

# Relationships, trust and learning to drive: A report on a discussion of young people's participation in SEND dispute resolution

## Report on a roundtable discussion for the project A Place at the Table

Margaret Doyle, UKAJI, University of Essex, August 2018

Relationships and trust: these are the 'vital elements' identified as key to supporting young people to have a meaningful place at the table where decisions are made and disputes are resolved. Relationships include those of young people with their parents and their school or college, and the need for trust arises not only in the context of young people trusting those who support them in their decision-making but also trusting the sources of advice and information on their rights.

The focus of the *A Place at the Table* project's roundtable discussion, held on 25 June 2018 at Garden Court Chambers in central London, was young people's participation, as rights holders and decision-makers, in resolving disputes about support for their special educational needs and disabilities (SEND). The aims were to provide a space to share knowledge and experiences from different perspectives and to explore feasible next steps, with specific attention paid to the issues of participation, capacity and information. Roundtable participants discussed the need for early involvement of children and young people in planning their SEND support; help for parents/carers to navigate the shift from advocate to supporter, from *speaking for* to *speaking with*; accessible information and legal advice; a central role for schools and colleges; and guidance for those involved in redress and resolution, including mediators and tribunal members.

The analogy of learning to drive was used at the roundtable discussion to describe how a young person might feel being invited to a mediation meeting to make decisions on the support for their special educational needs and disabilities (SEND), with no experience of mediation and without ever having had the chance to be involved in decision-making to plan their support. It may be a rough-and-ready analogy, but it's apt in that young people are being given driver's licences (a right to appeal a local authority decision) with little, or no, guidance, practice or support as to how to drive (information, advocacy, legal advice).

Like driving, decision-making is not something we're all born knowing. We need to learn, and we need help in that learning. Mostly we need practice. It isn't just the learner driver who needs practice and support, however. It's also the parents, the driving instructors, and other professionals involved – supporting someone else in their decision-making is a skill that also needs to be learned. But as participants at this roundtable concluded, the SEND system talks the talk of participation and young people's voices being heard, but it doesn't walk the walk – a culture change is needed, as are more resources to help local authorities, parents, and professionals involved in planning and providing SEND support.



## Background

Under the Children and Families Act 2014 in England, from age 16 the right to make requests and decisions on SEND applies to the young person directly, rather than her/his parents. Few would argue against young people who want to drive being allowed to do so, just as few would disagree with young people having rights, and international conventions back this up: the UN Convention on the Rights of the Child (CRC) sets out the rights of children and young people to be involved in decisions which affect them, to have their views taken seriously and to participate in proceedings; and the UN Convention of the Rights of Persons with Disabilities (CRPD) sets out rights in relation to support for accessing justice and exercising legal rights.

Decisions made by local authorities on SEND provision reflect many aspects of concern in administrative justice. These include the **quality of initial decision-making, accountability of public bodies, human rights considerations in the delivery of public services, and mechanisms by which people can challenge and appeal such decisions**, all of which must be considered in the current context of budget pressures on schools and local government and concerns about efficiency. The expectation is that the project will contribute to our *understanding* of the way these aspects of administrative justice are experienced through the lenses of children's rights and participation in access to justice and to our *knowledge* of best practice for including children's and young people's voices in the process.

*A Place at the Table* focuses specifically on individual participation of young people in England aged 16-25 in SEND dispute resolution, and primarily on mediation, with lessons to be learned across the mechanisms that exist for complaint handling and accountability in local authority decision-making. It is being carried out as part of the UK Administrative Justice Institute (UKAJI), a national network of researchers and research users based at the University of Essex, with support from the ESRC's Impact Acceleration Account funding, from Garden Court Chambers' Special Fund, and from KIDS, a national charity working with disabled children and their families. Participants in the project include mediators and mediation services; SEND Tribunal leads; local authority representatives; parent/carer groups; IPSEA; the Department for Education; the Local Government and Social Care Ombudsman; the Children's Commissioner; specialist lawyers and advisers; and academic researchers. A project website has been set up as a place to gather relevant information and guidance and to disseminate information about the project:

<https://aplaceatthetablesend.wordpress.com>

## The roundtable

The roundtable discussion was a half-day session held on 25 June 2018 and hosted by Garden Court Chambers in central London; it was attended by 30 individuals with a range of perspectives on young people and SEND dispute resolution. Aside from presentations by project partners, contributions to the discussion are not attributed to individuals in this report. The roundtable discussion will feed into the project's Final Report and recommendations.

### ***Project partners***

Each of the project's partners gave a brief presentation at the start of the roundtable discussion. Professor Maurice Sunkin, University of Essex and UKAJI, discussed how the

project fits into the work of UKAJI as a network on administrative justice research and how it relates to the need to encourage a wider view of decision-making and the values and approaches of decision-makers. Audrey Dorival, Service Manager of the KIDS London SEN Mediation Service, discussed the work of KIDS and the obstacles that mediation providers face in trying to engage directly with young people in challenges to local authority decisions on SEND. Helen Curtis, a barrister and mediator with Garden Court Chambers, discussed her concern with human rights and young people in particular and the need to explore how decision-making works in mediation, especially in relation to references to the Mental Capacity Act.

### ***Related research***

This project focuses on England and on young people aged 16-25 and is primarily a knowledge exchange. A related current research project, [Autonomy, Rights and Children with Special Needs: A New Paradigm?](#), based at the universities of Manchester and Edinburgh and funded by the ESRC, is investigating the way in which the children's rights agenda is being implemented in practice in the field of SEN/ASN in England and Scotland, taking into account the wider policy context of declining budgets, reduced local authority power, increasingly complex governance arrangements and policy divergence across the two jurisdictions. At the roundtable, the project leaders, Professors Neville Harris and Sheila Riddell, explained briefly how the legislation in England and in Scotland is materialising in practice. In Scotland, the right to appeal a local authority decision has been extended to 12-year-olds, but this does not include a right to request mediation or a change in school placement, and a child or young person who wants to exercise this right has to request it. In England, the right has been extended to 16-25-year-old young people, but there seems to be uneven progress in implementing participation. There are concerns about how capacity is dealt with in both jurisdictions.

Other related research includes the review of SEND disagreement resolution arrangements under the new Children and Families Act framework, led by Mairi Ann Cullen at the University of Warwick (see [Review of arrangements for disagreement resolution \(SEND\) – Part 1: Understanding the effect of the 'Recommendations pilot' and Review of arrangements for disagreement resolution \(SEND\) – Part 2: Impact of compulsory mediation information on appeals to the First-tier Tribunal SEND](#)); and a study of children and young people's participation in SEND mediation, carried out by researcher and mediator Ben Walsh (see [The participation of children and young people in special educational needs mediation](#)).

### ***Engaging with young people***

The roundtable participants watched an extract from a video – [Ask Us, Hear Us, Include Us](#) – produced by the Scottish Young Ambassadors for Inclusion, a group of pupils working to help schools think about how they can become more inclusive. The Young Ambassadors share their views about what schools and local authorities can do to make sure every pupil feels included and supported.

One of the issues for the current project is that, for a number of reasons, it has not been possible to engage directly with young people, including the need to develop resources and to design an approach that will involve young people in a more meaningful way than the constraints of this project allowed. Other reasons are:

- Most children and young people, even those actively engaged in participation, will not have had experience of dispute resolution such as mediation, the tribunal, or an ombud complaint and so may not be familiar with the process in order to contribute to ideas about how they can be made more accessible, beyond the useful but mostly generic ideas about participation in meetings and decision-making generally. There is a risk that this could be tokenistic and not make the best use of young people's time.
- This project has identified that the lack of accessible, young-people-friendly information (printed and online literature and leaflets, videos) on complaints and disputes in SEND hampers researchers' ability to engage directly with children and young people, and the resources for the project do not allow for creation of, and consultation on, such information.
- There are also challenges in accessing existing participation groups. A number of such groups exist (eg FLARE, a group of young people with SEND, run with Council for Disabled Children and KIDS and funded by the Department for Education), but SEND dispute resolution is not necessarily one of the areas on which they focus; getting time to discuss this means offsetting other issues they are working on.

Participants at the roundtable discussed the 'slippery concept' of co-production with young people and the need for resources to facilitate such co-production. What is needed is involvement by young people, to design how they want to be involved, both in dispute resolution and in research and production of guidance. It's important to consider who is not involved as well as who is, and to assess whether young people are being asked to represent themselves (and their interests, which are variable) or to represent the interests of a group.

### ***Briefing paper***

The briefing paper distributed to participants in advance highlighted a number of issues. Among these are the areas about which we know very little: young people's views and those of parents, schools/colleges, and local authorities, as well as the wider context of complaints and disputes (tribunal and mediation but also school complaints and the work of the Local Government and Social Care Ombudsman (LGSCO) and Children's Commissioner in handling complaints). The LGSCO publishes its decisions on complaints about local authorities in relation to SEND, but otherwise there is a lack of concrete data to draw on in this area; one contributor has described the area of SEND dispute resolution as 'anecdote rich and data poor'.

The reasons for focusing primarily on mediation include that there has been a steep increase in the number of mediations since the Children and Families Act 2014 (from 75 in 2014 to 2,497 in 2017; compared with 1,599 tribunal appeals decided in 2016-17). This increase has occurred without any parallel increase in scrutiny of the mediation process, aside from very recent development of SEND-specific mediator practice standards. Other reasons to focus on mediation include the confidentiality of the mediation process and the distinctiveness of the parties' role in mediation as decision-makers, which goes beyond participation or giving views.

### **Three themes**

The roundtable participants considered three primary themes identified in the briefing paper: **participation, capacity, and information and advice.**

Much of the work on the voice of children and young people with SEND highlights the greater risk to them of not being heard and having rights denied and the importance of doing 'with' rather than doing 'for' or 'to', a key principle of the disability rights movement. The 2015 SEND Code of Practice explains that young people '*may be finding their voice for the first time, and may need support in exercising choice and control over the support they receive*' (2015 CoP 2.15). This is particularly important in the context of mediation, which is a problem-solving process whose emphasis on collaborative decision-making prioritises self-expression and self-determination by the parties. Therefore, mediation involving young people with SEND is an area of participation that both demands creative approaches to participation and provides opportunities for such creativity.

*'The mediation process needs to meet the needs of the people who have to live with the decision.'*

Arguments for participation include the need for young people to 'practise' decision-making and the need to help them build resilience (eg by learning from decision-making). Early involvement of young people in planning for their SEND support may result in better and more sustainable outcomes. There is, however, what one commentator has referred to as a 'tyranny of autonomy', where rights of one group, such as young people with SEND, take priority over rights of others, such as carers. One researcher has suggested that we need to ask *why C/YP should* participate, referring to a 'participation policy regime', with levels of engagement being contingent on individual relationships and on '*assumptions about degrees of capability or deservability*' (McKay 2014).

Roundtable participants also identified the risk that prioritising decision-making by young people can threaten their relationship with their parents, who in many cases remain a key resource for young people entering adulthood. Further, it can create anxiety, not only in young people but also their parents and professionals working with them – that's not a reason not to prioritise decision-making by young people, but to explore ways to relieve that anxiety.

In theory, young people can exclude their parents from the tribunal process or from mediation, and this could cause conflicts between parents and young people, but it does not appear to be happening. In practice, **a minority of young people attend mediation or tribunal hearings involving SEND disputes**: the SEND Tribunal does not collect data on appeals led by young people, but figures from the mediation services managed by national charity KIDS, which cover about one-third of all local authorities in England, suggest that young people attend mediation in approximately 8% of cases. The extent of young people's involvement is not possible to determine from the collected data, so this figure is likely to reflect a range of levels of participation, including attending only. One of the tasks for this project has been to try to identify the extent to which young people attend mediations, although only a limited snapshot can be provided, as this data is not published, or even routinely collected, by mediation providers.

### ***Participation***

The project focuses on individual rather than strategic participation, and in particular 'decision-making' as one form of participation. As Harris (2018) notes, it is in this area of resolution of individual disputes that '*the principal barrier to children's participation – arising from a general paternalistic perception that parents are best placed to represent*

*their children's interests and advance their cause – has been most at the fore'*. However, it is important not to see participation as a ladder or hierarchy, with some forms seen as more valuable than others, but instead to consider all forms of participation and supported decision-making as important.

Young people may feel their participation in their own decision-making on support is limited to completing Part A of a draft Education, Health and Care (EHC) Plan and that they want more say in earlier stages such as assessments, planning, outcomes and pathways. At the roundtable, a case of one young woman was described that showed how she was excluded from discussions and planning meetings, and it was only with the help of an Independent Supporter that she was able to take part in discussions and finally obtain an EHC Plan. Young people may find they are being labelled or excluded and that there is a focus on negative needs and not capacities, and they may feel under threat of exclusion from school and college settings, often feeling as if adults are 'waiting to get rid of them'.

*'To what extent is the emphasis on participation a potential source of anxiety for young people, and to what extent is it empowering? Or both?'*

Participants discussed whether the new right causes anxiety in young people and their parents. To some extent the anxiety is created because of the lack of support and information available. Outcomes of participation may not be as intended; a young person may be perceived as not requiring support if he or she is able to engage in planning and decision-making, as occurred in one case example given. There is anxiety among professionals who feel ill equipped to work with young people with SEND. Concerns were raised among participants about the use of the term 'vulnerable', which is commonly used but reflects the 'welfare' approach that is at odds with children's rights and a focus on 'citizenship'.

*'It is unrealistic to expect the young person to pull up a chair if they have not been involved throughout their SEN journey.'*

One question is: why are young people not involved from the start in their SEND support planning? This should be embedded into the SEND work done by schools and colleges and local authorities. Roundtable participants suggested that in the four years since the reforms were introduced, there has not been the cultural change needed. Where is listening happening within the organisations involved in SEND, and what role should the Equality Act and Human Rights Act take in underpinning the approaches taken by organisations? It was also suggested that feedback mechanisms are too formal and not accessible – this area is particularly under-developed, hindering young people's ability to feed into decision-making even informally. Participants explored whether better use of technology, such as producing webinars by and for young people, can assist with the gap identified.

### **Capacity**

A parent shared a real-life case example at the roundtable involving her daughters, two young women who challenged their local authority at tribunal and were assessed as not having capacity because they didn't have decision-making experience – revealing a vicious circle that echoes earlier comments about building resilience and giving opportunities to practice decision-making.

*'Mental capacity is decision specific; it is not a status.'*

The way 'mental capacity' and 'best interests' are used and referred to suggests some confusion in the SEND field among parents and lawyers. There should be a presumption of capacity, and under the Mental Capacity Act (MCA), decisions to be made are issue-specific; it is not about global decision-making capacity. It was noted that best interests only kick in once capacity has been assessed and someone has been identified as not having capacity; there is, as one participant suggested, a tendency to leapfrog straight to best interests before capacity for a specific decision has been determined. When is an assessment (under the MCA) necessary, who should do it, and how does carrying out an assessment affect the strict timeframe for mediation to take place?

It was suggested that the Children and Families Act is inconsistent with the MCA; the two pieces of legislation don't marry up (for one thing, the MCA does not apply to young people under age 16), and young people fall through the gaps. In Scotland, there is a requirement that proof of capacity must be established in order to exercise the right to appeal; this is not consistent with the MCA's presumption of capacity. Drawing on other research on children and young people's legal capability, participants explored whether a capability approach might provide a more useful framework for understanding how young people with SEND can be supported in decision-making. Capability is knowing where to go for help, not knowing everything yourself. It includes supported decision-making – young people being supported to make the decisions they can make. Would a capability approach help us move away from the limitations and tensions of the capacity approach?

The debate at the roundtable suggested that even among those working in the field of SEND and mental capacity, there is disagreement and a lack of clarity about the concepts and terms. If such challenges are arising in legal processes, are they more or less likely to lead to confusion in 'non-legal' processes such as mediation?

Participants asked if it would be possible to revise the SEND legislation to reinforce the principle of presumed capacity and to determine which views should prevail, the young person's or her/his parents', if they conflict with each other. It was also suggested that a statutory right to, and funding for, independent advocacy is needed for young people to separate their voices from their parents (as in the Court of Protection).

### ***Parent views***

The roundtable explored views that had been shared from parents involved in a parent/carer forum and considered what is needed to help parents with the shift in role brought about by the Children and Families Act. Parents need time to prepare for this shift, and information and advice to support them in making the transition; their child's participation in decision-making is a complicated issue. Parents clearly see themselves as the advocate for their child and as the person to raise a complaint, where necessary, on their child's behalf. As one parent said, 'As parents we are unsure why the LA requires A's voice to be separated from ours, when it is clear that he does not have the mental capacity to contribute at this point in his life.'

The spirit of the law, being person-centred, is seen by parents as a great approach, but they also are sceptical about how the child's or young person's views and wishes can be meaningfully incorporated. It is not, one parent argued, person-centred to obstruct a young

person's access to parental advocacy. This is particularly true where the young person is non-verbal. It is unacceptable to equate being non-verbal with lack of capacity and to come across attitudes such as that in wording put into an EHC Plan, highlighted in the briefing paper, that said, 'Due to Aaron's difficulty with language it was not possible to gain his views.' It is also a worry to parents that the local authority or school might be interpreting the voice of the pupil.

*'A question that has come to the surface since the start of the project is a more fundamental one, however (Mueller et al 2007) – do we need to test the hypothesis that C/YPs' participation in SEND mediation is beneficial?'*

One parent described her concerns about how the views of her son, who is non-verbal, could be used meaningfully, explaining, 'He can sometimes make choices about things that motivate him, but not always. ...On a daily basis I absolutely expect his views – where he can give them – to be taken into account. But for assessments and documents that could really affect his future provision I feel strongly that his views need to be interpreted by us, his parents, and supported by other adults who know him well.'

It is also important to consider, as one parent suggested, that 'voice' is not a one-off event but is acquired over time and through ongoing dialogue: 'We feel that A's voice regardless of whether it is written by him or by us, his parents, will have been created through the ongoing dialogue within the home, through long night-time conversations about worries, experiences and through observations of him dealing with the world around him in the light of the support he has needed in various situations.'

*'...'voice' is not a one-off event but is acquired over time and through ongoing dialogue'.*

For looked-after children the issue of capacity has enormous implications, as the local authority is in effect the 'parent' and also the one to determine capacity, as well as the body being challenged.

### **Information and advice**

The SEND Code of Practice states that LAs '*must ensure children, young people and parents are provided with information and advice on matters relating to SEN and disability*', including '*information on the local authority's processes for resolving disagreements, its complaints procedures and means of redress*' (2015 CoP 2.17). This does not appear to be happening consistently, and there is a lack of an information and advice infrastructure to support rights. The Local Offers appear to be patchy in the information they provide, and local authorities appear to be sending decision letters (which contain the statutory information on advice and mediation) to parents, regardless of the age of the young person.

It was noted that in Scotland, when the right to appeal was extended to age 12 and older, the Scottish Government committed to funding a specialist advice resource for young people with SEND; in England, advice and information on SEND for young people is wrapped up within the services of the Information and Advice Services (IAS), provision of which has been patchy and under-resourced. Research carried out by IPSEA last year found that nearly three-quarters of young people said they would look to their parents or carers for

information on education and training, highlighting the importance for many young people of supporting their relationship with their parents.

Where does the responsibility lie to ensure there is a system in place to support C/YP to exercise and enforce their rights? Although legislation is clear that responsibility lies with local authorities, is this realistic, given the reality of where young people seek help? Participants had a range of views of where responsibility lies: with parents, government, local authorities, schools and colleges, and perhaps with all of us. Also, information that is too generic and not tailored to individual circumstances and need is less helpful. How to make sure that local authorities discharge their duty, particularly in light of budget cuts to local government? It was noted that the system is based around individual rights, but the information infrastructure is so starved of resources that it is impossible to deliver on this.

*People 'do not always identify an issue with SEND as a legal problem – they 'slip on a loose drain'.'*

Young people should be in the driving seat, but as with learning to drive, practice and guidance are needed. Early access to legal advice, for example, can be critical for young people, but an initial obstacle is that many young people do not identify their problem as a 'legal' one; in recent Ministry of Justice research, only 6% of young people viewed the problem they faced as a legal one. If they do, they may not trust the services that can help them; relationships and trust are essential building blocks. It was suggested that parents also do not always identify an issue with SEND as a legal problem in the way SEND professionals do – they 'slip on a loose drain'. And many young people consider the law as primarily about punishment and not about enforcing rights. The current situation suggests a need for radical re-thinking of how legal advice is made available to children and young people. Participants suggested that there are many systemic issues to be addressed, not only in terms of cuts to legal aid and other barriers to accessing advice, but also in the need for a cultural change to one that respects young people's rights.

## **Further ideas**

Among the ideas discussed and suggested at the roundtable meeting were practical measures as well as areas where further questions need to be explored through research and engagement, including:

- **Guidance** - Young people should be involved as co-producers of guidance on how to design/redesign dispute resolution processes that facilitate their participation as decision-makers. How do we do that? Participation groups are not intended to be representative of young people generally, and there will be a range of views and preferences as well as a range of needs to take into account. Funding will be needed to resource this work.
- **Research** - How successful is mediation, what is meant by 'success', and how does it fit with legal entitlements? A key question is: Are there good-quality outcomes for young people?
- **Statistics** - How many appeals involving young people are led by them, as opposed to a parent/carer? Data and analysis is also needed on how mediation providers and the tribunal respond. If young people are not leading on their appeals or mediation cases, why is that? It was agreed that more data is needed on the statistics for both mediation and tribunal cases.

- **Local authorities** – What good practice is happening in terms of supporting young people in SEND decision-making? What are the obstacles that local authorities face in carrying out their duties in relation to young people's participation and information and advice?
- **Schools and colleges** – Can they be supported to involve young people earlier in the SEND process, in a way that does more than give them a voice among many voices. Could there be 'rights surgeries' held in schools, giving young people access to specialist advice? What is known about the approaches taken by academies in involving young people in their SEND support and decision-making. Is the experience of SEN Support different in academies than in maintained schools, given the different role of the local authority in terms of accountability?

Among the practical steps that could be taken are:

- Producing a **map of feedback and complaint mechanisms** for young people with SEND.
- Creating a **database of support specialists** on a local authority website or at IPSEA website to help young people choose who will support them in decision-making
- Sharing **best practice on mechanisms for children and young people to express their views and participate in decision-making** – best practice guidance exists, and there is no need to reinvent the wheel. This should include learning from work on the project Ask, Listen, Do to encourage listening environments.
- Requiring local authorities to **obtain the student's signature** on every EHC Plan; and similarly, requiring mediation providers to obtain a young person's signature on mediated agreements.
- Recruiting and **training young people as SEND mediators**.

Ideas generated at the roundtable meeting will be developed further with participants and incorporated within the recommendations in the project's Final Report.

#### Sources:

Department for Education and Department for Health (2015), 'Special educational needs and disability code of practice: 0 to 25 years: a statutory guidance for organisations that work with and support children and young people who have special educational needs or disabilities', [www.gov.uk/government/publications/send-code-of-practice-0-to-25](http://www.gov.uk/government/publications/send-code-of-practice-0-to-25)

Harris, N (2018), 'Autonomy, Rights and Children with Special Needs: A New Paradigm?', Working Paper 2, Centre for Research in Education Inclusion and Diversity, University of Edinburgh, University of Manchester, [http://www.docs.hss.ed.ac.uk/education/creid/Projects/39\\_ij\\_ESRC\\_SENChildren\\_WP\\_2.pdf](http://www.docs.hss.ed.ac.uk/education/creid/Projects/39_ij_ESRC_SENChildren_WP_2.pdf)

McKay, J (2014), 'Young people's voices: disciplining young people's participation in decision-making in special educational needs', *Journal of Education Policy*, 29, 6

Mueller, M, et al (2003, updated 2007), 'The Involvement of Students in Their Special Education Mediations', a briefing paper for the Consortium for Appropriate Dispute Resolution in Special Education (CADRE), [https://www.cadeworks.org/sites/default/files/resources/The%20Involvement%20of%20Students%20in%20Their%20Special%20Education%20Mediations\\_1.pdf](https://www.cadeworks.org/sites/default/files/resources/The%20Involvement%20of%20Students%20in%20Their%20Special%20Education%20Mediations_1.pdf)