SEND National Trial Single Route of Redress - Briefing Events 2021

Event questions and answers

This document provides responses to questions asked at the three SEND National Trial Briefing events held in March 2021. The events provided local areas with an update on the progress of the trial and a reminder of duties in relation to the SEND national trial.

The FAQs will be updated as required and notification of changes will be placed in the regular national trial newsletter. SENDdeliverysupport@mottmac.com

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# General questions

What advice is there to best manage a situation where a child with therapy needs has not received their statutory assessment due to long waiting lists and limited resources in the area?

It is a statutory requirement that health advice and information is provided as part of an EHC needs assessment within six weeks of being requested. Failure to secure this advice places the local authority in the position of failing to undertake its statutory duties. The local clinical commissioning group is under a duty to comply with the local authority in the performance of its statutory duties.

Where an independent therapist contracted by a school to provide advice as part of the EHC needs assessment is also contracted by the school to provide the service, this can potentially result in a conflict of interest. What advice can you give a local authority on how to manage this situation?

The local clinical commissioning group is required to provide advice and information as part of the assessment. There may be times when advice from independent health professionals is also received as part of the assessment. The local authority is expected to consider very carefully all advice received and make a judgement on the basis of all of this advice about the child’s needs and provision requirements

We are seeing an increasing number of parents and young people challenging LA decisions when they are unhappy with the SEN provision in their schools, as well as an increase in the number of schools supporting parents requests to move to specialist provision when needs can be met at SEN Support level. Is this a trend being observed in other LAs?

The department does not collect data on complaints about SEN Support. Data on appeals to the Tribunal for each local authority is published annually and is available [here](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/992304/SEND_Appeal_Rate_Table_2020.ods).

Do Ofsted and CQC inspectors receive training on Section 21?
Inspectors from both Ofsted and CQC engaged in local area inspections are fully informed about the statutory requirements of the Children and Families Act.

# Questions about Mediation

We have had a mediation case that was settled ‘at the court door’ and it wasn’t clear whether the settlement could be signed off by the mediator in order for it to have some legal standing. Is there a view on whether the mediator can do that?

**Global Mediation Response:**

The mediator is there to facilitate agreement between the parties. If the parties have reached agreement, there is nothing to stop the parties asking the mediator to reflect the terms of the agreement in a written document. The mediator will usually assist the parties in reaching an agreement and can play a useful role in ensuring that any agreement is specific (clear and precise), measurable (meaningful), achievable (agreed, attainable), relevant (reasonable and resourced) and timed (clear timescale for actions), as well as being framed in neutral non-judgmental terms. The mediator can also suggest any areas of potential future disagreement that could be addressed in the agreement.

**KIDS Mediation Response:**

If a Tribunal Appeal hearing is very imminent and parties agree written terms at mediation, the Tribunal will usually still be involved and Tribunal procedure will be adhered to. We would need clarification of the context of this question. We are happy to provide a full response if we are given details of the situation the questioner experienced. Please contact *susanna.diegel@kids.org.uk**.*

Are professionals contributing to the EHC plan allowed to attend mediation meetings?

**Global Mediation Response:**

Yes

**KIDS Mediation Response:**

Absolutely. Anybody who has information about the CYP that helps find solutions to resolve the disagreement is welcome. In the KIDS model we consult with both parties who should attend and usually there is no disagreement about who should be there. On the rare occasion where parties cannot agree, by law the mediator can make the final decision and will base it on a number of factors, for example: what will the knowledge contribute? Could it be contributed in another way? See [SEND Regulation 2014](https://www.legislation.gov.uk/uksi/2014/1530/contents/made) 38(e).

We want to keep the number of participants at reasonable levels, but the main factor is the contribution. In this context, please note that professionals participating are there as experts providing information about the CYP, not to take sides with either the parent or young person or the LA/CCG, i.e. they are not “witnesses”.

Typical participants: LA officer, parent or young person, Education Provider, Parental Supporter (for example SENDIASS or a friend/family member), other professional experts (for example OT, SALT) plus the mediator.

What do you recommend when parents request their lawyer attend the mediation meeting and ask to record the meeting?

**Global Mediation Response:**

Lawyers are not necessary in mediation; some can be helpful and some less so. The meeting is designed to be an informal way of resolving issues without recourse to legal remedy. Discussions are confidential and without prejudice to legal rights. This allows creative problem-solving and ensures that suggestions for resolution can be explored freely. As everything discussed in mediation is confidential and cannot be relied upon elsewhere, the only record kept is when there is agreement, and any notes of discussions cannot be used in a Tribunal or legal case. If a parent wishes to have a lawyer present, they can do so. Recording the mediation would not normally be agreed for a variety of reasons and would be likely to impede a free and open confidential discussion. As a neutral provider we do not provide advice to either party but would not ordinarily allow recordings which do affect the provision of the mediation service, as well as the parties. We do try hard to ensure that parties attending mediation feel that the space is safe, that discussions are conducted in a respectful manner, and that everyone leaves feeling that they have been heard.

**KIDS Mediation Response:**

Occasionally the parent or young person wish their lawyer to attend mediation with them. Some lawyers are also trained mediators / have good understanding about the mediation process so of course they can attend if it helps the family to feel better supported. In the KIDS model we will inform the LA/CCG so they can also bring legal rep if they so wish. (This happens rarely).

The mediator will speak with the lawyer before the mediation meeting to explain the mediation process and roles of those attending. Specifically, that mediation is conducted in a non-adversarial way and very different to the tribunal process.

Recording: we would strongly advise against this. The reason is that a cornerstone of all mediation processes is that what is said in the meeting is confidential. The written outcome / agreement form can be shared on a “need to know” basis. The reason for the confidentiality is that it allows everybody to speak freely and openly – and this in turn leads to better outcomes for the CYP. If KIDS were to receive a request for recording, we could check whether this is because of making reasonable adjustments for a participant and if that was the case, gain agreement from the other party and the mediator would be likely to set out in the Mediation Agreement the purpose of the recording and who it can be shared with. If the recording is for other reasons, we would have further conversations with the family and their solicitor to explain the mediation process and why recording is not part of it.

Is it a requirement for the mediator to contact the LA prior to the agreed mediation date?

**Global Mediation Response:**

There is no requirement in the SEND Code but it is usual for the mediator to make a pre-mediation call to the parties. When this is possible, it provides a useful opportunity for the mediator to introduce themselves, explain the process, check who will be attending and identify the key issues to be discussed at the meeting. This helps to manage the expectations of the parties.

**KIDS Mediation Response:**

The legal requirement is for the mediation provider to confirm 5 working days before the mediation meeting all meeting details: time, location, participants etc. with the LA, the family and everybody else attending the mediation meeting.

In addition to this, it is best practice for the mediator to contact the LA and especially important if a number of LA officers attend mediation rather than say just one or two – or the LA officer is new to SEND Mediation. The mediator should introduce themselves, gain the LA view of the disagreement, check that the LA officer has decision making power etc. KIDS also have a preparation process that means that detailed information is shared before a mediation meeting, so that a clear agenda is established and any new / recent information or reports can be shared beforehand.

Mediation is an excellent way to de-escalate issues at hand so why isn't it compulsory for parents prior to lodging an appeal?

**Global Mediation Response:**

Mediation is usually a voluntary process and works best when parties are committed to a resolution without the need for more formal proceedings. It is difficult to force parties to mediate in good faith if they do not wish to do so. When the SEND services were set up, the SEND Tribunal and DfE considered that it would be unfair to deprive parents/carers and children of their legal right to an appeal if they wished to do so without mediation but would be better to encourage them by requiring them to find out about the process (and obtain a certificate) before proceeding to the Tribunal. Local authorities were required to provide a service free of charge and to participate in mediation if requested. This is essentially a political decision. Most mediation providers would certainly encourage more mediation as an excellent way of de-escalating issues but would not necessarily agree it should be compulsory.

**KIDS Mediation Response:**

A very interesting question. A cornerstone of most mediation contexts is that it should be voluntary as this is the best basis for encouraging a collaborative environment. If one of the parties is forced to attend, that can put up a barrier. It is also important to be aware that for some people voicing their disagreements directly to each other can be more difficult than presenting to a judge / panel and for them to make the decision. I believe the introduction of the Mediation Information Awareness Service (MIAS) is a good way to encourage the uptake of Mediation without making it compulsory for PYP.

In the SEND context it is of course compulsory on the LA (and CCG when disagreement is about the final EHCP) but as it is a sensible alternative to tribunal, that is reasonable to raise awareness of the benefits of mediation, for example reaching early resolution.

What happens when the SEND officer does not have the authority to make a decision and instead it has to go back to the LAs decision-making panel rather than being made at the mediation session?

**Global Mediation Response:**

The SEND Code of Practice at 11.38 provides: “For mediation to work well … the local authority and health commissioner representative(s) should be sufficiently senior and have the authority to be able to make decisions during the mediation session”. Ideally, decisions should be capable of being made at the meeting. There are times when this is not possible or practicable, and in those circumstances a decision-maker could be contacted by telephone, or arrangements made for an agreed proposal to be put before a panel. Progress can still be made, in terms of clarifying the issues and, in particular, any gaps in the evidence; action points identifying further information/ documentation to be produced to a clear agreed timeframe can offer reassurance to the parties.

**KIDS Mediation Response:**

In SEND Mediation the LA is required to send someone who can make decisions on the day, and the service provider should check that they do.

Decision-making power “on the day” is essential for Mediation. SEND Regulations 2014 37(1) states that mediation must be attended by “*persons who have authority to resolve the mediation issues*”.

The service provider should check decision-making power – KIDS do this when preparing parties for Mediation and via a Pre-Mediation Agreement. The service provider should ensure an appropriate LA representative attends or there is an open line to a decision maker during the meeting.

If a LA is not complying with their legal obligation to send someone with decision-making authority, that should be addressed. There are reasons why panels are used for decision making – to do with local accountability and the wider public interest that decisions are made fairly and consistently, but those reasons do not override the legal obligation for decisions to be made in Mediation.

Authority can be delegated, others can be consulted during a Mediation, in-principle decisions can be made in advance that are finalised in Mediation – there are many ways to do this. Anybody involved in a Mediation who is concerned about decision making power should advise the service provider so that the matter can be sorted before the meeting. However, the service provider should make it clear at the outset of delivering the service, that they need to deliver the service within the legislative framework and which includes LA / CCG decision making power.

What happens if the agreement made in the mediation session is not followed? Can the mediation service be contacted by parents to address it?

**Global Mediation Response:**

A Mediation Outcome Statement or Agreement/Action Plan is not legally enforceable in the same way that a court order is; however, as a signed written agreement entered into with the intention of the parties that the points of agreement and actions set out in the document be adhered to, it has some force, and the parties are entitled to expect that it will be followed. The mediator does not impose any judgment or decision on the parties; any agreement that they reach comes from the participants finding elements of common ground. The mediator’s role usually ends upon completion of the mediation meeting and distribution of the agreement document, and it is not part of their remit to monitor or enforce adherence to the terms of the agreement. To do so would compromise the mediator’s neutrality.

**KIDS Mediation Response:**

In KIDS experience it is very rare that Mediation or DR agreements are not adhered to (1% of cases if that) and KIDS offer to assist parties when that happens, i.e. the service manager communicates with parties and helps resolve to avoid further escalation. It will depend on your service provider whether they offer this service or not, but in our view this is best practice without compromising neutrality.