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MEDIATION, NEGOTIATION &
CONFLICT RESOLUTION SERVICES

How is Mediation Conducted in the Shadow of the Law?

Additional Support Needs Mediation in Scotland

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CHAPTER 1- INTRODUCTION

The Education (additional support for learning) (Scotland) Act 2004 as amended ('the Act'), is the only Act in Scotland providing a formal framework for provision of mediation; in this case to parents of children and young persons ('YP's), in dispute with local education authorities ('LEA's) over additional (educational) support needs ('ASN') for children and YPs('CYP's).

To my knowledge there has only been one other study of ASN mediation. This was carried out by an MSc student.¹ It focused on interviews with LEA education officers('EO's) and analysed dispute types in ASN mediation.²

The motivation for my study- and potential bias

I am a Scottish solicitor, and interested in how mediation is practised in the shadow of the law. My son Peter became deaf through meningitis aged two. He started school just after the Act became law. Due to unhappiness with the LEAs educational support for Peter, I wrote to it under the Act seeking additional support(AS). I corresponded with the LEA re what constituted both ASN and coordinated support plans (CSP), and which Peter qualified for. I have insight into the Act as both parent and solicitor. I wanted to look at the theory of ASN mediation and its practice. A court practitioner for years, it occurred to me there may be a better way to resolve disagreements, with parties talking to each other to resolve issues/relationship difficulties, without going to court. I was interested to look at how mediation in this field works and whether it is effective.

¹ Morag Steven, 'Partnership and collaborative working: what is mediation's contribution to the Scottish additional support needs educational framework?'(2012), unpublished, University of Strathclyde

² Ibid3-4

Structure of this dissertation

This work is a combination of an academic review of literature and field research in the form of interviews with five working ASN mediators. I also made requests to LEAs under Freedom of Information ('FOI') legislation re the extent of mediation since the Act came into force.

Chapter 2 describes the Act, which provides a tripartite system of dispute resolution, namely mediation, dispute resolution (known as independent adjudication (IA)) and Additional Support Needs Tribunals (ASNTS) (shortly to be part of the 1st tier tribunal). To appreciate the role of mediation under the Act it is necessary to understand what is covered by each dispute mechanism.

Chapter 3 is a review of writers discussing the pros and cons of introducing mediation as a form of ADR between states and their citizens. It focuses on critiques of mediation in the shadow of the law, from left-wing, loss of law and 'inherent contradictions and competing requirements of all forms of mediation' perspectives.

The difficulties of different models of mediation are then discussed, in particular those arising from self-determination versus informed-consent and neutrality/impartiality versus power-balancing.

Chapter 4 details the methodology of the research with regard to the FOI requests and the conduct of the interviews, with findings of both aspects; and discusses and explores themes that emerged from interviews.

Chapter 5 is a conclusion, summary and recommendations for further research.

Questions of interest: How do ASN mediators operate in the room- (Self-Determination-Neutrality/Impartiality-Power Balancing)?

How is ASN mediation conducted? What model(s) of mediation are employed? Is there a one model rule? Do mediators have flexibility as to how they conduct themselves? Will they adopt transformative (TM),³ facilitative (FM),⁴ strategic (SM)⁵ or evaluative (EM)^{6,7,8} mediation? Or might they construe their approach/role on the basis of the schematic envisaged by Waldman as norm-generators (facilitators of conversation); norm-educators (educating parties re statutory norms) or norm-advocators (evaluating/directing outcomes)?⁹ Are any of these models used? What would the implications be for how mediators conduct themselves?

The overriding principle in mediation is self-determination of parties. They make the decisions-not the mediator. However, what may be regarded in one model as appropriate intervention by a mediator, might be regarded as undermining self-determination, and inappropriate, in another.

Another issue is, whose self-determination? Walsh has written about the participation of CYPs in Special Education Needs (SEN) mediation in England. He notes, 'Research with children and young persons has linked participation to increased self-determination', but observes CYPs often do not participate in the mediation session, and that a 'key point is that CYP's views can differ from those of parents. Some parents conveyed the CYP's view, while others felt this would be inappropriate'.¹⁰

³ Robert A Barruch Bush & Joseph P Folger (B&F), *The Promise of Mediation: The Transformative Approach to Conflict*, (Jossey Bass 2005)

⁴ Kimberlee K Kovach, 'Mediation', *The Handbook of Dispute Resolution* (2005) (ed) Michael L Moffitt and Robert C Bordone, Jossey Bass, 304-317

⁵ Kenneth Kressel, 'The Strategic Style in Mediation', *Conflict Resolution Quarterly*, (2007) vol 24, no3, 251-283

⁶ Leonard L Riskin, 'Understanding Mediators Orientations, Strategies, and Techniques: A Grid for the Perplexed' (1996), 1 *Harv Negot L Rev* 7

⁷ James H Stark, 'The Ethics of Mediation Evaluation: Some Troublesome Questions And Tentative Proposals, from an Evaluative Lawyer Mediator' (1997), *South Texas Law Review*, vol38, 769-799

⁸ Donald T Weckstein, 'In Praise of Party Empowerment-And of Mediator Activism' (1997), *Williamette Law Review*, vol33, 501-564

⁹ Ellen Waldman, 'Identifying the Role of Social Norms in Mediation: A Multiple Model Approach', *Hastings Law Journal* (1997) 1, 703-770

¹⁰ Ben Walsh, 'A powerful thing? Exploring the participation of children and young people in Special Educational Needs Mediation' (2017), *Education Law Journal*, 0-26, 23 & 25

ASN mediators have found sometimes parents have a different view to their child. Whose self-determination prevails here - how do mediators manage this tension?

Mediation models' differing approaches raise questions of mediator role and ethical conduct. In ASN cases, there appears to be an inherent power-imbalance, between parents/YPs on the one hand and LEAs with legal departments/control of financial resource on the other. Is there any attempt by mediators to address this? Where parents lack legal knowledge about likely outcomes of ASNTS were mediation to fail, can mediators address this power-imbalance? If they do intervene, does this affect their impartiality/neutrality? If they don't, aren't they simply reinforcing that power-imbalance? Astor (referencing Cobb & Rifkin and Mulcahy) summarises the double-bind facing mediators. 'Neutrality in mediation has been shown to function as a rhetorical device that obscures the operation of power in mediation. Mediators assert neutrality but intervene or, alternatively, feel constrained by neutrality and so refrain from intervening, to assist a fair process and a fair outcome. Where mediators fail to deal with power-imbalances, those power-imbalances are reproduced'.¹¹

¹¹Hilary Astor, 'Mediator Neutrality: Making Sense of Theory and Practice'(2007), *Social and Legal Studies* 1 (6) 2,221-239,2-6 referencing Cobb, Sara & Rifkin Janet, 'Practice and Paradox: Deconstructing Neutrality in Mediation'(1991), *Law and Social Inquiry* 16:35-62; Mulcahy, Linda, 'The Possibility and Desirability of Mediator Neutrality: Towards an Ethic of Partiality'(2001), *Social and Legal Studies*10:505-527

CHAPTER 2-THE ACT

To understand ASN mediation, it is important to understand the Act and its tripartite dispute resolution system. While summarising the Act I make reference to its Code of Practice(“CoP”).¹²

Additional Support Needs

In terms of S1, a child or a YP (16+) has ASN “Where...he is...unable without the provision of additional support to benefit from school education provided...to him”. Further ‘additional support’ (AS) means...provision (of education) which is additional to, or otherwise different from the provision made generally for CYPs of the same age in schools. The CoP observes the definition of AS is wide and inclusive not exclusive.¹³ It identifies four factors potentially giving rise to ASN: the learning environment itself, family circumstances, disability/health needs, and social/emotional factors.

Coordinated Support Plans (‘CSP’s)

S2 provides a CYP requires a CSP for AS if the CYP has ASN arising from-(i) one or more complex factors or (ii)multiple factors and (iii) those needs are likely to last for more than a year, and (iv) those needs require **significant** AS provided either (a) by the LEA in the exercise of any of their other functions relating to education; or (b) by one or more (other) appropriate agencies, such as health boards, further education colleges etc.

The CoP provides a ‘complex factor’, is one having a significant adverse effect on CYP’s education, listing the same four factors above potentially giving rise to complex factors.¹⁴ It advises multiple factors aren’t complex factors, but when taken together are likely to have significant adverse effect on CYPs’ education.¹⁵

¹² Scottish Government supporting children's learning code of practice (revised edition), (Edinburgh: Scottish Government, Crown Copyright,2010)

¹³ Ibid21

¹⁴ Ibid77

¹⁵ Ibid78

Requirements for CSP qualification

ASN needs of the CYP must be **significant** to qualify for a CSP, per The Additional Support for Learning (coordinated support plan) (Scotland) Amendment Regulations 2005.

Lord Nimmo Smith in the case of JT¹⁶ provided a binding definition. ‘The use of the term ‘**significant**’ signals...the scale of the support provided...whether that is in terms of learning and teaching...personnel...provision...resources...specialist aid to communication...or a combination of these, stands out from the continuum of possible AS...The issue of significance thus refers to the extent of provision’.¹⁷

The qualifying bar for a CSP, the only statutory plan giving rise to ASNTS access, is higher than its pre-Act equivalent. Riddell points out in 2015, only 0.1% of the Scottish school population had CSP,¹⁸ compared with 0.4% in 2007, and 2% who had a Record of Needs (CSP’s predecessor) in 2005.¹⁹

Views and rights of parents and CYPs

Per S12, a LEA in seeking to establish whether a CYP has ASN or requires a CSP, must seek/take into account the views of the child, parent or YP.

Per S8, the LEA or parent/YP can propose/request respectively, an examination/assessment of a CYP to ascertain whether a CYP has ASN or requires a CSP. The LEA must comply with a request unless the request is ‘unreasonable’.

¹⁶ Inner House, Court of session, June,2007-http://www.scotcourts.gov.uk/opinions/2007_CSI_H_52.html

¹⁷ N12, 80

¹⁸ Riddell S, Weedon E, ‘Social justice and provision for children with additional support needs in Scotland’ (2017), Education, Citizenship and Social Justice, Vol12, no1,36-48,40

¹⁹ Riddell S, Harris N, Smith E, Weedon E, ‘Dispute Resolution in additional and special educational needs: local authority perspectives’ (2010), Journal of Education Policy, vol25, no 1,55-71,60

Placing requests ('PR's)-ASNTS

S18, which also covers what can be referred to ASNTS provides that parents of children/YPs (if they have capacity, parents if they don't), can seek a PR either at mainstream school or special school in or out of their own LEA. A PR may be made to a special school whether or not there is a CSP in place for the CYP. If an LEA refuses a PR to a special school, that can be appealed to the ASNTS, even if there is no CSP.

If a parent/YP seeks a mainstream PR, and is rejected, an appeal lies to ASNTS if:

- There is a CSP in place for the CYP
- There isn't a CSP, but the LEA thinks there should be
- There isn't a CSP but the LEA have issued a proposal to establish whether a CYP needs a CSP
- The LEA has decided that the CYP doesn't need a CSP and that decision has been referred to the ASNTS.

Where a mainstream PR has been made but none of the circumstances above apply, in the event of rejection, an appeal goes to the LEA's own Education Appeal Committee and from there, if further rejected, to a Sheriff, whose decision is final, and who has complete discretion in making any award of expenses arising out of the appeal hearing.²⁰

CSPs-ASNTS

Under S18, parents/YPs may refer to ASNTS matters pertaining to CSPs. Anything connected to a CSP and its terms/adequacy is something ASNTS have jurisdiction to address.

²⁰ The Act, Schedule 2(5); n13,67

The Equality Act; Disability cases; ASNTS

In Scotland ASNTS now hear all disability discrimination cases on the provision of education in schools, as well as cases relating to admissions and exclusions.²¹

Dispute Resolution (Independent Adjudication)

Is provided by S16 and by The Additional Support for Learning Dispute Resolution (Scotland) Regulations 2005. This confusing reference to dispute resolution regulations is a misnomer with potential to cause confusion with mediation; I refer to this process as Independent Adjudication (IA).

IA procedure allows review of cases by independent third parties, who consider matters making a report with recommendations for all parties. Disagreements covered by this procedure include:

- Does the CYP have ASN?
- If they do, the accuracy of the description of those needs,
- Refusal by the LEA to respond to a request to establish whether a CYP has ASN
- Refusal to respond to an assessment request
- The person who carried out any assessment/examination of a CYP for ASN, his suitability or the method of carrying it out
- The failure of the LEA to provide/make arrangement for provision of AS, whether educational or not and
- The LEA's failure to request support from external agencies, ie a health board.²²

IA doesn't cover matters relating to CSPs or PRs.²³

²¹ N12,156-157

²² N12,162

²³ Ibid,141

Procedures of IA

Applications by parents/YPs go to ministers, who refer to the relevant LEA. If they accept the reference (this 'happens'), ministers nominate an external adjudicator. Both parties provide written information to the adjudicator, who issues a recommendation. Parties are expected to accept this, unless the LEA regards it as incompatible with their statutory duties. If rejected, the parent/YP may refer matters to ministers in terms of S 70 of the Education (Scotland) Act 1980, if they believe the LEA has failed in a statutory duty.²⁴

In one case, an adjudicator recommended the child should have specialist assessment to diagnose his learning difficulties; the LEA should prepare a clearly delineated Individualised Educational Plan (IEP), agreed/regularly reviewed by all parties including the child. The LEA accepted, appointing an educational psychologist to secure implementation.²⁵ The recommendation mirrored what is a legislative requirement in the USA per the Individuals with Disability Education Act 1990 which: requires LEAs to prepare an IEP for CYPs with SEN; requires parental input into the IEP, with a requirement that they sign it off. If parents aren't satisfied with the IEP, they can go to due process (Tribunal). IEPs exist in Scotland: but have no statutory force conferring no right to go to ASNTS. There is discussion of IEPs/SEN mediation by Silbey, referred to subsequently.²⁶

Mediation

S15 requires LEAs to provide **independent** mediation to seek to avoid/resolve disagreements between LEAs and parents/YPs. Mediation is voluntary. LEAs pay for mediation; its use doesn't preclude parties going to ASNTS/IA.

²⁴ Ibid

²⁵ Ibid 141-143

²⁶ Susan S Silbey, 'Patrick Davis 'To Bring out the Best... To Undo a Little Pain', In Special Education Mediation', Deborah M Kolb & Associates, When Talk Works, Profiles of Mediators, (1994)61-103

S14 provides LEAs must allow a parent/YP to have present with/conduct conversations for them, a supporter/advocate at meetings (including mediation), but LEAs don't have to pay for the supporter/advocate.

Conversely, S14A requires provision of free advocacy services to be available to parents/YPs, in respect of ASNTS. This discrepancy between ASNTS and non-ASNTS dispute resolution provision of 'support' seems odd. ASN mediators do refer parents/YPs to advocacy/support services pre-mediation ('PM') if they need assistance.

S15 places emphasis on **seeking resolution** of disagreement using mediation. This seems a constraint, when juxtaposed with the observation in the 'ASN Mediation Service Providers Scottish Quality Standards' ('SQS'),²⁷ which indicates while seeking resolution of disputes, mediators must **remain impartial/neutral**. Is there a tension between the aim and such requirement?

The CoP notes: 'The overriding principle is...disputing parties come to a shared agreement themselves on how to resolve the disagreement. Mediation can be used at any time in...a disagreement...It can be useful for resolving parts of...disagreement.'²⁸ Further, 'Objectivity and impartiality are key principles...All parties concerned need to be satisfied...the mediator is truly independent'.²⁹ Finally, 'it is important...mediation remains...a joint problem-solving process...(not)...an adversarial forum. All participants...need to feel confident...their views...will receive equal respect. The purpose of...mediation is to achieve a solution to a difference of views...it is not about apportioning blame.'³⁰

²⁷ Available-Scottish Mediation Network: www.scottishmediation.org.uk

²⁸ n12,136

²⁹ Ibid137

³⁰ Ibid137-138

The CoP suggests, per S26, arrangements be made for recording/copying outcomes to parents/YPs.³¹ ASN mediators do this, but the Act puts no duty on anyone to keep statistical information about mediations that have taken place/what they were about/outcome, making it difficult to assess the contribution of ASN mediation.

The Act provides various rights to parents/YPs; few are justiciable. Effectively only CSP's/PR's can go to ASNTS. Around 20% of the Scottish pupil population have ASN;³² issues arising from these can go to IA or ministers under S70. Those processes are opaque, providing no 'hearing' for disputing parties. Mediation is available for all disputes. The crucial question is: can it be effective if most disputes it considers are not justiciable?

Under S20, provision was made for prospective new rights enabling wider reference to ASNTS-ministers may extend categories of decision/failure or information in respect of which a reference could be made to ASNTS including a decision of a LEA:

- That a CYP does, or doesn't have ASN;
- That a CYP has ASN of a type that the referring person considers is not an accurate reflection of the CYP's ASN;
- To refuse an assessment request as required by S8 or
- As to the person, or means used/to be used, to carry out the process of assessment/ examination referred to in S8.

Enacting S20 would make most parental/CYP rights justiciable. Genn observes, 'ADR cannot supplant the machinery of civil justice precisely because...the background threat of litigation is necessary to bring people to the negotiating table...mediation without the credible threat of judicial determination is the sound of one hand clapping.'³³

³¹ Ibid138

³² Riddell S & Weedon E, 'Additional Support Needs Policy in Scotland: Challenging or Reinforcing Social Inequality?'(2015), *Discourse: Studies in the Cultural Politics of Education*, vol37, no4,496-512

³³ Hazel Genn, *The Hamlyn Lectures, Judging Civil Justice* (2010), Cambridge University Press, 80 &125

New Provisions

The Act has been amended again by the Education (Scotland) Act 2016, effective circa January 2018. The amendments can be found in the Schedule: 'Modifications of the Education (ASL) (Scotland) Act 2004'.

Changes give rights to 12-15-year-olds (assessed as having capacity), which are the same as the rights currently enjoyed by parents on behalf of children currently aged 12-15 under the Act, **except in relation to mediation.**

Before 12-15-year-olds can exercise these rights, they must be assessed by the LEA as having capacity.

The assessment must also demonstrate that exercising such rights won't adversely affect their well-being.

ASNTS will have jurisdiction to hear appeals re assessments and must be satisfied this two-stage test has been met.

The Act makes provision in a new section 3C for the rights of parents of children aged 12-15. It provides that where a right is conferred on a child aged 12+ and the right is also exercisable by the child's parents, and the child doesn't want to exercise the right and doesn't wish the parent to exercise the right either, nonetheless parents who do want to exercise the right can!

It is unclear what happens to parental rights when children aged 12-15 with capacity want to exercise their rights. Whose rights prevail?

The right to request **mediation** under S15 lies **only** with parents/YPs. In terms of the amendment at no14 of the Schedule, there is an additional S15 (1A) which requires LEAs providing mediation to seek/take account children's views! Despite extending rights to children aged 12-15 to make references to ASNTS re CSPs and enter the IA process, these children won't have the right to enter into mediation on their own account, even though LEAs are obliged to seek/take account of children's views. Once again: 'whose self-determination'?

What will happen if there is a difference of view between parent and child? Previously parents could exclude their child's view from mediation-now LEAs must (over parents' heads?) seek/take account of the child's view (ignore it-if it differs from the parents or vice versa?). Whose best interest is being served here?

New regulations for the amended Act are being prepared, as is a new CoP. These are out to consultation, ending 12/9/2017, and aren't available.

CHAPTER 3-LITERATURE REVIEW

'Bargaining in the shadow of the law' is what parties do when mediating a dispute arising under the Act.³⁴

Astor observes: 'in mediation control over how a dispute is defined and over the outcome of the mediation is (in theory) with the disputants not the mediator, and the norms and values according to which a mediation proceeds are not necessarily constrained or even influenced by law. Although in practice law casts a...shadow over mediation, the influence of legal norms is negotiable and may be rejected altogether.'³⁵ Or can it?

Criticism of mediation takes three forms: a left-wing critique; a loss of law critique; and an 'Inherent Contradictions/Competing Requirements of Mediation' critique, also my schematic. In the last critique, I also address what models of mediation might be used in ASN mediation, to contrast them with actual practice of it.

Mediation Definitions Differ

Mediation isn't defined by the Act, but in terms of the SQS³⁶ 'although there is no intention on...government's part to be prescriptive about what sort of mediation should be provided' [mediation is] 'a process in which a mediator, who is an impartial third-party, facilitates...resolution of disputes by promoting...participants' voluntary agreement to a solution...ASN Mediation Services will remain impartial, independent and neutral...mediation is based on the principle of voluntary participation and uncoerced self-determination by...parties'.³⁷

³⁴ Mnookin, R & Kornhauser L, 'Bargaining in the Shadow of the Law: The Case of Divorce'(1979) Yale Law Journal 88:950-997

³⁵ Astor, n11,3

³⁶ N27,1

³⁷ Ibid2-3

The UK Centre for Effective Dispute Resolution defines mediation as ‘a flexible process...in which a neutral person assists parties in working towards a negotiated agreement of the dispute...with...parties in ultimate control of the decision to settle and...terms of resolution’.³⁸

Moore defines mediation as ‘intervention in a...conflict of an acceptable third party who has limited or no authoritative decision-making power, who assists the involved parties to voluntarily reach a mutually acceptable settlement of the issues in dispute’.³⁹

Kressel observes ‘mediation may be defined as a process in which disputants attempt to resolve their differences with the assistance of a third party whom they find acceptable’.⁴⁰

The first defines identifies the third party as impartial; the second neutral, the last two neither. All identify the aim as resolution/agreement/settlement. The differences in definition are important.

Left-Wing Critique

What B & F refer to as ‘the oppression story of mediation’⁴¹ sees mediation as a threat to socially-economically disadvantaged groups. Writers taking this view include Santos,⁴² Abel,⁴³ Nader⁴⁴ and Delgado.⁴⁵

Delgado summarises left-wing objections to ADR (mediation) well: ‘(informalism);(I) solidifies control by capital and the state;(II) disadvantages weaker parties; (III) expands state control; (IV) deflects energy away from collective action; and (V) promotes law without justice’.⁴⁶

³⁸ Roger Seaman, *Explorative Mediation At Work: The Importance of Dialogue for Mediation Practice* (London Palgrave Macmillan 2016) 3, quoting CEDR 2014. Retrieved from <http://www.cedr.com/solve/mediation/>

³⁹ *Ibid* 3, quoting Moore CW 2003, *The Mediation Process: Practical Strategies for Resolving Conflict* (third Ed) 15, San Francisco Jossey Bass

⁴⁰ Kressel K, 'The Mediation of Conflict, Context, Cognition and Practice' (2014), *The Handbook of Conflict Resolution, Theory and Practice*, 3rd edition, (eds Coleman, Deutsch, Marcus) Jossey Bass, 817

⁴¹ Bush, n3, 17

⁴² B de Sousa Santos, 'Law and Community: The Changing Nature of State Power in Late Capitalism (1982)' RL Abel (ed) *The Politics of Informal Justice*, volume 1: *The American Experience 1982*, academic press, New York

⁴³ *Ibid*. RL Abel 'The Contradictions of Informal Justice'

⁴⁴ Laura Nader, 'Disputing without the Force of Law', *Yale Law Journal* (1979), volume 88, 1006

⁴⁵ Richard Delgado et al, 'Fairness and Formality: Minimising the Risk of Prejudice in Alternative Dispute Resolution' (1986) *Wis L Rev* 1359

⁴⁶ Delgado, n45, 1391

By sending social disputes to mediation away from tribunals the state expands its power. Superficially although this appears to be retraction (of power), or de-legalisation, it is actually relegalisation 'because the state expands in the form of civil society, social control may be exercised in the form of social participation, (the) state per expands through...indirect rule.'⁴⁷ So in ASN mediation, we have an indirectly state-sanctioned mediator, assisting in organising/controlling mediation, a form of social participation.

Abel argues growth of informal institutions is expansion of state power. By diverting people in conflict from court to mediation, coercion is disguised: 'the velvet glove has largely hidden the iron fist'.⁴⁸ It is not the state through formal adjudication that resolves conflict by reference to written law: it is the mediator 'often female, dressed like parties... stressing help, rather than threats'⁴⁹ without reference to law.

Genn⁵⁰ notes: 'critics argue [mediation] increases the power of the strong over the weak. Precisely because it is an informal and consensual process it can be used as an inexpensive and expedient adjunct to formal legal processes seeming to increase access to justice, whereas in fact it can magnify power-imbalances and open the door to coercion and manipulation by the stronger party'.

Riddell notes social class may be a key variable affecting parents' ability to be active/have power in the arena of ASN. In reviewing the introduction of ASN mediation⁵¹ she highlights 'the power of middle-class parents in the field of specific learning difficulties to challenge professional discourses...to secure a particular diagnosis and...capture additional resources for their children.'⁵²

⁴⁷ Santos, n42,261-263

⁴⁸ Abel, n43,270-271, 275

⁴⁹ Ibid

⁵⁰ Genn, n33,90

⁵¹ Neville Harris, Sheila Riddell Emily Smith, 'Special Educational Needs (England)And Additional Support Needs (Scotland) Dispute Resolution Project, Working Paper 1: Literature Review'(2008) University of Manchester, available from <http://www.creid.ed.ac.uk/adr/pubs/adrworkingpaper1.pdf>

⁵² Ibid20

She notes in 2015, 0.1% of school pupils in Scotland had a CSP. 1.3% of children with ASN from the most deprived areas had a CSP, compared with 2% of those with ASN from the least deprived areas.⁵³

She is concerned socially/economically disadvantaged parents don't have the time or financial/intellectual resource necessary to effectively exercise rights existing in ASN legislation; either judicially, or by mediation. Since there are no centrally prepared statistics re ASN it is not possible to verify the reality of her concern.

Riddell notes, referencing Adler: 'there is...concern...mediation may not be appropriate for citizen v state disputes because of...inherent imbalance of power between parties...enter(ing) the process'; the inequalities 'would take a very skilled mediator to deal effectively with them'.⁵⁴ Conversely, despite partial antipathy to mediation, Genn⁵⁵suggests it depends on the type of dispute. Mediation isn't appropriate for fundamental human rights, but could be in a resource dependent dispute where no definitive outcome can be predicted.⁵⁶ Many ASN disputes are about resources-few are justiciable. According to ASNTS, the number of CSP cases that came to them between 1/4/15-31/3/16 was 17; the number of PR's was 45.⁵⁷

Nader, commenting on ineffective informal dispute processes between individuals and corporations argues the main problem confronting ADR derives from its inability to compensate effectively for the ineffective bargaining position of people confronting such organisations. These disputes between people of unequal power are unlikely to be settled fairly by mediation unless force of law is available as a last resort.⁵⁸ Few parents in ASN cases have justiciable rights.

⁵³ Riddell, n18,40

⁵⁴ Harris et al, n51,5; Adler M, 'ASNTS Reform Proportionate Dispute Resolution and the pursuit of administrative justice (2006)' *Modern Law Review* 958-985, 977-978

⁵⁵ Genn, n33,

⁵⁶ Richardson, G & Genn, H, 'ASNTS in Transition: resolution or adjudication?' (2007) *Public Law*, Spr, 116-141

⁵⁷ 11th annual report-ASNTS, 24

⁵⁸ Nader, n44, 1008, 1119-1123

Abel suggests informalism diffuses pressure for systemic change by neutralising conflict which threatens the state; it does so by inhibiting those grievances transformation into challenges to the state.⁵⁹ Arguably diffusion is happening in the ASN field. Although 'rights-disputes' can be mediated, most aren't justiciable. Were the provisional rights defined in S20 enacted, such disputes could be taken to ASNTS, helping equalize balance-of-power between State and parents/YPs.

ASN mediators are aware of power-imbalance. One mediator took the view it should be 'named' in the mediation as a resource and power-balance issue; not ignored. Another that its always worth mediating, regardless of power-imbalance, as usually extra resource can be found. This is a social constructivist position. Winslade & Monk (W&M) explain 'power' isn't a commodity. Thinking about power needn't rely on a structural/hierarchical analysis showing power belonging to or resting with individuals. Power operates in/through discourse, offering people more or less entitlement. These discourses are unstable and shift. Teachers may have a position of influence in one discourse (the school) but not necessarily carry that 'power' with them into another, mediation. People regularly challenge these positions- power isn't stable, it moves. 'It is more a relational phenomenon than a commodity or quality possessed by an individual.'⁶⁰ Viewed this way power cuts across individual lives, opening up or closing down opportunities depending on context. 'When power is understood in these ways, mediators...recognise...those who belong to apparently disadvantaged groups can have access to courses of action that significantly influence a relationship...it makes no sense to speak of somebody as powerless in any total sense, or as having no ability to act'.⁶¹ There's no such thing as a lost cause!

⁵⁹ Abel, n43,280

⁶⁰John Winslade & Gerald Monk, *Narrative Mediation: A New Approach to Conflict Resolution* (Jossey Bass2001)50-51

⁶¹ Ibid50

Loss of Law Critique

Fiss⁶² observed ADR asks us to assume rough equality between two parties, when there isn't. This inequality of arms, is at odds with his conception of justice, which imagines parties' wealth as irrelevant.⁶³

Resnick agrees Fiss' equation of 'equality of people before law', with justice. She notes '[Adjudication is] itself a democratic practice- an odd moment in which individuals can oblige others to treat them as equals as they argue- in public- about alleged misbehaviour and wrongdoing.'⁶⁴ Thus adjudication is better than settlement/ADR. There is inequality of arms in mediation, as in adjudication/settlement- this idea of equality before law amounting to justice is a fallacy.

In ASN mediation, the Act seems to create a level playing field by giving rights to parents (free advocacy to go to ASNTS) then making it almost impossible to qualify for a CSP- denying access to tribunal/justice for the vast majority who have ASNs. Rights are determined by law; law is politically determined- often about resource allocation. ASNTS don't dispense equal justice, they dispense law.

Fiss' main objection to ADR is the clash between public settlement by judge adjudication and private unseen settlement by ADR. For Fiss, Cohen observes the latter privatises justice, undermining public-values expressed by law and precedents. Private individual interests dictate outcomes, not public law.⁶⁵

Fiss notes dispute resolution gets its legitimacy from the principle of individual consent;⁶⁶ but that resolution needn't be 'just'. By contrast, courts are legitimate because they dispense justice.⁶⁷ Judges adjudicate cases/write judgements/create precedents. Their power is conferred on them by public law not by private agreement. Their job is to apply law.

⁶² Owen Fiss, 'Against Settlement'(1984)93 Yale Law Journal1073-1090

⁶³ Ibid1076

⁶⁴ J Resnick, 'Courts: in and out of sight, site and cite'(2008) Villanova Law Review, 53,771-810,806

⁶⁵ Amy J Cohen, 'Revisiting against Settlement: Some Reflections on Dispute Resolution and Public Values'(2009) Fordham Law Review78(3)1143-1170,1143/4,1151

⁶⁶ Owen Fiss, 'Foreword: the Forms of Justice'(1979) Harvard Law Review1,127

⁶⁷ Ibid38-39

Per Genn, judges don't simply keep the peace/resolve disputes (à la mediation), but explain/enforce values which society chooses to embody in law.⁶⁸ In ASN mediation, notwithstanding 'neutrality', mediators have power- their presence in mediation is sanctioned by public law. They mediate under the Act-against a backdrop of its norms.

Other proponents of judicial determination, including Galanter,⁶⁹ Luban,⁷⁰ Hensler⁷¹ and Ackerman⁷² see 'adjudication as a critical social practice that resolves disputes, defines and refines law, reinforces important public values.'⁷³ Ackerman argues taking part in litigation involves...a willingness to accept communitarian standards and...cede individual autonomy in the interests of community cohesion. This form of community participation (being part of a public, legally binding dispute resolution process), is a barometer of democracy's health.⁷⁴

Buck⁷⁵ observes cases raising points of law aren't suitable for private ADR where matters debated require establishment of precedent. For ASN, JT⁷⁶ in defining the word **significant**, was one such case. The decision showed every case had to be dealt with on its own facts-what was **significant** was unique to each case. Supperstone et al observed people settled, avoiding risky tribunal outcomes. My mediators suggested if compromises were on offer re-AS this might give parents what they wanted-why should they risk that offer at ASNTS, fail to establish a CSP and lose the mediation offer?⁷⁷

⁶⁸ Genn, n33,86

⁶⁹ Marc Galanter, 'A World without Trials?' *Journal of dispute resolution* (2006),7-34

⁷⁰ D Luban, 'Settlements and the erosion of the public realm' *Georgetown Law Journal* (1994/5)83,2619-62

⁷¹ D R Hensler, 'Suppose it's not true: challenging mediation ideology (2002)' *Journal of Dispute Resolution*81-109

⁷² R M Ackerman, 'Vanishing trial, vanishing community? The potential effect of the vanishing trial on America's social capital (2006)', *Journal of Dispute Resolution*7,165-181

⁷³ Luban, n70, 2638

⁷⁴ Ackerman, n72,166

⁷⁵T Buck, 'Justice and ADR: the Australian experience'(2005) *DCA Research Series*8/05

⁷⁶ N16

⁷⁷M Supperstone, D Stultz, C Sheldon, 'ADR and Public Law' (2006), *Public Law Sum*,299-319

Genn suggests adherents of mediation think 'there is no value in judicial determination; there are no legal rights, only clashing interests...problems to be solved'.⁷⁸ She notes Menkel-Meadow conceding a role for adjudication in certain kinds of cases⁷⁹ but that Menkel-Meadow also argues 'the time for adversarialism and adjudication is over'.⁸⁰ In fact Menkel-Meadow's position is nuanced. Galanter noted her suggesting the demise of the adversary system of trial was an evolutionary process leading to a 'veritable rainbow of possibilities...now available for parties, big and small, to use to resolve the disputes with each other'; new dispute resolution processes were in effect, pluralistic.⁸¹

Genn thinks mediation is only about settlement.⁸² Mediators see ASN mediation as more; primarily about fixing broken relationships between parents and teachers. Mending these, transforming the quality of conflict intervention, per B & F,⁸³ is a pre-requisite to resolution.

Criticism of mediation as private, not forming part of public discourse, ignores that mediation itself promotes public values, grounded as it is in moral development through self-empowerment and recognition of other's needs and perspectives;⁸⁴ and ignores its ability to promote values such as 'consent, participation, empowerment, dignity, respect and empathy'.⁸⁵

Mediators consider mediation can be easier, producing better results in terms of resolution/ relationship outcomes than those obtained through adversarial court experience, especially in ASN mediation, where there is a need for a continuing positive relationship.

⁷⁸ Genn, n33,83

⁷⁹ Ibid, n33,84-ref Carrie Menkel-Meadow, 'Whose Dispute is it anyway? A philosophical and Democratic defence of settlement (in some cases)'Georgetown Law Journal' (1995)83,2663-96

⁸⁰ Genn, n33,84-ref Menkel-Meadow, 'The trouble with the adversary system in a post-modern, multicultural world'(1996), William and Mary Law Review,38,5-44,5

⁸¹ Galanter, n69,31-32, quoting Menkel-Meadow, 'Is the Adversary System Really Dead? Dilemmas of Legal Ethics As Legal Institutions And Roles Evolve' (2004),57 Current Legal Probs85,87,102

⁸² Genn, n33,117

⁸³ Bush, n3,13

⁸⁴ Robert A Baruch Bush, 'Mediation and Adjudication, Dispute Resolution and Ideology: An Imaginary Conversation (1989-90)',3 J Contemporary Legal Issues 1,6-7,13-15

⁸⁵ Menkel-Meadow, n80,2669-70

Leggatt also takes this view,⁸⁶ in particular in relation to public law and education disputes, as do Stilitz & Sheldon.⁸⁷ Mediation doesn't stop parties who 'qualify' going to ASNTS; as M5 succinctly put it, that is their right!

Inherent Contradictions and Competing Requirements of Mediation Critique

Waldman⁸⁸ described 3 models in considering mediation: norm generating(NG); norm educating(NE) and norm advocating(NA). In defining NG, she described mediators as neutral and facilitative, not evaluative or directive. Parties themselves generate norms by which they judge any agreement they choose to enter into. In NG, mediators respect self-determination of parties and won't suggest a solution. Notwithstanding 'neutrality,' mediators stop personal attacks, assist inarticulate parties, constrain loquacious parties, seek to correct power-imbalances and practice agent-of-reality checks to parties with unrealistic expectations; although they won't remove options identified by parties as possible solutions-if they conflict with pre-existing social/legal norms.⁸⁹ Waldman suggests NG may be appropriate where autonomy and preservation of relationships are paramount considerations.

In NE, mediators go further, explaining to parties the external societal, social-legal norms they could consider. In ASN mediation, a mediator might explain the statutory scheme, viz what 'ASN' are; what qualifies a child for a CSP. This is done in the USA in SEN mediation. Stulberg suggests in SEN mediation, mediators should bring their knowledge of statutory options and school practice in previous cases into mediation for parties benefit- it would be unhelpful if they didn't.⁹⁰ Todis et al, studying SEN mediation note one mediator confirm in his post mediation interview, he spent 'time in caucus reviewing special education law with the parent to compensate for the absence of an advocate'.⁹¹ Some say this assists self-determination enabling parties to make informed decisions; others perceive this as a mediator

⁸⁶A Leggatt, 'ASNTSs for users-one system, one service'(2001), London, Stationary Office

⁸⁷D Stilitz & C Sheldon, 'Meeting education disputes', *Education Law Journal* (2007), 8,165-173

⁸⁸ Waldman, n9

⁸⁹ Ibid714-718

⁹⁰ Joseph B Stulberg, 'Facilitative Versus Evaluative Orientations: Piercing the Gridlock' (1997), *Florida State University Law Review*, volume24,95-1005,999-1000

⁹¹ B Todis, P Moses & P Marshall, 'Perspectives of Participants in Special Education Mediation: A Qualitative Inquiry' (2008), Consortium for Appropriate Dispute Resolution in Special Education(Cadre), Eugene, Oregon, 1-17, 4

breaching neutrality/ impartiality, by assisting one party. None of my mediators were prepared to do this. NE mediators leave parties to reach their own decision, whether or not in keeping with the Act.

NA⁹² overlaps with NE. NA mediators engage with parties in dispute in an area where statute frames the provision of mediation and shapes its outcome. Mediators don't just educate parties about the law, but require to ensure that agreements reflect its normative requirements. As M3 puts it, you can't just disappear a CSP. Mediators might evaluate a likely outcome at ASNTS, and make proposals to which parties can agree.

This happens in SEN mediation in the USA. Silbey,⁹³ writing about mediation in this field by Patrick Davis, notes he: controlled the process of mediation directing it;⁹⁴ used caucus to evaluate and challenge (reality-check) the child's and education authority's legal cases;⁹⁵ and as a mediator talked 'about trying to create a balance-of-power and authority between the two parties, which may at times lean away from neutrality and towards advocacy...that...may threaten mediation.'⁹⁶ He also made compromise settlement proposals without first discussing these with either party.⁹⁷

The NA approach trumps the mediation principle self-determination, seeing mediators take a more interventionist role, beyond that of neutral/impartial facilitator.⁹⁸ But mediators I interviewed were clear that evaluating legal outcomes/parties' positions was not their role; they weren't prepared to do so. It would breach their neutrality/impartiality.

⁹² Waldman, n9,735

⁹³ Silbey, n26,61

⁹⁴ Ibid77

⁹⁵ Ibid89,95

⁹⁶ Ibid102

⁹⁷ Ibid96-98

⁹⁸ Waldman n9,734-735

Facilitative mediation

This corresponds to NG. It is worth setting out separately as its structure is followed by other models of mediation (except TM). I want to make observations about difficulties with neutrality/impartiality that are acute in FM.

Kovach is an FM protagonist.⁹⁹ She observes 'Mediation is defined as a process in which a third -party-neutral, the mediator, assists disputing parties.'¹⁰⁰ She notes mediation is informal/flexible; communication is private; people feel more relaxed-more able to disclose matters given mediation's confidentiality. It provides a forum for expression, understanding and release of emotions; often critical in assisting with conflict resolution creating the possibility for repairing/preserving damaged relationships. Parties are the decision-makers.¹⁰¹

She sets out illustrative stages: preliminary arrangements, mediator's introduction, opening remarks/statements by clients, venting, information-gathering, issue/interest identification, agenda-setting, caucus, option-generation, reality-testing, bargaining and negotiation, agreement, closure.¹⁰² Stages can be optional, but this gives the process structure.

Kovach discusses the mediator's role; facilitating discussion and remaining neutral/impartial.

Additionally, mediators may 'move the parties towards option generation'; meet parties separately, privately identify potential options for settlement, and engage in reality-testing with parties. The problem with this-which many FM mediators seem unwilling to admit-is these moves are themselves evaluative, beyond simple facilitation.

⁹⁹ Kovach, n4

¹⁰⁰ Ibid304

¹⁰¹ Ibid305

¹⁰² Ibid306;

Problems with neutrality/impartiality are issues for all mediation models, but particularly for FM. Seaman, considering FM in employment mediation observes: 'Mediators should openly recognise the myth of neutrality'.¹⁰³ Further, 'FM mediators say they are neutral; in practice, they intervene. He argues because resolution is a goal (employers pay mediators to resolve disputes)-mediators have an interest in resolution, so are no longer neutral. Under a cloak of mythical neutrality mediators wittingly/unwittingly engineer settlement to meet the resolution requirement.'¹⁰⁴

The difficulty is more deep-seated. There is no agreement in mediation circles about what neutrality or impartiality mean; there is significant dispute about how to practice them.

Weckstein observes impartiality is distinguished from neutrality. Impartiality refers to performing the mediation function, free from bias, to assist resolution and not to benefit a particular party. Neutrality refers to the mediator's relationship with the disputants or the dispute. Neutrality seeks to avoid use of a mediator who by relation to either party could be biased for or against the party. Neutrality is about any conflict of interest a mediator might have.¹⁰⁵

Astor notes three aspects of neutrality. Mediators won't influence the content or outcome of mediation. Mediators won't be partisan. Mediators won't be influenced by financial/personal connection to disputants. She observes 'there is no consistency or agreement among mediators about how neutrality is defined: it is a debated and contested term'.¹⁰⁶

Ostensibly FM emphasises mediator neutrality (as to outcomes) and impartiality (as to disputes).¹⁰⁷ In reality mediators judge parties- evaluating their disputes by correcting power-imbalances and practising reality-checks.

Astor observes mediators are aware of these issues with neutrality and of the double bind they face; they have to assert neutrality because it gives mediation legitimacy. But if they don't overstep neutrality and

¹⁰³ Seaman, n38,6

¹⁰⁴ Ibid, 29,7

¹⁰⁵ Weckstein, n8,553, fn156

¹⁰⁶ Astor, n11,223

¹⁰⁷ Kressel, n40,817

intervene to correct power-imbalance, they perpetuate it. She exemplars Mulcahy's research finding¹⁰⁸ that neutrality in mediation is unobtainable/undesirable because it entrenches inequality- protecting the status quo by disempowering disadvantaged people. She suggests 'the notion of partiality in dispute resolution reflects not only an empirical reality but an ideal to be aspired to in the interests of redressing imbalances'.¹⁰⁹

Astor notes for some mediators the solution 'is to draw a distinction between neutrality and impartiality, to claim...mediators are not neutral but they are impartial...It is conceded...mediators inevitably bring their own perspectives to mediation, it is asserted that they will nevertheless treat...parties equally'.¹¹⁰ But, asks Astor, how do you know you are treating both parties equally-through your own perspective? If you decide a power-imbalance needs equalised-who makes that judgement? She concludes 'asserting impartiality as a solution merely cloaks the situatedness of the mediator and...conceals the operation of power'; hiding again the impossibility of either neutrality or impartiality.¹¹¹ She suggests abandoning the pretence of neutrality and ensuring mediators should aim instead to maximise the control parties have over mediation.¹¹²

Cloke suggests rejecting 'simple notions of neutrality and mediator objectivity...the mediator should seek **fairness** through an **omnipartiality**, not siding with one party but supporting both simultaneously'.¹¹³

¹⁰⁸ Mulcahy, n11,505-527

¹⁰⁹ Ibid, n11,514

¹¹⁰ Astor, n11,227

¹¹¹ Ibid, n11,227

¹¹² Ibid, n11,234

¹¹³ Kenneth Cloke, *Mediating Dangerously: The Frontiers of Conflict Resolution*, (San Francisco-Jossey Bass2001),13

Do other models answer the neutrality/impartiality conundrum?

Transformative mediation

B&F are TM's creators.¹¹⁴ It is thought of as a relational type of mediation. TM is practised in the USA in employment mediation-as the sole form of mediation for resolving discrimination disputes arising from equal opportunity legislation between employees in the United States Postal Service.¹¹⁵

In TM, focus is on fixing parties' relationships not on resolution.¹¹⁶ Parties control 'Process', not mediators. They decide what to talk about-mediators follow. Mediators foster empowerment of parties, who become calmer/regain strength/recover control of their situation, enabling them to give recognition to each other's perspectives. Resolution isn't the goal, but may result. Mediator evaluation of parties' cases isn't permitted-no opinion should be given re potential court outcomes. Providing legal information is off-limits. Mediators make no settlement proposals-these come from parties, ensuring maximum self-determination.¹¹⁷ Mediators mustn't power-balance.¹¹⁸ In TM 'neutrality means that the mediators only interest is...using his...influence to make sure...the parties maintain control of decisions about outcome...By adopting...(TM)...mediation...gains a solution to the problem of the inevitability of...(mediator)...influence.'¹¹⁹

B&F argue this allows 'proper' self-determination-in one sense TM is the most neutral form of mediation. But TM outlaws mediator intervention through power-balancing, perpetuating inequality-of-arms. This is a neutrality of nihilism.

In two other forms of mediation, neutrality is not such a concern.

¹¹⁴ B & F, n3

¹¹⁵ Lisa B Bingham & David W Pitts, 'Highlights of Mediation at Work: Studies of the National Redress Evaluation Project (2002)', *Negotiation Journal*, 135-146

¹¹⁶ Kovach, n4,310

¹¹⁷ Bingham, n115,137

¹¹⁸ Bush, n3,76

¹¹⁹ Bush, n3,35,105-106

Strategic mediation

Kressel¹²⁰ describes the SM model: Mediators focus on the cause of conflict. They indicate an initial diagnostic session where mediators are strongly directive; parties tell their story in response to informed mediator questioning. Next, strategy formulation: mediators share their thinking about the conflict cause, putting forward a plan, respecting parties right to modify/reject. Finally, 'the mediator engages in a highly directive orchestration of the problem-solving plan...although the strategic style is heavily dependent on establishing rapport, the approach is relatively unconcerned by concerns about neutrality;¹²¹ and doesn't get worked up about the mediator's directiveness undermining self-determination. Parties can still reject proposals. SM is used in employee disputes at the National Institutes of Health in the USA. It had a forerunner- the problem-solving style ('PSS') of mediation adopted by Fran Butler¹²² in family/child custody mediation- comparable to Patrick Davis in SEN mediation. SM/PSS indicates open mediator assessment- evaluation and judging of parties' disputes, showing mediator directiveness/generation of solutions.

Evaluative Mediation

Procedurally similar to FM but of the view it is an important requirement of fairness that parties have full legal knowledge prior to reaching resolution. For true self-determination, there must be **informed consent**. This legal information/evaluation can come from a suitably qualified mediator.

¹²⁰ Kressel, n5

¹²¹ Ibid,255

¹²² Kenneth Kressel, 'How Do Mediators Decide What to Do? Implicit Schemas of Practice and Mediator Decision-Making' (2013) Ohio State Journal of Dispute Resolution, vol28,709-775,712-713

Kovach & Love argue the most important principle is self-determination-if a mediator evaluates, this takes away decision-making responsibilities from parties undermining their self-determination.¹²³ But Stark responds: 'legal evaluation affirmatively facilitates the goal of party self-determination. Indeed, meaningful self-determination is not possible without adequate legal information.'¹²⁴

The New Zealand Employment Relations Act 2000 enables mediators to choose what mediation model to practice, including TM, FM and EM; allowing mediators to evaluate, express views on matters of substance and provide recommendations to parties.¹²⁵

The Code of Professional Conduct of Family Mediation Canada provides 'it is the duty of a mediator to actively encourage...participants to make decisions based on sufficient information, knowledge and advice'.¹²⁶ As Stark puts it 'disputants must be permitted to invoke legal norms if they choose...the mediator must take steps to ensure...parties choices are knowing and informed...Any threat to the appearance of neutrality and impartiality is a necessary price...mediators must pay for party empowerment and informed consent'.¹²⁷

Neutrality/impartiality are trumped by the need for party empowerment through informed consent for mediation to be fair. This enhances self-determination.

¹²³ Kimberlee K Kovach & Lela P Love, 'Evaluative Mediation Is an Oxymoron, Alternatives to the High Cost of Litigation (1996)', vol14, issue3,31-32

¹²⁴ Stark, n7,776

¹²⁵ Grant Morris, 'Eclecticism Versus Purity: Mediation Styles Used in New Zealand Employment Disputes' (2015), Conflict Resolution Quarterly, vol23,203-227,206,207,217

¹²⁶ Weckstein, n8,538, fn177

¹²⁷ James H Stark, 'Preliminary Reflections on the Establishment of a Mediation Clinic (1996)',2 Clinical L rev,437-503,487

Children in Mediation: Whose Self-Determination?

The Act's amendments indicate significant attempts to increase children's rights/participation. Mediators are alive to the need to establish/take account of children's views. They are aware children's views can be different to those of their parents. This raises difficult questions about whose view is communicated at mediation. Whose voice, whose self-determination prevails?

Walsh's earlier remarks refer. He also observes: children's 'experiences or expectations of being ignored are a disincentive to participate', undermining their self-determination.¹²⁸ To complicate matters, whilst children aged 12-15 won't get 'mediation-rights' to appear on their own behalf under the amended Act, there will be a new duty on LEAs to seek/take account of children's views for mediation purposes. A wedge between parents and children?

¹²⁸ Walsh, n10,23-25

CHAPTER 4 METHODOLOGY OF RESEARCH, FINDINGS, OBSERVATIONS.

Methodology

Research and analysis took place from 24/5-31/8 2017. To my knowledge this is the first study into how ASN mediation is undertaken by ASN mediators. Re SEN mediation in the USA, Lake & Billingsley¹²⁹ undertook a study including interviews of parents, school officials and **mediators**, based on semi-structured questions analysing factors contributing to parent/school conflict, not how SEN mediation was conducted. D'Alo¹³⁰ carried out research assessing SEN mediation based on written parental responses to a quantitative questionnaire after mediation. Welsh¹³¹ carried out qualitative research on SEN mediation involving interviews with parents/school district officials involved in mediated cases; the perspective was their experience of the mediations. Both D'Alo and Welsh appended questionnaires to their studies; my questions for ASN mediators were significantly informed by them. Todis et al¹³² carried out case study research (CSR) of five SEN mediations. CSR is qualitative research based upon a combination of semi-structured interviews plus participant observation of an event (SEN mediation), in order to both document it and obtain/contrast the perspectives of participants in that event.¹³³ The strength of this form of enquiry is each case is examined in its entirety, compared to other qualitative studies, which may only analyse interview data. If I could have undertaken a CSR; it would have been easier to judge the efficacy of ASN mediation by contrasting views of parents/CYP's, LEA EOs and mediators. My study relies upon self-reporting views of ASN mediators re how they carry out mediation. As Kressel says, there is often a gap between what mediators say they do, and what they actually do.¹³⁴

¹²⁹ Jeannie F Lake Bonnie S Billingsley, 'An Analysis of Factors That Contribute to Parent-School Conflict in Special Education' (2000), Remedial and Special Education, vol21, no4,240-251

¹³⁰ Grace D'Alo, 'Accountability in Special Education Mediation: Many a Slip Twixt Vision and Practice?' (2003), 8Harv Negot L Rev,201-269

¹³¹ Nancy A Welsh 'Stepping Back through the Looking Glass: Real Conversations with Real Disputants About Institutional Mediation and Its Value (2004)', Ohio State Journal on Dispute Resolution, vol19: 2,574-678

¹³² Todis, n91

¹³³ Ibid1

¹³⁴ Kressel, n40

Freedom of Information Requests

A FOI request was made to all Scottish local authorities. It asked seven questions- 1 and 2 were relevant to the nature of mediation provision by the LEA/identity of the EO responsible for it.

Questions 3-7 asked:

- For information identifying how many mediation requests there were each year since 2005;
- How many mediations took place per year;
- How many resolved through mediation;
- How many did not resolve going on to ASNTS;
- How many which didn't resolve didn't go to ASNTS.

The Interviews

Research questions covered:

- 1) the level of experience, knowledge and training of the mediators.
- 2) what happens in PM?
- 3) what is the structure, process and procedure in an ASN mediation itself?
- 4) what are the primary goal(s) of ASN mediation?
- 5) what impact does ASN mediation have on parties ongoing/future relationship (Can this be used as another way to measure its effectiveness)?
- 6) is there any tension for mediators between the Act's aim in seeking resolution of disputes and the SQS requirement for mediators to be impartial/neutral?
- 7) do ASN mediators observe any power-imbalances between parties in mediation (If so, do they do anything about these- does that affect their neutrality-impartiality)?
- 8) how do ASN mediators define their role *qua* mediator? Do they consider themselves observers or participants?

9) do ASN mediators think ASN mediation is effective?

I sought answers in semi-structured interviews. My script included eighteen qualitative questions, and twelve biographical questions covering issues of ASN mediation/law knowledge, training and experience. As Todis observes, 'research methodologies defend the use of qualitative methods in areas in which the research base is not yet well-established and in which...perspectives of insiders or participants in the activity being studied are of interest'.¹³⁵ This method enabled me to follow participants' leads, identifying phenomena I hadn't previously considered-namely issues of children in mediation and how emotion was managed.¹³⁶

Interviews were digitally recorded and transcribed verbatim to ensure replication of interviewees exact words. This enabled direct quotes to be obtained in order to highlight conclusions. I conducted a thematic analysis based on my research questions. Other themes emerged. Each interview lasted two to four hours. Each interview was a two-person dialogue. Mediators often led the way and topics chosen by them were different: making it difficult to compare directly because each interview was unique. I complied with University of Strathclyde ethical requirements for all interviews; each interviewee was provided with a participant information sheet explaining the nature of the research and that participation was voluntary. All who took part signed a participant consent form.

¹³⁵ Todis, n91, 1

¹³⁶ G Gibbs, *Analysing Qualitative Data*(Sage2007)

Findings

FOI Responses

I analysed responses from LEAs and Resolve/Common Ground Mediation ('CGM'). After FOI requests were sent, I became aware of Morag Steven's research. She notes there has never been national monitoring/evaluation of ASN services in Scotland. It transpired LEAs didn't keep records of mediation activities/outcomes in their areas. I met the heads of Resolve/CGM who the LEAs had turned to for information to respond to my FOI requests. It became clear that service-level contracts between LEAs and mediation-providers don't require the latter to keep comprehensive data or statistics on the mediation services they provide. Once cases leave mediation-providers, they have no knowledge of outcome; whether resolutions continue to work or whether matters went to ASNTS, and what happened there. There is no data on outcomes by LEAs.

Only 29/32 LEAs responded. Some refused to provide information on grounds of cost/time/failure to keep records. Some confirmed there had been mediations but where there were less than five per calendar year, refused to give details on grounds of data protection. Few had information about mediated cases that hadn't resolved and gone to ASNTS. Few kept records before 2012(destroyed on data protection grounds).

On the basis of LEA figures, it isn't possible to give accurate figures for total numbers of cases mediated in the six-year period 2012-2017, It is clear that figures fluctuate. In 2012 the total mediations provided by LEA's was 29; 2013-53; 2014-54; 2015-46; 2016-64 and 2017-32 (part year). Due to inadequate LEA responses, I obtained records from Resolve/CGM for the years 2012-2017.Their combined figures were: 2012-62; 2013-60; 2014-59; 2015-83 and 2016-93.

Steven indicates in year 2010/11 the total number of mediations for Resolve/CGM combined was 55; and that the total for both in 2007/08 was 25. Resolve currently have 15/32 LEA contracts and CGM currently have 9/32. There are three other small providers each having one contract. Several LEAs have no service contract for mediation, seeking mediation support case-by-case.

The Resolve/CGM figures for mediations are self-reported, but it seems reasonable to accept their accuracy. Given they have contracts with 75% of LEA's, one can extrapolate that use of ASN mediation has come close to quadrupling over ten years. Anecdotal evidence from Resolve/CGM mediators indicates whereas in early years most referrals came from parents, the reverse is now the case, with most referred by LEAs. I have seen feedback forms for Resolve/CGM from parents/teachers and EOs; the overwhelming majority saw their mediation experience in a positive light.

Neither the original Act nor subsequent amendments, have any requirement on central government, LEAs or mediation-service providers to collate statistical evidence of mediation. This contrasts (badly) with the situation in England where, in terms of the Children and Families Act 2014, a report had to be laid before Parliament on the efficacy of the new SEN mediation regime introduced by the Act (which requires parents to consult with mediation providers to consider it as a possible means of dispute resolution, before being allowed to take any SEN case to Tribunal, seeing a massive rise in SEN mediation).¹³⁷

It is impossible to retrospectively gather data in any comprehensive form enabling assessment of the provision of ASN mediation/its efficacy as a form of ADR in its own right. This failure needs to be addressed- going forward data should be gathered to properly assess Scotland's first statute-introduced mediation scheme.

¹³⁷ Centre for Educational Development, Appraisal&Research-Report29/3/2017-see-Bibliography- 'Reports'

Interviews & Observations

Themes arose from answers to research questions (1-9)- two additional themes emerged; children in mediation, and emotion management. Mediators are identified M1 through to M5; except in relation to biographical details where they are MA-ME. I identify all mediators as 'she'; although the group of 5 was mixed.

1: experience, training and knowledge of ASN mediation

The Act commenced in 2005. In 1999 two of the mediators set up a pilot scheme for ASN mediation through Enquire. They contributed to the Bill team. One had experience in family mediation-the other experience in victim/offender/community mediation.

'MA and I made this model up...it was definitely a facilitative model...very strong doing lots of PM work in order to get the best of a joint meeting.' MB

MB identified her knowledge of ASN law as 9/10. MA identified her knowledge as 'ensconced in it since the beginning really...we need to know, as mediators...what we can mediate on, from the legislation. We can't mediate away a CSP if it's a statutory plan...our mediators need to know what's in the statute...what the terminologies are'. She also pointed out 'most of our work is done roundabout relationships and communication...much more at the human aspects of the relationships'. This was a common thread, for all five-law wasn't a major topic of conversation, although all understood the Act's terminologies.

MA/MB are old hands in ASN mediation. They set up Resolve/CGM. They assisted in training other mediators interviewed, using co-mediation.

MC is an experienced mediator, doing ASN work for 12 years, with a background in community/family/peer/homeless mediation. MC comments 'a lot of it (training) was on the ground training, as we went, experiential training'. She felt her knowledge of the Act was high. She'd had top up legal training from an education law specialist solicitor-she had a good grasp of the law.

Mediators A/B/C have done hundreds of mediations among them. MD has undertaken about eighty ASN mediations. ME had less experience, but echoed MA's observations, advising that she felt much of the law in the Act was not relevant to what she was doing when mediating. MD points out 'ASN is different in that relationship plays big. It's not just about repairing what's there, a parent and the teacher; the young person will still be in class...that relationship will need to continue'.

2-Pre-mediation, including children and emotion.

In ASN mediation, more than others, PM is significant, much of the groundwork for joint mediation (JM) is done here. What emerged during research into PM were two other themes, namely the views of children and management of emotion.

Referrals come from parents, advocates/supporter groups, Enquire and LEAs. M3 noted 'mostly now it's the authorities that will refer because they understand, trust in the service, know what it is...we probably had more parents referring in the early days...but the tide's turned, and I think it's certainly more LA people.' M5 worries, if there are fewer referrals from parents, 'do they even know we exist?'

A-Meeting the parties; dealing with emotions

Mediators meet the principal actors, starting with parents and if appropriate the child. M1 points out she may want to meet them separately, as well as together: – 'It depends on what's appropriate, what the young person is comfortable with-but certainly to get the young person's view, really important-because there are circumstances where what the parent is wanting for the child is not what the child is wanting'. M1 indicates she will try to get everyone's view into the mediation, and suggests the outcome can be an amalgam of all views, but focusing on what is best for the child. M5 points out that, when a child is under the age of 16, you can't speak to them without the parent's permission 'so we ask parents, can we see your child, and some will say no...this dispute is between me and the school (or) I don't want my child involved in this because it'll upset them'.

M5 says the reality is that only occasionally are children present in mediation. She gives an example: – one young boy was present in mediation; the issue was the teacher’s bullying behaviour towards him. During the mediation, the teacher shouted at the child who promptly fled the room with the child’s parent saying, ‘I told you so’. When the child, parent and mediator were out of the room, the teacher was upbraided by a fellow teacher sitting in, and who pointed out that the behaviour was as alleged and inappropriate. On reconvening the teacher apologised, realisation having set in. A good example of child participation making a difference; assisting in his self-determination.

M3 advises part of her job PM is to assess anger, observing: ‘I’m not a believer that the child should be in mediation where there is...high tension, particularly between a parent and a headteacher. The child still has to go to that school... the educator has a place in the child’s life that needs to have a level of understanding and respect’. M3 feels it is inappropriate for a child to witness a parent shouting at a teacher-she feels that one should sort out communication between adults first, then bring the child in. ‘I think the child should be seeing...The school and parents on the same hymn sheet...it’s good modelling behaviour’.

M5 advises where she anticipates high emotional behaviour from participants in JM she will bring in a co-mediator.

B: Use of PM as ‘Emotional Control Valve’ and ‘Confessional’

M4 observes PM affords (head)teachers the ‘opportunity in a confidential way to have a bit of breathing space and think about the situation...because the very nature of conflict is something that human beings find difficult...There is human emotion that is attached...that has to be acknowledged...and that’s why the pre-meetings are important...it helps people to be clear in their minds...and their perspective, how they see the situation. And if it then moves onto the next stage (JM) that preparatory work is worth its weight...With agreement, with both sides, that’s what we pass back. So, nobody comes along to a mediation meeting blank... what they know...are the main topics for discussion...’

This works for parents too. M1 points out 'sometimes you get information, and I say is the teacher aware of that? Is that a conversation you've had?' M1 often seeks permission to share this information if it is germane and the other is unaware of it, and feels that awareness may help unlock the situation.

M5 also points out there is 'a huge emotional imbalance because parents are advocating...about their child...the most precious thing in the world...The best teacher or EO...in the world, it's still just their job...there's this disconnect...It comes out sometimes when parents are pushing for resources...and the educator says, but I have a responsibility for thousands of children in the authority and I have to be seen to be equitable'.

Mediators use PM to enable people to get it all off their chests in one-on-one meetings, thus enabling the JM to be less fraught- more focused. Mediators were of the view they preferred all parties to be in the JM so they can hear each other, including the emotions that go with that, because that is why mediation works. They are not in favour of caucus, M3 making it clear she wouldn't undertake 'ASN mediation by shuttle'.

M1 advises there can be differences of view between teachers, headteachers and EO's, surfacing during PM, in a confidential setting. Headteachers can be hostile to mediators coming into 'their school', but M1 notes headteachers who are repeat players send a lot of information through, making the process easier. These headteachers are pro-mediation.

Mediators identified parents often feel 'talked down to' by teachers; teachers feel threatened by parents challenging their professionalism and being aggressive towards them. Mediators encourage participants to leave their roles at the door; take part in mediation just as people. M1 observes 'I speak about the process being more like a conversation between two adults, so it's helpful to getting a resolution if they can sort of leave their teacher hat at the door.... Because teachers often talk to parents the same way they talk to pupils'.

C: Identifying and focusing key issues and people

M1 observe that initially, a lot of what the mediator does PM is **listen** to parents and teachers. It's a matter of listening to what's going on-not saying an awful lot. But 'by the end of the meeting... I would be really clear what **we** need to talk about... I quite often say to people...it can be useful to have an agenda... I'm thinking about a list and what goes on the list...helping them to focus...being really clear about what we're going to talk about'. Each PM is time-consuming-M5 points out at least 2 hours with each parent. She also points out many feedback forms say parents feel this is the first time someone has ever really **listened** to them.

Mediators are clear they assist parties in **focusing**. M3 observes mediators spend a lot of time 'having to listen, and help people **focus** on what they are taking to the table'.

Mediators actively **evaluate** what they hear-helping parties **focus** on what is important-what needs to be discussed. This is not TM, 'talk about what you want'. As M5 points out, following parties lead is 'fine if you've got all week'.

Part of the listening exercise is to enable mediators to identify key people who need to be at the JM, to whom the mediator needs to speak. As M1 points out, if the JM is about a PR you need a 'bean-counter' there. Who the key people are is unique to every case.

D: Manipulation?

Spoken to by M5. She 'sees' parents can often get a better outcome from mediation, quicker than ASNTS, so she uses her persuasive abilities to guide parents towards mediation, though 'we're not supposed to'. She observed this in the context of a recent conversation with a parent whose child was being discriminated against by school on grounds of disability.

The parent felt that the matter was beyond mediation but after listening to M5 seemed likely to opt to try it. Her reasons? She explained if the parent went to ASNTS ‘the problem is it’s not the school, it’s the LEA that have to answer the discrimination charge...at ASNTS...it’s very adversarial. It...won’t do their relationship with the school any good at all, the opposite, and...her son’s in S1 and she wants him there ‘til S6. She doesn’t want to move him...The hearing [from June] won’t be until October. Whereas...we could have mediation next week and do something’. M5 was clear the parent had the right to go to ASNTS, but may get a better result through mediation. She observed 10 years ago she wouldn’t have given such an assessment and would have been less interventionist; but: ‘it’s a bit of a dilemma for a mediator, how much information do you share?’.

By the end of the PM process all mediators hope to have built up a good degree of rapport and trust with all parties.

3: Structure, Process, Procedure

This is similar for all mediators-comparable to Kovach’s model- but with twists!

M2 observes: ‘if the opening statement is going to be negative...in my experience sometimes it’s better to start with something a bit positive...Tell me what your hopes are to get out of this conversation...Often people say... I want this resolved. I want us to be able to talk again...Often both sides say that, a common thing they are both in the room to do’.

M3 observes ‘having my own assessment of the case; if it’s a particularly nervy parent...I ask someone else to start off, or if it’s a particularly angry parent...I ask them to start...if they sit having to boil, they’d flow over’. It’s a basic process: identify issues; explore options, craft the agreement-keep child-focused!

Mediators were clear they were chairing mediations. M2 says she is running the meeting, there needs to be control. In the past teachers have been in charge; these earlier meetings have not worked-this is a different dynamic. M3 curtails long speeches. All tell participants; they must listen to each other-not interrupt; they will get their turn, they can ask questions afterwards. All want JM to be procedurally fair; everyone gets a chance to voice their perspective-be heard. M5 prearranges to remind particularly parents, what it is they want to talk about if they forget; by prompting them, if so desired.

M3 tells people-put paperwork away 'we can't concentrate on having...good conversations, if we're not looking at people, not engaging with people.'. If people get upset, they can have a break, but not in the sense of caucus. M3 says '99% of my work would be joint. I believe mediation is about getting people together and getting them listening and talking'.

4: What are the primary goal(s) of ASN mediation? And 5: What impact on(future)relationships?

All mediators felt resolution was one of the goals. The preliminary goal was focusing on relationships-improving them through better communication. Doing that may enable resolution. This is akin to TM.

M1 sums it up for all: 'As a mediator, it's always nice to get a nice cosy agreement...But...not always possible and it's not always necessary. So people being heard...people having a voice...can make a huge difference to the way folk approach conflict...(After JM)...people say...that's the first time I have been able to say what I wanted to say...and that's what I am facilitating...(It)...can make a huge difference to moving people from positions to interests...the process allows...folk to mellow a wee bit and hear other voices...I think...getting folk to the point where they are able to negotiate, more able to hear the other person's point of view...that's huge because I've seen it being dramatically successful so many times...there's a meeting of minds...and compromise'.

M3 observes 'The primary goal, is to support an increase in better relationships and communication ... This issue will be resolved, if we get your communication and your relationship, to a place where you can have a good positive communication. We can solve this...it's not unsolvable. But your relationship is broken'.

I had approached questions of resolution and relationship separately. But it was clear what made ASN mediation effective, was concentrating on resolving communication and relationship issues. Doing so was a necessary precursor to reaching resolution. M5 observed that ASN had stronger links with neighbour dispute/family mediation than the 'legal stuff' even though it was set in a legal framework.

All thought mediation does improve communication and relationship, helping make ASN mediation effective.

6: Is there tension between the goal of resolution outlined in the Act; and the requirement for impartiality/ neutrality on the part of mediators?

M4 had strong views on neutrality/impartiality. She said the mediator had to be both. She was closest to the TM school of no mediator intervention. She states: 'People tend to avoid conflict or feel that it's something somebody else needs to sort out and the whole process is designed specifically to give the responsibility to the participants who are involved in the conflict'. That 'it's important we are not taking sides as mediators', so 'we as mediators...appreciate...everybody has a different perception...of the situation...we're not there to judge or assess or say who is right and wrong or take sides...We are remaining neutral'. Her view was, to maximise party self-determination, mediators must remain neutral/impartial. Notwithstanding her desire not to intervene, she was adamant that a 'mediation meeting in a neutral setting...has an impact on the power-balance'. This is of itself an evaluative intervention; is it neutral?

The others were more nuanced. M1 didn't think there was tension. While affirming neutrality/impartiality as part of FM's ideology she thought 'folk didn't really understand what they meant on a practical level'. She says: 'You're the guys who are involved in this, you know...more about this than I do...you're the ones that are going to come up with the best solution'. She emphasises their power and self-determination. She facilitates a conversation; a facilitative type of mediation.

M2 observes a potential tension given LEAs pay for mediation; but feels it doesn't influence her neutrality/impartiality. She wonders if as a mediator she can be completely impartial/neutral and no longer uses these words with people, 'I think the closest I...got to being comfortable with it...was it Ken Cloke that talks about omnipartial? So, supporting both people...that...sits a bit easier with me'.

M2's view is echoed by M5, 'I don't use the word neutral. I don't like that cause I'm not neutral. I don't even say I'm impartial any more.... Sometimes I say, if I'm not impartial let me know...I'm trying to...assist everybody. Yes, omnipartial I think'.

M3 observes 'it's not an issue...the goal is child focused... I'm not neutral in that...I think...we're not impartial...we want everyone to have...stress taken off...I think it's...the fact that you're not partial to one only...it comes back to fairness and evenhandedness'. But 'I'm not on anybody's side. I'm here to help both parties. (I do) explain to them what neutral and impartial means'; and finally, with regard to any tension and needing to be neutral/impartial 'I think it sounds difficult, but I don't think it is'.

None of the mediators felt there was 'significant tension' between the goal of resolution and requirement for impartiality/neutrality. Most seem to have gone down the 'Cloke' route of omnipartiality, be supportive to everyone; not partial to one party. It seemed to me none felt driven by a need to achieve settlement, per Seaman's fears.

7: Is Power-Imbalance observed by ASN Mediators-What do they do about it?

M3 advises 'there is more of a power-imbalance in ASN mediation than...in other areas...It's an authority against a parent. The authority has...the power to deliver...a service...they have that resource'. But there is a counterbalance 'the parent...has the power of the child...The parent has the duty to put the child into that resource' This echoes what M4 said when she asserted it was always worth going to mediation- something usually turns up in negotiation; reinforcing the point made by W & M's social constructivist view of power as something that moves through discourse and changes. The neutral venue of mediation can change the balance-of-power; leaving the teacher-hat at the door changes the identity of participants in the discourse from teachers and parents to people. As W & M observe, Narrative mediators are interested in seeing how people labelled/perceived as weaker (parents), can push against power, changing the discourse; they remind us power isn't necessarily hierarchical/a commodity owned by one not the other.

Nevertheless, M3 notes practical circumstances where a headteacher is saying 'we need an extra classroom assistant; and the LEA is saying you can't have one. Sometimes there isn't anything we can do about it, apart from putting it on the table...naming it. If it's about financial resource and they don't have it, there's nothing we can do about that'.

M5 observes 'it is the mediator's job to address perceived power-imbalances. I used to think...parents had no power...But it's not as simple as that...Parents of children with ASN have a lot of power, but they don't always know they have it...Read the parent's guide...you have a right to do XY and Z...There are parents who know their legal rights and they will bloody well get them...and there are others who don't have a Scooby'. She gives parents the guide, PM. If they don't know their rights, she points them to advocacy organisations. She tends to give more information now to parents and be more interventionist; but as previously advised, it is always a dilemma for the mediator about how much to share. She points out that (head)teachers can also feel powerless.

In her experience LEAs are willing to try and find extra resources although they have to work with what they have.

None of these mediators were prepared to evaluate the legal case- it's not their role and they feel strongly they cannot predict the outcome of ASNTS. They won't provide even a caveated sketch of the situation facing parents- M3 would never say, you have a better than 50:50 chance of a CSP 'because I don't know that'.

M4 takes the view with regard to power-imbalance 'it's not our job to resolve that...that's up to the ministers...to administer the law and try to match that with what's being provided'.

Mediators were aware there could be a legal-knowledge-imbalance, - some parents don't know their rights. They point them to advocacy organisations to power-balance. One is interventionist in giving a general assessment and persuading people into mediation, as there may be a better result than at ASNTS. None were prepared to go down the NE route. I do think mediators should give a broad overview to parents 'who don't have a Scooby'. A broad overview is providing legal information helping parents to self-determine with informed consent. It is not giving definitive advice or evaluation of a likely outcome. A failure to provide an overview amounts to entrenching a power-knowledge-imbalance, ironically not neutral/impartial.

Most mediators were willing to acknowledge and publicly name power-imbalance in a Mulcahyian sense, not ignore it. They clearly didn't feel that doing so affected their neutrality/impartiality.

8: How do ASN mediators define their role *qua* mediator-do they observe or participate?

Mediators are keen to ensure fair process, by which they mean everyone's voice got to be heard-everyone got a fair crack of the whip. They are prepared to intervene, ensuring it happens. They all evaluate from what they hear, what they think are the 'important' issues; helping parents particularly, to focus on those, ensuring a productive JM. M3 also wants the JM to be a safe place, 'it's not an arena for personal criticism'; she will stop people talking over each other, and characterises herself as a referee. Mediators are in charge of process.

M4 observes that the technique of reflecting-back by mediators in JMs gives parties a chance to pause and reflect, helping defuse anger. That 'the mediator's job is to listen out for key aspects of movement towards trying to resolve the situation'. This is reminiscent of TM indicating mediators should listen for 'Recognition-Shifts'. M4 is also (as in TM) of the view mediators shouldn't positively make proposals to promote agreement- 'absolutely not'. But 'it's all about the questioning. You promote it in the sense that you...ask for clarification. But you won't make a positive suggestion'. Solutions are for parties to generate- it's their self-determination that matters.

M3 echoes M4's 'use-of-questions' approach to promoting resolution. M5, in relation to promotion says: 'I prefer to call it...reality testing...what are people's suggestions for improvements...if they don't come up with anything... I don't see anything wrong with saying...in my experience people in a similar position have thought of doing this? Would that work here? I might throw that in as a suggestion'. She observes 'I think my style...(is)...facilitative...but I think I...change quite fluently, depending what I've got in the room'.

This willingness to be more positively interventionist was shared by M1 and M2.

M1 went as far as to say 'It's parties' decision what happens, it's their agreement', but wouldn't be comfortable if she thought someone was being bullied into agreeing something; and in those circumstances, would stop the mediation preventing resolution. 'We spoke about being non-judgemental and impartial and all the rest of it, but we do kind of...want it to be okay...good for the young person because that's what it's all about'.

As part of her efforts to assist parties in focusing, M1 will ask at the beginning of JMs re any parallel legal process going on, and its stage- reminding parties: if this mediation doesn't resolve matters, you have another route. She emphasises this isn't done to put pressure on people! She notes many cases she has mediated had parallel-legal-processes, but was not aware of her cases going beyond mediation.

These mediators are a little interventionist-some more than others. It seems to me there is evaluation going on in many ways; mediators are exercising influence, benignly, and are participants, as well as observers.

9: Do they think it's effective?

Mediation is voluntary for parents. The Act says nothing about LEAs; the implication is, it is voluntary for them too. M4 indicates 'the majority of the time they do agree...it wouldn't really be in their interests to refuse mediation'.

M3 says 'if they're prepared to come to mediation, there's agreement to move forward. If they go out the room talking...relationship repaired, that is a huge outcome... I think the biggest outcomes are improving communication and re-establishing relationships'.

M3 thinks 'we see a lot of movement...a lot of negotiation...quite a bit of compromise...of people getting placements that they wanted, that had been turned down. We've had compromises and negotiation round what kind of plan a child has. We've had compromises from parents who have put their child back to school'.

M1 comments: 'One LEA has recently doubled its budget. They value it. They see it as being good...an effective process...cost-effective. It heads off ASNTS. It heads off costs for that. It heads off folk going

off work. It heads off teachers with stress... Most of the cases we see...had ASNTS lined up...but I've never had a case that's gone to ASNTS'.

M5 says mediators help make mediation effective and is candid that mediators do evaluate what people say in seeking to concentrate people's attention on what needs to be discussed. Referencing Imperati,¹³⁸ she indicates though mediation is voluntary and mediators are impartial, they do manipulate people (with benign intentions); evaluation is going on. 'It's my job to help everyone have a productive conversation'. If people talk unproductively, she will bring them back to what she thinks is productive.

Exposing people to emotion is also used by mediators as a tactic to make mediation more effective. M2 says 'I don't think the mediator should be too afraid of emotion in the room...if we can harness that in a positive way...so that...people aren't losing face, but so...the other person can experience the impact this situation is having on that individual'.

M5 observes LEA's now refer more than half the cases, a good thing, but wonders if LEA's are using mediators to sort out the 'mess' they have created, eg in relation to school's unintentional discrimination. She wonders what the real aim of the then Scottish Executive was in promoting ASN mediation? The stated aim was to allow local/early resolution which was laudable. But was it really to avoid S70 complaints coming to them after complaints were exhausted with LEAs?

¹³⁸ Sam Imperati & Steve Maser, 'Why Does Anyone Mediate If Mediation Risks Psychological Dissatisfaction, Extra Costs and Manipulation' (2014), 29 Ohio St John, Disp Resol, 223

CHAPTER 5- CONCLUSION, SUMMING-UP AND FURTHER RECOMMENDATIONS FOR RESEARCH.

I wanted to understand how ASN mediators mediate under a statutory scheme. I wanted to compare/contrast what they did with the issues raised by mediation between emanations of the state and individuals; and how their ASN model compared to others. I wanted to see if there were weaknesses arising and whether they could be resolved. I thought I would be able, through statistical/data collection means, to assess the effectiveness, or otherwise, of ASN mediation. But for reasons discussed, I realised I couldn't do this.

The numbers from Resolve/CGM show an increasing trend for mediation albeit at still quite low levels. It is clear neither Resolve nor CGM have enough statistical information to enable a definitive assessment of what disputes were about; and whether or not they were justiciable. LEAs don't feedback to them what happens after mediation in each case, whether agreements were adhered to, or subsequently went on to ASNTS.

Data provided by some LEAs showed 1-2 cases per year going to ASNTS. This ties up with ASNTS figures for 1/4/15-31/3/16. Of 72 references made to ASNTS, 43 were claim dismissed (parent withdrawn) and 6 were dismissed as not competent/not within jurisdiction. 14 references were outstanding from the year at its conclusion and only 9 references were decided by the ASNTS. They don't say if the 'parent withdrawn' category were resolved in mediation or simply dropped.¹³⁹ A couple of LEAs indicated some were dropped as a result of mediation. This also chimes with anecdotal evidence from mediators. M1 was clear many of her mediations had taken place in parallel to ASNTS. As far as she was aware none had proceeded thereafter to an ASNTS hearing.

¹³⁹ 2016,11th Annual Report ASNTS,27

ASN mediator interviewees -leaders in the field- gave comprehensive views in nine areas. It became evident that the PM process was more significant in this form of mediation than in others; indeed M4 subsequently indicated that ASN mediation wouldn't work without it. It was at PM that information gathering/assisting participants to focus was carried out, to ensure the JM was productive. It was at PM that emotion management commenced, and where children's views were sought and differences between their views and those of parents were noticed. M4 also subsequently commented that where such a divergence arose she indicated to participants they would need to decide a joint position for presentation at the JM, for it to be productive.

ASN mediators all use FM, albeit caucus is used rarely; JM is preferred to increase mediation effectiveness.

With regard to the primary goals of mediation, all ASN mediators support the view that communication/relationship issues must be looked at first. Beyond that it was possible to get either partial or full resolution. This was reminiscent of TM.

The mediators didn't feel any tension between a goal of resolution and a requirement for neutrality/impartiality. Two of them drew a distinction between neutrality and impartiality. One was rigid in supporting the view that there should be no positive intervention by mediators as this undermined self-determination and neutrality/impartiality. She was closest in attitude and method to TM. The others, whilst aspiring to achieve impartiality, were more nuanced. They all thought that neither neutrality nor impartiality are strictly achievable; and identified with the idea of omnipartiality. There was also a focus on the child not in the room- remembering that child's interests, not the participants', are what matters.

All the mediators are aware of power-imbalance issues. They differ about how these should be dealt with, with one mediator being very against intervention, three prepared to intervene a bit, and one more interventionist. They all seem clear that if there is a power-balance issue it should be identified.

These mediators self-identified their roles, one close to TM, the others more FM mainstream. The latter are prepared to intervene and regulate behaviour. Unlike TM, it is 'their' meeting, they are in charge and are prepared to direct conversations to productive topics. One is much more, apparently consciously, interventionist than the others and willing to manipulate people (for benign reasons) to get them to mediation.

All are reluctant to provide legal information, never mind an overview assessment of what is required. None fall into the SM/EM models. They tackle lack of knowledge of legal rights/power-imbalance by directing people to advocacy in the PM stage.

No mediator thought they were actively entrenching power-imbalance by being neutral and noninterventionist. None of them identified the idea that true self-determination requires informed consent. Notwithstanding this, all bar one are prepared to make practical suggestions for resolution albeit at a relatively limited level. All of them talk about using reality-checking questions to query whether party proposals would work or not; they preferred that idea to direct mediator proposals.

Imperati, referencing Frenkel & Stark, notes mediators often employ tactics to help parties in conflict, and that these tactics are often designed to influence party choice and preference. 'When they use these tactics, mediators often refer euphemistically to reality-testing or balancing-power. They tend to do this when they think parties aren't thinking correctly about a topic'.¹⁴⁰

¹⁴⁰ Imperati, n138,243; Douglas Frenkel & James Stark, 'Changing Minds: The Work of Mediators and Empirical Studies of Persuasion' (2013), 28 Ohio St J, Disp Resol, 263

The mediators think their mediation is effective. I have been provided with feedback documents from Resolve/CGM showing anonymized comment, voluntarily provided, by mediation users, including parents, (head) teachers and EO's. The vast majority are complimentary. It seems clear that mediation has been effective for many of these users.

Genn observes that for mediation to be effective it needs the possibility of justiciability. There is some force in that observation, such a possibility would assist in power-balancing. ASN mediation's effectiveness is determined, to some extent, by its legal framework. The Act provides a justiciable route only to very few via CSPs/PRs. For the 20% of parents whose children have ASNs but don't qualify for a CSP, there is mediation, IA or possibly a S70 complaint to ministers.

The easiest way to level the ASN playing field would be, as S20 of the Act envisaged, to extend justiciable ASNTS rights to parents/YPs for ASNs too. The fear would be a floodgate argument. To some extent that could be reduced by following the English development of requiring parents to meet a mediator before going to ASNTS; or making ASN mediation mandatory before having the right to go to ASNTS.

LEA's would be concerned re resources; but if Scottish government is serious about creating a school/parent partnership, that would be one way. Justiciable rights are limited in terms of the Act; and that may have some impact on ASN mediation's effectiveness.

Recommendations and further study/research ideas

Statistics should be collated by Scottish government at a national level from all ASN mediation services and from LEA's in order to obtain an accurate overview of the effectiveness of ASN mediation for the whole of Scotland.

Studies are needed re:

- the nature of agreements reached in mediation, following-up outcomes.
- child and YP involvement in mediation- is it happening and is it meaningful?
- to what extent do parents and (head) teachers know that mediation is available for ASN disputes- do parents/YPs know their rights?
- How is emotion managed in ASN mediation?

The best form of enquiry into ASN mediation, and its efficacy, would be a CSR of mediation in action.

This could observe, collate and analyse, the conduct of all participants, including mediators, parents/YPs and LEA staff. This would also identify what mediators really do in the room.

Finally, there is a need to consider empowering mediators to provide an overview- legal information and basic (caveated) assessments to parents and YPs.

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