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## Realising the educational rights of children with special and additional support needs

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## **Introduction: Realising the educational rights of children with special and additional support needs: paradigm change or more of the same?**

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Article 12 of the UN Convention on the Rights of the Child (CRC) reinforces the right of every child to express their view on all matters of concern to him or her and for due weight to be given to their views, in the light of their age and understanding. It applies to a wide range of situations in which decisions and arrangements governing children are made, including, importantly, in the context of education. In light of the UNCRC, there is a growing recognition of the need to ensure children's rights of participation and redress in the field of education. This special issue explores the way in which different developed countries are responding (or not) to the challenges posed by Article 12 of the CRC in relation to children with Special Educational Needs (SEN)/Additional Support Needs (ASN), who may experience a range of difficulties in participation due to disability, social disadvantage and discrimination. The contributors to this special issue are based in five jurisdictions: the US, Spain, Scotland, England and Wales. In order to understand national legislation, policy and practice in each of these contexts papers draw on literature and empirical research from the fields of law, education, philosophy and social policy.

The authors in this special issue bring different geographical and disciplinary perspectives to bear on the topic of the autonomy and rights of children with SEN/ASN. In addition to the specificities of each national context, three general themes emerge, which we briefly review here.

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First, most developed countries endorse the broad idea of children's participation rights, but there is considerable reluctance to allow children rights of redress. In the context of alternative dispute resolution, Genn et al. (2006) have argued that rights without redress may be regarded as 'the sound of one hand clapping'. Participation rights will inevitably be limited unless backed up by the possibility of judicial challenge as a last resort. This is particularly likely to be the case when a less powerful group, in this case, children with special and additional support needs, are challenging adult decisions. As noted by Riddell and Carmichael (this issue), in Scotland, considerable progress towards incorporating the UNCRC into domestic legislation has recently been made. However, the decision to allow children aged 12–15 to make references to a tribunal has been controversial and so far little use appears to have been made of this radical provision.

The second broad theme concerns the relationship between the rights of children and their parents. Until recently, parents have been the main bearers of legal rights and boosting the rights of children and young people may be seen as a threat to family autonomy, as has been argued in the United States (Russo, this issue). Ware (this issue) draws attention to the situation in Wales, where parental wishes to have their children educated in Welsh may trump a child's desire to be educated in English. At the same time, there is clearly a danger that professionals might seek to use children's voices in order to deligitimise parental aspirations for their children (Harris and Davidge, this issue). Ryan and Runswick-Cole (2008) remind us of the danger of downplaying parents' 'special competence' and suggest that the role of activist mothers has been largely overlooked, resulting in the side-lining of children's most determined advocates.

Thirdly, there is a need for greater investment in the education of children with special and additional support needs if their right to equal and inclusive education is to be ensured. In addition to appropriate classroom provision, further support for advocacy services to support decision-making by children and young people is required. It is ironic that at a time when children's rights are ostensibly being increased, access to quality educational provision is at risk due to ongoing austerity measures which are depleting public services across the developed world.

Taken together, the papers in this issue show that efforts are being made in each of the five countries to ensure the rights of children with special and additional support needs are realised in line with their growing maturity and understanding. However, it is also clear that *diverse approaches* are being followed in the different contexts. The papers in this issue shed light on exactly how different countries are supporting children and young people to participate actively in their education. For example, Scotland affords children with ASN aged 12–15 almost the same rights of participation and redress as those already enjoyed by their parents. However, these rights are diminished by the local authority's duty to assess the capacity of the child each time he or she wishes to use a particular right, and to ensure that exercising the right will not be detrimental to the child's well-being. In contrast, in England children have fewer rights, but competence is presumed.

It is also interesting to note that of the five countries featured in this issue, the US is the only non-signatory of the UNCRC. Despite this, as noted by Russo (this issue), the US system complies with important aspects of the UNCRC in practice. Having considered a few of the over-arching themes and the points of national divergence, we now consider briefly the focus of each paper.

The first paper, by Riddell and Carmichael, draws on data from an ESRC-funded project entitled *Autonomy, Rights and Children with Special Needs: A New Paradigm?* (ES/P002641/1). The authors examine the extent to which core rights granted to children with ASN in Scotland via The Education (Scotland) Act 2016 are likely to be realisable in practice. Reflecting on key informant interviews, they express fears that the new legislation may be well intentioned but tokenistic. Further concerns about tensions between the rights of parents and children and a decline in CSPs are also discussed. Tokenism may only be overcome, they argue, if there is an urgent clarification of the concepts of needs and rights, and a radical simplification of the legislation itself. The second paper, by Harris and Davidge, also analyses findings from key informant interviews from the same project, but this time exploring the English context. Harris and Davidge consider the extent to which new rights of children and young people with special educational needs and disabilities in England, introduced under the Children and Families Act 2014, are being

operationalised. They argue that parents still find the system difficult to navigate and that there is little evidence of enhanced participation by children and young people. Their findings also suggest that the agency of children and young people is contingent on the involvement of their parents or carers. Finally their paper suggests that when it comes to redress, little progress had been made in bringing the wishes and feelings of children and young people to the fore.

The third paper focusses on the Welsh context. Ware notes that Wales was the first UK country to incorporate the UNCRC into domestic law and the first to appoint a children's commissioner. She maintains there are cautious grounds for optimism in terms of capacity to hear the views of children with special educational needs as long as the resource implications are acknowledged. However, she also suggests there is a need for greater discussion of potential tensions between the Welsh language strategy and provision for children with special educational needs in their preferred language.

The fourth paper takes a more philosophical approach to the topic of autonomy rights for children with ASN. MacAllister notes that though the UNCRC increasingly animates education law, policy and practice, philosophers like MacIntyre (1984) and O'Neill (1988) have raised pertinent questions about whether or not a rights-based approach is the best way of ensuring that all children receive the care, support and education they need to flourish. Discussion focuses on four possible objections to the human rights tradition generally and the new legislation concerning the rights of older children with ASN in Scotland specifically. The paper concludes by suggesting that future policy, practice, law and research on child well-being should prioritise capabilities over rights.

The last two papers in the issue focus on countries outside the UK. Casado-Muñoz, Lezcano-Barberoa and Baños-García analyse the legislation in Castilla y León in Spain on the rights of children and youth with Specific Needs of Educational Support (SNES) to participate in education. Their paper suggests that Castilla y León incorporates the minimum standards proposed by the UNCRC. Nevertheless, the authors report limitations and setbacks to the participation of

children and young people in Castilla y León, which especially impact on children with SNES.

These limitations include the lack of representation of children with SNES on school boards, socio-economic segregation at some schools, and scarce social participation with disadvantages for girls and other vulnerable groups.

In the final paper, Russo considers the significance of the U.S. Senate's reluctance to ratify the CRC. He reviews the history of rights in the U.S. before examining how the Individuals with Disabilities Education Act (IDEA) affords students with disabilities opportunities to participate in transition planning and to exercise control over their educational records. The article ends by reflecting on how the IDEA corresponds with the CRC in protecting the rights of students with disabilities to self-determination.

Overall, the papers in the special issue suggest grounds for optimism, while also reminding the reader of the ground still to be covered. Above all, progressive rights-based legislation and policy are necessary but not sufficient to advance children's rights. Knowledge, awareness and commitment to children's right in classrooms, staffrooms and families are also essential, and here there is much work still to be done.

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