the Rights of the Child, *General Comment No.9* (2006), *The rights of children with disabilities* (CRC/C/GC/9) (Geneva, Switzerland, UN, 2007).

⁵ *Ibid* para.32.

⁶ UN Committee on the Rights of Persons with Disabilities, *General Comment No.4 on the right to inclusive education* (Geneva, Switzerland, UN, 2016), para 12(e).

⁷ UN Committee on the Rights of the Child, *General Comment No.12* (2009) *on the right of the child to be heard* (CRC/C/GC/12) (Geneva, Switzerland, Centre for Human Rights, 2009), para 20.

recent DfE monitoring⁹ indicates scope for improvement, since participation on this issue is at a 'moderate' level only.

Provision of advice and information to children and young people

13. LAs have a duty to provide advice and information to children and young people about SEN. They use various agencies, tending to commission from a range of bodies including Citizen's Advice and Barnardos.
14. LAs provide information via a range of passive and active channels and make an effort to maximise accessibility. Most authorities use a variety of printed and digital media. Parent forums, local partnerships, charities and strategic groups also communicate SEN information on their behalf.
15. Efforts are reported by LAs to ensure that local offer information is accessible. There is considerable variation in how the information is provided on LA websites and, in particular, whether any alternative versions aimed at children and young people with SEND are available and easily accessible.

Children and young people's participation in EHC assessment and planning

16. Previous, DfE-commissioned research revealed a mixture picture of engagement by children and young people.¹⁰ The DfE's monitoring report, which is based on LA and Parent Carer Forum responses, has reinforced it.¹¹ But in the ESRC survey, there was reportedly a significant degree of engagement with young people, unless they lacked capacity. Their views tended to be considered, but few submitted *evidence*.
17. Arrangements for information, advice and support regarding EHC assessment are not always provided. In around a third of LAs they will be made for a child or young person only when the LA considers they are needed.
18. Few young people seem to exercise their right to request that a school or other institution be named in their EHC plan. A likely reason is that they are not always consulted about the plan's contents. In some cases the young person is judged (by the LA) to lack capacity.
19. Regarding EHC planning, LAs said that often in practice it occurs via a parent or other person. Some young people prefer their parents to be engaged on their behalf. Sometimes there is friction on the part of parents when direct engagement with young people occurred, suggesting that they would prefer to speak for the young person.

⁸ See G Thom, K Lupton, M Craston, S Purdon, C Bryson, C Lambert, N James, S Knibbs, D Oliver, L Smith and T Vanson, *Special Educational Needs and Disability Pathfinder Programme Evaluation. Final Impact Research Report. July 2015* (London, DfE, 2015), 100.

⁹ DfE, 0-25 Special Educational Needs and Disabilities, Alternative Provision and Attendance Unit, March 2018 Newsletter, Annex B.

¹⁰ Thom et al op cit; L Adams, A Tindle, S Basran, S Dobie, D Thomson, D Robinson, and C Shepherd, *Experiences of Education, Health and Care Plans. A survey of parents and young people. Research Report. March 2017* (London, DfE, 2017).

¹¹ DfE, 0-25 Special Educational Needs and Disabilities, Alternative Provision and Attendance Unit, March 2018 Newsletter, Annex B.

20. LAs also, mostly, claim to seek to ascertain children's own views, using a variety of methods, including forms and questionnaires. However, LAs commonly place reliance on parental or third party communications, particularly in the case of younger children, raising questions about how certain LAs can be that it is the child's own views and feelings that are being represented.
21. The ESRC research also sought to ascertain how much weight LAs attach to the views expressed by children and young people. LAs told us they consider such views to be important considerations. Yet it was not clear how much weight they place on them when deciding on assessment or plans.
22. Most LAs claimed always to include the child/young person's views and aspirations in a plan, as regulations require.¹² Some LAs, however, will seek prior parental consent. Separate research examining a sample of EHC plans found strong indications that often the child's view is not directly obtained.¹³

Personal budgets

23. Young people and parents/carers of children have the right to request a personal budget. Difficulties around understanding personal budgets, impacting on take-up levels, have been underlined by Ofsted/CQC.¹⁴
24. In ESRC survey, over 90% of LAs reported that less than one in ten young people had requested a personal budget. These findings are consistent with those of an earlier DfE survey of parents and young people.¹⁵

Participation in disagreement resolution, appeals and mediation of disputes

25. Disagreement resolution, mediation and appeal to the First-tier Tribunal (FtT) are separate processes for redressing SEN grievances. In addition, a complaint of disability discrimination may be brought to the FtT.
26. Cullen et al's DfE-commissioned study, published in 2017,¹⁶ found that young people's experiences of mediation and appeals 'were largely negative'.¹⁷ Among the problems is a lack of awareness and a degree of anxiety among young people.¹⁸ Cullen et al cite cases in which an

¹² SEND Regs 2014, reg.12.

¹³ O Palikara, S Castro, C Gaona and V Eirinaki, 'Capturing the Voice of the Children in the Education, health and Care Plans: Are We There Yet?', *Frontier in Education* (19 April 2018), online at <https://pdfs.semanticscholar.org/4ccb/811386b4e9a0f46e90224a7eb91bf1f2374e.pdf> (accessed 14 June 2018).

¹⁴ Care Quality Commission/Ofsted, *Local area SEND inspections: one year on* (ref 170041) (London, Ofsted, 2017), 7.

¹⁵ L Adams, A Tindle, S Basran, S Dobie, D Thomson, D Robinson, and C Shepherd, *Experiences of Education, Health and Care Plans. A survey of parents and young people. Research Report*. March 2017 (London, DfE, 2017); M Cullen M et al., *Review of arrangement for disagreement resolution (SEND). Research Report* (London, DfE/Ministry of Justice, 2017) p.117

¹⁶ M Cullen et al., *Review of arrangement for disagreement resolution (SEND). Research Report* (London, DfE/Ministry of Justice, 2017).

¹⁷ *Ibid*, 157.

¹⁸ See also, B Walsh, "'A Powerful Thing": Exploring the Participation of Children and Young People in Special Educational Needs Mediation' *Ed Law Journal* (2017) 18, 1, 13-35.

insufficient regard for support needs affected attendance and participation. There is a general lack of public understanding of the processes for resolving disagreements and disputes.¹⁹

27. The ESRC survey has found that, across LAs, it is very rare for a young person him/herself to utilise a right to seek redress autonomously.
28. In the case of *disagreement resolution*, two-thirds of LAs reported that no cases were pursued by young people over the past year, and a further quarter had had only one or two. One reason may be the provision of the relevant information to the parent/carer alone.
29. The picture is similar with regard to *mediation*. Most LAs had had no more than two mediation requests by young people (even if assisted by a parent or other person). In addition, children and young people often fail to participate in mediation meetings, even though most authorities said they ensure that advocacy support is available.
30. Over half of LAs in the ESRC survey had not had any *appeal* cases brought by young people independently in the previous year; most others had had only one or two cases. Advocacy support is again available, contracted from a range of independent organisations. Children are not independently represented in SEN appeals. LAs must ensure their views are placed before the tribunal, which LAs told us is often difficult, or provide an explanation as to why this is not possible. Some parents refuse the LA consent to obtain the child's view. They may judge the child to lack capacity. There is also sometime a doubt that a parent is accurately representing the child's view. Some LAs also claimed that legal advisors may resist LA attempts to seek the child's views. Direct participation by children and young people in appeal hearings was reportedly quite rare. We are seeking further evidence on this issue.

Conclusions and recommendations

31. There has been uneven progress in implementing the principles and requirements governing children and young people's participation in the area of SEN. There have been advances in collective engagement through consultation about local provision and the local offer. But progress in other areas has been slow, particularly in the context of EHC planning and assessment and provision of information, advice and support.
32. The clearest message sent out by LAs in the ESRC survey is that of being insufficiently well-resourced to deliver the changes needed as well as managing significant increases in both the volume and scope of SEN-related work.
33. A number of other problems have been revealed:
 - variations in the frequency and scope of LA SEN training provision relevant to supporting children and young people's participation.
 - variations in LAs success in ensuring that SEN-related information and advice are accessible and appropriate for children and young people.

¹⁹ See L Adams, A Tindle, S Basran, S Dobie, D Thomson, D Robinson, and C Shepherd, *Experiences of Education, Health and Care Plans. A survey of parents and young people. Research Report. March 2017* (London, DfE, 2017).

- questions about how the child’s or young person’s capacity is being judged by LAs; it is not clear whether LAs are applying the correct statutory test.
- difficulties facing authorities in trying to consult with younger children and those with communication difficulties or more complex needs.

34. There are also issues about whether children’s or young person’s *own* views are being ascertained and, in the event that parent and child’s views conflict with each other, whose should take precedence.

35. Key Recommendations:

- There should be more guidance and direction for LAs on essential staff training on engagement and co-production regarding children and young people with SEND. Training needs to be more consistent, and evaluated.
- An improved availability and quality of independent professional support and advice is needed to enable the voice of the child or young person to be better heard.
- LAs need more guidance on publicising the local offer in ways that facilitate the engagement of children and young people.
- LAs need more actively to seek to involve children and young people in EHC assessment and planning. This may require improved resources, but also a change of approach to one which places less reliance, as the default position, on the parent’s agency.
- There needs to be greater clarity and guidance on the assessment of young people’s capacity.
- Young people need to be given better information on all the avenues for redress and more support for utilising and participating in them.

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