

Institution: The University of Manchester
Unit of Assessment: 20 (Law)
Title of case study: Increasing Mediation in Special Education Dispute Resolution
<p>1. Summary of the impact</p> <p>Research undertaken at the University of Manchester (UoM) considers the use of mediation for citizen versus state disputes outside the context of the courts, and efforts to render an appeals system less adversarial. It focuses specifically upon dispute resolution concerning Special Educational Needs (SEN). SEN is an area of education decision making relevant to one in five children, in which there is an established right of appeal to a tribunal.</p> <p>The research has impacted on both policy development and practice, in terms of both the guidance given to parents by the tribunal and proposed legislation providing for would-be appellants' compulsory engagement with the choice of mediation as an alternative to appealing.</p>
<p>2. Underpinning research</p> <p>The impact that emerges from this case study is based on research which took place at the Universities of Manchester and Edinburgh between January 2008 and August 2009. The researchers were: Professor Neville Harris (2000-date), Emily Smith (Research Assistant, 2008-2009) and Professor Sheila Riddell (The University of Edinburgh). This research was conducted for an ESRC-funded project 'Dispute Resolution and Avoidance in Education: A Study of SEN and ASN in England and Scotland' (RES-062-23-0803, £313,942). The funding split between the two institutions was 50:50.</p> <p>Professors Harris and Riddell both contributed to the wider consideration, analysis and presentation of the research findings. The fieldwork in England, where one in five children have SEN, included surveys of 150 local authorities and parent support services, and in-depth interviews (some grouped into case studies) with key professionals, judges, local authorities, parents and others.</p> <p>The researchers found that despite being available for a number of years and although actively advocated by ministers and others, mediation was not being widely used for resolving disputes. The key reasons found by the research included:</p> <ul style="list-style-type: none"> • A failure by local authorities to promote its use despite a legal obligation to make it known to parents. The reasons for this varied from cynicism about its value, for example because there was perceived to be little scope for compromise, to a concern at the cost of mediations which must be borne by the authority. [A][B][C][D] • A low take-up due to a lack of knowledge or trust in the process among parents. The researchers found this was borne not just out of ignorance, but also a preference among advisers and representatives for the appeal process, which leads to a binding decision. [A][B][D][E] • A wide-scale but largely unrecognised degree of successful dispute resolution through informal negotiation between parents and local authorities, often facilitated in England by parent partnership services. This removes the need for formal mediation. [A][E] <p>The research identified circumstances where mediation would or would not be appropriate and the wide-ranging pros and cons regarding its use as compared with the First-tier Tribunal (Health, Education and Social Care Chamber) in England and ASN Tribunal in Scotland. It examined the conduciveness of mediation to just outcomes to disputes. It also explored the socio-economic context to dispute resolution, children's rights perspectives and how mediation fits into theories of administrative justice.</p> <p>The two most important recommendations to ensure that mediation could have a</p>

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meaningful role in the future were: firstly, that it should be better promoted, to ensure greater awareness and understanding of it and increased take-up; secondly, that it should be available as a stage in the appeal process itself, provided it does not unduly lengthen the process as a whole. [A][D][E]

3. References to the research (all references available upon request - AUR)

Reference [A] is a book emerging from the research, with 5 of 7 chapters based on the ESRC project; an independent ESRC evaluation in 2011 rated the project 'Outstanding' (the highest of the six available categories). Reference [D] was included in a publication distributed to around 4,000 judges and others, and also posted on the judiciary's public access web pages.

- [A] (2011) Harris, N. & Riddell, S. *Resolving Disputes about Educational Provision: A Comparative Perspective on Special Educational Needs* (Ashgate: Farnham) (REF 2014) (AUR)
- [B] (2011) Harris, N. "You're only going to get it if you really shout for it": Education Dispute Resolution in the 21st Century in England', in Holden, C., Kilkey, M. & Ramia, G. (eds.) *Social Policy Review 23: Analysis and Debate in Social Policy* (Policy Press: Bristol) 233-255 (AUR)
- [C] (2010) Riddell, S., Harris, N., Smith, E. & Weedon, E. "Dispute Resolution in Additional and Special Educational Needs: Local Authority Perspectives" *Journal of Education Policy* 25(1) 55-71 doi:10.1080/02680930903349497
- [D] (2010) Harris, N. & Riddell, S. "Is Mediation in Need of Promotion?" *Tribunals* (Spring)13-16 (AUR – including circulation figures)
- [E] (2009) Harris, N. & Smith, E. "Resolving Disputes about Special Educational Needs and Provision in England" *Education Law Journal* 10(2) 113-132 (AUR)

4. Details of the impact

Context: Government policy for the past decade has promoted the use of alternative dispute resolution methods, especially mediation. In the areas of SEN and ASN there is a statutory right of appeal to a tribunal against local authority decisions. There is also a parallel mediation route. This research confirmed the disputatious nature of SEN/ASN decision making and its underlying reasons.

Pathways to Impact and Dissemination: The findings were disseminated as the research progressed, including through the posting of working papers at regular intervals on the project's website and also via the ESRC website. In October 2009 Professor Harris organised the dissemination of results conference at UoM. All delegates and speakers received a copy of the briefing paper [1] which was subsequently cited in the Government's Green Paper on SEN (March 2011) in its discussion of policy on mediation [2]. Attendees at the conference included local authorities, government officials, mediation organisations, academics, a senior tribunal judge and members of the Administrative Justice and Tribunals Council (AJTC).

Impact on advice to parents: In 2009 Professor Harris was invited to a meeting with senior members of the tribunal judiciary, including Judge Phillip Sycamore – the President of the Tribunal, and the Deputy President with responsibility for SEN cases (the SEND jurisdiction), to discuss the research findings. The Deputy President later noted that:

"The research did indeed have an impact. It not only raised awareness of mediation but prompted further contact between the Tribunal and mediators who have forms of block contracts with Local Authorities. Initially we designed a letter which now accompanies each registration of an appeal with an exhortation to reconsider mediation. This raised mediation from around 2 or 3% to something around 5%." [3]

Around 3,000 appeals are registered each year and there is now a standard letter by the Deputy President sent to all appellants advising them of the availability of mediation arranged by the local authority, and recommending its take-up. The research has therefore prompted this policy so that cases with a potential for settlement can be resolved more quickly. The Deputy President also

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confirms that in pilot areas a direction to receive information on mediation has been issued to parties to an appeal, which has been “*very successful and around 18% of cases given this mediation direction then enter mediation*”, and also confirms the influence of [A]: “*I have found the book you have written very interesting and with real value for SEND in formulating our approach on a strategic basis*” [3].

Impact on justice system: Professor Harris was also invited to meet with the AJTC in August 2010. The Council’s previous interest in the research was evidenced by its contribution of two speakers at the results dissemination conference. Its 2009-2010 Annual Report to the Lord Chancellor and others referred to the research, describing the (October 2009) dissemination event as having been “*of particular interest to us both in respect of our oversight of the First-tier Tribunal... and our wider interest in the promotion of ADR as an alternative to tribunal hearings*” [4]. Harris’ contribution to the AJTC’s thinking is also acknowledged in the Council’s 2012 report ‘Putting it Right – A Strategic Approach’ [5]. The research itself – particularly the book and the briefing paper [A][1] – is discussed at length, prior to the Council’s conclusions and recommendations concerning mediation; a juxtaposition indicative of its growing impact.

Influencing Government policy: In its March 2011 SEN Green Paper (Cm 8027) the Government consulted on making entry into mediation a pre-condition to appealing. A senior Department for Education (DfE) policy official wrote:

“I am happy to confirm that two of your articles - Is Mediation in Need of Promotion? with Sheila Riddell and Resolving Disputes about Special Educational Needs and Provision in England with Emily Smith (Education Law Journal 2009) [D][E] – were, and continue to be, important in helping us to develop our thinking on our proposal for compulsory mediation before parents can register appeals at the Tribunal.” [6]

He also asked if Professor Harris would agree to be a ‘sounding board’ for further ideas as they develop.

Further influence on policy thinking around the research has arisen from Harris’ invited keynote speech in London (26th January 2012), at a Westminster Education Forum (WEF) focusing on the Green Paper proposals, chaired by the Shadow Minister for Children and Families and a Member of the All-Party Parliamentary Group on Learning Disability. WEF seminar attendees typically include members of both Houses of Parliament, senior government officials and representatives of Ofsted and Ofqual, together with other stakeholders. Professor Harris’ speech related the research to the Government’s policy intention of making the system less adversarial.

Initially, in September 2012 the Government published draft legislation on SEN (Cm 8438) which would, *inter alia*, have made entry into mediation a compulsory pre-requisite to an appeal. Subsequently, the policy was modified and the draft Children and Families Bill (1st Reading, 5th February 2013) replaced this requirement with one stating that the parent or young person be provided with information or advice about pursuing mediation (and if they opt for mediation, to have taken part in it) before an appeal may be brought. Professor Harris, at the express invitation of the DfE, made in the light of his research and expertise [7], attended a meeting with the Department and regional mediation providers in June 2013 to discuss the arrangements for mediation under this new framework. He subsequently made recommendations to the DfE which were taken on board in July 2013 in the framing of the draft new Code of Practice of SEN to which all local authorities and schools will be required to have regard. A senior DfE policy official notes that these recommendations, communicated on 16th July 2013, were: “*considered...within the next couple of days and the majority of them were taken on board at that time and reflected in the revised text of the Code which came round for further comment*” [8].

In the light of all these developments the research can be seen to have had a significant impact in influencing thinking on policy and practice in an important field of dispute resolution.

Impact case study (REF3b)**5. Sources to corroborate the impact** (all claims referenced in the text)

- [1] (2009) Harris, N. et al 'Dispute resolution and avoidance in education: a study of special and additional support needs in England and Scotland. Briefing Paper', Centre for Research in Education Inclusion and Diversity, University of Edinburgh
- [2] (2011) Department for Education 'Green Paper: Support and Aspiration: A New Approach to Special Educational Needs and Disability', Cm 8027 (*para.2.61*, citing [1])
- [3] Testimonial from Deputy President, First-tier Tribunal, Health, Education and Social Care Chamber (3rd January 2013)
- [4] (2010) AJTC 'Annual Report 2009-10' (p.27, *paras. 17-20*)
- [5] (2012) AJTC 'Putting it Right – A Strategic Approach to Resolving Administrative Disputes' (June) *paras. 89-94 & paras. 103-105*.
- [6] Testimonial from Team Leader, SEN and Disability Division, Department for Education (9th December 2011)
- [7] Email from Department for Education, SEN and Disability Division – incorporating forwarded email from Mediation Works (30th April 2013)
- [8] Follow-up email from Department for Education, SEN and Disability Division (20th August 2013)