



Centre for Research in Education Inclusion and Diversity

CREID BRIEFING 42

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

English Local Authority Survey Results

Dr Gail Davidge and Professor Neville Harris

School of Law, University of Manchester



June 2019

Table of Contents

Introduction	1
The role of respondents	1
Reviewing the local area’s educational provision and the local offer	2
Advice and information	2
Assessment of education, health and care (EHC) needs	2
Young people	2
Children	3
Content of education, health and care plans	3
Consultation with the young person	3
Inclusion of child or young person’s views in EHC plans.....	4
Personal budgets	4
Reviews of EHC plans	4
Resolution of disagreements and disputes	4
Disagreement resolution	4
Mediation.....	5
Appeals	5
Other issues	5
Supporting young people to make decisions about future education/training.....	5
The involvement of parents or carers	6
Authorities’ views on the rights of children and young people	6
Conclusion	6

Introduction

Part 3 of the Children and Families Act 2014 has introduced a new legal framework governing the role of local authorities (LAs) in meeting the needs of children with special educational needs (SEN) and disabilities in England. The Act's reforms aim to transform the field into one in which local arrangements become more accessible to families and more easily navigable by them. Children and young people's needs are to be responded to in a more holistic manner; and common ground and solutions are to be more easily reached when areas of disagreement arise between families and LAs. One of the most important and potentially far-reaching features of the new legal landscape, however, concerns the rights of children and young people, which are the subject of our research.

Under the Act, local authorities now have new obligations (amplified in the SEN Code of Practice) to engage with children and young people and ensure that their views and wishes are elicited and given proper consideration – both collectively, when the authorities are reviewing their SEN provision and their 'local offer', and individually, for example when reaching a decision about an individual child in respect of assessment of needs or provision to be made in an education, health and care (EHC) plan. For young people – those aged 16-24 inclusive – not only do the full range of SEN obligations of LAs now potentially extend until their 25th birthday, but they now hold the same independent rights as parents under the legislation. As a result they are afforded a degree of autonomy over such issues as requests for assessment of needs, selection of a school or other placement specified in their EHC plan, or triggering mediation or initiating an appeal if in dispute with the LA about various prescribed issues including the contents of their EHC plan or a decision not to conduct a statutory assessment of their needs.

This briefing reports the results of an online survey of local authorities in England conducted in November and December 2017 on the implementation and operation of the SEN framework with particular relevance to children and young people's rights. It aimed to find out how, and to what degree, LAs are facilitating the participation of children and young people in the relevant decisions and processes and to identify the challenges these authorities are facing. A total of 56 local authorities out of 150 responded, a response rate of 37%. The findings are summarised below.

The role of respondents

- The majority of respondents were the lead person for SEN and Disabilities (SEND) in their LA. Just over half of the authorities completing the survey have an officer with a lead role in children's and young people's SEND participation.
- In nine out of ten of the LAs staff responsible for SEND decisions receive training on children's and young people's participation. What occurs is a mixture of internal and external training provision, the latter often involving independent consultants and third sector organisations.
- A very large majority of LAs report that staff workloads have increased significantly as a result of the 2014 Act. Creating mechanisms for increased engagement and co-production with children and young people are cited as a contributory factor. Other contributory factors include higher numbers of assessment requests, parents' increased awareness and higher expectations of LA provision, the extended age range of young people covered by LAs' SEN obligations, and an increased need to collaborate and communicate with health and other agencies.

Reviewing the local area's educational provision and the local offer

- A majority of LAs will always consult with children and young people when keeping the SEN provision in the area under review (a duty under s.27 of the Act) and when preparing and reviewing their local offer (a duty under the SEND Regulations 2014).
- LAs consult with children and young people using a range of mechanisms, such as children/young people forums, voluntary organisations, surveys and local youth councils. They frequently use more than one mechanism. Around half of LAs stated they have set up a children/young people's forum for consultation.
- Although some LAs feel consultation could be improved, it is mostly viewed positively by LAs. Some see it as a burden on time and resources, but it is widely considered to help LAs refine policy and practice, identify gaps in provision, and give children and young people opportunities to influence the agenda for change and participate more meaningfully in debates about how they might be supported. It has enabled LAs to improve the accessibility, layout, content and functionality of local offer information and pay closer attention to diverse communication needs.

Advice and information

- Local authorities have a duty under the Act (s.32) to provide advice and information to children and young people about SEN and disabilities.
- Almost all LAs stated that they provide such 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 SEND information on behalf of LAs.
- Local authorities report efforts to ensure that local offer information is accessible that barriers to access are reduced. Alternative layouts or adjusted formats are adopted, including features such as 'dyslexia friendly' fonts, increased text size, use of symbols and video content, 'Easy Read' information for people with learning disabilities, reordering information, changing colour schemes and 'jargon free' language.
- Advice and support are provided through a variety of agencies, especially SENDIASS and commissioning of these services from bodies such as Citizen's Advice and Barnardos.

Assessment of education, health and care (EHC) needs

Young people

- The number of requests for EHC assessments of young people varied widely across LAs, but it is rare for young people themselves to exercise their statutory right to make requests.
- The majority of authorities consult with the young person when determining whether to carry out an EHC assessment. But over three-quarters who do this write to both the young person and their parent and only a minority write to the young person (or the parent) exclusively. The young person's incapacity is the key factor regarding whether to consult with him or her.

- Responses indicated that in just over half of local authorities young people undergoing EHC assessment submit evidence. In a higher proportion of LAs, four in five, those undergoing assessment submit their views to the LA.
- Authorities always or usually take into account the views, wishes and feelings of young people when an EHC assessment is conducted. They may not do so, however, where they face a shortage of time and resources, or due to the young person's incapacity, or if they do not consider it will be useful. A majority of LAs viewed young people's input to SEN assessment and decisions as important, for example in ensuring an appropriate response to needs.
- The young person's ability to communicate independently and confidently and the level of commitment and skill of the advocate supporting the young person are among factors moderating the influence of the young person's voice.
- Less than half of LAs will always arrange information, advice and support for young people in relation to EHC assessments.

Children

- A large majority of LAs always seek to ascertain the views, wishes and feelings of the child when carrying out an EHC assessment. When they do not, it is due to the child's lack of capability or the parent's refusal to consent.
- Authorities adopt a variety of approaches to ascertain the views of children for EHC assessments. It is common to rely on third party communications or parents, advocates and professionals. A number of authorities made efforts to ascertain a child's view through alternative media such as photographs, video and symbols.
- Almost all authorities always or usually take in account the child's views, wishes and feelings when carrying out EHC assessments. When they do not, it is for reasons to do with the child's incapacity, the parents' objection or conflict with the child's view, and time/resource constraints.

Content of education, health and care plans

Consultation with the young person

- Young people have rights under the 2014 Act (sections 38 and 39) to be consulted about the EHC plan, to make representations regarding the plan's contents and to express a preference for a school to be named in the plan.
- Almost half of LAs always consult young people about the EHC plan contents. Consultation may be dependent on the capacity of the young person or the availability of sufficient time and resources. Some LAs only consult with the agreement of the parents.
- The majority of LAs indicated that young people tend not to name a preferred school.
- Young people rarely communicate their views on the EHC plan independently. In the majority of cases, their views are communicated via a parent or another person.
- A number of intersecting issues, include limits to time and resources, affect the LA's ability to support young people to have the final decision and ensure that it is the young person's view that is heard and acted upon. There are particular problems with

identifying the young person's own views as distinct from their parent's and in supporting a young person with communication or confidence issues to articulate their independent view.

- LAs may try to mediate between the parent and the young person or may harness the help of independent advocates or voluntary organisations to ensure that the young person's independent voice is heard and acted upon.

Inclusion of child or young person's views in EHC plans

- The SEND Regulations 2014 require an EHC plan to include, in section A, the 'views, interests and aspirations of the child and his parents or the young person'.
- The vast majority of authorities always set out the views of the child or young person in EHC plans. Where an authority does not do so it would generally be due to the child or young person's lack of capacity or an absence of parental agreement.
- Barriers to including these views, which most authorities encountered, included an insufficient ability or willingness on the part of staff to engage with children and young people with more complex disabilities, a lack of parental co-operation, and the child or young person's low confidence, communication difficulties, anti-social behaviour or apathy.

Personal budgets

- Most LAs indicated that young people do not tend to make requests for personal budgets.

Reviews of EHC plans

- A large majority of authorities always consult the child or the young person about their EHC plan review. In a small proportion of cases such consultations are dependent upon the child's capacity, on time and resources or on parental agreement. Very few authorities hardly ever or never consult with children or young people regarding EHC plan reviews.
- On the whole, most authorities offered some support to young people for participation in their Preparing for Adulthood review, but there was much variation in the approach taken and in the level of support on offer. In some cases there was comprehensive multi-agency provision which aimed to maximise young people's participation. A number of authorities also commissioned specialist support and guidance on transition and future education and careers from dedicated agencies and charities.

Resolution of disagreements and disputes

Disagreement resolution

- LAs are under a duty to make arrangements with a view to avoiding or resolving disagreements between, among others, (1) LAs/schools and (2) young people with SEN or parents of children with SEN (2014 Act section 57). Authorities use a range of methods to inform young people of the arrangements. Information is often communicated to young people via a parent or advocacy worker and through a range of face to face meetings or printed and online resources.

- Some authorities rely on the local offer as the primary source of information for both young people and parents. Some authorities also delegate the task of providing advice and information to young people to voluntary sector partners and advocacy services such as SENDIASS.
- It is very rare for a young person him/herself to request or utilise disagreement resolution.

Mediation

- Very few young people have exercised their right under the 2014 Act (see section 51-56) to pursue SEN mediation autonomously. Most LAs have had no cases where young people have invoked mediation.
- Almost all authorities make arrangements to ensure that young people with SEND are provided with, or have access to, advocacy support in connection with mediation. Authorities tend to signpost or commission support for young people participating in mediation via a range of independent advocacy providers.

Appeals

- Young people have an independent right of appeal to the First-tier Tribunal on any of the grounds specified in the 2014 Act (section 51). However, LAs reported that very few young people have brought an appeal against the LA in their own right. In the previous 12 months most authorities had had two or fewer cases where young people had appealed.
- A large majority of authorities will ensure that young people have access to, or are provided with, advocacy support for an appeal.
- A majority of LAs experienced difficulty in ensuring that the views of children are placed before the tribunal. Parents often refuse to consent to the eliciting of the child's view. Issues around ascertaining capacity or establishing whether the view presented is the child's independent view or that of the parent are common. Inappropriate intervention of legal advisors was an additional concern.
- It was very rare for a child or young person to attend a tribunal hearing, although some LAs had very few tribunal hearings. A small number of authorities described how some children and young people manage to participate and present their views, but mostly this requires the support of another adult.

Other issues

Supporting young people to make decisions about future education/training

- Arrangements for such support varied across authorities. Some LAs commissioned independent support from specialist providers and some authorities also provided specific advice and support themselves. In other authorities young people are also able to access a range of services provided by schools and college careers services or are expected to consult information publicised within the local offer.

The involvement of parents or carers

- A majority of LAs considered parental or carer involvement to be particularly important for young people with SEND, even though they recognised that the views of the young person should remain paramount and should take precedence where they conflict with the parent's view.
- Where a young person lacks capacity to make decisions, the views and extra contextual information that parents and carers can provide are considered broadly positive additions to decision making processes.

Authorities' views on the rights of children and young people

- LAs are mostly positive about the rights conferred on children and young people by the 2014 Act. They welcome the Act's potential to enable children and young people to influence LA decisions. Many LAs report that children's and young people's participation is, however, yet to be engrained within routine practice.
- Reported problems hindering implementation of children and young people's rights include issues of funding, the capacity of advocacy support, a lack of staff awareness of the Mental Capacity Act 2005, the cost of mental capacity assessments, and parental and professional failure to accept fully children and young people's right to participate in SEND decisions.

Conclusion

The picture that has emerged from this survey is one of uneven progress in implementing the principles and requirements governing children and young people's rights introduced under the Children and Families Act 2014 and the SEND Code of Practice 0-25 years (DfE, 2015). Local authorities, while positive about the Act's potential to transform children's and young people's participation in SEND decisions, acknowledge that there is still a long way to go in ensuring that upholding the relevant rights is properly reflected in local authority practice across a range of SEN functional areas.

One area of advance has been an engagement with children and young people through consultation about local provision and the local offer. In relation to processes of assessment and EHC planning in individual cases, however, progress has been slow. There have, for example, been sub-optimal levels of children's and young people's participation in EHC plans and assessments; and less than half of the LAs always arranges information, advice and support for young people in relation to EHC assessments. A factor in these difficulties is that proper engagement and co-production can involve a considerable investment of time and resources. However successfully individual authorities have been facing up to their additional statutory responsibilities to uphold children and young people's specific legal rights, there is one clear and common message – about being insufficiently well-resourced to deliver the changes needed as well as managing significant increases in both the volume and scope of SEN related workload. Some authorities also reported that these constraints have led to a reduction in the overall quality of provision offered.

The survey has also uncovered a number of specific issues that are likely to be impeding the effectiveness of the new framework for children's and young people's rights. One comprises variations in the frequency and scope of LA SEN training provision relevant to supporting children and young people's participation. There are also variations in the capacity of different authorities to ensure that SEN related information and advice are both

accessible and appropriate for children and young people. Another issue is the determination of the child's or young person's capacity, representing a significant obstacle and area of uncertainty. If resources are scarce, there is an inherent risk that apparent concerns about capacity may mask other underlying issues around resource allocation and staff workload or even cause unnecessary default to the parent's or LA's view.

A further problem is the tension around balancing the right of a child or young person to express his or her independent view and clarifying whose view – the child/young person's or the parent/carer's – is presented or should take precedence. There are also difficulties facing local authorities in consulting with younger children as well as those with communication difficulties or more complex needs. There are indications that an improved availability and quality of independent professional support is needed to enable the voice of the child or young person to be better heard in the future. Finally, authorities have identified a pressing need for greater collaboration with the FE sector as well as requiring further guidance on how best to include and support the post-16 age group.

Further information

All working papers and briefings of this project **Autonomy, Rights and Children with Special Needs: A New Paradigm?** (Ref. ES/P002641/1) are available at <https://www.ed.ac.uk/education/rke/centres-groups/creid/projects/autonomy-rights-sen-asn-children> and on the website of the Centre for Research in Education Inclusion and Diversity (CREID) at the University of Edinburgh (www.creid.ed.ac.uk).

For any enquiries, please contact Professor Neville Harris (neville.harris@manchester.ac.uk).

If you would like to receive briefing, or to be added to or removed from the distribution list, please contact Grace Kong (creid-education@ed.ac.uk).

All briefings are available in hard copies, or as an email, or to download on www.creid.ed.ac.uk.