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**Mediation and Conciliation in Disputes about Special
Educational Needs: Proportionate Dispute Resolution or
Justice on the Cheap?**

**A thesis submitted to the University of London for the
Degree of Doctor of Philosophy.**

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Declaration

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Abstract

The thesis identifies goals of proportionate dispute resolution (PDR). The operation of the decision-making and dispute resolution processes relating to the provision of remedial help for children with special educational needs (SEN) is examined to assess attainment of these goals.

A factual basis is established for the analysis by describing the relevant legislative provisions and what is known about their operation from existing empirical research. The exercise of discretion is examined. A theoretical framework is devised to enable consideration of the balance of trade-offs; collective goals and individual interests; and adequacy of redress. The SEN decision-making and appeals processes are analysed with reference to this framework. Parties to SEN disputes are parents and Local Education Authorities (LEAs). Attainment of PDR goals by the formal SEN dispute resolution mechanisms is assessed and the mechanisms compared.

In 2002, obligations were imposed upon LEAs to provide informal disagreement resolution services in the form of conciliation and mediation. The strengths and weaknesses of these dispute resolution models are considered with reference to theoretical and empirical works. The effect of their introduction is then assessed with reference to the framework and attainment of PDR goals. None of the formal or informal dispute resolution mechanisms assure attainment of all of the PDR goals. Neither does the operation of the system as a whole.

Analysis of the children's services complaints model using the framework reveals that this model assures attainment of all PDR goals and affords adequate redress. The model appears to resolve problems identified in the SEN dispute resolution process, and to be a promising candidate both for reform of that process and for a unified system of education and children's services complaints. The role of children in the process and possibilities for one-door access and a single system are considered.

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List of Acronyms

ADR	Alternative Dispute Resolution
ALJ	Administrative Law Judge
CSCP	Children's Services Complaints Procedure
CAB	Citizens' Advice Bureau
DBP	Disability Benefit Programme
DCSF	Department for Children Schools and Families
DDA	Disability Discrimination Act 1995
DCA	Department of Constitutional Affairs
DFE	Department for Education
DFEE	Department for Education and Employment
DFES	Department for Education and Skills
DRC	Disability Rights Commission
DRS	Disagreement Resolution Service
EP	Educational psychologist
IEP	Individual Education Plan
IPS	Independent Parental Supporter
IPSEA	Independent Panel for Special Educational Advice
LEA	Local Education Authority
LGO	Local Government Ombudsman
MoJ	Ministry of Justice

PEACH	Parents for the Early Intervention of Autism
PEP	Principal educational psychologist
PPO	Parent Partnership Officer
PPS	Parent Partnership Service
SEN	Special educational needs
SENDA	Special Educational Needs and Disability Act 2001
SENDIST	Special Educational Needs and Disability Tribunal
SENT	Special Educational Needs Tribunal

Chapter One

Introduction

Behind the most practical decision-making lie matters of theoretical interest. It is hoped that the discussion of those issues will not only be of interest in its own right, but that it may also be of practical interest in helping to identify some of the problems that are encountered in any area of discretionary authority. (Galligan 1986 p.3).

1.1. CHAPTER SUMMARY

This chapter describes the structure of the thesis and its methodology; explains the theoretical framework of the analysis; describes the context of SEN decision-making and dispute resolution; sets out Mashaw's bureaucratic justice models and discusses the relevant statutory provisions with reference to the models.

1.2. INTRODUCTION TO THE THESIS

1.2.1. Central Question addressed by the Thesis

The term 'Proportionate Dispute Resolution' (PDR) is taken from the White Paper 'Transforming Public Services: Complaints, Redress and Tribunals' published in 2004 ('Transforming Public Services'). This states that decision-making systems must be designed to minimise errors and uncertainty, and that, where mistakes are made, the 'system for putting things right' must be proportionate. That is, it should reflect the following 'standards':

- **there should be no disproportionate barriers to users in terms of cost, speed or complexity;**
- **misconceived or trivial complaints are identified and rooted out quickly;**
- **those with the power to correct a decision get things right and changes feed back into the decision-making system so that there is less error and uncertainty in the future; and**
- **disputes are dealt with cost-effectively. (Ibid. para 1.7)**

The standards are aspirational, therefore they are referred to in the thesis as '**the PDR goals**'.

This thesis is an examination of the decision-making and dispute resolution processes relating to the provision of remedial help for children with special

educational needs (SEN). Decisions about the nature of children's needs and the help they receive are made by schools and Local Education Authorities (LEAs). Formal dispute resolution mechanisms for resolving disputes between parents and LEAs are the Special Educational Needs and Disability Tribunal (SENDIST), the Local Commissioners for Administration (referred to as the Local Government Ombudsman (LGO))¹, and the Administrative Court. The Special Educational Needs and Disability Act 2001 imposed an obligation upon LEAs to make arrangements for informal disagreement resolution services, and to make schools and parents aware of these services. The thesis assess firstly whether the formal mechanisms assure proportionate dispute resolution, and secondly what is added by the introduction of informal disagreement resolution services.

The SEN statutory framework is described alongside information about its operation drawn from empirical studies to establish a factual basis for the analysis. The first stage of the analysis comprises consideration of the operation of discretion. The second stage takes as its central reference point the work of Jerry L. Mashaw and Michael Adler. Their work was chosen because, in order to draw meaningful conclusions about the operation of decision-making and dispute resolution processes, it is necessary to examine the operational effects of the trade-offs employed, particularly the effect of the trade-off between collective goals and individual interests. These themes are the focus of two studies - Mashaw's study of a disability benefit programme (Mashaw 1983) and Adler's study of school admission appeals (Adler 1989). Observations drawn from Mashaw and Adler's work are applied to the operation of SEN decision-making and dispute resolution enabling conclusions to be drawn about the effects of adopting particular configurations of trade-offs and models for balancing individual interests and collective goals.

¹ The thesis refers to the LGO as a formal mechanism in contrast to mediation and conciliation which are referred to as informal. 'Transforming Public Services' refers to Ombudsmen as informal mechanisms in contrast with courts and tribunals.

The basis of analysis in the thesis is different to that employed in recent studies of the SENDIST². The PDR goals are not focused exclusively upon dispute resolution processes. They envisage improvement of initial decision-making, case management and outcomes of complaints informing future decisions. Justice, if it features at all, is about ‘getting things right’ in terms of correction. There is no reference to the Franks’ criteria of openness, fairness or impartiality (Franks 1957). This signals a policy leaning towards substantive justice, as opposed to procedural fairness, and towards Mashaw’s model of bureaucratic rationality³ which is driven by the objective of realisation of the legislative will at the lowest possible cost. The thesis makes no comment upon the merits of the definition of PDR, regarding its goals simply as the declared objective of administrative reform. It does consider procedural fairness.

The PDR goals provide a benchmark for the analysis. It is possible to identify which goals each SEN dispute resolution mechanism assures the attainment of. But it is necessary to go further. Mashaw suggests that evaluation with reference to false-absolutes, such as ‘accuracy’, ‘efficiency’ or ‘fairness’ is a substitute for critical analysis. In order to draw meaningful conclusions, it is necessary to evaluate trade-offs among goals. He also suggests that this is both problematic and unsatisfactory. Whilst, for example, a cost-benefit analysis of the provision of representation may be straightforward, weighting the importance of accuracy against delay, where one is traded-off in favour of the other, is problematic. Any conclusions would be open to argument.

For this reason, and because there is no indication in policy documentation that any of the PDR goals should have greater weight, the thesis does not attempt to weight goals. But it goes further than simply determining whether they are attained. Where a goal is not attained, the trade-offs leading to this are considered. This enables observations to be drawn about what needs to be

² Harris’s assessment criteria were independence, impartiality, skill, speed and an enabling approach giving due weight to the views of parents and children (Harris 1997). Leggatt considered whether the tribunal offered an enabling approach which supported the parties in a way that would give them confidence in their own abilities to participate in the process (Leggatt 2001). Genn used Leggatt’s benchmark in terms of access, fair hearings and outcomes (Genn 2006).

³ The model is described on p. 31 and discussed in detail in Chapter Four.

changed in order to attain goals, and for comparisons to be made between different mechanisms to determine which dispute resolution model provides the optimum assurance of PDR. The thesis does not simply substitute PDR goals for access to justice criteria as false-absolutes and determine whether each are met, it adds depth to existing analysis of SEN dispute resolution; reaches new conclusions, and makes cohesive and sustainable arguments for change.

‘Transforming Public Services’ suggests that different redress mechanisms have advantages and disadvantages, and recommends combining mechanisms to enable a responsive service based upon choice – a ‘one-door approach’. It makes few practical suggestions, however, as to how this objective might be achieved. In light of this recommendation, it is necessary to consider how redress is provided for each of the different types of grievance that commonly arise in SEN disputes. Adler, adopting PDR as a reasonable conception of administrative justice and an appropriate starting point for legislative reform, has developed a composite typology of administrative grievances (Adler 2006c). The typology is used in the thesis not as a tool for empirical research, as was envisaged by Adler, but as a tool to draw observations about various dispute resolution models in order to reach conclusions about:

- the ability of individual SEN dispute resolution mechanisms to deal with each of the grievances identified;
- the detrimental effects of having a plethora of dispute resolution mechanisms in operation;
- the advantages of mediation and conciliation in enabling all aspects of a dispute to be dealt with in one arena; and
- provision of a ‘one-door’ service for complaints about the provision of education and children’s services by local authorities and schools.

The analysis situates SEN decision-making and dispute resolution as part of an overall system of providing education and other services to children. There has been a tendency in previous work to focus upon SEN in isolation⁴. As the Audit Commission observe (Audit Commission 2002b), it is difficult to see how

⁴ Harris (2007) is an exception.

teaching in mainstream classes of 30 children, including children with significant learning difficulties and physical disabilities, can operate effectively for all of those children unless decisions are made with reference to both the needs of individual children and the needs of the class. Holistic decision-making necessitates crossing the boundaries of legislation that creates different parameters for decision-making and different dispute resolution processes. This thesis constitutes a first attempt to rationalise SEN dispute resolution against a background of inclusion and integration of education and children's services with a view to suggesting how PDR may be assured within a genuinely responsive system.

It is unlikely that any dispute resolution system can be judged objectively perfect. All involve trade-offs: greater accuracy may lead to delay; participation may increase cost; flexibility in decision-making may lead to disparities; a proliferation of rules may lead to unfairness caused by lack of flexibility. The objective of the thesis is to suggest the good within the constraints of the possible. Mediation was introduced following recommendations made in a major review of the tribunal system⁵ as an 'obvious' solution to situations where conflict leads to a breakdown in communication. A wider question that appears not to have been considered is whether mediation is appropriate in *citizen v state* disputes in the absence of context-based adaptations to reduce the risk of unfairness arising from power-imbalance.

The thesis is not intended to be critical of the SENDIST. Various studies have concluded that the tribunal operates well, within the remit it has been given⁶. Tribunal members and staff endeavour to redress power-imbalance and to provide assistance. What the thesis questions is whether a system that places LEAs in a position of defending their decisions at a tribunal following adversarial pre-hearing procedures can be said to secure the optimum balance of trade-offs in the context of resolving disputes about whether children who have learning difficulties receive the help they need. Such a system appears likely to

⁵ Leggatt 2001.

⁶ These studies are referred to in Note 2.

generate and exacerbate conflict in circumstances where it is important that children, parents and professionals have a co-operative relationship.

It is stated in a report by the House of Commons Education and Skills Committee that the number of appeals lodged represents less than 1% of children with SEN (Education and Skills Committee 2006 p.52). There is no information about why the numbers are so low. The (then) Department for Education and Skills (DfES) suggested, in evidence given to the Committee, that it is an indication that the system is working well. The Committee did not accept this, concluding that there were significant problems with access for particular groups. The evidential basis for their conclusion is unclear from the report. They refer to a statement by a head teacher who said, 'tribunals are a complicated process and it's often only the dogged, middle-class parents that are prepared to take the process on.' They also cite the high level of variation in the number of appeals across different local authorities as reasons for this conclusion.

The DfES suggested to the Committee that there is no clear link between numbers of appeals and areas of social deprivation. The Committee, therefore, acknowledged that the issue is not as straightforward as wealthier areas having more appeals, or there being higher levels of appeals in areas where more adverse decisions are made. The DfES response is misleading. Hackney, for example, is an area of high deprivation with a high number of appeals. The implication, therefore, is that there is no link between class and high numbers of appeals. But this is based upon an assumption without any information about the class of parents who have appealed. It is possible that every appeal was made by a middle-class parent. It cannot be assumed that there are no middle-class parents living in Hackney.

The link between class/educational background, and access in relation to SENDIST appeals can be made through other sources. Studies by Harris (1997), Riddell et al. (1994) and (2002), Knill and Humphries (1996), Evans (1998) and Hall (1999) identify a predominance of middle-class better educated parents. Even if the picture may be more complicated, as Evans says:

It would be unusual, given all the evidence which suggests that middle-class families benefit more than others from the Welfare State in general (Wilkinson 1994), and from the education service in particular (Mortimore and Whitty, 1997; Smith and Noble 1995), if it were not the case that use of the Tribunal was skewed towards middle-class families. (Evans 1998 p.59).

Research by Genn on perceptions of tribunals (including SENDIST) by minority ethnic users (Genn 2006) identifies a reluctance on the part of appellants to become involved in legal proceedings because of anticipated expense and complexity. Dominance of the criminal justice system in the public imagination leads to misconceptions about what to expect and deters people from seeking redress. Findings in this study are consistent with Genn's earlier research on what people do and think about going to law generally (Genn 1999a), which indicates that people find accessing formal dispute resolution mechanisms stressful. This research concluded that, faced with the choice of either invoking an impartial dispute resolution mechanism with all that involves, or simply abandoning their claim, more than half of the participants abandoned their claim. Possibly parents of children with SEN are making the same choice for similar reasons, indicating the hidden potential demand for justice Genn identifies.

If it continues to be the case that few parents of children with SEN appeal and that those who do make gains for their children in terms of provision, children whose parents do not appeal may be disadvantaged both in terms of not making a gain, and in terms of someone else's gain depleting resources available for their child. If large numbers of parents are not accessing the SENDIST, for whatever reason, a solution might be to take steps to make it more accessible by educating parents so that they are competent and confident to enforce state obligations towards their children. The risk is that this may not resolve all of the problems this thesis identifies; that it would fail to assure PDR, and would result in a race perpetuating a fundamental unfairness. Those who appealed first would exhaust available resources. Another solution might be to strongly encourage settlement. But this would need to be considered against a background of power-imbalance. Arguably what is wanted is a system that is easily negotiated by parents and which facilitates choice between 'safe' options.

1.2.2. Format

The structure of the thesis evolves in four stages:

- *Process and context* – an outline of the statutory framework for SEN decision-making and dispute resolution and an evidence-based description of the processes, highlighting tensions;
- *Framework and analysis* – examination of the operation of discretion; analysis of the SEN decision-making and formal dispute resolution processes with reference to the work of Mashaw and Adler and the goals of PDR;
- *ADR* – analysis of changes to the system brought about by the introduction of mediation and conciliation and issues relevant to their use in the context of SEN;
- *Reform* - suggestions for change informed by the analysis and the wider context of disputes involving children, rights to education and children's rights.

The detailed sequence of the thesis is to:

- describe the SEN decision-making process with reference to relevant studies and to describe Mashaw's justice models (Chapter One);
- describe the formal dispute resolution mechanisms as above (Chapter Two);
- consider the exercise of discretion in SEN decision-making, the extent to which its exercise is limited or influenced, and the source of such limitations and influences (Chapter Three);
- analyse the SEN decision-making and dispute resolution processes with reference to the work of Mashaw and Adler and, using the information and observations in previous Chapters, assess whether PDR and adequate redress are assured (Chapter Four);
- describe the operation of mediation and conciliation in the SEN context;
- with reference to theoretical work and recent research studies, describe the advantages and disadvantages of mediation and conciliation and key issues such as power-imbalance, low take-up, oversight and monitoring, pressure to mediate, and cost-effectiveness; and

- consider what the introduction of mediation and conciliation achieves in terms of the balance of trade-offs; collective goals and individual interests; assurance of PDR; and redress (Chapter Five);
- describe a possible alternative model and analyse it with reference to the above;
- identify the need for a 'one-door' approach and unified system of children's complaints (Chapter Six);
- consider the role children should play in the decision-making and dispute resolution processes;
- draw observations and conclusions about possible reform of the SEN dispute resolution system (Chapter Seven).
- Appendix – Bibliography and data sources for studies cited.

A considerable amount of stage-setting is needed before embarking upon the meat of the theoretical analysis which then evolves in stages. The format of having a formal literature review as the second chapter did not work well within this framework. As a result, critical analysis of relevant literature is conducted as each study is referred to in the text, and data sources are set out in an Appendix.

1.2.3. Methodology

The thesis analyses SEN decision-making and dispute resolution as administrative law processes in the light of recent theory on administrative justice, developments in administrative law jurisprudence and case law. The work of Mashaw and Adler is used to establish a framework for examination of the exercise of discretion and evaluation of the operation of the balance of trade-offs against the objectives of the substantive justice model known as PDR. Whilst there is some reference to statistical and empirical data, this thesis is not an empirical study. It is set in the mould of classical administrative law studies, drawing where necessary on empirical information to provide informed analysis.

1.2.4. Terminology

The following terms are used:

Adversarial-style pre-hearing procedure - a procedure used typically in disputes in the civil courts. Each party is responsible for the preparation and presentation their own case. The procedure encourages each party to discredit their opponent's case.

Inquisitorial procedure – an adjudicator takes full control of the process, may inspect files, call witnesses and adjudicates on a dispute with, or without, a hearing.

Inquisitorial hearing – an oral hearing at which an adjudicator takes control of the proceedings and determines the extent to which the parties participate. The adjudicator may call evidence.

*Enabling hearing*⁷ – an oral hearing at which the parties are supported in ways that give them confidence to participate, and where the adjudicator compensates for appellants' lack of skill or knowledge. In contrast to adversarial hearings where the adjudicator maintains a neutral position, intervention by the adjudicator to assist the weaker party is legitimate.

DFE, DFEE, DFES, DCSF – the Government Department with oversight for SEN is the Department for Children, Schools and Families (DCSF). This was formerly the Department for Education and Skills (DFES); before that the Department for Education and Employment (DFEE); and before that the Department for Education (DFE). All of these abbreviations are used in the text.

DCA, MoJ – the Government Department with oversight of administrative justice is the Ministry of Justice (MoJ). This was formerly the Department of Constitutional Affairs (DCA). Both abbreviations are used.

LEA – Local Education Authority. Section 162 of the Education and Inspections Act 2006 (c. 40) introduces a power to repeal by order references to local education authorities. Since no order has been made under the section, the thesis refers to LEAs, as this is the term currently referred to in relevant legislation.

SENT/SENDIST – the appellate body for SEN appeals was created in 1993 as the Special Education Needs Tribunal (SENT). It changed jurisdiction in 2002, becoming known as the Special Educational Needs and Disability Tribunal (SENDIST). Both abbreviations are used.

⁷ Terminology taken from Leggatt 2001.

There are numerous references to the White Paper ‘Transforming Public Services: Complaints, Redress and Tribunals’, which is referred to throughout as ‘Transforming Public Services’ and to reports by the House of Commons Education and Skills Committee. These are referred to as ‘the Select Committee’s 2006 Report’ and ‘the Select Committee’s 2007 Report’.

1.3. LEGISLATIVE PROVISIONS

1.3.1. Introduction

The legislative provisions are set out in Chapter 1 of Part IV of the Education Act 1996. A child has SEN if he has a significantly greater difficulty in learning than the majority of children of his age; he has a disability that either prevents or hinders him from making use of educational facilities of a kind generally provided for children of his age in schools within the area of the LEA; or he is under the age of five and is, or would be if special educational provision were not made for him, likely to have a significant difficulty in learning or a disability when of, or over, that age⁸. ‘Special educational provision’ means, in relation to a child who has attained the age of two, educational provision that is additional to, or otherwise different from, the educational provision made generally for children of his age in schools maintained by the LEA (other than special schools) and, in relation to a child under that age, educational provision of any kind⁹.

1.3.2. Governing bodies’ obligations towards children with SEN

Governing bodies of maintained schools must use their best endeavours, in exercising functions in relation to the school, to secure that the needs of children with SEN are provided for¹⁰; to secure that a child’s needs are made known to all who teach him¹¹; and to secure that teachers are aware of the importance of identifying, and providing for, the needs of pupils with SEN¹². There is a ‘responsible person’ for SEN – usually the head teacher or a

⁸ Section 312(2) of the Education Act 1996.

⁹ Ibid. Section 312(4).

¹⁰ Ibid Section 317(1)(a)

¹¹ Ibid Section 317(1)(b).

¹² Ibid. Section 317(1)(c).

governor¹³. Those concerned with making special educational provision for a child must secure that he engages in the activities of the school along with the other children, provided he still obtains the additional help he needs and this is compatible with the efficient education of his peers and the efficient use of resources¹⁴.

Schools and LEAs are obliged to have regard to the SEN Code of Practice (SEN Code of Practice 2001)¹⁵. For the majority of children, their school identifies learning difficulties and provision is made. This is referred to as 'School Action' and 'School Action Plus'. The child is given an Individual Education Plan (IEP) setting out his difficulties, targets, and remedial strategies. The IEP is reviewed and updated on a regular basis. If a child is considered to be failing to make progress after the school has exhausted all available resources including specialist help, it may become necessary for the LEA to conduct an assessment of his needs (Ibid. Chapter 4).

1.3.3. LEAs' Obligations towards children with SEN - The assessment and statementing process

LEAs must exercise their powers with a view to securing that they identify children for whom they are responsible with SEN and for whom it is necessary to make special educational provision¹⁶. LEAs have discretion to decide when an assessment of a child's needs is necessary¹⁷, and will do this with reference to the principles in the SEN Code of Practice. In contrast to the considerable level of discretion afforded to LEAs in relation to the decision as to whether to assess, the assessment process must be conducted in accordance with the rigidly prescribed procedures and time limits in Schedule 26 of the 1996 Act. If, in light of an assessment of a child's educational needs and any representations made by the child's parent, it is necessary for an LEA to determine special

¹³ Defined in section 317(2).

¹⁴ Ibid. Section 317(4).

¹⁵ Ibid. Section 313(2).

¹⁶ Ibid. Section 321.

¹⁷ Ibid. Section 323.

educational provision, they must make and maintain a statement of special educational needs¹⁸.

The process that must be followed for the making of statements is set out in Schedule 27. The Schedule provides that a proposed statement must be served upon the child's parents. They must then be invited to express a preference for the maintained school or maintained special school they wish their child to attend. The LEA must comply with this preference unless they consider the school is unsuitable or the child's attendance would be incompatible with the efficient education of other children at the school or the efficient use of resources. The LEA has discretion to decide whether it is reasonable not to comply with the parents' preference, but if they decide that none of the reasons for refusing to comply with the preference apply, they must name the school in the statement. The Governing Body of any school proposed to be named in a statement must be consulted, and where the school is situated in the area of another LEA, that LEA must also be consulted¹⁹.

Parents must be advised that they have the right to make representations on the content of the statement and to request a meeting with a person nominated by the LEA for this purpose. Following this meeting, where parents disagree with the advice given in any report, they have the right to request a meeting with the person who has provided that advice. The process takes place within prescribed time limits²⁰. Where the LEA decide it is not necessary to make a statement, they must issue a Note in Lieu²¹. Statements must be maintained, kept confidentially, and reviewed on an annual basis²². A decision to cease to maintain a statement must be made formally, and the child's parents notified²³. Parents may appeal to the SENDIST in respect of the following: refusal to

¹⁸ Ibid. Section 324.

¹⁹ Ibid. Schedule 27 paragraph 3 and 3A.

²⁰ Ibid. Schedule 27 paragraph 4.

²¹ Ibid. Section 323.

²² Ibid. Schedule 27 paragraph 7 and the Education (Special Educational Needs) (England) (Consolidation) Regulations 2001 (S.I. 2001/3455).

²³ Ibid. Schedule 27 paragraph 9.

assess²⁴; refusal to make a statement²⁵; the content of a statement²⁶; refusal to re-assess²⁷; changes to the provision in a statement following a review²⁸; and a decision to cease to maintain a statement²⁹.

Formal guidance as to the format of a statement is set out in the Education (Special Educational Needs)(England)(Consolidation) Regulations 2001. All statements follow this format. Part 1 contains details of the child and the person(s) responsible for him; Part 2 sets out the special educational needs identified with reference to any representations made by the parent(s) and the various reports; Part 3 sets out the educational provision in terms of the overall objectives, detailed provision to meet each identified need; arrangements for establishing short term targets and for regular monitoring of targets, and any disapplication or modification of the National Curriculum; Part 4 sets out the identified school or type of school that can deliver the provision, or any arrangements whereby provision is made other than in a school; Part 5 describes any non-educational needs the child has and Part 6 sets out the non-educational provision that the LEA proposes to make available. There are prescribed appendices consisting of parental representations and evidence, and reports from the child's school and relevant professionals.

There is an obligation upon LEAs to arrange for the parent of any child in their area with SEN to be provided with advice and information about matters relating to their child's needs, and to take such steps as they consider appropriate for making these services known to parents, schools in their area, and such other persons as they consider appropriate³⁰. There is also an obligation upon LEAs to set up arrangements for the avoidance or resolution of disputes and to make schools and parents of children with SEN aware of those arrangements³¹.

²⁴ Ibid. Section 329.

²⁵ Ibid. Section 325.

²⁶ Ibid. Section 326.

²⁷ Ibid. Section 328.

²⁸ Ibid. Section 326.

²⁹ Ibid. Schedule 27 paragraph 11.

³⁰ Ibid. Section 332A inserted by section 2 of SENDA.

³¹ Ibid. Section 332B inserted by Section 3 of SENDA.

All school-age children with SEN for whom no statement is maintained must be educated in mainstream schools³². Children with statements must be educated in mainstream schools unless this is incompatible with the wishes of their parents or the provision of efficient education for other children³³. In order to demonstrate incompatibility with the efficient education of other children, the LEA must show there are no reasonable steps they could take to prevent the incompatibility. Schools are not permitted to rely on the incompatibility argument to relieve them of their legal obligation to admit a child where a school is named in the statement. Children with SEN do not have to be educated in mainstream schools where the costs are not being met by an LEA³⁴.

1.4. THE CONTEXT OF SEN DECISION-MAKING

The concept of 'Special Educational Needs', and the structure of the current statutory regime were introduced by the Education Act 1981. This legislation enacted such of the recommendations of the Warnock Committee as were politically expedient at the time. Warnock reported in 1978, concluding that 20% of children throughout the country had 'learning difficulties'. These children were to be identified and their needs determined by considering the results of a multi-disciplinary assessment. This was to consist of reports compiled following the administration of a battery of tests, and from the child's parents and those teaching him on a regular basis.

Prior to this legislation, children with learning difficulties were either left to sink in mainstream schools, dependent upon individual teachers having the time and goodwill to provide extra help without additional resources, or they were transferred to special schools where they would remain throughout their school career. Under the Education Act 1944, children were tested at the age of 11 by means of intelligence tests administered by Medical Officers to assess whether they were 'suffering' from particular forms of 'handicap' requiring 'treatment' in a special school. Learning and behavioural problems were seen as essentially medical rather than educational matters. The 2% of children adjudged

³² Ibid. Section 316 substituted by Section 1 of SENDA.

³³ Ibid. Section 316(3).

³⁴ Ibid. Section 316A(1).

'educationally sub normal' or 'maladjusted' were segregated from their peers. Neither they nor their parents had any choice in the matter.

The Education Act 1981 appeared to be an improvement over the previous regime. It is important, however, to view the Education Act 1981 in context to understand why SEN legislation has continued to be controversial. The 1980s saw a raft of legislative reform based upon low standards and school failure – Standard Attainment Tests, publication of league tables and independent inspection of schools. Children with SEN became an unattractive proposition to mainstream schools in a climate where there was pressure to attain goals of high academic attainment in order to attract more pupils and avoid public humiliation in league tables. LEAs were obliged to delegate as much of their overall budget as possible to schools³⁵. This meant they had less money at a time when they were facing increased demand for assessments and statements. Parents' expectations that remedial help would be available had been raised, and where the demand for resources exceeds what is available, dissatisfaction is inevitable.

A study by Jane Hall conducted in 1999 describes parents' perception of the SEN decision-making process.

The process was seen to be '*stressful*³⁶' and '*anxiety-provoking*' and parents were left feeling angry and frustrated by the whole procedure which they saw as a '*long drawn out process*'. Even when the parent felt their child only required marginally more support than the LEA was prepared to offer, they were still made to '*battle through the process*.' (Hall 1999 p.45).

Hall's study preceded obligations imposed upon LEAs to set up disagreement resolution and advice services. Several of her interviewees stated that only the most vocal and knowledgeable parents secured the help they needed for their child; parents were unaware of their rights and options; decisions made about children by schools were perceived to relate to professional issues about which parents know nothing; teachers held prejudices about parents which manifested themselves in a '*blame culture*', especially in relation to children with behavioural problems.

³⁵ The Education Reform Act 1988 introduced local management of schools, giving schools their own budgets.

³⁶ Hall's italics throughout.

The relationship between parents and teachers was frequently seen as... '*mutually defensive*' [...] '*a very adversarial relationship*' [...] It was felt that parents tend to regard teachers as authority figures and the head teacher as being particularly imposing. This in turn makes it difficult for the parents to see themselves on an equal footing with the school. This perceived power imbalance can lead to an early breakdown between the two parties [...] By the time parents get to speak to the headteacher they are usually '*so built-up and het-up about the situation*', that is the delays they have incurred, the number of people they have had to speak to, and the amount of time it has taken them to get that far, that they are quite confrontational [...] The impression that the interviewees had of a perceived power imbalance between parents and schools was felt to be even more exaggerated between parents and LEAs. Parents tended to be wary of dealing with officials and felt uncomfortable in doing so [...] parents had the impression that provision was rationed and not made available as an individual response to an individual need. (Ibid. p35-37).

All parents interviewed had a poor relationship with the LEA shaped by interactions and perceptions of the LEA's motives.

Many parents who had dealt directly with the LEA would have welcomed some help from an independent third person. Parents frequently spoke of having to 'fight' or 'battle' for what they wanted for their child, and this antagonistic relationship carried on through all their dealings with the LEA [...]

The overriding perception that parents had was that the LEA was more concerned with resources than it was with their child's education. Whilst parents acknowledged that the LEA had finite resources, they did not think that there should be a trade-off between the cost of providing for their child and their child's needs. (Ibid. p.42 - 43).

A number of interviewees felt that, before a dialogue could be promoted on a wider scale, a shift in attitudes amongst teachers and LEA officials was required; that the (then) DFEE should encourage a '*conciliation mentality*' – a culture of '*resolution rather than blame*' and become involved in monitoring SEN decisions.

It is unsurprising that parents should favour individuation. The negative trade-off of this, however, is that parents who are poor and inarticulate may not be in a position to ensure enforcement of LEA obligations towards their child. Such a policy framework would have no concern for systemic equity. On the other hand, a model focused upon systemic equity appears unpopular with parents because it fails to engage them in a positive manner. There appears to be an imbalance of trade-offs due to cost being given more weight than needs.

It was considered that LEAs looked for reasons to delay assessment and statementing.

'The more they draw it out, the more money they are saving. If they can stretch it so they don't go for a term, that's a term's money saved.' [...] The common perception was that 'the LEA does as little as possible. (Ibid p. 43).

An Audit Commission Report (Audit Commission 2002b) which considered how well the education system was serving children with SEN following introduction of the Government's inclusion policy observed that one in five children has SEN, yet SEN had remained low profile in education policy-making and public awareness.

Schools have struggled to balance pressures to raise standards and become more inclusive. This has been reflected in a reluctance to admit and a readiness to exclude some children, particularly those with behavioural difficulties. (Ibid. p.2).

Concern was expressed that the separate structures and processes for children with SEN had allowed their needs to be seen as peripheral.

The research revealed a picture of great variability. Whether children's needs were identified appeared to be influenced by a range of factors, including gender, ethnicity, family circumstances, where they lived, and the school they attended.

Some children continue to face considerable barriers to learning, including inaccessible premises, unwelcoming attitudes, shortfalls in specialist support, and exclusion from aspects of school life. Children with SEN are more likely to be consistent non-attenders... Very little is known about the educational attainment of children with SEN, or about how they fare beyond school. (Ibid. p.51).

The report concluded that practice needed to change from picking up the pieces of individual children to responding to the diversity of needs within the classroom; focus needed to shift from processes and paperwork to children and outcomes, and to children's quality of experience in school as opposed to the type of school they attend. Children with SEN should be put at the heart of mainstream policy and practice. The report also stated that an attitudinal shift

was needed, so that children with SEN (including disabled children) feel genuinely included in the life of their school. But that attitudinal shift could not occur until the resources were provided to respond to diversity.

The House of Commons Education and Skills Committee conducted an inquiry into policies relating to children with SEN and disabilities which reported in 2006 (House of Commons Education and Skills Committee 2006). The conclusions of this report and the contribution by the Audit Commission to the inquiry indicated that problems identified in the 2002 Report had not been addressed. The Committee found significant failings within the system that needed to be addressed urgently. The report states that the Committee had received 'large numbers of memoranda from parents whose lives had been taken over by the statementing process and who had to fight to achieve a better outcome for their child'; and that 'parents feel a sense of injustice and anger and are very dissatisfied with the current system.' (Ibid. para 147). There was evidence that LEAs were operating blanket policies. The Committee considered that a letter from the (then) DFES to LEAs of December 2005³⁷, whilst providing clarification, did not make up for lack of a clear national strategy (Ibid. para 151). The Committee's view was that it is preferable to reduce reliance on statements by improving the capacity of schools to meet a diverse range of needs. But this, they said, must be done within a national framework of guidance offering local flexibility.

The Committee recommended that SEN assessments should not be made directly by the bodies that fund such provision (Ibid. para 161); multi-agency panels should make decisions about placements and be held accountable for those decisions; parents should be kept better informed and involved in the decision-making process; greater consideration should be given to the support of parents who themselves have SEN and require assistance in coming to considered decisions about their children's futures (Ibid. para 170); expenditure on independent special schools should be monitored by the Government (Ibid. para 244); and there must be a child-centred approach based upon need (Ibid. para 282).

³⁷ The letter is discussed on pps. 91, 105 and 304.

Around 18% of all pupils in school in England were categorised as having SEN (1.5 million children). Around 3% had a statement (250,000), and around 1% (90,000), were in special schools. The Committee concluded:

[...] the original Warnock framework has run its course. With Ofsted identifying a considerable inequality of provision³⁸ - both in terms of quality and access to a broad range of suitable provision – the SEN system is no longer fit for purpose and there is a need for the Government to develop a new system that puts the needs of the child at the centre of provision.

It is simply not acceptable for the Minister to say that the current system is “not always working well” Special educational needs should be prioritised, brought into the mainstream education policy agenda, and radically improved. (House of Commons Education and Skills Committee 2006 pps.6-7).

The report states that SEN exists across the whole spectrum of social classes and abilities. Some conditions that give rise to SEN, in particular along the autism spectrum and specifically Asperger’s Syndrome, can defy easy correlation between those conditions and social deprivation. But there is a strong correlation generally between social deprivation and SEN. In 2006 13% of all secondary and 16% of all primary pupils were eligible for free school meals as compared with 26.5 % of secondary school pupils and 26% of primary school pupils with statements.

It is known that outcomes within the system are still heavily differentiated by socio-economic background, gender and ethnicity [...] The implication is that those students who are most disadvantaged socially and economically continue to suffer the greatest educational disadvantage. Moreover, it is precisely these students who are disproportionately represented in the SEN population. As Ann Lewis, Professor of Special Education and Educational Psychology at the University of Birmingham explains ‘there is extensive evidence of the overlap between education and social/economic needs. The evidence is well documented and sustained over time.’ (Ibid. p.17).

The Committee observed that there continued to be separate policies for SEN that result in it being sidelined away from the mainstream agenda in education. Their conclusion was that this could not be allowed to continue. Echoing comments from the Audit Commission in their response to the inquiry, they suggested that the Common Assessment Framework, in the post *Every Child*

³⁸ Ofsted 2004 para 69.

Matters (DfES 2004d) world where services are increasingly expected to be integrated, should be developed to include SEN funding and assessment. This should become part of the work of Children's Trusts, enabling comprehensive assessments and commissioning of provision across a variety of different agencies with access to a pooled budget. Correlation between SEN and exclusions, low attainment, not being in education and youth crime provide even more compelling reasons for suggesting a holistic approach. There is a significant personal cost to the children and families let down by the system, but also significant costs to society. (Ibid pps. 19-20).

The Government's response to the Report was that it is not in the interests of children with SEN for a major review of the legislative framework to be conducted; that inclusion has not yet been properly bedded-down; and that development of local provision and early intervention strategies would bring about needed improvement (Government Response to the Education and Skills Committee report on Special Educational Needs October 2006).

The Committee followed this up with an exchange between its Chairman and the Minister of State for Schools during an Opposition Day debate on the 30th January 2007 when the Minister agreed to reconsider proposals on the practicalities of implementing separation of SEN funding from the assessment process. In October 2007, a further report was published (House of Commons Education and Skills Committee 2007) containing options for change. The Government's response was that their response to the previous report had not been meant to convey that they would not look critically at SEN policies in the future. Her Majesty's Chief Inspector of Schools ('HMCI') has been asked to review progress in 2009/2010, and that they will consider, in the light of HMCI's advice, whether the present framework for SEN should be reviewed and what further action might be taken to achieve better outcomes for children with SEN and/or disabilities and their families. It was also suggested that pilot studies for the contracting out of assessment functions might be conducted and that guidance to educational psychologists on maintaining an independent role was a possibility.

1.5. MASHAW'S MODELS

Mashaw suggests three types of justice arguments: that decisions should be:

- accurate and efficient concrete realisations of the legislative will;
- appropriate from the perspective of relevant professional cultures; and
- arrived at fairly when assessed in the light of traditional processes for determining individual entitlements.

This produces three distinctive models of justice – bureaucratic rationality, professional treatment and moral judgment. The characteristics of the models are set out in the table below (Mashaw 1983 p.31.):

Model	Legitimizing Values	Primary Goal	Structure or Organization	Cognitive Technique
Bureaucratic Rationality	Accuracy and efficiency	Program Implementation	Hierarchical	Information Processing
Professional Treatment	Service	Client Satisfaction	Inter-personal	Clinical Application of Knowledge
Moral Judgment	Fairness	Conflict Resolution	Independent	Contextual Interpretation

The bureaucratic rationality model is likely to be favoured by LEAs; the professional treatment model by educational psychologists, teachers and health professionals; the moral judgment model by welfare rights and advocacy agencies and parents confident enough to mobilise the appeals process. Pre-Warnock, the professional treatment model was dominant. Following the introduction of the statementing process, and against a background of the Conservative reform agenda of the early 1980s and 1990s driven by parental choice, market forces and limitation of professional power, there was a call by parents' organisations for a tighter legal framework.

This led to the implementation of a Code of Practice (The Code of Practice on the Identification and Assessment of Special Educational Needs (DfEE 1994). LEAs began to draw up criteria for assessment, and the decision-making process changed to resemble more closely the bureaucratic rationality model. Local appeals committees not perceived as sufficiently independent of LEAs

were replaced by the Special Educational Needs Tribunal which led to an appeal process resembling the moral judgment model.

Recognising the danger that a rapid swing towards a moral judgment framework might lead to escalating and unmanageable costs, the DfEE grant-aided LEAs to set up Parent Partnership Services (PPSs) and subsequently introduced legislative requirements for LEAs to make advice available to parents and to provide disagreement resolution services with the objective of reducing conflict and minimising the number of appeals. There are tensions between the models. Bureaucratic rationality applies rules in order to ensure accuracy and consistency, whereas moral judgments made in relation to individual children pay no regard to the balance of provision within a particular LEA.

Chapter Two

Formal Dispute Resolution Mechanisms

2.1. CHAPTER SUMMARY

The principal dispute resolution mechanism is the Special Educational Needs and Disability Tribunal (SENDIST, formerly the Special Educational Needs Tribunal - SENT³⁹). This is a tailor-made SEN-specific tribunal. However, the SENDIST only deals with appeals on the merits. It cannot deal with complaints about process or rationality of SEN policies, and has no procedure for urgent cases. There is no right of appeal to the tribunal against decisions made by schools. There are other dispute resolution mechanisms available to parents where specific circumstances apply. These are complaint to a Commissioner for Local Administration, more commonly known as Local Government Ombudsman (LGO), and application to the Administrative Court. They are not SEN-specific.

The detailed focus of the thesis is on the SENDIST. In comparison to the number of SENDIST appeals, applications to the LGO and Administrative Court are small, though this may be because of the remit of the mechanism, as opposed to appellants favouring one procedure over another. There is no choice of mechanism. This is dictated by the nature of the complaint. The SENDIST employs adversarial pre-hearing procedures followed by an enabling hearing; the LGO an inquisitorial procedure, and the Administrative Court an adversarial procedure and hearing. Consideration of the LGO and Administrative Court is less detailed. The thesis makes no suggestion that either the LGO or the Administrative Court should be considered as alternatives to the SENDIST.

The SEN statutory framework does not enable appeals to be made to the SENDIST against decisions made by schools in respect of SEN. Neither can a complaint be made to the LGO about schools. A table setting out the different forms of complaints procedures that may be relevant to children with SEN is set out in Chapter Six.

³⁹ The tribunal was re-named following the implementation of the SENDA 2001 when it expanded its jurisdiction to hear specified claims of disability discrimination.

2.2. THE SENDIST – ADVERSARIAL/ENABLING

Partly as a result of the way the legislation has been constructed and partly because of the very technical nature of diagnoses and definitions of learning difficulty, the SENT is faced with a challenging task. It not only has to apply the law accurately and fairly, which is not easy in a rapidly developing field, it also has to make fine judgments about the needs of children, and the provision required to meet them, which will have crucial long term effects as regards the children's intellectual, social, and in some cases, physical development as well as their academic attainment. (Harris 1997 p.3).

2.2.1. Wider background (briefly)

Since the inception of SEN legislation in 1981, parents have had a right of appeal to a tribunal. Originally this was to a committee of the LEA. A specialist tribunal was created in 1993 operating independently of LEAs. It was intended to operate as an effective means of access to justice for parents – 'a new system that is quick, simple, impartial and independent; informality is the key' (Baroness Blackstone, Minister of State. Hansard HL, Vol 545 col 567). One that is 'friendly to parents' (T. Boswell, Minister of State. Standing Committee E. Hansard Column 1168. 28th January 1993).

There have been three major reviews of the tribunal system: Donoughmore (1932), Franks (1957) and Leggatt (2001). Donoughmore recommended that 'judicial' as opposed to 'quasi-judicial' decisions should normally be entrusted to the courts. In exceptional circumstances where this was not possible, the decision should be entrusted to a tribunal as opposed to a Minister; tribunals should be independent, though appointed by the Minister in consultation with the Lord Chancellor; quasi-judicial decisions should be left to a Minister unless his Department had an interest, in which case an appeal should lie to a tribunal. Parties to decisions considered by tribunals should have rights to be heard, to be given reasons, and to appeal to the Administrative Court on a point of law.

Franks observed that Parliament had decided that particular decisions should be referred to tribunals (as opposed to the ordinary courts) in the interests of good administration. This is described as attaining policy objectives without delay by means of a system that is perceived as fair. The essential characteristics of this

system are openness, fairness and impartiality. These characteristics are essential because:

Administration must not only be efficient in the sense that the policy objectives are securely attained without delay. It must also satisfy the general body of citizens that it is proceeding with reasonable regard to the balance between the public interest which it promotes and the private interest which it disturbs... Take openness. If these procedures were wholly secret, the basis of confidence and acceptability would be lacking. Next take fairness. If the objector were not allowed to state his case, there would be nothing to stop oppression. Thirdly there is impartiality. How can the citizen be satisfied unless he feels that those who decide his case come to their decision with open minds? (Franks paragraphs 21 to 24).

[...] openness appears to us to require the publicity of proceedings and knowledge of the essential reasoning underlying the decisions; fairness to require the adoption of a clear procedure which enables parties to know their rights; to present their case fully and to know the case they have to meet; and impartiality to require the freedom of tribunals from influence, real or apparent of departments concerned with the subject-matter of their decisions. (Franks paragraph 40).

Franks was a watershed in the development of the tribunal system. As a result of the report's recommendations, tribunals were re-made in the image of the ordinary courts. The report recommended that chairmen be legally qualified; formal procedures be adopted; there be a right to legal representation; Legal Aid be made available (although this was never implemented); full reasons be given for decisions, and that a system of precedents be developed.

The independence of tribunals was a key issue in the Franks Report, however the centralisation of administrative support was rejected. The report recommended that support for tribunals continue to be provided by their sponsoring Departments. The conduct and duties of clerks were to be regulated on the advice of the (then) Council on Tribunals, which was to have objective oversight of the system. It was noted that there was no significant evidence that any influence is exerted upon members of tribunals by Government Departments. The report concluded that, despite the haphazard way in which tribunals had developed, the system worked reasonably well.

Leggatt recommended a tribunal system with common administrative support under the auspices of the DCA working with user groups to ensure that tribunals do all they can to render themselves understandable, unthreatening, and useful to users, who should be able to obtain all the information they need. There was no interference with the Franks model of tribunals as court-substitutes, merely an emphasis on the need for enabling hearings. The central tenet of the report was that ‘a combination of good quality information and advice, effective procedures and well-conducted hearings, and competent well-trained tribunal members’ would make it possible for ‘the vast majority of appellants to put their cases properly themselves’ (Leggatt para 4,21). Adler and Gulland, who summarised the findings of relevant research on users’ experiences, perceptions and expectations of tribunals concluded that there is little research-based support for this assertion (Adler and Gulland 2003 p.27).

2.2.2. Legislative provisions

The SENDIST has a President and two Panels – the Chairman’s Panel and the Lay Panel. The Chairman’s Panel is appointed by the Lord Chancellor and comprises solicitors and barristers qualified for at least seven years. The Lay Panel is appointed by the Secretary of State for Children, Schools and Families, and comprises persons with knowledge and experience of either children with SEN or local government. Each individual tribunal comprises a chairman and two lay members. The Administrative Justice and Tribunals Council⁴⁰ acts as supervisory body, and its members visit hearings as observers from time-to-time. The SENDIST also considers some claims of disability discrimination. The composition of the tribunal is different for these claims.

The SENDIST exercises its jurisdiction for SEN disputes pursuant to the Special Educational Needs Tribunal Regulations 2001⁴¹. There are formal pre-hearing procedures that must be adhered to strictly. These include time limits⁴², and provisions relating to applications for disclosure and further and better particulars of evidence⁴³. Parents must file a notice of appeal no later than 2

⁴⁰ Formerly the Council on Tribunals.

⁴¹ As amended by the Special Educational Needs (Amendment) Regulations 2002.

⁴² Regulation 7 of the 2001 Regulations.

⁴³ Ibid. Regulation 18.

months from the date upon which the LEA advise them of their right of appeal; both they and the LEA then have 30 working days to file a case statement together with any evidence they wish to produce. If the LEA fail to file a reply to an appeal within the prescribed time limit, the tribunal may determine the appeal without a hearing or, without notifying the LEA, convene a hearing at which the LEA are not permitted to be present⁴⁴. The tribunal has no facility for dealing with urgent appeals. It has been unable to meet its target of concluding appeals within four months of registration⁴⁵, with most appeals taking 4-5 months.

The SENDIST can order LEAs to assess needs, and to make, re-write or discontinue statements. The President may summon witnesses to attend⁴⁶. She also has the power to review her own decisions. If either party is dissatisfied with a tribunal decision, there is a right to apply to the Secretary for a review⁴⁷. The tribunal may review its own decisions⁴⁸. There is right of appeal on a point of law or by way of case stated to the Administrative Court (though this is about to be replaced by an appeal to a second-tier tribunal). Digests of decisions are published. There is no system of binding precedent, but decisions are monitored to ensure consistency.

Right of appeal to the SENDIST is that of the parents and not the child. Legal Aid is not available for representation before the tribunal, but legal advice and assistance is available to parents who are financially eligible. This covers initial advice, writing letters and preparation of the appeal papers, and may cover fees for expert reports provided pre-approval is obtained and the cost is reasonable. The tribunal will not ordinarily make costs orders against any party, but has power to do so in specified circumstances. Legal Aid is available for appeals to the Administrative Court. The Court of Appeal has determined that the child has no right of appeal, not having been a party to the tribunal proceedings⁴⁹. This means that it is the parents' income that is relevant both for the purposes of

⁴⁴ Ibid. Regulation 15.

⁴⁵ Hughes 2005.

⁴⁶ Regulation 26 of the Special Educational Needs Tribunal Regulations 2001.

⁴⁷ Ibid. Regulation 37.

⁴⁸ Ibid. Regulation 39.

⁴⁹ *S v Special Educational Needs Tribunal* [1995] 1 WLR 1627.

assessing financial eligibility for legal advice and assistance for SENDIST appeals and legal advice and assistance and Legal Aid for appeals to the Administrative Court. The tribunal is not a party to appeals to the Administrative Court.

In contrast to the formal pre-hearing procedures, an informal enabling procedure is employed at the hearing itself. The chair identifies key issues. The parties are asked whether there are any points that should be added to the list. The tribunal then go through the list asking questions of, and eliciting comments from, the parties and their witnesses.

2.2.3. Facts about SENDIST appeals

The table below sets out the number of SENDIST appeals registered since the tribunal came into existence:

NUMBERS OF SEN APPEALS REGISTERED

⁵⁰ Year	Number of appeals	Percentage Increase
1994/1995	1161	N/A
1995/1996	1626	40
1996/1997	2051	26
1997/1998	2191	7
1998/1999	2412	10
1999/2000	2463	2
2000/2001	2728	11
2001/2002	3048	11
2002/2003	3532	16
2003/2004	3354	-5
2004/2005	3215	-4
2005/2006	3411	6
2006/2007	3110	-9

SENDIST Annual Reports offer no information about the reasons for percentage increases or decreases. The majority of appeals are lodged by whites - 1847 (out of 3772) in 2002/3, 1558 (out of 3637) in 2003/4, 1540 (out of 3513) in 2004/5, 1837 out of 3717 in 2005/6 and 1920 out of 3110 in 2006/7. But it is difficult to obtain an accurate picture in relation to ethnicity because significant numbers of forms showing ethnic background are not completed. Figures for 2006/7 show that parents had legal representation in 23% of appeals and other representation in 29% of appeals; LEAs had legal representation in 10% of appeals; the number of appeals against SENDIST decisions was 42 (35

⁵⁰ Table features on SENDIST website www.sendist.gov.uk.

by parents and 7 by LEAs), an increase of 18% from the previous year. Parents have a high success rate in SENDIST appeals, as the table below demonstrates.

⁵¹**SUCCESS RATES FOR PARENTS IN SENDIST APPEALS**

	2005/2006	2006/2007
Refusal to assess	62%	62%
Refusal to statement	66%	64%
Refusal to re-assess	90%	39%
Cease to maintain statement	50%	71%
Parts 2 and 3	91%	90%
Parts 2, 3 and 4	96%	95%
Part 4	64%	68%
Refusal to change named school	30%	25%
Failure to name school	0%	100%

Where parents appeal against the contents of a statement, the achievement of only a proportion of their objectives may result in the appeal being technically upheld. Thus, some minor amendments to the wording of Parts 2 or 3 of a statement in an appeal registered against Parts 2, 3 and 4 is indicated in the 95-96% success rate, whereas the main part of the appeal in respect of Part 4 may have been dismissed. Numbers of appeals against refusal to change the named school and failure to name a school is very small, Only one appeal against failure to name a school was lodged in 2006/7 and in 2005/6.

Trevor Aldridge, former President of the SENDIST, has acknowledged that the remit of the tribunal could be different, and that there might be a need to review whether education rights should be those of the parent or the child:

The Tribunal could be directed to consider other matters: the effect of appeal decisions on other children, from whom resources may be diverted; how far varying local policies should influence appeal

⁵¹ Source Hughes 2006 p. 9.

decisions; what involvement other agencies should have. There is also the broad question of whether our education legislation should continue to be framed in terms of parental rights, when the United Nations Convention on the Rights of the Child confers the rights on the child. (Aldridge 2002 p.1.)

Harris reviewed the work of the SENT during the first 20 months of its coming into operation. (Harris 1997). Findings were that 25% of parents sought advice from a lawyer and 43% from CAB or a voluntary organisation; 90% of those who sought advice said they were happy with the advice received and could not have coped otherwise; those who sought advice from the outset were more likely to appeal; those who had not sought advice thought advice would have been helpful; and that 53% - 55% of parents were represented.

Harris attributed high levels of representation to the predominance of middle-class parents and to ongoing contact between parents and support bodies. Not only did those who used legal representation value it very highly, some who had not used it wished they had and disagreed with the suggestion in the Tribunal's guidance that it was not necessary. Observations of hearings revealed that chairs adopted different approaches. Although there was a uniform attempt to make the hearings informal, many hearings were fairly formal, and this was where representation was considered to be valuable. Its effectiveness was described as variable. Some lay representatives were over-zealous or inclined to make political points, and the involvement of legal representatives tended to make the proceedings more formal, adversarial and longer.

Although the majority of children with SEN are from social class C2-E, the parents who responded to the questionnaire sent out by the researchers comprised equal number of A-C1s and C2-Es. Harris remarked that this is consistent with other research in the field - 'the wealth of parents and their ability to manipulate the system becomes the ultimate arbiter of a child's educational opportunities.' (Riddell et al.1994 p119). Harris supposed that the predominance of responses from middle-class parents could be attributed to the fact that such parents are more likely to complete questionnaires, but considered it more probable that they would use the tribunal than other parents.

The research indicated that racial and ethnic minorities were massively under-represented among appellants. In the 40 hearings observed, all the parents were white. This was consistent with research conducted by IPSEA in March 1996 into the use of its services. (IPSEA provides free advice and representation to parents appealing to the SENDIST). In a sample of 42 clients, all had described themselves as white (Andrews 1996 para 2.4). Harris observed that, if ethnic minorities are neither bringing appeals nor seeking the help of the voluntary sector, this is a serious matter which may be part of a much larger issue of access to justice for ethnic minorities (Harris 1997 p.195).

Many respondents to the questionnaire commented upon the helpful approach of Tribunal officials, and said that useful factual information was provided. (Ibid. pps 81-82). Harris considered that public funding should be available to enable parents to be legally represented in complex cases. He concluded that the Tribunal had met many of the positive expectations that were held prior to its introduction; suggested that weaknesses identified were amenable to practical resolution; and recommended extension of powers to enable interim orders to be made, and that children's views should be represented independently through a named person equivalent what are now termed Cafcass guardians⁵². The study does not yield information about why parents do not appeal.

A report by Evans (Evans 1998) following research conducted in 1997 observes that the creation of the SENT was seen as necessary by the Government:

...to tip the power balance away from the benevolent humanitarianism of the Warnock model, where most of the decision-making power lay with the LEA and its professionals, towards a more assertive and consumerist role for parents, adjudicated by a [...] tribunal independent of the LEA. (Ibid. p.7).

The report highlighted a tension between schools and LEAs over resources leading to schools encouraging parents to press for statutory assessments. There

⁵² The function of Cafcass guardians is to represent children's interests in public law court proceedings. Cafcass was set up on under the provisions of the Criminal Justice and Court Services Act 2000 which brought together the family court services previously provided by the Family Court Welfare Service, the Guardian ad Litem Service and the Children's Division of the Official Solicitor's Office.

are a number of inter-related factors that might predispose an LEA to a higher or lower level of appeals - social affluence, deprivation, ethnicity, high (or low) levels of statements, efficiency in the statementing process; whether the LEA is high-achieving; resources spent on SEN; and numbers of exclusions. The inter-relationship of different factors is complex. The LEA's policies and processes were thought to have a major influence.

Although 41% of LEAs in the study reported that they had made changes to their procedures as a result of the possibility of appeals to the Tribunal, there was little change in practice. LEAs, on the whole, tended to treat Tribunal decisions as 'one-offs' – 85% had made no notable change of policy following a Tribunal decision. Over half of the LEAs responding to the questionnaire had experienced a Tribunal decision with significant financial impact, and were worried about the 'bandwagon effect' of these cases where parents of other children with similar levels of need would be encouraged to seek the same provision. Some LEA officers saw unsuccessful appeals as useful in highlighting gaps in provision, enabling them to make a case for more resources (Ibid. p.27).

The report states that criteria devised by LEAs to decide whether it is necessary to assess or statement a child are seen by schools as a series of hurdles to be jumped, with the prize of additional resources attached to a statement at the end. This has contributed to LEAs making such criteria explicit. Schools' perception of the criteria is seen by LEAs as indicative of a failure by them to understand their own responsibilities to meet the needs of children with SEN from their available resources.

The practice by LEAs of establishing Panels to make decisions in individual cases is seen as useful in ensuring that criteria are adhered to and in providing moderation across schools within the LEA. But the report questions whether cases presented receive adequate attention. There are comments from parents about missing reports and failure to take account of advice. There is an example cited of a Panel meeting once a week making decisions on 30 cases per meeting; and of one LEA going to strenuous efforts to prevent parents from

accessing the system, which proved counter-productive as it led to a huge increase in appeals.

The report cites a case history involving a child whose parents had requested a placement at an independent boarding school and placed him at the school pending a Tribunal hearing. The appeal had been upheld:

This is the type of case which raises questions of equity and efficient use of resources. The parents felt that the provision offered by the LEA was not adequate to meet their son's needs. However, LEA officers would argue that the level and cost of the provision given to a small number of individuals results in distortion of the SEN budget, and consequently less money available to fund support for the remainder of pupils with special educational needs. The LEA officer commented: We have lost few cases, but the common factors in the cases we have lost have been (a) prior placement by parents and (b) parents employing a barrister or solicitor. (Ibid. p.35).

Other controversial cases were those where a child has severe disabilities, or where there are child protection issues suggesting a need for an expensive residential placement. These cases led to arguments between different Departments within local authorities and between local authorities and health bodies as to which Department or body should be responsible for funding. The report questions the objectiveness of experts paid by parents to help them make their case, and suggests that LEAs should focus their arguments against expensive residential placements less on value-for-money and more on suitability of provision. It also states that the Tribunal tends to take the wider view that family circumstances are key in determining which provision might best meet a child's educational needs.

A number of LEAs with low levels of appeals attributed this to the efforts they had made to communicate effectively with, and support parents. These LEAs had virtual open-door policies enabling parents to make appointments to discuss their case at any time. One Parent Partnership Officer (PPO) had established a parents' support group which the Principal SEN officer attended to explain policy or answer queries. LEAs with high levels of appeals used the PPS as a buffer to direct access. Those with low levels of appeals placed emphasis on direct contact with parents. Two quotations present very different pictures:

Parents have a human face to talk to. They can get to the people who are making the decisions, be involved in the process. We try to be creative, not rigid in our procedures. Even if it is not what parents first thought of, they appreciate being listened to... We have a special needs centre which houses the Parents' Advice Centre. We provide a hotline for parents to phone in with concerns. We have a parents support group. Parents are encouraged to come in and voice their concerns. (SEN officer, London Borough, low number of Tribunal cases).

My perception is that the LEA goes ahead against parents just to see how far parents will take it. And some do give up, but if parents keep going, on several occasions, the LEA has backed down at the last minute before the date of the hearing. Partly this must be because they think it will cost them less than going to SENT, but I feel there is an element of testing the water to see how far they can push parents. I don't feel this is healthy, because then some parents feel that appealing is the only way to get the LEA to listen. (PPO, metropolitan LEA, high number of Tribunal cases). (Ibid. p.41).

Some LEAs appoint Tribunal officers, which has the consequence of further distancing decision-makers from their actions.

The report also suggests that a key factor in accessibility is having sufficient (LEA) staff to have time to talk to schools and parents to make sure communication does not break down. The report cites several examples of schools encouraging parents to request statutory assessments. One LEA officer, when asked about the role of schools in liaising with parents replied:

Can be good, bad or indifferent, depending on the school. It's a very important question to ask, though, because the major point of trust is very often between the parent and the school. We can talk to headteachers and explain the policy and the budget etc., but unless the school, the headteachers consent to that policy, we have a problem. We had a case, just the other day, of a mother telling us that the headteacher had said that her complaint about us refusing to assess was 'an indication of what we have to put up with'. Now, if schools are saying to parents, 'Oh, it's that lot up at the office. Go to the Tribunal', well, LEAs can't win really. (SEN officer, metropolitan authority). (Ibid. p.44).

LEA officers varied in their attitudes towards the Tribunal. There were positive comments, describing the Tribunal as a forum where decisions were tested:

We have always felt that the Tribunal has been fairly conducted. We are impressed at how all cases are handled. The Tribunal has always got to

the heart of the issue and has given both sides a chance to air their views. (SEN officer from LEA with high levels of appeals) (Ibid. p. 47).

For some officers, the experience had been entirely negative, though this was rare:

Now the Tribunal is a weapon for the middle classes to get more out of the system. Either there was an oversight in the drafting of the legislation, which set up the dichotomy of the Tribunal's focus on individual cases and the LEAs' duties to all children and for financial prudence, etc., or it was a deliberate strategy and was intended as a way of buying off trouble-makers. As it is, the Tribunal's budget is x millions – it's out of control. (SEN officer from LEA with high levels of appeals). (Ibid. p.47).

The report lists a number of positive impacts of tribunal appeals identified by LEA officers:

- positive decisions provide affirmation of the LEA's approach;
 - negative decisions highlight a shortfall in provision and staff expertise, which can be redressed;
 - some LEAs have changed procedures and re-examined their relationships with parents, perceiving the value of negotiation and face-to-face contact;
 - the tribunal gives parents a voice;
 - the tribunal acts as an objective and independent arbiter between parents and the LEA (though it was qualified by an observation that the tribunal process is a costly one, and can lead to a 'mindset' where LEA officers who are in conflict with parents stop negotiating at an early stage, leaving the Tribunal to decide);
 - the existence of an appeals procedure has made LEAs aware of the continuing need for close liaison with, and the need to monitor the quality of provision in, schools;
 - LEAs generally have developed positive relationships with voluntary organisations, which may have influenced provision (though some interviewees saw these organisations as assisting a small number of parents, skewing resource allocation away from the most needy);
 - there has been more collaboration between LEAs and other agencies.
- (Ibid. pps. 48-54).

Negative impacts were:

- the disproportionate amount of time taken in defending appeals, which deflects energy away from core tasks;
- the high costs involved, which are met from the LEA budget, depleting resources from other services;
- tribunal decisions are focused on individual children and do not take into account their impact upon other children who will be affected, leading to the perception by LEAs that decisions are inequitable;
- successful tribunal appeals conflict with policy aims e.g. reducing the number of statements in line with Government policy;
- some decisions have ‘massive resource implications’, that appear ‘arbitrary or unfair’ and ‘undermine the credibility of the tribunal in the eyes of LEAs’. Almost all LEAs in the study had examples of this, and they often involved a situation where parents were represented by a solicitor or barrister and had moved their child to a private residential placement prior to the hearing. (Ibid. pps. 54-59).

The practice of parents using the Tribunal to get independent school fees paid or to get their children into local LEA schools that are over-subscribed was perceived by LEAs as a misuse of the process. There were also reported instances of voluntary organisations actively exacerbating conflict between parents and LEAs, or appearing to have a vested interest in decisions by offering parents cut-price places at their schools pending Tribunal decisions.

The report states that, running through many of the comments of LEA officers is the perception that Tribunal decisions have implications for the equitable use of resources - that the tribunal is dominated by middle-class articulate parents whose children are getting resources at the expense of equally deserving children whose parents are not so skilled at advocacy. Evans suggests that, even if this is the case, the question is whether improvements in services and all levels of support gained for some children through the actions of their parents will result in a better service for all pupils. The research suggests this is not happening, with LEAs regarding appeals as one-offs.

There are some factors associated with lower levels of appeals:

- adequate staffing levels;
- accessibility of staff;
- hand-delivery of key documents to explain their contents;
- flexibility and willingness to compromise;
- a source of semi-independent advice for parents (in areas where there were low levels of appeals, the PPS was part of a network of support facilitating communication between parents and LEAs, as opposed to an independent advocacy service for parents);
- good relationships with voluntary organisations;
- good relationships between LEAs and schools;
- effective policies and procedures for SEN based upon values shared by LEAs, parents and schools accessible to all affected by them and reviewed following tribunal decisions;
- LEAs should not adhering rigidly to policies demonstrated to be untenable;
- increased willingness to assess and statement; and
- a good range of local provision.

Other relevant factors were that areas with significant populations whose first language is not English where parents are educationally and materially disadvantaged tended to have low numbers of appeals. Parents had low expectations and were disinclined to challenge the LEA. In this instance, low levels of appeals indicated that there were issues to address, such as how less articulate parents might be enabled to participate more actively in decisions about their children's education. It was observed that pressure groups were more active in some areas than others, particularly around provision for autism and dyslexia. Professional middle-class parents who appeal have been able to assemble a great deal of professional expertise from lawyers, psychologists and specialists in particular disorders to help them put their case. The report states that such parents appear less likely to negotiate with LEAs and will take their case all the way to the Tribunal.

This study, although highlighting many positive aspects of the SENT, provides a clear picture of the tensions caused by the operation of the bureaucratic rationality model at the decision-making stage and the moral judgment model at the appeal stage. For the purpose of later analysis, it does not appear that the positive aspects described must necessarily be derived from a *tribunal* process. The question is whether a different configuration of models and trade-offs would enable the positive aspects identified to be retained whilst minimising the negative aspects.

The study by Hall (Hall 1999) found that, where parents register appeals, it is not always the presenting problem that is of most concern '*it is often more deep-rooted.*' Some parents were seen as '*hell-bent on going to Tribunal*', and some perceived this as the only method of getting things done (Ibid. p.33.).

The processes and procedures that parents have to go through, that is the formality of lodging an appeal and attending a hearing are very stressful for a great many parents and their advocates [...] Whilst it was felt that vocal, articulate and knowledgeable parents can succeed in the formal Tribunal setting, others might not be able to [...] Many negative opinions about the SEN Tribunal were voiced by a wide-range of interviewees; that the Tribunal does not operate independently; that LEA officers are not being honest at hearings; that parents' representatives do not feel confident and are therefore not starting out on an equal-footing; that people do not feel at ease in the environment; that there are huge variations in outcomes, even for very similar cases [...] that outcomes depended upon the composition of the Panel [...] that Panel members haven't understood the SEN [...] that nobody is looking at outcomes [...] that lay members are biased towards the LEA. (Ibid. p. 38).

A study by Riddell (Riddell et al. 2002) aimed to describe the range of statutory assessment practices, and was based upon a comparison between SEN procedures in England and Scotland. There was no Code of Practice in Scotland and no right of appeal to an independent tribunal. The study referred to Mashaw's models, describing the Scottish system as being dominated by the professional treatment model, with educational psychologists being afforded discretion about opening a record of needs, whereas the English system combined bureaucratisation at the initial decision-making stage with the moral judgment model at the appeal stage. The study illustrates that, although parents have more power in England to challenge the dominance of the bureaucratic

model, the professional treatment model in the Scottish system offers fairer ways of allocating resources and better ways of balancing collective goals and individual preferences.

The study concluded in relation to the English system that, although it gave parents more power to claim individual rights, this led to an increase in their involvement as active citizens. There was evidence in one of the English authorities studied of parents being marginalised. Passivity of the local community was seen by the LEA as the reason for low levels of appeals, rather than a failure by them to support use of legal redress; the PPO service focused on explaining LEA decisions, as opposed to suggesting alternatives; parents found the appeal route 'particularly unattractive' (Ibid. p.418); LEA officers, educational psychologists and PPOs were complicit in parental passivity.

The overall conclusions of the study were that some parents were able to exercise power, resisting the role ascribed to them by LEAs of passive consumer, whilst others experienced high levels of social disadvantage and became disengaged from the process.

Case studies categorised parents. The 'consumer' and 'transgressive' parents were able to exercise most influence. Both sought independent advice. The 'disengaged' parent and the 'uneasy client' both initially displayed interest, but later opted out. These parents were from socially deprived backgrounds, as was the 'transgressive' parent. The most successful was the middle-class 'consumer' parent who initiated the assessment and drove the process forward. But even she compromised on provision and did not take her case to tribunal.

Evidence from SENDIST Annual Reports indicates that high numbers of appeals are withdrawn. Little is known about the reasons for withdrawals. There is a suggestion in the Evans 1998 study that some LEAs 'try it on' to see whether parents will back down and concede on the eve of the hearing. There was a suggestion by the (then) DfES in the Select Committee's 2006 Report that

appeals are withdrawn because the parties settle upon mutually satisfactory terms. There is also evidence in a survey by PEACH⁵³ that concludes:

It is clear that some parents are settling and accepting provision which only partially meets their needs because of fear of escalating costs. Of those that settled 48% were not happy with the settlement but did so for the following reasons:

- 11% did not feel they would win;
- 23% were glad to have something;
- 22% were too worn down to continue;
- 44% were concerned about the cost of continuing.

‘We settled, we were really skint and couldn’t go on any more.’

‘The cost was high, it was gambling to go for higher stakes.’

PEACH is concerned that parents are settling because they cannot afford to continue fighting. In some instances LEAs offer an inappropriate financial settlement. This is accepted by parents who then “top up” the difference. This sets a precedent, which disadvantages those who come later and cannot afford to “top up.” (Williams, M. 2005 p.23).

The SENDIST Annual Report for 2005/6 stated that there were still far too many adjournments with the accompanying additional expense and inevitable delay to the settlement of a child’s education (Hughes 2006 p.4). The SENDIST instigated a case-management pilot scheme in August 2006. This involved a small number of chairs giving directions to ensure that the final hearing would be effective having read through appeal bundles in appeals about a child’s placement after the parties had submitted their case in writing. But the project was abandoned due to lack of resources (Hughes 2007 p.2.).

In January 2006 a report entitled ‘Tribunals for Diverse Users’ was published (Genn 2006). It is a study of access, expectations, experiences and outcomes of tribunal hearings from the perspective of users. Its aim was to compare the experiences of white, black and minority ethnic tribunal users to establish how they perceive and are treated by tribunals, and whether they experience any direct or indirect disadvantage in accessing and using tribunal services. The SENDIST was one of three tribunals examined. The benchmark used for

⁵³ Parents for the Early Intervention of Autism in Children

assessment was one derived from Leggatt - whether the tribunal offered an enabling approach that supported the parties in a way that would give them confidence in their own abilities to participate in the process (Leggatt 2001 paras 7.4-7.5).

The main findings were that language and cultural barriers, coupled with poor information about systems of redress, were critical obstacles in accessing tribunals. Public awareness of advice sources was variable. There were reported experiences of difficulty in accessing free advice services, and evidence of reluctance to become involved in legal proceedings because of anticipated expense and complexity. The dominance of criminal justice in the public imagination deterred people from seeking redress. Discussions revealed nagging apprehensions among black and minority ethnic groups about their likely treatment within the legal system.

The principal motivation for appealing to tribunals was a sense of unfairness. Few users had known about the possibility of seeking redress from their general knowledge and in most cases information about the possibility of appealing had come from the initial decision letter. Users' expectations of proceedings were relatively vague for the other tribunals, but the SENDIST practice of sending a DVD to users prior to hearings appeared to be effective in framing their expectations. About half of the users interviewed at hearings were attending without representation, generally because it had not occurred to them to seek representation, or because they had tried and been unable to obtain it. Unrepresented minority ethnic users attending hearings were more likely than white users to have tried and failed to obtain representation.

Observation of tribunal hearings revealed generally high levels of professionalism among tribunal judiciary, with most being able to combine authority with approachability. Tribunals used a wide range of techniques to enable users to participate effectively and to convey that they were taking the case seriously. With the assistance of tribunals, most users were able to present their cases reasonably well – indeed regression analysis indicated that representation increased appellants' success rates at the SENDIST by only 7%.

But although tribunals have developed the competencies necessary to conduct hearings in a way that enables users to present their cases, observation revealed deep and fundamental differences in language, literacy, culture, education, confidence and fluency, which traversed ethnic boundaries. These differences significantly affected users' ability to present their case. The report concludes that, even with the benefit of training, there are limits to the ability of tribunals to compensate for users' difficulties in presenting their cases. In some circumstances, an advocate is not only helpful to the user and to the tribunal, but may be crucial to procedural and substantive fairness.

Most users interviewed after their hearing and before receiving their decision made positive assessments of treatment during hearings and of their own ability to participate. Where dissatisfaction occurred, it tended to result from tribunals communicating the impression that they had already made up their mind or that they were not listening attentively to the user. This underlines the significance that users attach to feeling that they have been heard, and that their arguments have been taken seriously by the tribunal. Lack of preparedness affected users' responses to the hearing and those startled by the relative formality of hearings tended to feel less comfortable and to express greater dissatisfaction.

Despite users' generally positive assessments of hearings, about one in five, when prompted, raised concerns about perceived unfairness or lack of respect. There was evidence that those minority ethnic groups most likely to perceive unfairness at hearings were less likely to do so when the tribunal was itself ethnically diverse. Post-decision interviews revealed that about one-quarter of unsuccessful users had not understood the reason for the decision and this was more often the case among minority ethnic than white users.

Tribunal judiciary generally displayed high levels of sensitivity to diversity issues and most felt that enabling minority ethnic users to participate in hearings was an aspect of ensuring fairness that applied to all users. Users were treated well during hearings, and the majority perceived this to be the case - at least before they received their decision. In spite of the tribunal's efforts, however, there remained significant difficulties with access for minority ethnic

groups. The study revealed deep and fundamental differences between users in education, confidence, fluency and literacy for which tribunals cannot be expected to compensate. If the objective is to enable users to make the best of their case, it is important to consider factors such as language, education and culture in deciding how to assist them in doing so.

The (former) House of Commons Committee for Education and Skills concluded in their 2006 report in relation to SENDIST appeals that, whilst there is no fee for appellants, there are often substantial costs involved in commissioning expert reports and instructing legal representatives. Parents reported spending up to £18,000 on Tribunals. The SENDIST do not collect data on the costs incurred by parents, but they do recognise that there are 'significant costs that parents may incur.' With regard to the cost of legal representation, the SENDIST informed the Committee that, although in recent years, they had seen greater use of legal representatives, it was misleading to present representation as the norm. In reference to whether these costs are necessary, the SENDIST referred to the Genn 2006 research above suggesting that legal representation improves success rates of appeals by only 7%. The SENDIST's view was that, 'unless there are complex areas of law to be explored, factual and relevant evidence is better than unnecessary legalese and most parents are able to argue their cases effectively.' (House of Commons Education and Skills Committee 2006 paras 2.11-2.13).

In relation to the cost of expert reports, however, the SENDIST recognised that a single report is likely to cost several hundred pounds. Their view was that, even if it is not a necessary part of the tribunal process for parents to commission such reports, there are cases where an alternative professional opinion will be necessary to sway the Tribunal against the advice of the relevant local authority professional. The SENDIST suggested, however, that it was for others to consider whether or not parents should receive financial assistance to commission reports. The tribunal did not see how they could help. (Ibid. paras 2.14-2.15).

The Committee had significant concerns about the issue of equal access to the tribunal:

All parents and legal guardians must have equal access to the appeals process. Evidence suggests this is not the case at present. The Government is responsible for ensuring steps are taken to guarantee equal access to an appeals process for all parents and guardians; in doing so it should give particular attention to the access of parents from low socio-economic backgrounds, parents with SEN themselves, and the fair representation of looked-after children.

The Government should start to collect data on the background of parents at tribunal, and on expenditure in relation to outcome (Ibid. paras 2.17-2.18).

The Committee considered that the issue of equality of access for looked-after children needed urgent resolution. The only people who can appeal to the tribunal on behalf of a looked-after child are the social workers who are employed by the authority whose decision is appealed.

It was also their view that the effectiveness of local authorities in promoting informal resolution needs to be closely monitored. In relation to the appeal process, they said:

The standard approach should not be adversarial. We recognise, however, that all too often parents had little choice in taking an adversarial approach during the appeals process in order to obtain what is in the interests of their children (Ibid. para 2.22).

Memoranda received from LEAs referred to frustrations regarding the Tribunal process and the lack of 'fairness' inherent in the system. There are quotations in the report from a spokesperson from Buckinghamshire County Council who said 'The Tribunal process, initially established as a means of appeal for parents in disagreement with the local authority, has become a quasi-legal process where affluent parents engage barristers to 'fight' their case, irrespective of the educational rationale', and from Mark Rogers, Director of Education and Children's Services, Solihull Metropolitan Borough Council, who did not consider it helpful for tribunals to be able 'to make decisions out of context, especially as they have no financial responsibility for the decisions that they make.' (Ibid. para 223-4).

The Committee observed that parents seek an entitlement to have their child's needs met, and a local authority seeks to distribute finite resources as effectively as possible. This is a situation that 'inevitably raises conflict'. They recommended:

Conflict between parents and local authorities needs to be minimised through clear understanding of roles and responsibilities, transparent processes, and better management of expectations. (Ibid. para 225).

Mark Rogers described the need to consider SEN appeals within a broader appeal system—rather than creating a separate system for SEN. He suggested:

[...] if we took the opportunity that the Child Care Bill gives us to boost our Children's Information Service to include an [...] advocacy and disagreement resolution function [it] would be a major start. We have a Disagreement Resolution Service already for special educational needs, but we do not have it more broadly [...] I would like to see the introduction of a generic advocacy and disagreement resolution service that had within it the specialisms that you need for particular areas of disagreements [...] I think that there are ways and means of putting in place universal systems for all children and families and not the specialised ones [...] [and] have the specialisms within it. (Ibid. para 226).

The Committee recommended:

The Government should review whether SEN appeals should be part of a broader education appeal process as part of a strategy to reduce reliance on a separate system for SEN. (Ibid. para 227).

The Government's response was to dismiss the concerns of the Committee:

The SENDIST was established to handle SEN appeals and claims of disability discrimination. There are no direct costs in appealing to the Tribunal. The service is free and the Tribunal reimburses parents and their witnesses for travel expenses. Witnesses can also receive a standard allowance towards loss of earnings.

SENDIST aims to provide an accessible, supportive and helpful service to parents of children with SEN and to avoid formality in its proceedings as much as possible. Many parents do need help making and pursuing an appeal to SENDIST. Details of some organisations that can help parents appear in their appeal booklet. It also provides information in a range of accessible formats, including Braille and large print, tape and video. The video seeks to dispel any notion that parents are coming to a court, and reassure them that the Panel will guide them through the process.

Although there are no data on the socio-economic backgrounds of parents appealing to SENDIST, its annual report includes a breakdown of appeals by local authority. There does not appear to be any clear link to economic circumstance between the local authorities with relatively high and relatively low levels of appeals.

The Tribunal's annual report for 2004/05 shows that nearly two thirds of all appeals were either conceded by LEAs or withdrawn by parents. The Tribunal has indicated that the great majority of withdrawals arise because parents are satisfied with their LEA's response to their appeals. A majority of the remaining 35 per cent of appeals resolved by tribunals were at least partly upheld.

In 2004/05 the Tribunal upheld 58 per cent of appeals against LEA refusals to carry out statutory assessments. In cases involving the contents of statements 87 per cent of appeals were upheld at least in part – that is, the resulting statements included some if not all of the provision parents were seeking. Given that only a quarter of parents retain a lawyer for the hearings, the high proportion of appeals upheld or settled in advance in favour of parents indicates that legal representation is not required for parents to be successful in their appeals.

Decisions about collecting further data on those using Tribunals are for the Tribunals Service itself.
(Government Response October 2006 para 54 p.54-55).

On one level, this response is convincing. Any parent who is dissatisfied with decisions made about provision for their child's needs can appeal. The SENDIST is a competent specialist tribunal. It operates well, within the remit it has been given; provides clear information about how to prepare and present appeals; conducts enabling hearings, and parents have a high success rate. Parents have access to advice through the PPS. Mediation is available as an alternative to reduce conflict. Why should anything more be done if parents do not choose to access what is available?

But the response is based upon the premise that the concerns are unfounded because there is no clear link between low levels of appeals and social deprivation. To a degree this is understandable because the report does not establish the link as clearly as it could have done. Although it has a reasonably

robust evidential base⁵⁴, there is a tendency to draw conclusions based upon anecdotal quotations. What is significant is that its conclusions are in line with the earlier studies referred to in this Chapter. Some of these are small studies⁵⁵ but, when considered together, a clear picture emerges that the current appeals system appears particularly daunting for parents who are educationally and materially disadvantaged.

Even if the DfES failed to make the link with these earlier studies, the results of the Department's own league tables show that the gap between rich and poor, in terms of educational achievement, is continuing to widen. Figures published by the Chief Inspector for Schools show that, in 2005, 28.2 per cent of pupils in the 10 per cent most deprived areas gained at least five GCSEs, including English and maths, at grades A* to C. In the richest 10 per cent of areas, 56.2 per cent of pupils reached this level, showing an attainment gap of 28 percentage points. In 2006 the attainment gap was 28.4 percentage points, and in 2007 it was 43.1 percentage points⁵⁶. The DfES have pledged to narrow this gap⁵⁷.

In light of concerns brought to their attention by a House of Commons Committee that inequality of access to the SENDIST may be perpetuating an attainment divide based upon social deprivation, it is difficult to understand why such concerns were dismissed on the basis that it is for the SENDIST to determine whether there is a problem. Lord Adonis, on behalf of the Government, has confirmed subsequently that the appeals process is one of the subjects of the HMCI review due to conclude in 2009/10⁵⁸.

In terms of Mashaw's models, it appears that the trade-off of overall control advancing collective interests in favour of individuation in the form of parental preference and appeals is having detrimental consequences for children most in need of help.

⁵⁴ 230 written submissions, interviews with 50 witnesses, visits to schools, response to a radio phone-in discussion and advice from specialist advisers – see Data Sources.

⁵⁵ The Evans 1998 study was the largest covering 25 LEAs; the Hall 1999 study covered 8 LEAs; the Riddell 2000 study covered 4 – see Data Sources.

⁵⁶ The Times 31 December 2007. www.timesonline.co.uk.

⁵⁷ Ibid. Spokesperson David Willetts.

⁵⁸ See p. 290.

2.3. THE LOCAL COMMISSIONERS FOR ADMINISTRATION – INQUISITORIAL

2.3.1. Legislative provisions

The Local Commissioners for Administration for England and Wales were created in 1974. There are three regional Commissioners for England. They are referred to collectively in the thesis as Local Government Ombudsman, ‘the LGO’. A member of the public aggrieved by a local authority decision may complain to the LGO by completing a form. The LGO’s website provides guidance about how to do this and the nature of the LGO’s remit. A complaint must be made within 12 months of the day on which the aggrieved person first had notice of the matters alleged⁵⁹. Before the LGO investigates, he must be satisfied that the complaint has been brought to the notice of the authority to which it relates and that the authority has been given a reasonable opportunity to investigate⁶⁰; the LGO may not investigate a complaint where there is a right of appeal to a tribunal or a Minister, or where the person aggrieved has a remedy by way of proceedings in a court of law, although he has discretion to investigate if he is satisfied in the particular circumstances that it is unreasonable to expect the aggrieved person to appeal or to go to court⁶¹.

The LGO and the Parliamentary Commissioner for Administration form a Commission that oversees the work, produces annual accounts and business plans and provides advice on good practice. The Commission attaches importance to ensuring uniformity of treatment. The LGO is impartial. For the purposes of an investigation, the LGO has the same powers as the High Court in respect of the attendance and examination of witnesses and the production of documents. Anyone who, without lawful excuse, obstructs an Ombudsman in the performance of his functions is guilty of contempt of court⁶². The LGO has unqualified discretion to decide whether to initiate, continue or discontinue an investigation. Investigations must be conducted in private. The procedure for the conduct of an investigation is at the LGO’s discretion. The LGO is not

⁵⁹ Although the Ombudsman has discretion to conduct an investigation not made within 12 months if he or she considers it reasonable to do so (Local Government Act 1974 section 26(4)).

⁶⁰ Ibid section 26(5).

⁶¹ Ibid section 26(6).

⁶² Information on the LGO website indicates there has never been a need to resort to proceedings for contempt www.lgo.org.uk.

bound by precedent in reaching conclusions and making recommendations, but aims to act consistently.

The LGO investigates ‘maladministration causing injustice’, which is not within the remit of the SENDIST. The LGO can consider complaints about the way a decision was made, but cannot conduct an appeal on the merits.

Maladministration is said to comprise:

- delay
- incorrect action or failure to take any action
- failure to follow procedures or the law
- failure to provide information
- inadequate record-keeping
- failure to investigate
- failure to reply
- misleading or inaccurate statements
- inadequate liaison
- inadequate consultation
- broken promises

There is no fixed definition of injustice but it can include:

- hurt feelings, distress, worry, or inconvenience
- loss of right or amenity
- financial loss or unnecessary expense
- time and trouble in pursuing a justified complaint

The injustice must arise from fault by the local authority⁶³.

The LGO employs investigators who will decide what information is needed in order to reach a decision. Where it is not clear exactly what the complainant objects to or what injustice they claim to have suffered, the investigator will obtain clarification. Having done so, he will write to the authority, defining the complaint and asking for comments. The letter also specifies what information is wanted (e.g. copies of policies, minutes of meetings). A copy of the authority’s reply is sent to the complainant and he is asked for comments. In the

⁶³ Definition taken from the LGO website.

light of these, the LGO will decide whether there is a need to inspect files or interview witnesses. Information may be commissioned and obtained from other sources.

If the LGO is satisfied with the remedial action offered by a council, he will regard the complaint as 'locally settled' and discontinue the investigation. The LGO both encourages, and oversees, settlements, which proves effective in curtailing the numbers of expensive investigations. Before reaching a view on whether a case is settled, the LGO will usually consult the complainant but is not bound by the complainant's views. Because authorities are willing to offer local settlements in so many cases, it is only necessary in a small minority of cases to complete an investigation and publish an adverse report. Before issuing such a report, a draft is sent to the authority, the complainant and any other relevant parties inviting their comments. Formal reports set out findings, conclusions and remedies for injustice.

The authority must give notice in newspapers that copies of the report are available for public inspection unless a direction has been issued that the report should not be made publicly available. Such directions are rare but can be necessary where, for example, the identity of the complainant (or others) would be likely to become known and could cause harm. Within three months of the issue of a report, the authority are required to tell the LGO what action they propose to take. In nearly every case, authorities agree to comply fully with the recommendations. In the tiny proportion of cases where authorities refuse to comply, the LGO may publish a further report formally recommending what action the authority should take. The authority must reply. If the LGO remains dissatisfied having considered the reply, the authority may be required to publish a statement in newspapers setting out the LGO's findings and why the authority's response is considered unsatisfactory. Recommendations can influence future practice and lead to wide-scale review of procedures.

2.3.2. Context

The 2006/7 Annual Review Report indicates that, in 2006/7, the LGO decided 18,192 complaints. The figure 2005/6, the figure was 18,487. The outcomes

were as follows. The 2004/5 figures are in brackets (Local Commissioner for Administration 2006b p.16):

OUTCOMES OF LGO COMPLAINTS

Complaint outcome	Number of complaints
Local settlements	2956 (2,875)
Maladministration causing injustice (issued report)	132 (167)
Maladministration, no injustice (issued report)	6 (28)
No maladministration	4952 (5,407)
Ombudsman's discretion not to pursue complaint	2631 (2,892)
Premature complaint	5123 (4,713)
Outside jurisdiction	2392 (2,405)

The figures for complaints outside the LGO's jurisdiction are high, and may signify confusion about the LGO's remit.

The Report also states that 47.6% of all complaints were determined within 13 weeks (the target was 50%); 78.5% within 26 weeks (the target was 80%); and 95.4% within 52 weeks (the target was 96%) (Ibid. p.21). There was a slight decrease in performance against targets as compared with previous years, which was attributed to an increase in the complexity of complaints and slow response times by local authorities. SENDIST appeals generally take five months to conclude. This is comparable with 80% of LGO complaints. However, 20% of LGO complaints may take up to twice as long to conclude. This is higher than the percentage of cases in which reports are produced. Figures on the number of complaints show that very few parents approach the LGO, and that maladministration is found in a tiny number of cases. But the LGO's remit is limited.

A recent customer satisfaction survey (Ipsos Mori 2007) indicated that there was a problem with complainants being unclear about what the LGO can do. Although satisfaction with the handling of complaints outstripped those satisfied with the final outcome, there was dissatisfaction with the level of thoroughness of investigations and suggestions that the LGO is not impartial. The researchers suggest this was linked to the small number of findings of maladministration causing injustice and that it is difficult to change the outcome

of investigations to improve customer satisfaction. The LGO now provide a telephone advice service the purpose of which is to explain their role and the complaints process.

The LGO publishes summary reports ‘naming and shaming’ councils. For the period June 2006 – June 2007, there were 242 complaints relating to SEN resulting in eight published findings of maladministration causing injustice. All of them involved delay. There were examples of inadequate needs assessments; failure to provide advice as to availability of ADR; and failure to meet the needs of a looked-after child who fell between two different LEAs for months whilst they argued about which was responsible. Compensation was awarded in each case for the frustration and distress caused to parents and children, and for lack of adequate provision during the prolonged period it took for the LEA to comply with legal obligations.

The LGO cannot recommend that a statement include specified educational provision or that a child be placed in a particular school. Although the remit of the LGO is not to adjudicate on the merits of decisions, it appears conclusions are reached about failure to comply with obligations in deciding awards of compensation. The maximum award was £13,000. Specific recommendations for further action were made, including review of procedures, and the making of apologies. Two LEAs pre-empted LGO recommendations, and had already instigated reviews before publication of reports.

The table below shows the numbers of cases where recommendations were not complied with over the entire spectrum of local authority complaints:

⁶⁴LGO RECOMMENDATIONS NON-COMPLIANCE

Year	Number of cases
1997/98	1
1998/99	2
1999/00	3
2000/01	2
2001/02	2
2002/03	1
2003/04	0
2004/05	1
2005/06	0

Although the figures indicate that the level of compliance with LGO recommendations has been excellent since 1997/8, nevertheless there has been some debate about the status of recommendations necessitating intervention by the courts to ensure resolution.

In the case of *R v Local Commissioner for Administration ex parte Eastleigh Borough Council*⁶⁵ Lord Donaldson said-

. . .the Parliamentary intention was that reports by Ombudsmen should be loyally accepted by the local authorities concerned. . .Whilst I am very far from encouraging councils to seek judicial review of an Ombudsman's report, which, bearing in mind the nature of his office and duties and the qualifications of those who hold that office, is inherently unlikely to succeed, in the absence of a successful application for judicial review and the giving of relief by the court, local authorities should not dispute an Ombudsman's report and should carry out their statutory duties in relation to it.

In *R (Bradley) v Secretary of State for Work and Pensions*⁶⁶, Bean J, commenting on *Eastleigh*, said that it was authority for the proposition that the findings of an LGO are binding on the relevant local authority in the absence of a successful application for judicial review in which such findings are objectively shown to be flawed, irrational, peripheral or where there is genuine

⁶⁴ Figures for 1997/8 – 2005/6 are taken from a table at p.30 in the Annual Report for 2004/5 (Local Commissioner for Administration 2004). The figure for 2005/6 is taken from the Annual Report for that year (Local Commissioner for Administration 2005).

⁶⁵ [1988] 1 QB 855.

⁶⁶ [2007] EWHC 242 (Admin).

fresh evidence to be considered. It follows, therefore, that if the LGO's findings are binding unless challenged, it will be difficult to argue that it is reasonable to ignore recommendations based upon such findings.

Giddings says that the strength of Ombudsman schemes has been their ability to adapt to a variety of systems and cultures (Giddings 2000 p.459). There has been a proliferation of schemes in both the public and private sectors that have been adapted successfully to fit diverse contexts. A significant advantage of inquisitorial procedures over the SENDIST process of adversarial pre-hearing procedures followed by an enabling hearing, is the ability of the inquisitor to be pro-active role in seeking information. He may inspect files; interview whoever he considers may have relevant information; and commission evidence. As Seneviratne says (Seneviratne 2002), Ombudsmen in the UK have been remarkably successful, and this is due, in part, to their using methods that overcome many of the disadvantages of the court system. They are free to complainants, and there is no need for complainants to seek professional advice.

By contrast, the SENDIST's pre-hearing procedures place the onus on the parties for producing the information they think the tribunal should consider. The Genn 2006 study shows that SENDIST members can, and do, intervene to assist parents who are disadvantaged at the hearing. But this is of no help to parents who are deterred from appealing by the prospect of producing statements and arguing their case orally, or who are unable to afford to pay expert witnesses. As the SENDIST confirmed to the Education and Skills Committee of the House of Commons, it is difficult for the tribunal to overturn decisions by LEAs based upon expert evidence where parents produce no expert evidence to refute the LEA's evidence, and it is beyond the tribunal's remit to commission evidence. If, as Giddings says, Ombudsman schemes can adapt successfully, inquisitorial procedures could bring many advantages in the SEN context. A particular strength of Ombudsmen is that they can recommend not only reconsideration of decisions, but financial redress and change to procedures.

Seneviratne's study indicates that Ombudsmen generally receive very few complaints. She considers that steps should be taken to make more people aware of their existence. A major problem with all Ombudsmen schemes, she says, is the time taken to deal with complaints. Seneviratne considers that delay is inevitable because investigations need to be thorough and extensive. She also notes that, because of this, there is a more-resolution focused attitude, working with complainants to try to avoid using formal investigative procedure unless absolutely necessary (Seneviratne 2002 p.286). The statistics in the table at p.62 indicate that the resolution-focused attitude is proving successful, with the vast majority of complaints being either settled or filtered-out. It is clear, however, that a significant percentage of appeals take up to a year to conclude.

Seneviratne's contention that delay is inevitable does not necessarily follow. The time taken to complete an investigation depends upon the nature of available resources. It is possible to conclude even extensive investigations quickly. This is a question of trade-offs. Complaints necessitating full-scale investigation of practice and procedure are likely to be rare. There is a choice as to whether resources might be bought in. For complainants, trading-off speed of resolution for comprehensive reform may be a trade-off worth making. The children's social services complaints procedure, which is discussed in detail in Chapter Six and which employs inquisitorial procedures, imposes an obligation upon local authorities to conclude focused reviews within short time-scales, but makes provision for time-limits to be waived. This establishes avoidance of delay as a principle, with authorities having to justify taking longer and complainants having the opportunity to escalate the complaint to an independent Panel where they consider the time taken to complete the investigation is unreasonable.

2.3.3. Jurisdiction

It is clear that there is not meant to be any overlap of jurisdiction between SENDIST, LGO and the Administrative Court, and no choice available. Seneviratne says that courts and tribunals are not equipped to investigate the manner in which decisions are made. Ombudsmen were designed to fill a gap. They are not an alternative – they have a different role (Ibid. p.310). This is

why they are precluded from investigating complaints where other remedies are available. However, with the expansion of judicial review, there is more overlap which, she suggests, calls for a re-evaluation of the relationship between Ombudsmen and the courts.

The continued involvement of the LGO in SEN disputes and the nature of the LGO's role merits reconsideration, given the very small numbers of complaints. The relationship between the SENDIST, the Administrative Court and LGO in SEN disputes was considered in the case of *R v Commissioner for Administration ex parte PH*⁶⁷. This was a case about delay in assessing a child's SEN. The mother initiated judicial review proceedings and the LEA agreed to an order requiring them to assess the child without further delay. Subsequently, the mother complained to the LGO that her child had been caused injustice by the delay in making suitable provision for him and sought compensation. The LGO took the view that the complaint was outside their jurisdiction because she had already sought a remedy by way of the judicial review proceedings. The mother sought judicial review of the LGO's decision. She wanted the court to order the LGO to investigate her complaint. Mr. Justice Turner said:

It can hardly have been the intention of Parliament to have provided two remedies, one substantive by way of judicial review and one compensatory by way of the Local Commissioner.... Where a party has ventilated a grievance by way of judicial review it was not contemplated that they should enjoy an alternative, let alone an additional right by way of complaint to a local commissioner⁶⁸.

He upheld the LGO decision and awarded costs. In two other cases - *R v Commissioner for Local Administration ex parte Bradford City Council*⁶⁹; and *R v Commissioner for Local Administration ex parte Croydon LBC*⁷⁰ the Administrative Court also took a hard line on any suggestion that the LGO should be able to consider complaints that had already been the subject of court decisions.

⁶⁷ 21 December 1998.

⁶⁸ The significance of this case is discussed on the LGO website www.lgo.org.uk/origins.htm.

⁶⁹ [1979] QB 287

⁷⁰ [1989] 11 ER 103.

The issue of when each mechanism should be used is not straightforward. It is understandable that parents who consider their child has been disadvantaged by delay would wish to seek compensation. Had the parents in *PH* brought their complaint to the LGO in the first instance, compensation might have been awarded. But neither the LGO nor the SENDIST have procedures enabling immediate decisions to be made, as is the case in urgent judicial review applications. Compensation was traded-off for an urgent decision. But why should this have to be the case? The continued operation of a proliferation of mechanisms, each having different functions and procedures should be re-evaluated to avoid duplication and confusion, particularly in light of the call in 'Transforming Public Services' for integrated systems. This issue is considered in detail in Chapter Four with reference to Adler's typology of administrative grievances.

2.4. THE ADMINISTRATIVE COURT - ADVERSARIAL

The courts have a number of roles in relation to SEN disputes. Although not the principal dispute resolution mechanism, they have laid down principles as to what constitutes reasonable exercise of discretion and fair procedures which public bodies must act in accordance with. A judicial review application can be made in the Administrative Court, by-passing the SENDIST, where an urgent decision is needed. Government guidance, LEA policies and other decisions not appealable to the SENDIST may be challenged on the basis that they do not comply with administrative law principles, the European Convention of Human Rights or relevant EC law provisions.

Proceedings are formal; there is an application fee of £50 in judicial review proceedings, with a further £180 payable if the applicant wishes to continue, having obtained permission. Costs of legal representation run into thousands of pounds. Research by Genn (Genn 1999a) suggests that the courts are so remote from people's everyday lives as to be almost irrelevant. Relatively speaking, there have been high numbers of court decisions involving children with SEN, but these amount to 20 (approx.) reported cases per year. Of the three available formal dispute resolution mechanisms, this is the least accessed. But parents

cannot choose to apply to the Administrative Court in preference to appealing to the SENDIST.

The Administrative Court is also the appellate body for the SENDIST, though it is proposed that, when a two-tier tribunal system is implemented, right of appeal will be to the Upper Tribunal (Ministry of Justice 2007 'Transforming Tribunals'). Both parents and LEAs may appeal. In 2006/7, parents lodged 35 appeals and LEAs lodged 7. No appeals were successful, but 10 were referred back to the tribunal, and 12 were withdrawn. 3 were dismissed (Hughes 2006 p. 17). 'Transforming Public Services' makes clear that the prospect of having a court as the principal dispute resolution mechanism for public law disputes is no longer on the political agenda, and that the debate has moved on from the 1980s 'courts vs tribunals' arguments to an argument of 'formal vs informal', with tribunals cast in the role of formal mechanisms and the onus becoming increasingly in favour of informal mechanisms.

The role of the Administrative Courts in SEN decision-making is discussed at various points in the thesis, so this section is brief. Their role in determining principles that shape the exercise of discretion and what constitutes a fair procedure is discussed in the next Chapter. Jurisprudence on the right to education and the rights of the child is discussed in Chapter Seven.

Chapter Three

Discretion and Controls over its Exercise

If we stay within the comfortable areas where jurisprudence scholars work and concern ourselves mostly with statutory and judge-made law, we can at best accomplish no more than to refine what is already tolerably good. To do more than that we have to open our eyes to the reality that justice to individual parties is administered more outside courts than in them, and we have to penetrate unpleasant areas of discretionary determinations...where huge concentrations of injustice invite drastic reforms. (Davis, K. 1969 p.70).

3.1. CHAPTER SUMMARY

This chapter considers the process of SEN decision-making, focusing upon the exercise of discretion, boundaries upon its exercise and their effectiveness. This is the first stage of analysis. It is essential to conduct this exercise in order to consider in detail the balance of trade-offs.

The SEN legislative framework envisages substantial exercise of discretion by LEAs. This is limited in a number of ways: by the prescriptive procedural requirements identified in the previous Chapter; obligations to advance the purpose of relevant legislation and to have regard to the SEN Code of Practice; independent scrutiny; enforced corrective action; and the overarching obligation upon public bodies to act in accordance with administrative law principles. LEAs have self-limited by compiling criteria for the purpose of deciding whether to conduct formal assessments. A further limiting factor is the amount of resources allocated by Government and the degree of flexibility afforded about how local priorities should be met within available resources. This chapter consists of a section on discretion and sections on each form of control.

As Mashaw observes, organisations and the bureaucrats that inhabit them have their own goals, desires and motivations, which may conflict with the purposes of relevant statutory obligations. It is important to examine the tensions between organisational goals and programme goals in order to assess whether, and how, the exercise of discretion should be controlled and to identify, as accurately as possible, the tensions between systemic and intuitive rationality. This Chapter identifies that LEAs are adopting 'blanket policies' driven by a culture that

places more emphasis on resources than on children's needs. If discretion is viewed as a continuum or spectrum, the objective must be to achieve an optimum point on the rule-to-discretion scale – a reasonable balance between effectiveness and certainty of expectation, on the one hand, and flexibility to take into account individual circumstances, on the other.

Exercise of discretion by the SENDIST is limited by some of the same constraints as those applying to LEAs - obligations to advance the purpose of the legislation, to comply with procedural requirements, and to have regard to the SEN Code of Practice, administrative law principles, the ECHR and EU law. Tribunals are not bound by previous tribunal decisions, but should act consistently. There are, however, three significant differences. SENDIST are not bound by any guidance directed at LEAs, other than the SEN Code of Practice, nor by any self-limiting criteria developed by them, and they are not limited by resources in the same way as LEAs. This has led to a situation whereby the tribunal is more likely than LEAs to make decisions favourable to parents. The figures shown on p.40 demonstrate a high success rate for parents in appeals. The adoption of self-limiting criteria indicates that LEAs are interpreting their obligations restrictively which, Mashaw says, increases the chance of appeals being successful.

Mashaw's view is that the courts are ineffective in determining normative moral standards because they are only able to lay down principles in judgments on the limited number of individual cases that come before them. An examination of the general and SEN-specific jurisprudence relating to the exercise of discretion and substantive legitimate expectation indicates that, although the courts have laid down important principles governing the exercise of discretion in some cases, they are not always consistent in approach. Whilst the importance of the over-arching administrative law principles laid down by the courts and their role as independent check on the Executive cannot be dismissed lightly, they are undoubtedly a mechanism of last resort and the effect of this must be considered in any proposals for reform.

3.2. DISCRETION

Teubner has observed an increasing tendency for social relationships to be regulated by law. He terms this 'juridification of the social sphere' (Teubner 1987 p. 391-2.), suggesting it marks a substantial departure from the traditional position of law's neutrality and non-interference. Teubner sees this legal explosion as 'puzzling to the public'; as 'over-regulation' - an 'excess of laws'. His concern is that this is damaging law's enforcement role and reducing its credibility, as the mastering of increasing numbers of highly technical regulations becomes impossible. Galanter (1996 p.2) considers this proliferation is in response to a demand for more information, and linked to a decline in trust of governments. There is little doubt, however, that rules are an efficient way to organise complex societies, and a method of ensuring that legislation is interpreted consistently. The purpose of administrative rules is to facilitate delegation; allow internal communication within organisations; and to help standardise administrative practice by allowing it to be measured and audited.

Theorists are divided into two camps – those who put their trust in the courts as the primary means of controlling discretionary power, and those who believe in rulemaking. Mashaw described the contribution of the courts to the control of discretionary power as modest at best. Control (he says) is external and largely retrospective. Preference for regulation, however, is based upon mistrust, and may signal priority for the principles of efficiency and uniformity enshrined in Mashaw's bureaucratic rationality model, over individuation and diversity, as enshrined in the moral judgment model.

Bradshaw argues that the contradiction between effectiveness and sensitivity to individual cases calls for a judicious blend of rules and discretion:

Most agencies making decisions do so in a manner which can be located on a continuum somewhere between discretion at one end and rules at the other. Competing values push the character of the decision between these two ends of the continuum. Thus accountability, rationality and entitlement push the agency towards rules, and generosity, sensitivity and choice push it towards discretion. (Bradshaw 1981 p.139).

Jowell presents a scale:

Discretion is rarely absolute and rarely absent. It is a matter of degree, and ranges along a continuum between high and low. Where he has a high degree of discretion, the decision-maker will normally be guided by such vague standards as 'public interest' and 'fair and reasonable'. Where his discretion is low, the decision-maker will be limited by rules that do not allow much scope for interpretation. (Jowell 1973 p.178).

Jowell distinguishes between rules, principles and standards, with rules being the most precise form of general direction, requiring for their application nothing more or less than the happening or non-happening of a physical event. Principles involve normative standards by which rules might be evaluated, and arise mainly in the context of judicial decision-making. But principles need not necessarily be determined by the courts. Mashaw suggests a 'superbureau' as an appropriate, sufficiently independent, body to define such principles. Standards are distinguishable from rules by their flexibility and susceptibility to change over time.

Dworkin considers discretion is always contained within rules, describing it as 'the hole in the doughnut'.

Discretion does not exist except as an area left open by a surrounding belt of restriction. It is therefore a relative concept. (Dworkin, R.M. 1979 p.31).

Galligan suggests that any exercise of official power should be capable of being explained in terms of its purposes and within a framework of constraining principles (Galligan 1986 p.20). As rules structure discretion, so discretion structures rules. The exercise of discretion is also shaped by the wording of the rule; the body of administrative law principles within which decision-makers are required to operate; the intention of the legislature in enacting the power or duty from which the rule derives; and the interpretation of the rule by the decision-maker. In seeking the optimum point on the rule-to-discretion scale, it may be possible to fit rule-type to function. Baldwin considers that precise rules are better suited to simple matters. As the matter becomes more complex, principles deliver more consistency than rules. (Baldwin 1995 p.16).

Rules themselves may not be the optimal means of controlling discretion. As Baldwin says:

Using governmental rules is one way of controlling or executing governmental functions but it is by no means the only one. Alternative controls include accountability to variously constituted bodies; scrutiny, complaints, and inspection systems; arrangements to ensure openness (such as requirements to publish performance indicators and statistics) and schemes for giving effect to consumers' views. (Baldwin 1995 p.16).

These forms of control are not necessarily mutually exclusive. The SEN decision-making process incorporates all of them. In addition to those already mentioned, local authority education and children's services and schools are inspected by Ofsted⁷¹; there are internal complaints systems; requirements to publish information on standards in schools; individuals may make requests to see personal, and other, information under the Freedom of Information Act 2000 and the Data Protection Act 1998. In spite of this plethora of controls, there remains considerable scope for the exercise of discretion in individual cases, which brings into play the tension between the objective of establishing settled general standards, and the need to approach individual cases with a relatively open mind – to be willing to modify, extend or make exceptions to the standards to take account of the merits of individual cases. The implications of this willingness to modify the standards are that they must not be viewed as binding rules, and that decisions will not form precedents for future cases.

But, as Galligan observes, decisions made on the merits are simply decisions made in accordance with unarticulated standards (Galligan 1986 p.8). The argument for having criteria for assessment and statementing in the context of SEN decision-making is not simply to assure predictability, but to advance the collective good in ensuring fair distribution of limited resources. However, in the administrative law context, it is considered important that the discretionary authority maintains an attitude of reflective interaction between policy choices and the particular features of individual cases. There is evidence in the Hall study (Hall 1999 pps 42-43) that LEAs are more concerned about resources

⁷¹ Now the Office of Standards in Education, Children's Services and Skills.

than children's needs⁷² and in the Select Committee's 2006 Report that LEAs may not be making decisions on the merits of individual cases – that they are operating blanket policies⁷³. In order to understand why this is, it is necessary to understand the internal point of view⁷⁴ - the way officials approach their own powers and perceive their tasks.

Possibly there is a proliferation of 'bad' officials who stand on the letter of the criteria to prevent children from receiving remedial help. But perhaps a prevailing culture is in operation in which resources are seen as more important than children's needs. In cases where a child is failing to make progress but does not yet meet the level of difficulty required for a statement, an LEA might argue that the child is not sufficiently deserving of this resource. But, in situations where such a decision would confine the child to years of increasingly significant failure, it might be reasonable to depart from the criteria to give the child a statement at an earlier stage. 'Generous' officials may bend the rules or find loopholes to help more children. But lack of uniformity between decision-makers creates arbitrariness, uncertainty and possibly unfairness. Eligibility is not determined by the rule or the circumstances of the case, but by which particular individual or Panel makes the decision.

In the cases of *R v Home Secretary ex.p. Anufrijeva*⁷⁵ and *European Roma Rights Centre v Immigration Officer at Prague Airport*⁷⁶ examples can be seen of rules being disregarded by decision-makers where they were at odds with the prevailing culture and of a culture of discrimination that had infused decision-making, influencing how rules were applied. This practice may be difficult to track down, let alone eliminate. In both cases, the courts condemned what was happening unequivocally. But, in the case of *R (Gillan) v Metropolitan Police Commissioner*⁷⁷ in which the police were accused of using stop-and-search powers in an arbitrary manner based upon racial prejudice, the courts did not

⁷² See p.26 of the thesis.

⁷³ The report refers to a letter from the DfES to LEAs which is discussed at pps. 91, 105 and 304 of the thesis.

⁷⁴ This is the notion of H L A Hart in *The Concept of Law* 1961 Oxford UP.

⁷⁵ [2003] UKHL 36.

⁷⁶ [2004] UKHL 55.

⁷⁷ [2006] UKHL 12.

condemn the practice. It was held that deployment of the power against a higher proportion of people from particular ethnic groups was the *only* legitimate use of the power where those likely to perpetrate acts of terrorism were more likely to be from one ethnic group than another.

The question these cases raise is whether, and to what extent, rules change behaviour – whether the strongest influences on decision-making are strong/weak discretion, the degree of prescription imposed by rules, or social conditioning, group morality, attitudes of mind and prejudice. Perhaps LEA decision-makers, erroneously, have come to regard the criteria as binding conclusive rules, or the relevance of resources is misunderstood. The task of LEAs is not to prevent, or delay, children getting remedial help where such help is needed. Rationing, which may be a necessity where resources are insufficient, is about the nature and degree of what is offered, not about finding reasons to refuse a request for help.

It is important to understand the motivation of those operating the rules. They are unlikely to have met the child or the parents (Evans 1998 p.31). Parents may request meetings, but only after a proposed statement has been prepared⁷⁸, and there is no requirement that the child should be present at such meetings. LEAs are cast in the role of defending their decisions. Officials who make decisions on a regular basis may have developed a ‘them and us’ attitude, castigating middle-class parents who wish to jump the queue and get more for their child at the expense of others (Evans 1998 p.34). In the absence of such a culture, one might suppose it would be difficult to refuse any request in respect of a child who needs remedial help.

Davis says that rulemaking is the most important way in which bureaucracy creates policy, but this does not mean that discretion should be eliminated:

Even where rules can be written, discretion is often better. Rules without discretion cannot take into account the need for tailoring results to unique facts and circumstances of particular cases. The justification for discretion is often the need for individualized justice. This is so in the judicial process as well as the administrative process. (Davis 1969 p.26).

⁷⁸ Paragraph 4 of Schedule 27 to the Education Act 1996.

There are three problems with rules – selective enforcement; a need to mitigate their severity in particular circumstances; and over-inclusiveness. Although discretion may lead to arbitrariness, uncertainty or manipulation by its possessor, it cannot simply be replaced by rules. Rules may reduce arbitrariness, but particular prevailing cultures driven by rules may lead to manipulation of discretion. They may ‘solve’ problems whilst creating others. A proliferation of different types of rules adds to the complexity of the problem. The SEN Code of Practice (2001) discussed in section 3.3.1. emphasises the obligation to have regard to its provisions. On the other hand, the guidance on Management of SEN Expenditure (DfES 2004c title page) discussed in section 3.3.2. is headed ‘Status: Recommended’. There is no reference to specific powers under which it is issued.

There is a need for uniformity where mass decisions are being made in order to ensure equal treatment. Yet, even in cases where the most prescriptive form of rules operate, the classic rule of administrative law is that a public body entrusted with discretion must exercise it, and may not fetter its exercise. But departure from rules is complex. The existence of particular procedures and practices may engender a substantive or procedural legitimate expectation. Rules operate as a promise that they will be followed. The more prescriptive the rule, the more likely it is that an obligation to follow it will be implied. If a child meets tightly-drawn eligibility criteria for a statement, the expectation is that he will get one.

In the case of *R v North and East Devon Health Authority, ex p Coughlan and others*⁷⁹ the applicant, a disabled elderly woman, went to live in a local authority nursing home, acting on an assurance that this would be her ‘home for life’. Later, the local authority, for financial reasons, decided to close the home. In considering the status of the assurance, the Court of Appeal took the view that it had induced a legitimate expectation of a benefit that was substantive, not simply

⁷⁹ [2000] 2 WLR 622.

procedural, such that it was open to the court to decide that to frustrate the expectation was so unfair that to take a new and different course amounted to an abuse of power. It was open to the court to determine whether there was a sufficient overriding interest to justify departure from what has been previously promised.

The case of *R(Rogers) v Swindon NHA*⁸⁰ advances the principle of substantive legitimate expectation. A Primary Care Trust (PCT) had adopted a policy of deciding to fund particular treatments based upon taking into account statutory guidance; all relevant evidence; the views of patients and others involved; and the needs of other groups competing for scarce resources. The policy also provided for applications for funding to be made in the case of special healthcare problems presenting an exceptional need for treatment.

Refusing an application for funding of the drug Herceptin, the PCT cited the fact that it was not licensed or approved by the relevant Government agency, NICE⁸¹. The Court of Appeal held that this was irrational. The policy allowed the possibility that Herceptin could be funded for some patients under the exceptional applications procedure. This being the case, the only rational basis for distinguishing between claims made under this category would be to focus on clinical needs and fund Herceptin for patients for whom it was properly prescribed. An order was made that Herceptin be funded for the applicant.

As in *Rogers*, there are two exercises of discretion in the SEN context – discretion to devise criteria and discretion as to whether to follow them in individual cases. LEAs may be concerned to create certainty but not an expectation that will bind them to a particular course of action. This would lead to negative formulation of criteria - statutory assessments will not be undertaken unless the child has x level of difficulty and there

⁸⁰ [2006] EWCA Civ 392.

⁸¹ National Institute for Clinical Excellence.

is evidence of this from y sources, rather than, if a child has x level of difficulty and there is evidence of this from y sources, an assessment will be undertaken. Where such a negative formulation is adopted, it is possible this may influence the way criteria are perceived and operated. Evans refers to schools perceiving criteria as 'hurdles' (see p.43 of the thesis) which suggests they are operated as barriers.

Because resources are limited, there is a need to secure a balance between making appropriate provision for the individual child who is the subject of the decision and the interests of all children who will be affected by it, such that all decisions are seen as objectively fair. But the function of LEA criteria is to determine which children should be assessed and statemented. Officials who perceive their function as being to limit the distribution of resources are acting in a manner contrary to purpose of the legislation, whereas any departure from the criteria leading to more help being given to an individual child is advancing its purpose. But persistent departure from the criteria might lead to unfair outcomes, and not simply in terms of decisions being arbitrary. A parent who is told that their child cannot have a statement because the LEA has been so generous that the budget is used up, is unlikely to perceive this as fair.

Below are Galligan's observations, which reflect those of both Adler and Mashaw, namely that whether the operation of discretion operates effectively in any given set of circumstances, may depend upon one's point of view:

There might be good reasons for setting out standards and rules in advance, and it might be desirable over a course of decisions to develop patterns of standards based on precedents. However, the reasons for acting in this way are not inherent in the idea of rational action, but derive from a number of factors: it is easier and time-saving to have rules of thumb, or it is desirable to give those likely to be affected by my decision notice of how I intend to act... rules are likely to enhance accountability; they are also likely to help overcome some of the organizational difficulties within bureaucracies; or where rights are in issue, it might be thought that they are best protected by settled standards. It may

be highly rational and typical to proceed according to settled standards even at the cost of a certain flexibility, but it is not a requirement of the very idea of rationality to do so; and whatever configuration of rules, principles and looser standards is most suitable is a matter to be settled in each set of circumstances [...]

The nature and complexity of the task, the expertise of officials, and the opportunity for participation by individuals and groups are all factors that bear on the final structure of decision-making; whatever strategy finally is used is likely to be a compromise [...]

[...] any answers to the right balance of formal, substantive and reflexive rationality are complex [...] Firstly, much depends on the point of view taken and what is considered within that point of view to be most important. One approach might stress the efficient and effective realization of goals as the dominant consideration, while another might emphasize stability in legal relationships, or procedural fairness, or extensive participation by interested parties [...] the emphasis given to one will affect the strategy selected. Secondly, even within a particular point of view, there may be different factors which cannot easily or uncontentiously be assessed. Assuming, for example, that the effective realization of goals is taken to be most important, it may be necessary to assess the problem of overinclusion and under inclusion in considering the virtues of rules. (Galligan 1986 p.148 and 150 and 166-7).

Galligan's observations are apposite but not particularly helpful in solving the problem of achieving a reasonable compromise between individuation and certainty. He rightly says that what needs to be done is to conduct an assessment in light of all relevant circumstances.

Unfortunately decisions on SEN policy appear to be made on a fragmented and piecemeal basis, as opposed to on the basis of a holistic approach. (Audit Commission 2002b).

Laws LJ offers some assistance, suggesting that the answer to the rules v discretion dilemma may lie in proportionality. Starting from the principle that it is a requirement of good administration for public bodies to deal straightforwardly and consistently with the public, he says that there is a need to articulate the limits of requirements – to describe what amounts to a good reason to depart from the rule. Where an expectation is capable of being engendered by the rule, the only justifiable reason for

departure is a legal obligation to do so or in circumstances where this would be a proportionate response having regard to the legitimate aim pursued by the decision-maker in the public interest.

Proportionality will be judged [...] by the respective force of the competing interests in the case [...] All these considerations, whatever their direction, are pointers not rules. The balance between an individual's fair treatment in particular circumstances and the vindication of other ends having a proper claim on the public interest (which is the essential dilemma posed by the law of legitimate expectation) is not precisely calculable, its measurement not exact.⁸²

The development of eligibility criteria by LEAs is an example of public bodies exercising discretion to make rules. This is legitimate, given that general administrative law principles, such as fairness and rationality, provide uncertain guides as to outcome. The difficulty appears to stem from lack of understanding that it is legitimate, and sometimes necessary, to depart from the rules. In some circumstances, discretion is not only compatible with rights, but an essential component in working out their meaning and giving them full effect.

The *Anufrijeva* and *Roma Rights Centre* cases demonstrate that rules can have only a limited effect where they are at odds with the prevailing culture. Thus, the best prospect of assuring reasonable outcomes does not lie in jurisprudence, or rules but, as Mashaw says, in cultural-engineering. In the words of Carol Harlow:

There is little evidence to suggest that regulated (or in the fashionable jargon) "grid" administrations perform better than a "group" culture operated on trust and forbearance. "Grid" culture creates a formalised, juridified, bureaucratic society, which becomes impoverished in terms of human relationships (Harlow 1997 para 250).

In seeking Mashaw's optimum rules/discretion balance, it appears a change of rules would not, of itself, engender trust and forbearance in a system that pits parents and LEAs against one another as adversaries and drives rigidity in decision-making based upon defensiveness.

⁸² *Naharajah Abdi v Home Secretary* [2005] EWCA Civ 1363 para 68.

3.3. CONTROLS OVER THE EXERCISE OF DISCRETION

3.3.1. The SEN Code of Practice

Where the state allocates resources to public bodies for distribution, there may be a need to set out broad policies and principles governing such allocation. The vehicle for this, in the context of SEN, is the Code of Practice, (Special Educational Needs Code of Practice November 2001). LEAs and all persons working with children with SEN are required to have regard to its provisions⁸³. It sets out the principles underpinning the legislation together with guidance on the stages of intervention, from pre-school to post-school. It describes the roles of the different agencies, and emphasises the principles of inclusion and parent/pupil participation.

Two aspects of the Code are relevant for the purposes of this thesis: what it says about participation of parents and children in the decision-making process, and the degree to which it prescribes the actions of LEAs⁸⁴. In relation to the involvement of parents, Chapter 2 of the Code states:

Partnership with parents plays a key role in promoting a culture of co-operation between parents, schools, LEAs and others. This is important in enabling children and young people with SEN to achieve their potential.

Parents hold key information and have a critical role to play in their children's education. They have unique strengths, knowledge and experience to contribute to the shared view of a child's needs and the best ways of supporting them. It is therefore essential that all professionals (schools, LEAs and other agencies) actively seek to work with parents and value the contribution they make.

The work of professionals can be more effective when parents are involved and account is taken of their wishes, feelings and perspectives on their children's development. This is particularly so when a child has special educational needs. All parents of children with special educational needs should be treated as partners. They should be supported so as to be able and empowered to:

- recognise and fulfil their responsibilities as parents and play an active and valued role in their children's education;
- have knowledge of their child's entitlement within the SEN framework;
- make their views known about how their child is educated;

⁸³ Section 313 of the Education Act 1996.

⁸⁴ Participation of children is considered in Chapter Seven of the thesis.

- have access to information, advice and support during assessment and any related decision-making processes about special educational provision.

These partnerships can be challenging, requiring positive attitudes by all, and in some circumstances additional support and encouragement for parents (paras 2.2 and 2.3).

It is said that there should be no presumption about what parents can or cannot do to support their children's learning. Stereotypical views of parents are unhelpful and should be challenged. All staff should bear in mind the pressures a parent may be under because of the child's needs (para 2.6).

The Code sets out fundamental overarching principles:

- a child with special educational needs should have their needs met;
- the special educational needs of children will normally be met in mainstream schools or settings;
- the views of the child should be sought and taken into account;
- parents have a vital role to play in supporting their child's education;
- children with special educational needs should be offered full access to a broad, balanced and relevant education, including an appropriate curriculum for the foundation stage and the National Curriculum (para 1.5).

In relation to assessment, it states:

In deciding whether to make a statutory assessment, the critical question is whether there is convincing evidence that, despite the school, with the help of external specialists, taking relevant and purposeful action to meet the child's learning difficulties, those difficulties remain or have not been remedied sufficiently and may require the LEA to determine the child's special educational provision. LEAs will need to examine a wide range of evidence. They should consider the school's assessment of the child's needs, including the input of other professionals such as educational psychologists and specialist support teachers, and the action the school has taken to meet those needs. LEAs will always wish to see evidence of, and consider the factors associated with, the child's levels of academic attainment and rate of progress. The additional evidence that authorities should seek and the questions that need to be asked may vary according to the child's age and the nature of the learning difficulty (para 7.34).

There then follows a list of the evidence to which LEAs should pay particular attention. The Code states that LEAs will always require evidence of academic

attainment, but cautions that attainment is not in itself sufficient for LEAs to conclude that a statutory assessment is or is not necessary. An individual child's attainment must always be understood in the context of the attainments of the child's peers, the child's rate of progress over time and, where appropriate, expectations of the child's performance (para 7.39).

LEAs should be alert, therefore, to significant discrepancies between a child's attainments:

- in assessments and tests in core subjects of the National Curriculum and the attainment of the majority of children of their age;
- in assessments and tests in core subjects of the National Curriculum and the performance expected of the child as indicated by a consensus among those who have taught and observed the child, including their parents, and supported by such standardised tests as can reliably be administered;
- within one of the core subjects of the National Curriculum or between one core subject and another;
- in early learning objectives in comparison with the attainments of the majority of their peers (para 7.40).

LEAs should seek clear recorded evidence of the child's academic attainment and ask, for example, whether:

- the child is not benefiting from working on programmes of study relevant to the key stage appropriate to their age or from earlier key stages, or is the subject of any temporary exception from the National Curriculum under section 364 of the Education Act 1996;
- the child is working at a level significantly below that of their contemporaries in any of the core subjects of the National Curriculum or the foundation stage curriculum;
- there is evidence that the child is falling progressively behind the majority of children of their age in academic attainment in any of the National Curriculum core subjects, as measured by standardised tests and the teachers' own recorded assessments of a child's classroom work, including any portfolio of the child's work (para 7.41).

Whilst the Code sets out what LEAs must take into account and the evidence they must seek in making a decision, there are the phrases such as 'significantly below that of their contemporaries', which are not defined, and 'progressively behind', which is not clarified in terms of degree. The Code does not prescribe specific levels of attainment. It also makes clear that attainment is not the only

relevant factor. It sets out the principles governing decision-making and evidence that must be taken into account, but leaves scope for the exercise of discretion by LEAs.

The Select Committee's 2006 Report recommended that the Government issue guidance about when children should be assessed and statemented in order to standardise provision across local authorities. This was the DfES response:

The Government has issued the SEN Code of Practice which gives statutory guidance to schools, local authorities and others. It sets out a graduated approach to meeting children's needs including general guidance on moving between the provision made at School Action, School Action Plus and through SEN statements.

It is difficult to go beyond this general guidance and become more prescriptive as this recommendation proposes.... because more prescriptive guidance from the centre would not sensibly take account of local variation.

Whilst the Government wishes to see greater consistency of approach to SEN across local authorities it recognises that there can be perfectly valid reasons why a child might receive a statement in one area and not in another. For example, in one area the SEN expertise contained in schools and local SEN arrangements may be such that a child's needs are met without requiring a statement, whereas in another area where SEN provision has not been developed in this way the child may require a statement.

Removing Barriers to Achievement set out a programme to spread best practice and promote consistency but no prescriptive central guidance could take proper account of these local variations. (Government Response to the Education and Skills Committee Report October 2006 para 34 p.46).

3.3.2. Resources

Attempts at justification for particular rights to welfare may take various courses. The principle of equal concern and respect might appear to be a powerful principle, although according to one of its main exponents, R.M. Dworkin⁸⁵, it does not yield welfare rights but requires only that each individual's interests be considered in allocating resources. (Galligan 1986 p.187).

LEAs are allocated funding for education purposes from two main sources – the Revenue Support Grant (RSG) and the Direct Schools Grant (DSG). The LEA

⁸⁵ Dworkin, R.M. 1979.

Budget for prescribed expenditure⁸⁶ is funded through the RSG. It funds (amongst other things): educational psychologists; identification and assessment of children with SEN and the making, maintaining and reviewing of statements; monitoring provision for pupils in schools for the purposes of disseminating good practice; collaboration with other bodies to provide support for children with SEN; provision of PPSs and mediation services. RSG is allocated to LEAs in respect of general local government expenditure, therefore the amount available for SEN expenditure described will be determined with reference to local priorities.

DSG, on the other hand, is ring-fenced - paid on condition that it is appropriated for the purposes of the schools budget. LEAs may retain a proportion of the schools budget for prescribed purposes⁸⁷. The rest must be delegated to schools. There are limits on the proportion of the schools budget that may be retained centrally⁸⁸ and also a requirement that each school receives a percentage funding increase annually⁸⁹. This means that LEAs must obtain exceptional permission to retain more where this would breach the limit, or where schools would receive less than the guaranteed percentage increase. The schools budget may be topped-up from other sources, but this will either mean that the LEA must raise additional revenue or that funds allocated for a different purpose are diverted. Fees of children with SEN in independent schools are retained centrally.

Unplanned costs arising from successful appeals which result in increased numbers of assessments and statements and other specialist provision funded from the LEA Budget may cause significant funding difficulties. Because this budget is not ring-fenced, these additional costs will usually be met at the expense of other local services. There are also significant difficulties caused by any unplanned placements for children in independent schools met from the schools budget. LEAs regard SEN pupils in maintained schools as fully-funded. They receive an age-weighted per pupil allocation plus an enhancement for

⁸⁶ See Schedule 1 to the School Finance (England) Regulations 2008.

⁸⁷ Ibid. Schedule 2.

⁸⁸ Ibid. Regulation 7.

⁸⁹ Ibid. Regulation 22 and Schedule 4.

SEN from the DCSF for all pupils in maintained schools. Input from the educational psychology service is not viewed as an additional cost because LEAs employ educational psychologists. Local specialist services, such as speech therapy and occupational therapy, are provided at no cost to LEAs by NHS bodies.

Where a child with SEN moves from a mainstream school to an independent school, the LEA must pay the school fees, but there are no means of securing immediate funding from the DCSF to cover the cost. The LEA lose the child's per-pupil allocation and any enhancement for the next financial year following the January census count, but are permitted to claim a fixed credit from central Government in respect of the independent school fees. This is linked to a DSG funding unit for the LEA which is less than the per-pupil allocation plus SEN weighting and usually substantially less than the full cost of the fees.

There is both an immediate shortfall of the full cost of the fees and a long-term shortfall of the difference between the credit and the actual cost which must be found from the centrally-retained element of the schools budget. Because of the limits upon how much the LEA can retain centrally, funding of independent school fees must be met at the expense of other services. Where the LEA obtains exceptional permission to retain more, this means less money is delegated to schools.

By way of an example of the effect of unplanned independent school fees, in the Royal Borough of Kingston upon Thames in 2001, four successful appeals resulting in placements at independent schools led to the disbanding of the LEA's specialist dyslexia service providing outreach support to all secondary schools which had been funded by the centrally-retained element of the schools budget. The additional costs of the school fees might have been met in other ways, but what is significant for the purposes of this thesis is that the SENDIST, in allowing each individual appeal would not have considered the cumulative or overall effect caused by other successful appeals. It is not within their remit to do so. Each tribunal will have considered whether the proposed maintained school and local provision were suitable for the child who was the subject of the appeal. If not, they might name an independent school requested by the parents

as suitable to meet the child's needs. If both were suitable, the tribunal would balance the wishes of the parents against reasonable use of public expenditure. It is important that the methodology for deciding what is 'unreasonable public expenditure' be examined closely.

Section 316(3) of the Education Act 1996⁹⁰ imposes an obligation upon LEAs to educate children with statements in mainstream schools, unless this would be incompatible with the wishes of the parent or the provision of efficient education for other children. Children with SEN who do not have statements (the vast majority) must be educated in mainstream schools⁹¹. Parents may choose an independent school and pay for it themselves⁹². Parental choice of an independent school does not give parents a veto over a mainstream placement⁹³. Neither does it give parents the right to insist on such a placement⁹⁴. The legislation creates a strong presumption in favour of mainstream education. LEAs are required to have regard to the general principle in section 9 of the 1996 Act that children are to be educated in accordance with the wishes of their parents, provided this is compatible with the provision of efficient instruction and training and the avoidance of unreasonable public expenditure⁹⁵. This qualified duty merely means that parents' wishes must be taken into account and balanced against other factors.

Paragraph 3 of Schedule 27 to the 1996 Act requires LEAs to allow parents to express a preference for a mainstream school to be named in the statement⁹⁶ and to uphold the preference unless the school is unsuitable, or the child's attendance would be incompatible with the efficient education of other children

⁹⁰ Section 316 was substituted by section 1 of SENDA.

⁹¹ Section 316(1) and (2) of the Education Act 1996.

⁹² Section 316A of the Education Act 1996 was inserted by section 2 of SENDA.

⁹³ See *R v London Borough of Brent and Vassie ex parte AF* [2000] ELR 550; *L v Hereford and Worcester County Council and Hughes* [2000] ELR 375; *L v Worcester County Council and Hughes* [2000] ELR 674.

⁹⁴ In various cases, parents have sought to rely on Protocol 1 of Article 2 of the ECHR to suggest there is an obligation to educate children in accordance with the religious and philosophical convictions of their parents (see *PD and LD v UK* (1989) 62 DR 292; *Graeme v UK* (1990) 64 DR 158; *Simpson v UK* (1989) 64 DR 188) discussed further in Chapter 7.

⁹⁵ *C v Buckinghamshire County Council and SENDIST* [1999] ELR 179.

⁹⁶ This duty also applies where the LEA propose to amend the statement (Schedule 27 para 3(1), as amended by para 1 of Schedule 4 to SENDA) and upon request for change of the named school (Schedule 27 para 8).

at the school or the efficient use of resources. LEAs are not required to facilitate the expression of a preference for an independent school, neither are they obliged to uphold such a preference. Parents wishing to express a preference for an independent school must rely upon section 9.

In balancing the wishes of parents against avoidance of unreasonable public expenditure, it appeared, until recently, that LEAs could only take into account their expenditure *qua* LEA⁹⁷. However, it appears they may now include other expenditure of the authority in the calculation, specifically children's services expenditure⁹⁸. Expenditure by other public bodies (such as health authorities)⁹⁹ may not be included. SENDIST calculate resources in a different way to LEAs in relation to independent school placements¹⁰⁰. Their guidance to LEAs provides that, in case statements, LEAs should set out the per-pupil allocation for the child including any enhancement; the cost of a placement at the independent school of the parents' choice; transport costs for both schools and any additional costs¹⁰¹.

The SENDIST views the difference¹⁰² between the per-pupil allocation (plus any transport/additional costs) and the independent school fees (plus transport/additional costs) as the additional cost, whereas LEAs regard the additional cost as the immediate unfunded shortfall plus the long-term difference between the credit from the DCSF and the actual cost of the fees. LEAs view the cost as greater and are more likely than the SENDIST to conclude that a placement in an independent school is unreasonable public expenditure. There is considerable uncertainty about what the phrase means, with the courts suggesting they could not interfere with a SENDIST decision to reject an LEA placement calculated as costing £12,200 p.a. in favour of the

⁹⁷ See *B v LB of Harrow* [222] ELR and *S v Somerset County Council* [2002] EWHC 1808 (Admin).

⁹⁸ *O v Lewisham and SENDIST* [2007] EWHC 2092 (Admin).

⁹⁹ *C v Special Educational Needs Tribunal* [1997] ELR 390.

¹⁰⁰ See further N. Armstrong and D Wolfe 'Special Educational Needs: Counting the Costs' (2002) *Legal Action* January 23.

¹⁰¹ www.sendist.gov.uk/forms.

¹⁰² The courts upheld this as the correct approach in *R v Special Educational Needs and Disability Tribunal and the London Borough of Hillingdon* [2005] EWHC Admin 580.

parents' choice of independent school at a cost of £70,000 p.a.¹⁰³, but also finding cost differentials of £2000 p.a.¹⁰⁴ and £200,000 p.a.¹⁰⁵ significant.

Also, the SENDIST – unlike LEAs - in considering whether it is necessary to assess or statement are not making this decision with reference to a list of children with SEN to whom obligations are owed compiled in order of need, or measuring children against criteria designed to ensure that only 2% of children with SEN (approx.) are statemented, they are considering whether it is necessary make special educational provision for a particular child. Their guidance to LEAs states:

We will take LA policies into account if they are set out in the written evidence or explained verbally. But you cannot assume that a LA decision that was made in line with its policy will necessarily be approved by the tribunal (if it were the case there would be no need for a tribunal). We will seriously consider local policies, particularly if you explain why they were adopted and how they reflect national policy and guidance¹⁰⁶.

The SENDIST Annual Report for 2006/7 shows that 65% of appeals for placements at independent schools were successful (137 upheld out of 214 appeals lodged). This is a relatively low number, though a high percentage. Even one or two appeals where there are independent school fees of £70,000 p.a. can have a significant effect on an LEA's schools budget. The report does not show the spread of these appeals between LEAs.

Government policy, as set out in a document entitled 'Management of SEN Expenditure' is to reduce the number of statements, the objective being for parents to have confidence that their child's needs will be met without the need for a statement:

We would expect only those children with the most severe and complex needs, requiring support from more than one specialist agency, to need the protection a statement provides. (DfES 2004a p.3).

¹⁰³ *R (Wiltshire County Council) v YM and Special Educational Needs and Disability Tribunal* [2005] EWHC Admin 2521.

¹⁰⁴ *S v London Borough of Hackney v SENT* [2002] ELR 45.

¹⁰⁵ *R (D) v Davies and Surrey County Council* [2004] ELR 416.

¹⁰⁶ www.sendist.gov.uk/forms.

In line with this, LEAs are delegating more money to schools for provision. This is likely to lead to a raising of the threshold at which it becomes necessary for LEAs to intervene, resulting in fewer children being assessed and statemented, and LEAs ceasing to maintain some existing statements. Obviating the statutory assessment process will reduce costs expended on cumbersome procedures, allowing these costs to be re-deployed into making additional provision for children in schools. This may lead to an increase in appeals, but with schools having the lion's share of both resources and responsibility for provision, it is becoming increasingly odd that the SEN-specific appeals procedure relates exclusively to LEA decisions. The general complaints procedure that governing bodies are required to set up under section 29 of the Education Act 2002 does not involve external scrutiny, and the LGO has no jurisdiction to consider complaints about governing bodies.

3.3.3. LEA Criteria

LEAs have developed criteria for the exercise of discretion. There is no requirement for LEAs to have criteria. Where they choose to have them, general principles of administrative law dictate that they must be rational. In December 2005, the Department for Education and Skills wrote to all Chief Education Officers and Directors of Children's Services as follows:

Statutory assessments

Authorities have developed, or are developing or amending criteria for statutory assessments as a means of securing greater consistency in their decision-making. It is, of course, open to authorities to develop criteria as guidelines to help them decide when it is necessary to carry out statutory assessments and they have a wide discretion to determine what criteria they will adopt. But authorities must be prepared to depart from those criteria where there is a compelling reason to do so in any particular case and demonstrate their willingness to do so where individual circumstances warrant such a departure. In our view, for the avoidance of any doubt, any published criteria should make this very clear. Although local authorities appear to be aware that they must not operate a blanket policy for all children, some appear to believe that blanket policies can be developed for particular groups of children or certain types of need. Yet having a policy that assessments will not be undertaken for particular groups of children or certain types of need, in our view, constitutes a blanket policy that prevents the consideration of children's needs individually and on their merits.

The letter echoes what Laws LJ said in the case of *Naharajah Abdi v Home Secretary*¹⁰⁷. It states that it is was written in view of enquiries and complaints received in recent months, which would suggest a number of LEAs are applying their criteria rigidly. An example of what the letter refers to features in Warwickshire's criteria which state:

Referrals for literacy and numeracy should not be made until time has been allowed for Action Plus intervention. Therefore, literacy and numeracy referrals will not normally be appropriate before the beginning of National Curriculum Year 2.

Decisions on any Year R and Year 1 referrals will be subject to moderation.

Reading (accuracy) at or below 2nd percentile¹⁰⁸

And/or

Reading (comprehension) at or below 2nd percentile

And/or

Spelling at or below 2nd percentile

Evidence of difficulty in the area of spelling alone will not be sufficient to indicate the need for statutory assessment but, together with evidence of other cognition and learning difficulties, may warrant an 'exceptional' referral.

In every case a test recommended in this document must be used and poor attendance eliminated as a significant factor in attainment¹⁰⁹.

The concern would be that, although the criteria do not preclude referrals before year 2, they would be operated in this way. If this were the case, it would not be as a result of the criteria themselves. These allow 'exceptional referrals'.

A typical criticism of the bureaucratic rationality model is the rigidity referred to in the DfES letter. The Select Committee's 2006 Report suggests that the letter has not solved the problem. It seems odd that more has not been done by the Department to assure greater emphasis on individuation at the initial decision-making stage following this report.

¹⁰⁷ Ibid. Note 82.

¹⁰⁸ The lowest 2% in British Ability Scales.

¹⁰⁹ The criteria can be observed on www.warwickshire.gov.uk/web/corporate/pages.nsf/Links/.

3.3.4. External scrutiny

3.3.4.1 Procedural fairness

The SENDIST, LGO and the Administrative Court bring independent scrutiny and an assurance of procedural fairness to the process. The PDR goals make no reference to independence or fair procedures, but the principles of administrative law dictate that the system, as a whole, must comply with common law requirements of procedural fairness. The two main pillars of procedural fairness are the rule against bias, which requires that a person may not be a judge in his own cause, and the rule that a person must be given a fair hearing. Article 6 of the ECHR imposes similar requirements. Article 6(1) provides that:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly by the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

It was said in the case of *Simpson*¹¹⁰ that Article 6 of the ECHR is not engaged in SEN disputes, therefore it is not discussed in this section. But, as Article 6 enshrines principles similar to those of the rules of procedural fairness, case law relating to compliance with its requirements is useful in providing a benchmark for assessing whether procedures are fair. This is discussed in Chapter Seven with reference to proposals for reform.

3.3.4.2. Independence/impartiality

The principle is that justice must not only be done, but must be seen to be done, suggesting a need to avoid bias and any appearance of bias. The purpose of the rule is to foster confidence in the process. What constitutes bias will depend upon the context. A person with some interest in the outcome of a decision may be capable of putting that interest aside and making an impartial decision. Fostering of confidence in the process has particular relevance in the context of

¹¹⁰ (1989) 64 DR. 188.

SEN because the SENDIST replaced local appeal committees perceived as insufficiently independent of LEAs. This issue is the subject of discussion in the next Chapter in relation to Mashaw's argument that it is possible to achieve confidence in the process without externality. The Evans study (Evans 1998)¹¹¹ suggests that some LEAs perceive the SENDIST as favouring parents, citing high levels of successful appeals as evidence for this. Possibly this has arisen as a result of enabling hearings where SENDIST members actively assist parents who appear to be disadvantaged by the process. The independence of the LGO does not appear to be in question. All formal SEN dispute resolution mechanisms are independent and impartial.

3.3.4.3. Procedures

The form of any external scrutiny; whether procedures should comprise oral hearings, and the process adopted in such hearings will depend upon the context. SENDIST appeals and judicial review applications offer oral hearings. The procedure of complaining to the LGO does not. Procedural fairness entails being able to put one's case by presenting evidence and argument, and being able to respond to opposing evidence and argument. Galligan suggests the procedure that is necessary is one that secures treatment according to relevant standards. (Galligan 1996b).

In *McInnes and Onslow-Fane*¹¹² an oral hearing was held not to be necessary in an application for a boxing manager's license. In *Lloyd v. McMahon*¹¹³ Woolf LJ did not consider councillors accused of willful misconduct by the district auditor should have been given an oral hearing – the opportunity to make written representations was sufficient. Here the task was investigatory and adjudicative, as in LEA decisions about SEN. Galligan considers that the notion of a hearing is open and variable and capable of being construed by many different kinds of procedural forms based upon three basic elements – notice, disclosure and hearing.

The question in each context is what combination of the three elements is needed for effective and fair decisions. That is both the main practical

¹¹¹ The Evans study is summarised at pps 42-49 of the thesis.

¹¹² [1978] 1 WLR 1520.

¹¹³ [1987] AC 628.

and normative point of a hearing, and we should be wary of suggesting that the hearing is in some sense independent and self-contained. For that reason, the highly developed procedures of a judicial trial are not necessary in most areas of administrative process: they are not necessary because decisions can be made properly and fairly on the basis of lesser forms of hearing. (Galligan 1996b p.349).

Galligan argues that an accurate decision may be made about a person without relying on him as the source of the information. The place of a hearing in administrative procedures relies on the extent of its contribution to better outcomes, and this needs to be balanced against cost. If, as Galligan says, the right to be heard derives from the principle of respect, it is difficult to see why, in the SEN context, such respect should not be shown to parents and children at the initial decision-making stage. This principle is, after all, at the heart of the SEN Code of Practice.

Where parents are dissatisfied with a decision, given that important obligations are involved, there is an argument that any appeal or review stage should involve an opportunity for parents to state their reasons for disagreement and for the child's views to be made known, especially where the only other possibility for parents to challenge a decision would be judicial review¹¹⁴.

However, Galligan suggests that, where a decision contains two elements, one being how to treat a person and the other being what is in the public interest, the first element has an affinity with the adjudicative mode, the second gravitates towards the policy-making consultative mode. The union of the two, he says, is unsteady.

Nevertheless the standards of fair treatment are reasonably well-settled: facts must be accurately assessed; the decision-maker must consider the circumstances of the case and the consequences of any decision; and the party affected should have the opportunity to influence the policy element. Thus, participation has three functions – to assist in establishing facts; to assist the decision-maker to understand the consequences; and to inform policy relating to future decisions (Ibid. p.376).

¹¹⁴ See *Ridge v Baldwin* [1964] AC 40. *R v. The Army Board, ex parte Anderson* [1991] ALT 297.

The analysis in the next Chapter illustrates that inquisitorial procedures better meet these objectives than the adjudicative/enabling hearing model adopted by the SENDIST which does not allow wider interviewing of witnesses, inspection of files or commissioning of evidence. The SENDIST do not consider all the implications of their decisions, and parents have no opportunity to influence the policy element. It is for the LEA to decide whether there should be policy changes following successful appeals.

In the context of the SEN dispute resolution process, oversight by the SENDIST, LGO and Administrative Court envisages a complex split between policy-making and policy-application. This is examined in detail in the next Chapter with reference to Adler's typology of administrative grievances.

Galligan states that a common response to the difficulties of providing adequate recourse is to provide a plurality of procedures. He argues that the negative side of this is that the initiation and pursuit of procedures for recourse is not an activity that comes naturally to most aggrieved parties. Even to initiate an informal review can be a major effort for many, let alone to pursue those of a more formal kind or to have several running at once. The implications of this in the SEN context are that the small minority of parents who appeal to the SENDIST may incur the anxiety and expense of following that process to a conclusion, but come away with important aspects unresolved. They would then face the prospect of having to embark on another process to resolve those aspects. Or, as happened in the *PH case*¹¹⁵, they may get their processes in the wrong order and be penalised in costs by the Administrative Court.

Although the courts have conceded Galligan's essential elements - notice, disclosure and hearing in particular cases, they have not been prepared to concede a right to representation in civil disputes. Mashaw argues that, in the absence of representation, there is very little chance that unrepresented appellants can be enabled to master relevant law and procedural requirements within the time available to enable them to put their case properly. Thus, unrepresented appellants may be disadvantaged. As Galligan says:

¹¹⁵ Ibid. Note 67.

The practical problems of knowledge, access and determination are real obstacles to the usefulness of recourse and should have a major influence on the shape and design of appeal procedures. (Galligan 1996b p.406).

Galligan suggests that representation is a better solution to inequality of access than adoption of an inquisitorial procedure.

That is not to say that an enquiring, investigative approach will never be adequate: it is only to say that a properly presented case on behalf of the party has a strength and influence, the absence of which is not easily compensated for by other procedures. (Ibid. p.367).

Galligan's remark is based upon the premise that a tribunal will never have the same incentive as an appellant to pursue evidence and facts. Mashaw suggests something similar, however his study of disability benefit appeals revealed a high success rate for appellants in a review process incorporating inquisitorial hearings before Administrative Law Judges (ALJs). It is possible that a review body may pursue evidence and facts to a degree that some appellants themselves may be incapable of. It is important, therefore, to consider how proper investigation can be assured. The SENDIST's practice of conducting enabling hearings has contributed to the fact that absence of representation makes little difference in SENDIST appeals (Genn 2006). This suggests that a competent tribunal is capable of redressing power-imbalance. Indeed, one of Leggatt's recommendations was more training for tribunal chairs to enable them to fulfil this role.

It is clear, however, that there are some cases where an enabling hearing will be unable to compensate for the inability of appellants to put their case and the lack of evidence to substantiate it. Genn recommends representation for difficult cases. Making publicly-funded representation available is one option for redressing power-imbalance, a tailor-made inquisitorial procedure is another. Both need to be examined in context. It is difficult to assess the extent to which oral hearings are valued by parents of children with SEN, or whether they present a prospect so daunting that it deters them from appealing. A recent study by the (then) Council on Tribunals on the value of oral hearings (Council on Tribunals 2005) indicates that the debate about inquisitorial, adversarial and enabling approaches is still very much alive. This was a small study that did not

involve seeking the views of tribunal users. Responses from the advice sector suggest strong support for oral hearings by users, but it is not possible to infer conclusions about whether parents of children with SEN value oral hearings from these general conclusions.

There is no evidence in the SEN context of support (or otherwise) for oral tribunal hearings as a process of choice. Whilst studies by Genn (2006) and Harris (1997) indicate that those who appeal generally consider the process is conducted well, the Genn study also indicates that those from minority ethnic backgrounds who appeal tend to be the most determined and confident, or those who are successful in obtaining advice and support. The study found evidence of reluctance to become involved in legal proceedings because of anticipated expense and complexity. Although this was, in part, due to a misconception about what the process involved, there are no answers to the questions of what sort of process people might choose and what might make those who decide not to appeal act differently. Would they prefer to meet an adjudicator and explain their circumstances, leaving him to do all that is necessary to investigate to a process where they have to argue their case orally in the presence of the LEA by applying relevant facts, as established by evidence that they have had to go to the expense of obtaining, to unfamiliar complex legal provisions?

‘Transforming Public Services’ envisages a choice for complainants between formal mechanisms (tribunals) and informal mechanisms. But this means that those who choose formal resolution must choose a hearing. If such hearings are valued, they should remain on offer. But it is clear that more needs to be done in terms of assuring equal endowments.

3.3.4.4. Effectiveness

A further factor relevant to any discussion of external scrutiny is effectiveness. Are decisions by the SENDIST, LGO and Administrative Court complied with, and do they influence future decisions? Prior to the coming into force of the SENDA, there had been concern about delays and failures in complying with SENDIST decisions. Section 4 of the SENDA now provides that, if the Tribunal makes an order, the LEA concerned must comply with it before the end of the

prescribed period beginning with the date on which it is made¹¹⁶. There are no statistics on compliance with SENDIST decisions. In relation to the issue of the extent to which appeals influence future practice, the Select Committee's 2006 Report states that fewer than 1% of parents of children with SEN appeal and the Evans research indicates that 85% of LEA officers interviewed said that they had made no notable changes in policy - that losing appeals was a 'price worth paying' to defend SEN policies (Evans 1998 p. 27).

The LGO cannot make binding decisions, only recommendations. The figures in section 2.3.2. indicate that virtually all recommendations are complied with. Nevertheless, Seneviratne suggests that the fact that there are authorities that do not comply with LGO recommendations may bring the system into disrepute (Seneviratne 2002 p.306). This is a difficult argument to sustain where the numbers are so low. It is not an argument that could legitimately be made to rule out more extensive use of the inquisitorial model. The LGO does not have enforcement powers because they have not pressed for them. This is because they consider it would change their relationship with authorities, making it more investigative than co-operative. This is a trade-off rationalised in a particular context that can be re-evaluated if necessary.

3.3.5. Other overarching principles

Decision-making by public bodies, courts and tribunals is confined by principles of rational achievement of purpose and legal stability. These bodies operate within a context of political and moral values, and the courts have a role in defining principles that enshrine those values and developing societal norms. This is the role described by Teubner and referred to in the introduction to this chapter, and by Fiss in his critique of settlement (see Chapter Five).

Relevant standards about how discretionary decisions should be made have been laid down by the courts. These are that: that the decision-maker must: consider the merits; address himself to relevant matters and exclude irrelevant matters; not act arbitrarily or with prejudice; and act in good faith and for the right purpose. Decisions must be reasonable.

¹¹⁶ Section 4 of SENDA inserts new section 326A into the Education Act 1996.

Administrative Courts regulate the operation of discretion by interpreting and applying statutory provisions, and have developed their own principles of judicial review. It is difficult to calculate the precise effect these principles have on decision-makers. In deciding appeals and reviewing the actions of LEAs, the courts' role is both to uphold or overturn a decision, and to lay down principles for future cases. In doing so, the courts are both reviewing the exercise of, and also themselves exercising, discretion. They consider whether to overturn decisions in accordance with general principles:

- power to overturn decisions must be exercised sparingly;
- legitimate expectations should not be disappointed;
- the future consequences of the rule should be considered;
- the importance of certainty should be taken into account; and
- decisions may be overruled where there is a sufficiently important principle of justice at stake. (Galligan 1986 p.43).

In setting up a normative framework, courts may overturn rules and set up new ones whose meaning and specificity is developed incrementally through case law, becoming settled until there is a need for adjustment.

This process, which is the quintessence of the common law method, has its costs in terms of certainty; but it also has the considerable advantages of providing a way of handling complexity, overcoming the perpetuation of unjust and outdated rules, and of ensuring against over-rigidity. (Ibid. p. 43).

Relatively speaking, there has been a high number of judicial decisions in the area of law relating to SEN, but these number in the hundreds, in contrast to the hundreds of thousands of decisions made. Former SENDIST President, Trevor Aldridge has implied that the courts have added to uncertainty in SEN decision-making, producing further disputes and increased delay. His view is that what is wanted is more detailed legislation, and that court judgments may not be best suited to laying down principles because they necessarily only deal with the facts before them¹¹⁷.

¹¹⁷ Aldridge 2000 pp 13-14.

There are a number of observations that can be made about this statement. Firstly, it is undoubtedly true. Legislation and guidance may be pre-emptive and anticipatory, whereas court judgments can only lay down principles in a reactive fashion. Secondly, it neglects to mention the chicken-and-egg relationship between the courts and the Executive. Legislation and guidance, and the principles behind them, may be driven by court judgments. Thirdly, the over-arching principles of administrative law derived from jurisprudence, the influence of the ECHR, and EU jurisprudence form a fundamental backdrop to the exercise of discretion by public bodies that cannot be disregarded. Evolution of these principles through a public dialogue driven by a body independent of the Executive is a fundamental check on Executive power.

When tribunals were introduced as an informal alternative to the courts for particular disputes, there was a wide-ranging debate about whether they constituted an inferior substitute. With the courts becoming increasingly remote from ordinary citizens due to cost and perceptions of inaccessibility¹¹⁸, it appears to have become accepted not only that it would be inappropriate for the courts to be the sole formal dispute resolution mechanism for welfare disputes, but that tribunals are now the principal formal mechanism¹¹⁹. The High Court may be replaced by a second-tier tribunal which will become the appellate body for parties dissatisfied with SENDIST decisions. This is to be a superior court of record able to exercise juridical review functions.

Harris argues that the courts have played an important role in the development of the law of SEN. He suggests that their role goes beyond the function of ensuring procedural fairness. Their scrutiny has served to add greater certainty and fairness of outcome in this imprecise field of law – though they have been limited in their ability to re-allocate resources and unable to resolve major tensions in the statutory framework. He describes relevant cases as ‘closely positioned dots on the legal map of SEN that cannot easily be ignored by LEAs and other decision-makers.’ (Harris 2002 p.155). He also suggests that decisions in the field have demonstrated the judiciary’s awareness of some underlying

¹¹⁸ See ‘Paths to Justice’ (Genn 1999a).

¹¹⁹ See ‘Transforming Public Services’.

ideologies and their reasonable attempts to engage with professional educational concerns. He concludes, however:

Voluntary bodies and LEAs alike are correct in claiming that the courts' involvement has reinforced the highly technical nature of SEN law, making this field something of a lawyer's paradise (even though a minority of appellants are represented). (Ibid. p.156).

It is necessary briefly to examine the case law to assess whether the courts have added certainty. The cases referred to earlier in the chapter about what constitutes unreasonable public expenditure illustrate inconsistency. It would not be possible for an LEA in an individual dispute to look at the case law and know whether a particular amount constitutes unreasonable public expenditure. The case of *S (A Minor) v Special Educational Needs and Another* [1996] determines that right of appeal against a SENDIST decision is the right of the parent as opposed to the child. Broadly the implications of the decision are that it is the parents' income, as opposed to the child's that will be used to determine eligibility for public funding of legal representation. This at least adds certainty, though the decision might raise objections in terms of children's rights.

SEN legislation implies that needs can, and should, be met up to a finite point. Perhaps this is the only way it can operate against a background of insufficient resources. The courts, in reviewing LEA decisions, will consider the policy basis for such decisions.

It is surely common knowledge that [LEAs] have the unenviable task of eking out resources inadequate to meet all the demands upon them and it is obvious that the consequences of making provision for one child may mean under-provision for others. (Beldam LJ¹²⁰).

The Administrative Courts have laid down the following principles in respect of the relationship between needs and resources: LEAs are entitled to have a general policy of meeting the needs of dyslexic children in mainstream schools, so long as this does not lead to inappropriate provision for any particular child¹²¹; LEAs are entitled to have general policies operating as a guide to

¹²⁰ *Richardson v Solihull Metropolitan Borough Council and the Special Educational Needs Tribunal; White and Another v London Borough of Ealing and Special Education Needs Tribunal and Worcester County Council v Lane* [1998] ELR 319 pp 334H - 335A.

¹²¹ *R v London Borough of Newham ex parte R* [1995] ELR 156 p.161 C - F.

whether they should make a statement¹²²; meeting the needs of the child is the primary consideration as opposed to curbing of expenditure - LEAs cannot cut provision in order to make financial savings where this would mean needs were not being met¹²³; budgetary constraints can be considered in determining how needs should be met, provided always that they are met¹²⁴. It is difficult to see why such principles need to be settled by courts. They could simply be enshrined in the SEN Code of Practice.

The courts have failed to resolve the definitional issue as to what constitutes SEN and what constitutes special educational provision¹²⁵. This is an important distinction in terms of legal obligations - LEAs have a duty to make provision for educational needs and discretion to arrange non-educational provision. Sedley LJ remarked that, whilst there is uncertainty that is less than ideal, this is preferable to rigid categorisation, which he considered would lead to more dispute and litigation¹²⁶. By contrast, guidance given by Lord Woolf in relation to the distinction between health care and social care in the *Coughlan* case has proved helpful¹²⁷ in a situation that is not dissimilar.

Harris asks whether Sedley was being sensitive to the practical realities of decision-making or failing to 'bite the bullet' in an area that is regularly the subject of conflict. The question is whether Sedley should be left to 'bite the bullet', or whether the Executive, aware that this distinction is one of some debate, should be pro-active in order to achieve some consistency in decision-making. The Court of Appeal recently declined to become involved in the debate, holding that nappy-changing may be an educational need where the LEA had accepted it as such by putting it in Part 3 of a statement¹²⁸. This is an

¹²² *R v Cumbria County Council ex parte NB* [1996] ELR 65 p. 68 B – C.

¹²³ *R v East Sussex County Council ex parte T* [1998] ELR 251.

¹²⁴ *R v London Borough of Hillingdon ex parte Governing Body of Queensmead School* [1997] ELR 331.

¹²⁵ *R v Hampshire Authority ex parte J* [1985] 84 LGR (dyslexia constitutes a disability); *R v London Borough of Lambeth ex parte MBM and London Borough of Bromley v Special Educational Needs Tribunal and Others* [1999] ELR 260 (requirement for use of lift was held not to be special educational provision, but a combination of occupational therapy, speech therapy and physiotherapy was).

¹²⁶ *LB Bromley* case above p.296E.

¹²⁷ *Ibid.* Note 79 at p.77.

¹²⁸ *K v The School and SENDIST* [2007] ELR 234.

example of the courts evading an important issue because to tackle it in the way that it needed to be tackled would have led to an adverse result for parents coping with very difficult problems. But what is extraordinary is the waste of public money involved in having the debate. How can it be right that this argument can go all the way to the Court of Appeal and still not be resolved?

The test of whether a child should be assessed and statemented is one of necessity. The courts have never developed a test to guide LEAs. On the contrary, they have confirmed that the legislation confers wide discretion¹²⁹, and have been reluctant to interfere. When assessing resources, there has been some inconsistency about which expenditure may be taken into account¹³⁰; where a school is named in a statement, it must admit the child¹³¹; statements must be specific and detailed¹³², but the courts have allowed LEAs some flexibility¹³³. As mentioned previously, the courts have said that statements cannot simply refer to funding bands. The need for the DfES to send a reminder of this to LEAs calls into question the effectiveness of laying down principles in this way. Perhaps the time has come for the Department to recognise the need for, and provide, the much-needed clarity called for by Mr. Aldridge.

Many LEAs have adopted a process of banding. Instead of specifying in a statement the person or body making the provision and the number of hours, the statement refers to a band that equates to a sum of money. This is devolved to the school who decide how the money should be used. In the case of *R v Cumbria County Council ex parte P*¹³⁴, a statement failed to specify an amount of speech therapy but referred to 'extra funding at band Level 3 ... £6,000 p.a.'. Professional advice indicated that the child needed three hours of speech therapy a week and that £6,000 p.a. could not pay for this. The court ruled that although it was not unlawful for an LEA to refer to a funding band or an

¹²⁹ *R v Secretary of State for Education and Science ex parte Lashford* [1988] 1FLR 72; *O v London Borough of Harrow and Another* [2001] EWCA Civ 2046.

¹³⁰ See discussion in section 3.6.

¹³¹ *R v Chair of Governors and Headteacher of A and S School ex parte T* [2000] ELR 274.

¹³² See the SEN Code of Practice 2001 which reflects the Court of Appeal decision in *R v Secretary of State for Education and Science ex parte E* [1992] 1 FLR 377.

¹³³ In *Joyce v Dorset County Council* [1997] ELR 26 an LEA was permitted to adduce evidence of how needs were to be met where the statement left room for doubt.

¹³⁴ [1994] ELR 25.

amount of money, this on its own did not fulfil their duty in law to specify the provision a child should receive in a statement. Cumbria were ordered to rewrite the statement to make it clear what they considered the child ought to receive. This is an example of the courts redressing the balance between resources and individual needs.

This decision has been followed in subsequent cases, including *R on the application of IPSEA Limited and the Secretary of State for Education and Skills* and was also referred to by the DfES in their letter to LEAs in December 2005:

Specifying provision in statements

Authorities will know and understand the legislative background and the Court of Appeal judgment in the case of *The Queen (on the application of IPSEA Ltd) and the Secretary of State for Education and Skills*....¹³⁵

But it appears that some authorities are operating blanket policies of never quantifying educational provision for particular groups of children, types of need or particular types of placement.

In some cases, authorities set out the child's special educational needs in detail in Part 2 of their statement but leave provision open to the school to determine completely or in terms of options, for example a particular number of hours support from a support assistant or a pro-rata amount of time from a support teacher or some equipment, without specifying the provision to meet children's individual needs. Other authorities refer solely to a particular band of funding from their local system of calculating funding or a sum of money and do not always specify clearly the provision it is meant to fund.

In our view, any local authority policy which prohibits, deters or even discourages its officers from specifying educational provision clearly and in detail and/or from quantifying educational provision for particular groups of children is likely to result in breaches of:-

- section 324(2) and (3) of the Education Act 1996, which provide that the statement must contain such information as may be prescribed and must specify the educational provision to be made for the purpose of meeting the needs identified in the statement;
- regulation 16(b) of the Education (Special Educational Needs) (England) (Consolidation) Regulations 2001, which provides that the statement must contain the information specified in Schedule 2 to those Regulations, which requires educational provision to be specified in terms of “any appropriate facilities, equipment, staffing arrangements and curriculum”; and

¹³⁵ [2003] EWCA Civ 7.

- section 313(2) of the Act, which imposes a duty on LEAs to have regard to the provisions of the Special Educational Needs Code of Practice (2001), paragraphs 8.36 and 8.37 of which make clear that statements should specify the special educational provision necessary to meet the needs of the child, detail appropriate provision to meet each identified need and normally quantify the provision.

In view of the recent cases we have had, I should be grateful if you would consider again the terms of the judgment referred to above, in particular paragraphs 14, 15 and 17 in which Lady Justice Hale notes that:

"[...] the statement clearly has to spell out the provision appropriate to meet the particular needs of, and objectives identified for, the individual child" (paragraph 14); and

"[...] any flexibility built into the statement must be there to meet the needs of the child and not the needs of the system." (paragraph 15)

"It remains the case that vague statements, which do not specify provision appropriate to the identified special needs of the child, will not comply with the law." (paragraph 17).

The letter imposes no new obligations. It implies that the Government suspect large-scale non-compliance with the law, but are not doing anything substantive to address this. It appears that neither the Executive nor the courts are prepared to be pro-active in laying down detailed controls governing the exercise of LEA discretion. LEAs are self-limiting to a large degree. Within the context of legislative provisions whose objective is to ensure appropriate remedial help is provided to children with learning difficulties, the current system may not be achieving the optimum rules/discretion balance. There is evidence of rigidity driven by a culture of placing over-emphasis on the significance of resources. The courts, the SENDIST and the Executive continue to emphasise the importance of individuation. But the 'before the event' control of laying down principles in a Code of Practice, and the 'after the event' controls of SENDIST appeals and court judgments appear not to be influencing practice to the extent that LEAs are clear that they may depart from their own rules when it is reasonable to do so.

Chapter Four

Analysis of the SEN Decision-making and Dispute Resolution Processes with Reference to the Works of Mashaw and Adler

...the importance of the provision of an education appropriate to the particular needs of children cannot be denied. It is not only in the interests of the child and his or her parents that such provision should be made, but also in the interests of the country that its citizens should have the knowledge, skill and ability to play their respective parts in society with such degree of competence and qualification as they may be able to develop. (Lord Clyde in *X and Others (Minors) v Bedfordshire*)¹³⁶.

4.1. CHAPTER SUMMARY

This Chapter continues the theoretical analysis of the SEN decision-making and dispute resolution processes by applying observations derived from relevant studies conducted by Mashaw and Adler to reach conclusions about:

- the balance of trade-offs among goals;
- collective goals and individual interests;
- adequate redress; and
- problems identified and options for change.

It is divided into sections with each of these as sub-headings. The objective of this thesis is to determine whether the introduction of conciliation and mediation into SEN dispute resolution assures PDR. It is therefore necessary firstly to examine formal dispute resolution mechanisms, which this Chapter does, and secondly to evaluate what is added to the process by the introduction of informal alternatives, which is the subject of the next Chapter.

Section two comprises an analysis of the SEN decision-making and dispute resolution processes with reference to Mashaw's work on bureaucratic justice. Observations about the exercise of discretion and facts derived from the reports and studies cited in previous Chapters form the basis for the analysis, which comprises two stages. The first is an application of Mashaw's models and observations on bureaucratic justice to the SEN context. A comparison between SEN decision-making and the operation of the disability benefits programme

¹³⁶ [1995] 2 AC 633.

(DBP), which is the subject of Mashaw's study, reveals that, where both systems employ similar configurations of trade-offs, the same tensions emerge. Outcomes of operating different configurations in the disability benefit context provide information about how some of the problems identified in the context of SEN may be resolved. The analysis teases out themes derived from Mashaw's work, highlighting trade-offs and tensions associated with those themes. It develops and adds value to Riddell's broad observations derived from application of Mashaw's models in the SEN context (Riddell 2000 and 2002).

The second stage comprises an examination of the trade-offs among goals. The starting point is that none of the SEN dispute resolution mechanisms assures attainment of all of the PDR goals. A comparison between the LGO, SENDIST and Administrative Court reveals that the LGO incorporates the most, which suggests that it is the most promising model in the context of SEN. Analysis of the trade-offs leading to failure to assure attainment of goals reveals what might be done to ensure their achievement.

Section three comprises an analysis with reference to Adler's study of school admission appeals. Its starting point is the observations made in Chapter Three about discretion and controls upon its exercise. Adler's study reveals that similar trade-offs are made in admissions to those adopted in SEN decision-making and appeals. Individual interests are traded-off for collective goals at the initial decision-making stage. This is followed by an appeals process focusing upon individual interests. In both instances this has led to steps being taken to limit the exercise of discretion and defensiveness at the initial stage, and the adoption of more formal bureaucratic modes of dealing with clients.

Thus, it appears that the problems Adler describes as flowing from this - rights of appeal benefiting those who are least disadvantaged, and who gain at the expense of others; inhibition of comprehensive social reform; procedural rights that confer symbolic appearance of legality actually inhibiting the achievement of fundamental change that could enhance social welfare – are predictable consequences of this configuration of models. The model does not assure fair

outcomes for all children affected by decisions. Adler advocates a more equal balance between collective goals and individual interests.

In section four, Adler's typology of administrative grievances, which has been developed with reference to the definition PDR is used to illustrate starkly that no formal SEN dispute resolution mechanism is capable of dealing with all of the grievances identified. The ensuing risk is that identified by Galligan that, even if a complaint is formally pursued using a mechanism that can resolve some of its aspects, other important aspects will remain unresolved.

Section five is a summary of the problems identified and suggestions for change. Models used in sections two and four are used to assess attainment of the PDR goals and adequacy of redress in relation to mediation, conciliation and the children's services complaints procedure in Chapters Five and Six.

4. 2. THE BALANCE OF TRADE-OFFS AMONG GOALS

There is a continuing tension between a Tribunal's decision, which is made 'in the interests of the child', and the LEA's allocation of resources to meet the needs of all children with special educational needs for who it is responsible. (House of Commons Education and Skills Committee 2006 p.viii.)

4.2.1. Stage One

4.2.1.1. Mashaw's models

Mashaw queries whether bureaucratic justice is possible, desirable and appropriate in a particular context. He asks whether there might be an internal law of administration that guides the conduct of administrators: a law capable of generalisation, critique and improvement – of producing a sense of satisfaction, acceptance and justice quite apart from its connection to external legal institutions. He analyses the administration of a disability benefits programme (DBP) to see how the internal process functions - to consider the ideals created; the images of 'good administration' that guide behaviour, and the techniques by which ideals are realised, reinforced and sanctioned. In order to do this, Mashaw evaluates performance with reference to models of administrative

justice. His technique for developing the models is, he says, part empirical and part intuitive and analytic.

Criticisms leveled at the DBP were that it failed to provide an adequate service; individual claimants were unable to assert their rights to benefits because the decision-making process lacked the essential ingredients of judicial trials, and that it failed to manage claims in a way that produced predictable and consistent outcomes. Mashaw hypothesises that these criticisms reflect particular models of administrative justice; that each model is coherent and attractive; although the models are not mutually exclusive, they are highly competitive. The models are meant to indicate general features. Whole models and features shade into one another at the margins, but the internal logic of any one of them tends to drive the others from the field as it works itself out in concrete solutions. The models are described on p.31 of the thesis – bureaucratic rationality; professional treatment; and moral judgment.

Mashaw states that the best system of administrative adjudication that can be devised may fall tragically short of our ideals, and that ideals may be inconsistent and will differ according to the values of the person holding them. Applying this in the SEN context, an LEA officer may view the SEN decision-making process as ideal because criteria are operated to assure control and predictability; a parent might prefer the SENDIST appeals process because it places greater emphasis on individuation. But such perceptions would be based upon the models as they currently operate, and might be misconceived. The question is whether, from an objective perspective, the current configuration of models can be said assure a reasonable balance of collective and individual interests, or whether it can best be described as production-line decision-making with an add-on to buy off the worst troublemakers.

The adoption of criteria at the initial LEA decision-making stage reflects a desire to adopt the rational hierarchical structure to ensure control of costs enshrined in the bureaucratic rationality model. Wide discretion is limited in an attempt to make decisions consistent and predictable. Although there is a need

for decisions to be made about deservingness¹³⁷, the moral judgment model is not the model of choice. The process is steered away from individuation. Parents are enabled to participate, but this is limited to the right to make written representations. There are indications of a prevailing culture of interpreting obligations restrictively and perceiving resources as more important than children's needs. Individuation is traded-off for accuracy, transparency and consistency.

The LEA, as decision-maker, should be neutral, their role being simply to allocate resources in accordance with legislative objectives. Unfortunately, the conflict generated by the process and the fact that LEAs are placed in the role of actively-defending their decisions as parties to appeals have led to a situation in which parents are unlikely to regard either the LEA or local professionals commissioned to produce reports by them as neutral deciders or contributors. There is a focus on accuracy, with requirements to obtain reports from all relevant professionals, and an attempt to avoid the delay, which might be inherent in such an assessment, by the imposition of time-limits. Process costs are traded-off for accuracy, possibly at the expense of provision.

Although the SEN decision-making process is heavily reliant upon expert evidence, it does not follow the professional treatment model at the LEA decision-making stage. The LEA – the holder of the purse-strings – is the decider, as opposed to practitioners who have assessed, or are working with, the child. The process could lend itself to the professional treatment model but LEAs have chosen to subordinate the judgment of experts to the necessity of controlling cost against a background of limited resources. Individuation is traded-off for control of the costs of provision.

Arguably, in some ways, the SENDIST itself enshrines the professional treatment model – the members are lawyers and SEN specialists who make decisions applying professional judgment. However, it seems more realistic to describe the SENDIST as a specialist tribunal that follows the moral judgment

¹³⁷ This is Mashaw's word. Alternatives might be 'worthiness' or 'merit', but 'deservingness' better conveys what is meant.

model using evidence of professional witnesses to assist in adjudicating between competing claims. The pre-hearing appeals process resembles that of adversary court procedures, albeit that there is an enabling hearing. There are pleadings rules; the decider is neutral; and the parties control the evidence submitted. It is more expensive than the system it replaced. Process costs and the costs of provision are traded-off for individuation and confidence in the system deriving from the perception of impartiality that externality brings.

There is evidence of systemic stress. The reports referred to in Chapter Two and the letter from the DfES to all LEAs in November 2005 portray LEAs as being pre-occupied with resources. This may signify that bureaucratic rationality's demand for accuracy and efficiency at the initial decision-making stage is leading to the objectifying of norms conflicting with those of moral deservingness that are dominant at the appeal stage. Successful SENDIST appeals, on the other hand, curtail efficiency and cause financial unpredictability for LEAs. The stress is generated by the fact that different models are used at different stages.

4.2.1.2. A comparison between the SENDIST appeals process and the DBP dispute resolution process

The DBP model features an inquisitorial *de novo* hearing, whereas the SEN model features an adversarial *de novo* enabling hearing. As is the case with the SEN decision-making and dispute resolution process, the DBP which is the subject of Mashaw's study, combines the bureaucratic rationality model at the initial decision-making stage and the moral judgment' model at the appeals stage. Mashaw considers the rationality behind the combination of models adopted for the DBP.

Due to political pressure to expand the class of beneficiaries in times of economic downturn, there was a need for a system incorporating tight administration. The experience of private disability insurance in the 1920s suggested that adversarial adjudication was not such a system, with several insurers bankrupted as a result of judicial expansion. Nor did 'farming out' disability decisions to professionals seem an attractive option where there was a

need to control the process. A rational hierarchical structure was seen as the only option for ensuring control of programme and administrative costs, or put more positively the best option for operating cautious benevolence: a system tailor-made to the specific legislative purpose, not linked to professional values or the dominant legal culture.

But specialists' professional judgment's must have a role in determining both disability and capability for work. In fact, the professional rehabilitation perspective is relied upon to 'sell' ineligibility decisions – to ameliorate stress in the system caused by its all-or-nothingness. A negative decision could be accompanied by a recommendation for treatment or a particular rehabilitation programme. Furthermore, there are risks with the bureaucratic rationality model. It cannot be assumed that the underlying culture of the bureaucracy will follow the legislative objective, and there are limits to the degree to which this can be controlled. Decision-makers may pursue local interests and may be influenced by personal prejudice. Thus, a model that determines deservingness may be a more equitable model.

But Mashaw argues that, because a deservingness model necessitates individualised hearings, it brings with it the risk of inequality due to lack of experience, resources and skill on the part of the claimant. Also that subjective judgment appears inconsistent with responsible management of a national benefits programme. Compromises were made. Most decisions were to be made by the State agency under the auspices of a matrix of bureaucratic standards, routines and structures. There was to be some delegation of decisions to an arms-length body of professionals, but this was to be controlled by contract. There was to be some individuation for those dissatisfied, but the adversary model was considered unsuitable for the hearing stage because the agency, as the statutory body responsible for delivering the programme, should not be charged with defeating the claims of the sick. In view of the fact that the administration was not a neutral decider of claims but an organisation charged with taking forward the disability programme, it was decided that it should be investigatorially active in the initial determination of claims.

Mashaw observes that this model has withstood attempts to change it, including attempts to judicialise the review process by moving to adversary presentation, but this (he says) does not necessarily signal a happy blending. Bureaucratic rationality's demands for accuracy and efficiency may lead to an objectifying of norms that conflict with professional treatment modality and moral deservingness; just-allocation for individuals may conflict with objective rules; adjudication may curtail efficiency. Thus, the story of disability administration is one of systemic stress. As he says:

When one steps back from administrative implementation to ask what we want from it (bureaucratic justice), and forward into the empirical realities of a particular system, it becomes clear that structuring and controlling a system of administrative action that can also claim to provide "justice" is a very subtle enterprise. (Mashaw (1983) p.17).

Any dispute resolution model will have advantages and disadvantages. In choosing a model, rationalisation of the process, as a whole, is important. The model should, as Mashaw says, be subject to the normative evaluation and improvement that is the subject of legal discourse. Mashaw considers that a hearing process fits uneasily into the bureaucratic scheme. The adoption of decisional neutrality and just desert leads to the agency being unable to control the programme. In order to do this, it must control each stage of the process.

The DBP model has inconsistencies: appellants who seek *de novo* hearings before ALJs obtain an award in 50% of appeals, but in only 15% of reconsiderations by state examiners. The process of appealing to an ALJ has been criticised for inefficiency and delay. Attempts have been made by the legislature to curtail the number of ALJ awards. One such attempt was the threat of regulations that would allow representation for the benefits agency at appeal hearings, abandoning the non-adversary posture. This was meant to serve as a warning shot across the bows for ALJs. They responded by bringing a class action against the agency.

As with the DBP, the large number of decisions made by LEAs about children's SEN are invisible both in terms of literature on the subject and empirical evidence. The focus is on tribunal decisions and court decisions. Both systems

are subject to economic and political stresses. In the SEN context, there are powerful lobby groups representing the interests of children with particular learning difficulties, and significant political interest in outcomes for children involved in the process. Decisions are made at central Government level as to how much funding LEAs receive, and at local level as to the amount of funding deployed to SEN with reference to numerous different national and local priorities. Both the DBP and the SEN decision-making process involve the decision-making body taking responsibility for compiling the evidence, and both incorporate an initial decision-making process dictated by collective goals followed by an appeal process focusing on individuation.

There are, however, significant differences between the DBP and the SEN decision-making and dispute resolution process. In the DBP, applicants are precluded from instructing their own experts, whereas in the SEN context, parents obtain their own expert reports to discredit evidence in reports commissioned by the LEA. Because of the nature of the appeals process, it may be essential for parents to obtain such reports in order to succeed. In SEN decisions, representatives from the services that prepare reports for assessments sit as advisers on LEA Panels making decisions in individual cases, whereas the DBP decision-making process envisages a clearer separation between the experts employed to provide evidence and the decision-maker. Whilst the fact that each case is discussed by multi-disciplinary Panels in the SEN context might have the advantage of reducing the likelihood of any one individual influencing decisions in line with their own value sets, the disadvantage is that this practice may exacerbate any perception by parents that professionals commissioned by the LEA to produce reports are influenced by the LEA's rationing agenda.

The consequences of trading-off confidence in the process are significant. Parents may have been in conflict with their child's school before approaching the LEA, and an adversarial stance has developed. Perceiving that the odds are against them securing proper help for their child, they seek their own expert reports, and a contest emerges. This is in stark contrast to the DBP procedures. A potential advantage of employing an arms-length body of professionals to

conduct SEN assessments is that this might foster more confidence in decisions. The difficulty is that, unless this body has decision-making powers, it may not be perceived as adding very much. On the other hand, if it were to be given the function of decision-making without resource constraints, this might result in unworkable outcomes for LEAs.

The differences between the SENDIST procedure and that adopted by ALJs in disability benefit appeals are significant. In the DBP context, appellants put their case to an ALJ. The agency is not present to argue with, or discredit, anything said. The ALJ is free to ask whatever questions he sees fit. By contrast, when appealing to the SENDIST, parents must initiate an appeal with a case statement. If the LEA oppose the appeal, they must file a reply discrediting the parents' arguments. Each party submits evidence to advance their own position at the expense of the other; there is provision to request further and better particulars; to have an appeal or a reply struck out; for the calling of witnesses – all fostering litigiousness. The SENDIST conducts an enabling hearing, leading the questioning and discussion, however the LEA is present and will seek to advance their case in opposition to the parents. Each party chooses the evidence they think should be considered. The SENDIST do not examine files or instruct their own experts.

If the DBP practice of inquisitorial review conducted in the absence of the decision-maker were substituted for the SENDIST appeals procedure, the process might be perceived as more accessible by parents. It might also be less damaging to the ongoing relationship between the LEA and parents. But this might lead to more appeals, and more successful appeals, with costs spiraling out of control. Appellants have a high success rate both in reviews by ALJs and in appeals to the SENDIST, albeit that the procedure is different. This suggests that the nature of the process may not be as significant as the move from the bureaucratic rationality to the moral judgment model, or from a focus on collective welfare orientation to individuation.

4.2.1.3. Mashaw's observations applied in the context of SEN

Mashaw says it is necessary to consider two things in evaluating different models of dispute resolution – what makes a model work successfully, and is success a good thing? A central argument in this thesis is that the SENDIST model operates successfully within the remit it has been given, but that success is not a good thing. LEAs have obligations to large numbers of children with SEN. In light of limited resources, they devise a priority system for determining who should receive additional remedial help, and the extent of that help.

In making decisions about children's needs, there will be a list of children. If child A gets more help, child B, C, D ... all get less. It may be possible for them not to get less if funding can be obtained from other sources. But the effects of reducing the amount available for another service would need to be considered. Child C may not meet the criteria for a statement. There may be reasons to make an exception, but this should not be decided without considering the effects of this in terms of certainty, precedent, and implications for other children on the list. A reason for making the exception that does not feature within the decision-making framework might be that the additional resources going into a school for C can be accessed by D, E and F who attend that school and have needs similar to A. Z school has a unit attached where there is spare specialist teaching capacity. If A attends Z school, additional costs will be minimal, so less funding will be diverted from provision for B, C, D.

This is a necessary exercise if all children involved in the process are to be treated fairly. It may operate imperfectly. But, if decisions are irrational, they should be taken properly, not considered afresh with only limited consideration of the context. The concept of rights, in terms of them being moral rights that must be accorded even if a utilitarian calculation shows that the general good would be maximised by denying them¹³⁸, sits oddly in context of a long list of children all of whom need additional help. As long as the SENDIST continues to advantage those parents who appeal, this creates and perpetuates inequality. If more parents were enabled to appeal, the SENDIST would be a more successful model, but more appeals would drain further resources from those

¹³⁸ Dworkin, R.M. 1979.

who did not appeal, exacerbating the inequality. Mashaw concludes that perfect justice in the rational bureaucratic model is impossible. His focus is then on searching for the good within the constraints of the possible, which is the task of this thesis in the context of SEN.

Mashaw's starting point is to view the decision-making agency as being involved in formulating, interpreting and communicating policy; designing decision-making processes that support both systemic rationality and important dignitary values; and exercising supervision and control over the implementation of the system's ideals. There are irresistible demands for systemic rationality that necessitate specification of adjudicatory criteria; the process does not allow the production of effective precedents, QED the decision maker must make rules to guide adjudication. This is what has happened in the SEN context, with LEAs developing criteria.

Mashaw asks whether there is a need for escape-hatches allowing intuitive judgment where rule-making constrains discretion. As mentioned in the previous Chapter, the difficulty is that this may lead to perceptions of inequality of outcomes. Prescriptive regulation has advantages in terms of systemic rationality, but considerable disadvantages where over-generalisation in situations involving complex considerations leads to irrational decisions. It is difficult to argue that it is inappropriate for decision-makers to have some rules. The objective is to seek a workable balance of trade-offs between collective goals and individuation. The next section teases out various themes from Mashaw's analysis.

4.2.1.4. Mashaw's Themes

4.2.1.4.1. Goals

Mashaw argues that, when examining the exercise of discretion, it is difficult to specify a single set of 'relevant, absolute, consistent, stable, precise and exogenous goals' and find fault with failure to implement them. Desirable goals are:-

- to ensure that discretion is exercised rationally;

- to provide claimants with the opportunity to contribute to the decision-making process and the opportunity to complain where they consider discretion has been exercised improperly;
- to ensure that the outcomes of complaints influence future practice; and
- to reduce conflict and engender trust, particularly where the parties' relationship is ongoing.

The opportunity to complain and the assurance that outcomes of complaints influence future practice are reflected in the goals of PDR, as is rationality (expressed in terms of accuracy). PDR envisages that people will be able to seek the symbolism of formality and binding decisions, or an agreed solution. The examination of the SEN decision-making and dispute resolution system in the previous three Chapters reveals that it appears to fulfil some of Mashaw's goals to a limited degree. There are concerns about rational exercise of discretion in light of the evidence of rigidity and over-emphasis on resources.

Parents are able to contribute to the LEA decision-making process, but their contribution is limited initially to being able to put their views in writing. They are entitled to request meetings to discuss a proposed statement, but only after the LEA have made decisions about whether it is necessary to assess and drafted a proposed statement setting out needs and provision. The Code of Practice recommends that parents and children be involved in decision-making on an ongoing basis. The Exeter Study (University of Exeter 2004a) referred to in Chapter 7 suggests that children are not involved in decision-making. The Hall 1998 study and representations made by LEAs to the House of Commons Education and Skills Committee for the purposes of their 2006 Report indicate that the vast majority of parents do not appeal, and that outcomes of successful appeals do not influence future practice. Whilst it would be wrong to suggest that the existence of the SENDIST has no influence upon LEA day-to-day decision-making, it is apparent that LEAs continue to make decisions with reference to resource constraints and in accordance with their criteria in pursuit of collective goals, whilst the SENDIST follow a child-centred approach.

Parents' lack of trust in the willingness of LEAs to make appropriate provision for children's SEN is evident from the Hall and Evans studies, and from the Select Committee's 2006 and 2007 Reports which recommend separation between the assessment function and the holder of the purse-strings. As mentioned previously, the DCSF are considering the possibilities of guidance to educational psychologists and piloting the contracting-out of assessment functions if any LEAs will volunteer for this. (There is no provision that allows the Secretary of State to compel LEAs to contract-out functions unless there is a failure to perform those functions adequately).

The recommendations of the Committee are misconceived because they are based upon the premise that there is a conflict between the requirement to make provision for children's needs and the consideration of resource implications necessitating a split between the two functions. But this needs/cost balancing exercise is inherent and necessary in virtually all local authority decisions about provision of services in light of the fact that budgets are finite. The problem is not one of conflict of interest, but lack of confidence that LEAs accord sufficient weight to children's needs in decision-making and suspicion that local professionals collude with LEAs' assigning of disproportionate importance to resources.

4.2.1.4.2. Fact-finding

The SEN decision-making process is based upon an investigatorial process that is prescriptive in terms of the information to be collected and the timescale within which this task must be completed. Fact-finding may nevertheless present difficulties: what to do about missing information; how to decide between conflicting expert reports; prediction of the effect of a particular difficulty on future performance; subjectivity or bias in the making of value-judgments. The optimum objective is to take into account all relevant facts and values plus the costs in order to maximise the total net benefit of each decision. There are concerns expressed in the Evans study that cases do not receive adequate attention - that parents complain about missing reports and failure to take information into account. Evans gives the example of a Panel meeting once a week making decisions on 30 cases per meeting. Mashaw's contends that

decisions are often based on a sub-set of the relevant values and facts. This then leads to the question of whether the organisation has made sensible judgments about how to deal with the bounds of its competence.

Requirements imposed upon LEAs about the nature of the information that must be collected are designed to ensure a comprehensive assessment with contributions from all relevant sources. The fact-finding task is carried out by low-level officials. There is no incentive for them to read reports to ensure they contain all relevant information. Indeed, the necessity of compliance with time-limits may render this unlikely. As Mashaw observes, officials who gather information in this way do not have the same incentive as parents to ensure all relevant information is obtained.

If information is lacking, this may be detected by Panels comprising more senior officials who make decisions on provision. They then have the dilemma of whether to remit the case back, causing delay and breach of the time-limits. It is important to the issue of equality that any initial fact-finding process is conducted properly. Mashaw rightly says that it is more relevant to consider whether the decision-maker has chosen the correct value than the correct fact. Whether an official values accuracy and individuation above delay will be influenced by the prevailing culture. There is no guidance in relation to this issue, so practice may vary between LEAs with different outcomes. On closer examination, the assessment process is an expensive one that gives the appearance of trading-off cost for accuracy, but provides no guarantee of accuracy.

4.2.1.4.3. Process-values

Considering whether the best choices have been made for a particular system, and how this should be evaluated, is not an easy task. Mashaw suggests that rejection of the adversary adjudication paradigm necessarily suggests nonsupport of some of its values – party control, equality of access, transparency – all linked to individuality and autonomy. But he says their association with the adversary process is not indisputable, and they may be retained in the bureaucratic rationality model. Further, that the dynamics of the

adversary system accentuate the negative. Oral examination and cross-examination of witnesses is a better method for highlighting gaps and uncertainties around a decision than it is for portraying notions that would support it.

In a section entitled ‘the Elusive Value of “Process-Values”’ Mashaw identifies process-values as:

- equality,
- transparency,
- privacy,
- humaneness,
- appropriate symbolism and
- participation.

Most of these process-values are present at the LEA decision-making stage. In relation to equality, LEAs are obliged to assess and make appropriate provision for the needs of all children for whom they are responsible. Any parent can make a request for assessment or provision. Schools may also request assessments, so children are not dependent upon the capability and willingness of their parents. This is an important facet of the system, the political motivation for which derives from the principles of distributive justice as enshrined the works of Rawls (1973), R.M., Dworkin (1979) and others – a recognition that parents are not equal in their endowments in terms of having the capability to take the steps needed to enforce LEA obligations towards their children, and that the state must take positive steps to compensate for this. The same principle drives the actions of the SENDIST in taking positive steps to assist parents, particularly those who are manifestly on an unequal-footing with the LEA. This point is revisited in the final Chapter. Evidence in various reports suggests that LEA decisions about children with SEN are being taken consistently – perhaps too consistently, but this is the purpose of adopting criteria¹³⁹. Consistent decisions ensure equality. The initial decision-making stage appears to offer equality in terms of both access and treatment.

¹³⁹ The Select Committee’s 2006 Report and the Audit Commission’s Report (Audit Commission 2002b) suggest lack of consistency between LEAs.

In relation to fact-finding, there is doubt about whether equality of treatment can be assured where LEA officials develop the evidence. Allowing parents to commission their own evidence, however, also causes problems. It enhances the position of children whose parents commission reports over children whose parents do not (or cannot), but places parents who do commission evidence on a more equal basis with the LEA. Adjudicators at all levels accept responsibility for ensuring they have the necessary evidence to develop a claim. The SENDIST are unable to fulfil this responsibility to the extent necessary where parents submit no evidence to counter LEA expert evidence.

Mashaw says that, if claimants are in contest with the government, they are in an unequal position, both in terms of expertise about the system and in terms of access to the decision-maker. The studies and reports referred to in Chapter Two highlight concerns about equality of access at the appeal stage. This lends credence to Mashaw's statement that strict equality of access in adversary systems only assures equality in a formal sense – that there may still be material and substantial inequality due to inequality of resources with which to wage battle. This reflects the views of Galligan and Adler, as referred to in the previous chapter. In the SEN context, the reports referred to in Chapter Two indicate that, in spite of the efforts of the SENDIST to make the tribunal process more accessible, this has not overcome the problem of access and unequal endowments.

Mashaw considers that transparency, in terms of openness and comprehensibility, contributes to the self-respect of all participants in the system. There is transparency in SEN decision-making in the sense that the SEN Code of Practice and the LEA's criteria enable parents to know the parameters within which decisions are taken. They are given reasons for decisions. There is also transparency at the appeal stage, with each party being given notice of the other party's case; both parties being present at the hearing and a requirement for reasoned written decisions. Privacy is important in view of the confidentiality of the information provided. All information about a child's educational needs is confidential. His difficulties are only made known

to those who are assessing and teaching him. SENDIST hearings are conducted in private, and decisions published on an anonymised basis.

In relation to humanity, the SEN Code of Practice, in setting out the principles within which LEAs must operate, should assure that children and parents will be treated humanely and with respect. However, the Exeter and Gersch studies referred to in Chapters Five and Seven convey the impression that some LEAs have embraced the ethos of the Code, while others have not. This is likely to be influenced by the prevailing culture. Arguably, the SENDIST appeals process is more 'humane' than the initial decision-making stage because it offers an oral hearing focusing upon the child's needs. A recurrent theme in the Genn's work is the importance to people of being listened to (Genn 1989, 1993, 1994, 1999a, 2006).

Symbolism assures participants that the state takes decision-making seriously: it causes them to treat decisions as final and legitimate. There are difficulties with appropriate-symbolism at the initial SEN decision-making stage. Where parents are dissatisfied with an LEA decision, it is understandable that they would consider that conclusions in reports by local professionals might be coloured by their close working relationship with the LEA and biased in favour of the LEA's perspective. Oversight by an independent body brings legitimacy.

Mashaw says, in relation to this:

Emphasizing the moral content of the disability decision and invoking the legitimating symbolism of quasi-judicial judgment after quasi-adversary process is also possible though I believe it to be ill-advised. Mixing professional, moral and bureaucratic judgment, of course, makes it difficult to maintain the legitimizing power of the symbols. But there is no reason to believe that there are no choices to be made – that all mixes or all pure models have equivalent symbolic costs and benefits. (Mashaw 1983 p.95).

In the SEN context, legitimacy comes at the cost of further undermining confidence in the initial decision-making process and exacerbating conflict. Because most people receiving adverse decisions do not appeal, the emphasis arguably should be on transparency and encouraging the perception that the initial decision has been arrived at following a process that is fair. Organisations

can provide independent representation and hearings; they can treat people with humanity; they can produce rational, fair and efficient adjudications.

In relation to participation, Mashaw cites the contextualization school, the principal proponents of which, Thibault and Walker (1978), argue strongly for the adversary process on the basis that it maximises the control of the participants. Yet, Mashaw says, even that school admits that adversariness contributes to powerlessness where disparity of resources yields disparate power over the process. Mashaw asks whether oral presentation and argument enhance meaningful participation, and what type of process will support perceptions of meaningful participation and therefore self-respect. He suggests that such a process might be one that would make general legal rules of fairness applicable to the bureaucratic process and permit individual process choices whenever these choices have no clearly detrimental effect on decisional accuracy.

Allowing parents and children to express their views orally at the initial decision-making stage might be considered more effective participation and more humane treatment. One LEA's practice of calling in parents who are dissatisfied with decisions has proved an effective technique in deterring parents from appealing to the SENDIST (see the second example of conciliation arrangements taken from Gersch 2003 discussed at p.217 of the thesis). There may be other concerns about this practice which are discussed further. Also it is not extended to all parents and children, merely to dissatisfied parents who are considering an appeal. Nevertheless, it does illustrate that listening to parents can cause LEAs to compromise and change decisions, and that re-assurance for parents that they are being listened to reduces dissatisfaction and conflict.

A possibility for ensuring that all parents and children are listened to might be to impose a requirement upon LEAs to invite them to attend the meeting of the Panel making decisions about whether the child should be assessed and statemented. This might lengthen the time taken by Panels to consider individual decisions, but if delay were minimal, this might be a trade-off worth making. This would need to be considered in light of the fact that the decision-

making and appeal processes are both already lengthy, though this would not necessarily have to remain the case.

Mashaw suggests it might be possible to import the values of an adversary system – party control, equality of access and transparency - into a non-adversarial system. This is worthy of consideration in the SEN context. A possible model for achieving this is suggested in Chapter Six. If such a model were to operate successfully, this would necessitate all of Mashaw's core values being present at each stage of the process.

4.2.1.4.4. Culture

Mashaw says there is information within an organisation – the feel and craft of experienced decision-makers; a sense of what works when ferreting out information. But what is also significant is that, as he says-

Organizations and the bureaucrats that inhabit them have their own goals, desires, motivations. Action that seemingly contradicts statutory purposes may be taken not only because those purposes are vague and their application uncertain, but because it is in the interests either of the organization or the particular decision-makers to behave in this fashion. (Mashaw 1983 p.68).

Those who operate statutory provisions develop a value matrix. Sometimes this will conflict with goals established by the courts and other bodies charged with oversight of their operation. The critical question, he says, is to what degree the pursuit of organisational goals undermines the pursuit of programme goals.

In the SEN context, the emphasis in the Code of Practice on seeking the views of parents and the importance of their role, together with the warning that stereotypical views of parents are unhelpful and should be challenged, might suggest that there is (or was) a prevailing culture within LEAs of under-valuing parents' views. Working in partnership with parents is enshrined in the Code. It appears that the obligation to have regard to its principles may not have prevented the development of prevailing cultures within some LEAs that conflict with those principles. Breaches of the Code cannot be complained about to the SENDIST, only to the Administrative Court. There is a risk that prevailing cultures running contrary to the Code's principles will not be

challenged. It appears criteria devised by LEAs are being operated as a barrier to resources – that the criteria have transcended and subverted the principles of the Code, albeit that they appear to have been developed from its principles. The outcome is the operation of blanket-policies driven by a culture that perceives resources as more important than children's needs.

In order to place controls over human decision-makers, discretion may be constrained by programmatically specified values. Mashaw suggests this must be done to prevent what he terms contextual rationality. This is where decision-makers exercise discretion within a value-set that is influenced by local politics, the organisation itself, or the culture of particular professions involved. Possible control mechanisms are rules of relevance; presumptions in case of doubt; clear rules; objective oversight from within the organisation re-enforced by objective performance standards.

Although there are a number of controls on the exercise of discretion in the SEN context, Mashaw's suggestions do not number amongst them. There is also the issue of the degree to which decision-making should be controlled. In light of evidence of rigidity, narrowness, and a forgetting of what is being set out to be accomplished, arguably what is needed in order to assure a better balance between systemic and intuitive rationality is not more rules, but clearer guidance on when it is legitimate to depart from the rules and a change of culture¹⁴⁰.

4.2.1.4.5. Tensions

Mashaw argues that there are disadvantages in having a different system at the decision-making and appeal stages. This is because initial decision-makers will not consider that a successful appeal means that they were at fault, simply that a body, which has considered the matter from a different perspective, has come to a different conclusion. Thus, appeal decisions do not inform best practice. Mashaw does not consider that a multi-level, apparently inconsistent, type of system is inappropriate *per se*, but suggests there might be preferable

¹⁴⁰ Goodin (1986) makes the point that everything that can be done with discretion can be done by means of rules.

alternatives: allowing first-level decision-makers more discretion; making appeal judges more systemic; changing the 'sorting mechanism'; employing different deciders for different types of cases. He observes that legitimating a quasi-adversary process by following it with quasi-judicial judgment is one of a number of choices, and the perception of legitimacy is a factor to be taken into account in making such choices, but there are other factors that might be taken into account and other choices to be made.

Evidence from the Council on Tribunals that was accepted in the Leggatt review of the tribunal system indicated that the SEN appeals process exacerbates conflict and leads to wasted costs.

The time the LEA takes to prepare detailed evidence on each child can result in a long period between the initial statement of education needs and the tribunal hearing. During that period, it is not uncommon for relations between the LEA and the parents to break down, so their meeting on the day of the hearing can provide the first serious opportunity for negotiations to resume. 50% of appeals are withdrawn, some on the day of the hearing. This wastes LEA and tribunal resources, and puts parents through unnecessary stress. We agree with the Council on Tribunals that SENT cases are particularly suitable for conciliation or mediation. We recommend that the DFEE considers with LEAs the scope for formal or informal mediation or conciliation in the period before a SENT hearing. (Leggatt 2001 para 15 Part II Individual Tribunals).

Although mediation and conciliation have been introduced to reduce such conflict, the observations of the Select Committee in their 2006 Report suggest that parents have little choice in taking an adversarial approach, which implies more needs to be done.

Mashaw argues that various studies have demonstrated that decision-making processes involving second-stage hearings systematically disadvantage the uneducated, the unintelligent, racial minorities and women¹⁴¹. He also suggests that the substantially higher level of awards for those who appeal to ALJs in disability benefit claims may simply be a reward for pursuing the claim, which

¹⁴¹ Institute for Community Studies "Case Facilitator Project" (undated) SSA 71-3409: M Bendick "Why Do Persons Eligible for Public Assistance Fail to Enrol?" (Urban Institute Working Paper, August 1979).

begs the question of whether this 'perseverance bounty' is in some way discriminatory.

Arguments against this are that the hearing, with its focus on individuation, achieves a just outcome. Those who appeal are simply those whose claim should have been granted in the first place. They have just been disadvantaged by the delay involved in convening a hearing. Alternatively that adjudication is simply a means of legitimising the resolution of a conflict in which neither side can be said to be correct. Since those who appeal seek legitimisation, non-appealing claimants are 'satisfied' claimants.

Mashaw says it is difficult to argue against the contention that increased participation and control gives claimants a stronger belief that they have been treated fairly, yet he is unconvinced that oral appeal hearings are the best way of achieving this. He accepts that participation may promote greater understanding of adjudicatory norms on the part of the claimant; that collection of evidence provides re-assurance that all material facts have been considered; and that presentation of the evidence promotes a feeling, on the part of a claimant, that he has been listened to. But, as the chances are slim that the claimant can be brought up to sufficient standard to understand the law and regulations at an acceptable cost, just outcomes are not assured. Supply of brochures and explanations is insufficient. He argues that the system would operate more effectively and productively if the 'right' claims could be appealed and pursuit of unmeritorious claims deterred. Pursuit of claims that are never likely to succeed simply increases dissatisfaction with the system. This might, he suggests, be facilitated by independent representatives who are knowledgeable about the system acting as information mediators.

But there are two ways of judging whether an initial decision-maker is getting things right – appeals and quality assurance. Mashaw is critical of the appeal system for the DBP. Only claimants can appeal, therefore a large part of the caseload can never be reviewed. Appeals are *de novo*, so the hearing process:

employs live testimony, substantial redevelopment of the documentary record and vaguer criteria for judgment so transforms cases that ALJs could be said to be dealing with different cases. (Mashaw 1983 p.148).

He concludes that appeals do not promote high-quality adjudication at organisational level. This makes a strong quality assurance programme (QA) essential. Standards must be developed and performance judged against those standards. But this is by no means straightforward. Where decisions involve the exercise of judgment, it is difficult to say they are erroneous except perhaps where they are made on the basis of insufficient information or where relevant facts or expert opinion have been ignored. Mashaw says that what is essential is that the system ensures the record is complete and that review is fed back to influence future cases, therefore information on performance must be gathered and analysed. This does not happen in the SEN context. LEAs may review compliance with statutory time-limits, but where the SENDIST allows an appeal resulting in a child being assessed who would not have met the LEA's criteria for assessment, it appears LEAs are unlikely to amend their criteria to allow assessments where similar circumstances exist, they will simply try harder to win the next appeal.

4.2.1.4.6. Cost

In a climate of limited resources, trade-offs between costs and benefits are inevitable. This is at the heart of any analysis. Costs feature twice in the PDR goals – cost-effectiveness to the complainant and cost-effectiveness to the state. The bureaucratic rationality model is focused upon achievement of the maximum benefit at the minimum cost. The SEN decision-making process relating to assessment and statementing is costly. As mentioned previously, Government policy is that LEAs should devolve more monies to schools for provision, with a view to reducing the number of assessments and statements enabling administrative costs also to be deployed on additional provision. A further argument for this course of action is that the statement is of limited value because it is only amended annually. It quickly becomes out of date if detailed. Other assessment tools employed by schools, which are amended more frequently, are more accurate and serve as benchmarks for whether a child's needs are being provided for.

On the other hand, the statutory framework for assessment and statementing assures consistency of dealings within a set of visible and predictable procedures. It is arguable that the statutory assessment process, whilst it might be cumbersome and expensive, is thorough. More importantly, the making of a statement transforms the nature of the LEA's obligations towards the child from a general responsibility to one of individually enforceable obligations.

4.2.1.4.7. Reform

As with the disability benefit programme analysed by Mashaw, the system of determining eligibility for SEN provision by LEAs is an 'accuracy-oriented, investigatorially active, hierarchically organised and complexly engineered system of adjudication.' Mashaw's view is that:

The quality of justice provided in such a system depends primarily on how good the management system is at dealing with the set of conflicting demands that define rational, fair and efficient adjudication. It must translate vague and conflicting statutory goals into administrable rules without losing the true and sometimes subtle thrust of the programme. It must attempt to ensure decisions are consistent and that development is adequate, without impairing the discretion necessary for individualization. It must simplify and objectify the data relevant to adjudication in order to direct action and to monitor outputs, but without so distorting perception that decision-making is in fact divorced from a reality that is also complex and subjective. It must deploy appropriate expertise while screening out inappropriate professional bias. It must balance perceptible administrative costs against the less perceptible costs of error, delay and demoralization. (Ibid. p.172).

Clearly the task Mashaw describes is a subtle and difficult one. His suggestion for reform of the DBP is the abandonment of the appeal process conducted by judges and judicial review, but tighter controls on initial decision-making, greater participation by claimants and review by medical or multidisciplinary Panels, with oversight by a superbureaucracy.

He asks whether there are ways of overseeing and engineering a system so that it produces predictable and acceptable responses. This would necessitate hierarchical control – the engineering of a 'culture'. He suggests that, although this notion is jarring, it must be attempted. Decision-makers who function in an identical decision culture should apply norms and evaluate facts in the same

way. The organisation can ensure these values pervade decision-making using structural and personnel techniques – recruitment of staff who embrace the culture, training and establishing appropriate relationships between all who participate in the process.

The difficulty with cultural engineering, however, is that where discretion is exercised there is always an element of norm ambiguity. Excessive guidance may produce rigidity. Producing consistency across organisations is also problematic. Mashaw concludes that unified administration can only be achieved by the elimination of discretion. He then asks whether this is a good thing and whether it will contribute to the achievement of bureaucratic justice. His conclusion is that it would not. The complaints of rigidity and narrow-mindedness that would ensue would be valid, and this would undermine the legitimacy of administrative action.

Mashaw considers that hearings contribute to, rather than eliminate, bureaucratic stress. The processes of initial decision-making and appeal are too radically different not to produce different results. He says that ultimately a decision will have to be made as to whether the hearing process is brought into line with initial decision-making, or the moral judgment model will have to be used as the primary decisional tool in all cases. In the latter case, budgetary concerns might need to be off-set by an adversary process, with the organisation providing a vigorous defence. He says that this may seem inappropriate in the case of an organisation charged with implementing a social welfare programme, but that it must be remembered that deservingness is not one-sided, and that the organisation is concerned with administering benefits fairly to all applicants.

Mashaw observes that people appear to have greater confidence in adversary systems and that such confidence diminishes as the process moves towards an inquisitory mode. He does not, however, advocate a move to adversary hearings in the context of the disability programme, predicting that this would lead to extensive pre-hearing delay, expensive settlements, lengthy hearings and disadvantage to unrepresented claimants. He says:

Although the moral judgment model in an adversary process mode can be defended, reform that emphasizes the role of hearings should be contemplated only if one despairs of the acceptability of some modified form of bureaucratic rationality. (Ibid. p.193).

The route to bureaucratic justice is to make the internal structure and operation of organisations respond to a sensible set of demands for rational, fair and efficient adjudication. This is done through management of decision-makers and by influencing decisional technique rather than through intensified legal or political control or by adopting adversary hearings into the bureaucratic process. In order to ensure consistency across different organisations making the same decisions, Mashaw suggests defining accuracy objectively by identifying determinants of claim strength. If cases could be classified as strong, weak or marginal, this would enable analysis to be conducted.

Mashaw considers that bureaucracy cannot escape the impression that it provides second class justice, as compared with the courts. Policy is cast in a defensive mode so that it neither identifies the shortcomings of the court system nor develops correctives to bureaucracy that might be more effective. There are several possibilities that could improve rationality, fairness and efficiency. The first he describes as modest - claimants themselves could be the counter-force to facelessness. Examiners could be forced to talk to them, treat them as important sources of information, and explain decisions.

This might lead to claims taking longer, more claims being allowed (therefore an increase in programme costs), but it might also enhance the humaneness of the process and improve its standing and transparency leading to a higher level of satisfaction, fewer appeals, and fewer reversals on appeal. The feeling of being listened to may make adverse decisions more palatable. Successful claimants who would otherwise have succeeded only on appeal will be spared (possibly) expense and delay. An experiment conducted in the context of the DBP showed that interviewing claimants had all of these effects, though it was not possible to tell why the interview made a difference¹⁴². But interviews are

¹⁴² Mashaw says that the results of the experiment were contained in a plethora of unpublished memoranda and letters.

costly and may cause delay, so time and expense would be traded-off for increased satisfaction. If this led to fewer appeals, there might be an overall cost-saving.

A second counter-force is representation for claimants. Where claimants have a limited understanding of the system, specialist representatives could assist them to make informed choices, filter out frivolous claims, ensure all relevant evidence is considered and even counsel acceptance of defeat where appropriate. Mashaw suggests that representatives should operate through relevant voluntary organisations. They should have specialist knowledge. If representatives are to be Government employees, this must be their clear and explicit role. He suggests a bureau of general benefits claims representatives detached from the agencies distributing benefits.

He also suggests a combination of face-to-face reconsideration interviews and representation from the time of denial is worth trying in a carefully controlled test incorporating data on both correctness and satisfaction. He considers this would yield results so superior to the existing system that the costs could be recouped by eliminating ALJ hearings and judicial review. Claimants could choose their own representative if they did not wish to have one assigned; ask their representative to attend and speak for them at the interview; or represent themselves.

A more radical policy option is his suggestion that reconsiderations of disability eligibility decisions be made by a Panel of physicians following examination, or by multiprofessional Panels comprising specially trained teams who would investigate the claimant's background, medical problems, psychological state, work capabilities and prospects for rehabilitation. The Panels would meet to discuss the case and make a decision. A study was conducted by Nagi in 1970 of the multiprofessional Panel option where Panels took samples of decisions and developed them substantially. Disadvantaged applicants were provided with assistance. The outcome was that refusals were changed to awards in 21% of cases and awards were changed to refusals in 8% of cases.

Improved development of cases favoured claimants with particular characteristics – those with low IQs, low educational levels; those with low socioeconomic status; those who have combinations of unlisted impairments; and those who have adverse vocational factors but only modest impairments. Mashaw suggests that the multidisciplinary approach may constitute a powerful legitimating symbol. Where a claim is refused, the vocational expert could provide a list of appropriate jobs, training and rehabilitative therapy. Possible criticisms are that it is likely to be an expensive model; there might be considerable variation in Panel decisions; it would be intrusive – the claimant would have to submit to interviews and tests.

But focus on dispute resolution is misplaced according to Mashaw's analysis. Second-stage hearings systematically disadvantage the uneducated, the unintelligent, racial minorities and women, so the principal aim should be to ensure that the initial decision-making process operates as well as possible, enabling external review to be avoided. The system would need to ensure a reasonable balance between consistency and individuation.

The arguments referred to by Mashaw, that successful appellants are those who should have been successful at the initial decision-making stage and that those who do not appeal are satisfied claimants, are, as he says, unconvincing. He refers to a study of the DBP in which unsuccessful claimants were asked why they did not request a review. Only 4% said this was because they considered the denial was correct. Where this is the case, two questions follow: why did 96% think the denial was incorrect – because it was not what they wanted, or because they did not believe that their application had been considered properly - and why did they not appeal? What was it about the appeals system that made them unwilling or unable (in their own eyes) to access it?

Through Genn's research more is now known about why people do not access formal dispute resolution mechanisms. What remains unknown is what would make them change their minds, or what mechanisms, if any they would be prepared to access. Reform of SEN dispute resolution has been directed at encouraging early settlement on the basis that most cases settle anyway, and

towards improving access to the SENDIST, as opposed to consideration of other processes.

An argument that the SENDIST should be replaced with something different, or given a different role, is an unusual one in light of general findings that the tribunal operates well. But it is important that distributive justice arguments, in terms of properly facilitating equal endowments (as opposed to simply improving access), are made. Education policies driven by choice and 'parent power' appear to be resulting in an ever-widening gap between rich and poor. A study published in January 2008 by the Institute of Education (Ball 2008) reveals that in 2000, 18 per cent of young people from skilled manual or unskilled backgrounds went to university. While this was up 8 percentage points from 1990, the increase for young people from professional and non-manual backgrounds was 11 percentage points (from 37 per cent to 48 per cent), indicating that the gap between the higher and lower social classes has grown.

Today's education policies focus on the production of high-level skills, at the expense of disadvantaged working-class children – there are still high levels of failure among working-class students, and the UK has one of the worst post-16 participation rates in the OECD. (Ibid. p.7).

SEN and attainment are inseparable as issues. The balance between collective goals and individuation is at the heart of the attainment divide, with better-educated middle-class parents being able to gain more for their children from the educational system.

As with the DBP claimants in Mashaw's study, some parents of children with SEN may perceive the LEA as a faceless bureaucracy and have little understanding of the basis of a decision based upon complex expert evidence and criteria. This perception might be altered if more face-to-face contact between LEA officers and parents were incorporated into the decision-making process. In the SEN context, perhaps any delay and additional expense resulting from oral participation by parents and children at the initial decision-making stage might be evaluated in light of possible savings of appeal costs and concerns by the House of Commons Education and Skills Committee about access to the appeals process. An interview conducted prior to decision-making

might serve to ensure that LEA officers consider parents and children as individuals, as opposed to names on paper, and might re-assure parents that they are being listened to. Participation in the form of attendance at a tribunal hearing, although allowing parents to have their say, may place some at a disadvantage, and deter others completely.

Mashaw's suggestion that independent advocates should be employed to ensure that the 'right' claims are pursued is considered further in the next Chapter in terms of advocacy and case management. Another question is whether the advocate should represent the child or the parents. This is considered in Chapter Seven. In relation to QA analysis, currently there is no requirement for LEAs to conduct any. LEAs do not review the rationality of their own decisions as a matter of course. Mashaw says that monitoring and self-correction are important at organisational level.

But what about the risk of a prevailing culture or criteria that allow too few children to be assessed or statemented? Can this ever be uncovered and redressed in the absence of external review? Mashaw suggests that cultural engineering must be attempted. The SEN Code of Practice contains the normative elements in terms of values that should inform LEAs' adjudication. Oversight of the drafting of rules and culture driven by a superbureau is Mashaw's suggested alternative to correction in isolated individual cases. It is difficult to quarrel with the logic that suggests that the better way forward is to drive a particular culture from the outset and enshrine decision-making within that culture, so that decision-makers receive training and are immersed in the culture. The difficulty with implementation of Mashaw's suggested reforms in the SEN context is that the extensive level of mistrust between parents and LEAs would mean that cultural engineering driven and monitored through internal mechanisms may not be considered by parents as preferable alternatives to external review.

4.2.1.4.8. Comment

Mashaw considers that the disability programme has succeeded remarkably well in embracing neutrality, expertise and efficiency. The 'cloud over Camelot' is

that new goals, such as fiscal restraint and consistency may undermine or distort these goals. There are tensions in the system – appending uncontrollable hearings and judicial review has undermined and contradicted the fairness and accuracy of the initial decision-making stage. They ‘criticise a stringency that their profligacy promotes’ (Ibid. p.215).

There is a further cloud. Mashaw cites a number of studies suggesting that it is difficult to control the behaviour of adjudicators to ensure they conform with normative goals. His view is, however, that this is possible where decision-makers cannot avoid review by QA analysis. In the DBP, investigators are desk-bound bureaucrats who work ‘elbow to elbow’ with their peers and supervisors and yards from the QA unit. In the QA process, virtually every dimension of examiner behaviour has a statistical check. Also, increased contact with claimants may also avoid a tendency to stray too far towards stringency.

Mashaw concludes that bureaucratic rationality is a promising form of administrative justice. It permits the pursuit of collective ends without sacrificing individuation. External modes of control, in the form of judicial review, not only provide inadequate remedies, they undermine the premise of the bureaucratic ideal. They are ‘wrongheaded’, though the images of justice they evoke are hard to dislodge. In relation to bureaucracy, Mashaw asks:

Must we strive forever within a conceptual framework that either denies its own underlying reality or compares it deprecatingly with institutional and legal structures that our substantive public policy long ago abandoned? [...] Our constitutional myth is that liberal democracy requires political leadership tied to electoral politics, with individual rights guaranteed by judicially administered law. (Ibid. p.225).

In his view there is a gap in the constitutional order of both symbolic and functional significance. A superbureau would fill the gap. Its function would be to supervise the drafting of administrative legislation; review the competence of Departmental policy analysis; provide binding counsel on managerial technique, and hear complaints of maladministration. This might then become the model for ordinary bureaus, which might reorient the evaluation of fairness of administrative judgments toward the adequacy of the internal structure and functioning of organisations.

4.2.2. Stage Two – PDR and false-absolutes

Mashaw observes that there are many value dimensions within decision-making processes – costs, delay, accuracy, service delivery – that must be traded off against each other, and that an attempt must be made to achieve a harmonious and consistent balance between competing goals. But the critical question of how much these trade-offs are worth is so difficult to answer that it is often ignored, or false-absolutes – ‘due process’, ‘accuracy’, ‘efficiency’, ‘fairness’ are substituted for critical analysis. He suggests that the most that can be achieved is careful weight of the trade-offs among goals, but recognises that such methodology will satisfy neither the theoretician nor the service manager. Also that it demands consideration of every value and value-conflict involved in every process feature.

An analysis with reference to ‘false absolutes’ will only yield limited information. The Leggatt review of the tribunal system concluded that the SENDIST operates successfully within the remit it has been given. Whilst this is true, it does not mean that the tribunal has the correct remit, or even that its successful operation is a ‘good thing’. The Select Committee’s 2006 Report identifies problems with SENDIST appeals relating to equality of access, expert evidence, stress and cost. This would suggest that proper evaluation of dispute resolution systems cannot be achieved simply by consideration of attainment of pre-determined goals – that the system as a whole needs to be examined, and that there needs to be a second stage of identifying the advantages and disadvantages of possible models and assessing the trade-offs that could, or should, be made in order to achieve the good within the constraints of the possible.

This section comprises an evaluation of the balance of trade-offs in SEN decision-making and dispute resolution processes, but not with reference to every value and value-conflict enshrined in the process. The benchmark for analysis in this thesis is PDR. Therefore its definition prescribes the relevant goals which are:

- Accessibility which divides into:
Quick
Uncomplex
Cheap for Appellants;
- Misconceived and Trivial Complaints Rooted-out Quickly;
- Accuracy
- Changes Feed back in to the System leading to:
Less error
Less uncertainty;
- Cost-effective to the State

The first task is to assess which goals are attained by the formal SEN dispute resolution mechanisms. The goals are all of equal value. Where a goal is attained, the mechanism is a success in this respect and further discussion is unnecessary. Where a goal is not attained, there is consideration of the balance of trade-offs relevant to the goal to assess what might be done to attain it.

SENDIST, LGO, ADMINISTRATIVE COURT - ATTAINMENT OF PDR GOALS

	SENDIST	LGO	ADMINISTRATIVE COURT¹⁴³
Cheap for Appellants	?	Yes.	No. But Legal Aid may be available
Quick	No.	?	Relatively quick for appeals involving children and very quick for urgent judicial review applications
Uncomplex	?	Yes.	No.
Misconceived and trivial complaints rooted out quickly	No.	Yes.	Yes. There is case-management, and a permission stage of judicial review proceedings.
Accuracy	Yes.	Yes.	Yes.
Changes feed back	No.	Yes.	Yes.
Cost-effective to the State	Yes, comparatively.	No.	No.

¹⁴³ The Administrative Court is considered in terms of urgent applications for judicial review, as an alternative to SEN appeals and LGO complaints, rather than as an appellate body.

It is necessary to explain some of these answers. SENDIST is queried as being cheap because of the evidence in the House of Commons Committee's 2006 Report and the PEACH study (Williams, M. 2005) that appeals are expensive for parents. The Administrative Court is an expensive procedure for parents in view of the court fees and costs of legal representation.

The SENDIST procedure is queried as being complex. It is complex insofar as parents need to relate relevant facts, and evidence (including expert evidence) to the law in order to establish their case. There is evidence, however, that SENDIST members use a wide range of techniques to assist users to participate effectively in hearings, though there are limits to the ability of tribunals to compensate for users' difficulties in presenting their case¹⁴⁴. On the other hand, there is evidence that parents do not feel they are on an 'equal-footing'¹⁴⁵.

High numbers of successful appeals might suggest that the tribunal is effective in assisting parents. This may be influenced by the relatively high level of representation, though there is evidence suggesting that representation makes no significant difference¹⁴⁶. Representation is not universally available, and there is evidence suggesting that parents from minority-ethnic backgrounds have greater difficulties in securing representation¹⁴⁷. Possibly the task of preparing a case-statement and explaining one's case at a hearing is perceived as so complex that parents are deterred from accessing the tribunal. By contrast, a complaint to the LGO is less complicated because complainants simply write a letter and the LGO investigates.

The LGO and Administrative Court employ filters to ensure that investigation and contested court hearings proceed only where absolutely necessary. The SENDIST has no such filter. The issue of changes not feeding back is important. There is evidence that where parents succeed in SENDIST appeals, this does not result in LEAs changing their practice, whilst the LGO may recommend systemic change. Both the LGO (where there is a full investigation)

¹⁴⁴ Genn 2006 Executive Summary p. ii. and discussion at pps. 165-167.

¹⁴⁵ Hall 1999 p.38.

¹⁴⁶ Genn 2006 p.264.

¹⁴⁷ Ibid. p.133.

and the Administrative Court are expensive mechanisms for the state. Costs figures referred to at p.160 of the thesis show that there are small numbers of Ombudsman complaints, but these are more resource-intensive than tribunals. SENDIST is cheap, but not *per se*, only in comparison to the LGO and Administrative Court.

Looking at failure to attain PDR goals firstly in terms of the SENDIST, it appears that the SENDIST trades off five (out of seven) PDR goals for accuracy and cost-effectiveness to the state. It is not cheap for parents because the commissioning of expert evidence is essential to their success on appeal. Alternatives might be an inquisitorial process or a system similar to that adopted in the DBP envisaging one set of reports prepared by an arms-length body. Both are possible reforms. But what would be traded-off would be the opportunity for parents to advance their own case which both Galligan and Mashaw suggest is difficult to replace. In light of the fact that this is part of the adversarial pre-hearing procedures which exacerbate conflict, replacing the ability of parents to procure expert reports by a universal set of reports compiled by an arms-length body might be a worthwhile reform. Replacing the SENDIST procedure by an inquisitorial one would need to be considered alongside the strengths and weaknesses of the LGO (as an example of a body operating such a procedure) in terms of attainment of PDR goals.

SENDIST is not quick. There is no fast-track procedure. When Harris identified this as a shortcoming (Harris 1997), the response was that effort would be put into disposing of all cases more quickly because the acceleration of some cases would cause more delay for others. The procedure was shortened, but there is still a period of 5 months (approx.) between the LEA decision and the appeal decision. The advantage of having quick decisions, which is significant for the child who is the subject of the dispute, is traded-off for individuation and enhanced participation, as enshrined in the moral judgment model. But this model enshrines pre-hearing procedures enabling each party to prepare their case properly that lead to delay. Yet the Administrative Court, which has similar pre-hearing procedures, has an effective fast-track system. This is a

possible reform for the SENDIST that would need to be evaluated in terms of practicalities and additional cost.

SENDIST is queried as being uncomplex. The process of identifying relevant facts, assimilating expert evidence and applying these to legal provisions and case law is a difficult one. Since representation is not assured, the issue is whether the assistance available from the tribunal is sufficient to overcome the difficulties given the limits as to how far this can go without compromising independence. This is at the heart of the access to justice debate. There is force to the arguments of Mashaw, Adler and Galligan that this type of adjudicative procedure does not assure equality between citizen and state. There will be some parents whose endowments are so lacking that they will be unable to contemplate access and, where they do, the tribunal will be unable to compensate. In terms of distributive justice, a considerable amount is traded-off for confidence, symbolism and other perceived benefits of due-process.

Misconceived complaints are not rooted out quickly, other than those that are obviously outside the tribunal's jurisdiction. This appears to be an example of efficiency being traded-off for the perceived benefits of due process. In terms of the outcomes of successful appeals prompting changes in process, consistency and control are traded-off for the perceived benefits of due process. Because the rationale for decision-making adopted by the SENDIST is different to that adopted by LEAs, they appear not to learn from appeals.

If the trade-offs were re-evaluated, it would be possible to have one set of expert reports; a fast-track procedure; representation for hard cases and appellants who, for whatever reason, would have particular difficulty in bringing cases by themselves; a case management system; and wider-ranging powers for the SENDIST to order changes in practice, but there would still remain a fundamental problem. If the function of the SENDIST should be to replicate the decision-making process followed by LEAs, this will lead them further into the realms of polycentric decision-making. Fuller draws an analogy between polycentric decisions and a spider's web (Fuller 1978 p.353). A pull on one strand distributes tensions in a complicated pattern throughout the whole.

As each decision communicates itself to other centres of decision, the conditions change necessitating a new basis for the next decision. Fuller argues that adjudication cannot encompass the complex repercussions of this type of situation¹⁴⁸.

In terms of PDR goals, the LGO trades-off only two, and so emerges as the 'winner'. There are failures to attain the goals of speed and cost-effectiveness to the state. The consequences of delay for a child with learning difficulties can be detrimental, and delay is inherent in Ombudsman systems according to Seneviratne. Also, the fact that this is such a resource-intensive model might rule out its use, from a practical point of view, because the state is unlikely to countenance having such a system as the principal dispute resolution mechanism in light of the number of appeals. The failures are only relevant, however, in relation to 20% of LGO complaints – those where there is a full investigation where delay and expense to the state are traded for accuracy, lack of complication for, and minimal cost to, complainants, and for recommendations that will influence future decisions. If delay can be obviated, whilst keeping state costs to a minimum, the inquisitorial model may be promising one. This would entail its being managed effectively. The prospect of the inquisitorial model operating as the LGO currently operates taking on the entirety of complaints about SEN would appear to be both unworkable and undesirable.

A relative scale is used to enable further comparison between the mechanisms. Points available are 1, 3 and 5, with 5 being the most successful. The difficulty is that, even with careful justification, the weighting of these values is open to debate.

¹⁴⁸ This argument is developed further on p.158.

RELATIVE ATTAINMENT OF PDR GOALS (1)

	SENDIST	LGO	ADMINISTRATIVE COURT
Cheap for Appellants	3	5	1
Quick	3	1	5
Uncomplex	3	5	1
Misconceived and trivial complaints rooted-out quickly	1	5	3
Accuracy	3	5	1
Changes feed back	1	5	3
Cost-effective to the State	5	3	1
TOTALS	19	29	15

In terms of speed, the courts are quickest, the SENDIST is second and the LGO third. The LGO is weighted highest in terms of cheapness for appellants because there are no process costs; the SENDIST is second because, although there are no process costs, obtaining expert reports is essential for parents; the courts are last with high process and representation costs.

The LGO scores highest in terms of being uncomplicated for parents because they simply have to write a letter; SENDIST is second because of the assistance provided to parents, with the courts last. The LGO scores highest in rooting-out misconceived and trivial complaints because this is effected at the earliest possible stage. Although the courts employ filters in the form of pre-action protocols, case-management and a permission-stage in judicial review applications, parents may have already incurred expense in instructing a lawyer before their application is filtered-out. SENDIST employs no filter.

The LGO scores highest in terms of accuracy on the basis that the range of information that may be considered is wider than that submitted by the parties; SENDIST is second because the members are specialists; the courts are third, which might appear controversial in light of the fact that some writers consider

them to be the 'Rolls-Royce' mechanism. Although there is a high level of competence among Administrative Court judges, they are not SEN specialists.

The LGO scores highest in terms of changes feeding back to influence future decisions. The courts are second because individual decisions create precedents. SENDIST is lowest in view of the evidence in the Evans study. The LGO again emerges as the 'winner', with the SENDIST most frequently in the middle, or compromise, position. Perhaps this is significant where it is also the cheapest mechanism.

Although SENDIST, LGO and the Administrative Court attain all of the PDR goals between them because each employs different trade-offs, it cannot be said that the formal system as a whole assures PDR. This is because the nature of the dispute will dictate a particular dispute resolution mechanism. If parents appeal a decision not to assess, the appropriate mechanism is the SENDIST in all but the most urgent cases. Should the LGO be approached, jurisdiction would be declined. Only the goal attainment of the appropriate jurisdictional mechanism is relevant in determining whether PDR is assured in individual cases.

Only the LGO appears to display all of Mashaw's process-values of equality, transparency, privacy, humaneness, appropriate symbolism and participation. In terms of Mashaw's models, the LGO appears to enshrine features of both the bureaucratic rationality and moral judgment models, facilitating accurate and efficient concrete realisations of the legislative will in terms of making sure things are done properly, whilst also focusing on individuation, though not in determining entitlements and without the hallmarks of due process common to the moral judgment model. There is a balance between collective goals and individual interests within the model.

There is one value prescribed in PDR that must self-evidently be left out of any consideration of dispute resolution systems – that is that initial decisions must be right. The Evans study recommends various practices that should improve LEA decision-making, which this thesis endorses. These are set out in section 4.5. The central question posited by this thesis is whether the introduction of

mediation and conciliation assure PDR. None of the formal dispute resolution mechanisms assure this by themselves because none attain all of its goals.

Having assessed whether the PDR is assured by formal SEN decision-making processes and having concluded that it is not, it is necessary to look more carefully at the over-arching trade-off between collective goals and individuation. If it can be shown that the nature of this trade-off predictably causes the problems identified in the SEN context, this suggests a powerful argument for altering the balance.

4.3. COLLECTIVE GOALS v INDIVIDUAL INTERESTS

Adler's study of school admission appeals (Adler 1989) has been chosen as a basis for analysis because it examines a system that is similar to the SEN decision-making and appeals systems. Decisions are made with reference to collective goals at the first stage with an appeal system placing greater emphasis on individual interests. The thesis contends that the balance of trade-offs between collective goals and individuation is responsible for the system's most significant flaw – a failure to assure equality in the face of unequal endowments as between parents and LEAs and as between parents of different social and ethnic backgrounds.

Social welfare programmes typically provide benefits and services intended to promote collective welfare. In deciding which benefits an individual is to receive, his personal circumstances are only one factor that must be taken into account. As Adler observes:

Social welfare agencies need to devise ways of balancing the claims of an individual client vis-à-vis those of other clients against a background of limited resources and in such a way as to promote the achievement of policy goals in an efficient manner.

The dependence of clients on social welfare programmes, coupled with those considerations that can lead programmes to disregard a particular client's circumstances, raises central questions about how social welfare programmes balance the claims of individual clients against other concerns. (Adler 1989 p.1).

Adler notes that social welfare legislation tends not to establish individual rights, but to impose general duties upon public bodies. This is the case with SEN legislation. Conflicts between individual and collective concerns are dealt with in the course of case-level decision-making¹⁴⁹.

Clients were not seen as being entitled to particular levels of benefits or services, or to having their claims dealt with in a particular way. Rather, subject to availability of resources, the manner in which their claims were dealt with and the level of benefits or services they received were seen to fall within the discretion of those vested with responsibility for administering the benefits or providing the service. One result of this was that the distribution of benefits and services frequently reflected the moral judgments of officials and the presence of situational constraints on decision-makers as well as the collective concerns of the agency. (Ibid. p.2).

Adler proposes two ideal-type approaches to case-level decision-making that may be constructed to provide a framework for analysis. The first he terms collective welfare orientation. In this model, decision-making is oriented towards the achievement of collective ends, emphasising the programme objective of promoting the welfare of all its clients. It has four characteristics:

- it focuses on collective ends;
- it is primarily concerned with the pattern of decisions and the way this relates to the programme's goals rather than decisions in individual cases;
- it exercises control over case-level decisions through the development and application of bureaucratic standards and procedures that can be adjusted to produce a satisfactory pattern of outcomes; and
- it recognises that resource constraints make it necessary to make trade-offs between the various ends the policy seeks to achieve.

Adler says:

Taken together these four characteristics entail the subordination of case-level decision-making to the achievement of collective policy goals. This is, in part, because the programmes seldom have the resources to satisfy the claims of every client and, in part, because the programmes often have distributive goals. (Ibid. p.4).

The second ideal-type is primarily oriented towards the achievement of individual ends. This is known as the individual client orientation, and is rooted

¹⁴⁹ For further discussion of the influence of choice-based theories on governance in the 1980s and 1990s, see Lewis 1996.

in two sets of ideals – the client’s autonomy and the professional judgment of case workers. Both versions reject the subordination of individuation to policy goals. The client autonomy version can be described in terms of four characteristics:

- it focuses on the client’s case, and precludes consideration of the claims of other clients and resource constraints;
- case-level decisions respond to the preferences of the client – there are no bureaucratic constraints upon the decision-maker;
- clients are encouraged to participate in decision-making and may challenge unfavourable decisions; and
- trade-offs are precluded – the claims of the clients determine what the programme provides.

The professional judgment version shares the first and third of these characteristics, but assumes that individuals are not necessarily the best judges of what is in their interests and that case-level decisions call for exercise of professional judgment. There is, however, no comparison between one individual’s circumstances and another’s. Adler says that conflict between these ideal-type orientations underlies case-level decision-making in social welfare programmes and that, although no orientation entirely dominates, social welfare programmes in Britain have tended to favour the collective welfare orientation. In the context of both admissions and SEN, the collective welfare model is used at the decision-making stage but, although the appeal stage follows Mashaw’s moral judgment model focusing on individual interests, consideration of other factors is not excluded.

The question then is what weight should be given to individual interests? In answering this question, Adler says this depends upon which rights theory is adopted. There is choice theory, which suggests clients’ choices must prevail, or interests theory, which suggests that clients’ wishes must be weighed against other relevant factors to determine how they should be treated. In both the admissions and SEN contexts, interests theory is adopted. Adler suggests that an understanding of rights in social welfare programmes requires detailed analysis of the duties they can invoke. In analysing the effect of legislation introducing

parental preference in school admissions, he says that, prior to its introduction, the system was based upon mutual trust and political accountability: parents placed their trust in LEAs to discharge their powers in such a manner as to enhance collective well-being; the Government would restrain unreasonable LEAs, but would trust LEAs generally and rarely exercise default powers. LEAs have no interest in whether a child attends a particular school – their main concern will be even distribution and efficient use of resources. Parents, however, may care a great deal about which school their child attends.

Adler characterises the two approaches as ideal models. A collective welfare (authority-wide) approach would be to ensure that each school admits a sufficient number of pupils to enable it to offer a broad set of curriculum options in an efficient manner; has a balanced academic and social mix of pupils; and does not admit so many pupils that its facilities and/or teaching staff are over-burdened. A client orientated (child-centered) approach would be concerned with matching children to schools. This can be done by allowing experts to place children following an assessment of ability and aptitude, or by allowing parents, as the persons best-placed to decide what is in their child's interests, to choose a school. An LEA could determine policies in the light of parental choice by simply putting more resources into popular schools.

Thus, policy would be determined by case-level decisions as opposed to vice-versa. Schools could be run independently: resources available to schools would relate to the number of pupils. They would compete with each other in terms of quality, and those that failed to attract pupils would close. The role of the LEA would be largely administrative. The current system in England is something of a mix, with LEAs directing admission by limiting numbers and imposition of over-subscription criteria for some maintained schools but not others, and different categories of maintained and independent schools competing for children. Adler's study made the important finding that, although the introduction of parental preference had led to integration of some pupils from areas of multiple deprivation into schools in adjacent catchment areas, it had also increased the segregation of those who remained in the district schools for

these areas. Schools that 'lost' pupils were almost without exception in the least prosperous housing schemes:

The legislation has quite clearly led to a widening of educational inequalities and to a re-emergence of a 'two-tier' system of secondary schooling in the big cities. (Ibid. p.219).

Adler observes that the adoption of a policy allowing parents to express a preference in relation to school admissions highlights that a rights strategy might have different attractions for Government and parents both of whom might see the exercise of LEA discretion as problematic for different reasons. A Conservative Government introduced parental preference to control LEA discretion. The welfare rights movement, perceiving LEAs as exercising discretion restrictively in a manner detrimental to clients, viewed its introduction as leading to more favourable outcomes strengthened by an appeals procedure.

The appeals procedure was also seen as important in providing guidance to case-level decision-makers - a deterrent to unreasonable decision-making and an opportunity for parents to participate in decisions affecting their child. Adler, however, cites several studies indicating that clients frequently do not challenge decisions because they lack the legal or administrative competence to do so, or for fear of antagonising officials with whom they have a continuing relationship (Nonet 1969; Cranston 1986); appeals are not independent and are dominated by presenting officers representing the agency and influenced by the clerk, who is employed by the agency; successful appeals fail to bring about improvements in case-level decision-making because agencies frequently concede cases without revising their general approach to decision-making (Jowell 1973; Harlow and Rawlings 1984); and appeal processes may be strengthened while substantive rights are reduced. Clients end up with stronger rights to fewer benefits (Prosser 1977; Adler and Asquith 1981). He says:

A pessimistic assessment of these shortcomings might point to the failure of rights in social welfare programmes. Thus, while rights (in particular the right of appeal) may have benefited those clients who appealed, they have not transformed the treatment of clients in general. This is because officials continue to make case-level decisions more or less as they did in the absence of rights. Moreover, rights can impose substantial costs which may work to the detriment of clients. The

existence of rights may eliminate discretion that could be used to help clients (Titmus, 1971; Bull 1980). Officials may respond defensively to the possibility of an appeal, adopting more formal and bureaucratic modes of dealing with clients to insulate themselves from criticism (Simon 1983; Harlow and Rawlings 1984). Clients who gain most from the existence of rights may be those who are least disadvantaged at the outset (Galanter 1975). Moreover, those who gain do so at the expense of others. Thus rights may limit the ability of social welfare programmes to achieve a reduction in inequalities. The existence of rights may inhibit the efforts of those seeking more comprehensive reform: strengthening procedural rights may confer the symbolic appearance of legality on the programmes in question and make it more difficult to achieve fundamental changes that could really enhance social welfare (Piven and Cloward 1972; Prosser 1977; Adler and Asquith 1981; Simon 1985) (Adler 1989 p.22).

The studies referred to in Chapter Two indicate that all of these are relevant and significant concerns in the context of SEN, calling into question whether true equality can ever be achieved within the current system.

However, Adler's study identified benefits to parents. The existence of appeal rights – to an admission appeals committee and thereafter to a sheriff – led LEAs to make restrictive interpretations of the statutory grounds for refusal of appeals, strengthening parents' ability to get their child into the school of their choice. The prospect of appeals reinforced LEAs' concerns to interpret and apply parents' rights correctly. Appeals allowed parents to participate in the process; to know the reasons for refusal; and to obtain information about alternative schools. They also ensured that decisions were consistent with parents' rights and that compelling reasons for choice and individual circumstances were taken into account. Appeal committees however, fell short of fulfilling their functions. They often failed to fulfil even their basic responsibilities of determining whether refusal was justified in accordance with the statutory grounds and determining whether parents' reasons merited an exception to the school's admission limit. Also, the members acted more like officials of the authority than independent arbiters.

Sheriffs adopted two different approaches – the single-child approach and the school-level approach. In the former, sheriffs took the view that, unless the authority could show that the admission of even one further child would require

the employment of an additional teacher, significant alteration to school premises or serious detriment to discipline at the school, the child should be admitted. Following the school-level approach sheriffs decided that, where a school is overcrowded, such that some additional measures would need to be taken, the statutory grounds for refusal exist. They also considered the fact that other parents had been refused admission, reasoning that the authority was entitled to take into account the effect of admission of the whole group when turning down individual requests. This latter approach is now enshrined in the Admissions Code of Practice (DfES 2007).

Adler suggests that both approaches are plausible readings of an authority's duties. But the outcomes of adopting each approach are very different. Under the single child approach it would be difficult to dismiss an appeal. Arguably schools can usually accommodate one extra desk and chair without having to make adaptations to premises. Admission of one additional child can generally be managed without employment of more teachers and is unlikely to lead to a serious breakdown in discipline. Sheriffs adopting this approach allowed appeals disregarding the possibility that parents could appeal one-by-one, and the fact that the adoption of this approach would lead to each appeal being upheld in turn. On the other hand, sheriffs adopting the school level approach were able to view individual parents' rights in the context of all parents' rights. None of the sheriffs adopting this approach allowed any appeals. But Adler says that this was not a foregone conclusion. The argument embodied in this thesis is that an analogous version of the school level approach should be used in SEN appeals, and that a failure to adopt this approach precludes the holistic reform referred to as essential by the Audit Commission to enable inclusion to operate effectively (Audit Commission 2002b).

In terms of findings, although appeal rights appeared to have a minimal effect because so few parents had exercised the right at the time the study was conducted, there was evidence that the existence of appeal rights influenced LEA practice. One authority in the study conceded 40 appeals as soon as they were lodged with the sheriff. Appeal committees and sheriffs differed in the way they viewed admission limits imposed by LEAs. The committees

considered the limits justified or that only a few children could be admitted above the limit. Sheriffs adopting the single child approach ignored the limit, requiring the LEA to justify refusal with reference to the admission of even one further child. Sheriffs who adopted the school-level approach reviewed both the reasonableness of the limit and whether there were compelling reasons why any justifications for imposing it should be overridden.

Adler says that differing approaches rest upon differing value-judgments.

Some people will welcome any move towards an individual client orientation while others will regret any departure from a collective welfare orientation. Likewise, some people care more about aggregate welfare, e.g. about the proportion of the population at school which acquires educational qualification, while others care more about distribution, e.g. about equality of educational opportunity [...] Thus, it is impossible to produce an assessment [...] which everyone will accept. (Adler 1989 pps. 219-220).

However,

The encouragement of individual choice, the matching of pupils with the schools selected by their parents and the introduction of quasi-market forces into education have imposed constraints upon authorities' attempts to achieve an academic and social mix, set upper and (more crucially) lower bounds on school intakes and school rolls, achieve an efficient use of scarce resources, and promote equality of opportunity. (Ibid. p.220).

Adler does not suggest that LEAs were particularly good at achieving these goals. He cites a study which predicted that government policies enhancing parents' rights would inhibit, and even reverse, the processes of equalisation and improvement (McPherson 1987). He observes that giving parents rights may not lead to their desired outcome. Will they still want their child to attend the school they have chosen when it becomes overcrowded and children are taught in temporary accommodation? Hirsch describes this as 'the tyranny of small decisions' resulting from the promotion of 'positional competition' – individuals gain only by dint of losses for others (Hirsch 1977 p.52). Adler suggests that the positional sector is a misleading guide to what individuals would demand if they could see and act on the results of their combined choices.

In considering whether the optimum balance is achieved between collective and individual rights, Adler cites McAuslan's important article in which it is argued that judges exhibit preferences for individualising issues and seeing all issues brought before them as battles between individuals and bureaucracies (McAuslin 1983). McAuslan argues that judges have an ideological preference for the individual as opposed to the collective, and that this has prevented them from grasping what is really at issue. Instead of acting as a check on government, they actively facilitate the government's attack on collective consumption, and they do so in a highly partisan way. Adler says that the behaviour of the sheriffs adopting the single-child approach in his study supports McAuslan's arguments. His view is that the effect upon the individual should be balanced against the collective effect. Evidence in the SEN context supports these arguments. If SEN appeals are lodged predominantly by white, well-educated, middle-class parents it is difficult to see why they should be advantaged by having decisions made in respect of their child on what, according to Adler's study, is a substantially more favourable basis.

MacCormick highlights the difference between choice and interest theories:

Are rights to be conceived primarily in terms of giving a special status to the choice of one individual over others in relation to a given subject matter or primarily in terms of the protection of individuals against possible forms of intrusion (or the advancement in other ways of individuals' interests)? (MacCormick 1977 p.192).

Adler observes that rights only become problematic in conditions of scarcity. He also observes that interests theory perceives rights as devices for protecting clients' interests, but that their interests in ensuring their wishes prevail are weighed against other interests as relevant factors. This, he says, enables consideration of how rights should be balanced, and against what. Adoption of the interests theory as a basis for decision-making would enable decision-makers to evaluate parents' reasons for wanting their child to go to a particular school, and the implications of granting the request against the implications for the child of refusing it. This would then be balanced against the interests of the other children whose parents' requests have also been refused and the interests

of children already in the school. Adler favours interests theory over choice theory as a basis for inter-personal comparisons.

Adler felt unable to conclude that the introduction of parental preference has achieved the right balance between individual and collective concerns. For LEAs, the shift to individual client orientation threatens too many collective goals. The imbalance, however, is exacerbated by the failure of LEAs themselves to promote collective goals; the failure of the legislation to enable LEAs to secure some protection for schools with falling rolls; the failure of appeal committees and sheriffs to act as the sort of check on decision-making that ensures a better balance between the concerns of individual parents; and the fact that parents do not base their preferences on an understanding of educational processes and outcomes, but on social considerations and the influence of other parents' preferences.

Obvious parallels can be drawn between the admissions and SEN decision-making and appeals frameworks. In both, parents' wishes and children's needs are weighed against other relevant factors at each stage. The initial LEA decision-making stage enshrines the four hallmarks of the collective-welfare orientation. It is focused on collective ends, and more concerned with the pattern of decisions and the way they relate to programme goals than decisions in individual cases. Bureaucratic standards have been developed, in the form of criteria for assessment/statementing, which can be adjusted to produce a satisfactory pattern of outcomes. There is recognition that resource constraints necessitate trade-offs.

The appeal stage, by contrast, has some resemblance to the individual client orientation. It focuses on the client's case; precludes consideration of the claims of other clients; case-level decisions respond to the preferences of the client; and clients are encouraged to participate in decision-making and may challenge unfavourable decisions. There are differences, however. Although SENDIST are not subject to the same bureaucratic constraints as LEAs, it would be wrong to suggest that those constraints are disregarded entirely. For example, SEN

legislation requires consideration of efficient use of resources and the interests of the child's peer group in determination of placement.

The differences between the decision-making and appeals processes stem both from the nature of what is considered and the degree of emphasis afforded to individual circumstances. In terms of what is considered, because the SENDIST does not conduct a review, members do not make decisions dictated by the stark confines of a list of children and a limited budget, or concerns about the wider impact on provision. But, in terms of emphasis, there is not a straight dichotomy between the collective welfare orientation at the initial decision-making stage and the individual client orientation at the appeal stage.

Rather it could be said that the interests theory of rights, which acknowledges the relevance of other factors, is used at both stages, but within cultures placing differing emphasis on individual interests. LEAs take into account the needs of the child and balance these against other relevant factors at the initial decision-making stage – but they place more emphasis on collective goals and resources. The SENDIST are obliged to take into account resources (and effect on peer group when making placement decisions), but they do this in a different way to LEAs. They take into account LEA policies – but, as stated in their guidance, they are not obliged to follow them; they will consider resources – but not in a way that reflects the true costs to the LEA. Their brief of conducting enabling hearings and *de novo* considerations leads to them individualising issues and perceiving the cases brought before them as battles between individuals and bureaucracies. They behave like the judges in McAuslan's study.

What emerges from this analysis is that the admissions and SEN decision-making and appeals processes both follow the same model in terms of the balance of trade-offs between collective welfare and individual client orientations. This is a model incorporating an appeal stage identified in the studies cited by Adler as one that eliminates discretion which could be used to help clients; advantages those who are least disadvantaged at the outset, and enables them to gain at the expense of others; inhibits comprehensive reform, and makes it more difficult to achieve the fundamental changes that will

enhance social welfare. It is not a model that will promote successful operation of inclusion.

There is another factor about the admissions appeals process that yields important information relevant to the SEN context. This relates to the operation of admission appeals. Parents attend and present their case. The decision-maker constructs a comparison between the circumstances of their child and the circumstances of other children whose parents have also appealed. This means that, in presenting reasons why their child should be admitted to a school, parents have no idea of what they are competing against because they are not aware of the circumstances of these other children. Arguably this is a breach of one of the fundamental principles of procedural fairness. If parents do not know 'the case against them', this impedes their ability to make their own case to the best of their ability. Also, the adjudicator's list of priorities goes unchallenged. Reasons relating to children who are not the subject of the appeal cannot feature in the notification of decision for reasons of confidentiality. The detailed rationale for the decision is invisible.

For these reasons, Harlow and Rawlings have been critical of the methodology of decision-making followed by Admission Appeals Panels (Harlow and Rawlings 1997). They adopt Fuller's argument that polycentric decisions are unsuitable for adjudication. Decisions about children's SEN are polycentric decisions - made by LEAs having taken into account a range of factors, and with knock-on effects. Admissions Panels (and SENDIST) conduct *de novo* hearings, re-establishing facts based upon new information. How would this work if the collective welfare orientation were adopted for SEN appeals? Parents would attend and present their case with reference to their child's needs. They would then presumably have to leave whilst the LEA made their argument about how (not whether) the child's needs could be provided for with reference to available resources as balanced against other obligations. They would produce the list and explain the needs of B,C,D and the effect of the decision upon these children and upon other services. Parents would be unable to challenge the information. The proposition would be problematic within the

current remit of the SENDIST. An inquisitorial procedure would be more suitable for such a process.

4.4. ADEQUATE REDRESS

In January 2006, a report entitled 'Administrative Grievances: a Developmental Study' was published (Adler 2006c). The researchers developed a top-down, bottom-up and composite typology of administrative grievances. The top-down element of the typology was constructed by reviewing literature on administrative law and public administration and consulting experts in these fields, the bottom-up element was constructed by asking people with administrative grievances to describe the problems they had experienced. The project was not simply an attempt to assess the feasibility of undertaking a large-scale study of administrative grievances, it was also designed as a study in its own right. The aims of the qualitative research were:

- to describe the problems people encounter in their dealings with government departments and public bodies and explore the nature of their grievances;
- to develop a bottom-up typology of administrative grievances based on participants' accounts;
- to identify the factors that encourage and inhibit people's attempts to resolve their grievances and the sources of information and advice that they use. (Ibid. p.5).

43 participants were recruited using a household screening method, which was based on that used in the 'Paths to Justice' surveys (Genn 1999a), and 71 grievances were discussed by the participants. Eight categories of grievance were identified relating to: delays; information and communication problems; decisions and actions perceived to be unfair; errors in administration; staff manner and attitude; access to services; quality of services; and policy issues.

The research showed that there was considerable variation in the length of time that participants spent trying to resolve their grievances. Some attempts were very short-lived while others lasted for years. Some participants made no attempt to resolve their grievance. Those who did, adopted a number of different strategies, including making face-to-face or contact by telephone or letter; obtaining material or moral support for their case; seeking advice and/or

representation; taking direct action. Whether or not participants made an attempt to resolve their grievance was influenced by the following six factors:

- the individual's assessment of the seriousness of the grievance;
- expectations of a positive outcome;
- knowledge of how to proceed;
- access to the right procedure for resolving the grievance;
- personal and financial resources;
- previous experience of successfully resolving a grievance. (Ibid. Chapter 4).

The perceived seriousness of a grievance was seen to be a function of its actual or potential impact; the immediacy of its impact; the identity of the person who was most affected by it, in particular, whether it affected someone vulnerable, for example a young child, an aged parent or someone with a disability.

The report states that research focusing on individual public agencies suggests that many people who are dissatisfied with public services do not make use of complaints and appeals procedures. It refers to data compiled from a report by the Comptroller and Auditor General (Comptroller and Auditor General 2005) following a survey of 284 central government departments, executive agencies and non-departmental bodies indicating that, in 2003/4, 1.3 million cases (approx.) were received through redress systems; there were 765,000 appeals and tribunal cases which cost £343m; 542,000 complaints which cost £65m; and 39,000 Ombudsman and mediator cases which cost £39m (Adler 2006c p.5).

Adler suggests that, since it is reasonable to assume from the number of requests for advice from CABx, that the number of letters to ministers and the number of cases considered by redress mechanisms are a small proportion of the number of problems experienced, and that the number of these problems must be very large indeed. Thus it is surprising that there has been no comprehensive research into the nature and incidence of such problems and, as a result, there is no solid empirical basis for distinguishing between different types of administrative problem, or assessing the incidence of problems of

different types, the availability of information and advice for those who experience these problems, or the effectiveness of the existing procedures for resolving them.

The report adopts PDR as its definition of administrative justice, along with a set of normative expectations that the Government accepts is reasonable for the citizen to have also described in 'Transforming Public Services':

- to receive correct decisions on our personal circumstances;
- where a mistake occurs, we are entitled to complain and to have the mistake put right with the minimum of difficulty;
- where there is uncertainty, we are entitled to expect a quick resolution of the issue; and
- we are entitled to expect that, where things have gone wrong, the system will learn from the problem and will do better in future. (DCA 2004 para 1.5.).

It also adopts a framework adopted by Festiner, Abel and Sarat (1980) for analysing the process by which unsatisfactory experiences are transformed into disputes – naming an unsatisfactory experience transforms it into a problem; blaming transforms a problem into a grievance; and claiming transforms a grievance into a dispute. Information, according to Adler, may be instrumental in persuading people that they have a grievance and whether to pursue it by making a formal complaint. The focus of research has traditionally been on the later stages of the process. Thus, many unsatisfactory experiences are not recognised as problems; many problems do not become grievances or proceed further. This means that the grievance remains unresolved.

The report cites three reviews of the literature on complaints which show that many people are dissatisfied with public services but very few complain; that the most common reason for not complaining is that people consider it would be pointless; that most people who complain do so informally; that the factors involved in whether people complain are subtle and complex; some people find it easier to complain than others and a variety of personal and social factors such as education, income, gender or age may help to explain whether an

individual takes steps to resolve a grievance.¹⁵⁰ Most people prefer making a complaint orally, and to front-line staff, rather than in writing or by submitting complex forms to officials further up the organisational hierarchy¹⁵¹. The role of front-line staff can influence people's propensity to make and pursue complaints. Their lack of knowledge of the complaints procedure; lack of ability to communicate with people experiencing problems; defensiveness and unwillingness to listen can all deter people from making and pursuing complaints¹⁵². Where people who complain fail to get satisfaction, they are unlikely to pursue the matter further¹⁵³.

Genn's 'Paths to Justice' study (Genn 1999a) is cited as indicating that social class and employment status are not associated with taking steps to resolve a problem, but educational qualifications and income are. Most of the factors identified by Genn as being influential relate to attributes of the individual, as opposed to the characteristics of the complaint, and none of the factors she identifies relates to the seriousness of the complaint or its impact. Another survey conducted by the Legal Services Research Centre has revealed that persons suffering social exclusion experience more problems more often (Pleasance et al. 2004).

Adler's top-down typology makes the distinction between grievances that relate to people not getting what they want and grievances relating to process; between unlawful decisions that are unlawful per se, and unreasonable exercise of discretion; between grievances amenable to individual redress and grievances that can only be challenged by collective action (i.e. amending the law, changing the policy or providing more resources). A bottom-up list was compiled through discussion in focus groups. The different categories in the top-down typology were then developed by citing specific examples following

¹⁵⁰ Leadbetter, D. and Mulcahy, L. (1996); Mulcahy et al. (1996) and Williams, T and Goriely, T. (1994).

¹⁵¹ The report cites Harris, N. (1992) *Complaints about Schooling: the role of section 32 of the Education Reform Act 1988*, National Consumer Council.

¹⁵² Lloyd-Bostock, S. and Mulcahy, L. (1994). 'The Social Psychology of making and Responding to Hospital Complaints, *Law and Policy*, 16(2) 123-147.

¹⁵³ Lloyd-Bostock and Mulcahy (1994) *op cit*.

the bottom-up analysis to form a composite typology, as follows (Adler 2006c p.61):

ADLER'S COMPOSITE TYPOLOGY OF ADMINISTRATIVE GRIEVANCES

	Composite Category	Examples
C1	Decision wrong or unreasonable.	decisions perceived to be wrong or unfair; decisions involving discrimination; decisions that involve imposition of unreasonable conditions; refusal to accept liability.
C2	Administrative errors.	record lost or misplaced; no record of information received.
C3	Unacceptable treatment by staff.	staff rude and unhelpful; staff incompetent and unreliable; presumption of 'guilt' by staff; threatening or intimidating behaviour by staff; staff did not acknowledge mistake or offer an apology.
C4	Unacceptable delays.	delays in making appointments; delays in making decisions; delays in providing services.
C5	Information and communication problems.	lack of information; conflicting or confusing information; poor communication; objections ignored by staff; lack of privacy.
C6	Benefit/service unavailable or deficient.	benefit/service withdrawn (either for everyone or for some people); benefit/service not available (Either for everyone or for some people); benefit/service deficient in quality or quantity.
C7	General objections to policy.	policy unacceptable.
C8	Other types of grievances.	other types of grievances not covered by categories C1-7.

Adler envisages a study of administrative grievances that would consider not just the factors motivating people to turn unsatisfactory experiences into grievances, but factors influencing a decision not to complain.

This thesis does not utilise the composite typology of grievances in the SEN context as Adler envisaged. It is used on the basis that it identifies the different aspects of grievances that are common in public law disputes. This enables consideration of how the dispute resolution mechanisms deal with each aspect, and provides information about adequacy of redress. Evidence from the Hall and Evans studies suggests that the merits of decisions are only one aspect of what parents might wish to complain about. Hall refers to delays; a 'blame culture' with teachers holding prejudices against parents and perceived power-imbalance (Hall 1999 p.35). She suggests that the presenting problem is not always the one of most concern, and that it is often more deep-rooted. It appears likely that many issues parents would wish to complain about stem from a culture that subverts the principles of the Code of Practice. Looking at the model, it appears likely that any complaint will comprise more than one of the identified categories.

But how does this feature in terms of redress? Adler says that both bottom-up and top-down analysis result in a subjective characterisation and that some complex grievances may have the characteristics of more than one element of the typology. The first point that is striking is that, although the SENDIST is the principal dispute resolution mechanism only one of the grievances in the list can be dealt with by the tribunal – that is, decisions perceived to be unfair. Other matters might form the subject of a complaint to the LGO – delays, problems with information and communication, administrative errors, and access to services. Some would fall to be dealt with by the courts – adoption of irrational policies, an application for Mandamus in cases of excessive delay. Complaints about staff manner and attitude might be dealt with by internal complaints procedures (although not required to have such procedures, most local authorities do).

The fact that complaints are likely to comprise more than one category of grievance and that one mechanism is unable to deal with all of the grievances that commonly arise in SEN disputes is significant. It means that, for a number of complaints, important elements will remain unresolved because, as Galligan says, people are unlikely to access even one formal mechanism, let alone two or three. It is possible that parents who appeal to the SENDIST about failure to comply with statutory obligations and unreasonable exercise of discretion may also consider that the decision-making process has been too slow; or that they have been given insufficient information, or they haven't been listened to. They may think the LEA's criteria are unreasonable, or that the LEA have adopted a blanket policy. The SENDIST cannot deal with most of these aspects. They can overturn a decision not to assess a child or re-write a statement, but they cannot offer compensation for failure to properly identify a child's needs over a lengthy period; re-write an LEA's criteria; or order an LEA to change their policies or procedures.

An examination of whether each of the principal SEN dispute resolution mechanisms deal with the grievances in the composite list is set out below.

ABILITY OF FORMAL SEN DISPUTE RESOLUTION MECHANISMS TO DEAL WITH ADLER'S COMPOSITE TYPOLOGY OF GRIEVANCES

	Composite Category	SENDIST	LGO	Administrative Court
C1	Decision wrong or unreasonable.	Yes.	No*	Yes.
C2	Administrative errors.	No.	Yes.	Yes.
C3	Unacceptable treatment by staff.	No.	Yes.	No.
C4	Unacceptable delays.	No.	Yes.	Yes.
C5	Information and communication problems.	No.	Yes.	No.
C6	Benefit/service unavailable or deficient	No.	Yes.	Yes.
C7	General objections to policy.	No.	No.	Yes.

*The LGO cannot conduct an appeal on the merits, but could investigate a decision that is ‘wrong’ decision because it was made as a result of a procedural error. This is a further example of the jurisdictional complexities. The ‘Other types of grievance’ category is omitted because it is not possible to determine whether a mechanism can deal with a grievance without knowledge of the nature of the grievance.

An examination of how the composite list of grievances identified by Adler are dealt with is set out below:

HOW ADLER’S COMPOSITE TYPOLOGY OF GRIEVANCES MIGHT BE DEALT WITH IN THE SEN CONTEXT

	Composite Category	Redress
C1	Decision wrong or unreasonable.	SENDIST or the Administrative Court for urgent cases.
C2	Administrative errors.	LGO.
C3	Unacceptable treatment by staff.	Schools’ and LEAs’ internal complaints procedures and the LGO.
C4	Unacceptable delays.	LGO for complaint, the Administrative Courts for injunctive relief.
C5	Information and communication problems.	LGO.
C6	Benefit/service unavailable or deficient.	Possibly LGO or the Administrative court – would depend upon the circumstances.
C7	General objections to policy.	Internal complaints procedures, the Administrative courts for review.
C8	Other types of grievances.	Would depend upon the nature of the grievance.

How is a parent to negotiate this complex system? It has evolved from different pieces of legislation, and becomes even more complex in cases where, for example, a child is disabled or looked-after by the local authority. A significant factor in relation to SEN decision-making is that most parents do not appeal to the SENDIST or complain to the LGO. Although the DCSF contend that this is because most have nothing to complain about, there is evidence contradicting this. Firstly, the Hall, Evans and Harris studies. Although these are ten years old, the Select Committee’s 2006 Report appears to echo the same complaints, suggesting there has been no improvement. Adler refers to Genn’s ‘Paths to

Justice' research and the factors that influence whether grievances are taken forward. These are, as he says, subtle and complex. In light of the research evidence, the DCSF's contention appears disingenuous.

There is a suggestion that the SENDIST is dominated by middle-class parents. But children whose parents may be less well-educated, or who value education less, who are on low incomes, or for whom English is not their first language may constitute a high proportion of the parents of children with SEN. It appears that they are not accessing the current systems, and are being disadvantaged by the success of those who do. Because the system is not accessed by the majority of parents who have children with SEN, and because it is necessary to access a plethora of mechanisms to resolve all aspects of a complaint, it cannot be said to offer adequate redress. At the very least, there appears to be a need for management of disputes to assist parents in locating the correct mechanism, but what would be preferable would be to have a single system. Suggestions as to how this can be achieved are in Chapter Six.

The typology is used in Chapter Five to assess the ability of mediation and conciliation to deal with all of the grievances in the list, and in Chapter Six to assess the ability of the children's services complaints procedure to do so.

4.5. SUMMARY OF PROBLEMS IDENTIFIED

Problems with SEN decision-making and dispute resolution processes identified through this analysis are:

- that it perpetuates inequality;
- initial decisions are made on a different basis to appeals;
- failure to give sufficient weight to individuation at the initial decision-making stage;
- failure to give sufficient weight to collective goals at the appeal stage;
- no one mechanism deals with all possible aspects of a dispute;
- the cost to parents of engaging expert witnesses to prepare reports and give evidence;
- access;

- too many appeals;
- delay;
- conflict.

Possible options are:

- **no change**

Problems identified would remain unresolved. The appeal system would continue not to be accessed by parents whose children may be most in need of help. Those children will have less resource available to them as a result of successful appeals, perpetuating an unfairness based upon inequality of endowments.

- **no change to the appeals process, but ensure all of the factors referred to by Evans¹⁵⁴ as being associated with low levels of appeals are in place**

These were: ‘open door’ policies; listening to parents; taking time to explain decisions; staff training; a source of semi-independent advice for parents; good relationships with voluntary organisations and local agencies; clear and accessible policies drawn-up in agreement with parents and schools; more assessments; and a good range of local provision. If the putting in place of these practices leads to fewer appeals, this should mean resources are distributed more equitably to all children for whom the LEA is responsible, provided LEAs are exercising discretion reasonably. These practices (“the Evans practices”) should be put into operation regardless of whether any of the other options for change referred to below are adopted.

Compliance with the ethos and principles of the SEN Code of Practice should ensure that these practices are already in place. Whilst it is not possible to inspect cultures, Ofsted could be provided with a checklist of these practices and take into account whether they are being operated in their rating of education services following an inspection.

¹⁵⁴ Evans 1998. See p. 48 of the thesis.

- **bureaucratic rationality plus the superbureau**

This option would involve ‘cultural engineering’ backed by training and management of staff, QA and internal review, but without external review. There would be a superbureau that would supervise the drafting of administrative legislation; review the competence of policy analysis; provide binding guidance on managerial technique, and hear complaints of maladministration. There is an example of a tribunal being replaced effectively by internal review¹⁵⁵.

- **retaining external review, but employing the same balance of collective interests and individuation at the initial decision-making and review stages**

There is evidence suggesting that there should be greater emphasis on the needs of the child who is the subject of the dispute at the initial decision-making stage and greater emphasis on collective goals at the appeal stage. This would necessitate that the same rules should operate at both stages within the same culture. This could be facilitated by the adoption of Mashaw’s recommendations relating to QA, training, recruitment and management. Adopting a practice of interviewing parents and children, if children were willing to participate, might lead to LEAs regarding them as people, rather than names on a list.

Interviews would increase process costs; increased focus on children’s needs might lead to more assessments and statements, so there would be an increase in provision costs stage, but there might be a reduction in the costs of appeals. There are difficulties, though, with the SENDIST reviewing LEA decisions to take into account collective interests because polycentric decisions are unsuitable for adjudication for the reasons advanced by Harlow and Rawlings (Harlow and Rawlings 1997).

¹⁵⁵ See Dalley and Berthoud 1992. Introduction of an internal review procedure for Social Fund applications led to decisions being made more quickly and a high satisfaction rate. Discussed in Harlow and Rawlings 1997 pps 486-491.

- **widening the remit of the SENDIST to enable the tribunal to deal with all aspects of SEN complaints**

There would be advantages in having one mechanism deal with all aspects of complaints. The question is whether it should be a tribunal adopting an adversarial adjudicative procedure. There would be problems with polycentric decision-making, and the problems of unequal access, high costs of expert reports and appeal decisions not improving future practice would continue.

- **LGO to consider all SEN Disputes**

As above, there would be advantages in having a single system of redress. Also, the involvement of a body employing inquisitorial procedures would overcome many of the disadvantages identified in relation to the SENDIST. The LGO's 'naming and shaming' practice, ability to award compensation and remit of being able to make recommendations in relation to future practice should improve LEA decision-making. The LGO can identify systemic abuse in a way that tribunals are ill-equipped to do.

Disadvantages are that the LGO is not SEN-specific and not widely used by parents of children with SEN (though this may be because the principal concern of parents is appealing the merits of a decision, as opposed to the process) and, because the procedure is cumbersome, it can be slow. Figures on p.160 show it is an expensive mechanism.

- **choice**

One of Mashaw's options for reform of the DBP appeals process was to allow appellants a choice of process, where this would have no detrimental effect upon decisional accuracy. Perhaps parents could be allowed to choose whether SENDIST or LGO deals with their complaint, having had the advantages and disadvantages of each mechanism explained to them. The remit of both could be extended to enable them to deal with any sort of complaint or appeal. Parents might find an inquisitorial procedure a less-daunting prospect than a tribunal

hearing at which they would have to prepare and present their case. The disadvantage of more LGO complaints would be cost. Allowing choice would be difficult to resource, certainly in the initial stages, because demand would be unpredictable.

- **a complaints procedure including impartial review operating locally**
A potential model is considered in Chapter Six.

- **independent assessment**

SEN decisions are currently made following discussion by Panels incorporating professionals whose services prepare reports for the statutory assessment process. The difficulty is that those conducting assessments and participating in decision-making are not perceived by parents as exercising independent professional judgment – they are seen as colluding with LEAs' rationing agenda. The Select Committee's 2006 and 2007 Reports both suggest that separation between the function of assessment and decisions relating to funding is needed. Difficulties with this suggestion are that, if independent assessors were to make decisions, LEAs would have no control of the budget which might lead to costs spiraling out of control and, if independent assessors were to make recommendations, LEAs might not comply with them if they were unable to resource them.

- **SEN appeals to be made to an independent professional panel**

This is one of Mashaw's suggestions for reform. What is envisaged is that the appellant will be re-examined by an independent Panel. In the SEN context, this would comprise educational psychologists, speech therapists etc. The Panel would be specialist, competent, impartial and technically independent, (though the SENDIST has all of these qualities); there would be no necessity for parents to incur the expense of obtaining expert evidence or contests of experts; the Panel could discuss different options with the child, the parents, the LEA, the school and anybody else who is relevant. Disadvantages are that it would be intrusive and expensive.

- **a single system for children's complaints**

This is discussed in Chapter Six.

Chapter Five

Mediation and Conciliation

The central quality of mediation lies in its capacity to reorient the parties towards each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes towards one another... the primary quality of the mediator... is not to propose rules on the parties and to secure their acceptance of them, but to induce the mutual trust and understanding that will enable the parties to work out their own rules. (Fuller 1971 p.324).

5.1. CHAPTER SUMMARY

None of the formal SEN dispute resolution mechanisms assure PDR. This chapter considers what is added by mediation and conciliation. 'Transforming Public Services' refers to tailored dispute resolution - improvement of people's understanding of their rights and responsibilities; access to advice and assistance so potential disputes can be 'nipped in the bud' before they escalate into formal legal proceedings; and cost-effective tribunal and court services better targeted to cases where a hearing is the best option for resolving a dispute or enforcing the outcome. A distinction is made between binding decisions and agreed outcomes.

The process is to be dictated by what people want – a legal remedy/binding decision, or something else, like an apology/agreed outcome. It is stated that, although mediation is usually voluntary, there is no reason why it should not be strongly encouraged. The SEN dispute resolution system enables parents to choose informal resolution. This can be chosen both for 'trivial' complaints and disputes involving important points of law or disclosing widespread systemic abuse. Choice is not managed. Advice is available to assist parents in making this choice from Parent Partnership Services (PPSs), but recent studies call into question the nature, quality and availability of such advice.

This Chapter comprises four broad sections – introduction, mediation, conciliation and evaluation. The introduction section defines mediation and conciliation and describes how they came into operation in SEN disputes. The

section on mediation is divided into two parts. The first relates to SEN mediation. It summarises operational guidance; sets out what is known about SEN mediation; and uses a case study as an example of how mediation might operate. This provides a reference-point for subsequent discussion.

The second part widens the analysis to draw on information about the operation of mediation from theoretical work and recent empirical studies relating to civil and family disputes. There is consideration of the benefits claimed for mediation. Concerns about its operation in public law and family disputes and their relevance to SEN disputes are discussed. In the SEN context, LEAs derive advantages by being repeat-players, and by being the stronger party. A brief look at research conducted within the last five years on the operation of mediation generally reveals that take-up is low, and compulsion does not appear to increase the prospects of mediated settlements. By contrast, mandated mediation in Australia has resulted in high take-up and high rates of mediated settlements in family disputes. In relation to the issue of whether mediation facilitates improvement in ongoing relationships, a study on mediation in custody disputes reveals that, although short-term settlements were reached, these did not endure. However there is some research about SEN mediation which reveals that settlements do endure – at least for six months following agreement.

If the risks of manipulation of outcomes by LEAs are to be avoided, ‘competence’ on the part of parents must be ensured – competence in the sense of having all of the necessary information to enable them to make informed choices about both the decision to mediate and to agree a particular settlement. The system provides the mechanics to enable this through the PPS, but it is not clear that PPSs in individual LEAs operate to ensure that parents receive the help and support they need. SEN mediation is contrasted with rights-based conciliation as operated by the former Disability Rights Commission in disability discrimination disputes. This is an example of a managed system that operates successfully because it directs disputes to the most suitable mechanism. It operates within a culture that recognises the benefits of

settlement and enables them to be realised without risk of disadvantage to the weaker party.

The SENDA and the SEN Toolkit envisage that PPSs will undertake a conciliatory role in disputes between parents and schools and between parents and LEAs. Various studies are summarised revealing that the operation of this service is variable in terms of what it provides, and that this is linked to the resources LEAs allocate to it. The DCSF have compiled standards and guidance on best practice that form the basis upon which LEAs will be judged in their regular Ofsted inspections. Other examples of local conciliation services are described. The benefit of conciliation is that it may offer a quick solution. But, as with mediation, if the system does not operate to ensure 'competence' on the part of parents, there is a risk that they will be disadvantaged.

The evaluation conducted in respect of formal SEN dispute resolution mechanisms in the previous Chapter is repeated for mediation and conciliation. Mediation and conciliation assure attainment of most of the PDR goals if the system operates as it should. Rights-based conciliation is used as a comparator. It assures attainment of all of them. In terms of relative weightings, the LGO remains the 'winner'. Access to mediation and conciliation significantly improves the prospects for resolving all aspects of a dispute.

There is a risk of power-imbalance in SEN disputes. This is acknowledged and dealt with in the context of SENDIST appeals. The tribunal is overtly helpful to parents as the weaker party. The same risk is present in SEN mediation. Arguably it is greater because settlements are reached in private. There is no requirement to record outcomes; they are not overseen by an independent body, and there is no system of ongoing external monitoring. Mediation operates in a different way to formal adjudication. There is no objective 'truth'. The rights-based paradigm is abandoned, as are the 'protections' of informal systems. If the system of SEN mediation envisaged this, it would be true to mediation's underlying principles. But it does not.

The risk of power-imbalance in mediation is acknowledged in the SEN Toolkit. The suggestion for dealing with it is that the mediator should ensure that each party is 'fully supported', but the mediator must maintain a neutral position. It is envisaged that parents might be supported through an Independent Parent Supporter, but this is not assured. Faced with a situation where parents are being disadvantaged, it is unclear how the mediator should react. This is clear in SENDIST appeals – the tribunal assists the parent. If a mediator assists parents, this resembles covert adjudication. If it is acknowledged that power-imbalance needs to be dealt with at both the formal and informal stages, arguably it should be dealt with consistently. Suggesting that help might be available but not ensuring such help is universally available and not providing a contingency plan for mediators is unsatisfactory, particularly where there is no management of disputes, so cases involving important rights may be mediated.

The evaluation of rights-based conciliation reveals that it meets all of the PDR goals. If this model were adopted, it would solve the problem of power-imbalance. Assurance of representation would be another option, but less cost-effective because there would need to be a mediator and an advocate. It is argued in the final Chapter that the system should provide advocates, but their function would be to represent children who wished to complain.

The issue of whether mediation and conciliation improve the ability of the system as a whole to achieve all of the PDR goals is considered in the next Chapter. An alternative model is suggested for dispute resolution which could incorporate mediation as part of the informal stage of resolution. Ongoing studies of mediation may reach conclusions about whether mediation brings benefits in SEN disputes or whether take-up is so low that it does not offer value for money and should be abandoned. If these studies conclude that mediation should continue to be offered, consideration could be given to its incorporation within the model. The Exeter research suggests that informal conciliation is more widely used than mediation (University of Exeter 2004a). If this is the case, the existence of power-imbalance would suggest that conciliation should operate within a managed system with independent oversight, as envisaged by the alternative model.

5.2. INTRODUCTION

For the purposes of this Chapter, conciliation means any informal attempt by an LEA to resolve a complaint. Mediation means a process involving an independent third-party whose intervention is supportive of negotiation. The mediator's role, within such a process, is to facilitate other people's decision-making. He has no power to impose an outcome on the parties, but his presence will alter the dynamics of the negotiations. Palmer and Roberts say that mediators have a number of tasks: to secure an arena and a climate conducive to negotiation; to ensure that all parties articulate clearly the issues as they see them; to ensure that the various options for resolution of a dispute are identified and explored; and to drive the process forward into a bargaining phase and towards settlement (Palmer and Roberts 1998 p.101). The mediator may also assist in formulating a written agreement. Mediation may involve caucusing – separate meetings where the parties communicate only with the mediator and not directly with each other.

Various dilemmas arise for the mediator within this process. Is his function to provide a structural framework for negotiations? How far should he bring any professional expertise to bear in informing the exchange of information or in evaluating options? How far is it appropriate for him to go to off-set power-imbalances between the parties? Should he adopt an advisory role in identifying the terms of any settlement? This leads to wider questions, such as should the mediator seek to influence the outcome? Is he responsible for the outcome? Gulliver describes the mediator's role as a continuum that runs from virtual passivity, to 'chairman' to 'enunciator' to 'prompter' to 'leader' to virtual arbitrator. (Gulliver 1979 p.200). Guidance on SEN mediation in the SEN Toolkit offers no suggestions as to how these dilemmas might be resolved.

Obligations upon LEAs to set up disagreement resolution and advice services for parents of children with SEN were introduced by the SENDA following recommendations in the Leggatt review of tribunals. Leggatt did not conduct research into the appropriateness of mediation in SEN disputes, but followed a recommendation in a report by the Council on Tribunals (2000). This recommendation was made on the basis that the delay between parents

receiving an adverse decision and SENDIST hearings led to a breakdown in dialogue between parents and LEAs, and that early settlement would avoid last-minute withdrawals of appeals and achieve costs savings to the state.

Neither Leggatt, the Council on Tribunals, nor the DfES in the Green and White Papers preceding the introduction of mediation (DfES 1996 and 1998) considered whether there might be potential disadvantages for parents in terms of there not being a level playing-field. This is despite the fact that, when the SENDIST came into being in 1994, there was much discussion about the issue of power-imbalance between parents and LEAs. The SENDIST addresses concerns by provision of advice to parents and conducting enabling hearings.

5.3. MEDIATION

5.3.1. SEN Mediation

5.3.1.1. Operational Guidance

Chapter Two of the SEN Code of Practice sets out the minimum standards that LEAs are expected to meet in delivering an effective disagreement resolution service. It states that independent persons appointed to facilitate disagreement resolution must have a range of qualifications, training and experience in dispute resolution, counselling and negotiation skills, ability to establish and maintain communications and knowledge of the SEN legislation and framework.

The SEN Toolkit envisages a two stage ‘informal process’. The stages are referred to as local conciliation and ‘formal’ mediation. In relation to the conciliation stage, it is said that as soon as a difficulty becomes apparent, parents and schools, and parents and LEAs should have informal discussions with the aim of resolving their differences locally. PPSs may act as conciliators by encouraging the parties to come together; assisting them to assess their relevant positions; negotiating between them, or on behalf of them; identifying areas of compromise, and making suggestions or recommendations about possible ways forward. In exercising this function, PPSs should be neutral and should not be an advocate for any one party.

Where these discussions have been exhausted and matters cannot be resolved, any of the parties may wish to consider recourse to 'formal' mediation. The Toolkit states that the process must be entirely voluntary and that the mediator must be independent. The parties decide the terms of the mediation. The venue should be neutral. Parties should be on an 'equal footing'. The aim is to achieve practical educational solutions quickly in order to prevent long-term breakdown of relationships and minimise any disruption to the child's education. It is suggested that mediation may be inappropriate where either side does not wish to engage in the process; matters of policy are at stake; the main issue is one that would set a precedent which LEAs would not wish to concede; there is no goodwill; or there has been a substantial recent change in the child's circumstances.

The role of the facilitator is described as taking responsibility for the resolution process; enabling all parties to articulate their views and tell their story, have their perceptions challenged, and work through possible outcomes; exploring and testing any agreement; assisting in drafting agreements; and providing feedback to the LEA to inform good practice. The Toolkit emphasises the importance of the parties' perception of the mediator's independence, suggesting that any perceived bias is likely to hinder progress towards agreement and cause resentment. It is recommended that mediators have training and experience in disagreement resolution, counselling and negotiation skills, and knowledge of SEN legislation and the Code of Practice.

It is not envisaged that the parties should be legally represented - this would be contrary to the spirit of informality. It is acknowledged that parents need to have an understanding of SEN policies and procedures and their entitlements under SEN legislation, so that they are able to participate fully and effectively in discussions. The mediator's role is to ensure that all parties are 'fully supported' (SEN Toolkit Section 3 p.14 para 41). Parents are encouraged to bring their Independent Parent Supporter with them if they have one. The question is how the mediator should proceed where the parents are not in a position to make informed choices about settlement and have nobody with them to help. Given the explicit statement that the mediator must be neutral, it cannot

be envisaged that he would give advice on SEN legislation and entitlement or the likely outcome of an appeal to the SENDIST.

It is stated unequivocally that it will not be appropriate to involve children in mediation discussions between their parents and school/LEA, but that their views should be sought. It is acknowledged that the views of children and their parents may differ, and that every effort should be made to establish the child's own point of view:

Discussions that do not have the child at the fore can deteriorate into a battle between the parents and the school/LEA. It is essential that the child's needs and best interests remain at the fore. (Section 3 p.15 para 44).

It is said that there will always be cases where it would be more appropriate for parents to seek recourse to the SENDIST. Where agreement is not reached and parents appeal, any discussions that took place during the mediation may not be made available to the SENDIST without the consent of all relevant parties. LEAs are told to review their arrangements periodically to ensure they are delivering a high quality service capable of meeting changing needs. It is recommended that LEAs seek feedback from mediation services as to the factors that trigger disagreement to enable changes to be made in policy and practice. The SENDIST has no oversight of mediated agreements.

5.3.1.2. Available information

SEN Regional Partnerships were established in 1999/2000 to facilitate effective collaboration between LEAs and other agencies to improve the quality of, and access to, SEN services. Following the implementation of the SENDA, the DfES grant-funded these organisations to arrange mediation in SEN disputes. Disagreement Resolution Services (DRSs) were operational throughout England by January 2002. This funding ceased in March 2004. Statistics published on the DfES website revealed that there were 608 mediation referrals for the period January 2002 to March 2003 across all regions in England; 406 cases went through mediation and 78 cases were due for mediation. Of the cases that went to mediation, 44% were fully resolved; 23% partially resolved; 20% remained unresolved and 3% produced other outcomes.

There was no information about whether the number of DRS referrals varied between the regions, or between LEAs, or why that might be. The number of referrals to mediation was extremely low. Reports by regional providers collated by the DfES showed considerable variation in content and quality. Some included statistics on numbers of cases and outcomes in terms of whether or not disputes had been resolved; others focused on value-for-money and cost-effectiveness. None examined the outcomes of cases. There were only two detailed reports. The DfES planned to review the operation of mediation after its first year of operation, but this did not happen.

A case study conducted by the University of Manchester for the DfES (DfES 2003) provides a broad overview, describing how disagreement resolution services had been set up by SEN Regional Partnerships. Three pairs of Partnerships had joined forces to establish a single service operating across their two regions; three Partnerships had developed services that were co-terminus with their own regional boundaries; and two Partnerships had developed different arrangements for different parts of their region. Early evidence from the London, South East and South Central and South West SEN Regional Partnerships indicated that fewer referrals were received than anticipated, but that the majority of cases that had been mediated had been resolved. From evidence taken from all 11 Partnerships, demand appeared to vary significantly. It was suggested that an evaluation soon to be commissioned by the DfES should explore the reasons for such variations.

The South West SEN Regional Partnership commissioned research on how LEAs were managing SEN disputes to identify the extent to which the agencies involved (including mediation services) elicited children's views in resolving disputes. An interim report was published in 2004 (University of Exeter 2004a). Its findings on eliciting children's views are discussed in Chapter Seven. The research provides information about the operation of mediation. Seven LEAs participated. Interviewees included LEA officers, mediators, educational psychologists, PPOs, parents, young people, representatives from schools, social services, disability services, Connexions, and child advocacy services. Interviews were analysed by group and detailed case studies undertaken.

Interviews with mediators revealed that mediating SEN disputes was not a significant part of their workload. Most considered that, although possible to conduct SEN mediations with mediation skills alone, it was advisable for the mediator to have some knowledge of the mechanics of the process. Some felt that, rather than all mediators undertaking specialist training, it would be more practical for SEN mediations to be conducted by specialists.

Most PPOs and volunteers were parents of children with a disability. Others had had experience in schools and understood the school perspective. Some felt that they were not perceived as professionals, and were seen by schools as 'interfering'. Most had undergone training in counselling or mediation.

PPO: I think (mediation) is a really valuable process, I think we need to do a lot more work on how lots more people in the field can have those skills, because I actually think it's something people are using and touching on a lot of the time in their jobs, lots of professionals in educational, well and in other agencies, I'm actually keen to see, you know, more training in skills so that it's not just 'well I'm doing mediation but I've never had any formal training'. Certainly Parent Partnership Services are using it all the time and in the case I actually went to I found personally it actually made me feel much better because I actually thought 'actually I'm doing a good mediation job here,' but I do think that it needs disseminating further. (University of Exeter.a. 2004 p.8).

PPOs did not view themselves as impartial. Neither did they see themselves as allied to the LEA. Their bias was towards helping parents. There was little use of formal mediation, though this varied between areas. Some LEAs had 40 appeals to the SENDIST in one year. Others had none. Some officers viewed resorting to mediation as failure. Some thought the tribunal existed to force LEAs to make provision they could not otherwise make on financial and equitable grounds. Some considered that 'becoming more parent friendly' and training in mediation and counselling skills for LEA officers and PPOs helped prevent disagreements escalating. Views were mixed as to whether formal mediation played such a role.

There were positive comments, such as 'mediation is a useful tool for getting people to start talking to each other', 'improves relationships and outcomes'

(Ibid. p.11). But there was also a feeling that it was not always the best process for parents, and that it was only as good as the mediator. Mediation skills themselves, however, were of great value in helping to prevent disagreements.

PPO: I think we need to look at different ways of using it at different levels in different ways and by different people in different studies, not just this 'well we've set up the thing we've been told by the Code we must set up, we've got access to an independent mediator'. It's a fairly expensive way of doing it and I think we really need to have more ideas of how we're actually doing it in other ways and at other levels as well as I say, you know, other people doing it maybe [...] (Ibid. p.12).

Enquiries of the DfES in July 2005 disclosed that information for the purposes of monitoring the operation of mediation was being compiled for them by the SEN Mediation Network. Information obtained from the Network Co-ordinator in September 2005 revealed that the majority of LEAs had continued with the mediation arrangements they had in place when the funding ceased, using regional services; some LEAs had made their own arrangements with local mediation providers or through their PPS, and some had no arrangements at all.

The Network Co-ordinator indicated that mediation providers produced reports. These were of variable quality. The Network was supporting providers to develop a standard format for reports, and to work towards acquisition of the Legal Services Commission's Quality Standard Mark for Mediation. Regional providers were in contact with one another through the Network. They had asked the DfES and SENDIST to promote awareness of mediation, suggesting that SENDIST could ask the parties whether they have been to mediation and, if not, adjourn the hearing to allow the parties to mediate. The SENDIST were said not to be in favour of this.

There were variations in the use of the mediation service not simply between regions, but between LEAs within regions. Cost was a relevant factor.

SENDIST is 'free' to LEAs, whereas they have to pay the costs of providing mediation. The Network Co-ordinator's concerns were that, whilst LEAs are obliged to facilitate mediation, they are not obliged to participate. Where they have to pay for mediation, they may have to take into account budgetary implications in deciding whether a dispute can be mediated. In view of the low

take-up of mediation, the concern was that it was not cost-effective for LEAs to enter into annual contracts with regional providers, and that they would cease to do so, preferring to use local services on an *ad-hoc* basis. The Co-ordinator considered that national standards driven by the Network would suffer, and it would become less likely that mediators would be SEN specialists.

In previous Chapters, empirical studies have been used to provide a factual underpinning for analysis. It is not possible to do this in relation to mediation because there has been no evaluation of its operation. The Select Committee's 2006 Report recommended that the DCSF conduct a review of the operation of mediation. This has now been commissioned. A Stage 1 report was due to be completed by July 2007; a Stage 2 report, including preliminary findings, was due in November 2007, with the final report due in March 2008. It had been planned to include the findings of this study in the thesis. Unfortunately the DCSF advised on the 28th March 2008 that the final report is not expected until July. There are no interim reports. There is also another study ongoing conducted by the Universities of Manchester and Edinburgh.

This thesis seeks to establish what is added by mediation and conciliation in terms of assuring PDR in SEN disputes. As will be demonstrated, it is possible to conduct this analysis by assessing the ability of mediation and conciliation, as models, to attain PDR goals and offer adequate redress. Conclusions about the future role of mediation in SEN disputes are, however, made contingent upon the findings of the ongoing studies¹⁵⁶.

There was a further dilemma as to whether some information should be obtained for the purposes of the thesis. It would have been possible to summarise information from reports by mediation service providers. These are variable in terms of quality and level of detail. But a sustained study is needed. There are two ongoing. A hasty compilation of statistics risked being

¹⁵⁶ Consideration was given to whether possibilities for delaying the deadline for the submission of this thesis should be explored in order to incorporate the findings of these studies. It was decided that, although information from these studies would enable the establishment of a firmer evidential basis from which to conduct analysis, this was not essential. Full acknowledgement of the consequential limitations of deductions based on limited factual material is made here.

insubstantial and anecdotal. So this thesis makes observations on the basis of very little information in full acknowledgement of the limitations of so doing, but argues nevertheless that this evaluation is worthwhile.

The DCSF research brief is to determine:

- how accessible mediation services are;
- how well they are promoted by all parties;
- whether there are significant variations in the provision of the service and its use;
- how the service is advertised;
- how the service is accessed – whether additional support is provided;
- follow-up;
- barriers to use by some or all of the partners;
- practical recommendations for improvement in line with the three key elements of economy, efficiency and effectiveness set out in ‘Improving Value for Money’. (DfES 2005).

The brief envisages analysis of different types of resolution. Information about parents using the service is to be gathered in terms of numbers, social deprivation and ethnicity. Information is to be obtained about the involvement of PPSs and voluntary organisations. The brief does not settle the size of the sample, and envisages surveys but not observation of mediation. The research conducted by the Universities of Manchester and Edinburgh will examine the strategies used by schools and local authorities to prevent SEN disputes arising; the ADR mechanisms in place and the way in which these are experienced by parents and service providers; and the success of ADR approaches in reducing the number of cases referred to courts.

This Chapter considers power-imbalance, which, as will be explained, has been raised as a significant concern in *citizen vs state* disputes. Determination of the effects of power-imbalance on the basis of empirical analysis is problematic. Observation might be conducted. The DCSF research does not envisage observation. But, in any event, conclusions derived from observation might be

of limited value because LEAs would be less likely to dominate or manipulate parents if being observed. Another method might be to assess the outcome of a mediation against what the parents would have achieved before a tribunal. But how could this be predicted accurately? Some of the benefits derived from mediation are unquantifiable – improved relationships, reduction of conflict, getting to the ‘heart’ of a dispute. Asking parents whether they are satisfied is also problematic because people can be happy with the outcome even though they have been exploited because they have low expectations or are ignorant of their entitlements.

This thesis proceeds on the basis that an assumption can be made that there is a risk of power-imbalance in SEN disputes and that empirical evidence is not essential to the making of this assumption. Below is a case study which serves as an example of how mediation can operate.

5.3.1.3. A case study¹⁵⁷

A was 13 years of age. He had speech and language difficulties. At the end of his first year in a mainstream secondary school, he moved to the area of this LEA. His parents enrolled him in an independent special school (HH school) at their expense. They then requested that the LEA carry out a statutory assessment. In the context of the assessment, the parents expressed a preference for HH school. Upon completion of the assessment, the LEA prepared a statement that named a local mainstream secondary school as the appropriate placement. The parents appealed to the SENDIST, but also requested mediation.

At the mediation, A’s parents explained, in detail, their concerns about A. They wanted the LEA to pay HH schools fees and ancillary costs:

¹⁵⁷ Taken from a report to the Education Committee of the Royal Borough of Kingston upon Thames 6th October 2002.

Placement at HH School – annual fees	£11, 510
Speech and language therapy	£ 2,300
Occupational therapy	£ 1,000
Transport	£ 3,000
Total	£17,810 p.a.

Privately (to the mediator) they did not expect the LEA to pay for everything they had asked for. Their solicitor had advised them that there was a good chance that the SENDIST would order the LEA to pay for the placement at HH school, and that they should not agree to anything less.

The LEA's case was that the local school named in the statement could meet A's needs.

The cost of the local provision was:

Delegated funding per secondary pupil	£6892.
Weighting for SEN	£3046.
Specialist teacher	£1,440.
NHS Speech and language therapy	£ nil
Transport	£ nil
Total	£11,378 p.a.

Privately, (to the mediator) the LEA considered they had been 'hi-jacked'; that the parents (possibly on advice of their solicitor, whom the LEA had encountered in other appeals where this had happened), had presented them with a *fait accompli*. They knew the parents were in a strong position with the tribunal – irrespective of whether the local provision met the child's needs – because the tribunal would be reluctant to see the boy moved. The LEA thought the parents were 'trying it on'. Their first offer was a contribution of £11,378 towards the cost of the placement. The parents rejected this as being insufficient.

The LEA, after much discussion, agreed to fund the cost of the placement at HH school; 2 x 1 hour group sessions per week of speech therapy at £30 per week

for the ten weeks, and a contribution of £60 per year towards travel costs. The total amount settled was £11,870 – only £492 p.a. more than the original offer.

Both parties were happy, and the relationship between them appeared to have improved. The parents considered they had been listened to. The LEA had avoided the time and expense of a tribunal hearing for little more than they had originally been prepared to pay. There was further discussion about the wording of the statement. This proceeded amicably. An action plan was agreed. The case study illustrates potential for compromise in SEN disputes. Although a dispute about placement may be a win/lose argument, provided the parents secured their principal objective, they were willing to compromise on other issues. The primary concern of the LEA appeared to be costs. They were willing to concede the placement on the basis that they could avoid ancillary costs.

A different analysis might be that the parents could have got more if they had proceeded to appeal, or if their solicitor had attended the mediation to negotiate on their behalf; the solution was not a permanent one, possibly there would be further disagreement over speech therapy at the end of the ten week period. The parents' 'bottom line' was informed by legal advice on the likely outcome of a tribunal appeal. They might have conceded more if they had not had such advice.

It is important to consider SEN mediation in light of the wider theoretical and empirical work on mediation to understand the benefits it can bring, concerns about its operation and issues currently under scrutiny. The next section considers the benefits and concerns, and the issues of pressure to mediate, low take-up, cost-effectiveness, regulation and customisation.

5.3.2. A Wider Perspective

5.3.2.1. The benefits of mediation

In order to evaluate the operation of mediation, it is necessary to suspend the cynicism and negativity deriving from indoctrination of the legal paradigm apparent in the preceding paragraph. Mediation involves turning away from a rights-based culture. Its aim is resolution of conflict. It does not promise

substantive justice. Understanding mediation necessitates a re-thinking of the rights ideology, both in terms of dispute resolution and social relations. It envisages a realisation that legal standards do not, of themselves, ensure an end to systemic inequalities or change attitudes. Mediation has the potential to design solutions reflecting consensus when conducted in an arena that does not intimidate one-shot participants. It can replace the game of winners and losers because it moves beyond rights-based discussion by exploring the issues of real importance to each party, thus disengaging rights from remedy. It represents a paradigm shift in how disputants think about the resolution of their conflict.

The process uncovers information about the parties' true needs and interests that might never emerge in a formal conflict arena. Each party is enabled to understand the other's point of view. In the above case study, the discussion focused upon costs. Rightly or wrongly, this was the 'real' issue for the LEA, so in a sense the process was more honest than a tribunal appeal focused upon conflicting expert evidence about needs. The parents were able to explain their concerns about moving A to a different school and be listened to. MacFarlane suggests that those who are concerned about the operation of what is essentially a private law inter-parties resolution process being used in disputes about the determination of rights, misunderstand the nature of public law disputes which are mostly about resources as opposed to a conflict of values (MacFarlane 1997 p.7.). The empirical studies referred to in Chapter Two bear out this observation. But, as rights determine provision and resources equate to provision in the SEN context, it is difficult to see how categorising disputes as being about resources alleviates the concern.

Advocates for mediation argue that its strength is in its educative and transformative character. It enables people to achieve solutions following interests-based bargaining, which enhances their strength of compassion (Ibid. p.20). Transformation on a personal level can change the relationship between the parties (confident with their success in the mediation, the parents in the case study might be in a stronger position to argue for the continuation of speech therapy). It can also lead to transformation on a societal level. In the context of SEN, where LEAs see and speak to parents, they are no longer simply names on

a list. Mediation might prevent LEAs castigating parents as queue-jumpers and manipulators. It might also be possible to explain to parents that LEAs' preoccupation with resources derives from a need to make provision for other children, so they are not perceived as faceless penny-pinching bureaucrats.

If the paradigm shift in the values of disputing processes can achieve the transformations claimed, there is potential for benefit. But this needs to be weighed against the disadvantages highlighted by critics. Significant concerns have been expressed by feminist writers about the disadvantages to women in family mediation as a result of power-imbalance. Their work has been used as an analogy for discussion about *citizen vs State* disputes. This is discussed in the next section.

It is worth noting here, though, that feminist writers also perceive advantages to women in family mediation. Providing a context that facilitates self-determination means that mediation gives parties the opportunity to exercise their own 'right and ability to make decisions and take actions to follow those decisions through' (Grillo 1991 p.1548). Mediators will often be engaged in explicitly validating 'the ability of individuals to speak for themselves', and expressly recognising an 'individual's competency and right to make their own decisions' (Lichtenstein 2000 p.23). Such actions and attitudes can, in effect, license women to step out of gendered inequalities to take a more equitable stance in terms of seeking a resolution of the dispute that accommodates, and incorporates, their own interests and needs. If parents, as the weaker party in SEN disputes, can be empowered in the manner suggested, this could enhance the strength of their position in what may be a long-term relationship with an LEA.

Other benefits claimed for mediation are, in summary, that it is 'quick, cheap and satisfying' (Genn 2006b). But mediation only brings time and costs savings where it is successful. Where it fails, this can prolong the time taken to resolve a dispute. Studies of the operation of mediation in civil and family disputes during the last five years indicate that mediation may bring savings of time and costs. A study by the National Audit Office concluded that, in family disputes,

mediated cases were quicker to resolve, taking on average 110 days, compared to 435 days for non-mediated cases. The average cost of Legal Aid in non-mediated cases was estimated at £1,682 compared with £752 for mediated cases, representing an additional cost to the tax payer of £74 million (National Audit Office 2007 p.5 - 'the NAO study').

An evaluation of the Exeter County Court's small claims mediation scheme also concluded that mediation had saved 216 hours of judicial time over an 11 month period (Enterkin 2005 p.7 - 'the Enterkin study'). But a study by Genn of quasi-compulsory and voluntary mediation schemes operating at the Central London County Court concluded that, although judicial time spent on successfully mediated cases was lower, there was an increase in the time spent on administration in mediated cases. In relation to the parties' costs, whilst parties in successful mediations felt that there had been a saving, significant additional costs were incurred in unsuccessful mediations (Genn 2007 p.110 - 'the Genn 2007 study').

Genn argued in an earlier study that the suggestion that saving time saves costs had yet to be established in a systematic way (Genn 1998 p.73). In order for a case to settle at mediation, a person with sufficient authority to agree this must attend. Their time will need to be factored in. Where mediation fails, time and costs spent on mediation will be added to the costs of preparing for, and attending, the formal hearing; parties may have incurred most of the expenses they will incur in obtaining advice and commissioning expert reports before the mediation takes place. Australian research suggests that, although mediation does not achieve significant costs savings, it may achieve early settlement in cases that would settle anyway (Astor and Chinkin 2002).

The costs, risks and incentives to the parties in mediating civil disputes do not exist in the same way for SENDIST appeals because the tribunal does not make orders that the loser pays the winner's costs. Also, there is no cost advantage to LEAs in mediating because they have to fund mediation, whereas there are no process costs in SENDIST appeals. It appears the ongoing study commissioned by the DCSF is investigating low take-up of mediation and value for money.

In relation to satisfaction, as mentioned previously, there are issues about how appropriate it is to measure success in terms of satisfaction where one party may be in a weaker position due to power-imbalance. The Enterkin, NAO and Genn 2007 studies all indicated satisfaction with the mediation process, with those who had participated expressing confidence in the mediators.

A study by Walker relating to private family law proceedings covering 11 geographical areas indicated that 46% of mediation users were satisfied with mediation, but 19% were dissatisfied and a further 19% very dissatisfied (Walker 2004, 'the Walker study'). Where parties were dissatisfied with mediation, their most common concerns were that outstanding issues were unresolved; mediation agreements were unenforceable; they felt that they had been put under pressure to make an agreement and had not received sufficient advice; mediation had not helped to make divorce less distressing, neither had it helped with improved communication or shared decision-making about parenting; it had not helped reduce conflict or led to the avoidance of a court hearing. The report concluded that mediation would continue to be used by only a minority of divorcing or separating couples, and that the majority, including most of those who do use mediation, would continue to be dependent on legal services.

A benefit claimed for mediation is that it brings about long-term improvement in relationships. A study by Trinder of the long-term outcomes of in-court conciliation in disputes between divorcing couples about arrangements for contact with children (Trinder 2007) indicated that, whilst conciliation was successful in helping couples reach agreement, this was not sustained. Two years after initial agreement had been reached, contact arrangements were in place in the majority of cases. But during that period, there had been further litigation in 40% of cases and 60% of agreements had been dropped or had broken down, necessitating re-negotiation. The study concluded that, although conciliation had been effective in achieving agreement and restoring contact in the short term, it was often followed by further negotiation and had limited impact on making contact work for children. Whether agreements endure in the SEN context is largely unknown. A report on SEN mediation by Global

Mediation for the SEN South Central and Eastern Regional SEN Partnerships includes the results of a six month follow-up survey for disputes successfully mediated. This shows that 67% of disputes remained resolved, but this was only in 8 out of 12 mediated cases. (Global Mediation 2004).

5.3.2.2. Concerns about the operation of mediation

Concern has been expressed by public law practitioners about mediation being used in judicial review proceedings¹⁵⁸ on the basis that there is a need to consider the implications of power-imbalance and lack of transparency and accountability on the part of public bodies arising from the fact that mediation is held in private. These reflect the well-known critique of informalism which continues to be the subject of debate. Abel, one of its principal proponents argues:

Only within the legal system can advocates even hope to pursue the ideal of equal justice in a society riven by inequalities of class, race and gender and dominated by the power of capital and state. Formal law cannot eliminate substantial social inequalities, but can limit their influence. Law is the sole arena in which unequals can hope to achieve justice. Only equals can risk a confrontation within the informal processes of the economy and the polity...formality is the best, often the only, defence against power. (Abel 1985 p383).

Abel perceives the growth of informal institutions as covert expansion of state power - 'the velvet glove has largely hidden the iron fist' (Abel 1982c p.270). Because coercion through informal institutions is less visible and less extreme, the state can seek to control more behaviour. The state is the only legitimate source of authority, therefore other forms of social control must either be its creation or at its sufferance. Beneath the rhetoric of consensus, ADR suppresses conflict and the disadvantaged are worse off than they would have been under an adjudicatory process.

If informalism grants additional offensive weapons to those already endowed with disproportionate legal resources while depriving the legally disadvantaged of the protection of formal defences, it also denies the latter the sword of formality whilst assuring the former that they can continue to invoke formality as a shield. (Ibid. pps. 294-6).

¹⁵⁸ See representations made by the Public Law Project and signed by 66 leading practitioners www.dca.gov.uk/response-litigation.pdf.

[...] informal institutions deprive grievants of substantive rights. They are antinormative and urge the parties to compromise; although this appears even-handed, it works to the detriment of the party *advancing* the claim – typically the individual grievant. Informalism may ensure that claimants get *some* redress, but the relief is almost always less adequate. (Ibid. pp297-8).

Abel considered that ADR is only desirable in very precise and limited circumstances. The Bowman review of the Crown Office List (Bowman 2000) concluded that mediation was unsuitable for public law disputes. Despite these concerns, the Government continues to place increasing pressure on individuals to participate in mediation without taking measures to address them.

A conference convened by the Public Law Project in April 2004 identified a need to develop clear guidelines for courts and practitioners to enable identification of cases most likely to benefit from mediation, and a need to ensure that the focus of ADR is on achieving better outcomes for claimants, as opposed to costs savings. It was considered that, in promoting mediation in public law disputes, the Government appeared to have given insufficient consideration to the fact that there are important distinctions between private and public law disputes. A theme emerging from the Conference was that the Government should acknowledge that the ‘one-size fits all’ mediation window (Bondy 2004 p.3) may need re-thinking.

Adler deals with the matter shortly in a recent article in the *Modern Law Journal*:

[...] although conciliation/mediation may well be appropriate in *party vs. party* disputes and in disputes that call for the exercise of discretion, **it is not clear that it is appropriate in citizen vs. state disputes and in disputes where rights are central. This is because the imbalance of power between the citizen and the representative of the government department or public body may be too great.**

In order to deal with these power imbalances, some degree of partiality is often required and mediators frequently find that they have to ‘take sides’¹⁵⁹. However, from a feminist perspective, the existence of power imbalances between men and women – especially in cases involving

¹⁵⁹ Adler says this issue is examined in depth in a number of studies, e.g. R. Dingwall and J. Eekelaar (eds.) 1988; Dingwall and Greatbatch 1993; and Raitt 1995.

domestic violence – has been used as an argument against conciliation/mediation¹⁶⁰. Although there has, as far as I am aware, been no discussion in the literature of the power imbalances that are found in *citizen vs. state* disputes, the inequalities that characterise disputes between ‘one shotters’ and ‘repeat players’ would undoubtedly be evident in these cases and it would take a very skilled mediator to be able to deal effectively with them.

Against this, it has been argued that, in the context of an individual appeal, appellants will be considerably more familiar with the facts of their case than the ‘harassed and overworked officials’ representing the government department or public body, who may be only too keen to settle so that they can get back to the office or on to the next case. It has also been argued that the alleged imbalance of power between the citizen and the representative of the government department or public body applies just as much to tribunal hearings as to conciliation/mediation. However, although the first argument may apply in some cases, it overlooks the tenacity with which some government officials seek to defend the decisions of their colleagues and the fact that, if an appellant presents new evidence, the representative of ‘the other side’ is likely to request time to check and consider. If so, this would reduce the cost-effectiveness of mandatory conciliation/mediation in tribunal cases. In addition, the second argument overlooks the important role played by representatives in tribunal hearings and the fact that tribunal chairs are much more pro-active than mediators.

Because, if appellants were required to attempt conciliation/mediation, many of them might settle for less than they are entitled to, tribunal hearings may be needed to protect their interests. In addition, it may be in the public interest that some cases are taken to a tribunal so that there can be a clear and authoritative ruling on a point of law. Thus, the scope for conciliation/mediation and, for similar reasons, for negotiation, in a system of proportionate dispute resolution for administrative justice would seem to be rather less than the White Paper envisages. (Adler 2006a p.977).

It is difficult to quarrel with the logic of Adler’s statement. He raises two issues – mediators ‘taking sides’ and power-imbalance.

In relation to the first issue, Dingwall asks whether mediation facilitates a process whereby the insidious influence of the mediator is substituted for the open decision of the judge. In some disputes, he says, it may be appropriate for mediators to act merely as facilitators. But, where neutrality allows one party to exploit the other, ‘real’ negotiations can only be possible where the mediator deliberately enhances the power of the weaker. Where third parties, especially

¹⁶⁰ Adler cites Bottomly 1984.

children, are to be 'victimised' by an agreement, the mediator is under a duty to speak out and 'act forcibly'. Thus, mediation can incorporate some elements of enforcement where settlements are required to meet moral criteria external to the standards of the disputants. But, where this is the case, mediation does not increase party control, but merely 'imposes a different set of norms about conduct and outcome'. (Dingwall 1988 p142).

Although intervention on the part of the mediator is for the purpose of assisting the weaker party, Dingwall says it must be acknowledged that, if mediators are more than facilitators, this also creates a potential for abuse. Ingleby refers to the mediation as 'Quasi-adjudication without judges and without the safeguards of the judicial process' (Ingleby 1993 p.441). If mediators intervene and direct the process towards what they consider to be a fair outcome, they are (he says) assuming the role of judges.

But the issue of lack of impartiality on the part of the mediator may not be problematic, provided it is acknowledged. As Dingwall and Greatbatch say:

[...] the crucial considerations are that clients should not be misled into thinking that they are entering a neutral arena, that they are clear what values mediators have adopted about the relative merits of various outcomes and what degree of pressure they consider legitimate. It is also important that clients should be genuinely free to enter or leave mediation at any point without prejudicing the subsequent course of their divorce . . . mediation may well be more effective if the mediator's influence is more explicitly acknowledged and the clients are encouraged to see it as an opportunity to consult a professional adviser who has more knowledge of divorce matters than either of them [...]
(Dingwall and Greatbatch 1991 pps. 301-302).

Rights-based conciliation, as employed by the former Disability Rights Commission (see section 5.3.2.6.), proceeds on the basis that the function of the mediator is not that of a neutral facilitator, but a person who is there to explain the nature of obligations towards the claimant and to assist in designing solutions that fulfil those obligations. It is accepted in the context of enabling hearings, that a tribunal can, and will, intervene to assist the weaker party to put his case but that, in so doing, independence is not compromised. What is

problematic is where this is not explicit. Criticisms of covert manipulation, in the context of a mediation process conducted in private, are unanswerable.

In relation to power-imbalance, Adler draws an analogy between the theoretical concerns of feminist writers on women's interests in mediation and individuals in *citizen v state* disputes. The argument of these writers¹⁶¹ is that inequality between the parties is re-enforced by being 'privatised' and concealed, as opposed to emerging in the 'public sphere of formal justice'; agreements are not shaped by true consensus; and power-imbalances are masked and perpetuated (Bottomley 1984 p.80). Grillo has queried whether for women mediation merely 'substitutes another objectivist, patriarchal, and even more damaging form of conflict resolution for its adversarial counterpart' (Grillo 1991 p.1549).

The risks women encounter in informal dispute resolution processes directly reflect 'the factors by which women's subordination is maintained in society generally', and removing family disputes into the private sphere of mediation works to undermine 'efforts to expose the relevance of power differentials between men and women' (Astor 2000 p.3147).

Grillo describes family mediation as a 'wolf in sheep's clothing, relying on force and disregarding the context of the dispute, while masquerading as a gentler, more empowering alternative to adversarial litigation'. The difficulty is a commitment to formal equality. Equating fairness in mediation with formal equality results in, at most, 'a crabbed and distorted fairness on a microlevel; it considers only the mediation context itself'.

Of course, subordinated people can go to court and lose; in fact, they usually do. But if mediation is to be introduced into the court system, it should provide a better alternative. It is not enough to say that the adversary system is so flawed that even a misguided, intrusive, and disempowering system of mediation should be embraced. If mediation as currently instituted constitutes a fundamentally flawed process in the way I have described, it is more, not less, disempowering than the adversary system -- for it is then a process in which people are told they are being empowered, but in fact are being forced to acquiesce in their own oppression. (Grillo 1991 p.1568).

¹⁶¹ See for example Bottomley 1984; Deech 1994; Grillo 1991.

Marian Roberts, writing in answer to these concerns, says they are underpinned by two assumptions: first that women do not know what they want and cannot speak for themselves, and second that when they make demands, these are mistaken, reactionary and contradictory (Roberts 1996). Power, in the context of dispute resolution, means bargaining power which comprises a number of endowments. Rarely, she argues, are the advantages all stacked one way. Neither is the position static. Roberts remarks that empirical studies show high levels of satisfaction among women who have participated in mediation. 'Agreements were perceived to be fair, even among those who objectively might be viewed as the losing party.' (Ibid. p.241).

There may be advantages in exploring settlements in private, but this is at the expense of holding public bodies to account publicly and establishing societal values and norms. Fiss argues that settlement reduces the functions of a lawsuit to determining the interests of the parties, ignoring the wider and important role of the courts in determining societal values.

The courts' job is not to maximise the ends of private parties, nor simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes; to interpret those values and bring reality into accord with them [...] A settlement will [...] deprive the court of the occasion to render an interpretation. (Fiss 1984 p.1084).

Astor and Chinkin argue:

The provision of institutional or public ADR mechanisms creates an outlet for claims by informed citizens about inadequate service or inappropriate behaviour that may foster the appearance of a responsive employer or government while concealing the lack of substantive reform. (Astor and Chinkin 2002. p.27).

As Roberts says, competence is a central tenet of mediation - competence in the sense of a person being able to define the issues for discussion to arrive at their own decisions (Roberts 1996 p.8). If this can be assured, then mediation has the potential to bring benefits. But, in order to assure competence where there is unequal power, either the mediator has to become overtly partial to the weaker party to ensure equality, or the weaker party must be assured advice and representation. Further answers to concerns might be monitoring of outcomes of mediations; binding codes of ethics for mediators; established procedures

enabling the mediator to call in expert assistance for a party who is being disadvantaged when needed; exclusion of some cases from mediation, or judicial scrutiny of mediated agreements.

None of these safeguards exist in SEN mediation. In terms of the balance of power in SEN disputes, as Riddell observes, the appeals system should empower parents (Riddell 2002). They start from the position that they can put an LEA to a considerable amount of time, expense and trouble by lodging an appeal. They may increase their power by complaining to elected members or engaging the services of representatives. But LEAs are repeat players¹⁶² - they are familiar with the process, which brings confidence. LEAs may have developed relationships with local mediators, and they are familiar with relevant legal requirements and the characteristics of various learning disorders. In mediation, their experience enables them to know how to trade-off symbolic defeats for tangible gains. Looked at cynically, perhaps this was what happened in the case study – much was made of conceding the placement, whereas, in terms of resources, the LEA did not perceive the effect of this concession as substantial.

Although SENDIST hearings are held in private, decisions are published on the SENDIST website. LGO findings of maladministration are also published, as are court judgments. Outcomes of mediations may, or may not feature on the websites of Regional Providers. Mediation was in operation for six years without the effects of its introduction being evaluated centrally. Despite the wealth of literature on the advantages and disadvantages of mediation, when mediation was introduced in SEN disputes this was not preceded by an empirical evaluation. The question is whether the values and principles of public law governing formal procedures can safely be substituted by a process facilitated by a private individual whose focus is on reaching agreement, as opposed to arriving at a decision compliant with such principles.

Drawing an analogy between the position of women in family disputes and parents in SEN disputes, whilst it may not be legitimate to make assumptions

¹⁶² See Galanter 1974.

about power-imbalance in the context of family disputes, it is legitimate to make an assumption that parents may be disadvantaged in SEN disputes because there will always be advantages for LEAs by virtue of being repeat players. Although the Riddell study (Riddell 2002) comprised a small number of case studies, it illustrates starkly the disadvantageous position parents are in throughout their dealings with bureaucrats and professionals and the pressure on them to assume a passive role. Only the most determined and assertive parents were able to challenge the power of LEAs, and this was with the benefit of independent advice. The Hall study also highlights power-imbalance between parents and schools and parents and LEAs.

But even if it cannot be assumed that parents will be the weaker party in every dispute, or that they are incapable of placing themselves on an equal-footing, what can be assumed is that there is a risk of unfairness. Where such a risk exists, there needs to be something in place to obviate that risk where disputes are settled in private with no ongoing objective monitoring and evaluation of outcomes. Roberts' 'satisfaction' argument is only convincing against the background of the Riddell and Hall studies if her essential element of competence is assured in every case.

5.3.2.3. Pressure to mediate

'Transforming Public Services' refers to 'strongly persuading' people to mediate. The first signs of pressure to mediate were seen in Lord Woolf's Access to Justice Report (Woolf 1996) and the 1995 White Paper on Family Law Reform (DCA 1995) which heralded the promotion of early settlement. Various changes were made to Court Rules and Legal Aid entitlements. In the context of civil disputes, the parties are placed at risk that they will fail to recover their costs, even if successful, where they have unreasonably refused to mediate. In family law disputes, legally aided parties may be refused funds for a contested hearing unless they first agree to participate in mediation, or there are reasons why mediation would be inappropriate. However these measures have not persuaded people to mediate. As a result of low take-up, pressure on parties to mediate is being increased.

The case law on ADR reflects differing opinions amongst the judiciary about the role of mediation in civil and public law disputes. In *Cowl and Others v Plymouth City Council*¹⁶³, Lord Woolf stated that there was a duty on parties to consider ADR prior to engaging in the judicial process, particularly if the case involved public money. In *Dunnett v Railtrack plc*¹⁶⁴, the court dismissed Mrs. Dunnett's appeal, but refused to order that she pay Railtrack's appeal costs because they had declined to mediate after this had been suggested by the court. In *Hurst v Leeming*¹⁶⁵, it was said that, although mediation is not compulsory, it is at the heart of today's civil justice system; that unjustified failure to give proper attention to the possibilities of mediation may attract adverse consequences; and that it is for the judge to decide whether refusal to mediate is justified.

This line was confirmed in two further cases - *Leicester Circuits v Coates Brothers plc*¹⁶⁶ and *Royal Bank of Canada Trust Corporation v Secretary of State for Defence*¹⁶⁷. In the latter case, the Ministry of Defence declined to mediate because they considered the case involved a point of law that needed to be resolved. The court resolved the point of law in the Department's favour, but refused to award costs. This was because the Government had pledged in March 2001 to use ADR in all suitable cases and where the other party accepts it. In this case, the bank had agreed to mediate. It was said that involvement of a point of law did not make the case unsuitable for mediation.

But in 2004 there was a sea-change in the case of *Halsey v Milton Keynes General NHS Trust*¹⁶⁸. The Court of Appeal did not accept the Civil Mediation Council's argument that there was a presumption in favour of mediation, preferring the argument of the Law Society that the question of whether mediation had been unreasonably refused should depend upon a number of factors evaluated by the court in individual cases. Dyson LJ held that the courts have no power to order the parties to mediate, and questioned whether such an

¹⁶³ [2002] EWCA Civ 1935.

¹⁶⁴ [2002] EWCA Civ 2002.

¹⁶⁵ [2001] EWHC 1051 Ch.

¹⁶⁶ [2003] EWCA Civ 333.

¹⁶⁷ [2003] EWHC 1479 (Ch).

¹⁶⁸ [2004] EWCA Civ 576.

order would infringe Article 6 of the ECHR. The court is able to impose a costs sanction on a party who unreasonably refuses to mediate. But factors to be taken into account in deciding whether a refusal is unreasonable might include whether the successful party reasonably considered he would win; cost benefits; and whether the unsuccessful party can show that mediation has a reasonable prospect of success. As Genn says, the case represented something of a retreat from the relentless escalation of judicial pressure to mediate (Genn 2007 p.8). But the subsequent case of *Burchell and Bullard*¹⁶⁹ appeared to signal a return to the climate of *Dunnett* and *Hurst*.

A study by Genn of mediation in the Central London County Court in 1996/7 showed only a 5% demand for mediation (Genn, 1998). The Genn 2007 study compared quasi-compulsory and voluntary mediation schemes for the period between April 2004 and March 2007 to assess the effect of increased pressure to mediate. There were problems with the quasi-compulsory scheme element of the project coinciding with the Court of Appeal ruling in *Halsey* because the judgment undermined the object and operation of automatic referral. The report states that it is not possible to speculate as to the exact effect of the judgment, but that it may have made those who were inclined to opt out of mediation more confident in doing so.

By the end of the evaluation period (10 months after its completion), a mediation appointment had been booked in only 22% of cases and only 14% of cases originally referred to mediation had mediated. In 81% of cases where the court received a reply to a referral, one or more parties objected (though this number declined slightly after the first few months). Case management conferences dealing with objections did not generally result in mediation bookings and tended to delay the progress of the cases. Settlement rates of mediated cases followed a downward trend, with a high of 69% at the beginning of the project, to a low of 38% at the end. The majority of cases settled without going to mediation.

¹⁶⁹ [2005] EWCA Civ. 358

There was no simple factor predicting the likelihood of settlement. The report suggests that the explanation is likely to lie in the attitude or motivation of the parties and the skill of the mediator. The scheme was not perceived by most solicitors as compulsory. Justifications for opting out were the timing of the referral, the anticipated costs of mediation in low-value claims, the intransigence of the opponent, the subject matter of the dispute, and a belief that mediation was unnecessary because the case would settle.

In relation to the voluntary scheme, court direction, judicial encouragement and fear of costs penalties were the principal reasons given for mediating. There had been an increase in take-up following *Dunnett*, however the settlement rate had declined from 62% in 1998 to below 20% in 2000 and 2003. Although comments were generally positive, there were some complaints centred on failure to settle, rushed mediation, court facilities and poor skills on the part of the mediator. Failure to settle was most commonly attributed to intransigence on the part of opponents, inappropriate court direction, time constraints and failings on the part of the mediator.

It was concluded that facilitation and encouragement together with selective and appropriate pressure to mediate are likely to be more effective than blanket coercion; motivation and willingness of the parties to negotiate and compromise are critical to the success of mediation; and that efficient administrative support and creation of an environment conducive to settlement are important.

There are currently no pressures on the parties to mediate in SEN disputes. What would be worrying would be if, following the outcome of the current mediation studies, the DCSF were to assert pressure to mediate in order to increase take-up in the absence of a mechanism which ensures that the 'right' cases are mediated and that parents are enabled to make 'competent' choices.

5.3.2.4. Low Take-up

The Enterkin study revealed that judges referred 34% of the total number of cases on the small claims track to the in-court mediation scheme. This appears

low, and the study concluded that mediation was under-used, but the researchers observe that it compares favourably with the 5% figure in the Genn 1998 study.

Low take-up of mediation was also an issue in the Walker study. Only 10% of those who responded to the questionnaire had used mediation (152 people out of 1500), and 62% of them left mediation with issues still needing to be resolved. The NAO study revealed that only 20 per cent of people who were funded by Legal Aid for family breakdown cases (excluding those involving domestic violence which are deemed unsuitable for mediation) opted for mediation. In the period October 2004 to March 2006, 29,000 people who were funded through Legal Aid attempted to resolve their dispute through mediation. In the same period 120,000 family disputes involving finances and children were completed through court proceedings or bilateral negotiation between solicitors. In response to a survey of recipients of Legal Aid, 33 per cent said that they had not been made aware by their adviser that mediation was an option. Of those who were not told about mediation, and so did not try it, 42 per cent said they would have been willing to do so.

The report recommended, amongst other things, that the Legal Services Commission actively promote mediation; review the list of exemptions from using mediation and the way exemptions are being applied; and reflect in contracts between solicitors and the LSC a presumption that mediation should normally be attempted before other remedies are tried. Solicitors who have significantly lower numbers of mediated cases should be investigated to ascertain the reasons for the low take-up and, where these prove unsatisfactory, should have their contracts curtailed.

It is possible to draw some parallels between the results of these studies and mediation in the SEN context. The NAO study shows lack of awareness resulting from the fact that legal advisers (who have an interest in the case proceeding to trial because their costs will increase) were not telling their clients about it. Perhaps it is worth noting that, in the SEN context, although LEAs have an obligation to make parents aware of disagreement resolution

services, they also have a financial interest in cases not going to mediation because they have to pay for it.

Studies of the Australian Civil and Family jurisdictions have shown settlement rates for mediation in administrative disputes of 55% in the Federal Court, though a relatively small proportion of cases was mediated (Buck 2005). There is a power to require mediation that does not appear to have caused difficulties. Mediation has been pervasive within the Family Law system, with the Family Court having a target of 90% of cases being resolved through mediation within six months of filing. Buck suggests that there has been an attitudinal shift in favour of ADR that is lacking in England.

5.3.2.5. Regulation

Regulation of the process in terms of setting out the circumstances in which an impartial mediator should intervene is problematic in the SEN context. It would not be possible to say that a mediator should intervene to prevent parents settling for less than they would have got at tribunal because this cannot be predicted with certainty. It might be possible to impose rules requiring intervention where there is coercion. But overt coercion may be unlikely in the presence of an independent party; what is more likely is that there will be a more subtle gain derived from better knowledge and familiarity with the system. Perhaps what happened in the case study was an example of subtle manipulation. Did the LEA know that they would have lost the argument on speech therapy and occupational therapy, and offer the ‘big prize’ of the private school fees knowing that this would enable them to trade-off the other costs? Is there even anything wrong with this? Where, and how, is the line to be drawn?

If regulating the process of mediation is problematic, consideration might be given to screening types of dispute that might be unsuitable. Where mediation operates within the ambit of the court system, possibilities for recommending appropriate cases for mediation and screening unsuitable cases exist at the case conference stage. There is also scope for mediated agreements to be overseen by a judge. This does not happen in SEN disputes. Mediation takes place before an appeal is lodged with the SENDIST. The tribunal neither screens cases for

suitability nor approves mediated agreements. Where a case settles following mediation, the only information the SENDIST receive is that the appeal has been withdrawn. Screening would necessitate case management at LEA level.

5.3.2.6. Customisation

Buck argues that the fact that there is a lack of clarity about issues such as the extent to which mediators should intervene to redress power-imbalance and whether mediation should be compulsory does not mean ADR has a flawed theoretical framework (Buck 2005). ADR methods must be valued in context in order to produce meaningful reflections on success (Ibid. p.v). ADR (he says) now has a robust infrastructure. It is integrated in law school curricula, the legal professions are generally supportive of its development. It has been customised and used as a major technique by the Human Rights and Equal Opportunities Commission and in industry-based disputes.

Buck considers that concerns about power-imbalance may be alleviated by customisation. He also argues that the success of ADR will depend upon the quality of mediators. He refers to a review by Mack (Mack 2003) of ADR in the Australian Federal Court system, which concluded that it is not possible to regularly 'match' particular types of dispute with particular ADR models, and that each court or tribunal must develop its own referral process and criteria taking into account programme goals, users, culture, resources and available service providers. Mack's review found that, where courts had developed their own systems, there were high levels of satisfaction that varied little according to whether mediation is voluntary or compulsory.

Buck concluded that what is required is a system that is sufficiently sensitised to identifying appropriate routes of dispute resolution in their individual contexts. He also concluded that:

In the realm of administrative justice, a great challenge remains to ensure that there are sufficient safeguards to ensure that significant legal rights are not jeopardised by the promise of expedition and costs savings held out by an increased use of ADR. (Ibid. p.vii).

A successful example of customisation of ADR is the form of rights-based conciliation arranged by the Disability Rights Commission (DRC)¹⁷⁰. Access to conciliation was through a helpline. Caseworkers assessed the circumstances of the case and decided the appropriate form of dispute resolution. Appropriate cases were referred to rights-based conciliation. This was contrasted with mediation as follows:

Mediation can be seen as a process that actively promotes its independence, neutrality and confidentiality. Mediators don't take sides, don't offer advice, and seek to neutralise power imbalances.

Within rights-based conciliation, the process is not premised on equality between the parties, but on the fact that obligations exist between them.

The DRC puts the rights of disabled people as a non-negotiable issue within the conciliation process. The conciliator must be active to ensure the service-user's issues are addressed, be active in suggesting ways in which the service-provider might meet their obligations and be clear whether a proposed solution would uphold the service-user's rights [...] in this way mediation achieves a just resolution, as opposed to just a resolution.¹⁷¹

In addition to referring cases to Mediation UK for 'formal' conciliation, DRC caseworkers resolved cases through a range of methods, including negotiation and provision of advice. In their first year, the DRC referred 146 cases to formal conciliation, 60% of which settled through telephone 'shuttle' conciliation. In 2002/3, 140 new cases were referred to conciliation with an overall settlement rate of 79%. Conciliation was encouraged, and its advantages heralded in terms of cost and speed. In the first three years of the Disability Discrimination Act 1995, only 43 Part III cases were commenced in the civil courts. 240 disputes were referred to conciliation. The DRC published on their website digests of the outcomes of cases as 'success stories', and 'name and shame' articles identifying organisations refusing to comply with their obligations towards disabled people. The DRC endorsed ADR unreservedly:

In short, whilst the DRC entirely recognises the value of litigation and law enforcement in the achievement of justice for individuals and in the pursuit of broader social change, it is discovering in its own work that those objectives are in many instances served as well by alternatives to the legal process, whether formal conciliation or problem-solving

¹⁷⁰ The DRC is now part of the Commission for Equalities and Human Rights

¹⁷¹ www.mediationuk.org.uk. The website no longer exists.

casework. It is a function of the DRC's modern outlook that it will continue to encourage its existing ADR initiatives as an effective way of securing rights for disabled people and thereby promoting the spirit as well as the letter of the DDA ... What is conciliation? Conciliation is a "win/win" approach - it is about finding a solution which satisfies everyone¹⁷².

The model provides an example of how management of cases and overt intervention on the part of the mediator has increased the number of settlements whilst ensuring that rights are protected. The model envisages screening of cases to determine suitability, assures monitoring of outcomes, and enables the strengths of ADR to be realised without risk of disadvantage due to power-imbalance. Cases are only taken to court when necessary to establish points of legal importance, and as a last resort where organisations refuse to comply with the law. The majority of disputes are resolved by talking to people and persuading them of the error of their ways. Conciliation is favoured by the DRC not simply because of the quantity of settlements but because of their quality. The attraction of ADR is its capacity to deliver outcomes that transcend the formal limitations of judicial remedy. ADR settlements can achieve results that get to the heart of the matter in a way that compensation awards rarely achieve.

This model of case management and rights-based conciliation overcomes concerns about the 'wrong' cases being mediated and the risks of disadvantage caused by power-imbalance. It would therefore appear to be a promising model in the SEN context. In considering whether the information from the ongoing studies of SEN mediation might alter this conclusion, it is difficult to see how it could. The studies will not be able to conclude that there is no risk of parents being disadvantaged by being the weaker party or of resolution being agreed in individual complaints whilst systemic abuse is allowed to continue unchecked because mediation, as it currently operates, allows both. The studies might conclude that it is not cost-effective for mediation to continue to be offered in view of low take-up. In light of the potential benefits mediation can bring, consideration might be given to 'customisation' and case management in deciding the future of SEN mediation. Case management might encourage take-

¹⁷² www.drc.gov.uk. The site no longer exists.

up and increase the use of mediation services so that they provide better value for money.

5.3.2.7. Comment

Mediation has been shown to be successful in Australia where it is mandatory. Take-up in the English Civil and Family jurisdictions has been low, despite covert and overt pressure to engage. The Genn 2007 study highlights that motivation and willingness of the parties to negotiate and compromise are critical to the success of mediation. It appears more likely that these can be encouraged within a dispute resolution system that operates within a culture of listening to concerns and facilitating resolution.

Buck's observations on customisation and management are significant. They suggest that, even if there are concerns about power-imbalance, or the 'wrong' disputes being mediated, those concerns may be addressed, enabling the advantages of mediation to be realised without the risk of adverse consequences. If PDR envisages that choice of dispute resolution mechanism is to be driven by desired outcomes in the form of either agreements or adjudicated decisions, its objective of accuracy implies a need to ensure informed choice of process, and that negotiations proceed from the basis of an awareness of entitlements.

If mediation works effectively and cases are appropriately settled at an early stage, this may benefit all involved. But if significant legal rights are not to be jeopardised by the objectives of expedition and costs savings, mediation needs to be customised appropriately to ensure this does not happen.

5.4. CONCILIATION

5.4.1. Advantages and disadvantages of conciliation

The advantage of conciliation is that it can comprise many different forms – a telephone conversation, a meeting, liaison by an intermediary such as an Independent Parent Supporter or representative from a voluntary organisation. In section 5.4.3., a system of internal review is described as conciliation. It would be impractical to preclude conciliation from any dispute resolution

system, although it is the process in which there is the greatest risk of manipulation by the more powerful party.

If the parents' complaint that their child needs more one-to-one tuition can be solved by ringing up the LEA, it would be a nonsense for the system to require that the LEA's response to the phonecall would be not to attempt to resolve the problem, but to tell the parents that the matter must be dealt with by way of either mediation or an appeal to the SENDIST. The advantages of parents being able to secure additional tuition on the basis of a phonecall are obvious. The questions, then, as with mediation, are whether, and how, the benefits may be derived whilst obviating the risk of the weaker party being disadvantaged. Given that conciliation may take any form, this can really only be assured by operation of the 'right' culture.

5.4.2. The Parent Partnership Service (PPS)

"When I called in the PPS, the school stopped working against me and apologised".

"Schools still do not tell people the PPS is in operation".

"It is excellent...it is a voice to represent those who don't feel confident or articulate enough to get the best for their child...parents can gain more information about procedures". (Woolfendale and Cook 1997 pps 99 and 100).

The SEN Code of Practice 2001 states that all LEAs must make arrangements for parent partnership services:

It is essential that parents are aware of the parent partnership service so that they know where they can obtain the information and advice they need. LEAs **must** therefore inform parents, schools and others about the arrangements for the service and how they can access it. LEAs **must** also remind parents about the parent partnership service and the availability of disagreement resolution services at the time a proposed statement or amendment notice is issued (Ibid. para 2.10).

PPSs have the principal role of facilitating conciliation between parents and LEAs.

During 1994-97, the DfEE grant-funded LEAs to encourage parental participation in the process of assessing their children's SEN. Most set up PPSs, but they operated differently in different areas. Some LEAs provided the service through employed staff and volunteers; others through voluntary organisations. In 1996, the DfEE commissioned a study of PPSs (Woolfendale and Cook 1997) which focused on 25 LEAs. A number of activities were found to be common in the different models: preparation and distribution of written materials for parents on SEN procedure; initiation of a 'Named Person Scheme'¹⁷³; and the creation of a key post of Parent Partnership Officer (PPO). There was evidence that PPSs had helped LEAs to work in partnership with parents, but there had been little progress with schools, and PPSs were generally becoming involved only at the statutory assessment stage.

The study concluded that there was a need for any PPS to be part of the core functions of the LEA, and to offer impartial support to parents. The research findings indicated that this was problematic for parents. Some accepted that the PPS needed to be located within the LEA to influence the LEA, whilst others thought that the PPS service should be provided by a voluntary organisation. The researchers suggested that this was an issue that needed to be resolved locally. They suggested that Named Persons needed support; that their role should be made clearer, and that they should be paid out of pocket expenses. They also recommended that the preventative role of the PPS in mediation, negotiation and conflict resolution should be enhanced.

In the first year of operation, the number of referrals to PPSs varied between 0 in one LEA and 350 in another. In all but one LEA, the number of referrals increased significantly in the second year. In addition to identifying many benefits to parents through responses to questionnaires, the researchers also identified factors inhibiting parents from accessing the PPS. These were:

- issues associated with ethnicity/cultural barriers, and lack of ethnic diversity amongst PPS staff;
- schools not passing information to parents;

¹⁷³ 'Named persons' were volunteers who gave parents information and advice on their child's SEN (Code of Practice 2001 p.128). They are now called Independent Parent Supporters'.

- parental perception that schools were against contact with the PPS;
- parental attitude to lack of independence from the LEA;
- lack of resources to cover parental need (all parents who participated cited this);
- communication breakdown;
- parents having literacy problems;
- unwillingness on the part of parents to become involved with another layer of bureaucracy;
- parental attitude to their child's difficulties;
- lack of parental time to be involved with more professionals.

There are also the 'silent' parents – those who did not respond to any communication from the LEA or PPS.

All PPSs provided advice about SEN and the statutory process. Only one regularly represented parents at tribunal; some never attended LEA meetings with parents, never visited schools on behalf of, or with parents, and never contacted other agencies on parents' behalf. The study recommended that services should be widely advertised in schools and in the community; PPSs should retain independence of judgment in advising parents; they should operate a quality assurance model, and there should be an annual report.

PPSs saw their services as crucial and indispensable, and were concerned that they lacked the resources to reach more parents. A number of services offered by PPSs assisted parents to assert themselves, and enabled them to assume a central role in reaching decisions about their children. As with mediation, initial funding to set up partnership arrangements ceased after three years. Some PPSs were disbanded. But many LEAs allocated funds unequivocally to maintain the service.

A further study was commissioned by the DfEE in 1999. This consisted of a study of 26 schools operating in 6 LEAs. It revealed that PPSs were becoming involved in planning and contributing to training courses for school staff. PPSs with closest links to schools were LEA based, giving them 'credibility'.

Although voluntary organisations were uniquely placed to promote partnership with parents, there were tensions between these organisations and LEAs/schools because the voluntary organisations adopted an advocacy based approach. There were many different models of PPS in operation. They differed as to whether they focused upon working with parents in groups or as individuals, and whether they adopted an advocacy, conciliation or facilitating role. Some had few links with schools, others worked directly with the LEA and school staff to influence practice.

The report concluded that PPSs are in a unique position to promote partnership with parents, but suggested that certain questions needed to be addressed: whether parents should be worked with in groups or as individuals; whether partnership with parents involves working with professionals and parents; and whether partnership is best promoted by targeting the parents of all children, or just those whose child has SEN. It also concluded that the advocacy based approach adopted by voluntary organisations commissioned by LEAs occurred at the expense of broader developmental activities with the LEA and schools. Although it was stated that there was scope for debate at local and national level, the report recommended an LEA-based service with links to schools and which informs local practice, rather than an advocacy-based service. The argument for this was that partnership should be embedded in local policy and practice. It therefore needed to be embedded in local education structures. An advocacy-based approach fosters a ‘them and us’ situation between parents and professionals that is counterproductive to the promotion of partnership.

The advice to parents on Directgov is that PPSs provide ‘accurate and neutral information on the full range of options available... training to guide you through SEN procedures, or link you to organisations who can help’. They can help to prevent difficulties from developing into disagreements, and with access to informal arrangements for disagreement resolution.

Independent Parent Supporters (IPSs) help by:

[...] listening to your worries and concerns; providing you with ongoing and general support; helping you understand what is happening during

SEN procedures [...]; explaining your rights and responsibilities; helping you to prepare for and attend visits and meetings; helping you make phone calls, fill in forms, write letters and reports; helping you to express your views and communicate with schools and LEAs; finding further sources of information, support and advice¹⁷⁴.

A further study conducted in 2006 (Rogers 2006) revealed that there were still wide variations in practices and outputs within PPSs. Other findings were that: the service is valued by parents and rooted in a culture committed to partnership; the level of service provided was linked to resources; and that there was inconsistency in the numbers of IPSs and the roles assigned to them. The original intention was that IPSs would be involved in casework and fulfil a key role. But, in some areas, their role is restricted to undertaking less complex casework and managing help-lines. This is due to concerns about relying upon unpaid staff to conduct complex and demanding work.

There remained evidence of failure to extend relationships to schools and hard to reach parents. Because LEAs are not equally convinced of the benefit of PPSs and therefore fail to resource them adequately, the researchers concluded that this threatened the equality agenda set out in the Audit Commission's 2002 report (Audit Commission 2002b). One of the recommendations was that there should be a minimum staffing requirement of one strategic worker, one caseworker and one person providing administrative support, and that smaller LEAs would either need additional funding or to work collaboratively with other LEAs in order to deliver a reasonable range of services. The SEN Toolkit suggests that IPSs should attend mediations with parents to offset problems of power imbalance. It appears this service may not always be available.

Following this report, the DCSF devised standards for PPSs to enable compliance to be assessed on inspection by Ofsted. The objective of introducing these standards was to increase parental confidence in the service. The standards include requirements that the service must have a developmental plan and the resources necessary to deliver the targets it sets out; and that parents must be provided with accurate, neutral information on their rights and the range of options available for their child's education. Where appropriate, and in

¹⁷⁴ www.direct.gov.uk/Education.

conjunction with their parents, the ascertainable views and wishes of the child should be taken into consideration. An example of best practice is that all parents should have access to an IPS who is appropriately trained. PPSs should have clear policies setting out how they operate impartially and at arms' length from the LEA, with separate offices, logo and monitoring arrangements.

5.4.3. Other Examples of Conciliation Arrangements

Gersch provides some examples of conciliation arrangements in operation (Gersch 2003). The first was a service operated by the educational psychology service in an Outer London Borough which conducted reviews of decisions parents were unhappy with. In 12 out of 31 cases analysed, conciliation prevented appeals to the SENDIST. Where reviews were successful, there was a high level of satisfaction on the part of parents in terms of both process and outcome, but some did not view the service as impartial. It was considered to be quick and efficient. Of the cases resolved, 26% were resolved without a face-to-face meeting and 37% involved only one meeting.

Features valued by parents were efficiency, accessibility, specialisation, and the feeling of being listened to. Educational Psychologists considered the question of impartiality and independence problematic – particularly since the Principal Educational Psychologist (PEP) was an 'influential' member of the decision-making panel. The PEP considered that having specialist knowledge of SEN in the Borough was essential in operating the service. In 75% of the cases resolved, the outcome was what the parents requested, and in 25% of cases the outcome involved 'more creative problem-solving'. Not all cases resolved in favour of parents had resource implications for the LEA. It was considered that disputes can be avoided where there is good communication with parents, where they are involved in the process from the outset, and where there is an effective PPS.

Parents said they wanted from the LEA:

- more information;
- greater transparency in decision-making;
- to be listened to and have their views taken into account;

- improved clarity about the operation of the administrative process and in the wording of statements.

The second example involved an Inner London LEA. In 2003, that LEA had only had 2 appeals to the SENDIST. It was said that this might have been due to the high proportion of parents for whom English was their second language feeling daunted by the appeal process, but that the LEA would like to think that there were so few appeals because the SEN team had a strong ethos of 'listening' and parental involvement. Their core values were about acknowledging and appreciating parents' thoughts and concerns. New members of staff, when being trained, were asked to put themselves 'in the shoes of parents.' (Gersch 2003 p.74).

Parents were invited to contact the head of the SEN service at every point of communication in the assessment process, and this person met with all parents at the point of a proposed statement:

In many instances parents have had to wage war, probably since their child was born, against a range of different agencies in order to secure the provision of what their child needs. They may have built up an expectation of an adversarial stance to fight for the rights of their child. (Gersch 2003 p.75).

An example of a successful conciliation was where a parent was persuaded not to appeal to the SENDIST because the LEA agreed to purchase her son a laptop to help him with spelling and concentration problems.

This is probably an illustration of how an appropriate culture can operate effectively to facilitate resolution of disputes and prevent the escalation of conflict. It could also be an illustration of the exclusion of entire communities from the formal system. If this LEA were manipulating their position (and this is not suggested), this would not be apparent. There is no involvement of independent persons in decision-making or monitoring of agreed outcomes.

5.5. EVALUATION

Mediation conciliation and rights-based conciliation are evaluated using the methodology in Chapter Four.

5.5.1. Mashaw's models

Mediation and conciliation in the SEN context follow the bureaucratic rationality model in the sense that they are internal redress mechanisms. There are elements of the moral judgment model in relation to the focus upon individuation, but mediation and conciliation do not incorporate the features of due process featured in this model. Adler (2003 and 2006) developed and adapted Mashaw's models of administrative justice. His models are entitled 'bureaucratic', 'professional' and 'legal', which broadly equate to the bureaucratic rationality, professional treatment and moral judgment models, but he adds two further models – 'consumerist', and 'managerial'. Redress systems for the consumerist model are characterised by a focus on customer satisfaction – allowing the complainant's voice to be heard. Mechanisms are not independent and are closely linked to service provision. Redress mechanisms for the managerial model envisage informing future actions and resource allocation. There is a need for careful record keeping. Mediation and conciliation most closely reflect the characteristics of Adler's consumerist model.

In terms of whether mediation and conciliation fulfil Mashaw's goals:

- rational exercise of discretion – mediation and conciliation provide no assurance of this. The outcome may be anything agreed by the parties. Rights-based conciliation should ensure this;
- an opportunity for claimants to influence decisions and to complain – mediation, conciliation and rights-based conciliation afford an opportunity to complain. The strengths of informal processes lie in enabling the parties to say what they wish without the confines of a formal structured adjudicative hearing focusing on legal entitlement. The resolution is consensual, and so will be influenced by the complainant unless he has been intimidated or exploited. This should not happen in rights-based conciliation;

- assurance that outcomes of complaints will influence future practice - there is no guarantee of this in relation to conciliation. In relation to mediation, the Toolkit recommends that LEAs seek feedback from mediation services to enable changes to be made in policy and practice to avoid future disagreements. It appears regional services produce reports for LEA, but it is not known whether LEAs change their practice as a result of these reports. Perhaps the ongoing studies will provide information on this. Rights-based conciliation, as operated by the DRC, did assure this. Embracing the culture of mediation and conciliation may influence decision-making generally. Where parents are successful in mediation, this may influence future LEA decisions in relation to their child;
- reduction of conflict – conciliation, mediation and rights-based conciliation have the potential to resolve disputes quickly, and so prevent escalation of conflict. It is not known whether settlements endure. The ongoing studies might provide information.

In relation to Mashaw's process-values:

- equality – SEN mediation *may* assure equality if parents are able to have an IPS with them. If not, whilst the mediator maintains a neutral stance, there is a risk that parents may be disadvantaged and that this will remain undetected because mediations are conducted in private with no external monitoring of outcomes. Rights-based conciliation assures equality. In relation to conciliation facilitated by the PPS, advice and assistance is provided to place parents on a more equal footing. There is no guarantee of equality in other forms of conciliation. No independent person is present and agreements are not recorded;
- transparency – only rights-based conciliation assures transparency. Mediation and conciliation are conducted in private. There is no legislative obligation to record the existence of disputes, their nature or outcomes. Regional providers produce reports on the operation of mediation services, but these have not been evaluated for the last eight years;
- privacy – this is assured;

- humaneness – where mediation operates fairly, arguably it is the most ‘humane’ of all the mechanisms described. Its essence is that it allows the parties to relate to one another on a human level. It can provide empowerment; the opportunity to get to the true cause of a problem, and for a wrong to be acknowledged and apologies made. On the other hand, exploitation conducted in a private setting is not humane. Rights-based conciliation assures humaneness. Whether or not conciliation provides humaneness would depend upon its form and outcome. To increase a child’s tuition following a phone call from parents is humane, but to suggest in a phone call that the child is getting more than his entitlement and that there is nothing the parents can do about this may be manipulation of a person who is in a weaker position due to lack of knowledge about obligations;
- appropriate symbolism – does not apply. In choosing informal mechanisms, people forego the legitimating symbols of binding decisions arrived at following a formal adjudicative process. This is why it is essential that the system ensures that this choice is an informed one;
- participation – is assured, though meaningful participation is not because, in mediation and conciliation, there is no guarantee that the disadvantages of power-imbalance will be overcome. Rights-based conciliation assures meaningful participation.

5.5.2. Collective goals and individual interests

Mediation and conciliation afford opportunities for parents to bring concerns about their child to the attention of the LEA, so it might be assumed that the focus would be on individual interests. However, the mediation case study referred to in section 5.3.1.3. shows a bargaining process centred on resources. The purpose of saving resources in individual cases is to ensure they may be more equitably distributed elsewhere. The extent to which collective goals will feature will depend upon their champion – the LEA - so advancement of collective interests will depend upon LEA’s dominance. Ironically, it appears that the exploitation of parents, as the weaker party, may assist the collective objective.

Although the argument in this thesis is that more emphasis should be placed upon collective goals in SEN appeals in order to ensure greater overall equality, advancement of collective goals through domination of parents in closed session is not advocated. Rights-based conciliation would ensure this does not happen. Arguably mediation could be a vehicle for LEAs to help parents to understand the overall purpose of collective goals.

5.5.3. PDR Goals

MEDIATION, CONCILIATION AND RIGHTS-BASED CONCILIATION – ATTAINMENT OF PDR GOALS

	MEDIATION	CONCILIATION	RIGHTS-BASED CONCILIATION
Cheap for Appellants	Probably.	Yes.	Yes
Quick	Yes.	Yes.	Yes.
Uncomplex	Probably.	Yes.	Yes.
Misconceived and trivial complaints rooted-out quickly	Yes.	Yes.	Yes.
Accuracy	Possibly if parents are assisted by IPS.	Possibly. If parents are assisted.	Yes.
Changes feed back	Yes.	No.	Yes.
Cost-effective to the State	Yes.	Yes.	Yes.

Rights-based conciliation is included in this table to illustrate the difference ‘customisation’ makes. The answers call for justification. Mediation, conciliation and rights-based conciliation are cheap for appellants. There are no process fees; legal representation is discouraged, and precluded in mediation. But parents may need their own expert reports to establish a basis for arguing that the child’s needs are not being met (it is for this reason that it is cited, in the next table, as being less cheap than the LGO).

Mediation, conciliation and rights-based conciliation can be arranged quickly. The issue of whether they can be considered uncomplex is a difficult one. In mediation, this will depend upon the nature of the dispute and the skills of the

mediator. There is evidence in the Exeter study (University of Exeter 2004a¹⁷⁵) which suggests that SEN mediators may not be specialists. If IPSs attend mediations with parents, they might assist parents with complex issues. Conciliation should be uncomplex, but this will depend upon the form it takes. Rights-based conciliation will be uncomplex because the mediator assists the weaker party.

Mediation and rights-based conciliation have the potential to resolve misconceived and trivial complaints quickly. Conciliation may resolve misconceived or trivial complaints without the need for mediation. The difficulty is that quick resolution is not limited to misconceived and trivial complaints, whereas case management in the model of rights-based conciliation operated by the DRC ensures the 'right' cases settle. LEAs are supposed to seek feedback from mediation services to enable changes to be made to avoid further disputes. It is not known whether this is happening. In the rights-based model operated by the DRC, learning from disputes was an important feature. There is no assurance that any agreements reached by conciliation will influence future practice. LEAs may be persuaded of the benefit of compromise generally where it achieves what they perceive as satisfactory outcomes.

Successful mediation and rights-based conciliation should be cheaper for the State than formal mechanisms, but this has not been established for mediation. If regional providers are being under-used, there may be value for money issues. The DCSF are evaluating this. The cost of conciliation will depend on the form it takes. Meeting and talking to parents should not involve additional costs. PPSs must be resourced, but IPSs are unpaid volunteers. The Gersch model involving the educational psychology service should not have involved additional cost because psychologists are LEA employees. In mediation and conciliation, accuracy and decisions influencing future practice are traded-off for cost-effectiveness for parents and the State and expedition. This is not the case in rights-based conciliation, which attains all of the PDR goals. This illustrates the effectiveness of 'customisation'.

¹⁷⁵ See pps. 182-4 of the thesis.

A comparison between mediation and conciliation and formal mechanisms in terms of relative weightings is set out below. Scores are 1, 3, 5, 7 and 9. The LGO remains the ‘winner’, but conciliation is a close second. Rights-based conciliation is not included in the table because it is not part of the SEN dispute resolution system.

ATTAINMENT OF PDR GOALS (2)

	SENDIST	LGO	COURT	MED	CON
Cheap for Appellants	3	7	1	5	9
Quick	3	1	7	5	9
Uncomplex	7	9	1	5	3
Misconceived and trivial complaints rooted-out quickly	1	7	5	3	9
Accuracy	7	9	5	3	1
Changes feed back	3	9	7	5	1
Cost-effective to the State	5	3	1	7	9
TOTALS	29	45	27	33	41

Conciliation is considered the cheapest mechanism for appellants. The LGO is considered cheaper than mediation for the reasons explained above. Mediation would probably be cheaper than the SENDIST because it would be convened locally and there would be no costs for the attendance of expert witnesses.

Conciliation is quickest. Mediation is arranged more quickly than a SENDIST hearing, though less quickly than an urgent application to the court. An LGO investigation is the lengthiest procedure.

This issue of complexity is not straightforward because the complexity of any process depends upon the nature of the dispute. A complaint that the LEA is in breach of statutory time-limits should be a straightforward question of fact, whereas a dispute about provision where there is conflicting expert evidence might take more unraveling. Relative weightings in terms of complexity are, therefore, judged in accordance with the extent to which parents are assisted to engage with the process. Parents get the most help in LGO complaints. This is followed by SENDIST where they also receive considerable assistance.

Mediation is rated as less effective in reducing complexity for parents than the SENDIST because it is unclear whether all parents who want help from an IPS will get this. The impartial and non-adjudicative role of the mediator make proactive intervention to assist weaker parties problematic. Conciliation also scores low using this methodology of rating because there is no assurance that parents will be assisted in one-to-one informal discussions with the LEA, though it is accepted that, on a practical level, conciliation may be uncomplex depending upon its form and the nature of the dispute. In terms of the Administrative Court, as stated in the previous Chapter, judicial review applications involve the most complicated and formal procedures. Albeit that a judge may provide some assistance to unrepresented applicants, the hurdles for such applicants in terms of complexity are difficult to surmount effectively.

Conciliation scores highest in rooting-out misconceived and trivial complaints because it has the ability to do this quickly. Mediation is considered less-effective than the LGO because the mediation would need to take place in order for this to happen, whereas the LGO would determine whether to refer the matter back for local resolution, refer it elsewhere or decide to conduct an investigation simply on the basis of the complainant's letter or a dialogue in correspondence with the parties. Because mediation takes place at an earlier stage than the SENDIST hearing, it is considered more effective in this regard than the tribunal because the SENDIST does not employ a filter other than refusing to register appeals that ask the tribunal to do something it cannot do. This is not the same as considering whether a complaint can be settled easily or whether there is an arguable case to be considered, which is the function of the pre-action protocols and the permission stage in judicial review applications. Filtering-out occurs at an early stage in urgent cases.

In terms of accuracy, conciliation scores lowest followed by mediation because there is no guarantee that the outcome will reflect the correct application of the law to relevant facts. It is simply an agreed outcome. Conciliation and the SENDIST score lowest on changes feeding back to influence future decisions. Mediation and conciliation score highest in terms of cost-effectiveness to the State (where they are successful).

5.5.4. Adequate redress

The table below speaks for itself.

ABILITY OF MEDIATION AND CONCILIATION TO DEAL WITH ADLER'S COMPOSITE TYPOLOGY OF ADMINISTRATIVE GRIEVANCES

	Composite Category	MED	CONC
C1	Decision wrong or unreasonable	Yes.	Yes.
C2	Administrative errors	Yes.	Yes.
C3	Unacceptable treatment by staff	Yes.	Yes.
C4	Unacceptable delays	Yes.	Yes.
C5	Information and communication problems	Yes.	Yes.
C6	Benefit/service unavailable or deficient	Yes.	Yes.
C7	General objections to policy	Yes.	Yes.
C8	Other types of grievances	Yes.	Yes.

This illustrates a significant advantage of informal mechanisms – they enable redress of all forms of complaint in one arena, increasing the prospect that all aspects of a complaint will be resolved. A model that assures management, monitoring and support for parents in conciliation and mediation – either in the form of an adviser/advocate or by way of overt recognition that the function of the mediator is not that of a neutral facilitator, but a facilitator of compliance with obligations towards children – might fully realise the potential of these mechanisms. But what is emerging is the importance of culture. The system must operate in a way that will persuade complainants of the value of early resolution. In order for this to happen, LEAs must believe in its value themselves.

Proportionate dispute resolution or justice on the cheap? Mediation and conciliation assure attainment of many PDR goals. It appears they could achieve all of them if operated within a managed system that provided support for parents. Otherwise, there can be no assurance of ‘justice’, in terms of fair outcomes, in light of the risk of power-imbalance. Whether SEN mediation is cheap has yet to be properly established.

Chapter Six

PDR, Adequate Redress and a Unified System of Children's Complaints

6.1. CHAPTER SUMMARY

Thus far, the analysis reveals that none of the formal SEN dispute resolution mechanisms attain all of the PDR goals. Neither is any able to afford adequate redress in terms of having jurisdiction to consider all of the types of administrative grievances identified in Adler's typology. Mediation and conciliation bring a considerable amount to the table in terms of being high in the PDR goal-attainment stakes and enabling all aspects of a dispute to be dealt with in one forum. But their introduction does not improve the PDR goal-attainment and adequate redress prospects for the system as a whole. Parents are able to choose between binding enforceable outcomes and agreed solutions. But unless all of the formal mechanisms are fully PDR goal-compliant and afford adequate redress, all that is achieved by the introduction of mediation and conciliation is the choice to make different trade-offs.

There is a model in operation incorporating dispute resolution mechanisms that attain each of the PDR goals and have jurisdiction to consider all of the grievances in Adler's typology. The strengths and weaknesses of the model are considered, and it is examined in detail with reference the framework derived from the works of Mashaw and Adler; attainment of PDR goals; and the trade-offs between goals. The possibilities for using the model as the basis for a unified system of education and children's services complaints are considered. Unification is both the objective of PDR's 'one-door' approach and a recommendation of the Select Committee's 2006 Report. The Chapter is divided into two sections – an alternative model and a unified system.

6.2. AN ALTERNATIVE MODEL – THE CHILDREN’S SERVICES COMPLAINTS PROCEDURE¹⁷⁶

An initial complication, which is not relevant to the discussion of whether the children’s services complaints procedure (CSCP) is a better model than the current SEN appeals system, but which needs explaining, is that there are two systems for complaining about provision of local authority social services – one for adults and one for children. Though set up under different legislative regimes, the model is essentially the same except that the adults’ procedure does not guarantee advocacy for complaints. Some complaints about children’s services must be made under the adult procedure. Before the alignment of children’s social services and education services under a single Director of Children’s Services¹⁷⁷, adults and children’s social services complaints were operated as one system, although enacted under different legislation. Some research applies to both, and research about the operation of the adults’ social services complaints procedure can be used to provide information about children’s services complaints. Functions of determining adults’ and children’s social services complaints are now divided between Social Services and Education Departments at local authority level and between the DoH and the DCSF at Central Government level. Amalgamation of health and social services complaints is envisaged to enable a seamless system for adults.

Consultation has been undertaken in relation to the operation of children’s services complaints about what is wanted from a complaints procedure. The concerns and aspirations that emerged are described, as are the revisions made to the model in order to take these into account.

6.2.1. The Model

Local authorities must appoint an independent Complaints Manager to deal with representations and complaints. The child, anybody appropriate representing him, his parents and anybody with sufficient interest may complain. Complaints may be about:

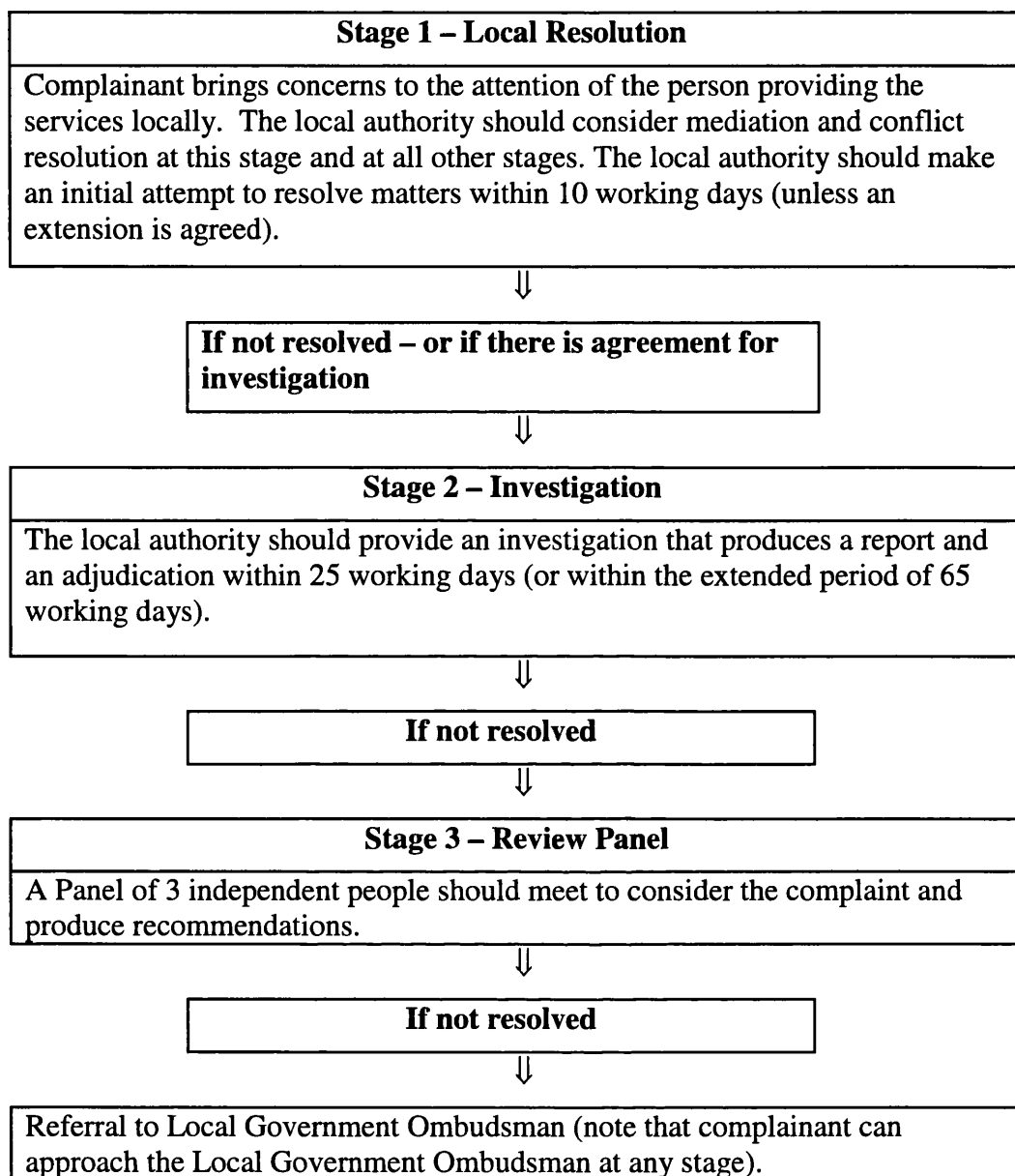
¹⁷⁶ The procedure is set out in the Children Act 1989 Representations Procedure (England) Regulations 2006 and in guidance entitled ‘Getting the Best from Complaints’ (2006).

¹⁷⁷ See the Children Act 2004.

- an unwelcome or disputed decision;
- the quality or appropriateness of a service;
- delay in decision-making or provision of services;
- provision, or failure to provide services including complaints procedures;
- quantity, frequency, change or cost of provision;
- attitude or behaviour of staff;
- application of eligibility and assessment criteria;
- the impact on a child or young person of the application of a local authority policy; and
- assessment, management and review.

Where a complaint is received from a representative acting on behalf of a child or young person, the local authority should normally confirm where possible that the child or young person is happy for this to happen and that the complaint submitted reflects his views. The procedure consists of local resolution followed by investigation followed by review by an independent panel all within fixed timescales. The model is set out below:

PROCEDURE FOR CHILDREN'S SERVICES COMPLAINTS



The key principles are:

A good procedure should ensure that children and young people who make representations have their concerns resolved swiftly and, wherever possible, by the people who provide the service locally. The complaints procedure should be a useful tool for indicating where services may need improving. It is a positive aid to inform and influence service improvements, not a negative process to apportion blame.

Local authorities should develop a listening and learning culture where learning is fed back to children and young people who use services – and fed into internal systems for driving improvement. The same listening and learning culture should shape wider opportunities for working in partnership with children and young people, such as

individual reviews and systematic quality assurance. It should give children and young people opportunities to tell the local authority about both their good and bad experiences of the service. (Getting the Best from Complaints 2006 para 1.5.).

The Complaints Manager

[...] should be independent of operational line management and of direct service providers (e.g. children's social work). Issues around possible 'conflict of interest' need to be considered when organising local structures [...] should be sensitive to the particular challenge of regular involvement with children and young people who are likely to be distressed or angry [...] should also take an active role in facilitating resolution of complaints by identifying appropriate colleagues and external people (including Investigating Officers and advocates) to contribute to complaints work [...] [and] should foster good working relationships with key bodies and partner agencies. (Ibid. Para 1.6.).

The existence of the complaints procedure must be published widely to create awareness of its existence. 'Complaints' include 'representations'. A complaint may be made to any member of staff, verbally or in writing (including electronically). The Complaints Manager (CM) must be informed as soon as possible so that the complaint may be monitored. It may not be necessary to engage the complaints procedure if the complaint can be resolved immediately, but a complaint will always be recorded. As soon as it becomes apparent that a person wishes to make a complaint, they must be given information about the procedure. If the complainant is a child, the local authority must provide him with information about advocacy services and offer help to obtain an advocate¹⁷⁸. The CM should ensure that a suitable person meets the child or young person to discuss the complaints process and address any questions or concerns. Where an advocate is being used, the local authority must ensure that the advocate is acting with the informed consent of the child.

The expectation is that the majority of complaints should be considered (and resolved) informally at Stage One. Staff at the point of service delivery – including an Independent Reviewing Officer where appropriate – and the complainant discuss and attempt to address the complaint quickly by exchanging information, exploring the thinking behind decisions and trying to

¹⁷⁸ This is to be revised in the Children and Young Person's Bill to impose obligations upon local authorities to provide advocates.

agree a way forward (Ibid. para 3.5.). The child's advocate may be present. If the local authority or the complainant believe that it would not be appropriate to resolve the matter in this way, they should discuss this together. Where both parties agree, the complaint can move directly to an investigation.

Where the matter is not resolved informally, the complainant has the right to request consideration of the complaint at Stage Two. The CM ensures there is a full written record of the complaint. Where it has been made orally, the CM must ensure that the details and the complainant's desired outcome are recorded in writing and agreed with the complainant. He may do this in conjunction with the Investigating Officer (IO) and Independent Person (IP) appointed to conduct Stage Two. The CM should arrange for a full investigation of the complaint to take place without delay. He may request any person or body to produce information or documents to facilitate the investigation. Consideration of the complaint at Stage Two should be 'fair, thorough and transparent with clear and logical outcomes.' (Ibid. para 3.6.).

The CM appoints an IO to lead the investigation and prepare a written report for adjudication by a senior manager. The IO may be employed by the local authority or be brought in from outside. The IO must not be in direct line-management of the service or person about whom the complaint is being made. An IP (a person who has no connection with the authority) must be appointed to the investigation¹⁷⁹ and must be involved in all aspects of consideration of the complaint including any discussions about the action to be taken in relation to the child.

A copy of the complaint is sent to any person involved, unless doing so would prejudice its consideration. The IO has access to all relevant records and staff. Information should be released within the bounds of normal confidentiality and with regard to relevant provisions in the Freedom of Information Act, 2000 and the Data Protection Act, 1998. The investigation must be completed and the response sent to the complainant within 25 working days¹⁸⁰. Where it is not

¹⁷⁹ Regulation 17(2) of the 2006 Regulations.

¹⁸⁰ Ibid. 17(3).

possible to complete the investigation within 25 working days, Stage 2 may be extended to a maximum of 65 working days¹⁸¹. All extensions must be agreed by the CM. The guidance says that the important thing is to maintain dialogue with the complainant and, where possible, reach a mutual agreement as to what is reasonable where a response in 25 working days is not feasible (Ibid. para 3.6). The authority must inform the complainant as soon as possible in writing of the reason for the delay and the date by which he should receive a response¹⁸².

The IO writes a report including details of findings, conclusions and outcomes against each point of complaint (i.e. ‘upheld’ or ‘not upheld’); and recommendations on how to remedy any injustice as appropriate. The IP should also provide a report to the authority once he has read the IO’s final report. He may wish to comment on:

- whether he thinks the investigation has been conducted in an impartial, comprehensive and effective manner;
- whether all those concerned have been able to express their views fully and fairly;
- whether the IO’s report provides an accurate and complete picture of the investigation; and
- the nature of the recommendations.

The IO may make his own recommendations as necessary (Ibid. para 3.7).

A senior manager acting as Adjudicating Officer will consider the complaint, the IO’s findings, conclusions, and recommendations, any report from the IP and the complainant’s desired outcomes. He may wish to meet the child as part of the adjudication process or afterwards to explain the details of the adjudication i.e. the outcome of the complaint and any actions that he proposes. The local authority then write to the complainant with their response containing a complete copy of the investigation report; any report from the IP; the adjudication; and details of the complainant’s right to have the complaint submitted to a Review Panel if he is dissatisfied and that he has 20 working

¹⁸¹ Ibid. 17(6).

¹⁸² Ibid. 17(6).

days to make this request¹⁸³. The Adjudicating Officer should ensure that any recommendations contained in the response are implemented. The CM must monitor implementation and report to the Director of Children's Services on what action has been taken on a regular basis.

Where the complainant remains dissatisfied, he may request a review by a Panel. The function of Panels is to:

- listen to all parties;
- consider the adequacy of the Stage 2 investigation;
- obtain any further information and advice that may help resolve the complaint to all parties' satisfaction;
- focus on achieving resolution for the complainant by addressing his clearly defined complaints and desired outcomes;
- reach findings on each of the complaints being reviewed;
- make recommendations that provide practical remedies and creative solutions to complex situations;
- support local solutions where the opportunity for resolution between the complainant and the local authority exists;
- identify any consequent injustice to the complainant where complaints are upheld, and recommend appropriate redress; and
- recommend any service improvements for action by the authority. (Ibid. para 3.10).

The guidance states that Panels should not reinvestigate complaints, nor should they be able to consider any substantively new complaints that have not been first considered at Stage Two. It is said that no party should feel the need to be represented by lawyers. The purpose of the Panel is to consider the complaint and, wherever possible, work towards a resolution. It is not a quasi-judicial process and the presence of lawyers can work against the spirit of openness and problem-solving. However, the complainant has the right to bring a representative to speak on his behalf. The Panel should be alert to the importance of providing a 'demonstrably fair and accessible process for all

¹⁸³ Ibid. 17(8).

participants’ because many complainants, particularly children and young people, may find this stage to be a stressful experience. It is important that the Panel is ‘customer-focused in its approach to considering the complaint and child or young person-friendly’ (Ibid para 3.11).

The following principles should be observed for the conduct of the Panel:

- The local authority should recognise the independence of the Review Panel and, in particular, the authority of the Chair;
- Panels should be conducted in the presence of all the relevant parties with equity of access and representation for the complainant and local authority;
- Panels should uphold a commitment to objectivity, impartiality and fairness, and ensure that the rights of complainants and all other attendees are respected at all times;
- The authority should consider what provisions to make for complainants, including any special communication or mobility needs or other assistance;
- Panels should observe the requirements of the Human Rights Act 1998, the Data Protection Act 1998, and other relevant rights-based legislation and conventions in the discharge of their duties and responsibilities;
- The standard of proof applied by Panels should be the civil standard of ‘balance of probabilities’ and not the criminal standard of ‘beyond all reasonable doubt.’ This standard will be based on evidence and facts; and
- It will be at the Chair’s discretion to suspend or defer proceedings in exceptional circumstances where required, including the health and safety of all present. (Ibid. para 3.11.)

The local authority should be mindful of the specific needs of children and young people. They must ensure that:

- the Panel acts in accordance with the United Nations Convention on the Rights of the Child;
- the Panel safeguards and promotes the rights and welfare of the child or young person concerned;

- the wishes and feelings of children and young people are ascertained, recorded and taken into account;
- the best interests of children and or young people are prioritised at all times; and
- where the complaint is made by a person deemed to have a sufficient interest in the child's welfare, they should, where appropriate, seek the child or young person's views with regard to the complaint. (Ibid. para 3.11.)

The Panel must set out its recommendations to the local authority on any strategies that can assist in resolving the complaint. These may include financial compensation or other action within a specified framework to promote resolution.

The Panel must consist of three independent people¹⁸⁴. There are factors the authority should take into account in selecting Panel members set out in the guidance; regular training should be provided; Criminal Record Bureau checks must be carried out etc. The review must take place locally within 30 working days of receipt of a request¹⁸⁵. The complainant must be notified of the date and location in writing at least 10 working days before the Panel meets and be invited to attend. Panel papers should be sent to Panelists and other attendees as soon as these have been agreed by the Chair and no later than ten working days before the date of the Panel. These will include: information on Stage One (as relevant), the Stage Two investigation report(s), the authority's adjudication, any policy, practice or guidance information relevant to the complaint, and any comments that the complainant has submitted to the Panel. The complainant has a right to attend the Panel and should be assisted in attending as appropriate. He should also be informed of his entitlement to be accompanied by another person and that this person may speak on his behalf.

The Chair makes the decision on attendees (including asking the local authority to make specific members of staff available to provide specialist advice or

¹⁸⁴ Ibid. 19(2).

¹⁸⁵ Ibid. 19(4).

opinion). He should also decide whether additional policies or procedures should be circulated with the Panel's papers. The CM will attend. The Panel should be conducted as informally as possible, but in a professional manner and in an atmosphere that is accommodating to all attendees. This is particularly important where the complainant might be a child or young person. The need for other support in response to diversity and disability issues should be catered for.

Panel hearings should normally be structured in three parts: pre-meeting, presentations and deliberation. The pre-meeting is an opportunity for the Panelists and their administrative support to meet in closed session to discuss the order of business and any other relevant issues (e.g. taking legal advice). The hearing itself consists of the complainant, or his representative, and the local authority explaining their desired outcomes on the points of complaint. Panelists should then have sufficient opportunity to ask questions of all present and seek clarification on the issues being discussed so they are in a position to make recommendations regarding the outcome. The complainant, local authority and other attendees may also ask questions and raise points of information and opinion. The Panel should then go into closed session to deliberate on their findings and conclusions.

They are required to produce a written report containing a summary of the representations and their recommendations for resolution of the issues¹⁸⁶. They must send this to the complainant, the authority, the IP and any other person with sufficient interest within five working days of the Panel meeting. The authority's Director of Children's Services must send a response to the Panel's recommendations to the complainant (and other participants as necessary) within 15 days of receiving the Panel's report¹⁸⁷. If the Director deviates from the Panel's recommendations he should demonstrate his reasons. In developing his response he should invite comment from all the attendees including the Independent Person from Stage Two. The complainant must be advised of his

¹⁸⁶ Ibid. 20(3).

¹⁸⁷ Ibid.

right to refer his complaint (if still dissatisfied) to the LGO¹⁸⁸.

In *R v Avon County Council ex parte M*¹⁸⁹ Henry J made it clear that panel findings and recommendations should normally be adhered to by local authorities. The LGO has taken the view¹⁹⁰ that where a review panel's recommendations have not been properly implemented, despite an undertaking to do so, prima facie this would be maladministration. In the event of this occurring, complainants should be advised of their right to proceed immediately to the LGO. The guidance now makes clear that the Director of Children's Services is responsible for ensuring implementation and must state what action is to be taken, specify the timescales, or justify why he disagrees with recommendations.

There had been confusion about whether the existence of the complaints procedure precluded applications for judicial review. The Court of Appeal have provided guidance on this issue in *R v Birmingham City Council ex parte A*¹⁹¹ where it was said that judicial review would be available to grant applications for Mandamus in cases of severe delay in providing an appropriate service.

Williams made the following comment – even before the revisions to the model:

there can be little doubt that the complaints procedure has come a long way since it was first introduced by the Children Act 1989 and it has much to commend itself. It has enabled the genuinely aggrieved to bring their complaints to the attention of their local authority and, at least in the authorities of which the author has personal knowledge, has resulted in a number of changes of social service practice to the advantage of service users in general. (Williams, C. 2002).

6.2.2. Analysis of the Model

6.2.2.1. What is known about its operation¹⁹²

There have been problems with the operation of this model. Ongoing reform has been partly triggered by instance of high levels of dissatisfaction and low levels

¹⁸⁸ Ibid.

¹⁸⁹ [1994] 2 FLR 1006, at p 1019.

¹⁹⁰ Expressed in letters (dated 2 June 1998 and 18 May 1999) to complaints officers groups.

¹⁹¹ (1996) 40 BMLR 137.

¹⁹² This section considers research on adult and children's services complaints.

of complaints¹⁹³. Simons (1995) found problems with inconsistency and insufficient detail in the annual reports on complaints. This issue is now dealt with in the guidance. Quality assurance must be in place, and annual reports are looked at on inspection of social services: Coombs and Sedgewick described the complaints procedure as 'exhausting and demanding' (1998 p.48) - their recommendation was for advocacy services. These are now part of the process. Dean et al. (1996) found that Review Panels were unclear about the nature of their role. The guidance now makes this clear. Preston-Shoot's (2001) research revealed dissatisfaction; a lower level of complaints than might be expected, given the levels of dissatisfaction; lack of information and help; and perceived lack of independence. The children's services procedure now offers help and information from the CM, advocacy services and independent Panels.

Ferris (2006) found that some local authorities had been struggling to know how best to operate the complaints system, given the lack of detailed procedures and clear direction, and suggested that there should be national standards with which all authorities should comply. The procedure is now set out in detail, prescribing the standards and the recording requirements. This enables its operation to be judged on inspection. Williams and Ferris (2005) suggested that, although Panels may vary from one local authority to another, their competence has been endorsed by the LGO, and they present a more promising redress mechanism than the alternative of the Commission for Social Care Inspection (CSCI) undertaking the independent review function. Of particular concern in relation to the proposal that the CSCI should replace Panels was the involvement of a proliferation of dispute resolution mechanisms and the confusion this would cause for vulnerable complainants, the possibility of delay, and duplication of the original investigation¹⁹⁴.

Gulland, in her PhD thesis on community care disputes in Scotland, observed many operational problems (Gulland 2006). These are listed below, along with

¹⁹³ See for example Davis (1998); Nuffield Community Care Studies Unit (2002); Office of Fair Trading (2005); Oldman and Quilgars (1999); Parry (2004); Rummery (2002); Tanner (2001).

¹⁹⁴ Williams and Ferris were referring to proposals in the consultation document *An Independent Voice – New Social Services Complaints Procedure* (Commission for Social Care Inspection 2004).

how the reforms to the system in England will address such problems should they arise:

SOCIAL SERVICES COMPLAINTS - PROBLEMS AND SOLUTIONS

Problems	Solutions
Differences in the practice of recording complaints and lack of awareness of the procedure.	<ul style="list-style-type: none"> • all complaints must be recorded; • the existence of the complaints procedure must be made widely known; • those who wish to complain must be assisted to do so.
Confusion about 'formal' and 'informal' complaints, with some people wanting to make 'formal' complaints immediately; confusion about which stage of the model had been reached; and concern about failure to recognise something as an informal complaint.	<ul style="list-style-type: none"> • an option to forego the informal stage for people who want to make 'formal' complaints; • close central control by the CM who will know which stage has been reached and is responsible for driving the process forward towards resolution.
Delays in resolving complaints due to confusion about when the formal stage began.	The timescales and distinctions between the different stages are now much clearer ¹⁹⁵ .
Problems with complainants not being informed about the existence of Panels.	The revised procedures now require that, if complainants remain dissatisfied following an investigation, they must be told how to access the Panel stage.
Presence of a legal adviser from the local authority led to a perception that Panels were not independent*.	Panels are now comprised entirely of independent members.

*Complainants in the study who doubted the independence of the Panel were those whose complaints had not been upheld. Some complainants appreciated

¹⁹⁵ Because the regulations stipulate a time-limit, it is open to the complainant to bring an action in judicial review where there has been a breach. This was confirmed by the decision of Ward J in *R v Royal Borough of Kingston-upon-Thames ex parte T*. 1994 1FLR. 798.

the independence of the Panel and valued it; some saw the procedure as similar to being in court. Gulland's conclusions about Panels must be treated with caution because she was able to observe very few hearings. Also an English study has not raised concerns about Panels not being perceived as independent (Ferris 2006). Both studies found that, where complaints were upheld, the authority almost always complied with the recommendations of the Panel – this was described by Gulland as virtually a 'rubber-stamping exercise'. (Gulland 2006 p.221)

Gulland attempted to classify complaints using Adler's composite typology, which proved difficult. This was for the reasons alluded to in Chapter Four of this thesis – that a complaint may be about more than one of the identified grievances - and also because those interviewed might characterise a complaint in one way, whereas the complaint might be characterised differently on an objective basis.

Taking one example, failure to provide a service could be characterised as breach of a statutory obligation, or simply as delay. It might be unclear what the problem is, and there might be differing views on the cause. The highest percentage of complaints was about a service being unavailable or deficient (34%); next was unacceptable treatment (23%) and quality of services (23%). In terms of outcomes sought by complainants, though not straightforward because views changed as complaints progressed, the research indicated that 60%, 55%, & 50%¹⁹⁶ of complainants wanted a service to be provided; 40%, 19% & 30% wanted reassurance that what had happened to them would not happen to others; 10%, 37% & 22% wanted vindication; and 25%, 19% & 22% wanted an apology (Ibid. pps 148 and 156)..

In relation to the model itself, Gulland suggests that it fails to make a distinction between complaints and appeal procedures. Taking definitions from a report by the National Audit Office, complaints systems are described as 'raising issues of administrative blame... indicators of things having gone wrong', while appeals relate to substantive decisions and are 'not treated... as raising matters

¹⁹⁶ The research considered three local authorities, hence the three sets of figures.

of administrative fault' (National Audit Office 2005 p.18). The National Audit Office report argues that the distinction is unhelpful - that what is needed is a combined system for 'getting things put right' (Ibid. p.7) and that, 'whether they are called complaints or appeals, grievances should be used as a management tool to improve delivery of services' (Ibid. p.14)¹⁹⁷.

An important consideration in Gulland's thesis was whether there should be an appeal for cases relating to entitlement to services. Her concern was that a model that fails to make the distinction between complaints and appeals could be defective because each reflects a distinct model of justice, whereas the redress mechanism caters only for one. Gulland characterises the model using Adler's terminology (Adler 2003 and 2006).

People's motivations for complaining appeared to be the desire to be listened to, but also to bring about change to prevent other people from experiencing the same problems, so the fact that the model comprises elements commonly found in the 'consumerist' and 'managerial' models was seen as positive in terms of providing redress. Gulland was sceptical about whether complaints influenced future practice. There is now explicit guidance on monitoring and quality assurance to ensure lessons are learned from complaints and that procedures operate effectively. There is also a requirement that each complaint outcome is recorded on an anonymised basis and circulated to line-managers, so they can discuss complaints with staff and use them to assess training requirements. The Annual Report must now contain a summary of all complaints and how they were dealt with, and a review of the effectiveness of the procedure. This enables a local authority's performance in handling complaints to be assessed on inspection by Ofsted.

Very few complainants in Gulland's study viewed their complaints in 'legalistic' terms – as a breach of entitlement to services, or of procedural rights. Gulland suggests this is not necessarily a bad thing. But she suggests that it would be expected that the legal model should have more prominence. What Gulland does not argue is that the model is incapable of dealing with complaints

¹⁹⁷ This report is considered further in Chapter Eight.

about breach of statutory obligations because it does not comprise the common features of due process. Her conclusion, following careful examination of the system, was that complaints cross boundaries between entitlement and the way that people are treated, and that an appeals procedure lacks the flexibility to deal with this. Most complainants were not seeking 'legalistic' solutions.

Gulland's conclusion is significant for the purposes of this thesis. The legal regime setting up local authority obligations in relation to community care services is similar to that in operation for SEN¹⁹⁸. Both are premised upon obligations to provide services where this is determined to be necessary following a needs assessment, therefore it is legitimate to draw comparisons. Having started from the point of considering that the community care complaints procedure should be replaced by an appeals process, following sustained analysis, and despite having found operational faults with the procedure, Gulland's conclusion was that it should not – that the complaints model is more appropriate. The problems identified in this thesis in relation to the SENDIST appeals procedure are not operational difficulties – they flow from the model itself. It exacerbates conflict; fails to assure equal access; and perpetuates a fundamental unfairness based upon the luck of parentage which is something children have no control over. Further, the system overall presents a plethora of mechanisms which is likely to be confusing for parents and militates against any prospect that all aspects of a grievance will be redressed.

As Gulland says, community care services are not rights-based, and so it is important that redress mechanisms are procedurally fair. She suggests, as a next step, research into understanding the difference between different types of redress mechanisms and what people would choose. This is information that is lacking in the research on SEN dispute resolution. SEN services are also not rights-based, so procedural fairness is equally important in this context. Where there are choices, procedural fairness would require that, where there is a risk of

¹⁹⁸ Section 47 of the National Health and Community Care Act 1990 imposes an obligation upon local authorities to conduct assessments of persons who are disabled or who appear to be in need of community care services.

power-imbalance, such choices should be informed choices leading to ‘risk-free’ alternatives. Procedural fairness is discussed further in Chapter Seven.

Although there have been problems with the operation of the CSCP model, it is significant that each of the problems appears to have been identified and addressed. That is not to say that all local authorities comply with obligations. It would be naïve to suggest that, even reasonably comprehensive guidance and regulations will obviate bad practice. However, the model incorporates independent oversight at an operational level. Additionally, local authority children’s services, including the complaints service, are inspected by Ofsted. Inspectors may scrutinise records, collect evidence, and take enforcement action if necessary. They may refer concerns to the DCSF who can direct that the complaints function be performed by a third party where an authority are failing to operate it to a satisfactory standard¹⁹⁹. The model, if operated as it is meant to operate, has many promising features, the most significant of which is its flexibility to deal with all aspects of a complaint.

6.2.2.2. Mashaw’s models, collective goals v individual interests and PDR

The CSCP has some characteristics of Mashaw’s bureaucratic rationality model. Its object is to facilitate the legislative will in terms of entitlement to services. But its focus upon individuation is more commonly a characteristic of the moral judgment model, though it does not have the common characteristics of due process generally associated with this model. As Gulland says, its characteristics most resemble those of Adler’s managerial and consumerist models. In terms of Mashaw’s goals – rational exercise of discretion; an opportunity for claimants to influence decisions and to complain; assurance that outcomes of complaints will influence future practice; and reduction of conflict, the CSCP would appear to fulfil all of them.

In terms of fact-finding, the CSCP envisages the initial decision-maker and then the investigator as fact-finders. A possible disadvantage of this is that the investigator may not have the same incentive as the complainant to establish

¹⁹⁹ Section 50 of the Children Act 2004 amends section 497A of the Education Act 1996 to enable this.

facts discrediting the authority. Arguably this is nevertheless a preferable fact-finding model to the one currently in operation in SEN disputes. Independent oversight of investigations should ensure that they are conducted properly. In order for this to be the case, all relevant information will need to be obtained. Although complainants are not precluded from adducing their own evidence, the model avoids the necessity of complainants being forced to incur costs in instructing experts. Such costs are unavoidable if parents are to succeed in SEN appeals.

In relation to Mashaw's process-values – equality; transparency; privacy; humaneness; appropriate symbolism and participation - the CSCP appears to have all of them. There may be some doubt in relation to appropriate symbolism, however, because the authority facilitates conciliation, conducts the investigation and convenes the Panel. This is an important point. Procedural fairness is discussed in detail in Chapter Seven. However, to summarise here, the argument embodied in this thesis is that there is sufficient involvement and oversight by independent persons to ensure that the model operates fairly and incorporates independent and impartial scrutiny at the investigation and Panel stages provided Panels are comprised entirely of members who are independent of the local authority. Management, availability of advocates and involvement of IPs ensures procedural fairness at the conciliation stage.

An assessment of PDR goal attainment at each stage of the children's services complaints procedure, of the system as a whole and of the SEN dispute resolution as a whole is set out in the table below:

**CSCP AND SEN DISPUTE RESOLUTION PROCESS –
ATTAINMENT OF PDR GOALS**

	STAGE 1 INFORMAL RESOLUTION	STAGE 2 INVESTIGATION	STAGE 3 PANEL REVIEW	CSCP	SEN DISPUTE RESOLUTION PROCESS
Quick	Yes.	Yes.	Yes.	Yes.	ADR and urgent judicial review applications.
Uncomplex	Yes.	Yes.	Yes.	Yes.	LGO complaints.
Mis-conceived and trivial complaints rooted out quickly	Yes.	Yes.	Yes.	Yes.	Conciliation, Mediation, LGO complaints and urgent judicial review applications.
Accuracy	Yes. Advocacy provided. Independent oversight assure risks of power-imbalance obviated.	Yes.	Yes.	Yes.	Formal mechanisms but not ADR mechanisms.
Changes feed back	Yes.	Yes.	Yes.	Yes.	LGO complaints, judicial review applications, mediation.
Cost-effective to the State	Yes.	Yes.	Yes.	Yes.	Conciliation, mediation, SENDIST.
Cheap for Appellants	Yes.	Yes.	Yes.	Yes.	Conciliation, mediation, LGO.

All stages of the CSCP and the procedure as a whole assure attainment of PDR goals. Each stage is time-limited to ensure delay is avoided and uncomplex because advice and advocacy are available. Outcomes are recorded and monitored so that complaints can be learned from. The risk of power-imbalance is obviated, and accuracy, in terms of realisation of legislative objectives, is assured by facilitating balanced consideration of all relevant factors. Although it

is possible for trivial complaints to go all the way to Panel, the likelihood is that, if the issue is trivial, it will be resolved at the first stage or after a short investigation within a culture of listening to complainants. There should be no necessity for complainants to incur costs at any stage. The procedure is likely to be cost-effective to the State. There will be the salary of the CM and some payment will need to be made to secure the services of advocates and IPs. Investigators are local authority employees and Panel members are only paid expenses. Complaints systems are generally the cheapest form of redress (see figures on p.160).

Although the SEN dispute resolution system comprises formal and informal stages, it does not assure PDR. This is because no formal or informal mechanism attains all of the goals. Only a managed system incorporating mechanisms that attain all of the PDR goals can assure PDR. If each PDR goal is of equal value, a significant amount is traded-off in choosing formal adjudication. There is much to be gained in terms of procedural fairness by having an appeal considered by a tribunal of the calibre of the SENDIST or by the Administrative Court, but since this is at the cost of time, expense and all of the other disadvantages identified in this thesis, the question is whether anything is 'lost' in adopting the children's services complaints model. If PDR is the blueprint for administrative justice, it would appear not.

The table below examines the ability of the CSCP to deal with Adler's composite list of administrative grievances:

ABILITY OF THE CSCP TO DEAL WITH ADLER'S COMPOSITE TYPOLOGY OF ADMINISTRATIVE GRIEVANCES

	Composite Category	CSCP
C1	Decision wrong or unreasonable	Yes.
C2	Administrative errors	Yes.
C3	Unacceptable treatment by staff	Yes.
C4	Unacceptable delays	Yes.
C5	Information and communication problems	Yes.
C6	Benefit/service unavailable or deficient	Yes.
C7	General objections to policy	Yes.
C8	Other types of grievances	Yes.

6.2.2.3. What people want from a complaints procedure

A survey was undertaken to determine what people wanted from complaints procedures (Department of Health 2008). This was what emerged²⁰⁰:

- complaints should be handled quickly and decisively;
- simpler complaints should be dealt with immediately to prevent unnecessary escalation;
- early acknowledgement of a complaint and the issues it raises are important;
- investigation of complaints must be rigorous and of high quality;
- procedures must be flexible to allow, where necessary, for alternative ways to be found for the problems to be resolved;
- there needs to be a single contact point for the people involved in a complaint;
- timely and effective communication throughout is important because it creates confidence in the process and helps everyone understand what is happening, why it is happening, and what the likely result will be;
- complaints arrangements must be seen as unbiased and impartial;
- the complaints process needs to be responsive to the needs of vulnerable people;
- there should be clear information about how to make a complaint. Information should be simple, clear, straightforward and jargon free;
- an open culture, which assists learning rather than apportioning blame, is more acceptable for complainants;

²⁰⁰ There were 376 written responses to the survey, and in excess of 1,000 people attended the road shows and national conferences at which Department of Health staff spoke (respondents comprised over 500 health, social care and advocacy professionals and over 500 patients, service users and their representatives).

- easy access to specialist, independent advocacy and adequate support for mediation is necessary;
- special measures need to be put in place for more vulnerable groups of people – for example, it may be necessary to work more proactively to engage with some groups that have tended to be ‘seldom heard’.

Successful techniques for complaints handling are:

- dealing with an ‘informal’ complaint on the spot to reduce the risk of escalation;
- clarifying the desired outcomes early in the process;
- an open, non-defensive attitude;
- recognition of the distress caused and recognition of the value of an apology;
- strong leadership by senior management within the organisation;
- senior management involvement in oversight of the complaints process;
- properly trained and experienced complaints staff;
- appropriate support in the form of advocacy and mediation;
- a shift from a process-driven system towards arrangements that are based on active resolution, involving the complainant. (Ibid. pps 8-15).

The organisation must monitor whether externally developed standards on complaint handling are met by ensuring there is in-house review of complaints handling and internal accountability of those staff dealing with complaints to senior managers. There should be rewards for dealing with complaints positively (or penalties for non-compliance), and external inspection of complaints handling with senior managers being held accountable for failure to meet standards.

Consultation preceding revisions to the model for children’s services complaints revealed a desire for similar requirements. In this context, the Children’s Rights Director sought views of children living away from home who were supported by social services²⁰¹. These are set out in Chapter Seven, and indicate broad support for the model. Key features for children were accessibility, swift resolution and follow-up to ensure that changes were made. It would seem that the children’s services complaints model has the potential to offer what service users want. Whilst these were comments relating to ways in which the social services complaints model could be improved, nevertheless the extent to which the SEN appeals process lacks what is wanted is striking. It is characterised by

²⁰¹These were children in boarding schools, further education colleges, children’s homes, residential family centres, foster care and with adoptive families.

the parents ‘fighting’ for their child²⁰², and appears to exacerbate conflict. There is no assurance of service improvement.

6.2.2.4. How the model would address the problems identified in SEN disputes

Problems with the SEN appeals process identified in the thesis are set out below. It is then explained how the model addresses these problems.

- the system perpetuates inequality;
- initial decisions are made on a different basis to appeals;
- failure to give sufficient weight to collective goals at the appeal stage;
- inability to deal with all possible aspects of a dispute;
- excessive costs for parents in engaging expert witnesses to prepare reports and give evidence;
- access;
- too many appeals;
- conflict.

Because the children’s services complaints model envisages investigation and review, as opposed to a *de novo* appeal, all relevant factors, including both context and consequences, will form part of any reconsideration. Although there is emphasis on individuation, the focus is on ensuring decisions have been taken properly in line with the authority’s overall obligations. Thus there should be no instance of ‘perseverance bounties’ or queue-jumping and better assurance of overarching equality within the system as a whole. There is consideration of whether the initial decision was made properly and reasonably, as opposed to a different basis for decision-making. There is an equal balance of collective goals and individual interests. All aspects of a dispute are dealt with in one place. Because there is an investigation, it should be unnecessary for parents to commission expert evidence. Complainants are helped to access the system. It is local and designed to be easily accessible.

²⁰² House of Commons Education and Skills Committee 2006; Hall 1999.

It operates to diffuse conflict and to stop disputes from escalating. The child is the focus. Steps are taken to redress the risk of disadvantage arising from power-imbalance. The system is based on a culture of listening to complainants and seeking resolution, as opposed to conflict and winning battles. It is envisaged that most disputes will be resolved at the first stage. If a complaint progresses all the way to a Panel hearing, the period between lodging the complaint and the Panel hearing is 13 weeks, with a further 3 weeks for the authority to say how Panel recommendations will be implemented. This is quicker than the SENDIST appeal process, which takes 16-20 weeks to get to the hearing stage, and a further 10 working days for a decision.

6.2.2.5. How the model might operate in SEN disputes

Both Galligan and Adler have serious reservations about making assumptions that a model used in one context may be suitable in another. These are considered in the final Chapter. If it is accepted that the CSCP is a model that could resolve the problems identified with the SENDIST appeals process in this thesis, the next stage would be a feasibility study and cost-benefit analysis. Below are some initial suggestions about how the CSCP model might operate in SEN disputes. There are a number of issues requiring further consideration.

The system of *de novo* appeals to an independent tribunal would be replaced by a complaints process comprising conciliation, investigation and review by an independent Panel. Complaints could be about: all of the LEA decisions that may currently be appealed to the SENDIST, and any other unwelcome or disputed decision related to a child's SEN; delay in the assessment process or in the making of provision; the management of the assessment and review processes; the quality or appropriateness of any provision made, or arranged, by the LEA; the attitude or behaviour of staff; eligibility criteria and their application; and the impact of policies on individual children. Available remedies would comprise: the LEA undertaking appropriate specified action to redress the complaint, to eliminate poor practice and to improve services; the making of apologies; and the payment of compensation. Questions arising are whether such a system would constitute a fair procedure and whether additional steps should be taken to ensure decisions are complied with. The CSCP

envisages that Panels make recommendations, whereas SENDIST decisions are binding upon LEAs.

The effect of introducing an internal complaints procedure encompassing investigation of all aspects of SEN disputes would mean that the LGO would be involved in fewer cases. The LGO generally defer to local procedures unless there is some indication that these are not being operated properly. If the procedure operates as it should to secure swift resolution, applications to the Administrative Court for Mandamus in urgent cases should be rare, but would not be precluded.

There would be a need to appoint CMs and to assemble advice and advocacy services. The role of the PPS could be redefined within this context. PPOs might fulfil the role of CMs and IPSs the advocacy role. It appears some PPSs are under-resourced, whereas there may be under-use of regional mediation services that are paid fixed fees. These services might be used more cost-effectively if brought within a complaints/advocacy/informal resolution service operating at arms-length from the LEA.

Mediation may, or may not, feature at the informal stage, depending upon what emerges from the ongoing studies. If mediation is to feature, consideration should be given either to incorporating a rights-based model or imposing a requirement upon LEAs to provide advocates for parents. Rights-based conciliation is advocated as the more cost-effective option. As explained further in the next Chapter, it is considered that advocacy services should be available for children.

Under the CSCP, investigations are conducted by IOs, who are local authority officers, and adjudicated upon by senior managers who are independent of the service under investigation with oversight by IPs. The question is whether an investigation conducted in this way could provide a competent and rigorous review in the context of SEN disputes that involve determinations made within a complex legislative and case law framework.

Competence is an important issue. On the one hand, there is no reason to suppose that local authority officers would not be competent to investigate SEN complaints since they are trusted to be initial decision-makers within this complex legal framework. Also, the legal framework relating to provision of care services for both children and adults is similar to the legal framework governing provision for SEN insofar as both are based upon discretion to provide services based upon needs assessments²⁰³. Arguably, if local authority officers are deemed competent investigators of children's services complaints, they should be deemed competent investigators of SEN complaints.

On the other hand, the function of any review should be a higher level re-consideration. This is ensured, to some extent, by the fact that the adjudication is conducted at senior manager level, but there also needs to be an assurance that the IO will be capable of understanding the nature of children's SEN and the LEA's obligations towards them in order to present a report for adjudication. In relation to the assurance of SEN expertise, possibilities are that there could be a requirement for IOs to undertake training to enable them to develop relevant expertise. Alternatively, there might be a requirement that IOs be educational psychologists, or that investigations be conducted by the educational psychology service, as in the Gersch case study referred to in Chapter Five. The (former) House of Commons Education and Skills Committee have called for these services to operate at arms-length from local authorities. Parents might have more confidence about the fairness of investigations conducted by an arms-length service.

In relation to the assurance that the IO and adjudicator have an understanding of the legal framework and relevant case law, investigations may involve consideration of issues such as whether it is reasonable for the initial decision-maker to have preferred the evidence of one witness over another; whether provision is adequate to meet a child's needs; whether speech therapy (and other types of therapy) should be in Part 3 of a statement; what constitutes an efficient use of resources or reasonable use of public expenditure; whether

²⁰³ See section 17 of the Children Act 1989 and section 47 of the NHS and Community Care Act 1990.

criteria for assessment and statementing are lawful and whether discretion has been exercised lawfully and rationally. Extracting principles from the case law relating to these issues and applying them to particular sets of facts may be a difficult exercise.

Although Gulland's 2006 study found that few complainants viewed their complaints in 'legalistic' terms – as a breach of entitlement to services, or of procedural rights – and were not seeking 'legalistic' solutions, nevertheless solutions must be in accordance with the law, even if they are not expressed in 'legalistic' terms. There are two possible methods of achieving this. The first is to acknowledge that it is essential for specialist legal advice to be made available to both the IO and the adjudicator in relation to individual complaints, and to have procedures requiring that such advice is sought, and that reports are cleared with lawyers before they are finalised. The second possibility is that advocated by former SENDIST President, Trevor Aldridge, in the context of SEN and Mashaw in arguing the need for a superbureau – that the principles must be established and set out clearly, obviating the need to rely upon case law.

The complexity of the legal framework strengthens the argument for having a qualified lawyer at the Panel stage. If the CSCP model were to be adopted for SEN disputes and the SENDIST replaced by local Panels comprised of volunteers (as per the model), there would be a loss of expertise. The SENDIST comprises legally qualified chairs and lay members with relevant experience. This is a tribunal that is highly regarded, and which has been suggested as an alternative to local Panels hearing exclusion appeals by both Harris and the Council on Tribunals²⁰⁴. What might be a possibility is the SENDIST undertaking the review stage. This could involve SENDIST members comprising independent Review Panels. Another possibility would be the SENDIST conducting a triage process to determine whether to conduct a further investigation or a review incorporating an oral hearing, depending upon the circumstances of the case and the complainant's wishes.

²⁰⁴ Harris 2000 and Council on Tribunals 2003.

A different possibility would be that the SENDIST lay members could undertake the role of IPs in second-stage investigations, with legally qualified chairs conducting the third-stage review. It appears currently that SENDIST members, through no fault of their own, are under-used. They undertake preparation for hearings that never take place because cases settle at the last moment, which is a waste of resources. A staged and managed system focused on resolution is less likely to have high numbers of last minute settlements. The time and expertise of SENDIST members could be put to better use within such a system.

If Panels were to be comprised of volunteers, as per the CSCP model, this is likely to prove unpopular with parents. The SENDIST replaced local Panels considering SEN appeals because they were not perceived as sufficiently independent. Although, at that time, Panels comprised elected members (and this would not be envisaged), a move back to local Panels might be seen as a retrograde step by parents. There are differing views about arms-length bodies that are supposed to be impartial but are convened by the body whose decision is being reconsidered. Although criticism of social services Review Panels has not been extensive²⁰⁵, there have been significant criticisms of local Panels hearing admissions and exclusions appeals relating to competence and lack of independence²⁰⁶.

A further question is whether, if the SENDIST (or SENDIST chairs) undertook the role of inquisitorial review, they could continue to operate as a tribunal within the Tribunal Service and, if this were possible, whether this should be the case. It would be a departure from the CSCP model. Local Review Panels under this model do not operate as tribunals under the supervision of the Administrative Justice and Tribunals Council, presumably because they do not

²⁰⁵ Williams and Ferris did not believe that the involvement of local authority staff (or councillors for that matter) in complaints compromised the independence of Panels. They concluded that local knowledge was valuable and perceived as such by complainants (Williams and Ferris 2005).

²⁰⁶ See Harris 2000, Leggatt 2001, Coldron 2002, Council on Tribunals 2003, House of Commons 2004, DfES 2005 and Coldron 2008. The case of *R (T by his mother and Litigation Friend) v Independent Appeal Panel for Devon County Council & the Governing Body of X College* [2007] EWHC 763 (Admin) presents a clear example of a failure by an exclusions panel to understand the reasoning process that must be undertaken in an appeal involving disability discrimination.

operate adversarial procedures and because they do not make binding determinations. There is an example of a tribunal that conducts inquisitorial reviews under the supervision of the Council. This is the Schools Adjudicator. If there were concerns about non-compliance with Panel recommendations, consideration could be given to whether the Panel, comprising SENDIST members, could continue to operate within the framework of the Tribunals Service. This would mean no structural change to the operation of the SENDIST, merely a change in procedures. It would also mean there would be a right of appeal to a second-tier Tribunal when it comes into existence. This is considered further in the next section and in section 7.6.

The CSCP model might operate in the context of SEN disputes as follows:

THE CSCP MODEL ADAPTED FOR SEN DISPUTE RESOLUTION

Stage 1 – Local Resolution
<p>Complainant may complain about an LEA as described above.</p> <p>The complaint may be made to any LEA officer or to the CO.</p> <p>If made to an LEA officer, the CO must be notified that a complaint has been made within 24 hours.</p> <p>The CO must record the complaint.</p> <p>Where the complainant is a child, an advocate must be appointed.</p> <p>The CO will liaise with the complainant and the advocate to determine the appropriate form of local resolution. It might be possible to resolve the complaint immediately by simply agreeing to provide what the complainant is seeking. Where agreement is reached in this way, the CO records the outcome. Where an immediate solution cannot be agreed, an appropriate form of local resolution will (if possible) be agreed with the complainant – this might take the form of a meeting with the school or LEA officers or relevant professionals or ‘formal’ rights-based mediation.</p> <p>The CM, the IP and advocate are present at the meeting or mediation.</p> <p>This first stage must be completed within 10 working days unless the complainant agrees to an extension. If a solution is agreed, the CO records that the complaint has been resolved.</p> <p>The complainant may by-pass this first stage and insist that the complaint be investigated. The CO might also be able to insist on an investigation.</p>



If not resolved



Stage 2 – Investigation

The CM arranges an investigation that produces a report and an adjudication within 25 working days. The complainant may agree for the period to be extended, but the maximum period is 65 working days.

An IO conducts the investigation and presents a report to the IP and the child's advocate for comment. A senior manager not linked to the case adjudicates.

If the complainant is content with the outcome of the investigation and any recommendations, the CM records that the complaint has been resolved.



If not resolved



Stage 3 – Review Panel

The complainant may request a review within 20 days of receipt of the investigation report, or at any time if the recommendations in the report are not complied with.

An independent Panel will consider the report of the investigation and will conduct a review of its adequacy and the adequacy of the recommendations.



If not resolved



Referral to the Second-tier Tribunal or to Education and Children's Services Ombudsman (see pps. 261-262)

6.3. A UNIFIED COMPLAINTS PROCEDURE

The table below sets out a list of possible complaints that could be made about education and children's services provided by local authorities and maintained schools, and the mechanisms for dealing with them.

POSSIBLE COMPLAINTS ABOUT MAINTAINED SCHOOLS AND LOCAL AUTHORITY EDUCATION AND CHILDREN'S SERVICES

Nature of Complaint	Dispute Resolution Mechanism	Legislation
Complaint that LA or GB in breach of statutory duty or acting unreasonably in relation to exercise of education and children's services functions (other than SEN functions specifically subject to SENDIST appeals)	Secretary of State LGO Administrative Court	Sections 496 and 497 EA 1996
Nature of Complaint	Dispute Resolution Mechanism	Legislation
Complaint about school admission arrangements	Adjudicator	Section 90 SSFA 1998
Appeal against decision not to admit a child to school of parents' choice (where child not statemented).	AAP	Section 94 SSFA 1998
Appeal against exclusion	GB IAP	Section 52 EA 2002.
Complaint about the curriculum	School complaints procedure	Section 409 EA 1996
Complaint about the school or extended services	School complaints procedure	Section 29 EA 2002.
Complaint about the quality of provision in a school	Ofsted	Section 11A EA 2005 ²⁰⁷
Complaint about pattern of education in a LA area	LA	Section 14A EA 1996 ²⁰⁸
Complaint about home/school transport, including SEN transport	LA LGO Secretary of State	Section 496/497 of the 1996 Act

²⁰⁷ Inserted by section 160 of the Education and Inspections Act 2006.

²⁰⁸ Inserted by section 3 of the 2006 Act.

Complaint of disability discrimination relating to provision of education	SENDIST AAP (admissions) IAP (exclusions) LGO(maladministration/process) Administrative Court (policies/urgent applications)	Part 2 SENDA
Complaint about children's services	CSCP	Representations Procedure (England) Regulations 2006
SEN	Schools complaints procedure Conciliation Mediation SENDIST LGO Administrative Court	
Complaint about school's refusal to admit child where school is named in statement	Secretary of State	Section 497 EA 1996

'LA' means local authority; 'GB' means governing body; 'EA 1996' is the Education Act 1996; 'SSFA 1998' is the School Standards and Framework Act 1998; 'EA 2002' is the Education Act 2002; 'EA 2005' is the Education Act 2005; 'AAP' is an Admissions Appeals Panel; 'IAP' means an Independent Panel dealing with exclusion appeals. The table relates to schools maintained by LEAs. Academies have a different complaints framework, as do independent schools.

There are 13 different procedures all involving different bodies. The DCSF's Children's Plan states:

Parents' complaints will be managed in a straightforward and open way and as many issues as possible will be resolved quickly. Parents, particularly those who may not be so readily engaged, will understand the route to follow when they have a complaint. We will review what more can be done to streamline and strengthen these arrangements. (paragraph 3.25).

The Department is looking to facilitate a coherent complaints procedure and arrangements for ensuring that advocacy for children is systematically

available. What is envisaged may be ‘one-door’ access. In contrast to the position relating to education and children’s services complaints, there is a ‘one-door’ access system in place for adults’ health and social care complaints, simplifying the process for complainants. A single complaint may relate to the actions of both private and public bodies providing services under different legislative regimes. Where complaints involve more than one body, the CM for the body receiving the complaint arranges for aspects of the complaint relating to their services to be investigated and sends details of other aspects to relevant bodies. The CM then drives the process forward to ensure compliance with timescales and coordinates production of a single response.

To illustrate how ‘one-door’ access might operate for education and children’s services complaints and to compare this with the current system, it is helpful to consider a hypothetical example. A 12-year-old boy with an autistic spectrum disorder and behavioural difficulties attends a high-achieving mainstream school. Staff at the school recognise that he has learning difficulties, and request a formal assessment. They are concerned about the extent to which his behaviour is disrupting the class. The LEA do not believe the boy’s needs are as severe as is suggested. Neither do they consider that the school have exhausted all of the strategies at their disposal for helping him. The request is refused. The boy is subsequently excluded. Despite an obligation upon governing bodies to provide education from the sixth day following an exclusion, no education is provided²⁰⁹. His parents struggle to cope with his behaviour at home. His social worker fails to provide respite care.

Under the current system, the boy cannot appeal to the SENDIST about refusal to assess or to an IAP against the exclusion. These are the rights of his parents. The boy or his parents could make a complaint to the Secretary of State under section 496 or 497 of the Education Act 1996 about the failure to provide him with education following the exclusion, or bring an application for *Mandamus* in judicial review proceedings. The boy, anybody acting on his behalf, his

²⁰⁹ See regulation 3(1) of the Education (Provision of Full-Time Education for Excluded Pupils) (England) Regulations 2007 (S.I. 2007/1870).

parents, or both he and his parents can complain about the failure to provide respite care under the CSCP.

If there were 'one-door' access, the parents or the boy could complain to a CM who would direct different aspects of the complaint to the relevant mechanisms and coordinate a response. But there would still be a plethora of mechanisms. If the parents wished to appeal both the exclusion and the failure to assess, they would need to prepare case statements, commission expert reports, attend hearings, and engage witnesses for each relevant tribunal.

If there were to be a single education and children's services complaints procedure based upon the CSCP model, the boy or any person on his behalf, his parents (or both) could make a complaint. The CM would assist the boy to find an advocate. The authority would then endeavour to resolve all aspects of the complaint informally. If this were not possible, the complainant(s) may request an investigation. It might be possible to agree arrangements for short-term educational provision and respite care pending the outcome of the investigation. But there would appear to be a need to introduce a fast-track procedure to determine issues needing to be resolved urgently where agreement cannot be reached.

An IO would identify and investigate each aspect of the complaint with oversight by an IP. The IO could seek views from educational psychologists and other relevant professionals, and would speak to the child, parents and staff at the school. If each aspect were upheld, the outcome might be recommendations that the boy be reinstated at the school pending the outcome of an assessment; that an assessment be conducted; that the school and the local authority apologise; and that compensation be awarded. Investigation of exclusions would be a significant departure from the current system, but it would bring exclusions in line with procedures for other complaints about schools.

This introduces a further argument for a single system based upon the CSCP. The guidance on schools' complaints procedures (DfES 2003) recommends that they follow the three stage CSCP model, except that there is no suggestion that

children can complain and no provision of advocates. This means that complaints about the actions of schools in relation to SEN are already being dealt with under a model with the same structural basis as the CSCP. Adopting this model for SEN complaints about LEAs would bring consistency. The third-stage of the school complaints procedure comprises a review Panel of governors, which would not be sufficiently independent, particularly for consideration of exclusion appeals. However, proposals are currently under consideration for an independent body to undertake the review stage of schools complaints, with either the local authority or the Government Office conducting investigations. This might be considered a sufficiently independent reconsideration and an improvement on the current system in place for exclusion appeals, provided compliance could be assured and investigations could be conducted quickly²¹⁰.

If the boy or his parents are unhappy with the outcome of the investigation, they can request a review. The expectation would be that most complaints would be resolved at the first or second stages. The research on social services complaints shows this to be the case (Gulland 2006 and Ferris 2006). The review stage might comprise the CM asking the relevant body to conduct a review. Where there is a need for more than one body to be involved, the CM would send details of the relevant aspects of complaint to the bodies having jurisdiction and coordinate a single response.

If sending complaints to different review bodies proved problematic, possibilities for their amalgamation to form a single review body might be considered. The question of whether this should be a tribunal or an Ombudsman would need careful consideration. As stated previously, it would be unusual for a tribunal to adopt inquisitorial procedures, though there is a precedent for this and it might be an attractive route if there were concerns about enforcement²¹¹.

²¹⁰ It is acknowledged that the suggestion that admission and exclusion appeals should be subsumed into a unified system is not one that should be made as an aside in a thesis about SEN. Whether this would solve the problems identified with Admission and Exclusion Appeals Panels would need to be the subject of further detailed consideration.

²¹¹ Compliance with recommendations by local authorities is unlikely to be problematic – see further section 7.6., but the issue of whether there might be a need to impose binding decisions upon schools needs further consideration.

What would be more in keeping with the CSCP model would be an Education and Children's Services Ombudsman. Such a body might be given the functions envisaged for Mashaw's superbureau, namely the drafting of specialist legislation and the ability to provide guidance on training and managerial techniques in addition to the function of reviewing the findings of complaints investigations.

'One-door' access will not assure proportionate dispute resolution. There is a need for rationalisation and unity of procedures – for a single model that attains all of the PDR goals; has a single access point; and is managed to ensure complaints are driven forward within a culture of listening to complainants. It is clear, however, that a considerable amount of further thinking is needed about how a single system would operate. The thesis presents a single system as the ultimate PDR goal, but recognises that there may be significant practical difficulties with its implementation.

An argument for amalgamating the SEN dispute resolution system with the CSCP is the need for a change to the culture within which SEN decision-making and dispute resolution operate. It does not appear to be one of listening to children and parents. It has been characterised as a 'battle ground', with LEAs being more concerned about resources than children's needs. Mashaw argues that 'cultural engineering' is necessary. Under an amalgamated system, children's services managers could fulfil the adjudication role and the expertise of IPs and advocates could be used to 'infuse' the process with people accustomed to operating within the 'children's services culture'. This may assist cultural change in SEN decision-making.

A further argument for a single complaints system is the need for a single system of determining provision for children with both educational and social needs. The need for this has been argued by the Audit Commission. Their 2002 report (Audit Commission 2002b) identified the damage caused by having separate SEN policies and sidelining children with SEN from other political agendas. In their contribution to the Select Committee's 2007 Report (p.11), they suggest that the holistic objectives of the Common Assessment Framework

implemented under the 'Every Child Matters' agenda should apply to children with SEN, and they recommend that assessment and funding of SEN should be transferred to Children's Trusts to allow shared budgets and joined-up planning. It is hoped that the Audit Commission and the Committee will continue to press for this. Whilst a single complaints system is needed regardless of whether there is a single framework of provision, it would be consistent with this much-needed wider reform.

In relation to the avenues of complaint identified in the table at the beginning of this section, the Secretary of State, LGO, Adjudicator, Ofsted and maintained schools all conduct inquisitorial procedures, whilst AAPs, IAPs and the SENDIST conduct *de novo* appeals. Yet in all instances what is being considered is whether a public body has failed to act reasonably. It is difficult to understand why the procedures should be different.

The creation of appeals procedures serves to create the appearance of conferring meaningful rights. However, for the reasons advanced by Adler and others and set out on pps.151-2 of the thesis, such procedures appear to create more problems than they solve – defensiveness on the part of officials; those who gain do so at the expense of others; procedural rights confer the appearance of legality whilst undermining meaningful reform; detrimental effects are caused by the tyranny of small decisions. The fact that ensuring a reasonable balance between individuation and collective goals has been problematic in admission, exclusion and SEN appeals²¹² suggests that, if there is to be a unified procedure, it should be an inquisitorial review - a procedure facilitating investigation of whether decisions are reasonable having regard to the implications for all children affected by them, and with the operational goals of resolving conflict and improving services.

In relation to the options for change identified in Chapter Four, it is now clear which of these is argued for and why. In relation to the other suggestions:

²¹² See Harlow and Rawlings 1997 p. 464 in relation to polycentric decisions in admissions appeals; Harris 2000 for the problems with exclusions appeals; and the Council on Tribunals 2003 for criticisms of admission and exclusion appeals.

- **bureaucratic rationality plus the superbureau** - an internal review without independent oversight would not constitute a fair procedure. Fair procedures are discussed in section 7.6.
- **widening the remit of the SENDIST** – the thesis recommends that Panels will be comprised of SENDIST members. Their remit will be wider than the SENDIST's current remit.
- **the LGO dealing with all SEN disputes** - although the LGO complaints process assures most of the PDR goals because it follows the inquisitorial model, arguably the CSCP model is a better one because it is specialist and managed locally.
- **choice** – a choice of procedure might be envisaged if the body, or bodies, conducting the stage-three review were to operate in the manner envisaged for the CSCI in social services complaints²¹³.
- **independent assessment** – as stated previously, separation of the decision-making functions relating to provision and funding is problematic. If independent assessors make decisions, this risks budgets spiraling out of control and cuts in other services. If they make recommendations, implementation would be considered taking into account available resources and other obligations. The DCSF have said they are considering piloting the contracting-out of the assessment function. A number of LEAs have been directed by the Secretary of State to contract-out this function because they have failed to perform it adequately. The DCSF are not aware of any LEAs that have voluntarily contracted-out this function, although it would be open to them to do so. If the DCSF are able to instigate a pilot study, its outcome will be informative as to whether taking steps to assure independent assessment might be a worthwhile reform. But this proposal stems from the perception that LEAs are more concerned with resources than children's needs. Arguably what necessary is for measures to be put in

²¹³ The consultation document *An Independent Voice – New Social Services Complaints Procedure* (Commission for Social Care Inspection 2004) proposed that the CSCI undertake third stage reviews of social services complaints and be afforded discretion to arrange an oral hearing by a Panel; conduct a further investigation; refer the complaint to the LGO; or take no further action.

place to ensure proper weight is given to children's needs and to foster confidence in the process.

- **re-assessment by an independent professional appeal Panel** – this would be expensive for the State and intrusive. It would necessitate children having to repeat a barrage of tests. The Panel would need to have information about other children to whom the LEA owed obligations, available resources and local provision. The CSCP model of an investigation followed by independent review should ensure that LEAs are properly fulfilling their obligations, and would be less intrusive for the child.

There is a crucial element of PDR that has been neglected in the discussion. This is that initial decision-making must be improved. Arguably, this is more important than consideration of complaints procedures since, however effective and accessible such procedures are, not everyone who is unhappy will complain. Therefore, the “Evans practices” (see p.169) are crucial and reflect a culture similar to that imbued in the CSCP. These could be defined as standards, compliance with which could be examined on inspection. Also, the evidence of LEAs' preoccupation with resources and battle-ground culture would suggest that Mashaw's recommendations of training, QA and management techniques are needed to ensure cultural change. A cost-benefit and feasibility study could be carried out to assess whether parents and children should attend Panel meetings where decisions are made, forcing LEAs to recognise them as people, as opposed to names on a list.

The final Chapter is about rights, children, fair procedures and justice.

Chapter Seven

Rights, Children, Fair Procedures and Justice

Our self-esteem and sense of worth are bound up with the right to determine what shall be done to and with our bodies and minds.
(Dworkin, G. 1982 p.203).

PPO: “I saw this question [Do you elicit children’s views?] and I thought ‘Well actually we don’t,’ and I thought ‘Well why don’t we?’ and the reason is because we are empowering parents – we very rarely actually meet the child...”

LEA Officer: “I mean it’s rare that as an LEA officer we meet children, it’s always a slightly unreal position because you find yourself in a meeting where you’re the only person there who’s never met the child.”

LEA Officer: “We don’t really listen to children and young people.”
(University of Exeter. A. 2004 pp.8-9.).

7.1. CHAPTER SUMMARY

The Previous Chapter suggested the CSCP model as a promising one for SEN disputes and for a unified children’s complaints procedure dealing with all complaints about LEA and maintained schools’ provision of education and related extended services, and children’s services. Although the thesis argues the need for a unified system, due to word limit constraints, it does not consider whether, and how, complaints about independent schools could be brought within this system nor deal with the practicalities of incorporating admission and exclusion appeals within such a system. This would need to be the subject of further work.

The CSCP enables children, of any age, to complain, and helps them to do so. Arguments in favour of enabling this are that giving children the status of complainant is the only way of enabling their true views to be heard. However, there is evidence in various studies that, even where children are given party status and separate representation in court proceedings, they remain ‘out of hearing’ (Masson 1999), with the proceedings being dominated by the views of adults. Arguments against enabling children to complain are that this would overburden them; complaining that a school is not meeting a child’s needs

might place the child in a difficult position *vis-à-vis* that school; that parents should complain on their children's behalf because they are the guardians of their best interests in taking forward any complaint; that helping children to complain is an unwarranted interference with parents' right to bring up their children, and may lead to conflict between children and their parents.

The argument of unwarranted interference might be stronger if it were envisaged that children should be the sole complainants. But as parents can complain, instead of, or in addition to, their children, allowing children to complain removes nothing from parents in terms of rights. Giving children a right to complain will not cause them to disagree with their parents, it will enable the child's view to be given proper status in any consideration where such disagreement exists.

A basis is needed to decide between competing arguments. A model for children's rights developed by Eekelaar appears to provide a reasonable benchmark. When assessing the current SEN decision-making and dispute resolution provisions with reference to this benchmark, it appears that it is reached in terms of what it envisaged in relation to the involvement of children in decision-making (though whether what is required in the Code of Practice is being implemented appears questionable), but it is not reached in terms of the provisions for children's involvement in dispute resolution. Enabling children to complain, as envisaged by the CSCP model, comes closer to meeting this benchmark. But in view of the evidence that so few parents of children with SEN complain, arguably there is a need for more. Where schools or other agencies are concerned that children's needs are not being met, they should be pro-active in referring cases to advocacy services to enable the matter to be pursued.

The Chapter discusses children's rights; the right to education and enforcement of that right; participation; respect for private and family life and procedural justice. It considers Adler's recommendations for achievement of PDR and explains why the recommendations in this thesis (which are different) provide a

promising model in terms of SEN. It concludes with a return to the research question, and observations on access and justice

7.2. CHILDREN'S RIGHTS - A BENCHMARK

Rights are relationships; they are institutionally defined rules specifying what people can do in relation to one another. (Freeman 1992 p.28).

Leaving discussion of the child's role in SEN decision-making and dispute resolution to the final Chapter is not reflective of failure to attach importance to this issue. Ensuring that children's true views inform the SEN decision-making and dispute resolution systems is of paramount importance. The discussion is situated here to enable it to take place in the context of both the existing system for resolution of SEN disputes and the proposals for reform. Various rights are involved in this discussion - the right to education; to participation in decision-making; to respect for private and family life; and procedural fairness. These are recognised by international instruments – the European Convention of Human Rights (ECHR), the Universal Declaration of Human Rights, the UN Convention on the Rights of the Child (UNCRC)), the European Charter of Fundamental Rights of the European Union, and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

Rights under the ECHR are the rights of both parents and children, and are enforceable in the English courts. Policies must be drawn up with reference to these rights. The other significant instrument in this discussion is the UNCRC which, although binding on the UK, does not confer directly enforceable rights, and is written in terms that are too vague to be easily translatable into obligations in domestic law. It has been influential, however, in terms of policy-making and court decisions relating to children.

Flekkoy and Kaufman (1997) say, as long as Robinson Crusoe was alone on his desert island, he did not need rights. He had liberty and autonomy, but did not need to exercise rules of social interaction:

The concept of human rights rests on a basic concern for the protection of dignity, integrity and equality of the individual as well as for society. When the strong elements in a population dominate the weaker, society's need to control becomes a question of the degree to which

control of the individual is necessary in order that society might function. (Ibid p.6).

The ethical, moral and psychological reasons for establishing rights are interpreted into legal rights through national law. In order to consider whether children have meaningful rights, it is necessary to consider, briefly, the fundamental question of what rights are.

Dworkin's thesis is that, if persons have moral rights, they must be accorded these rights even if a utilitarian calculation shows that the general good would be maximised by denying them (Dworkin. R.M. 1979). He invokes Rawls' 'A Theory of Justice' (Rawls 1973) in support of this. Rawls proposes a methodology of reflective equilibrium whereby people choose the structure of the society in which they live by designing moral principles to fit moral judgments through the mechanism of a social contract model. Autonomy lies at the root of the Rawlsian contractarian conception. Rights comprise both equality and autonomy. In contrast to utilitarianism where individual life choices may be overridden if others are to be made better off, rights protect the integrity of persons leading their lives in the way they choose.

Dworkin identifies the existence of a moral right against the state in terms of saying for 'some reason', the state would 'do wrong' to treat a person in a certain way even if it was in the general interest to do so. He sees Rawls' contractual mechanism as a moral metaphor and believes that all principles derive from a fundamental principle of equal concern and respect for each person. For Dworkin, equal respect is a fundamental political right. Governments have a moral duty to treat all citizens with equal concern and respect unless there is a good reason for treating them differently. But what constitutes a good reason is a particularly difficult question where children are concerned. As Freeman says, gender, colour and age are now universally accepted as indefensible distinctions, but age continues to ground legitimate discrimination in relation to children. (Freeman 1992).

Freeman describes children as the victims of the 'double standard which is deeply embedded in our social practices and well established in our laws, with

one set of rights for adults (providing them with opportunities to exercise their powers) and another for children (providing them with protection and at the same time keeping them under adult control).' What is childhood (he says) other than a concept invented by adults? In any event, having rights will not improve conditions or people. Rights are about acting within relationships, and are only as useful as their implementation permits. (Freeman 1992 p.29)

Children's rights have been the subject of much discussion. Fortin (2003) asks whether a body of literature may be used as a basis to apply legal rights to children in a way that promotes their moral and legal rights effectively. She observes that theorists have concentrated on finding an ideal theoretical model for the concept of children's rights, and that, although their contributions remain at the level of intellectual conjecture, they nevertheless provide a theoretical rigour that the subject would otherwise lack. Problematic issues are competence, conflict of rights and the extent to which rights may be overridden by paternalistic interventions where children choose a path that may not be in their best interests. Children may have the right to have their decision-making powers respected, whilst also having the right to be protected.

Fortin divides the theoretical writers into 2 camps – the 'children's liberationists' whom she suggests over-emphasised the importance of children's rights to enjoy adult freedoms, but nevertheless made an important contribution to the debate by generating interest in children's ability to take greater responsibility for their lives, and the 'children should be allowed to be children' writers.

Holt (1974) and Farson (1978), the most well-known children's liberationists, suggested that it was a form of oppressive and unwarranted discrimination to exclude children from the adult world, and considered children should have the same rights as adults. Writers, such as Campbell (1992), argued in response that there are dangers in ignoring the slow rate of children's physical and mental development by giving them the same rights as adults; that children should be protected from being forced into adulthood before they are sufficiently mature;

and that interfering in children's relationships with their parents may result in potential damage to the family unit as a whole.

More recent children's liberationists, such as Franklin (1995), have argued that even young children are capable of making informed choices. Freeman (1992) suggests that, whilst special treatment of children can be justified where they lack capacity and maturity, the goal is to bring them to a capacity where they are able to take responsibility for their lives. This involves allowing children to make mistakes. The law's treatment of children in determining their competence with relation to arbitrary age limits is open to criticism. This is reflected in the *Gillick* decision, where Lord Scarman said:

If the law should impose on the process of "growing up" fixed time limits where nature knows only a continuous process, the price would be artificiality and lack of realism in an area where the law must be sensitive to human development and social change.²¹⁴

Fortin observes that this case translated the concept of a qualified form of teenage autonomy into new legal principles governing the boundaries between parents' rights and children's rights by suggesting that, in some circumstances, parents have no right to interfere in decisions taken by mature teenagers.

At the opposite extreme, John Stuart Mill considered that it was justifiable for adults to make choices on behalf of children because children are not capable of rational autonomy. The promotion of children's rights conflicts with their welfare because they have not yet developed the cognitive capacity to make intelligent decisions in the light of relevant information and their judgment is prone to be 'wild and variable under the instance of emotional inconstancy' (Mill 1859 p.73).

Further arguments against giving rights to children are that parents are, for the most part, adults who know and love their children best, and are rightly cast by the state in a caring role, enabling them to exercise powers over their children. Purdy (1992) suggests that giving children more liberties renders the parental role unworkable and untenable. Goldstein, Freud and Solnit (1973) argue that

²¹⁴ *Gillick v West Norfolk and Wisbech Area Health Authority*. [1986] AC 112 p186.

parents cannot carry out child-rearing responsibilities with any confidence if subject to constant scrutiny; families operate most successfully if allowed to develop their own values, therefore family autonomy is essential to a well-ordered society; the state has not the resources or sensitivity to do a good job of parenting instead of parents. This non-interventionist approach reflects Article 8 of the ECHR – the right to respect for private and family life - and is followed in the Children Act 1989. But it assumes that generally the interests of children and parents are the same, and overlooks the fact that children also have rights under Article 8.

MacCormick (1982) argues that it is possible to acknowledge that children have rights, but that it is also possible to justify overriding those rights in their interests because children regularly perceive rights that are important to their long-term well-being, such as safety and discipline, as being the reverse of rights and advantages, however there is a need to maintain this in balance. Fortin argues that it might be possible to justify paternalistic coercion to ensure that children fulfil their potential, but this should not unduly restrict their capacities for decision-making. (Fortin 2003. p.23).

Flekkoy and Kaufman (1997 p.50) argue that abridgement of a child's freedom on the basis of lack of competence must lead to a moral obligation to develop such competence to enable the child to exercise that freedom, rendering the limitation unnecessary. Children must be made aware of their rights and helped to develop the necessary skills to exercise them. The rights of the child must be seen as a

[...] complex, dynamic totality, where rights of self-expression and self-determination must be weighed with or against the rights for protection or development, with best interests as the guidelines for choice. This means that the child may not always be allowed to make the decisions, but it does not mean that he or she loses the right to voice an opinion (if he or she wants to and is able to do so) or the right to be informed about the reasons for a different decision. (Ibid. p.62).

If the basis of Convention rights is that every person is to be treated with respect for his dignity and integrity, this implies that adults, including parents, should respect children's views. Dependency (they say) is not a reason to deny children

rights because negotiation of participation based on respect can very well be carried out in relation to dependent persons (Ibid. p.65). They refer to 'The trap [...] of considering children as one homogenous group, regardless of age, and without asking them, presuming that adults have all the answers.' (Ibid. p.67).

Eekelaar has advanced a model that deals with the issue of competence and achieves a balance between autonomy and protection for children. The model was developed in the context of considering whether children should be able to make decisions with significant consequences where parents considered the child's chosen course of action was contrary to their best interests. This is different to the context of considering whether children should be allowed to complain. But, as the arguments against allowing children to complain might be that it would not be in their interests to 'overburden' them by giving them this right, or that it might conflict with their parents' rights to decide what is best for them, the model presents a logical basis for resolving the dilemma of whether children should be given this right and the delineation between different interests.

The model has, as its goal, 'to bring a child to the threshold of adulthood with the maximum opportunities to form and pursue life-goals that reflect as closely as possible an autonomous choice.' (Eekelaar 1986 p.169). However, mindful of the conflict arising between the interests of children and those of their parents, Eekelaar suggests that children's interests be conceived only in terms of 'those benefits which the subject might plausibly claim for himself'. It is necessary to employ an adult's 'imaginative leap', and guess what an adult might have wanted once he reaches the position of maturity (Ibid. p.170).

This 'leap' suggests dividing children's interests into three groups: basic (care and well-being); developmental (equal opportunity to maximise potential); and autonomy (freedom to choose lifestyle)²¹⁵. If autonomy interests conflict with basic or developmental interests, the latter will always prevail. Eekelaar justifies this by suggesting that few adults would retrospectively approve of the exercise

²¹⁵ Other writers have defined similar categories of rights – Freeman 1983a, Campbell 1992, Bevan 1989. Bevan has two broad categories - protective and self-assertive.

of autonomy being allowed to prejudice life-chances. He considers that perceiving the relationship between children and their parents as 'welfarist' is inconsistent with the concept of children's rights – that if A has a right, that must be promoted by B in accordance with what B determines to be A's welfare, then A has no rights at all. He argues that such a model fails to give proper respect to the human worth of the child, and that no assessment of how best to advance a child's interests should take place without allowing the child to exercise choices. What is needed is a clear set of principles that respect choice whilst retaining the possibility to override it as a last resort.

Eekelaar developed a further version of the model based upon 'objectivization' and 'dynamic self-determinism' (Eekelaar 1994a). Its object is to enable acting with the object of furthering best interests to be reconciled with treating children as possessors of rights. The model does not rule out paternalism – it is not a delegation of decision-making - but it assures that the child's wishes are a significant factor in the adult's decision. Determining what children want should be facilitated in a structured environment in which competence and personality can be assessed. The function of the model is to establish the most propitious environment for children to develop their personality. It envisages integration of children in decision-making and into the legal culture as an important constituent part of society.

Freeman describes the model as one of the best attempts at an answer to the question as to when limits should be imposed on rights in the name of best interests (Freeman 2007 p.7). Morrow describes it as 'enabling children to make decisions in controlled conditions, the overall intention being to enhance their capacities for mature well-founded choices.' (Morrow 1999²¹⁶). Fortin suggests that Eekelaar's model allows 'respectable jurisprudential arguments for maintaining that a commitment to the concept of children's rights does not prevent interventions to stop children making dangerous short-term choices, thereby protecting their potential for long-term autonomy.' (Fortin 2004 p.72).

²¹⁶ Cited in Freeman 2007 p.7.

Eekelaar's model of 'dynamic self-determinism' would seem a reasonable benchmark against which to evaluate children's participation in SEN decision-making and dispute resolution. The questions are:

- whether children should be able to enforce their education rights – i.e. whether they should be the complainant in any disputes resolution process, or a participant;
- if they are participants, what the extent of their participation should be; and
- how their ongoing participation in SEN decision-making might be facilitated.

The first step in this analysis is to consider the nature of the substantive right to education.

7.3. EDUCATION

7.3.1. Rights

Harris observes that there are two fundamental principles enshrined in international treaty obligations relating to the right to education – 'universality' (that education, or at least primary education, must be provided free of charge to all) and 'equal access' (Harris 2007 p.37). Article 13 of the ICESCR envisages education as generally available and accessible to all; Article 23 of the UNCRC provides that 'handicapped' children have the right to special care, education and training to help them achieve the greatest possible self-reliance and to lead a full and active life in society; Article 28 recognises the right of the child to education with a view to achieving this right progressively and on the basis of equal opportunity²¹⁷, but Articles 23 and 28 are limited by Article 4 which provides that States parties must take measures relating to economic, social and cultural rights but only to the maximum extent of available resources. Rights under Article 15 and 17 of the European Social Charter relating to education for

²¹⁷ This includes provision of free primary education; encouragement of the development of different forms of secondary education, including general and vocational education; an obligation to make these forms of education available and accessible to every child, and to take appropriate measures such as the introduction of free education and the offering of financial assistance in case of need; and envisages measures to encourage regular attendance at school.

persons with disabilities and provision of adequate facilities and services are also limited by resources²¹⁸.

The right to education in Article 2 Protocol 1 of the ECHR ('A2P1') is a right of the child against the state:

No person shall be denied the right to education. In exercise of any functions which it assumes in relation to education and teaching, the State must respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

The second sentence is subject to a reservation by the UK to the effect that it is accepted only insofar as is compatible with the 'provision of efficient instruction and training and the avoidance of unreasonable public expenditure'. The meaning of 'education', and the scope of what constitutes a minimum level of provision are open to interpretation. In the *Simpson* case²¹⁹ it was said that the right under A2P1 is not an absolute right that requires Contracting Parties to subsidise private education of a particular type or level, and that there must be a wide measure of discretion left to appropriate authorities as to how to make best use of the resources available to them in the interests of disabled children generally. In principle, A2P1 guarantees access to educational facilities that have been created at a given time and the possibility of drawing benefit from the education received.

This right 'by its very nature calls for regulation by the state, which may vary in time and place according to the needs and resources of the community of individuals', as long as the substance of the right to education is preserved²²⁰. The *Belgian Linguistics* and *Simpson* cases have affirmed the overriding power of the state to decide how best to provide education within the resources available for all pupils. It appears the right to education, in relation to individuals, simply guarantees equal access to existing facilities²²¹, which

²¹⁸ See *Autism Europe v France* Complaint No 13/2002 European Committee of Social Rights.

²¹⁹ (1989) 64 DR 188.

²²⁰ *Belgian Linguistics (no 2)* (1979-80) 1 EHRR 252 para 3.

²²¹ See I Hare 'Social Rights as Fundamental Rights' in B Hepple (eds.) *Social and Labour Rights in a Global Context* (Cambridge, Cambridge University Press 2002) 153 at 167 referred to in Harris 2007 p. 71.

means 'efficient and properly equipped schools of sufficient type and number available to meet the needs of the LEA's population'²²².

A2P1 requires the state to respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions. Although education is the right of the child, relevant religious and philosophical convictions are those of the parents. Harris helpfully explains the relationship between parents, children and the state by categorising the state as agent of the parents in fulfilling their moral and legal duty to educate their children. Parental preference is not recognised as a philosophical conviction for the purposes of Article 9 of the ECHR. In the case of *Graeme*²²³ the Commission said that, even where a dispute concerns philosophical convictions, the child's right to education under A2P1 was the dominant part of the obligation. This implied that the most important consideration is whether the child is suitably educated. In determining this, the state is under a duty to ensure conformity with the parent's philosophical beliefs and convictions insofar as is possible, but this does not require the state to provide special facilities to accommodate particular convictions.

In *T v Special Educational Needs Tribunal and Wiltshire County Council*²²⁴ it was held that parents' preference for a particular form of special educational provision (in this case inclusion) did not amount to a religious or political conviction. However, this case was decided with reference to *R (Williamson) v Secretary of State for Education and Employment and Others*²²⁵ in which it had been held that belief in the use of corporal punishment could not amount to a philosophical conviction or belief. This was overturned by the House of Lords subsequently, so the position is uncertain. The Strasbourg jurisprudence indicates that 'conviction' denotes views that have reached a certain level of cogency, seriousness, cohesion and importance²²⁶. It is clear from the UK's reservation to A2P1 that policy favours collective goals over individual rights,

²²² *Hughes v First Secretary of State and South Bedfordshire District Council* [2007] EWCA 838 CA.

²²³ *Graeme v UK* [1990] 64 DR 158.

²²⁴ [2002] ELR 704 (QBD).

²²⁵ [2005] 2 AC 246.

²²⁶ *Campbell and Cosans v UK (No.2)* [1982] 4 EHRR 293 para 36.

even in circumstances where the parent's choice of educational provision is in line with other state policy (inclusion). By neglecting to interfere, the courts have upheld this as a reasonable position to adopt.

Harris argues that the rights under the various Conventions coalesce into a basic human right to education which fits into the welfare/interests theory of rights. The right protects an interest (in being educated) the importance of which has warranted the imposition of duties for the benefit of the interest holder (the child). However, even substantive education rights are tenuous because the nature of the obligation is often imprecise (Harris 2007). As observed in Chapter Three, an obligation to assess needs and make provision where necessary allows considerable discretion²²⁷. Education is an empowerment right, described as 'necessary for people to participate in the democratic process and for such process to function' (Fabre 2000), and 'a pre-requisite to the more reasoned exercise of political and civil liberties' (Hodgson 1998)²²⁸.

Because the right is limited by resources, scarcity of resources places children in a competitive position. This limits the potential of the right to ensure social inclusion on the basis of equality because some parents are better able to derive benefits for their children due to their own privileged educational backgrounds (Stychin 2000). Such parents are also more able to enforce their choice and influence provision generally due to their participation skills (Harris 2007 p.43). Equality of opportunity does not result in equal outcomes.

SEN and admissions legislation introducing parental preference were enacted in line with the rhetoric of empowerment of parents in the 1980s. A combination of weak rights limited by collective goals and resources, and unequal enforcement, has resulted in substantial inequality, as illustrated in the SEN context by the Select Committee's 2006 Report. There is evidence of wide variations in the extent to which LEAs statement children (Audit Commission

²²⁷ Further, the cases of *R v Secretary of State ex parte Lashford* [1988] 1FLR 72; *R v Isle of Wight Council ex parte AS* [1993] 1FLR 634; *H v Kent County Council and the Special Educational Needs Tribunal* [2000] ELR 660 confirm that LEAs may determine whether schools have sufficient funding and skills to provide for a child's needs, obviating the necessity for LEA involvement.

²²⁸ Cited in Harris 2007 at p.40

2002 pp. 26-30); that mainstream schools are unwilling to take children with SEN for fear of them 'dragging down' their position in the league tables of school performance (Ibid. paras 42-46); and that children with SEN are more likely to be permanently excluded²²⁹. There are also concerns about segregation of children with SEN in mainstream schools because they are being taught by untrained learning assistants (Ainscow 1999 p.3).

In the context of admissions, a recent study refers to covert selection and 'selection by mortgage'. (Coldron 2008). The higher the socio-economic intake of a school, the greater the likelihood it will be perceived as 'good' and popular with parents. Both parents and staff at the school will resist the intake of children likely to be disruptive. The market creates a hierarchy and those at the bottom of the hierarchy suffer perpetually by its creation. The study cites examples of polarisation and wholesale vilification and denigration of less advantaged families and communities, suggesting that this is a means by which material advantage and power are maintained and the imposition of symbolic and cultural inferiority made to appear acceptable. Given the ability of education to influence significantly the lives of children of differing levels of ability, ethnic background and social class, it appears, as Harris says, that 'the level of state intervention and redistribution required is clearly greater than that being achieved under the current market/consumer-based system.' (Harris 2007 p.46). This thesis argues that the same is true of the enforcement mechanisms currently in place.

The right to education is not an unqualified right. The next question to consider is the role of the child in enforcement.

7.3.3. Enforcement

Children cannot appeal LEA decisions about SEN or access schools' complaints procedures. They may attend a SENDIST appeal hearing, give evidence and

²²⁹ SEN pupils with and without statements made up 67% of the total number of permanent exclusions in 2001/2; 65% in 2002/3; 64% in 2003/4; 58% in 2004/5; and 68% in 2005/6. Figures are from the DCSF First Release series (www.dfes.gov.uk/rsgateway/DB/SR). A study by Harris identified links between exclusion and ethnicity and social deprivation, and found that children with SEN were seven time more likely to be permanently excluded (Harris 2000).

address the tribunal. The SENDIST guidance for parents states that they can bring their child to the hearing. There is also guidance for children about what to expect. This suggests that they may attend at the beginning of the hearing to give their views, but the expectation is that they will then leave. Harris's research indicated that children rarely attended hearings (Harris 1997 pp 146-151). Children may be excluded if likely to disrupt the proceedings, or where their presence would make it more difficult for any person to adduce evidence or make representations necessary for the proper conduct of the appeal²³⁰.

When the issue of children's involvement in SEN appeals was considered by the House of Commons Education Select Committee (1995-6 Q58), arguments against attendance were the absence of crèche facilities, and concerns that children might hear something about themselves that would be psychologically damaging; that they might appear more intellectually capable or well behaved than the evidence would suggest, as a result of which the tribunal would not obtain an accurate view of their needs; and that they might become bored and restless.

The parents' statement of case may include the child's views²³¹. Where an LEA opposes an appeal, they must include the child's views or reasons why these have not been obtained²³². The Exeter study (Exeter University 2004a) indicated that children's views were rarely sought before the tribunal stage of the dispute resolution process. Originally the purpose of this study was to examine the process of eliciting children's views. However data compiled indicated that there was such paucity of examples of children's views being sought that the researchers were forced to change the remit of the study to eliciting the views of professionals about the practicalities and appropriateness of eliciting children's views. Conclusions were that it could not be said that children's views played a significant role in preventing and resolving disputes.

²³⁰ Regulation 30 of the Special Educational Needs Tribunal Regulations 2001 (S.I. 2001/600, as amended by S.I. 2002/2787).

²³¹ Ibid. Regulation 9.

²³² Ibid. Regulation 13.

Many mediators who were interviewed stated that, as non-specialists, they were not keen to undertake eliciting children's views as a general practice. Some made practical suggestions as to how this could be done, others questioned the wisdom and practicality of attempting to elicit views of children with severe difficulties. PPOs did not elicit children's views because they viewed their role to be that of empowering parents. Most LEA officers never met children who were the subjects of disputes.

There was a diversity of views in response to the question of who should seek the child's view. Those suggested were educational psychologists, parents, independent advocates, the mediator, or the child's teacher. It was acknowledged that access might be a problem. Parents might be uneasy about professionals eliciting their child's views. Confidentiality was also considered problematic. The child may not wish his views to be made known to his parents or his school.

There were practical issues to be thought through: an appropriate place; eliminating pressure for the child; establishing a rapport; specialist help that might be needed where the child has difficulties in communication; ensuring the 'authentic voice' of the child is heard; the competence of children in giving a view and the competence of professionals to establish children's views accurately; the weight and value that should be afforded; placing too much responsibility on children; and not raising children's hopes.

In compliance with the requirement to make children's views known to the SENDIST, LEAs used pro-formas. These were almost never completed by the child on his own. Children were rarely consulted properly about disputes. But some interviewees considered that listening to children was crucial; that what needed to happen was for structures to be put in place to help children to express their views; that there needed to be a receptive audience willing not just to listen, but to negotiate and explain the 'reality'. Their view was that any provision will be more effective with the child 'on board': the perceived wisdom of children and parents being 'done unto' should be a thing of the past (Ibid. p.25).

The report concluded that there was much to be done in the field of eliciting children's views in dispute resolution. The value in doing this is that it promotes children's participation. But there is the risk of a negative effect where views are not taken seriously. Numerous recommendations were made: parents should be encouraged to allow their child's views to be heard; listening to children should be started early and become a normal part of their school lives; children with severe difficulties should be given appropriate specialist help in making their views known; instigation of effective specialist training in eliciting children's views; and the introduction of national guidelines to promote consistency of approach compiled by an independent body.

If the CSCP were to replace SENDIST appeals and other complaints procedures to bring a single system into operation, there would need to be consideration of what part children should play, and whether it should be the same for all children. Approached in this way, arguably the consideration would be whether there is a basis for not giving children with SEN a right to complain within a system where other children have this right – whether there is a reasonable basis for treating them differently. One difference is that children with SEN may be more likely to have parents who will complain for them.

Giving children the right to complain, and helping them to do so, in the children's services context, arose from the legacy of abuse scandals that highlighted failures to take seriously the opinions of children (Kirkwood 1992; Utting 1992, 1997; Waterhouse 2002). Children are looked-after by local authorities because they do not have parents, or because their parents are incapable of or unwilling to care for them. The same may not be true for children with SEN, although some children with SEN are looked-after by the local authority. Their position has been highlighted by the Education and Skills Committee in their 2006 Report as needing to be reviewed urgently because they are dependent upon the local authority, as their corporate parent, to bring an appeal against itself. In *Care Matters* (DfES 2006) the DfES announced that they would issue guidance about helping carers and persons with parental responsibility for looked after children with SEN to appeal.

The snapshot of the SEN appeals process portrayed by the various studies referred to in Chapter Two is one of middle-class, well-educated parents fighting for their children. In the absence of any evidence of conflict between parents and children, arguably parents should simply be left to be the guardians of their children's interests. Taking the step of empowering children to complain might be regarded as an unwarranted interference in family life. There is an obligation upon LEAs to make children's views known, albeit a qualified one. If the obligation is not being complied with, perhaps the only further action needed (if any) is to take steps to ensure the obligation is operating as it should.

But the snapshot is misleading because what is also known is that 99% of parents of children with SEN do not appeal despite the fact that help is available for them in the form of advice from the PPS and the SENDIST. The limited role children currently play in the SEN dispute resolution process is based upon an assumption that their parents are competent and willing to enforce state obligations towards them. The 99% figure calls into question the basis upon which this assumption has been made.

There is another aspect of the system that is inconsistent with the assumption. Provision enabling schools to request assessments for children implies a recognition that some parents may not seek remedial help for their children where this is necessary. There is also a recognition that some parents may be uncooperative with pro-active measures being taken in their child's interests. LEAs have a power under paragraph 4 of Schedule 26 to the Education Act 1996 to serve a notice on the parent of the child concerned requiring the child's attendance for the purposes of an assessment. Any parent who fails without reasonable excuse to comply with any requirements of a notice commits a criminal offence.

Where a school have requested an assessment, they do not have right of appeal against refusal. It is not suggested that schools should have such a right because this risks exacerbating conflict between schools and LEAs. It appears, though, that if the limited role of the child in the dispute resolution process is based

upon an underlying assumption that his parents can, and will, enforce his rights, this may not be a safe assumption to make. Eekelaar says that, if the 'empirical' assessment of children's interests is wrong, this contributes to their oppression. Children have a practical disability in vindicating their rights because they are dependent upon adults for this (Eekelaar 1986 p.168). As Sawyer says, 'Parents may as easily be cruel or inadequate as they may be kind and enlightened.' (Sawyer 2006 p.8).

Essentially there might be four models:

1. the SEN model;
2. the CSCP model allowing children to complain and helping them to do so;
3. a limited right to complain for children who wish to do so, but whose parents are unable or unwilling to complain on their behalf;
4. a system of ensuring that somebody will complain on behalf of a child where necessary to ensure enforcement of the child's rights.

Model 4 could be combined with 1, 2 or 3. Models 1 and 4 fall within the interests theory of rights; model 2 within the choice theory; and model 3 arguably combines both. However, choice and interests are not mutually exclusive. It may be in children's interests to enable them to choose to appeal. Analysis of the SEN appeals system with reference to Eekelaar's model would suggest that failure to allow children a right of appeal, leaving enforcement to be undertaken by parents in line with their own assessment of what is in the child's interests means that children with SEN cannot be said to have rights.

The system denies their autonomy interest, and fails to provide any assurance that their wishes are elicited in an environment in which personality and competence can be assessed²³³. It cannot be said to operate in a context of establishing the most propitious environment for bringing children to adulthood with maximum opportunities. Fortin states that legislation fully acknowledging that children are the focus in SEN proceedings is long overdue, and that they

²³³ Whilst attendance at the beginning of a tribunal hearing might facilitate this, if children rarely attend tribunal hearings, such instances must be rare.

should have party status. She considers that this is unlikely to be rectified by human rights law unless the courts ‘can be persuaded to interpret Article 6 of the ECHR vigorously’ (Fortin 2003 p.377). This appears unlikely, however, as it was stated in *Simpson* that Article 6 is not engaged – that education rights under domestic law and under A2P1 do not confer obligations of a civil nature but fall squarely within the public law domain, having no private law analogy and no repercussions on private rights or obligations.

The CSCP is a model that allows children to take steps to enforce a local authority’s obligations towards them, and to complain in relation to process and procedures. They can either do this themselves, or ask somebody to complain on their behalf. If a child wishes to complain, help is provided in the form of an advocate. The child’s parents, and anybody with an interest in his welfare, may also complain. In this context, complaining does not involve preparing a case statement, compiling evidence and commissioning expert witnesses. It may not even involve attending a hearing if the complaint can be resolved before this stage.

Applying Eekelaar’s model to the CSCP, the question would be whether this regime establishes the most propitious environment for children’s personal development. Arguably it does. It would appear to advance children’s developmental and autonomy interests; it ensures that the child’s wishes play a significant part in any decision; and provides an environment in which the child’s competence and personality can be assessed. The risk in complaining is that there may be adverse repercussions for a child who complains. But enabling children to complain, in this context, was prompted by the severe repercussions of **not** enabling children to complain.

There might be a need to do more for some children, however, in order to facilitate the environment envisaged by Eekelaar. Boylan and Braye (2006) argue that the advocacy provisions in the CSCP do not go far enough in empowering children to participate in decision-making. Provision is based upon a consumerist model operating on a case-based *post-hoc* problem-solving basis. Children (they say) should be pro-actively included in decision-making. This

may necessitate, for some children, enduring relationships with advocates who are independent of the local authority. The CSCP model enables looked-after children, young children, and children whose capacity to complain may be impaired to complain. Realistically they may be unlikely, or unable, to do so. This suggests that possibilities for a combination of models 2 and 4 should be explored - that schools and other agencies should be enabled (or required) to be pro-active in referring their cases to independent advocacy services.

Although Fortin is right that giving children party status in SEN appeals is long overdue, lodging an appeal within the context of an adversarial process is likely to be a more difficult and daunting process for a child than making a complaint within the CSCP where the evidence is obtained by the investigator and the process is managed. If children are to have a meaningful role in determining provision for their needs, a procedure that makes it easier for them to complain is more likely to enable this, which strengthens the arguments for the model.

During the consultation undertaken by the office of the Children's Rights Director on the proposals to amend the CSCP, the response of one younger person was "What are you asking us about complaining for? We all know how to do that." (Commission for Social Care Inspection 2005 p.7). But many of the group said they found it difficult to complain, and that the new procedures would not really change that. It was difficult to complain about a foster carer because afterwards you would still be living with that family. This has resonance in the SEN context. A child who says he does not wish to attend the school he is attending may nevertheless have to remain at that school, and a child who expresses the view publicly that he wishes to attend a school other than the one his parents think he should attend may have to face the consequences of possible discord at home.

The children and young people asked about the CSCP considered it was a reasonable procedure, the difficulty was that adults were not trusted to listen seriously and fairly to what children had to say. One group suggested a three-way meeting comprising the complainant, somebody to speak for them and the

person complained about. Complaints were important. Things did not get sorted out unless a complaint was made.

There was support for the idea of making suggestions, as opposed to complaints. It would seem more reasonable to make a suggestion and then complain if nothing was done, but it should be compulsory for social services to respond. One group suggested that children should be asked what they thought about decisions before they were made. Young people should be told how to make a complaint or a suggestion via a website, information leaflets or by someone explaining this to them. Children thought the best person to make a complaint to was their social worker. Another possibility was a suggestions helpline or a Children's Rights Officer.

Getting complaints sorted quickly was important and whoever looked into a complaint should check up on what changed afterwards. One group worried about improving the process because if this led to more children complaining, there might be too many complaints to cope with and each complaint would take even longer to sort out (Ibid. p.9). There should not be a time limit of one year to make a complaint as some people do not feel confident enough to make a complaint about something until much later. Children should be told the result of their complaint or suggestion and the reasons for the decision.

In relation to the issue of the involvement of an independent person, most of the consultees agreed that independent oversight should continue; some thought that this was not as important as getting things sorted out quickly; others thought the independent person should conduct the investigation, rather than just watching over it. One idea was that the independent person should check that action was taken following the complaint and that there were no repercussions for the child who had complained – that it should be explained to the person complained about that children are allowed to complain and that complaints can be positive.

Many found the distinction between 'formal' and 'informal' stages confusing – 'formal' was more to do with how serious the complaint was, rather than a stage that followed if something wasn't sorted out. There were three key messages -

‘listen and take action’; ‘quick and easy’, and ‘sort it out’ (Ibid. p.16). This provides a clear picture of what children who have a complaints procedure want from it.

Enabling children to instigate complaints may make a significant difference to the extent to which they are listened to. A study by Masson found evidence that, in child protection cases, although children have party status and are represented by Cafcass guardians, they were out of hearing of the legal process (Masson 1999). They wanted arrangements for their care to be sorted out and to maintain important relationships, but their concerns frequently remained unaddressed. One reason for this was the court’s limited power over local authority decisions, another was the desire of professionals to protect children. Although the children in the study were capable of understanding what was going on, they were not given information. The system appeared to exist for adults, not for them. Fortin, in discussing child protection cases, argues that the process is dominated by adult litigants and that it is ‘only where applications are made on behalf of children themselves that their rights are considered in any depth.’ (Fortin 2006 p.302).

In *Mabon v Mabon*²³⁴ three teenage boys applied to the Court of Appeal to be represented separately from the services of the Cafcass guardian. Their application was successful. Thorpe LJ concluded that it was ‘...simply unthinkable to exclude young men from knowledge and participation in legal proceedings that affected them so fundamentally, given that they were educated, articulate and reasonably mature:

Unless we... are to fall out of step with similar societies in the safeguarding of Article 12 rights, we must, in the case of articulate teenagers, accept that the rights to freedom of expression and participation outweigh the paternalistic judgment of welfare²³⁵.

A study on advocacy services for looked after children (Oliver 2006) revealed that advocates were described by children as more accessible than social workers. They responded more quickly, and were perceived as having more

²³⁴ [2005] EWCA Civ 634.

²³⁵ Ibid p.637.

time and willingness to listen. In relation to disabled children, most social care professionals agreed with advocates that views and wishes should be listened to. But some thought that advocates risked undermining parents and social workers in decision-making. A further group thought that advocates needed to be more assertive in expressing children's views. Separating the child's wishes from those of the parents was identified as a particular challenge for advocates.

Both advocates and social care professionals tended to agree that effective advocacy involved maintaining a balance between assertiveness and tactfulness, and that care should be taken not to disrupt children's networks of support. Most parents and carers of children with disabilities expressed positive support for advocacy and did not report feeling that their own needs were overlooked. Most children and young people expressed appreciation for the role of advocates in allowing their views to be heard, and in helping them to negotiate tensions in cases where their wishes were not in accordance with their parents' views. The study identified a range of perceived practical and psychological benefits for children as a result of advocacy. These included enhanced self-esteem, improved care packages and the reversal of decisions perceived as contrary to young people's wishes or welfare.

It was widely believed that advocacy empowered children and young people, even if they did not always get what they wanted. The majority of young people reported a high level of satisfaction with their experience of advocacy: on a scale of 1-10, 86% (N=31) of those who responded (65% of the whole sample) gave advocacy between 8-10 points. Most young people were able to identify important emotional and practical outcomes of advocacy, such as feeling more confident and less stressed, and considered their views were taken more seriously. 38% (N=18) of young people reported that their requests had been fully met and that practical outcomes were important and far-reaching (Ibid. p.11).

In 2004, the North West SEN Regional Partnership piloted an advocacy service for children with SEN that was successful and has been extended (SEN regional

Partnerships 2004). The South West Regional Partnership have developed Regional standards for the participation of children and young people with additional/special needs and their parents in the planning and review of services. It is hoped that, in fulfilment of their commitment in the Children's Plan to listening to children, the DCSF will make advocacy services generally available for children who need them.

During the passage of the Children and Young Person's Bill, an Opposition amendment was laid at the House of Lords Committee stage, the effect of which would have been to give looked-after children a right of appeal to the SENDIST²³⁶. Lord Adonis, in resisting the amendment on behalf of the Government, suggested that the HMCI review of the assessment, statementing and appeals process due to report in 2009/2010 might consider the issue of whether children should be given rights of appeal to the SENDIST. He also stated that research is ongoing, commissioned by the Welsh Assembly, which will consider whether children in Wales should be given a right of appeal to the SEN Tribunal for Wales. The argument in this thesis is that further consideration should be given enabling children to appeal under the current system, but that a model for SEN complaints based upon the CSCP would facilitate an environment in which children would find it easier to complain.

7.4. PARTICIPATION

The SEN Code of Practice 2001²³⁷ devotes an entire chapter to the inclusion of children in the decision-making process. However, children are not to be 'overburdened':

Children and young people with special educational needs have a unique knowledge of their own needs and circumstances and their own views about what sort of help they would like to help them make the most of their education. They should, where possible, participate in all the decision-making processes that occur in education including the setting of learning targets and contributing to IEPs, discussions about choice of schools, contributing to the assessment of their needs and to the annual review and transition processes. They should feel confident that they will be listened to and that their views are valued. However there is a fine balance between giving the child a voice and encouraging them to make informed decisions, and overburdening them with

²³⁶ 73/101. www.publications.parliament.uk.

²³⁷ Chapter 3.

decision-making procedures where they have insufficient experience and knowledge to make appropriate judgments without additional support.

Ascertaining the child's views may not always be easy. Very young children and those with severe communication difficulties, for example, may present a significant challenge for education, health and other professionals. But the principle of seeking and taking account of the ascertainable views of the child or young person is an important one. Their perceptions and experiences can be invaluable to professionals in reaching decisions. LEAs, schools and early education settings should make arrangements to enable this to happen (Ibid. para 3.4.).

The Code acknowledges that parents may need support in seeing their children as partners in education; that they may be reluctant to involve children in decision-making, considering them ill-equipped to grasp all relevant factors. Schools should show children sensitivity, honesty and mutual respect, encouraging them to see themselves as equal partners. Children should be involved in decisions from the start of their education, and ways in which they are encouraged to participate should reflect their evolving maturity (Ibid paras 3.5 - 3.6).

In stressing children's involvement in the decision-making process, the Code refers to Articles 12 and 13 of the UNCRC. Neither the Code nor the Convention provide clear, enforceable participation rights. Whilst Article 12 provides that children capable of forming their own views must be allowed to express them freely in all matters affecting them, this is limited in an important way by the overriding requirement in Article 3 that all actions concerning children should take full account of their best interests. Obvious difficulties with this phrase are that it may be open to different interpretations, and who should determine best interests. There is also a reference to 'protection and care as is necessary for [the child's] well-being'.

Article 5 provides that the state has a duty to respect the rights and responsibilities of parents and the wider family to provide guidance appropriate to the child's evolving capacities. There is a tension between Articles 3 and 5 and Article 12 that reflects the ambivalence over the need to promote children's capacity for self-determination, whilst at the same time maintaining the traditional rights of parents to provide direction, support and discipline.

Article 12 also states that the weight given to children's views is to be determined in accordance with their age and maturity, and that children must be given the opportunity to be heard in any judicial and administrative proceedings affecting them, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Researchers at the University of Exeter conducted a follow-up study to the one referred to in the previous section to establish the extent to which children's views were being sought as part of the ongoing process of providing for their needs based upon data from those working in schools and information from LEAs on relevant policies and practices (Exeter University 2004b).

What emerged was that some schools embraced an ethos of pupil participation. They saw it as applying to all children, there being no distinction for children with SEN, and had developed their own policies and practices. Key distinctions were made between formally and informally eliciting children's views.

'Formal' meant assigning specific persons to undertake the task for specific purposes – sometimes through talking to the child on a one-to-one basis or contriving a small group situation outside the whole class. 'Informal' meant listening to pupils as part of ongoing daily interactions.

There were considerable variations in the extent to which children were involved in the statutory process. Some were not involved at all, with practitioners considering it was inappropriate for them to hear what was said about them. Schools cited lack of time and lack of guidelines as to how to interact with children to elicit their views as reasons for not involving them. But there were also examples of practitioners going to considerable lengths to establish the child's authentic view: allowing the child to write his own views; scribing the child's view; allowing the child to relax by doing a craft-related activity while talking; taking care not to ask leading questions; and using opportunities away from school to talk and listen.

Of the LEAs participating in the study, only 20% rated their approach to eliciting the views of children with statements as 'satisfactory'; 60% reported that pupils' views were recorded in all their statements and said that they had

explained the requirement to seek children's views to their parents; but only 30% collected children's views over time, and only 10% had a written policy on seeking children's views (Ibid. p.8). There were examples of the expression of views leading to positive outcomes. The report recommended a model of full ongoing pupil participation which has been taken forward.

This study suggests that, despite what is stated in Chapter 3 of the Code, participation of children in decision-making was not universal practice. Although steps have been taken to rectify this in the area of the South West Regional Partnership, arguably there is a need to do more at a national level in terms of taking further measures to ensure compliance with the Code. Perhaps the participation model developed by the South West Regional Partnership could be developed to form a national framework of standards, compliance with which can be monitored on inspection. Also, there appears to be a need to develop a culture embracing children's participation.

7.5. RESPECT FOR PRIVATE AND FAMILY LIFE

How should the rights and interests of parents feature in determining the role children should have in SEN decision-making and dispute resolution? As previously mentioned, Article 5 of the UNCRC provides that States Parties must respect the rights of parents and guardians to provide appropriate direction and guidance to their children. Article 18 provides that both parents have responsibility for bringing up children, and that the state should support them in this task. Article 16 provides that no child shall be subjected to arbitrary or unlawful interference with his privacy, home or family life.

Article 8 of the ECHR provides:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Both parents and children have rights under this Article, though, as Fortin observes, Article 8 was not drafted with children's rights in mind. It appears to emphasise the privacy of adults, and is 'ill-equipped to help the courts in finding a balance between parents' powers and children's rights' (Fortin 2003 p.55)²³⁸. If conferring a right of complaint upon children in SEN disputes were to be considered interference with the rights of parents to make decisions about their children's upbringing, such interference would need to be necessary, as opposed to desirable, in order to comply with Article 8.

Firstly, what the thesis proposes is that both children and their parents may complain. It is arguable that enabling children to complain *in addition* to their parents is not an infringement of parents' Article 8 rights. Secondly, if there were any infringement, Eekelaar's model is helpful in arguing justification. If the objective is to bring a child to the threshold of adulthood with the maximum opportunities to form and pursue life-goals that reflect as closely as possible an autonomous choice; and if autonomy is an essential interest, then interference with parents' rights is necessary in the interests of a democratic society in developing responsible citizens. And if children cannot be said to have rights unless they can enforce them, then any interference with parents' rights that enabled children to enforce their rights is necessary for the protection of the rights and freedoms of children.

In 2006 the DCA commissioned research on whether children should be separately represented in private family law proceedings (Douglas 2006). The DCA concluded, on the basis of this research (interviews with 15 children and 23 parents), that there was no evidence to support facilitation of separate representation for all cases, and put out to consultation a proposal that children should only have separate representation in cases where there are legal issues to be resolved. Reasons cited for this were that it would not be in children's best interests to encourage separate representation. Bringing children into the

²³⁸ For example, the case of *Nielsen v Denmark* (1988) 11 EHRR the court refused to allow an application that a child's Article 5 rights had been infringed on the basis that to do so would undermine his parents' rights under Article 8. In this case, the child, who had a 'nervous disorder' was placed in a closed psychiatric ward for 5 months. Article 8 has also been used by parents to challenge local authority decisions to take children into public care. For analysis and summary of the case law, see Fortin 2003 at pps 55-61 and Fortin 2006 at pps 306-312.

proceedings could be stressful and impose too much responsibility, particularly where children believed that the judge would make a decision based entirely on their view. Children could be confused and manipulated by their parents.

The conclusion was reached in spite of the fact that the children interviewed liked the idea of someone being appointed by the court to help them to have their say; were clear about what they wanted from a 'good' guardian; and considered courts should be 'child-friendly' and judges approachable, so that children could put their views directly (Ibid. pps.7-9). Because the court is obliged to have regard to children's ascertainable wishes and feelings, these will continue to be obtained in a range of different ways and conveyed to the court by adults on behalf of children.

Because parents manipulate their children and use them to achieve their own ends in disputes, the response is to deprive children of separate status. This appears both unattractively paternalistic and punitive. Literature on access to justice²³⁹ indicates that ignorance of rights or procedures, cost, complexity of process, lack of assistance and physical barriers prevent many people from accessing formal dispute resolution mechanisms. In this context, it appears that being a child is a more significant barrier than any of these. The evidence emerging from this study, and the consultation on the CSCP, highlights the difficulties experienced by children in complaining. Arguably there are alternative responses to that of 'downgrading' children's views to lessen their feeling of responsibility. The outcome of this consultation cannot reasonably be used to suggest that it would be inappropriate to enable children to complain in the context of education and children's services.

If the CSCP model were to be adopted as the model for a unified education and children's services complaints procedure, this would envisage that children are enabled to participate at the formal and informal stages. If the ongoing studies reveal that mediation is valuable in SEN disputes, it might form part of the informal stage. Writings on family mediation suggest that the mediatory role becomes more complicated where the child is interviewed separately. The

²³⁹ Adler and Gulland 2003 provide a summary.

mediator voices the child's views in the same way as he does for the parties to the dispute. But the child is the subject of the dispute, so there will be ethical pressures upon the mediator to become his advocate. Where the child's views coincide with the views of either party, this must compromise the independence of the mediator. Also, the mediator may be placed in an impossible position regarding confidentiality of information revealed by the child. He may find himself in the position of being aware of information, but not being able to use it.

The model of rights-based conciliation and provision of advocates for children would appear to overcome these difficulties by allowing mediation to be seen as overtly advancing children's interests. The SEN Toolkit precludes children's involvement in mediation. It is not known whether the ongoing mediation studies will consider children's involvement. The DCSF research brief makes no reference to this.

7.6. FAIR PROCEDURES

7.6.1. Review Panels

The SEN dispute resolution system currently envisages an appeal to an independent tribunal, with further appeal to a court²⁴⁰, complaint to the LGO and mediation. All of these bodies and the mediator are independent of the LEA. The question is whether a change to the CSCP model would compromise the rules of procedural fairness. The informal and investigation stages of the CSCP model are not independent, though there is independent oversight and involvement of independent advocates for children. Whether there is sufficient independence at the Panel stage will depend upon what this stage comprises.

It is not suggested that the Panel stage comprise anything other than review by persons who are independent of the local authority. As stated previously, the possibility of the review stage being conducted by Panels comprising members recruited locally, as in the CSCP model, is not favoured. The possibilities suggested were Review Panels comprising SENDIST members or the

²⁴⁰ Though this is to be replaced by an appeal to a second-tier tribunal, this will be a court of record.

SENDIST conducting a triage process to determine whether they should conduct a further investigation or a Review Panel hearing. If the SENDIST were to operate as Panels convened under the CSCP model currently operate, they would make recommendations, as opposed to binding determinations. This exposes a flaw in the CSCP model's assurance of PDR because PDR envisages that people should be able to choose between binding decisions and agreed solutions.

The question is whether this renders the CSCP model unsuitable. The Gulland and Ferris research (Gulland 2006 and Ferris 2006) on the social services complaints procedure reveals that non-compliance with Panel recommendations is not a problem. The LGO Annual Reports also indicate this. This thesis argues that the model is not weakened by the fact that non-compliance is a possibility. Non-compliance with tribunal orders and court judgments is also possible. If there were concerns about non-compliance, the model could be adapted to introduce enforcement powers. The significant change recommended by the thesis is the change from a *de novo* consideration under adversarial procedures to inquisitorial review.

Nevertheless, careful thought is needed before removing a right of appeal to an adjudicative body. Judicial review is available, but in limited circumstances and as a last resort. It was decided in *Simpson* that Article 6 of the ECHR is not engaged in SEN disputes. But, if the proposals for reform in this thesis would breach the requirements of Article 6, to recommend them would be to advocate a lower standard of procedural fairness for SEN disputes. There is no desire to do this, therefore the Article 6 case law can be used a benchmark.

Article 6 requires that, in the determination of civil rights and obligations, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Under the CSCP, Panels do not make independent determinations, only recommendations. The body making the determination is the local authority. The question is whether the lack of independence can be cured by availability of judicial review. This will depend upon whether the original decision-making process was subject to

sufficient safeguards and how wide the reviewing court's powers are²⁴¹. Also relevant is whether review lies to a body with full jurisdiction to deal with the case as it requires²⁴². A combination of the further fact-finding process at the investigation and review stages and the independence of the Panel would appear to provide sufficient safeguards and to enable the Administrative Court to deal with cases as required.

The Article 6 compatibility of local authority complaints procedures has been considered by the courts in two cases with different outcomes. In both cases, Panels were not comprised entirely of persons independent of the authorities. The social services complaints procedure was considered in *Beeson*²⁴³. Although the Court of Appeal said that the Panel that had reviewed the complaint lacked the impartiality required by Article 6, they considered that this did not automatically render the decision nugatory. In this particular case, there was no evidence that the Panel had not arrived at a fair and reasonable recommendation. Therefore, if there was no reason in substance to question the objective integrity of the first instance process, whatever might be said about its appearance, the added safeguard of the availability of judicial review would very likely satisfy the Article 6 standard unless there was some special feature of the case to show the contrary. The body responsible for conducting the independent fact-finding does not have to be independent. It merely has to be capable of acting independently.

But, in *Tsfayo v United Kingdom*²⁴⁴ the European Court of Human Rights distinguished the *Alconbury* and *Runa Begum* line of cases which suggested that availability of judicial review cures lack of independence at the internal review stage where that review constitutes a reconsideration of the facts. *Tsfayo* concerned an appeal by an Ethiopian asylum seeker to a Housing Benefit and Council Tax Benefit Review Board (HBRB) comprising five elected members of the authority that had rejected her application. In response to an argument

²⁴¹ *R (Q) v Home Secretary* [2003] EWCA Civ 364. Judicial review was insufficient in asylum cases because the fact-finding procedures at first instance were inadequate.

²⁴² See *Alconbury* [2001] UKHL 23; *Runa Begum v Tower Hamlets LBC* [2003] UKHL 5.

²⁴³ *Beeson, R on the application of Dorset County Council* [2001] EWHC Admin 986. 30th November 2001.

²⁴⁴ [2007] LGR 1.

that the HBRB did not constitute an impartial and independent tribunal under Article 6(1), the Government argued that although the councillors were not themselves independent, the availability of judicial review ensured that the proceedings as a whole complied with Article 6(1).

In rejecting this argument, the court said that the HBRB had decided a question of fact, namely whether there was good cause for the delay in making the claim. Determination of this depended upon assessment of the applicant as a credible witness. The Administrative Court was not in a position to reach a view on this. The HBRB was not merely not independent, but directly connected to one of the parties to the dispute. For these reasons, there was held to be a violation of Article 6(1). *Tsfayo* may be seen as a shift towards more exacting standards in relation to Article 6(1).

It would appear that what is proposed in this thesis terms of reform would comply with the judgments in *Beeson* and *Tsfayo* because Panel members would be independent. SEN decision-making by LEAs comprises consideration of individuation and general policy, and should turn on the merits of both. The SEN Code of Practice sets out the principles in accordance within which decisions must be taken. The implications of local policy considerations are settled in LEA criteria. These leave room for various degrees of discretion depending upon how prescriptive they are. The decision-maker must balance individual and collective goals. Evidence must be collected and a judgment made. The right of the individual is not to any particular outcome, but to a fair procedure.

If the SENDIST were to assume the role of a Review Panel under the CSCP model, it is argued that this would be a fair procedure that would operate fairly. If it were considered necessary, enforcement powers could be introduced, or the SENDIST might remain within the Tribunal Service as an inquisitorial tribunal making binding determinations.

In terms of procedural values, such as the right of both parents and children to be heard, fair treatment, equal access, a level playing field, the right to be given

reasons for a decision may be said to relate to a concept of justice that supersedes in importance the assurance of an accurate decision in individual cases. As Galligan says:

The common good includes not only the effective application of the laws but also the fair treatment of persons. To neglect one in favour of the other, or to portray them as locked in conflict, would be to distort the relationship between them. (Galligan 1996b p.33).

He refers to the line between the social good in having accurate decisions and the social good in protecting certain values. These are the values enshrined and protected by the courts in judicial review - rights to have one's circumstances taken into account and genuinely considered; a process conducted in good faith; reasonable decisions taken on rational grounds having taken into account all relevant (and no irrelevant) factors. In terms of procedures, Galligan suggests that their normative function is 'to ensure that decisions are made accurately in accordance with the objective of the legislation; give effect to other identified standards relevant to their context; operate effectively and cost-effectively; and to ensure and appropriate safeguards.' (Ibid. p.43). The proposed reforms ensure this.

7.6.2. Mediation and Conciliation

The function of mediation and conciliation in SEN disputes is to achieve compromise. The parties agree a course of action which is different to that which has resulted from LEA exercise of discretion. Settlement may be a rational and justifiable course to take. The risk is that the need to compromise will be influenced by unequal bargaining power so that parents feel there is no alternative other than to settle, or that continuing with the dispute is so unappealing that compromise is the lesser evil. The PEACH study (Williams, M 2005) provides some evidence of the latter, but it is a small study. The early reports from regional mediation providers collated by the DfES, on the other hand, show satisfaction with the mediation process.

The advantages of informal processes are set out in Chapter Five. It is not proposed to repeat them here. The danger is that, where there is inequality between the parties, conciliation and mediation become a means of coercion

and injustice. It is for this reason that mediation is not an ideal forum for all disputes. The solution, however, is not to abandon informal mechanisms where such mechanisms show the potential to bring benefits, but to improve them. Galligan asks what are the boundaries within which compromise through agreement can be fair and legitimate. He suggests that it is artificial to contrast authoritative adjudication and compromise as opposite ends of the spectrum, and that 'most decisions are negotiated and contain elements of compromise.' (Galligan 1996b p.278)..

Galligan argues that conciliation and mediation are not appropriate in disputes where there are reasons of public policy for insisting on proper adjudication of the issue, and that there is a need to determine suitability. As Fuller says, 'not everything is negotiable; some signposts and boundary markers of what is tolerable should be preserved.' (Fuller 1970 p.305.). Galligan also argues that, where compromise is involved it must be informed compromise.

In terms of procedures, Galligan envisages a process enshrining principles for deciding whether to allocate a case to mediation; for reaching agreement; and for maintaining values relevant to the process. The SEN dispute resolution process currently has no procedure for this. The legitimacy of negotiation depends upon the process being fair which, Galligan says, is premised on three criteria: the parties must be able to participate effectively; they must be properly protected (have knowledge of the consequences of outcomes); and agreement must be uncoerced. He considers that the predicted outcome of adjudication should be made known and, because the process envisages an active bargaining process, the main object of procedures should be to secure a framework of involvement that guarantees a free and genuine process of negotiation and agreement. Ensuring that the predicted outcome is made known in SEN disputes is problematic. A possible methodology would be to conduct an Early Neutral Evaluation prior to mediation, but this would be cumbersome and likely to cause delay if it were to precede mediation, which might then precede access to formal mechanisms if unsuccessful.

Galligan states that the mediator must be competent and impartial; the bargaining process must be recorded, and outcomes made available for scrutiny. He perceives the legal basis of negotiation and compromise as problematic, and observes that issues of procedural fairness, in the context of informal mechanisms, rarely come before the courts. There is no requirement that the outcomes of SEN conciliated and mediated settlements be recorded or available for scrutiny. This is a requirement of the CSCP.

In terms of exercising discretion, doctrines against fettering a power or contracting it away are based upon the idea that the decision-maker must consider all relevant facts and act reasonably. In mediation a decision-maker may agree to provide more than he reasonably judges to be the legal entitlement, but Galligan considers this does not necessarily follow. The guiding principle, he argues, must be that any agreement is real and entered into voluntarily. The task of procedures, therefore, is to ensure this knowledge, willingness and genuineness.

This thesis argues that there are two methods of achieving this. The first is to establish procedural safeguards; the second is to create an administrative culture of fairness that will pervade any conciliation and mediation arrangements. It may be necessary to adopt the first approach pending a move towards the second. In the context of SEN, mediation and conciliation have been introduced without either. The adoption of a unified children's complaints process under the auspices of a specialist body with responsibility for designing the rules and oversight of operation might engineer development of such a culture to enable informal mechanisms to be used to their best advantage.

The introduction of case management; the provision of advice for parents and advocates for children; and the adoption of the principles of rights-based conciliation would ensure procedural fairness in the manner Galligan suggests is necessary. The involvement of a specialist body with the function of 'engineering' culture, and designing rules and procedures might obviate the need for the courts to undertake the function of laying down principles. This

would reduce concerns about the courts only being able to do this in a piecemeal fashion, and the length of time taken to develop a body of case law.

7.6.3. *De Novo* Appeals (adversarial/enabling) or Investigation (inquisitorial)?

A report by the National Audit Office observes that traditionally, complaints have been perceived to relate to processes and how issues have been handled, and as part of the internal business arrangements of departments and agencies (National Audit Office 2005). The report states that complaints are often thought about primarily in terms of customer responsiveness and business effectiveness. Appeals systems and tribunals, on the other hand, concern the accuracy or correctness of substantive departmental or agency decisions, and conventionally form part of the administrative justice sphere. They are often considered primarily in terms of citizens' legal rights, natural justice and a range of related quasi-judicial criteria. The report observes:

This bifurcated approach may have some advantages, but it is very distinctive to the public sector and has no counterpart in private sector firms. Rigidly separating complaints from appeals also means that many public service organizations are essentially providing two different basic systems of redress, which are set up and organized on different lines. And citizens also have to grapple with two very different concepts of redress, instead of a more integrated concept of 'getting things put right.' (Ibid. p.7).

In the context of SEN, where the decision-making procedure enshrines adequate provision for establishing relevant facts and enabling participation, it is difficult to see why this process should be repeated by a different body on appeal. If the decision-making process does not operate in this way, steps should be taken to rectify this. Where it is suggested, in an individual case, that the process has not been conducted properly, a reasonable course of action would be to investigate what has happened and review the decision. The rationale for *de novo* appeals stems from a consumerist approach to education that appears misconceived in the context of providing for children's needs and entirely at odds with the holistic approach needed to operate an inclusive system. A locally based inquisitorial review is a fairer procedure for SEN disputes because such a system removes the onus of preparing and presenting the case from the

complainant and so better facilitates access and equality; enables systemic abuse to be identified and redressed; and should drive service improvement.

There is evidence in the Evans study of systemic abuse in the form of dragging-out decisions and pre-occupation with resources. Operation of blanket policies prompted the DfES letter of December 2005. Although there is a mechanism for dealing with such abuse – the LGO – it is rarely accessed. This is unsurprising because the LGO cannot grant the substantive relief parents want for their child in terms of ordering the LEA to make a statement or pay for the child to go to a private school. If parents are exhausted from battling with an LEA through a tribunal process, it appears unlikely that they would further complain to the LGO.

7.7. PROCEDURAL TRANSPLANTS AND PDR

Having adopted Adler as its guru and the foundation of its theoretical basis, ironically this thesis is to conclude by disagreeing with him in some respects. Adler identifies a flaw with the PDR model, which is that it envisages that the dispute resolution mechanism should be determined by what people want. He says:

[...] it will still be necessary to make decisions in individual cases and it is by no means clear that it will always be in the public interest for individual preferences to prevail. Individuals who just want an apology may have a strong legal case while those who seek a legal remedy may have a very weak case or no case at all. Although pressure should not be brought to bear on those who do not wish to appeal (or complain), there is an argument for encouraging them to do so when it is clearly in the public interest that their cases should be considered by a tribunal (or by a court or an ombudsman). There is likewise an argument for discouraging those with weak cases or no cases at all from pursuing expensive and time-consuming appeals and complaints procedures. The problem, in both cases, is that of ascertaining, in advance, of a hearing or an investigation, the strength of the individual's case. (Adler 2006a p.970).

He proposes seven policy options²⁴⁵, all of which, he argues, hold out the prospect of enhancing administrative justice, either by reducing the incidence of disputes or by handling them more effectively. These are:

- **priority should be given to improving first-instance decision-making and reducing error rates**

‘Transforming Public Services’ envisages that the establishment of a unitary Tribunals Service will lead to improvements in this area. It proposes that the Tribunal Service should ‘enter into agreements with the various decision-making departments that feed into it, setting out how together they intend to improve the whole, end-to-end process. Adler questions whether this will be sufficient to raise the standards of first-instance decision making to acceptable levels. He refers to the limitations on tribunals’ effectiveness as a check on administrative decision-making identified by Genn (Genn 1994 p.266) and Baldwin, Wikeley and Young (Baldwin 1992 pps.84-85).

Adler is hopeful that the improved standing of the Tribunal Service might make tribunal decisions more appropriate, but argues that this is insufficient. He endorses Mashaw’s recommendation of QA determined by standards developed by a superbureau. These are suggestions made in the previous Chapter in relation to SEN decision-making.

- **a ‘one-door’ approach**

Adler highlights the difficulty alluded to in this thesis, that the relationship between procedural fairness (which might be dealt with by internal procedures or Ombudsman complaints) and substantive justice (which is dealt with by courts and tribunals) is a complex one. Grievances that appear only to involve procedural fairness may also involve substantive justice while grievances that appear only to be concerned with a denial of substantive justice may also raise issues of procedural fairness. Expecting people to analyse what sort of redress they want and then to choose the

²⁴⁵ The seventh option is that publicly-funded representation should be available for appeals to the second-tier tribunal. This is a reasonable and well-argued suggestion, but is not discussed because it is not immediately relevant to the recommendations for change in this thesis.

appropriate redress mechanism 'is bound to result in errors because people may misunderstand what is at issue and choose an inappropriate redress mechanism'. He states:

The existing arrangements assume that individuals know what kind of problem they have and how to access the appropriate redress procedure. However, the considerable number of cases that cannot be dealt with because they fall outwith the jurisdiction of the redress procedure that is selected suggests that many individuals lack this understanding. In order to deal with this problem, the NAO Report²⁴⁶ recommends that government departments and public bodies should investigate whether a closer alignment of procedures and a common handling of complaints and appeals would be more cost effective. It should clearly be more cost effective because the introduction of a 'one-door' approach, in which everyone who is dissatisfied with a decision or the way in which it is reached, puts their concerns to an official who decides what kind of problem they have and directs them to the appropriate dispute resolution procedure, would reduce the number of errors that individuals make when they select redress procedures for themselves. (Ibid. p.975).

This thesis recommends 'one-door' access and consideration of possibilities for implementation of a single system.

- **when an individual makes a complaint or submits an appeal, the initial decision should always be reviewed**

The proposals in this thesis endorse investigation and review following attempts to achieve informal resolution.

- **'early-neutral evaluation'**

Adler argues that a neutral review could result in the identification (for both sides) of 'weak' cases and, in such instances, appellants and government departments or public bodies could be advised to 'think again'. In other instances, both parties could be advised about what they need to do in order to stand a reasonable chance of succeeding at a tribunal. Together with departmental review (he says), Early Neutral Evaluation could result in the 'filtering out' of a substantial proportion of the weak cases that constitute a

²⁴⁶ National Audit Office 2005.

significant proportion of tribunal hearings. He suggests that this be carried out by the Tribunal Service.

As this thesis recommends the CSCP as a model for SEN disputes, this option would not be a practicable one. A possible weakness of the CSCP model is that it does not provide a satisfactory filter. Complaints with wide and important repercussions might be settled with one phonecall, whereas the ‘vexatious litigant’ complaints with no substance may go all the way to a Review Panel hearing. This problem could be ameliorated by the operation of proportionate case management. It should be possible for a CM to advise complainants, in appropriately defined circumstances, that a complaint will not be pursued, but also to ensure that a matter is further investigated even though the parties have resolved their particular disagreement. In these cases, the CM would take forward an investigation, with the original complainant simply being a source of information.

- **conciliation or mediation before the tribunal hearing**

As stated in the previous Chapter, Adler does not consider mediation and conciliation suitable in *citizen vs state* disputes. The argument in this thesis is that informal mechanisms can be ‘customised’ to enable the benefits claimed to be realised without the risk of disadvantaging the weaker party.

- **pro-active ombudsman procedures should be used to investigate cases in order, if possible, to settle without a hearing**

Adler does not advocate this. He states that Ombudsmen were established to deal with grievances where no remedy was available from courts or tribunals because no legal right had been infringed, and that their remit is to provide remedies for maladministration rather than to determine the legality or merits of administrative decisions. He observes that Ombudsmen use informal and flexible methods to investigate complaints about the ways in which administrative decisions are made, rather than adjudicatory hearings to determine the legality or merits of these decisions. He argues that they provide additional remedies and should not be seen as alternatives to courts

and tribunals. He acknowledges, however, that Seneviratne's work (Seneviratne 2002) illustrates that the dividing line between courts (and, by extension, tribunals) on the one hand and Ombudsmen on the other, which was once thought to be clear and unambiguous, is now becoming more contentious.

He notes the impressive achievements of the Financial Services Ombudsman²⁴⁷, but concludes:

In spite of [the] achievements [of the FSO], it is neither clear that the substitution of one mode of dispute resolution for another could be achieved in a smooth and orderly way nor that any costs savings would result from doing so. Thus, the case for tribunals adopting the pro-active procedures that Ombudsmen use to investigate cases is not really made out. However, Lord (Geoffrey) Filkin, who was the junior minister in charge of tribunal reform in the LCD when the White Paper was being drafted in 2003-2004, was known to be very impressed by the FSO's achievements, and some of the policy options discussed above, in particular, the 'one-door' approach and early-neutral evaluation, both of which involve pro-active advice giving, and the adoption of a more proactive approach by tribunal chairs and members, which is referred to below, do represent tentative attempts to incorporate features of the Ombudsman's approach into tribunal decision making. This is probably as far as the incorporation of ombudsman techniques into tribunal decision making is likely to go. (Ibid p.979).

If the SENDIST were to undertake the review stage for SEN complaints under an adapted version of the CSCP model, this would be an example of a tribunal adopting Ombudsman techniques. Adler's first argument against this is that tribunals and Ombudsmen have different functions. Whilst this is correct, it does not mean that only courts or tribunals can deal with disputes about legality or merits. Gulland's thesis considered this issue and concluded against recommending that is necessary to have a tribunal to determine disputes about legality or merits in the context of social services complaints (Gulland 2006 – see pps. 241-2 of the thesis).

²⁴⁷The figures he cites are that the FSO investigated almost 100,000 cases in 2003-2004; resolved 42 per cent of cases by mediation and conciliation, 50 per cent after investigation by an adjudicator and the remaining 8 per cent by decision of an Ombudsman. Less than 20 cases required an oral hearing. The average unit cost per case (£473) was almost exactly the same as for tribunal cases (£455) (National Audit Office 2005).

Placing the argument in the SEN context, it might be helpful to consider an example. If an LEA, in conducting a statutory assessment, fails to obtain an educational psychologist's report and, as a result, mis-diagnoses a child's needs and sets out unsuitable provision in a proposed statement, that LEA has acted unlawfully in breach of a statutory obligation and arrived at an irrational decision. The solution is to ensure that the LEA obtains the relevant report quickly, and reconsiders the decision. A complaints system could achieve this more quickly than an appeal to the SENDIST and more cheaply than an application for judicial review. Adversarial adjudication is not a pre-requisite for disputes about legality or merits.

The second argument is that 'procedural transplants' must be dealt with cautiously. If a mechanism operates successfully in one context, it does not necessarily follow that the same will happen in a different context. This is a reasonable conjecture. Indeed Galligan makes the same point (Galligan 1996b p.358) but, if taken to its logical conclusion, the argument that change should not be considered because there is no evidence that the change would work might mean that nothing would ever be changed. Where there is evidence that change is needed, the next step is to consider what the possibilities for such change might be and how feasible it would be to facilitate them.

A criticism of this thesis might be that it argues for change without producing any new empirical work to justify the argument – that it 'puts the cart before the horse'. The answer to this is that the thesis identifies that evidence for change exists, as does the justification for the nature of the changes suggested. It is necessary to set this evidence out persuasively as a first stage in order for the argument to be accepted. The empirical work is then about the practicalities of how change may be implemented. As Galligan says, in the quotation at the beginning of this thesis, matters of theoretical interest lie behind practical decision-making. It is hoped that the discussion in this thesis will not only be of interest in its own right as a theoretical analysis, but will be of practical use in identifying problems and proposed solutions not identified in existing work. It is from this twin basis that the theoretical analysis makes its claims of worth.

Whilst Adler's caution in relation to public expenditure is entirely proper, his observations do not stem from the premise of attempting to find solutions to problems identified with the operation of the adversarial adjudicative model in a specific context. Despite Adler's observations, the argument embodied in this thesis is that the CSCP model, incorporating rights-based conciliation, advice for parents, and with children having the status of complainants and being provided with advocates, is one that better assures PDR than the current SEN dispute resolution system. Its recommendation is that a feasibility study be undertaken. The long term aim would be to adopt the CSCP as a single model for education and children's services complaints. At the very least, possibilities for setting up local case management to ensure parents and children are aware of relevant complaints mechanisms and the complaints they deal with should be considered.

7.8. JUSTICE

Although the analysis is based upon PDR, which is a model of substantive justice, the rationale for change is based in Adler's interests theory/authority-wide approach model of rights. This distributive justice model is central to the arguments for reform. As Coldron says:

The concern of distributive justice is the fair allocation of social goods or resources. In a meritocratic, and therefore socially mobile, society our level of education would be a major means by which we are allocated to our occupations and consequently to different levels of prestige and financial reward. On this basis education is a major resource that would in a just society be allocated fairly.

This does not imply equality. For, quite apart from the impossibility that every individual can attain the highest competence in all fields, if educational attainment is to serve as the criterion for allocation, it requires that outcomes differ. Some people need to do better than others. When, inevitably, some people get greater social and financial rewards than others we are persuaded to accept this inequality if we think their rewards are the result of greater ability or hard work – the meritocratic principle.

If however some individuals or social groups are unfairly handicapped and others unfairly advantaged in the competition for educational success then the fairness of the system is brought into question. (Coldron 2008 p. 6).

Rawls advanced a theory referred to as the Difference Principle (Rawls 1993, pps. 5-6). He proposed that each person has an equal claim to a fully adequate scheme of equal basic rights and liberties, which is the same scheme for all; in this scheme the equal political liberties, and only those liberties, are to be guaranteed their fair value. Social and economic inequalities are to satisfy two conditions: they are to be attached to positions and offices open to all under conditions of fair equality of opportunity; and they are to be to the greatest benefit of the least advantaged members of society.

The moral motivation for the Difference Principle is equal respect for persons. Where strict equality would result in particular groups being disadvantaged, there is a need for them to be treated differently in order to bring them to a truly equal position. Rawls' principle provides guidance on what type of arguments will count as justifications for inequality. The Stanford Encyclopaedia of Philosophy summarises Rawls' arguments as follows:

Rawls is not opposed to the principle of strict equality *per se*, his concern is about the *absolute* position of the least advantaged group rather than their *relative* position. If a system of strict equality maximizes the absolute position of the least advantaged in society, then the Difference Principle advocates strict equality. If it is possible to raise the absolute position of the least advantaged further by having some inequalities of income and wealth, then the Difference Principle prescribes inequality up to that point where the absolute position of the least advantaged can no longer be raised²⁴⁸.

The former Prime Minister, Tony Blair recognised

[...] a long tail of under-achievement and failure, concentrated in our poorest communities, weakening our society and economy and undermining the life-chances of millions of young people [...] those students who are disadvantaged socially and economically [...] continue to suffer the greatest educational disadvantage. Moreover, it is precisely these students who are disproportionately represented in the SEN population.²⁴⁹

The aim of the proposed reforms is to bring those who are disadvantaged - because they are poor, less well-educated, have learning difficulties, are from ethnic minority backgrounds, or because they are children - to the starting gate

²⁴⁸ <http://plato.stanford.edu/entries/justice-distributive/>

²⁴⁹ Speech to headteachers in Cardiff, 3 May 2004.

on equal terms. The hope is that this will better ensure that children with SEN get the help they need; that help is provided quickly; that children, and their parents, are listened to and treated with respect; and that the system allocates limited resources fairly. Although access is only one element of PDR, true equality of access is an important factor. The proposed model for reform addresses the barriers to access identified in the body of work relating to access to justice by ensuring that: advice is available to parents and children about rights and procedures; the system is cost-effective for complainants; complexity is reduced; there is a single access point; complaints are resolved swiftly; the process is informal; and representation is provided for children. The evidence from the consultation with children and adults referred to in the last two Chapters also indicates that, following implementation of reforms that were much-needed, it is a system that users would want.

The conclusion of this thesis is that the introduction of mediation and conciliation into SEN dispute resolution does not assure proportionate dispute resolution. Justice does not come cheap. PDR embraces multi-factorial goals, some of which are attained through adopting aspects of conciliation and mediation. Because this thesis is located in the arena of provision for children with SEN where disputes may be fraught and solutions needed urgently, the PDR goals of swift resolution and reduction of conflict, which mediation and conciliation can ensure attainment of, are important ones. But introduction of these mechanisms, which may be cheaper for parents and for the state, simply allows different choices. Each choice involves different trade-offs; and each trade-off is a 'loss', in terms of goals. This thesis argues there is a need for more to be done.

Appendix: Bibliography and Data Sources

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- a survey of 50 per cent of LEAs in England and Wales;
- a survey of parent-partnership services;
- analyses of national data made available by the Department for Education and Skills (DfES), the Welsh Assembly Government (WAG) and others;
- evidence from school and LEA inspections by Ofsted, Estyn and the Audit Commission;
- a literature review by the Institute of Education, London University; and
- extensive discussions with key stakeholders in central and local government and the voluntary sector.

Baldwin, J., Wikeley, N. and Young, R. (1992), *Judging Social Security*, Oxford: Clarendon Press.

Based on observation of 337 hearings and interviews with 181 appellants to Social Security Appeal Tribunals and Medical Appeal

Tribunals. Chairmen, presenting officers and representatives were also interviewed.

Boylan, J. and Braye, S. (2006) *Paid, Professionalised and Proceduralised: Can Legal and Policy Frameworks for Child Advocacy Give Voice to Children and Young People?*, Journal of Social Welfare and Family Law, Vol. 28 Nos 3 – 4.

Based on a study of 39 looked after children aged between 8 and 17. Fieldwork comprised 6 focus groups, 6 individual interviews and 5 workshops with children.

Chan, Y-C., Chun, R. P. K., Lam, G. L. T. and Lam, S. K. S. (2007), *The Development of Family Mediation Services in Hong Kong: Review of an Evaluation Study*, Journal of Social Welfare and Family Law, Vol. 28 Nos 3 – 4.

Based on 2 telephone surveys of 828 and 915 Hong Kong residents respectively; 804 responses to a mediation service user satisfaction survey; interviews with 179 mediation service users; and data analysis of 915 cases using the mediation service under the pilot scheme.

Coldron, J., Stephenson, K., Williams, J., Shipton, L. and Demack, S. (2002), *Admission Appeal Panels: Research Study into the Operation of Appeal Panels, Use of the Code of Practice and Training for Panel Members*, Research Report No. 344, London: Department for Education and Skills.

Based on postal survey of 1011 panel members and 317 appellants to schools admission appeals and on case studies, involving observation, interviews with panel members, parents and officers, and documentary analysis, in three LEAs and two school admission authorities.

Coldron, J. (2008). *Secondary School Admissions*. Research Report no. DCSF RR020.

Based upon admissions prospectuses from 135 LEAs; numbers of offers of year 7 places from 106 LEAs; DCSF figures on numbers of appeals; the results of a telephone survey of 2000 parents or carers of children who started secondary school in year 7 in 2006, and interviews with 2,000 parents, recruited through a representative sample of schools.

Council on Tribunals Council on Tribunals. (2003). *School Admission and Exclusion Appeal Panels Special Report*.

Based on additional visits; observation the deliberations of panels, and discussions with members and clerks; meetings with other interested parties, such as the LGO, representatives from the training organisation ISCG (Information for Schools and College Governors), and researchers from Sheffield Hallam University who had recently conducted a study of admission appeals.

Council of Tribunals (2005), *The use and value of oral hearings in the administrative justice system*, Council of Tribunals consultation paper.

110 responses to the paper from a variety of sources including the advice sector, tribunals and practitioners.

Douglas, G., Murch, M., Miles, C., Scanlan, L., (2006) *Research into the Operation of Rule 9.5 of the Family Proceedings Rules 1991*, Cardiff Law School.

Based on interviews with 15 children and 23 parents and carers and 420 returns from a national postal survey of solicitors.

Evans, J. (1998), *Getting it Right*, Slough: National Foundation for Educational Research.

Based on 111 responses to a questionnaire from LEAs; 44 follow up telephone interviews; and detailed case studies in 25 LEAs involving interviews with LEA officers, Parent Partnership Officers and parents with experience of appealing to a Tribunal.

Enterkin, J. and Sefton, M. *An Evaluation of the Exeter Small Claims Mediation Scheme*. DCA Research Unit

Based on analysis of 255 cases referred by judges to the in-court mediation scheme; data from court files; observation of 89 mediations; 151 interviews with plaintiffs and defendants; responses to 214 postal questionnaires and focus group meetings.

Fletcher-Campbell, F., Chamberlain, T., and Smith P (2006), *Evaluation of the Special Educational Needs Regional Partnerships*, Department for Education and Skills.

Based on 66 interviews with facilitators; a total of 108 interviews with LEA officers, teachers, representatives from the Health Service, Social Care, the voluntary sector, Higher Education, Parent Partnership Services, Government Offices and Connexions and independent consultants and parents; 3 interviews with the national adviser; 10 interviews with regional field force workers; observation of 25 regional meetings; observation of National Steering Group meetings; and examination of regional documentation and websites.

Genn, H. and Genn, Y. (1989), *The Effectiveness of Representation at Tribunals*, London: Lord Chancellor's Department.

Based on interviews with appellants to 190 Social Security Appeal Tribunals, 113 Industrial Tribunals and 84 hearings before Immigration Adjudicators; a postal questionnaire to 168 potential SSAT appellants; the analysis of case papers for 958 Industrial Tribunals, 1,050 Immigration Appeals, 623 Mental Health Review Tribunals and 1,115 SSATs; observation of hearings and interviews with chairs, presenting officers and representatives.

Genn, H. (1999a). *Paths to Justice*

Based on a questionnaire about justiciable problems which was used to screen a random sample of 4,125 adults and interviews with 1134 people who had experienced justiciable problems.

Genn, H., Lever, B. and Gray, L. (2006). *Tribunals for Diverse Users*, London: Department of Constitutional Affairs.

Based on focus group discussions with 115 members of the public; waiting room interviews with 529 tribunal users; observation of 391 of the subsequent tribunal hearings; interviews with 374 of these tribunal users following the hearings but prior to decisions; and interviews with 295 of these tribunal users following decisions.

Genn, H., Fenn, P., Mason, M., Lane, A., Bechai, N., Gray, L. and Vencappa, D. (2007), *Twisting arms: court referred and court linked mediation under judicial pressure*, Ministry of Justice.

Based on 214 interviews with solicitors and parties relating to 178 cases referred to mediation under the ARM pilot scheme.

Gersch, I. (2004), *An Evaluation of an Independent Mediation Service Provided by Global Mediation (SEN) to South Central Regional Inclusion Partnership (SCRIP) and South Eastern Regional SEN Partnership (SERSEN); two regions in Southern England covering 19 LEAS – Third Report October 2003 – September 2004*, University of East London.

Based on responses to questionnaires from 33 LEA representatives, 24 parents and carers, 9 school representatives and 44 mediators; reviews of steering meeting minutes, notes of meetings between mediators and LEAS and case tracking records.

Gulland, J. (2007), *Complaining, Appealing or Just Getting it Sorted Out: Complaints Procedures for Community Service Users*, University of Edinburgh. Based on comparative case studies of 2 local authorities (Duncairn and Kinraddie).

Hall, J. (1999), *Resolving Disputes Between Parents, Schools and LEAs: Some Examples of Best Practice*, Department for Education and Employment. Based on 6 individual interviews, 5 paired interviews and 2 focus groups involving visits to 8 LEAs.

Harris, N. (1997), *Special Educational Needs and Access to Justice*, Bristol: Jordan Publishing Ltd.

Based on observations of 40 Special Educational Needs Tribunal hearings and a postal questionnaire returned by 118 parents.

Postal questionnaires were also sent to local education authorities, tribunal members and representatives.

Harris, N. and Eden, K. (2000), *Challenges to School Exclusion*, London: Routledge Falmer.

Based on observations of 48 school exclusion appeal hearings and a postal questionnaires sent to 289 parents (questionnaires were also sent to local education authorities, head teachers, school governors and appeal panel members). Interviews with a small number of children who had been excluded were also carried out.

House of Commons Education and Skills Committee (2007), *Special Educational Needs: Third Report of Session 2005 – 2006*, London: The Stationery Office Limited.

Based on 230 written submissions, 50 witnesses in oral evidence and visits to schools.

House of Commons Education and Skills Committee (2007), *Special Educational Needs: Assessment and Funding, Tenth Report of Session 2006 – 2007*, London: The Stationery Office Limited.

Based on 60 memoranda from a variety of individuals and relevant bodies.

Ipsos MORI Social Research Institute (2007), *Customer Satisfaction Survey for the Local Government Ombudsman*, Ipsos MORI.

Based on 812 telephone interviews with complainants to the LGO. 1570 leads were used to achieve the interviews giving a response rate of 61%.

Leggatt, A. (2001), *Tribunals for Users, One System, One Service*. London.

Based on reading 300 responses to a consultation paper; visiting 20 of the most important tribunals; a visit to Australia by two members for comparative purposes; holding four seminars, and limited research conducted by MORI among users.

Local Commission for Administration Annual Reports 2002-2006.

Mashaw, J. (1983). *Bureaucratic Justice*. Yale: Yale University Press.

Based on interviews and observation of the US Social Security Administration and 6 state disability determination services.

Masson, J., Winn Oakley, M. (1999) *Out of Hearing: Representing Children in Care Proceedings*, London: Wiley.

Based on observations of 20 care proceedings and interviews with the participants.

Morgan, R. (2005), *Getting the Best from Complaints – the Children's View*, Newcastle: Commission for Social Care Inspection.

Based on 7 workshop groups of children and young people looked after by social services. The workshops were conducted in London, Newcastle and the Midlands.

MORI Social Research (2000), *Review of Tribunals Consultation: research study conducted for the Review of Tribunals*.

Based on 40 qualitative interviews with applicants to eight tribunals (Appeals Service; Social Security Commissioners; Employment Tribunals, Education Admissions and Exclusions Panels; Parking Adjudicators; VAT and Duties Tribunals; Leasehold Valuation Tribunals; the General Commissioners of Income Tax).

National Audit Office Legal Services Commission *Legal aid and mediation for people involved in family breakdown HC 256 Session 2006-7*. London Stationery Office.

Based on 1,015 replies to a survey sent to 4000 people. 265 respondents had attempted mediation.

Oliver, C., Knight, A., Candappa, M. (2006), *Advocacy for looked after children and children in need: achievements and challenges*, Thomas Coram research Unit, Institute of Education.

Based on a telephone survey and subsequent investigation of advocacy services, interviews with 48 children, 18 advocates, 40 health and social care professionals and 13 parents or carers.

Peay, J. (1989), *Tribunals on Trial: a study of decision making under the Mental Health Act 1983*, Oxford: Clarendon Press.

Based on interviews with 26 patients and observation of 100 MHRT hearings.

Pleasence, P., Buck, A., Balmer, N., O'Grady, A. and Genn, H. (2002), *Summary of Findings of the First LSRC Periodic Survey of Legal Need*, London: Legal Services Research Centre (www.lsrc.org.uk)

Based on a national household survey of 5611 adults and a survey of 197 adults living in temporary 'institutional accommodation'. Surveys looked at incidence of 'justiciable problems' and how people had dealt with them, including objectives in resolving the problem, advice-seeking behaviour, and costs incurred. Not specifically concerned with tribunals but included those for whom a tribunal appeal would have been possible.

Riddell, S., Wilson, A., Adler, M. and Mordaunt, E. (2002), *Parents, professionals and special educational needs policy frameworks in England and Scotland*, Policy and Politics Vol. 30 No. 3.

Based initially on interviews with 15 key informants and responses to questionnaires to all local authorities. Subsequently, 4 local authorities were selected for case study work and in each of these 16 case studies were conducted with families involved in the process of opening a record/statement of needs. Parents, children and professionals involved in the particular case were all interviewed and efforts were made to maintain a balance between 'contested and 'non-contested' cases.

Rogers, R., Tod, J., Powell, S., Parsons, C., Godfrey, R., Graham-Matheson, L., Carlson, A. and Cornwall, J. (2006), *Evaluation of the Special Educational Needs Parent Partnership Services in England*, Canterbury Christ Church University College.

Based on national benchmarking survey of 110 Parent Partnership Services; telephone interviews with 32 Parent Partnership Services; and 20 case studies involving Parent Partnership Service staff, volunteers, local authority staff, school staff and relevant stakeholders.

Sainsbury, R. (1992), *Survey and Report into the Working of Medical Appeal Tribunals*, London, HMSO.

Based on an analysis of 1,000 case papers, a postal survey to which 1,028 appellants replied, and interviews with 39 appellants

and 16 representatives.

Sainsbury, R., Hirst, M. and Lawson, D. (1995), *Evaluation of Disability Living Allowance and Attendance Allowance*, London: HMSO.

Based on interviews with 188 Disabled Living Allowance (DLA) and 174 Attendance Allowance (AA) appellants to Disability Appeal Tribunals. Also includes interviews with 278 DLA and 322 AA claimants who had requested an internal review but had not yet appealed beyond this stage.

SENDIST Annual Reports 2000-2007.

Trinder, L. and Kellett, J. (2007) *The longer-term outcomes of in-court settlement*. Ministry of Justice.

Based on 117 second follow-up telephone interviews with parents who had attended in-court conciliation approximately 2 years previously and who had been interviewed in both the baseline and first follow-up studies.

University of Exeter - 'Eliciting children's views in resolving disagreements between LEAs, professionals and parents. Interim Report'(2004) and 'A study of promising practices of pupil participation in SEN procedures in south-west mainstream schools' (2004)

Based upon a study of seven LEAs involving interviews with LEA officers, mediators, EPs, PPOs, parents, young people, representatives from schools, representatives from social services, disability services, Connexions, and child advocacy services. Interviews were analysed by group and detailed case studies undertaken; a postal survey completed by SENCOs in 1600 schools, and data collected from those working in schools and information from LEAs on relevant policies and practices.

Vernon, J. (1999). 'Parent Partnership and Special Educational Needs: Perspectives on Good Practice'.

Based on a study of 26 schools operating in 6 LEAs.

Walker, J. (2004). 'Picking Up The Pieces: Marriage and Divorce Two Years After Information Provision'.

Based upon a follow-up study of pilot schemes across 11 geographical areas using both quantitative and qualitative methodologies; a postal questionnaire completed by 1,491 people and 131 in-depth interviews.

Wikeley, N., Barnett, S., Brown, J., Davis, G., Diamond, I., Draper, T. and Smith, P. (2001), *National Survey of Child Support Clients*, DSS Research Report No. 152, London: The Stationery Office.

Based on a survey of Child Support Agency clients, including 1017 non-resident parents and 1392 parents with care.

Wilkin, A., Archer, T., Ridley, K., Fletcher-Campbell, F. and Kinder K. (2005), *Admissions and Exclusions of Pupils with Special Educational Needs*, National Foundation for Educational Research.

Based on case studies involving officers at 6 LEAs and at 17 schools (primary, secondary and special) where interviews were conducted with, amongst others, headteachers, SENCOs, heads of year, teaching assistants, social exclusion staff, pupils and parents.

Wolfendale, S and Cook, G. (1997) 'Evaluation of Special Educational Needs Parent Partnership Schemes'
Based on a study of PPSs across 25 LEAs.

Young, R., Wikeley, N. and Davis, G. (1999), 'Child Support Appeal Tribunals: the appellant's perspective' in Harris, M. and Partington, M. (eds.) *Administrative Justice in the 21st Century*, Oxford: Hart Publishing.
Based on interviews with parents and others, plus observations of hearings and discussions with CSA staff, tribunal chairmen and members. Study comprises 123 cases and observation of 23 hearings.