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SPECIAL EDUCATIONAL NEEDS DISPUTES AND MEDIATION

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Introduction

This paper aims to give a general overview of the use of mediation in the context of challenges against local authority decisions by parents of children with special educational needs (SEN). It briefly describes the main external mechanisms (as opposed to internal complaints procedures) for resolving or determining SEN disputes.

Public law challenges such as these present a dilemma for practitioners and policy makers in the current climate of combined incentives and pressures to adopt alternative methods of resolving disputes, outside the courts and tribunals system. This climate has been evolving since Lord Woolf's reforms of the civil justice system of the late 1990s, but until recently the reforms' reach extended for the most part only into private, not public law, with restrictions on legal aid and the imposition of costs sanctions where parties are considered to have refused mediation unreasonably primarily affecting civil/commercial and family law arenas. Alternative dispute resolution (ADR) mechanisms such as mediation are not new, but their application in the area of public law, and the increasing pressure being brought to bear on litigants to use them, is new and is alarming to some legal practitioners.

Indeed, major changes in SEN legislation[1] and codes of practice, due to be implemented from September 2014, will place a greater emphasis on the role of private mediation as an alternative to determination by state tribunal. An element of compulsion is likely to be introduced for both parents and local authorities in an effort to steer disputes into private forms of resolution.

In a sense the range of dispute resolution mechanisms available for SEN disputes is a microcosm of the landscape of informal dispute settlement more generally and so can be used to illustrate the concerns that legal scholars and practitioners have expressed about informal resolution: that it is difficult to know which route to pursue, that the processes fail to safeguard statutory or legal rights, that they serve as individualised and privatized justice, and that an emphasis on "cheap and cheerful" dispute resolution contributes to a system of two-tier justice.

[1] Children and Families Bill 2012-13 to 2013-14.

What are SEN?

About one in five children has some kind of special educational need.[2] A special educational need is defined as a difficulty in learning, such that the child needs some form of help in class. These needs arise from a range of cognitive, physical and behavioural difficulties, including severe and moderate learning difficulties, autism, behavioural problems, specific problems with literacy and numeracy, and speech and language difficulties.

Just as the SEN label covers a wide variety of difficulties, the support required is also varied and can include one-to-one or small group support from teaching assistants, tailored approaches to teaching and homework, speech and language therapy, scheduling modifications, specialised equipment and residential provision. Most (about three-fifths) of students with SEN go to mainstream schools. This is in keeping with the policy emphasis on inclusion that has been prevalent for the past 30 years or so.[3] Some children need health and/or social care support as well as educational support.

For most children with SEN, help and support is provided at the school and classroom level. Where a formal assessment concludes that their needs cannot be met at this level, a statement is drawn up describing the child's needs and the provision to be made. The local education authority has a statutory duty to ensure that this statement is complied with. Only a small percentage of children with SEN have statements, yet more than two-thirds of SEN resources are spent in relation to children with statements.[4]

SEN generates a large number of complaints by parents. There is, generally, an atmosphere of distrust between parents and schools and the education departments that oversee them. From a local authority perspective, it can be a struggle to meet parents' demands in the context of capped resources to meet the educational needs of all children for whom they are responsible. From parents' perspectives, it is their child who needs the particular provision; some parents are seeking a 'cure' for their child, and others have more realistic expectations, but very often there is a gap between the parents' view of what the child can eventually achieve and the school's or local authority's view and very different perceptions of the child's needs or the type of provision that would be appropriate.

[2] Audit Commission, "Special Educational Needs: A Mainstream Issue", 2002.
[3] Warnock, H.M., *Special Educational Needs. Report of the Enquiry into the Education of Handicapped Children and Young People*, London, HMSO, 1978.
[4] Audit Commission, "Special Educational Needs: A Mainstream Issue", 2002.

In the current political climate, there is an additional complexity as education policy favours light-touch oversight; as the number of academies and free schools increases, responsibility for educational provision, including SEN, is increasingly being removed from local authorities. This has a direct consequence for parents who need to challenge a decision about SEN statementing and provision for a child at a state-funded school that is outside the maintained sector.

We do not know the scale of the problem in terms of the number of parents who are dissatisfied with the help their children receive in school; it is likely that most of these never reach a complaints procedure, much less become legal challenges. Those expressions of dissatisfaction that become complaints usually go, in the first instance, to the schools themselves: the child's teacher, the headteacher, the SEN coordinator (SENCO). Unresolved complaints can be taken to the school's board of governors.

Where they raise a complaint and it is not resolved at this internal level, parents in England and Wales (different laws and practice apply in Scotland) can pursue a number of options if their complaint is not resolved, including an appeal to the tribunal, an application for judicial review, a complaint to the ombudsman, or mediation. Aside from disability discrimination claims, complaints about schools, even those involving SEN issues, are not ones for tribunal, but they can ultimately go to the Secretary of State.

Tribunal appeals

Specific complaints trigger a statutory right to appeal to the SEND (the Special Educational Needs and Disability tribunal of the Health, Education and Social Care Chamber of HMCTS); appeals must be made within two months from the time the local authority gives the parents their final written decision. The complaints that trigger a right to appeal are:

- that the local authority refuses to carry out a formal assessment of the child's needs;
- that the local authority refuses to issue a statement of the child's needs;
- that the parent disagrees with the parts of their child's statement that describes their needs (Part 2) or the help the child should get (Part 3);
- that the parent disagrees with the school named in the statement (Part 4);
- that the local authority has not named a school in the statement;
- that the local authority refuses to change the school or refuses to reassess the child;
- that the local authority refuses to maintain the statement or to change the statement after reassessment.

Because of the staged approach to meeting SEN (i.e. school-based support at School Action and School Action Plus stages, then the statement stage, which is the stage at which ensuring

provision becomes a legal obligation on the authority), many parents argue that statements are the only way to hold local authorities and schools accountable for making adequate provision. Increasingly, however, local authorities are moving away from statementing.

Parents are encouraged to try to resolve the complaint directly with the local authority and to continue to do so even after they issue an appeal. The deadline for registering an appeal is two months after the local authority has notified the parents of its decision, so in many – if not most – cases it is essential for an appeal to be lodged before any other resolution processes, such as mediation, are explored. Appealing to the tribunal is free for parents, aside from the cost of legal representation where it is used. Parties are expected to pay their own costs. The tribunal can overturn a decision by the local authority if it finds in favour of the parent/complainant. Its decisions are final and binding. Appeals of tribunal rulings can be made on points of law only.

The tribunal never hears most registered appeals; three-quarters are withdrawn by parents or conceded by the local authority prior to hearing. In 2012-13 academic year, 3,600 appeals were made to SEND. Only 24% of these were decided by SEND; the rest were withdrawn or conceded.[5]

Outcomes

Although withdrawn and conceded claims are not followed up by the tribunal, it is interesting to note the issues that are more likely to be conceded by local authorities. Refusal to conduct a statutory assessment and refusal to issue a statutory statement are the two issues where the local authority is most likely to concede to the parents' demands. Local authorities appear to be very unlikely to concede on appeals relating to changing the statement, although in about one-quarter of the cases where parents are appealing the local authority's refusal to change the statement to identify the named school, the local authorities do give in. It is more difficult to identify any pattern in parent withdrawals, although it appears that a large percentage of appeals on contents of the statement are withdrawn.

As far as outcomes of tribunal hearings, the overall pattern shows that parents are more likely to win than not; of the appeals heard in 2012-13, 84% were upheld in favour of the parents.

[5] See statistics published at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/265148/quarterly-tribs-q2-2013-14.pdf

Mediation

Under the current SEN Code of Practice (due to be replaced with a new code under the new legislation in September 2014), local authorities must fund and make available an independent disagreement resolution service; in practice this is usually mediation. It is not an alternative to the tribunal, and participating in mediation does not affect parents' right to a tribunal hearing, but it can be attempted prior to a tribunal hearing, either before or after an appeal has been registered. A stated aim, however, is to reduce the number of appeals going to the SEND over time.[6] Disagreement resolution services are not limited to taking on cases where there is a right of appeal; an increasing number of services are also mediating in cases involving school and parent, and even tripartite school/parent/local authority disputes.

The 'SEN Toolkit', which gives guidance on specific aspects of the Code of Practice, describes the anticipated benefits of mediation as follows:

> *"in exploring outcomes – the solutions reached tend to be more creative than through other processes*
> *to build trust and ownership – which in turn might elicit outcomes that are more likely to be followed through…*
> *to facilitate communication – because the parties have solved the problem together, they will have needed to communicate positively and build greater understanding…*
> *in using a tiered process – enabling the parties, at separate sessions, to work through their differences e.g. the school or local authority, and then the parties separately."*[7]

Mediation is a way for parties to agree jointly any decision or change in decision. The legal status of mediated outcomes in this context is somewhat vague: mediated agreements are not considered to be legally binding, although a formal written agreement achieved in mediation can be referred to at a later tribunal hearing. The mediation involves a meeting between the parents and local authority, and sometimes involves the school and other involved agencies from health and social care, facilitated by an independent trained mediator who has no connection with the dispute or the parties. The meeting usually lasts about four hours and takes place at a venue that is acceptable to both parties – ideally an entirely neutral venue but in practice this can be the local authority offices or the school, if parents agree.

The meeting is confidential and without prejudice; this is to encourage honesty and openness in the discussion, but in practice it raises important issues – both practically, when information

[6] SEN Code of Practice (2001), Department for Education and Skills, s.2.26.
[7] DfES, 'SEN Toolkit: Section 3: Resolution of Disagreements', 2001, pp.7-8.

must be shared with colleagues and family members, and in terms of the legal standing of mediated agreements, as mentioned above. The aim is for the parties to discuss the areas of disagreement and, if possible, to reach an agreement that is satisfactory to all parties. Even where mediation does not result in an agreement, it provides an opportunity to clarify the issues in dispute and the parties' positions, and it is proposed by mediation providers that this can help narrow the focus of the dispute if it proceeds to a tribunal hearing.

The cost of mediation is borne by the local authorities, although the provider is expected to be completely independent of local authorities. SEN mediation is provided by a range of mediation providers, most of which are not-for-profit and cover a regional area. Some 'disagreement resolution' is provided by local authority-funded and managed Parent Partnership organisations.[8] The fact that funding of mediation, whether independently provided or not, relies on the goodwill of local authorities is a concern – although parents have direct access to the mediation service and its provision of pre-mediation advice and assistance, even if a local authority refuses to fund or participate in a full-fledged mediation meeting.

The 'SEN Toolkit' identifies certain situations that are considered inappropriate for mediation, including where:

> *"– either side does not wish to engage in the process*
> *– matters of policy are at stake*
> *– the main issue is one that would set a precedent on which the LEA is unwilling or unable to concede*
> *– there is no goodwill*
> *– there is a substantial change in the relationship between the parents and the LEA or school, for instance the parents have moved or are moving to another LEA area, or the child has or is about to transfer to a different school."*[9]

Mediation has a relatively high rate of settlement, although 'settlement' in this context does not always mean that all issues in dispute are resolved, nor does it always involve a withdrawal of an appeal already registered with the tribunal. There should be no pressure placed on parents to withdraw their appeal as part of a settlement at mediation.

[8] There are eleven regional SEN mediation partnerships, and local authorities are grouped in these partnerships. As a result, different arrangements exist regionally for providing SEN mediation.
[9] DfES 'SEN Toolkit' (2001), p.8.

A number of concerns and questions arise in any discussion of mediation in SEN cases, including: Does mediation assume equity of power between parties? How should we understand what types of power there are and what the implications are for achieving just and fair outcomes? Is this privatised justice, and should we be concerned that the emphasis mediation places on individualised remedies can conflict with the public interest? Is there a fundamental problem with the case-by-case basis on which settlements are achieved in mediation – without reference to cases resolved through other mechanisms – in that the outcome achieved might depend on the party's persistence or confidence and disadvantage others who are less persistent? Also, is there a risk that mediation in an area in which services are provided from capped public resources can result in inequitable distribution of limited resources?

Other dispute resolution options

It is useful to consider briefly what other options exist for resolving disputes over children's SEN provision, including applications for judicial review of an local authority decision and complaints to the Local Government Ombudsman.

Judicial review

Where the dispute involves an allegation that the decision was taken unlawfully, judicial review is an option. Disputes about statements are more likely to go to JR than those about refusal to assess or to make a statement.[10] The court can provide a decision where the issue is a point of law or statutory interpretation. It can order a local authority to take action – or cease action – and can quash a decision. Compensation is rarely awarded in successful judicial review cases.

Local Government Ombudsman

Where the dispute involves an allegation that the local authority or school has not dealt appropriately with a parent's complaint – e.g. has not followed its own policy or procedure – parents can complain to the Local Government Ombudsman (LGO) (in England and Wales; in Scotland, they can complain to the Scottish Public Services Ombudsman.) The ombudsmen receive relatively few complaints about special educational needs.

The LGO cannot overturn a decision made by the local authority but can recommend a range of remedies, including that appropriate action be taken and/or that the local authority provide compensation to the parent and/or child. There is no charge to either party, and legal representation is considered to be unnecessary, although in some cases the ombudsman has

[10] Silas, Douglas (2004), "Special Educational Needs – Where Are We Now?", presentation at Jordan's seminar, November 2004.

awarded legal costs where he or she believed it was not unreasonable for the parents to have sought professional advice.

Although the LGO process is a backward-looking one, exploring whether and to what extent the local authority failed to follow its own procedures and statutory procedures, the awards made can include an element of forward-looking redress, such as purchase of specialised equipment or support. Examples of remedies awarded by the LGO include £3,000 compensation to the parents for delay and a further £5,000 in educational benefits for the child;[11] £1,000 compensation, again for delay, and £500 for 'educational assistance' for the child[12]. What the LGO cannot do is turn the clock back and undo decisions that have been made, and because the LGO process is a relatively long one (in that in addition to its own timescales for handling complaints also require parents to have exhausted their local authority's internal complaints procedure before taking a claim to the LGO), it is not suitable for complaints requiring urgent action.

Range of mechanisms, but not all alternatives

It is perhaps inevitable that confusion would result from the variety of mechanisms available for resolving disputes over education provision for children with SEN. The different options each have their own procedural requirements and each gives rise to different remedies; as a result the dispute must be 'framed' according to the remit of the forum in order to make any progress or indeed be recognised as a dispute. The options described above are not all alternatives in the sense that claimants could choose to pursue whichever route they want. Where parents have a statutory right to appeal to the SEND tribunal they cannot take that complaint to the ombudsman, and where they have a right to pursue judicial review the ombudsman can decline to accept the complaint.

The "tick one box only" approach to resolving disputes requires complainants to choose how to define their grievance according to the dispute resolution mechanism they are using, which itself is determined by a) what remedy they are seeking or b) what process is most likely to give them a favourable outcome. It does not allow for a holistic approach to dispute resolution, and the result is that only part of a dispute might be resolved.

[11] LGO Report 02/C/2543; see LGO *Annual Report 2003-04* and *Digest of Cases 2003/04*, ibid.
[12] LGO Report 03/B/8725; see LGO *Digest of Cases 2004/05*.

On the other hand, we are seeing an increasing overlap between processes, including a greater awareness of mediation among SEND panel members[13] and, less positively, the introduction of legal aid rules requiring mediation by publicly funded litigants where permission has been granted in judicial review cases.[14] The reforms and initiatives within the tribunals system means that SEND, like other tribunals, is encouraged to adopt more mediation-like and ombudsmen-like approaches – i.e. informal and not involving legal representation.[15]

Originally the tribunal was established to provide a less formal and more user-friendly means of access to justice in these cases:

> *"The objectives of the legislation which established the SENT were that it should provide an effective means of access to justice for parents, by operating 'a new system that is quick, simple, impartial and independent; a system in which informality is the key' and one which is 'friendly' to parents."*[16]

It is interesting that the very language used to describe what was at the time a new tribunal system is the same language used currently to describe alternatives in the context of the government's push towards greater use of "proportionate dispute resolution". What were originally set up to be user-friendly mechanisms to resolve legal problems – tribunals and small claims procedures, for example – are now perceived as the unwieldy formal processes to which we seek alternatives.

[13] SEND asks parties who are withdrawing an appeal if they have participated in mediation; this development was only introduced in 2005.
[14] In July 2005 the Legal Services Commission announced that legal aid for litigation of judicial review cases that have passed the permission hurdle – in other words, those given the go-ahead to proceed by the administrative court – will not be funded unless mediation has been attempted.
[15] "Transforming Public Services: Complaints, Redress and Tribunals" (2004). Only seven years after Harris's description of the new SEN tribunal's objectives, this White Paper stated that the tribunal system needs to be transformed "into a new type of organisation which will not only provide formal hearings and authoritative rulings where these are needed but will have as well a mission to resolve disputes fairly and informally…." (p.19).
[16] Harris (1997), p.3.