The impact of mediation on resolution of disagreements around special educational needs: Effectiveness and cost effectiveness.

Abstract

Under England's Children and Families Act 2014, local authorities (LAs) have a statutory responsibility to provide an independent mediation service for cases of disagreement between parents or young people and the LAs where parents or the young person are considering an appeal to the First-tier Tribunal Special Educational Needs and Disability, around the description of special educational needs and/or provision to meet these. Also, parents and young people may only make an appeal after they have discussed with an independent mediator whether mediation might be a suitable way to resolve the disagreement. As part of a larger study to examine the effects on disagreement resolution of the introduction of this legislation, we examined the effectiveness and cost effectiveness of mediation in resolving such disagreements without recourse to an appeal to the Tribunal. Our data comprised three national surveys, two supplementary surveys and individual interviews with LA staff and parents to explore the implementation of the new mediation system and the impact on appeals and costs over 2014-16 from 109 English LAs who provided data. Our findings indicate that families who took up mediation were significantly less likely to appeal to the Tribunal. The absolute risk reduction associated with this difference was 13.58% (95% CI: 10.20%, 16.97%). The cost saving across all cases, taking account of cases of low, medium and high complexity, was £636,462 overall, approximately £500 per case. Overall, therefore, mediation was found to be a promising method of disagreement resolution, reducing appeals and producing savings in both financial and human well-being costs. To the best of our knowledge this is the first study of both the effectiveness and cost effectiveness of mediation as a means of resolution of disputes about the meeting of the special educational needs of children and young people.

Introduction

The offer of mediation as a means of resolving disagreements between parents or young people and local authorities (LAs) around the description of and/or the provision to meet special educational needs (SEN) became a statutory requirement In England, under the Children and Families Act 2014. Prior to that, the use of mediation had been stimulated by the earlier Special Educational Needs and Disability Act (SENDA) 2001 and the accompanying revision of the Code of Practice (Department for Education and Skills, 2001), but its use was voluntary. The research we report here investigated the effectiveness and cost-effectiveness of mediation in resolving such disagreements without recourse to the more formal disagreement resolution route of an appeal against an LA to the First-tier Tribunal Special Educational Needs and Disability (SEND) in England.

The statutory requirement to provide an independent mediation service affected all 152 English LAs and took effect from 1 September 2014. Up to that point, available national statistics suggested marked variation among LAs in rates of appeal to the First-tier Tribunal SEND (Evans 1998; Marsh 2014): the reasons for this were only partly understood. Thus, in 2014 each LA was faced with incurring the cost of commissioning a mediation service without reliable data on likely take-up or on likely effectiveness in preventing recourse to the First-tier tribunal SEND. Our study was therefore national in scale. It also had direct implications for national policy: the study was part of a broader commission by the Department for Education (DfE) to provide independent information to support Ministerial commitments to conduct a review of disagreement resolution arrangements. The research took place between April 2015 and March 2017. In April 2017, the results of the research informed a Ministerial report to the United Kingdom (UK) Parliament pursuant to Section 79 (3) of the Children and Families Act 2014 (Department for Education and Ministry for Justice 2017).

Context

Children and young people with special educational needs and disabilities are, by definition, exceptional. Consequently, it is not surprising that differences of view about the nature and degree of their SEN may lead

to disputes, which are by their nature and complexity different from other disputes in education, such as choice of mainstream school for typically developing young people. Lake and Billingsley (2000) identified eight categories of factors that, from parents' perspectives, increase conflicts regarding special education, namely different views about the child or child's needs, knowledge, service delivery, reciprocal power, constraints, valuation (e.g. that their child was being devalued), communication, and trust.

In England, appeals regulated by the original Special Educational Needs Tribunal increased substantially from 1,170 in its first year of 1994/5 (Special Educational Needs Tribunal, 1996) to 3,772 in 2003/4, by which time it had become the Special Educational Needs and Disability Tribunal (Special Educational Needs and Disability Tribunal: 2004). Thereafter, the number of appeals fluctuated and then rose again from 2011 (Marsh 2014) when the SENDIST was replaced as part of a broader restructuring of a number of public service tribunals and became the First Tier Tribunal (SEND) – hereafter the Tribunal. There were concerns about the appeal system in terms of variations across the country and the cost, both direct financial costs and with respect to professional and family time, as well as the substantial emotional cost. The Government wished to maintain the rights of parents to appeal to this Tribunal but hoped to develop a system whereby disputes would be resolved earlier, with fewer appeals to the Tribunal. A means to support this development was to be mediation by an independent party. Despite dispute resolution services existing at that time, they were under-used and under-provided (Harris and Riddell 2011). Disagreement resolution, and mediation in particular, became a key part of the legislation that followed: the Children and Families Act, 2014.

The Children and Families Act 2014 (England) placed a greater emphasis than before on the avoidance of disagreement through a person-centred approach to decision making and open communication between professionals and parents and young people (Department for Education [DfE] 2015, para. 111). In addition to this model of good practice, the reforms driven by the 2014 Act aimed to reduce the incidence of disagreements and to improve the resolution of those that arose. The Act required that, when disagreements and complaints occurred, parents and young people should be given information about and, if they choose to access it, support to enable their participation in disagreement resolution and complaints procedures, including mediation services, provided by the LA and also procedures around appealing to the Tribunal.

The revised Special Educational Needs Code of Practice 0-25 years (DfE 2015) specifies six elements of disagreement resolution. These start with informal discussions with school staff and/or LA SEN staff, at which stage it is expected that most disagreements will be resolved satisfactorily. Each LA is required to provide or commission an impartial, confidential and accessible information, advice and support service. The scope of this service includes offering support to children, young people and parents to resolve disagreements in relation to SEN and in managing mediation, appeals to the Tribunal and complaints relating to SEN (DfE 2015: paras 2.17 to 2.19). These include a complaints procedure (paras 11.67 to 11.111) and a disagreement resolution service (DRS) concerning all children with SEN, which is voluntary and must be commissioned by, but independent of, the LA. (para 11.8). Finally, if the parent(s) or young person chooses, an appeal on specific aspects relating to the assessment of SEN and to education, health and care (EHC) plans, including specific aspects of the content of EHC plans, can be made by parents or young people to the Tribunal, either after they decline mediation or after having undertaken mediation (para 11.45).

Under the Children and Families Act 2014, mediation refers to a specific process related to parents and young people who are considering an appeal to the Tribunal regarding a) the education, health and care (EHC) assessment, b) the special educational aspect of the EHC plan, or c) where parents want mediation on the health and/or social care elements of the EHC plan (DfE 2015 para 11.5). Every LA must commission an independent mediation service available to parents and young people (paras 11.13 to 11.38). Mediation itself is voluntary but, before an appeal can be made to the Tribunal (unless the appeal is only about placement), the parent/s must have contacted the mediation service and received information about mediation (mediation advice). They must receive a certificate to prove that this has taken place. Parents may then undertake mediation and/or appeal to the Tribunal.

Previous research

From our literature review, we found literature about SEN mediation relating to three countries: the United States of America (USA), where this has been established voluntarily since the early 1990s and compulsorily from 1997; England, where voluntary provision of mediation has been encouraged since 2001 and statutory provision (with voluntary take-up) since 2014; and Scotland, where statutory provision (with voluntary take-

up) has been required since 2004. We focus on literature concerning mediation's effectiveness and cost-effectiveness. In all three countries, the model[1] of mediation legislated for has been 'facilitative' mediation; that is, where "the mediator has no decision-making authority" (Hindmarsh, no date). In both Europe and the USA, there were professional guidelines for mediators - 'model standards' in the USA (American Arbitration Association et al. (2005) and a voluntary Code of Conduct (European Code for Mediators 2004) in Europe - but these were generic: neither contained specific expectations of SEN mediators.

Effectiveness of SEN mediation

The evaluation of mediation may examine the process itself or the outcome(s) of the mediation. With respect to outcomes, the main aim is to achieve an agreement between the partners and the avoidance of legal dispute. The nature of the agreement will vary depending on the details of the conflict.

Take-up

To understand the effectiveness of SEN mediation, it is necessary to understand the degree to which it is taken up and available alternatives. Take-up is partly affected by how the service is viewed by parents and also whether it is compulsory or not. In the U.S., parents considered it preferable to due process hearings[2] (Reiman et al. 2007). However, a number of caveats have also been identified. For example, parents disliked due process hearings at that time in the U.S., as they tended usually to lose but also were concerned that in mediation they usually compromised. Studies of parent satisfaction with mediation against due process hearings in the US have produced mixed results (Kuriloff and Goldberg 1997; Mills and Duff-Mallams 1999; Nowell and Salem 2007) but use of due process hearings can be very costly and also reduce the likelihood of opportunities to repair the parent-school partnership (Mueller 2015).

The use of mediation for dispute resolution in special education increased in the U.S. over the period 2006-07 to 2016-17, whereas the use of more adversarial processes (written state complaints and due process

[1] Various models of mediation are summarised by Hindmarsh (no date) and Zumeta (no date), including 'facilitative', 'evaluative',' transformative' and 'narrative'.
[2] 'Due process hearings' refers to a formal disagreement resolution option which is similar to the Tribunal system in England and Scotland.

complaints) have fallen, although the absolute numbers of due process complaints filed were almost twice as common as mediation (Centre for Appropriate Disagreement Resolution on Special Education [CADRE] 2018a). However, the number of mediation *agreements* made were substantially greater than the number of agreements made at due process resolution meetings. State variation in the average use of the different mandated disagreement resolution processes under the Individuals with Disabilities Education Act varies greatly; for example, three states account for 70% of due process filed and three states account for 76% of due process hearings held. Rates are also highly variable between states, from zero to 326 per 10,000 children due process complaints filed (CADRE 2018b).

In England, mediation was seen as a means of achieving early resolution of disagreements (Department for Education and Skills 2002), recognising the damaging effects of prolonged periods of disagreement or dispute on the children and young people involved. Mediation services implemented by LA parent partnership services (PPSs) were seen positively by parents (Rogers et al. 2006) but impartiality was considered to be essential if mediation was to be a positive experience (Tennant et al. 2008). The Code of Practice 2001 emphasised the importance of independence, which might be through LA PPSs or external mediation providers (Department for Education and Skills 2001). However, Riddell et al. (2010) found that although 16 independent mediation services had been commissioned to provide SEN mediation, the take-up of mediation was very limited, with 93% of LAs in England reporting no more than two mediations in 2007/08 and only seven of the 55 LAs in their survey reporting an increase in the number of mediations over the previous three years.

In Scotland, where mediation was relatively new at the time of their research, Riddell et al. (2010) found that, in 2007/07, 18% of the 27 Scottish education authorities had had no take up; most (56%) had had 5 or fewer cases, and only one authority (4%) had had more than 10 parents take up SEN mediation. Based on questionnaires returned by 182 parents of children with additional support needs (a broader concept than SEN in England) in 2008, Weedon and Riddell (2009) found that 14% (20 of 139) of those with experience of a disagreement had taken up mediation provided by their LA compared to 60% who had taken up 'informal negotiation/mediation' at school level.

Effectiveness

In the U.S., SEN mediation has been used to avoid a formal due process hearing. Its effectiveness has been judged by the reduction of litigation; the amicable resolution of differences between parents and schools; and the decision being made with the child's best interest in mind (Feinberg, Beyer, and Moses 2002). An operational measure is the result of the mediation resulting in a written mediation agreement: national statistics of each state's reported mediation agreement rates are made public and the average agreement rate in 2016-17 was 66% (CADRE 2018c).

In England, two small-scale studies have examined the effectiveness of SEN mediation. One was a case study of a single LA over an 8-month period following the voluntary commissioning of SEN mediation (Henshaw 2003). This reported that the combined use of mediation and pre-Tribunal Hearing meetings facilitated by an LA officer had resulted in 80% of appeals being withdrawn. It was not possible from the data reported to determine what proportion of these withdrawals were due specifically to the effectiveness of mediation.

The second was a pilot study (2012-14) by the Ministry of Justice (2014) in which mediation was offered *after* an appeal had been registered with the Tribunal. It was reported that 71% of cases that went to mediation were successful; i.e. did not require the Tribunal to make a determination in those cases. However a more accurate inspection of the data suggests that successful mediation was a very small part of the overall story: of 281 appeals registered in this study, 125 (44%) took up the option of a mediation information session. Out of those 125, 65 (44%) requested mediation, of whom just 14 went to mediation: a total of 5% of the original 281 appeals. Of those 14 cases of mediation, 10 were resolved without recourse to the Tribunal, three went to the Tribunal and one was struck out. That is: 10 cases did not require a Tribunal hearing, 4% of the original 281. In Scotland, to date no data have been reported on the effectiveness of SEN mediation, although Riddell et al. (2010) report that 52% of education authority officers in their study judged that mediation "resolved disputes quickly" (p65).

Cost-effectiveness

To our knowledge, there have been no previous published studies of the cost-effectiveness of SEN mediation. Previous studies have provided some information about the forms of commissioning of SEN mediation services by LAs (Riddell et al. 2010) and of the fact that parents incur direct and indirect costs in appealing to the Tribunal (Runswick-Cole 2007) but we have found no previous studies that detailed these costs in monetary form, nor included them in a comprehensive assessment of cost-effectiveness of SEN mediation. Riddell et al. (2010) also noted that some LA respondents, in open comments added to survey responses, had reported a perception that mediation did not always prevent an appeal and was viewed, therefore, as an additional cost rather than a cost-effective approach.

Our study extends existing knowledge in several important ways, namely: how SEN mediation services were commissioned by LAs; uptake of SEN mediation when it is compulsory to consider this option; costs incurred by parents/young people and the public purse; effectiveness; and cost-effectiveness. The findings we report here have previously been reported to the UK government and made publicly available within a research report that also covers findings related to other routes of SEN disagreement resolution. This is the first time our findings have been contextualised within the relevant literature and made available for academic peer review and [potential] publication, making these accessible to the academic community worldwide. This paper focuses on the impact of the statutory offer of mediation (with voluntary take-up); a separate paper (in preparation) reports on our process and implementation findings.

The study

The aim of the research was to examine the effectiveness and cost effectiveness of the use of mediation as a method of disagreement resolution with respect to children and young people with SEN during the first two years following the enactment of the Children and Families Act 2014. The operational criterion for effectiveness was the achievement of a resolution between the family of a child with SEN and the LA, in particular that there was no subsequent appeal to the Tribunal. With respect to cost effectiveness, we developed estimates taking into account the costs of the LAs, the Tribunal and the parents. We had two research questions (RQs):

RQ1. To what extent has mediation been successful in resolving issues without need for parents or young people having recourse to the First Tier Tribunal SEND and

RQ2. What cost savings were made as a result of early (pre-Tribunal) disagreement resolution through mediation?

Methods

Surveys of local authorities

Three online surveys were sent to all 152 higher tier and unitary LAs in England, each covering two terms of the academic years, 1 September 2014 to 31 August 2016, six terms in all. One hundred and nine LAs responded to at least one survey (Sample 1, 71.2%) and 42 LAs (27.6%) responded to all three surveys (Sample 2). In each case LAs came from all regions of England (Cullen et al. 2017)The sampling error at the 95% confidence interval is 5% and 13% respectively. Analyses of the 109 LAs' responses were used to indicate the relationships between key LA decisions, mediation and appeals; results from the 42 LA sample were analysed to explore changes over time in the use of mediation, including variation among LAs.

Surveys 1, 2, and 3 all collected numerical data including: assessments of SEN under the previous 1996 Act; cases for formal mediation (initial contact) and take up of mediation; new appeals under the 1996 Act, and new appeals under the 2014 Act (by reason, status, outcome, and type of special educational need). With respect to cost data, Survey 1 collected preliminary cost data to inform cost data collection in Surveys 2 and 3. Survey 1, therefore, collected general information: start dates for disagreement resolution and mediation services; arrangements for commissioning these services; reasons (if any) for cost variation in these services; reasons (if any) for variation in time spent on preparing and attending a First-tier Tribunal SEND; views regarding the change from expectations (if any) in costs to the LA of preparing for and attending a First-tier Tribunal SEND; and open comments.

Survey 2 collected data on the direct and opportunity costs incurred by LAs related to SEN appeals: the direct financial costs and opportunity costs associated with preparation and attendance at a Tribunal for an appeal considered representative of a medium complexity (medium time-consuming and hence cost); the

percentage increase in costs associated with a high time-consuming case (and higher complexity); percentage decrease in costs for a low time-consuming case (and lower complexity); proportion of appeals considered to be high, medium or low time-consuming appeals that went to an appeal hearing; views as to change (if any) in costs to the LA of preparing for and attending a Tribunal; and open comments. In addition, following administration of Surveys 2 and 3, a separate online survey was sent specifically to LA lead officers for EHC assessment and planning processes in order to collect their views on key elements of the reformed SEN system, including mediation: response rate Survey 2a, 39.4%, Survey 3a, 40.7%.

Interviews with parents

Sample selection

Multiple routes were used for recruiting the parents. First, as part of the overall research project, leaflets were distributed to parents who had appealed to the Tribunal in the 17 LAs that had agreed to be case study authorities for the research (Cullen et al. 2017). These leaflets were used to provide information about and seek permission for parents' involvement. They were distributed to relevant parents (and young people) through parent-carer forums, local mediation services and local SEN information, advice and support services. In addition, other parents were recruited following participating parents informing other parents about the research and, in particular, via social media through posts by the DfE and individual participatory parents. This diversity of routes enabled parents from 39, over a quarter, of the 152 LAs to be recruited (see Cullen & Lindsay, under review for full details).

Ninety six parents agreed to be interviewed and provided contact details direct or agreed to the LA doing so. Interviews were held with 74 parents (77% success rate). In the remaining cases two did not meet our inclusion criterion of experience of disagreement resolution since 1 September 2014, one withdrew because of illness and the remaining parents did not respond to our invitation for an interview after initial and follow up emails and texts. The overall interview sample comprised 53 parents (including three couples) who had lodged an appeal or were planning to do so. Of these, 45 parents (reporting on 48 appeals) provided costs data, which were usable in the cost benefit analysis. All data on personal characteristics were self-reported;

these do not always sum to 45 because some questions were not asked during the interview because of limited time available. Forty were female and five were male. The age range was from 30s to 60s, with the majority in their 40s (n=24) or 50s (n=10). Regarding ethnicity, 33 self-reported as White British, with 10 other ethnicities reported by either one or two parents in each case. Relationship status with the child's other parent comprised married (27), separated (6), divorced (4), single (3), partner (2), adoptive mother (2), and widowed (1). Employment status comprised: employed full-time (13), employed part time (1), unemployed (1), not in paid work (4), full-time carer (4) and retired (4). Highest educational qualification ranged from passes at the General Certificate of Secondary Education (2: qualifications typically taken in England at 16 years of age), to PhD (1), with 16 holding an undergraduate (bachelor's) degree, seven a Master's degree, and seven had a range of other postgraduate qualifications.

Children and young people subject of appeal

With respect to the 48 children and young people of parents in the final sample who were subject to appeal, 17 were male and 31 female. The large majority (40) were described as having multiple complex needs. For example, one parent described her child as having sickle cell anaemia, pulmonary hypertension and dyscalculia; another parent reported her child having cerebral palsy, autism and epilepsy, and that the child could not walk and was doubly incontinent. The most frequently mentioned category of SEN was autism spectrum disorder (ASD) with speech, language and communication needs (SLCN), language and communication difficulties, sensory processing issues, attention deficit with hyperactivity disorder (ADHD), dyslexia and dyspraxia also frequently noted. In addition, the most frequently mentioned health need was anxiety.

The children and young people who were subject to the appeal ranged in age from 4 to 22 years: 0-4 (4), 5-11 (18), 12-19 (21), and 19-22 (5). They attended a range of types of educational settings. Most were in mainstream schools with a minority in special schools and small numbers in college, alternative provision, were home educated, or had part-time home tutor support.

Experience of appeals and mediation

The total sample of 50 families interviewed had experience of 58 appeals (several families had been through more than one appeal). The majority of appeals concerned the content of the EHC Plan or statement (33), followed by the LA's refusal to assess the child or young person (15). In addition, seven appeals concerned the LA's refusal to issue an EHC plan or statement, two concerned the LA's decision to cease the EHC plan or statement, and one was an appeal against the LA's refusal to amend the EHC Plan or statement.

Of the sample providing costs data, 20 of the 45 parents chose to take up mediation prior to appeal, although the LA failed to make an appointment date for two parents. A variety of reasons were provided by the 25 parents who refused mediation: because they considered that there was no likelihood of the LA agreeing to change its decision; or they no longer trusted the LA SEN officers; or because they were close to the deadline to lodge an appeal.

Procedure

Fifty interviews were held with parents, three comprising both parents, (*N* = 53) to collect 'cost' data, both direct and opportunity costs. All interviews were semi-structured and most (45) by phone but five were conducted face to face at parents' request. As part of the main study, these interviews explored a range of issues concerning their experience, not only mediation costs, and typically each lasted about two hours. In two cases, parents were unable to provide cost data, resulting in a total of 48 individual cases included here.

Cost benefit analysis

Following HM Treasury Green Book guidance we undertook a cost benefit or cost effectiveness analysis comparing the present value of the additional costs associated with the provision of mediation services with the cost savings (benefits) that would result from the avoidance of full scale appeals to the Tribunal (HM Treasury 2018). The basic pathway is that, first, mediation is either taken up or not; next, on both routes there is either registration for a Tribunal appeal or resolution without a Tribunal appeal.

Derivation of local authority costs

The LAs' cost information was derived from our surveys, supplemented by interviews with parents about their costs and supported by desk-based research and modelling. This allowed assessment of costs associated

with each outcome under different pathways and thereby an assessment of the costs avoided by mediation. The first LA survey was used as an exploratory tool to identify the factors that most offset costs of mediation services, Tribunal preparation and attendance. As a result, the procurement costs of mediation services for LAs were evaluated in terms of monetary costs, and were relatively fixed. Determinants of time costs were evaluated with respect of time (opportunity) costs in relation to preparation for Tribunal appeals and attendance at Tribunal hearings.

Specifically, survey 1 asked LAs whether costs of services varied relative to different aspects including the nature of the primary SEN, the complexity of need (for example, education only compared with education, health and social care), the type of disagreement, and the number of issues subject to disagreement. Large minorities of respondents concluded that none of the options was a driver of costs in procurement of services for mediation (85% of respondents) or disagreement resolution (82%). Rather, LAs reported that their costs were associated with preparation ahead of mediation and disagreement resolution services and increased with the 'complexity' of each case, and that this did not directly relate to the procurement of the disagreement and mediation services: that is, procurement costs were independent of opportunity (time) costs. We concluded that 'complexity' (however defined by LAs) was the main determinant of costs linked with Tribunal appeals, but that this varied by LA.

Consequently, for surveys 2 and 3 LAs were asked to provide indicative costs associated with a representative Tribunal appeal of 'medium' complexity. Then LA respondents were asked for scaling factors to determine relative costs associated with a low end and high complexity case. LAs were requested to provide an estimate of total time devoted by each professional grade involved (e.g. educational psychologist, EHC co-ordinator) for a medium complexity case: the average of the LAs' responses was used in the cost estimation. LAs were also asked to provide an estimate of reduction in these costs where a Tribunal appeal is avoided and to estimate the distribution of cases considered to be low, medium or high complexity, and also the proportion of these three levels of cases resulting in a hearing following a Tribunal appeal.

Following the initial contact with mediation services, costs are associated first with the decisions to take up mediation or not; subsequently, costs will vary with the success or otherwise of the mediation. If

disagreements are unresolved, an appeal to the Tribunal is likely. Hence, additional costs will depend on whether or not there is a Tribunal hearing.

Labour costs were estimated using raw data from the Office of National Statistics' Labour Force Survey in the corresponding period of the LA survey, as earnings by occupation (e.g. teacher, social worker) are identifiable using the closest title/occupation match to its 369 occupational codes. Average gross hourly wages were obtained for all the categories of professionals involved, with a 25% additional employment on-costs incorporated to account for other payroll costs (for instance, National Insurance and pension contributions), thereby producing an estimate of the full economic cost. Aggregate costs for a medium complexity case were obtained by multiplying labour costs by average number of 8 hour days of involvement of each grade of staff multiplied by the number of staff.

Staffing

The costs associated with disagreement resolution depend on the pathway selected once initial contact is made by the family with the formal mediation service: a choice will be made whether or not to pursue formal mediation. When a formal mediation route is followed but the disagreement is not resolved parents are likely to opt for a Tribunal appeal. This will result in the LA incurring mediation costs and the full costs associated with preparation for a Tribunal hearing. Further costs will be incurred by the LA should there be a Tribunal hearing, associated with attending that hearing. If, on the other hand, mediation resolves the case, the LA will incur mediation costs and also some partial preparation costs.

In cases where the family chooses not to use formal mediation, there are also two scenarios. If a Tribunal appeal is registered: the LA will incur preparation and attendance costs for the hearing and, if a hearing takes place, the LA also incurs costs associated with attendance. If, on the other hand, no appeal is registered and the case is resolved without the full recourse to the Tribunal hearing, the costs incurred by the LA comprise only the reduced preparation costs and no attendance costs.

Results

Effectiveness of mediation

Prevention of First-tier Tribunal SEND appeals

The 109 LAs reported a total of 3003 appellants making contact with their local mediation service in order to access information about mediation, as required under the 2014 Act before making an appeal to the Tribunal (Figure 1). A total of 1275 (42.5%) took up mediation, of whom 1053 completed mediation, whereas 1728 parents/young people did not take up mediation (57.5% of those making contact with the mediation service). Finally, 817 (77.6%) of parents/young people who completed mediation decided not to appeal, compared with 22.4% (236) who chose to appeal to the Tribunal. In comparison, 622 (36.0%) of parents who chose not to take up mediation, after making initial contact, decided to make an appeal to the Tribunal (Figure 1). This indicates that parents/young people who took up mediation were significantly less likely to appeal to the Tribunal than those who had not taken up mediation: X^2 (1, N = 2781) = 56.59, p < .001. The absolute risk reduction associated with this difference is 13.58% (95% CI: 10.20%, 16.97%), suggesting the difference between appeal in the group that did not take up mediation compared to those who did is approximately 14%. In addition, the Number Needed to Treat is 7.4 (95% CI: 5.9, 9.8), indicating that seven people need to be provided with mediation to prevent one appeal that would have taken place if people had not taken up mediation.

<Figure 1>

Changes in use of mediation over time

The absolute number of new mediation cases in Year 2 increased substantially compared with Year 1, reflecting the transition to the 2014 Act. We therefore explored the relative take up of mediation among parents/young people in the two years. The number of new cases in the 42 LA sample where parents/young people took up mediation, after making initial contact with mediation services, more than doubled over the two years of the study from 297 in Year 1 (46.3%, 95% CIs: 41%, 49% of those making initial contact) to 651 (54.4%, 95% CIs: 50%, 56%) in Year 2 (Table 1). In comparison, there was a reduction from 53.7% (95% CIs: 48% to 56%) in Year 1 to 45.6% (95 CIs: 41%, 47%) in Year 2 in the proportion who did not take up mediation. This was a highly significant increase in the proportion taking up mediation in Year 2

compared with Year 1: X^2 (1, *N* =1837), = 10.96, $p < .001$. The route following contact about mediation was not reported for 3.0% (Year 1) and 3.1% (Year 2) cases.

<Table 1>

Variation between local authorities

We examined the variation among the 42 LAs with respect to the number of parents/young people making contact with mediation services, and the numbers subsequently taking up, or not taking up, mediation, taking into account the total school population in each LA. This resulted in a measure of rate per 10,000 school population, the same measure used in published rates of appeals to the Tribunal.

The range of rates of contact about mediation varied greatly. Ten of the 42 LAs had a low rate of cases where parents and young people made contact about mediation: fewer than one case per 10,000 of school population. By contrast, two LAs had high rates, of between 10 and 11 per 10,000. The rate of take up of mediation followed a similar pattern with 16 of the 42 LAs (38%) reporting between zero and one case per 10,000 of school population taking up mediation, compared to the highest rate in one LA of eight cases per 10,000 of school population. Most LAs reported low rates of parents/young people not taking up mediation: 43% of LAs reported a rate of between zero and one per 10,000 of school population not taking up mediation, whereas three LAs reported rates of between four and seven cases.

The variation between LAs with respect to mediation was complex. Across the 42 LAs, rates of making contact about mediation were very highly correlated with rates of taking up mediation ($r = .98$, $p < .001$). This was largely due to the very low rates on both measures of less than one per 10,000 school population by many LAs, where variability had a very small range. By contrast, the 10 LAs with the highest rates of making contact with mediation services had substantial variation in the rates of take up of mediation (Figure 2). These varied between 5.94 to 10.79 per 10,000 of school population of those LAs making initial contact, and between 2.14 and 8.15 per 10,000 taking up mediation. However, the correlation between making initial contact and take up of mediation was nonsignificant ($r_s = -.07$, $p = .855$). The LAs varied including large counties (3), a city (1), towns (4) and London boroughs (2). With respect to eligibility of free

school meals (FSME), there was a skew towards socioeconomically more disadvantaged LAs with eight of the 10 having levels between 23.9% and 39.2% but there was no significant correlation between FSME and either initial contact for mediation (for eight LAs, two missing data)(r_s =.26, p = .531) or take up of mediation (r_s = .17, p = .693).

With respect to the proportion of the school population whose first language was not English, the range was large (1.2% to 36.4%) with two clusters each of five LAs: range 1.2% to 9.3% and range 25.7% to 36.4%. The correlations with both initial contact for mediation (r_s =.52, p =.130) and take up of mediation (r_s = .20, p =.580) were also nonsignificant.

<Figure 2>

Outcome of mediation

The 42 LAs reported an increase in the number of families that chose to take up mediation, from 297 in Year 1 to 651 in Year 2, reflecting the introduction of the 2014 Act. The percentage of cases where mediation was conducted was associated with a significant increase in the proportion resolved without recourse to the Tribunal, from 71.4% (Year 1) to 81.2% (Year 2), X^2 (1, N = 725) = 8.74, p = .003. Hence, the proportion of families who went on to register an appeal with the Tribunal decreased from 28.6% to 18.8%.

Cases where families declined mediation after the mandatory initial contact, also increased: from 344 (Year 1) to 545 (Year 2). Among these cases where mediation was not taken up, there was a significant increase in the proportion registering an appeal with the Tribunal, from 26.5% (Year 1) to 38.2% (Year 2), X^2 (1, n = 889) = 12.96, p < .001.

Cost-effectiveness of mediation

We report first the cost incurred in providing mediation as a statutory option for parents and young people in disagreement with their LA over decisions about a child/young person's SEN. We next report cost savings through resolution via mediation and then overall cost-effectiveness.

Costs incurred

LA costs: staffing. Local authorities reported a total of 15 types of staff who might be engaged in preparation for a Tribunal, inclusive of mediation services, and 16 types of staff who might be engaged in attending the Tribunal hearing. In practice, not all of these staff were reported by all LAs and the staff involved in any specific case varied. We assumed that certain professionals would likely be involved in each case: for the preparation phase, LA SEN Officer, educational psychologist, administrative support and a legal representative; and, for attendance at a Tribunal hearing, an LA SEN officer, educational psychologist and a legal representative. These options were presented explicitly in the LA survey (allowing them to select the time commitment of each category as appropriate). However, in addition, the survey provided the option of providing open responses, allowing the LA to select the time commitments by occupational grade in their own set of circumstances. The mean numbers of days for preparation and attendance at a hearing by the three main professionals were: LA SEN officer, 10.1 (95% CI: 0, 23.7); Legal representative, 3.0 (95% CI: 1.4, 4.5); and educational psychologist, 2.4 (95% CI: 1.7, 3.0). The other professionals each contributed between 1.1 and 1.7 days

Given the relatively high response rate, mean scores were considered reliable. For other categories of staff, where responses were relatively low and varied between LAs, time involvement was averaged over the total number of respondents, to reflect that some professionals were not present under all types of SEN cases.

<Table 2>

Complexity of cases. Table 2 presents the costs per hypothetical medium complexity case by different pathways. For clarity, the four key cost elements involved are coded by the letters A (mediation costs), B (full appeal preparation costs), C (reduced appeal preparation costs), D (attendance at hearing costs) and E (no attendance costs). Local authorities also provided (Surveys 2 and 3) an assessment of the reductions in costs where a Tribunal appeal was avoided, and an estimate of both the distribution of cases they considered low, medium or high complexity, and the proportion of low, medium or high complexity cases culminating in a hearing following an appeal to the Tribunal.

A medium complexity case that was fully resolved after formal mediation (A), Tribunal appeal (B) and subsequent hearing (D) had an estimated resource cost to the LA of £6,908 (Table 2), assuming the average cost of formal mediation estimated at £853 across survey 2 and survey 3 respondents. An estimate of a case resolved following an appeal to the Tribunal, but without a full hearing taking place is equivalent to the cost of formal mediation (A) plus the full preparation costs (B) but not the costs associated with attendance (E), namely £5,183 (£6,908 - £1,725).

The costs associated with a medium complexity case where mediation is successful includes the cost of mediation (A: £853), the reduced resource costs associated with preparation (C: £1,600), the reduced financial costs associated with legal costs, overheads etc (£122) and reduced other expenses (£180) (E). These amount to costs of £2,754 associated with a successful mediation for a medium complexity case, corresponding to a reduction of £4,155 (rounded) compared to the costs associated with a Tribunal appeal and hearing outcome (Table 2). Where no formal mediation takes place but the Tribunal route is pursued (B), and a hearing is attended (D), the cost was £6,056 (no mediation costs); an appeal to the Tribunal (B) but with no hearing (not D) that results in resolution had a cost estimate of £4,331. For a resolution that is negotiated without formal mediation (not A) or an appeal to the Tribunal/hearing (not B or D), the estimate resource cost associated with a medium complexity case was £1,901.

<Table 3>

The cost increase associated with a high complexity case was approximately 59% compared with a medium complexity case; for a low complexity case the cost reduction was 31% compared with a medium complexity case (Survey 2, 28% and 60% respectively; survey 3, 34% and 58% respectively), see Table 3. In addition, estimates were provided by LAs of the proportion of cases by level of complexity: 44% of cases could be classified as medium complexity, 30% were classified as low complexity; and 26% identified as high complexity. The cost estimates associated with a low complexity case were scaled down by 31% compared with a medium complexity case, and for a high complexity case, the costs were scaled up by 59%. Specifically, for a high complexity case, the avoidance of a Tribunal appeal following successful mediation results in cost savings of £6,608 (£10,988 - £4,380: Table 4).

<Table 4>

As expected, the proportion of cases requiring a Tribunal hearing was associated with complexity: 12% of low complexity cases and 38% medium complexity, compared with 49% of high complexity cases. Local authorities estimated potential cost reductions or savings achieved if appeals to the Tribunal were avoided as a result of a successful mediation process, taking into account the different percentages of cases of different complexity, as 62% (survey 2, 60%, survey 3, 64%).

Tribunal costs. Feedback from Her Majesty's Courts and Tribunal Service (HMCTS 2015) indicated that, in the majority of cases, hearings require attendance of one member of the judiciary, together with one 'expert' (e.g. senior LA officer or head teacher). The length of time required to cover attendance was estimated by HMCTS as one day, with preparation time estimated at a further half a day. Given the volume of paperwork per case, we judged the latter to be a marginal underestimate, and have based calculations on one full day preparation time. Combining labour costs associated with preparation and attendance (i.e. judicial members, expert members and Tribunal clerks), we estimated the total labour costs associated with Tribunal preparation and attendance as £1,817. In addition, we also assessed the administrative costs incurred by HMCTS as £214 per Tribunal (HMCTS 2015). Consequently, combining these estimates, the 'bottom up' analysis suggests the average cost of conducting a Tribunal to be about £2,031.

We supplemented these 'bottom up' analyses, which are likely to provide an underestimate of true costs of delivery (because of complete absence of some categories of costs such as translation costs) by data from the Memorandum of Understanding between HMCTS and the DfE, which essentially allows the HMCTS to bill the DfE for appeals received. The cost of a two person panel (i.e. Tribunal judge and a non-legal member) was £2,380 per appeal. Given the comparability of the two approaches, we used a cost of £2,380 in the Tribunal cost of operation and administration.

Parent direct costs. Parent interviews provided information on direct and indirect costs associated with 48 appeals to the Tribunal, of which 45 cases went to a hearing. Data were provided on four types of direct costs for which the averages *per family affected* were: first, costs to parents of education while the child

was out of school or waiting for agreement, approximately £7,000; second, costs associated with the acquisition of private assessment reports (e.g. educational psychologists), approximately £2,100; third, with respect to costs associated with third party support, predominantly solicitors, lawyers and witnesses at the Tribunal hearing, approximately £6,800; fourth, other direct administration costs, approximately £900.

Only eight of the 48 cases had not incurred quantifiable costs, for example as they were in receipt of legal aid (although this is a cost on the public purse), whereas 40 indicated they had incurred some direct costs. Across the total number of cases where the eventual outcome was a Tribunal appeal, the average direct costs incurred by parents was £4,843 (across both pathways – i.e. mediation used or not). We did not disaggregate the costs for these two pathways as mediation was free for parents/young people.

Parent opportunity costs. The time reported by parents that were involved in preparation associated with a Tribunal appeal and hearing ranged from 4 to 52 weeks, averaging 22.9 weeks. The average total number of hours spent in relation to the appeal for the period was 13.8 hours per week, although there were some very high outliers, for example 75 hours per week. To estimate a monetary value associated with the opportunity cost, we estimated a fraction of the relevant hourly wage associated with the specific occupation of the parent from the Labour Force Survey. Total opportunity costs, combining information in hours and associated time-cost, was estimated at £1,456 per person (ranging from £0 to £3,625). We consider these estimates of the opportunity costs associated with Tribunal appeals to be conservative estimates of the 'true' opportunity costs. We did not disaggregate the costs for the mediation versus no mediation pathways as the opportunity costs associated only with mediation were reported as minimal.

A combination of the average direct cost (£4,843) and the average opportunity cost (£1,456) produces an estimate of total costs associated with a Tribunal appeal of £6,300 per family (including both pathways i.e. using mediation and not using mediation). The range was substantial: from zero (£0) to three families in excess of £20,000.

Total costs. In this section, we combine the estimated costs of LAs (by complexity) and the additional costs incurred by HMCTS and parents and finally weight the aggregate costs to the distribution of cases according

to their complexity. For a representative case, the cost associated with the mediation route, a full appeal and hearing was £16,935; the aggregate costs associated with mediation that is associated with no appeal is estimated at £2,917 (Table 5).

<Table 5>

Cost savings through resolution via mediation

We now compare the overall estimate of costs for the two pathways, taking account of the incidence and distribution of low, medium and highly complex cases: Pathway 1 - mediation services taken up and Pathway 2 - mediation services refused. Of the 3,003 cases of initial contact with mediation services, 42.5% (*n* = 1,275) followed Pathway 1 (mediation) and 57.5% *(n* = 1,728) followed Pathway 2 (no mediation: Figure 1). Of those on Pathway 1, 817 cases (64.1%) were resolved successfully without recourse to the Tribunal; 236 cases (18.5%) were registered for an appeal and the remaining 222 cases (17.4%) were still under mediation at the time of the LA survey ('outcome unknown').

For the 222 'outcome unknown' cases, we calculated a comparable 'recourse to Tribunal' rate of 22.4% (i.e. 236/1,275-222), that is, equivalent to the incidence of those cases that had applied to the Tribunal where the outcome of mediation was known. This approach suggests that of the 222 cases, about 50 would be likely to result in an appeal to the Tribunal, whereas the other 172 would be successfully resolved without a Tribunal appeal. Of the 50 cases for Tribunal appeal, we estimated that 16 would be resolved following a Tribunal hearing and 34 would be resolved without a hearing. This estimate is derived from applying the percentage of Tribunal appeals that would be expected to conclude with a full Tribunal hearing, based on the information provided by LA respondents for each type of case (Table 5).

Combining all the various data components, the analysis suggests that, overall, under Pathway 1 (mediation), 7.3% of cases end up with a Tribunal appeal and hearing, compared with 11.8% along Pathway 2 (no mediation); 15.1% of cases proceeding to formal mediation were resolved by a Tribunal *without* a hearing compared with 24.2% along Pathway 2 (no mediation); and 77.6% were resolved without a Tribunal appeal, compared with 64.0% along Pathway 2 (no mediation).

Cost-effectiveness

Finally, we compared average costs of Pathway 1 (mediation) versus Pathway 2 (no mediation). Combining data on incidence and distribution of low, medium and high complexity cases across the two pathways, we generated an overall estimate of the cost of a case following Pathway 1 compared to a case following Pathway 2 (Table 6). The estimation suggests that the cost of a Pathway 1 (mediation) case was £5,231 whereas the cost of a Pathway 2 (no mediation) case was £5,730, a difference of £499. In aggregate, across all cases, this represents a total saving of £636,462 associated with the mediation pathway for the resolution of SEN disagreements.

<Table 6>

Discussion

A major aim of the Children and Families Act 2014 was to improve the procedure for the resolution of disagreements between parents of children and young people with SEN and the LA. A new system was implemented which, the Government hoped, would increase parents' confidence in the SEN system and also reduce the numbers of parents appealing to the First-tier Tribunal SEND about LA decisions regarding EHC plans, in particular the refusal to conduct an assessment under the Act, refusal to issue an EHC plan and the content of the plan if drawn up. A key component was the statutory requirement to provide independent mediation as an option to resolve disagreements, with the aim of reducing the number of appeals to the English First-tier Tribunal SEND. Our study examined the effectiveness and cost effectiveness of the statutory offer of mediation.

Effectiveness

Compared to earlier studies (Henshaw, 2003 – a single case study; Ministry of Justice 2014 – a small scale pilot study), our results add rigour, depth and scale to the study of the effectiveness of mediation in reducing SEN appeals to a higher authority in England, the First-tier Tribunal SEND. Similarly to these two studies, our results showed the effectiveness of routinely offering the option of mediation. Overall, parents/young people who took up mediation were highly significantly less likely to appeal to the Tribunal

than those who had not taken up mediation, indicating the effectiveness of mediation as judged by this measure: 77.6% of those who undertook mediation did not appeal to the Tribunal. In addition, only 22.4% of parents/young people who took up mediation went on to appeal. This represents a 13.6 percentage point lower likelihood of registering a Tribunal appeal than parents who did not take up mediation, resulting in a substantial reduction in terms of human, as well as financial costs.

Similar benefits have also been indicated in the U.S. where mediation rates not related to due process are more likely to result in agreement, national average 66% (CADRE 2018a), and where the number of due process complaints have reduced over time (CADRE 2018b). The number of appellants in the U.S. requesting mediation increased by 24.7% from 2006-07 up to the most recent year, 2016/17 and mediation agreements by 19.7%. The trend in the present study in England was also one of growth, albeit across just the two years of the research, with a highly significant increase in the percentage of potential appellants deciding to try mediation first, comparing Year 2 with Year 1.

Going beyond our operational definition of effectiveness, our study raised some important questions about the effectiveness of the system of disagreement resolution as a whole. First, there was substantial variation between LAs in the proportion of parents/young people making contact with a mediation service (between 1 per 10,000 of the school population to between 10 and 11 per 10,000) and also the rate of take up of mediation (between zero and eight per 10,000 of the school population). Furthermore, the correlation between making contact and taking up mediation varied greatly. Variation between states in the U.S. is similar although the statistical basis is of percentage agreement rates (CADRE, 2018c).

Cost effectiveness

In order to estimate the costs that might be saved if mediation reduces the number of appeals to the First-tier Tribunal SEND, we examined the range of costs of different relevant elements in the appeal system, those of the LA and Tribunal, and also those of the appellants, both direct and opportunity costs. We drew on the information provided by the LAs, Ministry of Justice (First-tier Tribunal SEND) and a sample of parents. A key factor that has been incorporated in our analysis is the complexity of cases, as defined by

the LAs. As a result, we have produced estimates for the two pathways (mediation and no mediation) and whether or not a hearing was held, taking into account both incidence and complexity of cases.

Although the earlier study by Harris and Riddell (2011) did not collect cost data, they reported that LAs in their sample considered that mediation led to cost savings (also Riddell, et al., 2010). In the present study, we present more rigorous evidence that there were cost savings associated with disagreement resolution that avoided recourse to the Tribunal. The lower incidence of appeals and hearings by the Tribunal associated with the mediation pathway resulted in a lower aggregate cost compared to the non-mediation pathway: £5,231 compared to £5,730. The analysis suggests that, for the 1275 cases that took the mediation pathway, the aggregate cost savings that were associated was in excess of £600,000, with an average cost saving of just under £500 per case.

These savings may appear relatively small but they are important. For example, politically, the cost was one of the factors leading to the introduction of a statutory system of dispute resolution mechanisms and formal procedures in the U.S., initially in the Education for All Handicapped Children Act (PL 94-142) and then in the Individuals with Disabilities Education Act 1990, including subsequent revisions (Reiman et al., 2007). Studies have indicated the importance of costs in that system, in particular, to parents. For example, Daggett (2004) reported a cost of between $8000 and $12000 per case by mediation or due process compared with $98,000 for a litigation case. The fact that parents in England incurred often substantial costs in supporting their appeal process has previously been acknowledged (e.g. Runswick-Cole 2007; Kids First, 2013; SOSISEN 2014). Our study is the first to include costs incurred by parents based on their accounts of quantified and detailed estimates of direct and indirect cost and the first to include these costs in examining the cost-effectiveness of mediation prior to appeal.

Limitations

This study was initiated during the first year following the enactment of the Children and Families Act 2014. During the period, all LAs were managing changes in procedures: that for the determination of statements of special educational need was being replaced by the new procedure for EHC plans. Consequently,

comparisons between Year 1 and Year 2 data were not always possible. Nevertheless, the study did capture views from over two thirds of English LAs, with longitudinal data from 42 LAs. Second, the main source of data comprised surveys. However, these were completed by education officers with responsibility for the LA's SEN system. The evidence base for our study of effectiveness was based primarily on three surveys. Furthermore, the cost effectiveness study was also primarily based on data from the surveys, although additional information was available from individual parental interviews. The creation of the costs model was informed by LA estimates following Survey 1 in order to include the important variable of case complexity and its interaction with incidences, which varied by LA. These estimates, provided by LA SEN officer respondents, allowed each respondent to provide comparisons between three levels of complexity in the LA context, but were subjective.

This led to the use of scaling factors. Parent costs were also estimates obtained by qualitative interviews from a relatively small and non-representative sample. For this reason, outlier estimates were excluded, resulting in conservative estimates of parent costs being used in our analysis. Overall, therefore, there are limitations in the data but also rigorous approaches to mitigating these limitations. Given these factors, we consider that the estimate cost savings are conservative estimates of true savings. Furthermore, given the novelty of statutory mediation as an option within disagreement resolution, a greater impact of mediation might be expected over time as that system beds in.

Conclusions

This is the first study on this scale of the use of mediation as part of the disagreement resolution procedure for children and young people with SEN under the Children and Families Act 2014. The study captures the first two school years (2015-17) following the Act. The research has demonstrated that over this period the statutory requirement that parents/young people wishing to make an appeal to the First-tier Tribunal SEND must initially contact a local mediation service has resulted in a substantial increase in the percentage taking up mediation; and that those who go on to take up mediation are significantly less likely to make an appeal to the Tribunal than those who do not take up mediation. Furthermore, there are cost savings to be made of an average of just under £500 per case.

This positive result must, however, be considered in the context of the overall development of the SEN system in England, in particular the demands on the schools and services. The most recent DfE statistical report (DfE, 2019: NB this uses SEN2 returns from schools, not the school census data) indicates that, firstly, the number of children and young people with a statement in 2010 was 25,887 but that in 2018 the equivalent number with EHC plans was 48,907 – almost double, and an increase of 6745 since the previous year, 2017. Secondly, the number of new EHC plans started in 2018 was 38, 905, an increase from 25887 in 2010, and an increase from 27923 in the 2017. Furthermore, the percentage of EHC plans being issued within the requisite 20 weeks has reduced from 65% to 60% between 2017 and 2018. These national statistics suggest that, SEN systems are coming under more pressure. The challenge to meet children and young people's special needs therefore becomes more difficult. Mediation is not a panacea for all these negative pressures but our evidence suggests that it is an effective element in resolving disagreements: where it is successful in avoiding the need for an appeal, it reduces costs and shortens the duration of the disagreement, and reduces pressures on families, provided that they consider the outcome reasonable. As a result, although the positive impact may be small compared with higher investment in appropriate specialist provision and resources, mediation can make positive contributions to both the SEN system as a whole, including costs, and to families with a child who has severe and complex SEN.

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