

A Place at the Table:

Young people's participation in resolving disputes about special educational needs and disabilities in England



Margaret Doyle, Independent mediator

Visiting Research Fellow, UK Administrative Justice Institute

Garden Court Chambers, 20 May 2021

About the A Place at the Table project

- Origins of the project – practitioner concerns and administrative justice concerns
- Small-scale ‘knowledge exchange’ project
- Project Partners:
 - UK Administrative Justice Institute, University of Essex
 - KIDS SEN Mediation Service
 - Garden Court Chambers
- Focus on England and on 16-25-year-olds as ‘rights holders’
- Focus on mediation as specific area of concern about decision-making roles
- Final report (March 2019)

Key themes explored in the project

- Participation – and what do we mean by it in SEND?
- Mental capacity – and how is it understood in the SEND context?
- Information and advice – and what sources of advice are available to young people?

Why mediation is of particular interest

- Steep increase in numbers of SEND mediations in England - from 75 in 2014 to 4,100 in 2020
- Distinctiveness of parties' decision-making role in mediation
- Flexibility of the process
- Confidentiality raises issues of scrutiny
- Opportunity for holistic outcomes
- SEND Mediator Practice Standards

Mediation increase

Exponential increase in SEND mediations,
from 75 in 2014 to...

Number of SEND mediations
held 2020

4,100

Number of SEND appeals
decided by SENDIST 2019-20

3,770*

- *Number of decisions made on 7,990 registered appeals.*
- *Sources: Education, Health and Care Plans, published by DfE 13 May 2021; Tribunal Stats Quarterly July-Sept 2020, published by MoJ December 2020*

Observations

A **disconnect** between the policy ambitions of participation and the exercise of individual participation rights.

- Young people are not exercising their rights on SEND.
- Participation is both a source of anxiety and a means of empowerment.
- The legal concept of mental capacity is not well understood.
- Insufficient data are collected and published.
- Guidance should be co-produced with young people.

What is participation?

- In practice, mediators and the tribunal take a **welfare approach**, in which participation is intended to provide information to adult decision-makers
- The Code of Practice takes a **citizenship approach**, in which participation is intended to encourage the involvement of the young person in decision-making.
- In SEND mediation, **participation takes many forms**, including but not limited to decision-making.
- Participation can be **direct** or **indirect** – the key is the young person determines how.

Why is participation important?

- The greater risk to these young people of not being heard and having rights denied – '**seldom heard**' voices.
- The importance of **doing 'with'**, a key principle of the disability rights movement, rather than doing 'for' or 'to'.
- The need for young people to 'practise' decision-making and the need to help them **build resilience**.
- The potential for **more sustainable outcomes** for young people.

Risks of young people's participation

- Perception that LAs prioritise young person's views over parents as a way to reduce costs
- Potential conflict between parents and young person leading to damage to relationship and trust
- Concern that a young person who is able to participate has less need of support
- Silence taken as consent
- Sense of 'failure' if no agreement

Mental capacity issues

- A presumption of capacity under the Mental Capacity Act
- In SEND, a tendency to leapfrog straight to 'best interests' and/or to use 'capacity' loosely
- Approach reflects welfare approach of mediation
- Parents' concern that young person's voice is separated from theirs
- Deemed to lack capacity because of not having decision-making experience
- Assessment can cause delays that threaten the statutory timeframe.

Information and advice issues

- Are local authorities complying with their duty to provide advice and information?
- Under-resourced providers of information and advice, advocacy and independent support
- Limited provision of information for young people on mediation and tribunal
- Evidence of impact of reduced access to legal aid and face-to-face advice
- Some work on producing accessible information and developing legal capability

Further work

- More data should be collected and published on YP involvement
- Guidance for mediators and tribunal should be co-produced by YP
- Awareness raising and culture change – how?

Also:

- Complaints about schools and colleges about SEN Support (and informal exclusions) are a major gap in terms of independent oversight and resolution and an area where mediation could be hugely helpful.

More information

- Report, roundtable report, blog posts, and other resources on the A Place at the Table project website:

<https://aplaceatthetablesend.wordpress.com>

- UKAJI website: www.ukaji.org

- Contact: mdoyle@essex.ac.uk

margtdoyle@gmail.com

www.domarmediation.co.uk