

SEN Mediation- Why not give it a go?

Both local education authorities (LEAs) and the Special Educational Needs and Disability Tribunal (SEND), which is part of the Health, Education and Social Care Chamber (HESC), are required to inform parents about the availability of independent mediation as part of the SEN dispute resolution process.

The evidence available suggests that independent SEN mediation is woefully under-used, that many LEAs do not actively encourage parents to consider referring a disagreement to mediation, and that while SEND/HESC may pay lip service to the use of mediation, its own statistics suggest that independent mediation could be more constructively and beneficially incorporated into the SEN dispute resolution process.

Mediation has the potential to resolve disagreements in a way that enables the relationships between the parents, the school staff, the governing body, and the LEA to progress in a constructive and positive way. Mediation can be used at any stage, for example at School Action or School Action Plus, as well as when there is a disagreement as to whether a statutory assessment is required or in respect of the contents of a statement. Mediation can also take place after an appeal to the SEND tribunal has been lodged and before the hearing date.

The aim of mediation is for the parties to try and reach an agreement that is satisfactory to them all and which they will want to implement. Mediation is voluntary and confidential and will only take place where all the parties agree that the disagreement should be referred to mediation.

Local education authorities

In 2001 the Special Educational Needs and Disability Act required each local education authority in England and Wales to arrange for independent mediation to be available to

parents of children with SEN with a view to avoiding or resolving any disagreement between the LEA and such parents about the SEN provision.¹

The legislation also requires each LEA to provide independent mediation for avoiding or resolving disagreements between such parents and the governing body or proprietor of the school about the special educational provision made for that child.

The arrangements made by an LEA must provide for the appointment of independent persons with the function of facilitating the avoidance of such disagreements.² The LEA is required to publicise these arrangements and in particular to make sure that they are known to parents, head teachers, governing bodies, and other proprietors.³

Such arrangements are applicable to all pupils with special educational needs not just those with statements of SEN and mediation may be used at any time during the SEN process and about any aspect of a child's SEN provision.⁴ Disagreements might arise, for example, over whether the pupil has SEN, should be on School Action Plus rather than School Action, should have additional support, or whether the pupil should be referred to a specialist unit for a short period.

Schools which come within this provision include maintained schools, pupil support units, city technology colleges, Academies, independent schools named in a statement of special educational needs and approved non-maintained special schools.⁵

Independent Mediation Services

There are a number of independent SEN mediation providers. These tend to be regionally based. For example in London, the main provider is KIDS London SEN Mediation Service. KIDS provide an independent mediation service for 27 local authorities, which

KIDS London SEN Mediation Service: Mediations 2006-2009					
27 LEAs	Requests for mediation	Party declined mediation	Informal Mediations	Formal Mediation	
				Number	Agreement reached
2008/2009	91	20	54	17	15 (88%)
2007/2008	84	17	53	14	12 (86%)
2006/2007	82	15	52	15	11 (73%)

includes 25 out of a possible 34 London authorities and 2 local authorities outside London. The KIDS Mediation Service also in effect provides informal mediation by providing conflict management advice and by discussing the issues with each party as part of the process of setting up a formal mediation. Some Parent Partnership Services are also able to help resolve disagreements informally at a local level.

Where formal mediation does take place the figures indicate that in the majority of formal mediations the parties were able to resolve some or all of their disagreement. See *table above*.

SEND/HESC

What is perhaps surprising is how few requests for independent mediation are received, bearing in mind the number of appeals registered. For example in respect of the thirty-four LEAs in the London area, including the City of London, 698 appeals were registered in 2008/2009. The number of appeals registered varies considerably according to the London LEA concerned, as the table on *page 26* illustrates for 2007/08. Equivalent figures are not available for 2008/09.

HESC is required by its rules of procedure to seek, where appropriate -

(a) to bring to the attention of the parties the

availability of any appropriate alternative procedure for the resolution of the dispute; and

(b) if the parties wish and provided that it is compatible with the overriding objective, to facilitate the use of the procedure.⁶

The overriding objective requires that the Tribunal deals with cases fairly and justly and should, for example, avoid unnecessary formality and seek flexibility in the proceedings⁷.

In the HESC Practice Direction for special educational needs or disability discrimination in schools cases, it is noted at section 13 that the education authority must notify the parent of;

- a. the parent's right of appeal to the Tribunal;
- b. the time limit within which the appeal must be made;
- c. the availability of dispute resolution arrangements;
- d. the fact that use of such arrangements does not prejudice the right to appeal.

The letters sent by SEND to parents, who have registered an appeal, and to the local authority concerned do not refer to the possibility of dispute resolution, such as independent mediation, as a means of resolving the dispute with the LEA. This approach appears to barely comply with the letter of its own Rules, let alone the spirit.

Number of London LEAs	01/09/08 – 31/08/09 Appeals registered	01/09/07 – 31/08/08 Appeals registered	01/09/06 – 31/08/07 Appeals registered
34	692	771	731

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	Appeals registered 2007/08 per 10,000 of school population
Bromley	40
Southwark	27
Bexley	34
Harrow	20
Westminster	12
Tower Hamlets	7

Yet parents, LEAs and SEND itself could benefit in a variety of ways from an increase in the use of independent mediation. In particular, statistics indicate that approximately two thirds of appeals lodged with SEND are conceded or withdrawn before a hearing takes place.

Disposal of SEN Appeals⁸

Deputy President of HESC, John Aitken, has indicated that approximately one third of appeals are conceded or withdrawn shortly after an appeal is lodged, and another third are conceded or withdrawn within a week or so of the date of the appeal hearing. See *table below*. Conceding or withdrawing appeals at such a late stage would appear to lead to a considerable amount of unnecessary stress, work and expense for all concerned.

The time between registering an appeal and a decision being issued is normally more than 5 months.⁹ This gives more than enough time for independent mediation to take place. A mediation service provider can normally arrange

mediation in a matter of weeks rather than months so long as the parent and the LEA are available.

It would be in the interests of all concerned for mediation to take place so that some or all of the areas of disagreement are resolved at an earlier stage in the process, or at least the issues clarified by the parties prior to the tribunal hearing.

So what should happen?

- Where a disagreement arises the LEA should always inform the parent of a pupil with SEN that independent mediation is available; explain clearly and fully what independent mediation involves; and provide the name and contact details of the organisation which provides independent SEN mediation in their area.
- Parents and their advisers and LEAs should always consider whether a particular disagreement is suitable to be referred to independent mediation.
- HESC should inform every parent both in the SEN information booklet and in the letter sent to each parent who registers an appeal, that the LEA is required to offer independent mediation, that the parent may wish to consider taking advantage of this service, and that whether or not the parent does so will not affect their appeal.
- Parents should be asked to inform HESC when they register their appeal whether or not independent mediation has taken place.
- HESC should remind parents, after they have registered their appeal, that independent mediation can still be arranged quickly using their local independent mediation service.

Disposal of Appeals	2008 – 2009	%	2007 – 2008	%
Conceded	905	30	1090	34
Decided	739	25	811	25
Struck Out	55	2	61	2
Withdrawn	1317	44	1227	38
Total	3016		3189	

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- HESC should ask parents/LEAS when an appeal is conceded/withdrawn whether the disagreement was referred to independent mediation and whether that led to the disagreement being resolved.

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References

- 1 EA 1996 s 332B (1).
- 2 EA 1996 s 332B (3).
- 3 EA 1996 s 332B (5).
- 4 DfES/581/2001, *The Special Educational Needs Code of Practice para 2:23.*
- 5 EA 1996 s 332B (8) as amended.
- 6 Rule 3 *Alternative dispute resolution and arbitration, The Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008.*
- 7 Rule 2, *The Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008.*
- 8 Tribunals Service Special Educational Needs and Disability Tribunal Annual Report 2008-2009
- 9 Tribunals Service Special Educational Needs and Disability Tribunal Annual Report 2008-2009 para 1.1 Speed of Disposal.

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