The practical realisation of children and young people’s participation rights: special educational needs in England

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Children – rights – participation – special needs – disabilities – autonomy

Children and young people have until relatively recently had few independent rights under the law governing special educational needs (SEN) in England. Now, however, under Part 3 of the Children and Families Act 2014, not only have the governance and coverage of SEN provision changed, but there is also a new focus on children and young people’s rights, aimed not only at enabling their wishes, feelings and choices to influence decisions about their own education but also at ensuring that local provision is properly informed by child/young person perspectives. Drawing on our research for an Economic and Social Research Council (ESRC) funded Anglo-Scottish research project: Autonomy, Rights and Children with Special Educational Needs: A New Paradigm?,1 we explore the factors driving the extension of the rights of children and young people with SEN and disabilities in England and seek to highlight challenges and difficulties that have arisen in delivering them in practice, including issues of conflict between their wishes and their parents’, and questions of mental capacity.

Introduction

Children and young people’s autonomy, special educational needs and disabilities

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1 Led by Neville Harris in England and Sheila Riddell of Edinburgh University in Scotland. The project’s separate Scottish research concerns changed participation rights for those with additional learning needs under Scottish legislation.
To the many proponents of independent rights for children² and young people,³ Part 3 of the Children and Families Act 2014 (the 2014 Act) might stand out as a model statute. Its provisions governing state responsibility to ensure appropriate educational provision for children and young people with special educational needs (SEN), who comprise approximately one in seven school pupils in England,⁴ include measures with the express aim of giving these individuals ‘greater control … to make them authors of their own life stories’.⁵ The incorporation of a new rights framework within this policy area appears to evince an increased willingness to recognise and support the developing autonomy of children and young people with SEN. It builds on a general trend concerning engagement with the child’s perspective and voice since the Children Act 1989 – for example, in the requirement that courts in child upbringing or property cases have regard to the ‘ascertainable wishes and feelings of the child’ and consider them ‘in the light of his age and understanding’,⁶ and the duty placed on local authorities (LAs) to, ‘so far as reasonably practicable’, ascertain a looked after child’s wishes and feelings when making a decision about him/her.⁷ Most recently it is manifested in LAs’ duty under the Children and Social Work Act 2017 to ‘encourage’ looked after children ‘to express their views, wishes and feelings’.⁸ While adherence to the principle of engagement with the child’s voice is not guaranteed, it has also become a reasonably established feature of care arrangements⁹ and of areas of professional practice more generally.¹⁰

The true test of children and young people’s autonomy and their ability to influence decisions about their education, or their agency in this context,¹¹ nevertheless rests on both the extent to which those views and feelings may be expressed but also have due weight placed upon them by the decision maker – as per the normative framework under international children’s rights law (below). It is a question of not merely the nature and extent of their participation but also of how far their perspectives are influential or determinative. The relevant processes include those concerned with dispute resolution – an area on which much of the empirical research on

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³ Defined for the purposes of the Children and Families Act 2014, Part 3, as a person over compulsory school age and under 25: 2014 Act, s 83(2).


⁵ 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.

⁶ Children Act 1989, s 1(3)(a) read with subs (4).

⁷ Ibid, s 22(4)(a).

⁸ Children and Social Work Act 2017, s 1(1)(b).


children’s participation has been focused. The empirical studies have illustrated how participation faces barriers but also generates risks – for example, that children might be manipulated in ways that might undermine the decision-making process or that their wellbeing might be affected by the responsibility and strain of participating. The case for children and young people’s participation has been reinforced by theoretical perspectives, which also point to some dangers of autonomous decision-making by adolescents, particularly of making unwise choices. It includes utilitarian arguments about better decision making, developmental arguments about building towards adult capacity and citizenship, psychological benefits of personal fulfilment and well-being (and avoidance of the detrimental psychological impact of being denied participation) and moral claims concerning respect for the human rights, autonomy and capabilities of the individual. Various potential models of participation have been identified and evaluated. Prominent are Hart’s ‘ladder of participation’ model and Shier’s ‘Pathways to Participation’ model, both referring to intensifying degrees of participation, and Lundy’s typology of participation and engagement consistent with the realisation of Article 12 of the UN Convention on the Rights of the Child 1989 (CRC) in education settings, based around ‘Space’, ‘Voice’, ‘Audience’ and ‘Influence’. There is not the scope here to evaluate these models, but it is important to note their contribution in presenting qualitative and quantitative measures of children and young people’s participation, of value for ‘auditing existing practice’.

12 See, for example, J Masson and MW Oakley, Out of Hearing. Representing Children in Care Proceedings (Wiley, 1999); F Parkinson and J Cashmore, The Voice of the Child in Family Law Disputes (OUP, 2008); K Soar et al, ‘Pupil involvement in special educational needs disagreement resolution: some perceived barriers to including children in mediation’ (2005) 32(1) British Journal of Special Education 35; N Harris and S Riddell (eds), Resolving Disputes About Educational Provision. A Comparative Perspective on Special Educational Needs (Ashgate, 2011).

13 See Parkinson and Cashmore, ibid, at 194–196.


15 Parkinson and Cashmore, above n 12, at 190–191.


17 A Daly, Children, Autonomy and the Courts: Beyond the Right to Be Heard (Brill Nijhoff, 2018), 35.


19 For review of the models, see A Parkes, Children and International Human Rights Law. The Right of the Child to be Heard (Routledge, 2012), ch 1.


21 H Shier, ‘Pathways to participation: Openings, opportunities and obligations, a new model for enhancing children’s participation in decision-making’ (2001) 15(2) Children and Society 107. Shier’s model is based on five levels of children’s participation: (i) being listened to; (ii) being supported in expressing one’s views; (iii) one’s views being taken into account; (iv) being involved in decision-making processes; and (v) sharing power and responsibility for decision-making. Three possible degrees of commitment towards each of these levels are identified.

22 L Lundy, “‘Voice’ is not enough: conceptualising Article 12 of the United Nations Convention on the Rights of the Child” (2007) 33(6) British Educational Research Journal 927, 933: ‘Children must be given the opportunity to express a view’ (Space), ‘Children must be facilitated to express those views’ (Voice), ‘The view must be listened to’ (Audience), and ‘The view must be acted upon, as appropriate’ (Influence).

23 Ibid, 941.
When it comes to the rights of most children and young people with SEN there is an additional dimension to consider, concerning disability rights. Disability and SEN are separate concepts and legal constructs. As Ofsted has stated, ‘[n]ot all disabled children have [SEN]’. Yet the strong association between the two has led to the adoption of the conjunctive ‘SEND’ (special educational needs and disabilities) as reference to both the policy field itself and the category of children and young people it covers. The normative framework established under the UN Convention on the Rights of Persons with Disabilities (CRPD) (see below) is highly relevant to this field, as are broader issues around equality and inclusion. Their importance in the context of our discussion of SEN decision-making stems from the way that the involvement of children and young people may be an important grounding for their future social engagement and citizenship on a more equal and inclusive basis. Just as the barriers to participation contribute to the definition of disability itself, under the social model, engagement is potentially empowering in and of itself and in building future capacity. Yet children and young people with SEND face the greatest barriers to participation and require additional support. Due to their perceived vulnerability there is a particular tension between ‘participation and protectiveness’ in how their involvement is likely to be viewed by professionals. These factors contribute to the challenge in operating a rights framework that recognises or enhances autonomy.

Within education, SEN is a field which has at least led the way in acknowledging children’s agency. The rest of English education policy has lagged behind it and, in the interests of ensuring marketplace accountability among providers, has promoted and extended parents’ rights, encouraging parents’ active participation as consumers or ‘consumer-citizens’ exercising choice and pursuing redress. A consequence of this competitive focus in 2010, s 6 and Sch 1, disability is – ‘a physical and mental impairment’ which ‘has a substantial and long-term adverse effect on [a person’s] ability to carry on day-to-day activities’. In the 2014 Act, s 20(1) and (2), SEN refers to having a ‘learning difficulty or disability’, meaning having ‘(a) … a significantly greater difficulty in learning than the majority of others of the same age, or (b) … a disability which prevents or hinders him or her from making use of facilities of a kind generally provided for others of the same age in mainstream schools or mainstream post-16 institutions’.

Ofsted, Special Educational Needs and Disability Review – A statement is not enough (Ofsted, 2010), 77.


The social model focuses on how far someone is limited or disadvantaged within society due to their mental or physical state or condition and on how he/she experiences long-term disadvantage in daily life. It also looks at how barriers can be addressed: see, for example, J Swain, S French and C Cameron, Controversial Issues in a Disabling Society (Open University Press, 2003), 23–25. For a critique of it, see T Shakespeare and N Watson, ‘The social model of disability: an outdated ideology’ (2002) 2 Research in Social Science & Disability 9.


N Frederickson and T Cline, Special Educational Needs, Inclusion and Diversity (Open University Press, 2nd edn, 2009), 16.

31 See, for example, Daly, above n 17, 378. In presenting her ‘autonomy principle’ based on an ideal (and presumption) of adherence to children’s wishes, in ‘best interests’ decisions in the courts, unless ‘significant harm’ is likely, Daly excepts those with ‘significant mental health problems or cognitive impairment’.

domestic education policy has been the neglect of the rights of children as independent actors. Children have been viewed under domestic policy as ‘the object of a legally recognised relationship between the school and the child’s parents rather than the subject of the right to education and of … rights in education’. There has been a systemic failure to value the child’s independent voice and enable it to inform and guide everyday educational practice and decision-making as well as policy-making. The disparity between SEN law and the rest of education law in this regard has widened as a result of the 2014 Act. While the Act also seeks to advance engagement and ‘co-production’ – ‘a service delivery philosophy that shifts the balance of power and control from the provider of a service to the user’ with parents, in particular by reconfiguring the system to facilitate increased access to information and support and enhance accountability, with ‘greater control over the services they and their family use’, there are key elements with the potential to place children and young people with SEND into a more empowered position.

The relevance of human rights principles

The UK Government has explained that a key principle of the 2014 Act is to ‘place the views and interests of children and young people at the heart of decision making’. Its importance in the context of Part 3 is underlined by the concern of the UN Committee on the Rights of the Child (UNComRC) that many children with disabilities ‘do not see that their views are given due weight in making personal decisions in their life, including choice of support and future’. The Committee has recommended that the UK should ‘ensure full respect of the rights of children with disabilities to express their views and to have their views given due weight in all decision-making that affect them, including on access to and choice of personal support and education’ and on support for their transition to adulthood. Such rights are acknowledged by Article 7.3 of the CRPD, which requires them to be guaranteed on an equal basis with other children and calls for children with disabilities to be provided with ‘disability and age-appropriate assistance’ in connection with them. States Parties’ obligations under Article 7.3 are in furtherance of the CRPD’s general principles of ‘full and effective participation in society’ for children with disabilities and respect for ‘the evolving capacities of children with disabilities’ and ‘the right of children with disabilities to preserve their identities’. The UNComRC’s General Comment (No 9) on the rights of children with

36 DfE, above n 5, 4.
38 UNComRC, Concluding observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland (CRC/C/CBR/CO/5) (Centre for Human Rights, 2016), para 55.
39 Ibid, para 56.
40 CRPD, Art 7.3.
41 CRPD, Art 3.
disabilities explains that their Article 7.3 right extends to participation in ‘their own learning and individualized education plans’, school councils, and the development of school policies and systems and wider educational policy. The Committee also calls for training for professionals on children’s evolving capacities to participate in decision-making processes. Also highly relevant is Article 24 of the CRPD: States Parties must ensure ‘an inclusive education system at all levels’ so that children and young people with disabilities have access to primary and secondary education ‘on an equal basis with others in the communities in which they live’. The Committee on the Rights of Disabled Persons’ General Comment (No 4) identifies as a core feature of inclusive education that pupils with disabilities ‘feel valued, respected, included and listened to’. It also emphasises the importance of ensuring that they receive appropriate assistance and support with communication. It calls for legislation to guarantee their right to be heard and to have their opinion be given due consideration within schools and by local and national governments and dispute resolution bodies.

One of the risks arising from implementation of the provisions is that states might give ‘a voice only to those children who can be accommodated easily’ and may leave an ‘exclusionary gap’ in the case of other children, particularly those with impairments deemed ‘too difficult or expensive to accommodate’. However, a key point is that it should be assumed that a child with disabilities has the capacity to participate to some degree. Presumed capacity is also advanced by the UNComRC in relation to CRC Article 12 which, in equal application to children with or without disabilities, requires 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’. The child should, in particular, have the opportunity to be heard in any judicial or administrative proceedings affecting him/her.

As Lundy explains, Article 12 requires states to engage with children’s views and adopt affirmative measures to ensure that they are expressed, listened to, respected and able to have a meaningful influence. General Comment (No 12) on the children’s right to be heard emphasises that in relation to the issue of whether a child is, for Article 12 purposes, ‘capable of forming his or her own views’, capacity should be presumed and ‘it is not up to the child to

43 Ibid, para 47.
44 Ibid, para 32.
45 UN Committee on the Rights of Persons with Disabilities, General Comment No 4 (2016) on the Right to Inclusive Education (UN, 2016), para 12(e).
46 Ibid, para 63(l).
48 Callus and Farugia, above n 26, 11.
49 Article 12.1 read with Article 2.1, which requires States Parties to respect and ensure all the Convention rights ‘to each child within their jurisdiction without discrimination of any kind’.
50 Article 12.2.
51 Lundy, above n 22.
first prove her or his capacity’. 52

Ten years ago the UNComRC reported that the UK had made ‘little progress in enshrining Article 12 in education law and policy’. 53 However, an important nudge towards proper public service and policy engagement with children and young people was lent by Sir Ian Kennedy’s detailed review of services for children under the National Health Service, in 2010. 54 Kennedy called for the active participation of children and young people to be part of the process in which relevant agencies and professionals collaborate in establishing a ‘common vision’ for health and healthcare in any given area. 55 He recommended that the NHS should regularly explore what children and young people expect and want from the service and called, more fundamentally, for NHS services to be ‘designed, organised and delivered’ from their perspective as well as those of others. 56 A general governmental approach on children’s rights was announced a few months later, subsequently heralded by the Parliamentary Joint Committee on Human Rights (JCHR) as ‘an important and progressive move’ signalling an intent to take the human rights treaties seriously. 57 The Government would give ‘due consideration to the [CRC]’ and to recommendations of the UNComRC when making new policy and legislation. 58 While it may have been welcome, this express commitment merely reflected an existing international obligation under Article 4, which specifically commits States Parties to undertaking ‘all appropriate legislative, administrative, and other measures for the implementation of the [Convention] rights’. Moreover, the JCHR expressed disappointment that there was a dwindling momentum towards the spread of good practice and in encouraging departments to engage with the CRC. The JCHR has more recently recommended that a statutory duty be placed on public authorities 59 in England to have regard to children’s rights under the CRC in exercising their child-related functions, 60 equivalent measures having already been introduced in Wales 61 and Scotland 62 – with, according to the Equality and Human Rights Commission, beneficial

\[52\] UNComRC, General Comment No 12 (2009) on the right of the child to be heard (CRC/C/GC/12) (Centre for Human Rights, 2009), para 20.


\[55\] Ibid, paras 4.35, 4.43 and 4.102.

\[56\] Ibid, para 4.143 and R 33.


\[58\] Written Ministerial Statement by the Children’s Minister, Sarah Teather MP, Hansard, HC Deb, col 7WS (6 December 2010).

\[59\] As defined in the Human Rights Act 1998, s 6.


\[61\] Rights of Children and Young Persons (Wales) Measure 2011, s 1; Social Services and Well-being (Wales) Act 2014, s 7(2).

\[62\] Children and Young People (Scotland) Act 2014, ss 1 and 2.
effects on law and policy there. For example, in Scotland it has ‘engendered detailed and sophisticated consideration of children’s rights in policy making’. But it is clear that the main difficulties in England lie outside the Department for Education (DfE), said to be the department with the greatest awareness and knowledge of the Convention. Although the UNComRC reported in 2016 a continuing failure by UK Government to hear children’s views systematically in relation to policy issues affecting them, education and education-related measures at least are now consistently covered by CRC impact memoranda/assessments, as seen with the Education Bill 2011, the Children and Families Bill in 2013 and the Children and Social Work Bill in 2016. Also, the DfE has a national advisory group of young people with SEND, ‘FLARE’, recruited by the Council for Disabled Children (CDC).

SEN stands out as a field where the value of children and young people’s participation has long been underlined in official policy and prescribed processes. The Special Educational Needs Code of Practice published in 2001, since replaced by the 2015 Code, contained an entire chapter on ‘Pupil Participation’. It was expressed to be ‘about the right of children with [SEN] to be involved in making decisions and exercising choices’. This was highly significant, since although most of the ‘rights’ were derived from the Code’s non-binding obligations – LAs, schools and the appeal tribunal were merely under a duty to have regard to the Code when exercising their functions – there was nevertheless a clear set of expectations. The Code outlined practical steps to facilitate children’s involvement and, in so doing, supported the values expressed in Article 12 of the CRC (above). However, the underlying rationale centred on enhancement of ‘personalised learning’ rather than children’s rights. The SEN and Disability Act 2001, which among other things strengthened the inclusion presumption and extended the scope of disability discrimination law to schools, failed to acknowledge children and young people as independent rights holders. There was, however, an expressed policy intention to develop ‘practical tools for consulting and involving children with a wide range of needs’, both on an individual basis in planning and reviewing their provision, and collectively in the strategic development of school and LA

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64 Ibid, p 7.

65 JCHR, above n 57, paras 43 and 47.

66 Above n 38, para 29.

67 JCHR, above n 57, para 27.


70 Department for Education and Department of Health, SEN Code 0–25 years (DfE/DoH, 2015).


72 Education Act 1996, s 313(2) and (3).

73 The presumption that children with SEN should be educated in mainstream schools.

74 At that time covered by the Disability Discrimination Act 1995; see now the Equality Act 2010.
This dual (individual/collective) focus, which is also adopted in the UNComRC’s General Comment (No 12), has since also been adopted in the 2014 Act (see below).

This article now seeks to offer an evaluation of the reforms covering the rights of children and young people with SEND and their implementation by drawing on findings from the authors’ recent survey of English LAs and interviews with children and young people with SEND. This evidence was gathered for the ESRC research project on Autonomy, Rights and Children with Special Needs: A New Paradigm? (ES/P002641/1). Implementation of the reforms is shown to be a particularly challenging task for LAs, involving new processes and increased inter-agency co-ordination at a time of strained resources. Furthermore, there is an inherent tension between, on the one hand, the policy and legal emphasis on parental rights, and on the other, the rights and participation of children and young people. There are also risks that children and young people’s opportunity to tell their own story may hinge not so much on their inherent mental or physical capacities, but rather on how those capacities are interpreted by LAs and enhanced by the necessary forms of support that are consistent with an empowering rights framework.

Children and young people’s rights under Part 3 of the 2014 Act

Preparation for implementation

The 2011 Green Paper on SEN gave considerable emphasis to the position of parents – the need to empower them, give them more control and extend their influence – and evinced virtually no intent to promote children and young people’s rights as independent actors. The one exception concerned rights of appeal. Parents alone had held them, but while it is not a requirement of CRC Article 12 that children have party status in judicial proceedings, an independent appeal right for children would be particularly helpful for looked after children – and meet a concern of the UNComRC since legally the LA is their parent, unless they are placed with foster parents, and it is hardly likely to challenge its own decision. Previous attempts in Parliament to establish an independent appeal right for children with SEN had failed. The Green Paper, however, promised to pilot one and also a child’s right to make a

76 Above n 52.
77 DfE, Support and Aspiration: A New Approach to Special Educational Needs and Disability, Cm 8027 (DfE, 2011).
78 Ibid, paras 2.67 and 2.68.
80 Daly, above n 17, 273.
81 Children under the care of the LA or provided with accommodation by it under their children’s services functions: Children Act 1989 s 22(1).
82 UNComRC, above n 53, para 66(a) and (b).
83 The foster parents would then be classed as the legal parent: Fairpo v Humberside County Council [1997] ELR 12.
84 For example, the Education (Special Educational Needs) Bill, promoted by Lord Campbell of Alloway in the 1990s.
disability discrimination complaint. The 2014 Act established a power to implement a pilot, but the DfE made clear its intention to take account of a piloted right of appeal for children with SEN in Wales from 2012–15. In the Welsh pilot areas there was a paucity of independent complaints or appeals by children (although this has not deterred the Welsh Government from rolling out the child’s appeal right nationally). It appears to have deterred the implementation of the English pilot before the power to initiate lapses in March 2019. Since the completion of a two-year pilot is needed to trigger a power to extend independent rights of appeal and complaint to all children, these rights seem certain to be withheld. This will also affect the possibility of an independent right to opt for mediation, which the appeal pilot would be able to include. Linking the two processes reflects the policy intention, and legislative requirement, that would-be appellants should first consider mediation and only be permitted to appeal once they have either tried or rejected the mediation option.

An official commitment to give children and young people ‘greater control’ was not announced until the Government responded to the Green Paper consultation feedback. A more robust and structured framework of children and young people’s rights and co-relative agency responsibilities was proposed. The ‘full engagement’ of children and young people was one of the matters covered when the SEN reforms as a whole were tested out in the DfE’s Pathfinders in two stages (October 2011 to March 2013 (stage 1) and April 2013 to September 2014 (stage 2)). There was an attempt in the Pathfinder programme, which operated in 20 areas, to involve children and young people in the various strategic developments, but it was found that in many areas this was not occurring and there was a risk of processes being mostly parent/carer focused – problematic when young people’s and parents’ or carers’ views on needs and preferred outcomes diverge.

85 DfE, above n 77, paras 2.67 and 2.68. The pilot would be in two to three LAs.
86 2014 Act, s 58.
87 DfE, above n 77, para 2.47.
89 D Holtom, S Lloyd-Jones and J Watkins, Evaluation of a Pilot of Young People’s Rights to Appeal and Claim to the Special Educational Needs Tribunal for Wales (Llandudno Junction, Welsh Government, 2014). During the trial there were no SEN appeals by children and only one discrimination complaint.
90 Education (Wales) Measure 2009 (Pilot) (Revocation) Regulations 2014 (SI 2014/3267) (W 334) and the Education (Wales) Measure 2009, art 1, inserting ss 332ZA into the Education Act 1996. The child’s rights were to be ‘exercisable concurrently with the parent’s rights’: EA 1996, s 332ZA(3). These rights are set to continue under the new tribunal in Wales: Additional Learning Needs and Education Tribunal (Wales) Act 2018. Both the child and the child’s parents will have a right of appeal. Young people will have an independent appeal right.
91 This is because the 2014 Act states (s 58(5)) that the section containing the power, s 58, is revoked five years after the date the Act was passed (13 March 2014).
92 2014 Act, s 59.
93 2014 Act s 58(2)(b).
94 DfE, above n 77, paras 2.5 and 2.59–2.63; DfE, above n 5, paras 2.42–2.43
95 2014 Act, s 55.
96 DfE, above n 5.
97 Ibid, para 1.30.
98 The Pathfinders involved 31 LAs and the health bodies responsible for children and young people in them.
99 M Craston, G Thom and R Spivak, Evaluation of the SEND pathfinder programme: process and
evidence of engagement with children and young people, but as against the draft SEN Code’s expectation that they would be ‘at the heart of the system’ there were only ‘pockets of activity to involve young people’ and parent inputs weighed heavily. Further research confirmed the low level of involvement of children and young people in local preparations and support planning processes. The Pathfinder programme was concluding as the 2014 Act came into force, although the DfE allowed LAs until 2017 to implement the reforms fully. The Pathfinders final impact report, in 2015, was based exclusively on the parents’/carers’ perspectives. It reported an increased incidence of engagement with children and young people’s views but that it remained well below optimum level. It was found that 37 percent of parents in Pathfinder areas agreed that the child/young person’s views had been taken into account; in contrast only 29 percent in the comparison cases did so. The main reason for the non-participation of the majority of children and young people was their young age or the nature or severity of their disability. The report’s overall comment that more remained to be done before ‘aspiration’ was translated into ‘reality’ is apposite to engagement with children and young people. The barriers to participation were not, however, fully explored in the Pathfinders work, a gap which the ESRC project seeks to fill, drawing also on other evidence.

The 2014 Act, the Code and children and young people’s rights

It is important to view the new rights for children and young people in the context of the 2014 Act’s SEN reforms as a whole, which also include the introduction of a new SEN Code. The influential Lamb Inquiry report commissioned by the last Labour Government had said that the system ‘needs to feel more like one where “everyone is on the same side”’. There is an attempt to make the system work more effectively for families in the sense that they become better informed and able to work with LAs in ensuring appropriate arrangements for implementation.

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100 For example, a child or young person’s ‘passport’ containing what he/she ‘wanted to achieve and what was important to them’: ibid, 72.


104 The comparison group comprised 1,000 families where there was a statement of SEN under the Education Act 1996 and no EHC plan under the 2014 Act: ibid, 25.

105 Ibid, 42.

106 Ibid, 103.


108 Regard must be had to the Code by LAs, schools, the First-tier Tribunal, health bodies and others: 2014 Act s 77.

their child. Thus the Act provides for LAs to develop and publish a ‘local offer’ outlining the provision it expects to be available in or outside its area for children with SEND. \(^\text{110}\) LAs must also make arrangements for children, young people and parents of children to be provided with advice and information about the child or young person’s SEN. \(^\text{111}\) Each school must publish a report containing information on how the admission, access and equal treatment of children with disabilities is ensured. \(^\text{112}\)

Among the measures for giving parents more control is provision for ‘personal budgets’, representing the amount to be specified in an education, health and care plan (EHCP) as being available to a young person or child’s parent to meet the relevant needs, which amount can be transferred via ‘direct payments’. \(^\text{113}\) EHCPs have replaced statements of SEN for those whose needs mean that additional external resources are needed above those within the institution’s funding allocation. \(^\text{114}\) Approximately one in five children with SEN has an EHCP. \(^\text{115}\) Another aim – that of enabling areas of conflict between parents and LAs or schools to be resolved in a less adversarial manner – lies behind the Act’s new push on mediation, outlined earlier. A further policy goal is a more holistic and joined-up approach to assessment and planning individual provision. To that end, health and social care needs will be addressed alongside SEN in the assessment process \(^\text{116}\) and in drawing up of an EHCP. \(^\text{117}\) The Act also extends the age range covered by the SEN framework beyond school age to 25. \(^\text{118}\) As explained below, independent rights for young people and to a lesser extent children are woven into these different elements of the legislative framework. In addition, LAs are placed under a duty to have regard to four specific particular matters relating to children and young people (and in the case of a child, the parent) when carrying out their SEN functions:

- their views, wishes and feelings;
- the importance of them participating as fully as possible in SEND decisions;
- 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. \(^\text{119}\)

This is a pivotal provision in view of its potential to promote a stronger culture of engagement with children and young people.

Lundy has emphasised that Article 12 CRC applies not merely to decisions about individual children but also about policy determinations. \(^\text{120}\) It was noted above how government has begun to include children’s rights perspectives in policy development, although statutory

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\(^{110}\) 2014 Act, s 30.

\(^{111}\) Ibid, s 32.

\(^{112}\) Ibid, s 69.

\(^{113}\) Ibid, s 49. See also the SEN (Personal Budgets) Regulations 2014 (SI 2014/1652).

\(^{114}\) The legal test relates to a more general condition of necessity for prescription of needs and resources: 2014 Act, ss 36 and 37.

\(^{115}\) DfE, above n 4.

\(^{116}\) 2014 Act, s 36.

\(^{117}\) Ibid, s 37.

\(^{118}\) See in particular ibid, s 46, providing for an EHCP to continue to that age.

\(^{119}\) Ibid, s 19.

\(^{120}\) Lundy, above n 22, 931.
duties to elicit and engage with children and young people’s views have largely been lacking. The 2014 Act does not entirely neglect this issue, however, at least in relation local policies. It requires LAs to consult with children and young people when fulfilling their duty to keep education, training and social care provision for those with SEND under review and when reviewing their local offer (above). They must also publish any comments they receive from children and young people about the offer. The SEN Code advises that forums should be utilised or established for this purpose; and it also emphasises the value of children and young people receiving feedback, as discussed below.

In relation to decisions about individuals, perhaps the most significant aspect of the 2014 Act reforms is the transfer of rights from parents to young people. The SEN Code stresses that once a person ceases to be of compulsory school age, thus becoming an independent rights holder, LAs and other agencies should engage directly with him or her rather than the parent/carer, although allowing for both the young person’s need or preference for their parent’s or carer’s continuing involvement and their own possible lack of mental capacity. In the latter case their rights must generally be treated as held on their behalf by a ‘representative’ appointed under a specific legal/judicial process or, if none, the parent. The question of capacity is, unfortunately, problematic, as discussed below. One difficulty is that LAs reach their own judgment about capacity in individual cases, albeit often relying on others’ (including parents’) advice, affording them too convenient a rationale for bypassing the young person himself/herself and dealing exclusively with the parent.

The relevant rights of children and young people under the 2014 Act and the previous legislation, the Education Act 1996, are summarised in Table 1 below. There are also equivalent participation and information and support rights for children and young people aged 18 or under who are detained persons and following the ending of their detention. SEN are particularly prevalent among those in youth custody and figures relating to the pre-2014 Act system showed that they were six times more likely than other young people to have a statement of SEN; and three in every five children and young people in custody had speech, language and communication needs. In April 2018 there were 1,018 detainees aged

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122 2014 Act, ss 27 and 30.
123 DfE and DoH, above n 70, para 1.12.
124 Ibid, para 1.8.
125 Ibid.
126 The exceptions being their contribution to the collective consultation processes noted above and the right to advice and information: SEND Regs 2014, regs 64 and 65 and Sch 3.
127 Ibid and the 2014 Act, s 80. ‘Representative’ refers to, inter alios, a deputy appointed by the Court of Protection under the Mental Capacity Act 2005, or a donee of a lasting power of attorney appointed by the young person, to make decisions on his/her behalf: ibid, s 80(6). The representative may well be, although will not always be, the parent.
128 Defined under the 2014 Act, s 70(5).
129 Special Educational Needs and Disability (Detained Persons) Regulations 2015 (SI 2015/62). See also the 2014 Act, ss 70–75.
130 Explanatory Memorandum to the Special Educational Needs and Disability (Detained Persons) Regulations 2015 (SI 2015/62), para 2.1.
10–18 in youth custody.\textsuperscript{131} The detention on average lasts 85 days.\textsuperscript{132}

Table 1: Participation and the rights of children and young people (C\&YP) under the Children and Families Act 2014 (Part 3) and the Education Act 1996 (Part 4)

<table>
<thead>
<tr>
<th>Support and involvement principles</th>
<th>Children and Families Act 2014</th>
<th>Education Act 1996</th>
</tr>
</thead>
<tbody>
<tr>
<td>LA must have regard to set principles on engagement with C&amp;YPs’ views and supporting participation (section 19).</td>
<td>Only in SEN Code.</td>
<td></td>
</tr>
</tbody>
</table>

| Review of local provision | LA must consult with C\&YP when keeping under review its education and social care provision for C\&YP with SEN (section 27). | No LA duty to consult with C\&YP when keeping its special education provision under review (section 315). |

| The ‘local offer’ | LA to consult with C\&YP on local offer and publish their comments and LA’s response. Local offer to be published in format for those with SEND (section 30 and SEND Regs 2014, part 4). | No requirement for a local offer. |

| Advice and information | LA to arrange for advice and information for C\&YP/parents and make them aware of service (section 32). | LA to arrange for advice and information for parents only (section 332A). |

| Initiating assessment | YP (and child’s parent) may request EHC assessment; must receive reasons for the decision on it (section 36 and SEND regs, pt 2). Similar rights concerning re-assessment (section 44). YP (and child’s parent) to be consulted by LA when determining necessity for assessment; LA to take account of C\&YP’s views (section 36 and SEND Regs, part 2; SEN Code, 9.12). | Head teacher’s and parent’s right to request assessment (or re-assessment) and receive reasons for decision (sections 328, 329 and 329A). Parent to be consulted and LA to take into account his/her view (section 329A). School’s request required to have evidence on ‘ascertainable views of the child’ (SEN Code 7:13). |

| Assessment process | C\&YP to be consulted; C\&YP’s views, wishes & feelings taken into account (also if re-assessment); YP to receive info, advice and support if necessary and notified of EHC plan decision (section 36, SEND Regs, Part 2). | Parent’s right to make representations, which LA to take into account; the decision on EHC plan and reasons to be given to parent (section 329A; SEN Code 7:16). |

| EHCP | YP (and child’s parent) to be consulted over draft EHCP content; sent draft; informed of right to make representations and request naming of school/other | Parent to be sent copy of draft statement of SEN; informed of right to make representations and attend meeting with the LA; |


\textsuperscript{132} Above n 130, para 4.2.
<table>
<thead>
<tr>
<th></th>
<th>institution in plan (section 38). The ‘views, interests and aspirations’ of C&amp;YP to be included in plan (SEND Regs, reg 12).</th>
<th>representations to be considered by LA; parent entitled to express preference for school etc to be named in statement (Sch 27).</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Cessation of EHCP</strong></td>
<td>YP (and child’s parent) to be consulted and notified of cessation decision (SEND Regs, reg 31).</td>
<td>Parent to be consulted and notified of decision to cease SEN statement (Sch 27).</td>
</tr>
<tr>
<td><strong>Personal budget and direct payments</strong></td>
<td>If EHC plan made, the YP (or child’s parent) has right to have a personal budget prepared if he/she requests one; they may also give consent to direct payment (section 49).</td>
<td>No specific rights.</td>
</tr>
<tr>
<td><strong>Appeal</strong></td>
<td>YP (or child’s parents) appeal right re: various decisions; must be informed of it (section 51).</td>
<td>Parents alone had appeal rights (sections 325, 326, 328, 329, 329A and Sch 27).</td>
</tr>
<tr>
<td><strong>Mediation</strong></td>
<td>YP (or child’s parents) to be informed about mediation; a right to participate (sections 52–55; SEND Regs, part 2). Child may attend mediation with parent’s and mediator’s consent; mediator to take reasonable steps to ascertain child’s views (SEND Regs, reg 38).</td>
<td>Mediation available at option of parent alone; parents to be informed about it; no stated C&amp;YP right to attend (section 332B).</td>
</tr>
<tr>
<td><strong>Disagreement resolution (DR)</strong></td>
<td>YP (or child’s parents) to be informed of DR services (section 57).</td>
<td>Parents (and schools) to be informed of arrangements for DR (section 332B).</td>
</tr>
</tbody>
</table>

Table 1 shows that set against the almost entirely parent-orientated rights framework under the 1996 Act, there has been a significant and in many ways transformative advance in children and young people’s rights in this field. As noted earlier, the 2014 Act does not however represent the start of a policy of engagement with children and young people with SEN. It is also important to note efforts made over the years to ensure that the child’s voice is heard and his/her views are engaged with in the appeal process, even if attendance is unlikely. The tribunal rules, like the 2001 tribunal regulations before them, make specific provision about children’s views and participation. In particular, the LA’s response to the appeal, which it must send to the tribunal, must include ‘the views of the child about the issues raised by the proceedings, or the reason why the respondent has not ascertained those views’. If the child’s views are unavailable when the response has to be delivered they must be provided on a form in preparation for the final hearing. The child has a legal right to attend the hearing unless the tribunal on specific grounds (such as a risk of disruption to the proceedings or where it would be ‘adverse to the child’s interests’ or to those of a young

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133 See, for example, DfES, above n 70.
134 Special Educational Needs Tribunal Regulations 2001 (SI 2001/600).
136 Practice Direction, First-tier Tribunal, Health, Education and Social Care Chamber, Special Educational Needs or Disability Discrimination in Schools Cases (2008), para 15.
person lacking capacity) directs otherwise, and may be permitted by the tribunal to give evidence and address the tribunal.\textsuperscript{137}

The new SEN statutory framework has been imposed on a system that was already broadly receptive and to a degree culturally attuned to the practice of co-production and engagement with children and young people. Yet there is an avowed policy intention to take these elements to a new level.

**The children and young people’s rights agenda in practice**

Our methodology included an online survey of all 152 English LAs during November and December 2017.\textsuperscript{138} Additional evidence was also gathered in 2017 and 2018 from interviews with 21 key professionals working and engaging in the field of SEN\textsuperscript{139} and with 12 children (ages 7–13 years) and six young people (16–22 years) with a diversity of SEND. Fifty-six LAs completed the online survey – an overall response rate of 37 percent. The survey focused on LAs’ relevant areas of responsibility under the 2014 Act. Quantitative analysis of closed questions was undertaken alongside an in-depth analysis of the contextual issues and specific areas of current practice. The research has revealed how LAs are beginning to adapt and respond to the legislative requirements according to specific local needs and levels of resource. On the whole, LAs appeared optimistic about the potential of the 2014 Act to enhance children and young people’s participation in SEN decisions. Yet despite finding positive changes in some areas, the survey revealed variable progress in implementation.

**Local arrangements**

The realisation of SEN participation rights is dependent not only on how far these rights are known and able to be asserted by holders, but also on the existence of appropriate administrative structures and the necessary degree of professional awareness and understanding. The progressive shift in responsibilities that the reforms represent, for example the increased necessity for a person-centred approach in educational planning and decision-making, has established a clear training need.\textsuperscript{140} Most of the surveyed LAs reported that some or all staff with SEN responsibility had received some training on child/youth engagement and co-production. However, it has varied widely across LAs in both type and level,\textsuperscript{141} and core training on matters such as management of heavy SEN case workloads and safeguarding are often taking precedence over it. Moreover, the need to undertake further SEN-specific training is generally considered to be a matter of voluntary professional development. One mark of a rights-related cultural shift would be the appointment or assignment of an officer to have responsibility for children’s and young people’s participation, but this has occurred in only about half of the respondent LAs.

LAs also emphasised how a systematic involvement of children and young people in reviews

\begin{itemize}
  \item \textsuperscript{137} Above n 135, rr 24 and 26(5), both as amended.
  \item \textsuperscript{138} Seventy-seven percent of respondents were the LA’s lead for SEND.
  \item \textsuperscript{139} They included school and college staff, LA staff, voluntary sector experts, lawyers, and a senior tribunal judge.
  \item \textsuperscript{141} In 2017 there were regional workshops for LA staff assisting in interpreting and applying the legislation regarding assessment and EHCPs, but children and young people’s rights were not central elements. See: www.sendpathfinder.co.uk/send-decision-making-and-the-law-workshops.
\end{itemize}
of policy and provision and decisions about their own education required a considerable investment of effort and time. They consistently complained about being insufficiently well resourced to implement the reforms, particularly when other changes under the 2014 Act resulted in significant increases in their SEN workload, transposing statements of SEN and (post-school) learning difficulty assessments to EHCPs; managing the increased volume of assessment requests from schools and parents; the extended upper age range to 24; and ensuring greater collaboration and communication with health and social care bodies. It was clear that implementation of the children and young people’s rights agenda was being hindered not by a lack of professional commitment towards it, but rather by the competing demands on time and resources.

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

The 2014 Act’s measures for children and young people’s participation to inform decision-making at a strategic level constitute a key change from the previous system. As noted above, LAs must keep the education, training and social care provision for children or young people with SEND under review and must consult with children, their parents, and young people about these services. LAs must also publish their ‘local offer’. This mechanism for sharing advice and information with children, young people and families should also be subject to ongoing consultation and improvement. Around two-thirds of respondent LAs told us that they always consult with children and young people when exercising these strategic reviewing and local offer preparation functions. Just under half of LAs had followed the SEN Code’s recommendation, noted above, to set up a forum for this purpose, while most others consult via voluntary organisations or child/young people surveys. The DfE’s routine monitoring of ‘co-production and user engagement’ via LAs and Parent Carer Forums has revealed much room for progress. The monitoring has added a degree of granularity to the data available by showing that such participation is mostly at a ‘moderate’ level only, particularly in the case of children. The DfE reports that 20 percent of the LAs and 55 percent of Parent Carer Forums consider co-production and engagement with children in their area to be poor or non-existent, although it was better where young people were concerned.

Some of the surveyed LAs find the consultation burdensome, but most consider it helpful for refining policy and practice, identifying gaps in provision and enabling children and young people to influence the agenda for change and participate in discussions about needs. LAs also claim to be very responsive to opinions from children and young people on the local offer. If this is correct it could suggest an improvement from the experience under the Pathfinders. The SEN Code calls for ‘strong feedback mechanisms to ensure that children, young people and parents understand the impact their participation is making’. As Lundy explains, feedback following collective participation helps to alleviate the negativity children can experience when feeling that their views have not been taken seriously, notwithstanding

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

144 Thom et al, above n 103, 100.

145 DfE/DoH, above n 70, para 1.12.
partly compensatory benefits from skills enhanced and experience gained by participating. In our survey, a significant number of authorities indicated the adoption of a ‘you said, we did’ approach in publicising their response to views on the local offer information. Unfortunately, Ofsted/Care Quality Commission (CQC) inspections of local SEND provision appear not to cover implementation of the Code’s feedback recommendation.

Supporting children and young people’s participation in EHC assessment and planning

The participation of children and young people in decisions about their own educational provision, including EHCPs, is a central part of our research. Previous, DfE-commissioned research has revealed a mixed picture. In Thom et al’s survey, around half of the LAs – but a lower proportion of Parent Carer Forums (PCFs) – reported moderate to high levels of engagement by LAs with young people, although a less favourable position in relation to children. (DfE monitoring has confirmed the disparity in PCF and LA perceptions of participation levels.) Adams et al revealed a more positive picture: efforts were made to engage with children and young people in almost three in every five cases and to include them in meetings in about half of the cases, although there was less involvement among under-10s or those from a BME background. Adams et al also examined whether the child/young person was offered support during the EHC planning process. An advocate was offered in two in every five cases but communication or visual aids or other forms of assistance were much less commonly offered.

These surveys indicate reasonably high levels of children and young people’s engagement, but without distinguishing greatly between the different processes or exploring the influence of participation on the decisions taken. Our survey differentiated stages in assessment of needs and EHC planning and sought evidence relating to children and young people respectively. On young people, LAs reported that few exercise their right to request an EHC needs assessment. Schools and parents are more likely requesters, although almost all the respondent LAs generally consult with the young person, unless (s)he lacks sufficient mental capacity, when an assessment request is made. Young people also have the right to express views about an assessment. In 80 percent of LAs nearly all young people submit their views (but generally not any evidence), although this is often done through the parents or school, who have an established relationship with them, rather than via a less familiar independent supporter. LAs have a duty to make arrangements for providing information, advice and support to young people, as noted above. Yet less than half of the surveyed LAs routinely do so in assessment cases. Sometimes LAs do not regard such arrangements as necessary or would only make them if they have specifically been requested. Turning to the EHCP, the majority of our LAs reported that young people tend not to request the naming of

147 Lundy (ibid, 350) recommends that a response should be child-friendly.
148 Thom et al, above n 103.
149 DfE Newsletter, above n 143.
150 Adams et al, above n 107.
151 2014 Act, s 36.
152 See Daly, above n 17, 413–414, on the importance to the child’s autonomy of trust between the child and the professional working with them.
a specific school or other institution in it. It is likely that in a number of LAs young people are not always consulted about the contents of the EHCP or, in some cases, are not judged capable of being consulted. Also, in practice, engagement often occurs via a parent or other person. A large majority of LAs reported that this happens in at least 50 percent of cases. Some LAs reported instances of parents disliking direct communication from the LA to the young person.

In the case of children, the statutory rights within the assessment and planning process are much more limited, but LA engagement with their views is nevertheless required. In our survey, a large majority of LAs will consult with the child unless the child is considered to lack capacity. Most authorities use a variety of approaches to ascertain the child’s views, using forms and questionnaires but also commonly placing reliance on parental or third party communications, particularly in the case of younger children.

Our child and young person interviewees revealed very varied levels of interest in and capacity for participation in EHC planning, such as the annual review meeting to consider their needs. Young Person A (female, 21, autistic spectrum disorder (ASD)) ‘hated meetings like that … I get bored’. Child A (male, 12, ASD) attended but ‘wasn’t really listening’; he said he ‘just sat there, drooling at the biscuits the entire time, while the adults talked’. But Child D (male, 11, ASD/muscular dystrophy) was one of several interviewees who were involved in their review meeting although present for only part of it. He left ‘because sometimes they’ll talk about stuff which I shouldn’t really be there [sic]’ (discussion around issues potentially harmful for the child to hear about tends to occur in the child’s absence in these cases), which he accepted as ‘fine’. As regards choice of school, some of the child interviewees had had a say (Child H, male, 7, epilepsy and sight problem, for example, had a strong view after being teased about his appearance at his previous school), but ultimately the parent’s view prevailed. The young people, one of whom (Young Person D, male, 22, ASD) was a care leaver, had had more autonomy when it came to choosing their provision post-16.

As regards the quality of the engagement with children and young people, there is some evidence from Ofsted/CQC’s inspection of 30 LAs of significant shortcomings in some areas:

> In over a third of the local areas inspected, leaders across education, health and care did not involve children and young people or their parents sufficiently in planning and reviewing their provision. Leaders have not been successful in establishing strong practice when co-producing children and young people’s plans. In particular, there were weaknesses in co-production during the statutory assessment and annual review processes, including when statements of [SEN] were converted to EHC plans.¹⁵³

Effective co-production does not necessarily require a child’s views to be decisive in decisions taken, but as a minimum they should be given due weight as required by CRC Article 12 and CRPD Article 7 (above). In our survey, LAs reported that, for the purposes of the EHC assessment, children’s views were always or usually taken into account and young people’s views were considered important, indeed ‘pivotal’. While most LAs adhered to the requirement to include the child or young person’s views, interests and aspirations in an EHCP,¹⁵⁴ as also reported by parents to Adams et al,¹⁵⁵ a small number require parental consent. There was a concern that, in some cases, parental influence and pressure may have

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¹⁵３ Care Quality Commission/Ofsted, Local area SEND inspections: one year on (ref 170041) (Ofsted, 2017), 6.


¹⁵⁵ Adams et al, above n 107, 11.
played a part in the views expressed, including where there was a difficulty in ensuring that purportedly young persons’ views were truly theirs rather than their parents’. This is reinforced by recent analysis of 184 ECHPs by Palikara et al which found that while in two-thirds of the plans the child’s views were set out using the first person, the language used was often too complex having regard to the child’s functioning and suggested their views were not ‘directly obtained’. Overall, there is a tendency for the parental voice to dominate in EHC planning, as Child F (male, 9, ASD) observed in relation to his review meeting: ‘They wouldn’t really listen to me as much as they listen to mum, because … I’m just young – I’m only nine. My mum is an adult; they’ll believe her more than me’.

Another potentially important element of the new system is the personal budget (PB), comprising a sum specified for use in securing outcomes agreed in the EHCP. The SEN Code emphasises the need for LAs to ensure sufficient information, advice and support, both at an area and individual level, to assist families to take up and manage a PB. Young people and parents/carers of children may opt for a PB. However, most of our respondent LAs indicated that young people tended not to do so: over 90 percent reported that less than one in ten young people had requested one. This finding is consistent with the low uptake reported in Adams et al’s survey for DfE in 2016 and underlined by Ofsted and CQC in the first year of local area SEND inspections, which indicated a failure by some LAs to promote PBs due to a wariness of their potential impact on overall LA expenditure.

Disagreement resolution, appeals and mediation of disputes

There are three mechanisms under the 2014 Act for the resolution of disagreements or disputes between young people/parents and LAs or schools: appeal to the First-tier Tribunal (FtT), mediation and ‘disagreement resolution’ (DR). DR is a distinct process under the Act. DR services are arranged by the LA but are independent of it and are intended to provide a ‘quick and non-adversarial way of resolving disagreements’ at an early stage, obviating the need to use mediation or the tribunal. There is also a right to bring a complaint of disability discrimination to the FtT under the Equality Act 2010, which young people now hold independently as with the above processes under the 2014 Act. In the case of a child, only the parent holds the right under all four processes.

Research has revealed various problems concerning children and young people’s involvement in SEN dispute resolution processes. Cullen et al, drawing on interviews with parents and evidence from LA focus groups and representatives of tribunal panels and parent support organisations, found that young people’s experiences of mediation and appeals ‘were largely

158 2014 Act, s 49. They may also consent to a direct payment.
159 Adams et al and Cullen et al, both above n 107, 117.
160 Above n 153, para 23.
161 2014 Act, s 57.
162 DfE/DoH, above n 70, para 11.7.
164 Above n 107.
negative’. One of the barriers to children and young people’s participation is anxiety, as also observed in the small study by Walsh in the early stages of the new framework. Daly argues that in judicial proceedings adults have a responsibility to make children feel ‘important, welcome and safe’. An insufficient regard for support needs also affects attendance and participation. Another barrier is potential users’ lack of understanding of the processes, as also found in Adams et al’s parent and young person survey for the DfE. Our respondent LAs indicated how rare it was for a young person to utilise his or her right to seek redress autonomously. Where DR was concerned, in two-thirds of LAs no cases were pursued by young people themselves over the previous year, and a further quarter of LAs had had but one or two cases. One factor in this paucity is that frequently only the parent or an advocacy worker is given information about the process.

A similar picture on participation emerges in relation to mediation. Evidence from the KIDS charity, cited by Doyle, indicates that young people only attended eight percent of mediations. In most of our respondent LAs, only two or fewer mediation requests (usually none) had been made independently by young people (even if assisted by a parent or other person). The extent of children and young people’s participation in mediation meetings varied. Some respondents said participation was exceptional and that, even when it happens, the parents tend to speak for the child/young person, although in the case of young people most authorities also claimed that advocacy support was available. One mediation manager told us that young people sometimes prefer to communicate their views via text or email ‘because they find that a less stressful way of talking’. There were only a small number of mediation cases where young people knew they had an autonomous right to speak, which suggests that insufficient effort is being made to alert them to it.

A complete absence of appeals brought by young people in their own right in the previous year was reported by 55 percent of our LAs; a further 35 percent had had only one or two. Almost all LAs will ensure the availability of advocacy support for appellant young people, contracted from a range of independent organisations. Children are not independently represented in SEN appeals, but tribunals are required to ensure their views, wishes and feelings are taken into account. LAs have a legal responsibility to ensure that the child’s views are placed before the tribunal or, if that is not possible, to provide an explanation for this. A majority of respondent LAs experienced some difficulty in ensuring that the children’s views were available. Sometimes parents refused consent and some families’ legal advisors were reportedly also resistant to LA eliciting of the child’s views. There were also issues of capacity or problems ensuring that the views to be provided were the child’s rather than the parent’s.

Direct participation by children and young people in appeal hearings was reported to be quite

166 Walsh, above n 107.
167 Daly, above n 17, 266.
168 Adams et al, above n 107.
169 M Doyle, Relationships, trust and learning to drive: A report on a discussion of young people’s participation in SEND dispute resolution (University of Essex, 2018), 5.
170 See St Helens Borough Council v TE and Another [2018] UKUT 278 (AAC), [2018] ELR 674 and M and M v West Sussex County Council (SEN) [2018] UKUT 347 (AAC), [2019] ELR 43 (the latter holding that the tribunal’s conclusions regarding the child’s views must be included in its statement of reasons). The tribunal must obviously also engage with the views of young people, as appellants in their own right: see S v Worcestershire County Council (SEN) [2017] UKUT 92 (AAC), [2017] ELR 218.
rare. A number of professionals told us that parents may resist their child’s tribunal attendance to protect them from stress or emotional harm from things said about them or their condition. Young Person A told us she attended the tribunal with her mother but ‘did not go into the court room’ (a description seemingly indicative of a perception of formality), while Young Person E (female, 18, social, emotional and mental health difficulties) had felt ‘too traumatised’ to attend the tribunal after attending a panel meeting at the school, where the chair had been ‘downright insulting’. The few children and young people who attend tend not to speak for themselves. Half of the respondent LAs indicated a complete absence of such participation in any of their cases. It is not clear that children and young people are being given sufficient encouragement and support to attend and participate.

Conclusion

The rights framework within Part 3 of the 2014 Act holds out much promise that, for children and young people with SEND, the inherent barriers to agency and autonomy in relation to decisions about education and related health and care matters will be significantly reduced. Proper practical implementation of its measures could ensure fairly high normative levels of child or young person involvement, albeit with more adult support where needed. Influence on decisions or policies, critical to empowerment, cannot be guaranteed, but the legal framework should at least be, in principle, more conducive to it. Nevertheless, the evidence to date suggests that practical progress in enabling children and young people with SEND to be ‘authors of their own life stories’ has been uneven. Their levels of participation in EHC assessment and planning are significantly sub-optimal. There was a widespread positivity among LAs in our survey about the new rights and a belief that the 2014 Act may change the ways in which they engage with children and young people’s views and bring them to bear in decision-making – indeed that such change had already occurred – as illustrated by these four LAs’ individual comments:

‘Our view and ethos has changed to be much more person centred and to meet their aspirations – to do things with them instead of for or to them.’
‘It is making a real difference and will continue to improve on the situation so far.’
‘It has made some difference, we try to consider their views wherever possible. We have made some decisions based on the child and young person’s views rather than parents.’
‘[T]argets and provision have been put in place in agreement with the young person … [T]he young person having ownership of decisions appears to result in more successful outcomes.’

Even so, in many LAs there is still some way to go before the relevant policy principles become engrained in routine practice. Time and resources constraints are significant barriers to proper implementation, particularly when the SEND workload is increasing markedly. There is also a need for more training on the new rights and how to embed them more effectively in practice. Among other things, this needs to address the difficulties that some LAs experience relating to consulting with younger children and those with more complex needs.

171 Also found in research in Wales and Northern Ireland: O Drummond, ‘When the Law is not Enough: Guaranteeing a Child’s Right to Participate at SEN Tribunals’ [2016] Ed Law 149.
One of the issues consistently raised in research and also featured in views expressed in our LA survey is the need to improve the availability and quality of independent professional support for promoting the child’s and young person’s voice. Information, advice and support services are, as Doyle notes, ‘patchy and under-resourced’.173 Appropriate and accessible help can be critical to the realisation of the participation rights, as General Comment No 12 recognises.174 Improvements in support, and greater encouragement to utilise it, are needed. The Government’s recent contract with the CDC, in partnership with Contact, worth £20m, to provide impartial information, advice and support regarding SEND,175 represents a positive development provided young people receive better help as a result of it.

The question of capacity is also important, particularly where young people are concerned. The rights of those deemed to lack capacity may have to be exercised through another person – an ‘alternative person’ – either the young person’s representative176 or if none then his or her parent.177 The SEN legislation bases the test of capacity on the Mental Capacity Act 2005,178 but LAs seem to adopt a looser approach involving officers’ (or in some cases schools’ or parents’) own judgments.179 The danger is that at a time when resources are scarce, apparent concerns raised about capacity in individual cases may mask other underlying issues around resource allocation and staff workload. Incapacity may become a rationing device by influencing LAs’ willingness to engage directly with the views and wishes of the young person.

A related threat to autonomy comes from some LAs’ engagement with the parent rather than the young person. Even young people with capacity often prefer their parents to speak for them – for example, one parent told us that their autistic daughter ‘hates talking about herself … She gave us consent to sort of attend meetings and speak for her’. But some LAs simply presume this preference. The threat is compounded by some parents’ difficulty, as reported by a number of LAs, in accepting the increased emphasis on the child’s/young person’s independent voice. As one SEND manager said: ‘A lot of young people now make their own voice and own choices … But yes, I think parents find it very difficult to let go’. Also, conflict arises from the overall policy of simultaneously promoting both parental and children/young people’s participation, since there are potentially competing perspectives. There is also a possible risk of the child/young person being ‘manipulated into serving adult agendas’.180 Aware that the child’s true voice may be hidden, decision-makers may be

173 Doyle n 169 above, 8.

174 Above n 52, para 16.


176 See above n 127.

177 Special Educational Needs and Disability Regulations 2014 (SI 2014/1530), reg 64.

178 Section 2, which refers to ‘incapacity to make a decision for oneself due to an impairment of, or a disturbance in the functioning of, the mind or brain’.


cautious about placing weight on his or her expressed wishes.181 While parental involvement is consistent with the CRC,182 there is a danger that, as Freeman has warned, parents may take over and prevent their child from exercising their agency rights183 or, as Lundy says, erroneously judge their child to be insufficiently capable.184 An unresolved issue across the surveyed LAs is how to resolve a conflict between the child/young person’s or parent’s view and whether the latter should prevail.

Further advances in engagement with children and young people with SEND and giving effect to their statutory participation rights require continuing professional commitment and the provision of appropriate resources in support. This is a policy being pursued with endeavour and intent – including the commissioning by the DfE of a Making Participation Work programme from the CDC and KIDS185 – but it remains to be seen whether it is sustained and if its implementation is optimised. At the same time, a note of realism is required. SEN is a field where, despite holding a raft of rights offering potential to influence decisions and exert choice, parents have struggled to have their wishes upheld. It is not easy for them to navigate the complex system and its processes,186 and even when they do their aspirations may be stymied by the resource constraints that limit the system’s capacity to accommodate individual preferences beyond the bare meeting of their child’s needs.187 Even if children and young people’s voices are better heard and taken more seriously than in the past, these same barriers to influence and choice will exist. Nevertheless, as has been discussed, children and young people’s participation and engagement rights in this field are important for a number of reasons. Both central and local administrative authorities should maintain efforts to ensure the policy objectives behind them are fully realised.

181 See Daly, above n 17, 307–309.
182 Article 5, recognising the right of those with responsibility for the child to provide ‘appropriate guidance and direction’ consistent with the child’s ‘evolving capacities’, in relation to the exercise of the child’s Convention rights.
184 Lundy, above n 22, 937–938.
186 Lamb, above n 109; Harris and Riddell, above n 12, ch 3.