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SEN mediation, appeals and the transfer of rights to children with SEN

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This Research Paper considers appeals and mediation in relation to special educational needs (SEN), and explores the transfer of rights from parents to children, including issues around mental capacity.

Key Points

- The Dispute Avoidance and Resolution Service (DARS) aims to provide an informal forum for resolving disputes between Boards of Governors or the Education Authority (EA) and parents in relation to SEN across the EA regions;
- It dealt with 914 cases between 2006 and 2015, with a quarter of these relating to issues around statutory assessment;
- Mediation is generally well-regarded by users, although concerns include the time taken, perceptions of a lack of independence, a lack of enforcement and that it is more difficult to reach a resolution where parents are forced into participation;
- The Special Educational Needs and Disability Tribunal (SENDIST) considers appeals where parents cannot reach agreement informally;
- There has been a general increase in demand for both DARS and SENDIST over the past nine years;
- Over half (55%) of SENDIST appeals were against a refusal to initiate an assessment; no appeals over this period related to disability discrimination;
- There are issues around the ability of parents and guardians to appeal to SENDIST, with limitations in the availability of free representation and many users having little awareness of their rights and the legislation;
- There are perceptions of inequality between the EA and parents at SENDIST hearings, with the Authority having access to legal expertise, professional witnesses and being experienced in SENDIST cases;
- Involving young people with SEN in decisions that affect them can provide valuable insights and promote ownership of decisions; however, such participation is often limited, symbolic or tokenistic;
- No single organisation in NI is responsible for coordinating advocacy services, and the availability of such services for children with SEN varies;
- Mental capacity - the capacity to make decisions - can vary according to the complexity of the decision and may be temporary or permanent;
- Mental capacity is a complex concept in relation to children as they develop capacity at different stages; evidence suggests that people with learning disabilities are often assumed to lack capacity;
- The Mental Capacity Bill applies to decisions involving the care, treatment or personal welfare of those aged 16 and over; and
- There are mixed views in relation to whether children under 16 should be included, with some suggesting that older children should have a presumption of capacity.

Executive Summary

The Special Educational Needs and Disability (SEND) Bill makes a number of changes in relation to special educational needs (SEN) appeals, and transfers some rights from parents to children over compulsory school age. This paper considers appeals and mediation in relation to SEN, and explores the transfer of rights from parents to children, including issues around mental capacity.

The Dispute Avoidance and Resolution Service (DARS)

DARS aims to provide an informal forum for resolving disputes between Boards of Governors and parents in relation to SEN, and operates across the Education Authority (EA) regions (formerly the Education and Library Boards - ELBs). It dealt with 914 cases between 2006 and 2015, with a quarter of these relating to issues around statutory assessment.

An evaluation of DARS in 2008 found it to be a credible service, although it highlighted concerns around a perceived lack of independence from the ELBs. Indeed, four of the five DARS services are situated at EA regional headquarters. Between 2008 and 2013 57% of cases were resolved, although in almost a quarter of cases contact with DARS ceased without resolution.

Mediation

While mediation is generally well-regarded by users, there are concerns about its use in education including protecting the child's interests, the time taken, perceptions around a lack of independence and a perceived reluctance among authorities to act on findings. A key factor in the success of mediation is a willingness among parties to engage. Indeed, where parents are forced into mediation it is more difficult to reach a resolution.

Special Educational Needs and Disability Tribunal (SENDIST)

The independent SENDIST considers appeals where parents have not been able to reach agreement informally. Since 2006 there has been a general upward trend in the number of cases dealt with by both DARS and SENDIST, with the Tribunal hearing 121 cases in 2014/15 (DARS dealt with 136).

Over the past ten years over half of all SENDIST appeals (55% or 385 cases) were against an ELB refusal to initiate a statutory assessment, with a further 30% (210 cases) against the contents of a statement. Over this period SENDIST did not hear any appeals in relation to disability discrimination.

Capacity of SENDIST users, support and representation

Research suggests that some users of SENDIST have limited awareness of their legal rights or of the relevant legislation, and that those who receive advice are more likely to

understand the relevant issues. Many SENDIST appellants were unaware that advice existed, did not know where to go for it or felt that it was too expensive.

There is often a sense of inequality between parents appealing to SENDIST and the Authority, with many users perceiving the Authority to be a “*well-oiled machine*”: versed in the Tribunal’s procedures and with access to legal expertise and professional witnesses.

While limited legal aid is available to those appealing SEN decisions, this does not cover representation. Where those under 16 request legal aid their parent or guardian must consult a solicitor on their behalf, and their parents’ income is taken into account.

Stakeholders have called for tribunal users to have access to independent advice and representation, suggesting that those with little confidence in their literacy and oral skills would not be able to pursue an appeal without it. Indeed, the literature suggests that SENDIST users tend to be articulate and from more advantaged backgrounds.

Transfer of rights to children and young people

The SEND Bill gives children with SEN who are over compulsory school age rights previously held by parents, including the right to request an assessment and to appeal to the Tribunal.

The evidence suggests that involving young people can promote ownership of decisions and provide valuable insights. This right could be particularly important for children whose parents do not wish to pursue an appeal, or for looked after children who have to rely on foster carers or key workers to do so.

Supporting participation

There can be challenges relating to a child’s capacity to engage in decision-making, and the evidence suggests that involving children with SEN in decisions is often limited, symbolic or tokenistic. The Department’s Code of Practice states that schools should consider how best to involve pupils with SEN in decision-making.

Advocacy broadly describes making arrangements to support people to express their views. In Northern Ireland no single organisation has a duty to coordinate and provide advocacy services regionally, and there is variation in the availability of such services for children with complex needs and disabilities.

Mental capacity

Mental capacity relates to a person’s capacity to make decisions. Such capacity can be affected on a temporary or permanent basis, and can change according to the complexity of the decision to be made. This concept is very complex in relation to children as they develop capacity at different stages.

Evidence indicates that there are people with a range of disabilities who may be assessed as incapable of making certain decisions if the appropriate support is not

provided. It suggests people with learning disabilities are frequently assumed to lack capacity, and that professionals can lack confidence in making such assessments.

The Mental Capacity Bill

The DHSSPS and the DoJ published the civil provisions of the draft Mental Capacity Bill in May 2014. The Bill applies to decisions involving the care, treatment or personal welfare of those aged 16 and over who do not have the capacity to make decisions. It presumes that a person has capacity, emphasising the importance of providing support and help before deciding that this is not the case.

In the consultation there were mixed views in regard to whether the Bill should apply to children under 16. Some believed that older children should have a presumption of capacity and that the Bill could afford greater protections to them, while others thought that the provisions within the Bill were not appropriate for children.

Conclusion

This research paper has highlighted a number of issues around the accessibility of SENDIST and in terms of the complexity surrounding issues of mental capacity in relation to children with SEN. It has highlighted a range of areas that could be given further consideration, including:

- The proportion of DARS cases where contact ceased and the reasons for this;
- Whether the mediation service proposed by the Bill will include enforcement;
- The volume of appeals at both DARS and SENDIST relating to statutory assessment and how, if at all, the new SEN proposals will impact on this;
- The proposed duty for parents to speak to a mediation adviser, particularly whether the element of compulsion is likely to influence mediation outcomes;
- The perceived inequality between parents and the EA in SENDIST appeals, and how, if at all, the new proposals will mitigate against this;
- The perception that users of SENDIST tend to be more advantaged;
- The limited availability of legal support and representation for SENDIST, including the implications for children in exercising their new rights;
- The adequacy of advocacy provision, particularly in light of the rise in appeals;
- The key importance of the support provided to enable children to exercise their new rights and when the regulations regarding this will be available for scrutiny;
- Whether the SEND Bill regulations will include a presumption of capacity; and
- Whether the proposed DHSSPS code of practice for assessing whether a person aged 16 and over has capacity will link to the SEND Bill regulations.

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1 Introduction

The Special Educational Needs and Disability Bill aims to give effect to legislative changes for the revised special educational needs (SEN) and inclusion framework: further information can be found in [Paper 38/15: Special Educational Needs and Disability \(SEND\) Bill](#). This research paper considers appeals and mediation in relation to SEN, and explores the transfer of rights from parents to children, including issues around mental capacity.

2 Appeals and mediation in the SEND Bill

The Special Educational Needs and Disability (SEND) Bill makes a number of changes in relation to SEN appeals. The Bill:

- Introduces a new right of appeal to the Tribunal where the Authority decides not to make any changes to a statement following annual review;
- Provides a new right of appeal to the Tribunal for parents of children with SEN under the age of two in relation to a) a decision not to make a statement or b) the assessment or provision detailed in the statement;
- Requires the Authority to make arrangements for an independent mediation service for those appealing to the Tribunal;
- Places a new duty on those seeking an appeal to first seek and obtain independent advice and information about pursuing mediation;
- Provides the Department with powers to make subordinate legislation on a range of matters relating to the mediation service;
- Gives children with SEN who are over compulsory school age rights previously exercisable by parents, including the right to appeal and to request a statutory assessment; and
- Allows the Department to make regulations for a pilot scheme to enable children within the compulsory school age to appeal to the Tribunal.

3 The Dispute Avoidance and Resolution Service (DARS)

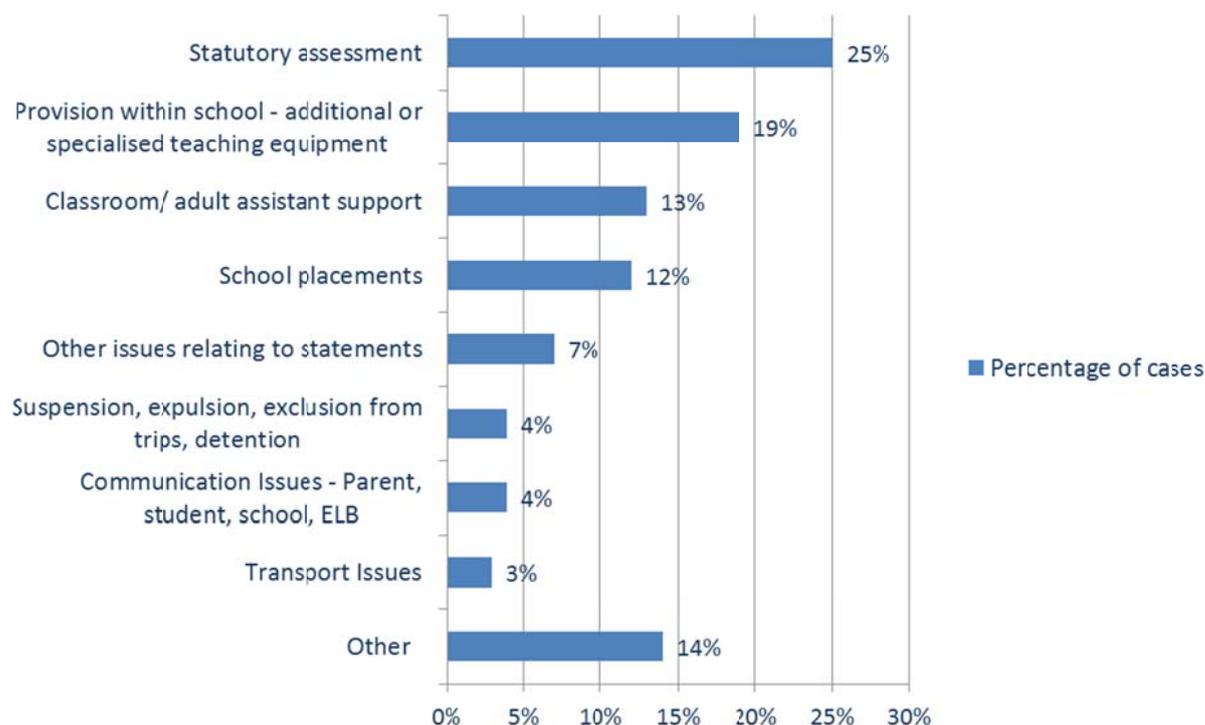
Existing legislation¹ provides for the appointment of “independent persons” by the Education Authority (EA) to facilitate the avoidance or resolution of disagreements. The DARS is an independent and confidential service operating across the EA regions (formerly the Education and Library Boards – ELBs) aiming to provide an informal

¹ Article 21B of the Education (Northern Ireland) Order 1996, as amended by the Special Educational Needs and Disability (Northern Ireland) Order 2005

forum for resolving disputes between Boards of Governors or the EA and parents in relation to SEN.²

In the period between September 2006 and February 2015 the DARS dealt with 914 cases. Figure 1 illustrates the types of cases dealt with over this nine year period, showing that cases relating to statutory assessment were the most common.³

Figure 1: DARS cases by type between September 2006 and February 2015



Other cases heard by the DARS include those relating to educational psychology issues, the management of challenging behaviour, bullying issues and adaptations to the physical environment.⁴

Departmental guidance notes that there may be instances where recourse to the DARS would not be appropriate, for example where:⁵

- Either side does not wish to engage;
- Matters of policy are at stake;
- The key issue is one that would set a precedent on which the Authority is not willing to concede without direction from the Special Educational Needs and Disability Tribunal (SENDIST); and

² Lundy, L., McKeever, G., Treacy, V. (2015) "Education Rights" *Human Rights in Northern Ireland: The CAJ Handbook* pp. 483-516 Oxford: Hart Publishing

³ Information provided by the Department of Education, May 2015

⁴ Information provided by the Department of Education, May 2015

⁵ Department of Education (2005) *Supplement to the Code of Practice on the Identification and Assessment of Special Educational Needs* Bangor: DE

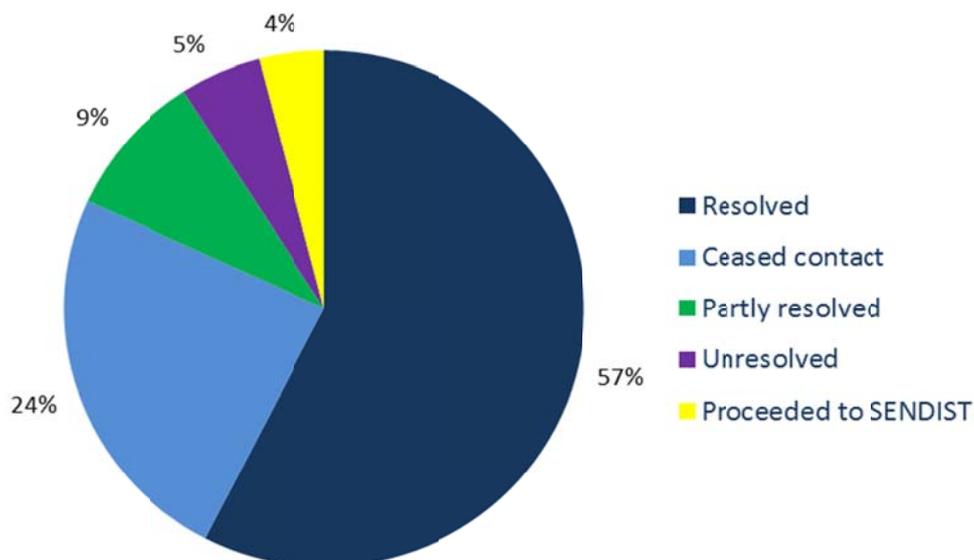
- There is a substantial change in the relationship between parents and the Authority or school.

Outcomes

An evaluation of the DARS in 2008 found that it provided a functional and credible resolution service, resolving the majority of cases. It noted that a minority of cases are unresolved, often due to an inability or lack of willingness to compromise.⁶

An analysis conducted for this paper of the available data (from 2008 to 2013) shows that 57% of cases at the DARS over this period were resolved. However, in almost a quarter of cases (24%), contact with the DARS ceased without resolution. Only a small proportion of cases (4%) proceeded to the SENDIST, as outlined in Figure 2.⁷

Figure 2: Outcome of DARS cases between September 2008 and August 2013



Concerns

The ETI report recommended that the DARS needed to further develop its sense of independence and objectivity, highlighting a perception that it is an ELB service.⁸

Indeed, of the five DARS services, four are located at the respective EA regional headquarters, while the Western Region's service is operated at the North West Teachers' Centre (a Curriculum Advisory Support Services – CASS centre). The Department advises that the new mediation service proposed by the SEND Bill should not be hosted on EA premises.⁹

⁶ Education and Training Inspectorate (2008) *Report of a survey on the Dispute and Resolution Service (DARS)* Bangor: ETI

⁷ Information provided by the Department of Education, May 2015

⁸ Education and Training Inspectorate (2008) *Report of a survey on the Dispute and Resolution Service (DARS)* Bangor: ETI

⁹ Information provided by the Department of Education 2015

Research suggests that those appealing to the SENDIST frequently did not use the DARS, even though they “*would have done anything*” to avoid a tribunal hearing. The reasons identified for this include:¹⁰

- A perceived lack of independence from the ELBs;
- A perception that DARS would not be able to obtain rights or provision;
- ELBs were viewed as inflexible; and
- A perception that ELBs may compel parents to SENDIST in the hope the case is dropped.

4 Mediation

Wider research suggests that mediation tends to be well regarded by users, although there is limited evidence about its use in the public law sphere. Concerns about its use in education include adequately protecting the child’s interests and whether it is likely to increase or decrease the inequalities between those involved in disputes.¹¹

Research in England and Scotland in 2009 found that mediation was being used less than had been expected in relation to SEN, and that it had lower levels of satisfaction in comparison to tribunals. Indeed, parents were more likely to appeal to a tribunal than to use mediation, believing that it offered a better chance of achieving their desired outcome.¹² Issues identified included reluctance on the part of local authorities to act on findings.¹³

Perceptions

Respondents to the Department of Justice’s 2013 consultation on the future administration and structure of tribunals in Northern Ireland supported the use of alternative dispute resolution procedures in relation to tribunals, suggesting that:¹⁴

- Such procedures could reduce the number of tribunal appeals;
- A less formal arena is best for users; and
- Alternative procedures could reduce processing time and costs.

¹⁰ McKeever, G. (2011) *Supporting Tribunal Users: Access to pre-hearing information, advice and support in Northern Ireland* Belfast: Law Centre (NI)

¹¹ Harris, N., Smith, E. (2009) “Resolving disputes about special educational needs and provision in England” *Education Law Journal* Vol. 10 No. 2 pp. 113-132

¹² Riddell, R., Stead, J., Weedon, E., Wright, K. (2010) *Dispute Resolution and Avoidance in Special and Additional Support Needs in England and Scotland* Edinburgh: Centre for Research in Education Inclusion and Diversity

¹³ Weedon, E., Riddell, S. (2009) “Additional support needs and approaches to dispute resolution: the perspectives of Scottish parents” *Scottish Educational Review* Vol. 41, No. 2 pp. 62-80

¹⁴ Department of Justice (2013) *Future Administration and Structure of Tribunals in Northern Ireland – Consultative Document: Summary of Responses* Belfast: Department of Justice

However, some respondents highlighted potential challenges, particularly that alternative dispute resolution could be time-consuming and costly and that it may not be suitable for all cases. This is likely to be particularly pertinent in children's cases, due to the potential consequences where timely intervention is not provided.¹⁵

The literature also indicates that mediation can be daunting for parents who may perceive that the service is not wholly independent. Other potential issues include a perceived lack of expertise and legal knowledge among mediators.¹⁶

Influence on outcomes

Many agree that a key factor in successful mediation relates to the willingness of parties to engage, and the evidence suggests that it is more difficult to reach a resolution where parents are forced into mediation.¹⁷¹⁸ This was found to be the case with the DARS where a key factor in the resolution of cases was the willingness of all parties to engage.¹⁹

The literature indicates that it is difficult to predict the other factors that influence settlement in mediation, although they may include personalities, depth of grievance, degree of conflict and willingness to compromise or negotiate.²⁰

5 Special Educational Needs and Disability Tribunal (SENDIST)

Where parents cannot reach agreement informally the independent SENDIST considers parents' appeals against decisions. It also deals with claims of disability discrimination in relation to children at school.²¹ It has dealt with 695 cases over the past ten years.²²

Figure 3 provides an overview of the number of cases heard by the DARS and the SENDIST since 2006. It shows that there has been a general upward trend (with some troughs) in the number of cases dealt with by each body.²³

¹⁵ Department of Justice (2013) *Future Administration and Structure of Tribunals in Northern Ireland – Consultative Document: Summary of Responses* Belfast: Department of Justice

¹⁶ Harris, N., Smith, E. (2009) "Resolving disputes about special educational needs and provision in England" *Education Law Journal* Vol. 10 No. 2 pp. 113-132

¹⁷ Harris, N. (2007) *Education, Law and Diversity* Portland: Hart Publishing

¹⁸ Genn, H. (2012) "What is Civil Justice For? Reform, ADR, and Access to Justice" *Yale Journal of Law and the Humanities* Vol. 24, Iss. 1, Art. 18, pp. 397-417 Yale Law School Legal Scholarship Repository

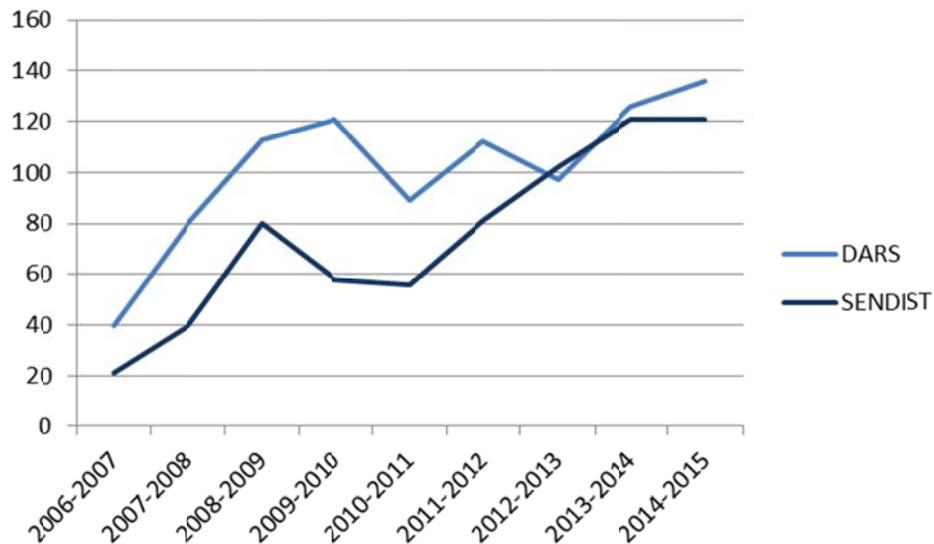
¹⁹ Education and Training Inspectorate (2008) *Report of a survey on the Dispute and Resolution Service (DARS)* Bangor: ETI

²⁰ Genn, H. (2012) "What is Civil Justice For? Reform, ADR, and Access to Justice" *Yale Journal of Law and the Humanities* Vol. 24, Iss. 1, Art. 18, pp. 397-417 Yale Law School Legal Scholarship Repository

²¹ Courts and Tribunal Service (2014) *Special Educational Needs and Disability Tribunal* [online] Available at: <https://www.courtsni.gov.uk/en-GB/Tribunals/SpecialEduNeedsnDisability/Pages/default.aspx>

²² Information provided by the Department of Education, May 2015

²³ Information provided by the Department of Education, May 2015

Figure 3: Number of cases at DARS and SENDIST since 2006

Role of the SENDIST

The SENDIST is an independent tribunal that deals with appeal cases where a parent or guardian disagrees with the EA. Appeals can be made on the following matters:²⁴

- Where the EA has decided not to assess a child's special educational needs;
- Where the EA has carried out an assessment but did not make a statement;
- Where applicants wish to appeal the educational contents of the statement;
- Where an EA repeals a statement or decides not to amend it following reassessment; or
- In certain circumstances where the EA decides not to reassess a child, or turns down a request to have a child placed in a different school.

Appeals cannot be made against the manner in which an assessment is carried out; the length of time taken to complete an assessment; against the way a school or the EA arranges provision; the level of funding provided or against the non-educational aspects of a statement (e.g. transport). An appeal must be made within two months of receiving the decision from the EA.²⁵

²⁴ Northern Ireland Courts and Tribunal Service (2014) *Special Educational Needs and Disability Tribunal* [online] Available at: <https://www.courtsni.gov.uk/en-GB/Tribunals/SpecialEduNeedsnDisability/Pages/default.aspx>

²⁵ Northern Ireland Courts and Tribunal Service (2014) *Special Educational Needs and Disability Tribunal* [online] Available at: <https://www.courtsni.gov.uk/en-GB/Tribunals/SpecialEduNeedsnDisability/Pages/default.aspx>

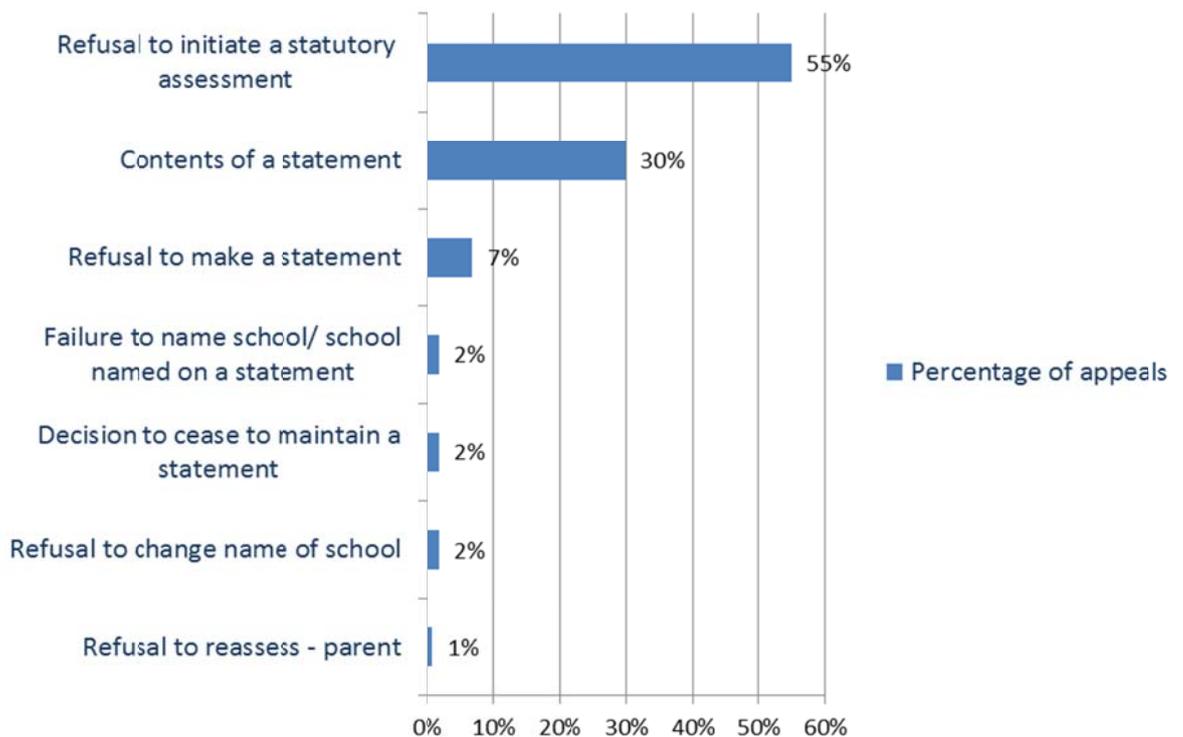
Figure 4: Types of appeals to the SENDIST between 2005/06 and 2014/15²⁶

Figure 4 shows that over the past ten years appeals against the Authority's refusal to initiate a statutory assessment made up over half of all cases (55% or 385 cases). Parents or guardians made 210 appeals (30%) against the contents of a statement.²⁷

Over this period there have been no appeals in relation to disability discrimination. In the past five years a total of six SENDIST appeals proceeded to judicial review at the High Court.²⁸

SENDIST panel

SENDIST panels consist of three members. The chair is a lawyer and the other two members will have experience of special education needs and/ or public administration. All members are required to be impartial and decide the case on the basis of the legislation, the documents before them and any oral evidence given at the hearing.²⁹

²⁶ Information provided by the Department of Education, May 2015

²⁷ Information provided by the Department of Education, May 2015

²⁸ Information provided by the Department of Education, May 2015

²⁹ Northern Ireland Courts and Tribunal Service (2014) *Special Educational Needs and Disability Tribunal* [online] Available at: <https://www.courtsni.gov.uk/en-GB/Tribunals/SpecialEduNeedsnDisability/Pages/default.aspx>

Figure 5: Perceived role of the Chair and panel members at tribunal hearings³⁰**Experiences of the SENDIST**

Research published in 2010 explored the experiences of tribunal users in Belfast, including those appealing to the SENDIST. Figure 6 provides an overview of the findings.³¹

Figure 6: Experiences of SENDIST users

Stage	Experiences
Pre-hearing	<ul style="list-style-type: none"> • Preparing a submission for the tribunal was challenging • Most were anxious and stressed, mainly due to a lack of familiarity with tribunal procedure; • Parties do not typically meet prior to the tribunal hearing (although they have the opportunity to do so) - this may contribute to a perception that the hearing is a “fight” between users and the Authority
Hearing	<ul style="list-style-type: none"> • Mixed views, with many finding it more formal than anticipated • Representatives believed that users were more likely to accept the outcome where they understood and felt part of the process
Delays in obtaining a hearing	<ul style="list-style-type: none"> • Problematic and distressing to families • Can prove costly where users must obtain new reports where evidence gathered prior to the hearing is out of date

³⁰ Adapted from McKeever, G., Thompson, B. (2010) Redressing Users' Disadvantage: Proposals for tribunal reform in Northern Ireland Belfast: Law Centre NI

³¹ McKeever, G., Thompson, B. (2010) Redressing Users' Disadvantage: Proposals for tribunal reform in Northern Ireland Belfast: Law Centre NI

Proposed reforms to the SENDIST

The Department of Justice has proposed a number of changes to the existing tribunal system which it describes as “complex and fragmented.” These include merging more than ten tribunals, including the SENDIST, into a new “Appeal Tribunal” - an integrated structure with common practices and procedures.³²

The proposals include deploying the Tribunal’s legal staff as mediators in order to deliver enhanced earlier dispute resolution.³³ Respondents to the consultation highlighted mixed views on this proposal, with some suggesting that it could have a negative impact on the perceived independence of the tribunal.³⁴

6 Capacity of tribunal users and support

Research has highlighted a lack of awareness among some SENDIST users of their legal rights or of the relevant legislation. Compounding these issues is a perceived lack of communication between schools, the EA and parents, and the provision of inaccurate information to parents in some cases.³⁵

Indeed, tribunal users often do not understand the legal element of the issues they are contesting, which can have implications for their understanding of the evidence they need to present. Users who had access to advice and support were more likely to understand the relevant legal issues.³⁶

Many SENDIST appellants were unaware that advice existed, did not know where to go to receive advice or felt that legal advice was too expensive. Of those that sought advice, the quality was variable, particularly where advisers were inexperienced or unfamiliar with the legal issues or did not understand what had to be established at the tribunal.³⁷

A report published by the Law Centre (NI) in 2010 recommended that tribunal users should have access to “*independent, good quality advice, support and representation.*”³⁸ Respondents to the recent Department of Justice consultation

³² Department of Justice (2013) *Future Administration and Structure of Tribunals in Northern Ireland – Consultative Document* Belfast: Department of Justice

³³ Department of Justice (2013) *Future Administration and Structure of Tribunals in Northern Ireland – Consultative Document* Belfast: Department of Justice

³⁴ Department of Justice (2013) *Future Administration and Structure of Tribunals in Northern Ireland – Consultative Document: Summary of Responses* Belfast: Department of Justice

³⁵ McKeever, G. (2011) *Supporting Tribunal Users: Access to pre-hearing information, advice and support in Northern Ireland* Belfast: Law Centre (NI)

³⁶ McKeever, G. (2011) *Supporting Tribunal Users: Access to pre-hearing information, advice and support in Northern Ireland* Belfast: Law Centre (NI)

³⁷ McKeever, G., Thompson, B. (2010) *Redressing Users’ Disadvantage: Proposals for tribunal reform in Northern Ireland* Belfast: Law Centre NI

³⁸ McKeever, G., Thompson, B. (2010) *Redressing Users’ Disadvantage: Proposals for tribunal reform in Northern Ireland* Belfast: Law Centre NI

supported this view, highlighting the importance of pre-hearing advice and representation for appellants to tribunals in enabling them to access the system.³⁹

Legal advice and assistance

The Green Form legal aid scheme is available to those appealing decisions regarding SEN assessment and provision.⁴⁰ This scheme provides limited legal assistance (typically covering two hours of a solicitor's work) to those on a low income; this is means tested and may be provided for free or for a small contribution.⁴¹

It covers matters such as writing letters, negotiating, information on evidence that might assist the case (such as a medical report) and preparing a written case for a tribunal. It does not include representation at the tribunal. It may cover the costs of mediation.⁴²

Research has considered whether providing advice in advance of tribunal hearings would avoid the need for tribunal representation. In general, the perception was that pre-hearing advice would be "better than nothing," with the main difficulties with relying only on such advice including:⁴³

- Cases may be more complex than anticipated;
- Advice given may not be accepted by tribunal which may proceed with a hearing in cases where a representative would have sought an adjournment; and
- Advice is not a substitute for representation.

Perceptions of inequality

The research identifies a perception among tribunal users that the opposing party tends to be much more knowledgeable of the legislation and experienced in the tribunal processes, perceiving the Authority in SENDIST proceedings as a "*well-oiled machine*." This led to a feeling of inequality between appellants and the Authority.⁴⁴

The Children's Law Centre has suggested that the lack of free legal representation for applicants to the SENDIST is problematic, highlighting the legal expertise and access to senior professional witnesses available to the EA during SENDIST hearings. It refers

³⁹ Department of Justice (2013) *Future Administration and Structure of Tribunals in Northern Ireland – Consultative Document: Summary of Responses* Belfast: Department of Justice

⁴⁰ Department of Justice (2014) *Consultation Document: Scope of Legal Aid* Belfast: DoJ

⁴¹ Citizens Advice *Help with legal costs* [online] Available at:

http://www.adviceguide.org.uk/nireland/law_ni/law_legal_system_ni/law_taking_legal_action_e/help_with_legal_costs_nireland.htm#h_legal_advice_and_assistance_the_green_form_scheme

⁴² Citizens Advice *Help with legal costs* [online] Available at:

http://www.adviceguide.org.uk/nireland/law_ni/law_legal_system_ni/law_taking_legal_action_e/help_with_legal_costs_nireland.htm#h_legal_advice_and_assistance_the_green_form_scheme

⁴³ McKeever, G., Thompson, B. (2010) *Redressing Users' Disadvantage: Proposals for tribunal reform in Northern Ireland* Belfast: Law Centre NI

⁴⁴ McKeever, G. (2011) *Supporting Tribunal Users: Access to pre-hearing information, advice and support in Northern Ireland* Belfast: Law Centre (NI)

to an “inherent” inequality in relation to the Tribunal that it asserts cannot be mitigated by the Chair facilitating appellants in making their case.⁴⁵

The literature highlights a perception that applicants to the SENDIST in Northern Ireland tend to be from more advantaged backgrounds and are often very articulate.⁴⁶ Similarly, there is a view that the corresponding tribunal in England is a “*weapon of the middle classes*.”⁴⁷

Representation to reduce inequality

There was consensus among interviewees in research conducted in 2010 that good representation was beneficial to appellants, particularly in providing equality between parties to the hearing. Participants highlighted a concern that those with little confidence in their literacy and oral skills would be unable to pursue a SENDIST case without advice and representation.⁴⁸

However, tribunal members stated that the quality of representation varied greatly. Members and users of tribunals noted that legal representatives with expertise in the area considered by the tribunal were particularly useful.⁴⁹

7 Transfer of rights to children and young people

Clauses 9 and 10 of the SEND Bill give children with SEN who are over compulsory school age rights within the SEN framework which were previously exercisable by the parent, including the right to request a statutory assessment and to appeal to the Tribunal against certain decisions of the Authority. Clause 11 provides for a pilot scheme to enable children within compulsory school age to appeal to the Tribunal.

Potential benefits

Including the views of young people with SEN in decisions can provide valuable insights on provision and can help to improve quality of life for marginalised students.⁵⁰ The literature suggests that involving children in SEN dispute resolution can also promote ownership of decisions and support outcomes.⁵¹

⁴⁵ Children’s Law Centre (2013) *Response to the Department of Justice Consultation on Future Administration and Structure of Tribunals in Northern Ireland* Belfast: Children’s Law Centre

⁴⁶ McKeever, G. (2011) *Supporting Tribunal Users: Access to pre-hearing information, advice and support in Northern Ireland* Belfast: Law Centre (NI); Children’s Law Centre (2013) *Response to the Department of Justice Consultation on Future Administration and Structure of Tribunals in Northern Ireland* Belfast: Children’s Law Centre

⁴⁷ Riddell, S., Harris, N., Smith, E., Weedon, E. (2010) “Dispute resolution in additional and special educational needs: local authority perspectives” *Journal of Education Policy* Vol. 25, No. 1, pp.55-71

⁴⁸ McKeever, G., Thompson, B. (2010) *Redressing Users’ Disadvantage: Proposals for tribunal reform in Northern Ireland* Belfast: Law Centre NI

⁴⁹ McKeever, G., Thompson, B. (2010) *Redressing Users’ Disadvantage: Proposals for tribunal reform in Northern Ireland* Belfast: Law Centre NI

⁵⁰ Prunty, A., Dupont, M., McDaid, R. (2012) “Voices of students with special educational needs (SEN): views on schooling” *Support for Learning* Vol. 27, No. 1, pp. 29-36

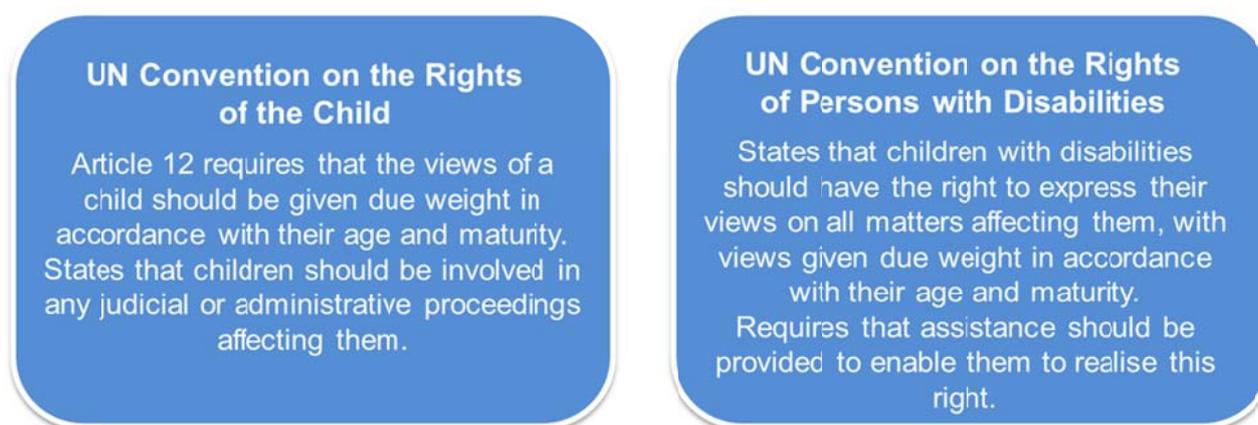
⁵¹ Harris, N., Smith, E. (2009) “Resolving disputes about special educational needs and provision in England” *Education Law Journal* 10 (2) pp.113-132

Having the right to appeal can be particularly important for those whose parents are anxious or disinterested about pursuing an appeal, and for looked after children who have to rely on foster carers or key workers to initiate an appeal (which may present a conflict of interest).⁵² A quarter (25%) of looked after children in Northern Ireland have a statement of SEN, compared to 5% of the overall school population.⁵³

Human rights perspective

The UN Convention on the Rights of the Child, ratified by the UK in 1991, and the UN Convention on the Rights of Persons with Disabilities, ratified in 2009, require States Parties to ensure that a number of rights are provided.

Figure 7: Relevant UN Conventions



Despite the international conventions, the evidence suggests that children's views are not consistently or reliably taken account of in educational decision making.⁵⁴ Indeed, the UN Committee on the Rights of the Child concluded in 2008 that there had been little progress in implementing Article 12 in education legislation and policy in Northern Ireland, particularly in relation to children with disabilities.⁵⁵

8 Supporting the participation of children with SEN

There can be challenges relating to a child's capacity to participate in decisions that affect them, particularly where their SEN affect communication.⁵⁶ The participation of children with significant learning difficulties is often dismissed, limited or tokenistic.⁵⁷

⁵² Anderson, K. (2011) "The right for children to appeal SEN decisions" *Children and Young People Now* 14-27 June 2011, pp. 30-31

⁵³ Department of Health, Social Services and Public Safety (2014) *Children in Care in Northern Ireland 2012-13, Statistical Bulletin* Belfast: DHSSPS

⁵⁴ Prunty, A., Dupont, M., McDaid, R. (2012) "Voices of students with special educational needs (SEN): views on schooling" *Support for Learning* Vol. 27, No. 1, pp. 29-36

⁵⁵ United Nations Committee on the Rights of the Child (2008) *Concluding Observations: United Kingdom of Great Britain and Northern Ireland UN*

⁵⁶ Harris, N., Smith, E. (2009) "Resolving disputes about special educational needs and provision in England" *Education Law Journal* 10 (2) pp.113-132

⁵⁷ Lawson (2010) *Beyond tokenism? Participation and 'voice' for pupils with significant learning difficulties* Confronting obstacles to inclusion Oxon: Routledge

Indeed, the literature warns against engaging children in decisions that affect them simply as a “symbolic gesture” that does not lead to changes in practice.⁵⁸

An international review has found that inconsistencies arise where support for decision making is not explicitly required by law. The review asserts that the legal framework should refer to independent advocacy and commit to taking all practical steps to support a person to make a decision prior to considering substitute decision-making powers.⁵⁹

Departmental guidance

The Department’s Code of Practice encourages the involvement of young people with SEN in decisions that affect them, where possible. It states that schools should consider how best to involve pupils in decision-making, taking into account approaches suitable for their age and ability.⁶⁰

“As far as the child’s levels of maturity and understanding will allow; all reasonable efforts should be made to ascertain the views of the child or young person about his or her own learning difficulties and education, offering encouragement where necessary.

Young people are more likely to respond positively to intervention programmes if they understand the rationale for them and are given some personal responsibility for their own progress.”

Code of Practice (1998)

The Department’s Code of Practice notes that schools and the Authority should consider the best way to ascertain a child’s views. It suggests that report forms could be provided for pupils to submit their views, and that if necessary, an adult close to the child could help them to complete these.⁶¹

It also discusses involving young people in assessment and review during transition periods and in the annual review process, providing examples including:⁶²

- Expressing views through a trusted professional, family member, independent advocate or an officer of the EA;

⁵⁸ Lawson (2010) *“Beyond tokenism? Participation and ‘voice’ for pupils with significant learning difficulties”* Confronting obstacles to inclusion Oxon: Routledge

⁵⁹ Davidson, G., Kelly, B, Macdonald, G. et al (2015) “Supported decision making: A review of the international literature” *International Journal of Law and Psychiatry* Vol. 38 pp. 61-67

⁶⁰ Department of Education (1998) *Code of Practice on the identification and assessment of special educational needs* Bangor: DE

⁶¹ Department of Education (1998) *Code of Practice on the identification and assessment of special educational needs* Bangor: DE

⁶² Department of Education (1998) *Code of Practice on the identification and assessment of special educational needs* Bangor: DE

- Incorporating their views using student counsellors, advocates or advisers, social workers or peer support;
- Focusing curriculum planning on activities that encourage young people to review their experiences and formulate their own views; and
- Supporting involvement with information, career guidance, counselling and work experience.

The 2005 Supplement to the Code of Practice states that schools and the Authority should seek participation of young people in all decision-making processes, including choice of school, assessment of needs and the annual review. It notes that their views should be given due weight in accordance with their age, maturity and capability.⁶³

Approaches to supporting the involvement of children with SEN

The literature highlights three broad types of supporting decision making: support in making a decision, support in engaging with others to give effect to the decision, and support to act on the decisions. Such supports may include.⁶⁴

- Advocacy;
- Communication and interpretive supports;
- Representational supports;
- Relationship building supports; and
- Administrative supports.

Advocacy

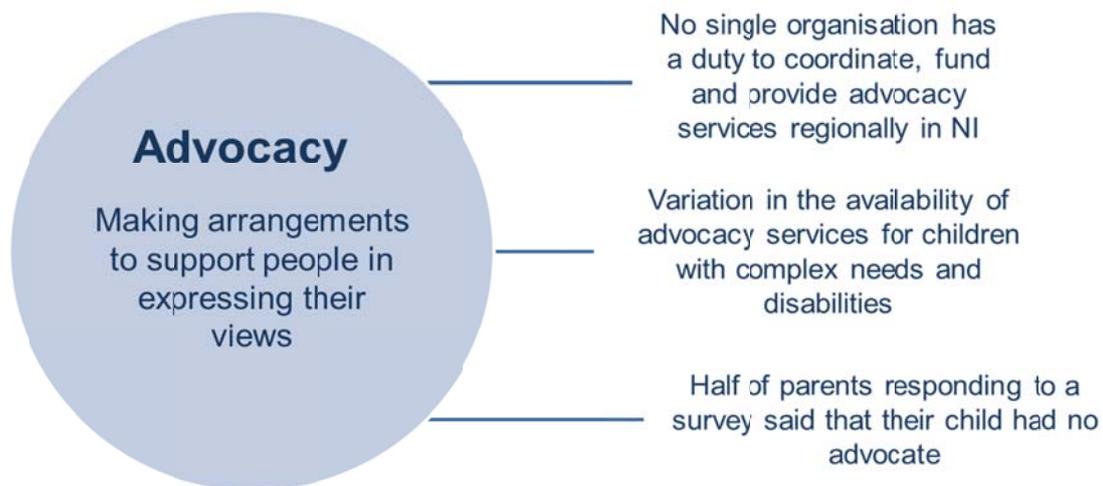
Advocacy can be defined in a number of ways; however it broadly describes making arrangements to support people in expressing their views.⁶⁵ Obtaining the views of children with limited communication may involve actively building a relationship in order to advocate for them.⁶⁶

⁶³ Department of Education (2005) *Supplement to the Code of Practice on the Identification and Assessment of Special Educational Needs* Bangor: DE

⁶⁴ Davidson, G., Kelly, B, Macdonald, G. et al (2015) "Supported decision making: A review of the international literature" *International Journal of Law and Psychiatry* Vol. 38 pp. 61-67

⁶⁵ Northern Ireland Commissioner for Children and Young People (2008) *"Who speaks for us?" Review of advocacy arrangements for disabled children and young people with complex needs* Belfast: NICCY

⁶⁶ Lawson (2010) *"Beyond tokenism? Participation and 'voice' for pupils with significant learning difficulties"* Confronting obstacles to inclusion Oxon: Routledge

Figure 8: Overview of advocacy support in Northern Ireland⁶⁷

A 2008 survey found that many parents view their Social Worker as playing an advocacy role. However, this can present a conflict of interest as they are employed by organisations responsible for providing services. Some voluntary organisations provide advocacy services in particular areas.⁶⁸

The Department advises that some young people with SEN express their views through a trusted professional, independent advocate or through an officer of the EA. Voluntary organisations such as the Children's Law Centre (CLC), the Special Educational Needs Advice Centre (SENAC) and Barnardos provide independent advocacy.⁶⁹

In addition, for a period of two years from April 2015, the Department is providing funding to the CLC for its SENDIST Project. A key objective of this is to provide free legal advice, information and representation to children and their parents and carers.⁷⁰

Communication and interpretive supports

Some children with significant learning difficulties communicate in a range of non-verbal ways, using symbols, signs, eye contact, vocalising, facial expression and changes in behaviour.⁷¹ In research by NICCY in 2008, 5% of parents surveyed said that their children had little or no communication and would always require someone to advocate on their behalf.⁷²

⁶⁷ Adapted from Northern Ireland Commissioner for Children and Young People (2008) *"Who speaks for us?" Review of advocacy arrangements for disabled children and young people with complex needs* Belfast: NICCY

⁶⁸ Northern Ireland Commissioner for Children and Young People (2008) *"Who speaks for us?" Review of advocacy arrangements for disabled children and young people with complex needs* Belfast: NICCY

⁶⁹ Information provided by the Department of Education, May 2015

⁷⁰ Information provided by the Children's Law Centre, May 2015

⁷¹ Lawson (2010) *"Beyond tokenism? Participation and 'voice' for pupils with significant learning difficulties"* Confronting obstacles to inclusion Oxon: Routledge

⁷² Northern Ireland Commissioner for Children and Young People (2008) *"Who speaks for us?" Review of advocacy arrangements for disabled children and young people with complex needs* Belfast: NICCY

The literature emphasises the importance of using a personalised approach to involving young people with SEN.⁷³ It highlights examples of approaches that may be used, including by:⁷⁴

- Group or individual discussions;
- Drawing and writing;
- Using symbols (for example, faces);
- Taking photographs or making videos (either by young people themselves or to prompt them in expressing their views);
- Being observed for non-verbal signals; and
- Moving to different corners of a room according to the view held.

In addition, some children with severe speech, language and communication needs can use assistive communication technology to support their speaking and writing, for example computers and voice output devices.⁷⁵

Representation

While the SEND Bill provides for regulations around the provision of assistance and support to enable children to exercise their rights, it does not state whether these will include legal representation.

Research suggests that access to legal advice and representation will be crucial in supporting children in exercising their right to appeal, particularly in light of their age, vulnerability and lack of income.⁷⁶

As outlined previously in this paper, legal aid is available to those appealing decisions regarding SEN covering limited legal support, but excluding representation at a tribunal. Where children under 16 request legal aid their parent or guardian must consult the solicitor on their behalf. The income of their parent or guardian is taken into account when assessing eligibility.⁷⁷

9 Mental capacity

Mental capacity relates to a person's ability to make decisions. Capacity to make decisions can be affected temporarily or permanently, and can change according to the

⁷³ Lawson (2010) *"Beyond tokenism? Participation and 'voice' for pupils with significant learning difficulties"* Confronting obstacles to inclusion Oxon: Routledge

⁷⁴ Macbeath, J., Demetriou, H., Ruddock, J., Myers, K. (2003) *Consulting pupils: a toolkit for teachers* Cambridge: Pearson

⁷⁵ Griffiths, T., Price, K. (2011) "A proposed framework for decision-making for assistive communication technology support: many perspectives, but one common goal" *Journal of Assistive Technologies* Vol. 5, No. 4, pp. 242-248

⁷⁶ Anderson, K. (2011) "The right for children to appeal SEN decisions" *Children and Young People Now* 14-27 June 2011, pp. 30-31

⁷⁷ Northern Ireland Legal Services Commission (2014) *A guide to Legal Aid* Belfast: Northern Ireland Legal Services Commission

complexity of the decision made. Someone lacking capacity is unable to do one of the following:⁷⁸

- Understand information about a particular decision;
- Retain the information long enough to make a decision;
- Weigh up the information to make a decision; or
- Communicate their decision.

The concept of mental capacity is very complex in relation to children, in that they develop capacity to make decisions at different stages. They are not assumed to have capacity in the same way as adults.⁷⁹

Current legislation

Mental capacity is governed by common law (case law); this presumes that everyone has capacity to make decisions, including decisions thought to be unwise. Under common law, a decision may be taken on behalf of someone who lacks capacity provided that there is a reasonable belief that they lack capacity and that the decision is in their best interests. However, this approach can be problematic.⁸⁰

The Children (Northern Ireland) Order 1995 sets out a number of principles, including the involvement of children in decision making. Its general philosophy is that those with parental responsibility have primary responsibility for raising children. This includes parental entitlement to make all major decisions about a child's welfare and education, regardless of whether the child has capacity.⁸¹

SEND Bill

Clauses 9, 10 and 11 of the SEND Bill provide for regulations about assistance and support to enable children to exercise their rights under the legislation. They also contain a series of powers to make regulations where a child over compulsory school age lacks, or may lack, capacity to exercise these rights, including making provision for:

- Determining whether a child lacks capacity in relation to the exercise of any such right (including the criteria to be applied in making the determination);
- The parent of the child to exercise the rights where it is determined that the child lacks the capacity to do so;

⁷⁸ Mental health foundation *Mental capacity* [online] Available at: <http://www.mentalhealth.org.uk/help-information/mental-health-a-z/M/mental-capacity/>

⁷⁹ Black, L. (2012) *The Mental Capacity Bill and children under 16* Belfast: Northern Ireland Assembly Research and Information Service

⁸⁰ Black, L. (2012) *The Mental Capacity Bill and children under 16* Belfast: Northern Ireland Assembly Research and Information Service

⁸¹ Black, L. (2012) *The Mental Capacity Bill and children under 16* Belfast: Northern Ireland Assembly Research and Information Service

- Part 2 of the 1996 Order (the main legislation governing SEN) to have effect in such a case with any modifications prescribed by the regulations.

Mental capacity in relation to people with learning disabilities

Evidence indicates that there are people with a range of disabilities who may be assessed as incapable of making particular decisions if appropriate support is not provided.⁸²

In a research study a number of people with learning disabilities stated that it was often assumed that they did not have capacity, simply due to their learning disabilities. They had to prove their capacity (without formal assessment) in order to make decisions for themselves. The study found that:⁸³

- People with learning disabilities are often considered incapable of making decisions, or are shielded from them;
- Such judgements are made routinely without a formal assessment of capacity;
- A judgement of incapacity was often not noticed or accepted; instead it was considered to be part of being treated like “*someone with a learning disability*”; and
- People were rarely given clear information about the options available.

Research also suggests that many professionals lack confidence in assessing mental capacity in those with learning disabilities, and that many clinical practitioners do not understand the rules around making accurate assessments.⁸⁴ In many cases where a person lacked capacity, those making the decision were not able to accurately predict their wishes.⁸⁵

Mental Capacity Bill

The Department of Health, Social Services and Public Safety (DHSSPS) and the Department of Justice (DoJ) published the civil provisions of the draft Mental Capacity Bill in May 2014, applying to those aged 16 and over.⁸⁶

The Bill proposes introducing a single legislative framework governing situations where a decision needs to be made in relation to the care, treatment or personal welfare of

⁸² Davidson, G., Kelly, B, Macdonald, G. et al (2015) “Supported decision making: A review of the international literature” *International Journal of Law and Psychiatry* Vol. 38 pp. 61-67

⁸³ Williams, V., Jepson, M., Tarleton, B., Marriott, A., Ponting, L. (2008) *‘Listen to what I want’ The potential impact of the Mental Capacity Act (2005) on major life decisions by people with learning disabilities* Bristol: Social Care Institute for Excellence

⁸⁴ Willner, P., Jenkins, R., Rees, P, Griffiths, V.J., John, E. (2010) “Knowledge of Mental Capacity Issues in Community Teams for Adults with Learning Disabilities” *Journal of Applied Research in Intellectual Disabilities* Online Early View

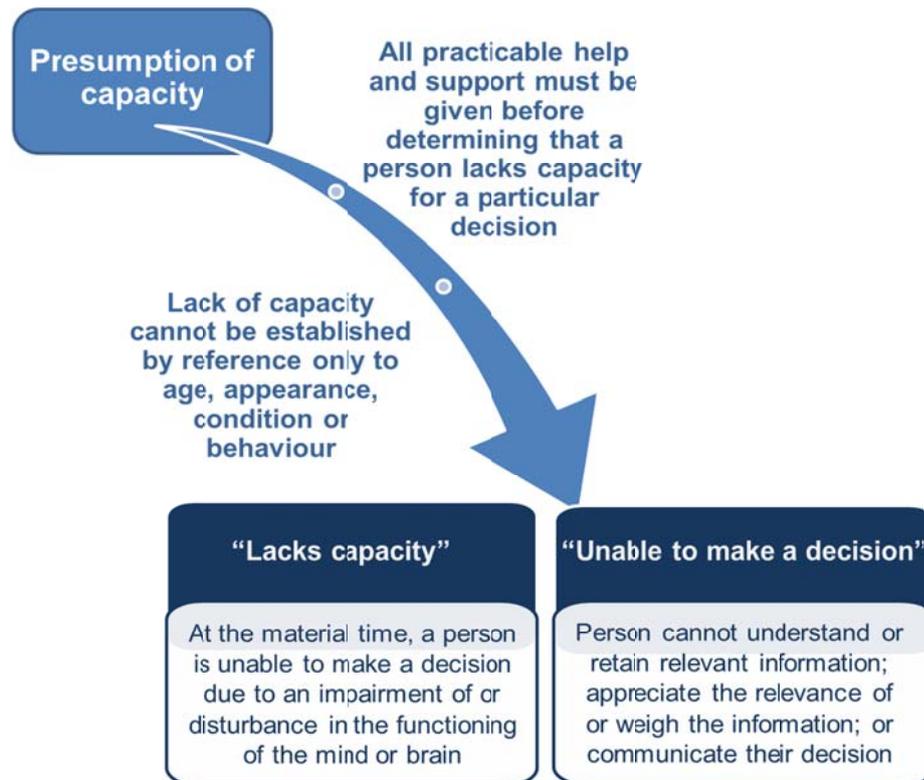
⁸⁵ Mental Health Foundation (2012) *Mental Capacity and the Mental Capacity Act 2005: A literature review* London: Mental Health Foundation

⁸⁶ DHSSPS and DoJ (2015) *Draft Mental Capacity Bill (NI) Consultation Summary Report* [online] Available at: <http://www.dhsspsni.gov.uk/mental-capacity-bill-consultation-summary-report.pdf>

those aged 16 and over who do not have the capacity to make decisions for themselves – the first of its kind anywhere.⁸⁷

Part 1 of the draft Bill sets out its key principles. The Bill presumes that a person has capacity, and emphasises the provision of support and help prior to deciding that a person does not have capacity or is unable to make decisions. In such cases, the Bill requires that any decision must be made in the best interests of the person who lacks capacity. The principles are illustrated in Figure 9.⁸⁸

Figure 9: Key principles of the draft Mental Capacity Bill⁸⁹



The draft Bill requires DHSSPS to issue a code of practice for assessing whether a person aged 16 and over has capacity. It also places a duty on health trusts to ensure that independent advocates are available where a compulsory serious intervention is proposed regarding a person who lacks capacity.⁹⁰

Many respondents to the consultation on the draft Bill suggested that it should apply to children under 16. They gave two broad reasons for this: a concern that children under 16 would not be able to avail of the protections afforded by the Bill, and a perception that older children should have a presumption of capacity. However, a number of

⁸⁷ DHSSPS and DoJ (2015) *Draft Mental Capacity Bill (NI) Consultation Summary Report* [online] Available at: <http://www.dhsspsni.gov.uk/mental-capacity-bill-consultation-summary-report.pdf>

⁸⁸ Mental Capacity Bill [online] Available at: http://www.dojni.gov.uk/index/public-consultations/archive-consultations/annex_a_-_draft_mental_capacity_bill_civil_provisions_.pdf

⁸⁹ Mental Capacity Bill [online] Available at: http://www.dojni.gov.uk/index/public-consultations/archive-consultations/annex_a_-_draft_mental_capacity_bill_civil_provisions_.pdf

⁹⁰ Mental Capacity Bill [online] Available at: http://www.dojni.gov.uk/index/public-consultations/archive-consultations/annex_a_-_draft_mental_capacity_bill_civil_provisions_.pdf

respondents believed that the Bill should not apply to children under the age of 16.⁹¹ The DHSSPS position is that the Bill is a decision-making framework for adults and is not suitable for children as it stands.⁹²

10 Conclusion

This research paper has highlighted a number of issues around the accessibility of SENDIST and in terms of the complexity surrounding issues of mental capacity in relation to children with SEN. It has highlighted a range of areas, many of which are cross-departmental, that could be given further consideration, including:

- The proportion of DARS cases where contact ceased and the reasons for this;
- Whether the mediation service proposed by the Bill will include enforcement;
- The volume of appeals at both DARS and SENDIST relating to statutory assessment and how, if at all, the new SEN proposals will impact on this;
- The proposed duty for parents to speak to a mediation adviser before pursuing an appeal with SENDIST, in particular whether this element of compulsion is likely to have an influence on the outcome of mediation;
- The perceived inequality between parents and the EA in SENDIST appeals, and how, if at all, the new proposals will mitigate against this;
- The perception that users of SENDIST tend to be more advantaged;
- The limited availability of legal support and representation for SENDIST, including the implications for children to exercise their new rights;
- The adequacy of advocacy provision, particularly in light of the rise in SENDIST and DARS cases;
- The key importance of the support provided to enable children to exercise their new rights and when the regulations regarding this will be available for scrutiny;
- Whether the regulations provided for by the SEND Bill regarding capacity will include a presumption of capacity; and
- Whether the proposed DHSSPS code of practice for assessing whether a person aged 16 and over has capacity will link to the SEND Bill regulations.

⁹¹ DHSSPS and DoJ (2015) *Draft Mental Capacity Bill (NI) Consultation Summary Report* [online] Available at: <http://www.dhsspsni.gov.uk/mental-capacity-bill-consultation-summary-report.pdf>

⁹² DHSSPS and DoJ (2015) *Draft Mental Capacity Bill (NI) Consultation Summary Report* [online] Available at: <http://www.dhsspsni.gov.uk/mental-capacity-bill-consultation-summary-report.pdf>