

## **LEGAL RIGHTS OF CHILDREN AND THEIR PARENTS AND THE SPECIAL EDUCATIONAL NEEDS (SEN) INCLUSION POLICY REVIEW**

### **INTRODUCTION**

This briefing paper looks at current legislation that enforces the rights of children with Special Educational Needs (SEN) and their parents in Northern Ireland. It also looks at the Code of Practice<sup>1</sup> and its Supplement<sup>2</sup> providing guidance for the implementation of the legislation for schools. The paper includes the duties and responsibilities placed on Education and Library Boards (“the Boards”), Boards of Governors and schools by the legislation.

The Department of Education (“the Department”) launched a review of special education in Northern Ireland in April 2006. Policy proposals to emerge from the review are contained in a consultation document ‘*Every School a Good School: The Way Forward for Special Educational Needs and Inclusion*’<sup>3</sup>. The Consultation period was extended to the end of January 2010.

The consultation document states that there are no proposals to change the appeal mechanisms already in place for parents if they disagree with decisions made by a Board (or the Education and Skills Authority) about their child’s SEN provision. However, concerns have been raised by parents and disability support groups<sup>4</sup> in response to what they view as a lack of clarity in the Department’s proposals.

It is proposed that the five-stage Statementing procedure<sup>5</sup> will be replaced with a three-stage model where a Co-ordinated Support Plan (CSPs) will document the child’s SEN provision rather than a Statement. Within two years

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<sup>1</sup> *Code of Practice on the Identification and Assessment of Special Educational Needs* (operative from 1 September 1998) DENI available at: : [http://www.deni.gov.uk/index/7-special\\_educational\\_needs\\_pg/special\\_needs-codes\\_of\\_practice\\_pg.htm](http://www.deni.gov.uk/index/7-special_educational_needs_pg/special_needs-codes_of_practice_pg.htm)

<sup>2</sup> *Supplement to the Code of Practice on the Identification and Assessment of Special Educational Needs* (operative from 1 September 2005) DENI available at: [http://www.deni.gov.uk/index/7-special\\_educational\\_needs\\_pg/special\\_needs-codes\\_of\\_practice\\_pg.htm](http://www.deni.gov.uk/index/7-special_educational_needs_pg/special_needs-codes_of_practice_pg.htm)

<sup>3</sup> *Every School a Good School: The Way Forward for Special Educational Needs and Inclusion* (August 2009) available at: [http://www.deni.gov.uk/every\\_school\\_a\\_good\\_school\\_the\\_way\\_forward\\_for\\_special\\_educational\\_needs\\_sen\\_and\\_inclusion\\_8211\\_consultation\\_document\\_english\\_pdf\\_434kb.pdf](http://www.deni.gov.uk/every_school_a_good_school_the_way_forward_for_special_educational_needs_sen_and_inclusion_8211_consultation_document_english_pdf_434kb.pdf)

<sup>4</sup> Presentation to the Education Committee on 11 November 2009 by Children with Disabilities Strategic Alliance (CDSA).

<sup>5</sup> A statement of SEN is a statutory document resulting from an assessment of educational need and confers a right of appeal for parents regarding the decision to make or not make a statement and review or change a statement of their child’s SEN.

of the proposals being adopted it is proposed that all existing Statements will have been replaced with CSPA. Currently a Statement is the statutory document that gives parents a legal right to challenge a Board's decision. Parents therefore fear that the proposed changes may erode their statutory rights and feel that there has been insufficient clarity around the replacement of Statements.

The CDSA in Northern Ireland launched its Manifesto in December 2009<sup>6</sup>. It states that:

Changes (amendments) to the current system of responding to the needs of children with SEN must result in greater parental confidence in the process and ensure the child's right to special educational needs provision is protected, strengthened and enforceable. No attempt should be made to reduce any current enforceable legal right.

Finally the paper looks at the proposed implementation of recommendations that have come from the Lamb Inquiry<sup>7</sup> in England. The remit of the Inquiry was to measure the level of confidence parents have in the process of SEN 'statementing'<sup>8</sup>. The recommendations and proposals are relevant to the issues that have been raised by parents in Northern Ireland as a result of the SEN Review and Consultation proposals.

Two of the main outcomes of the Lamb Inquiry are planned amendments to legislation. These will improve the rights of parents to appeal if they disagree with aspects of their child's Statement and place a specific requirement on Ofsted<sup>9</sup> to report on the progress of children with SEN and disabilities in schools<sup>10</sup>.

## CURRENT SEN LEGISLATION

*The Special Educational Needs and Disability (Northern Ireland) Order 2005* ("SENDO") amended the *Education (Northern Ireland) Order 1996*<sup>11</sup> ("the Education Order") and provides the legislation in Northern Ireland relating to the education of children with SEN. SENDO strengthened the rights of children with SEN to be educated in mainstream schools and the Department published Codes of Practice<sup>12</sup> for schools in line with the requirements of the legislation.

*The Code of Practice on the Identification and Assessment of Special Educational Needs* was effective from September 1998 implementing the legislation introduced

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<sup>6</sup> Children with Disabilities Strategic Alliance Manifesto (December 2009) available on the Children in Northern Ireland (cini) website at: <http://www.ci-ni.org.uk/>

<sup>7</sup> *Lamb Inquiry: Special educational needs and parental confidence* reports and correspondence available on DfCSF website at: <http://www.dcsf.gov.uk/lambinquiry/>

<sup>8</sup> A statement of SEN is a statutory document resulting from an assessment of educational need and confers a right of appeal for parents regarding the decision to make or not make a statement and review or change a statement of their child's SEN.

<sup>9</sup> Office for Standards in Education in Schools, Children's Services and Skills.

<sup>10</sup> Letter from Secretary of State to Brian Lamb 3 August 2009.

<sup>11</sup> Available at: [http://www.opsi.gov.uk/si/si1996/Uksi\\_19960274\\_en\\_1.htm](http://www.opsi.gov.uk/si/si1996/Uksi_19960274_en_1.htm)

<sup>12</sup> *Code of Practice on the Identification and Assessment of Special Educational Needs* (September 1998) DENI and *Supplement to the Code of Practice on the Identification and Assessment of Special Educational Needs* (September 2005) DENI available at: [http://www.deni.gov.uk/index/7-special\\_educational\\_needs\\_pg/special\\_needs\\_codes\\_of\\_practice\\_pg.htm](http://www.deni.gov.uk/index/7-special_educational_needs_pg/special_needs_codes_of_practice_pg.htm)

by the Education Order. In September 2005 the Department published the *Supplement to the Code of Practice* ("the Supplement") implementing amendments to the Education order contained in SENDO. The Supplement does not change the status, practices or procedures in the Code of Practice.

Responsibility for SEN provision belongs with the Boards. The definition of SEN contained in the Education Order is a "*learning difficulty which calls for special educational provision to be made*". A child has a learning difficulty if he:

- a) has a significantly greater difficulty in learning than the majority of children of his age;
- b) a disability which either prevents or hinders him from making use of educational facilities of a kind generally provided for children of his age in ordinary schools; or
- c) he has not attained the lower limit of compulsory school age and is, or would be, if special educational provision were not made for him, likely to fall into categories a) or b) when he is of compulsory school age.<sup>13</sup>

The purpose of SEN provision is to remove or diminish the barriers to achievement, which children and young people may face either through the approach to learning or by physical restrictions in the learning environment.

*The Disability Discrimination Code of Practice for Schools*<sup>14</sup> published by the Equality Commission states that because a pupil has SEN provision made for him or her, it does not necessarily mean that they are disabled under the Disability Discrimination Act 1995<sup>15</sup> (DDA). The DDA defines a disability as "*a physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities.*"

A pupil may have a Statement, but unless there is an underlying physical or mental impairment affecting the pupil's ability to carry out normal daily activities, the pupil would not be considered a disabled person according to the DDA definition.

Those who have a Statement, but are not covered by DDA legislation are therefore not protected by the disability discrimination duties in SENDO<sup>16</sup>.

### SENDO amendments to the 1996 Order

The new provisions introduced in SENDO are contained in Part II Articles 3 – 12 and Schedule 1. In summary SENDO:

- Strengthened the rights of children with SEN to be educated in ordinary schools;
- Required Boards to make arrangements for services to provide children with SEN and their parents with advice and information;
- Required Boards to provide a means of resolving disputes between parents and schools and/or Boards;

<sup>13</sup> Definition of SEN in the Education (Northern Ireland) Order 1996

<sup>14</sup> Document available on the ECNI website at:

[http://www.equalityni.org/archive/pdf/FSchoolsCOP\(SENDO\).pdf](http://www.equalityni.org/archive/pdf/FSchoolsCOP(SENDO).pdf)

<sup>15</sup> Available at: [http://www.opsi.gov.uk/acts/acts1995/ukpga\\_19950050\\_en\\_2#pt1-11g1](http://www.opsi.gov.uk/acts/acts1995/ukpga_19950050_en_2#pt1-11g1)

<sup>16</sup> Part III of SENDO.

- Required Boards to comply with orders of the Special Educational Needs and Disability Tribunal (SENDIST)<sup>17</sup> and make changes in support of the statementing and appeals process;
- Required schools to inform parents when they are making special educational provision for their child;
- Allowed 'responsible bodies', Boards of Governors or Proprietors of schools to formally request a statutory assessment of a pupil's SEN;
- Allowed parents to appeal to SENDIST where another body has requested a statutory assessment.

#### STATEMENTS OF SPECIAL EDUCATIONAL NEED

SENDO did not affect the way an assessment of SEN is carried out, or how a Statement is made, reviewed or amended. A Statement is a statutory document and parents may appeal a Board's decision about whether to issue a Statement, or review or amend an existing Statement. Parents may also disagree with the provisions contained in a Statement and have a legal right of appeal.

Interest groups<sup>18</sup> and parents argue that it is only by being in possession of a Statement detailing their child's needs that parents have an opportunity to exercise their legal rights. A key proposal in the consultation document is to replace Statements with Co-ordinated Support Plans (CSPs) and Personal Learning Plans (PLPs). PLPs will be used for the assessment of a child's progress during future reviews.

Statementing is in five stages:

- Stage 1: Teachers identify and register a child's special educational needs and, consulting the school's SEN co-ordinator, take initial action;
- Stage 2: The SEN co-ordinator takes lead responsibility for collecting and recording information and for co-ordinating the child's special educational provision, working with the child's teachers;
- Stage 3: Teachers and the SEN co-ordinator are supported by specialists from outside the school;
- Stage 4: The Board considers the need for a statutory assessment and, if appropriate, makes a multi-disciplinary assessment;
- Stage 5: The Board considers the need for a Statement of special educational needs; if appropriate, it makes a Statement and arranges, monitors and reviews provision.

SENDO did not make changes to the 5 stage Statementing process. However, proposals in the consultation document, if implemented, will change the process to a 3 stage one comprising of:

- Stage 1: SEN provision in school;
- Stage 2: Provision in school with the help of outside bodies, for example health and social services;

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<sup>17</sup> SENDO changed the Special Educational Needs Tribunal to the Special Educational Needs and Disability Tribunal (SENDIST) and extended its jurisdiction to hear SEN appeals and claims of disability discrimination in schools.

<sup>18</sup> Evidence to the Education Committee on 11 November 2009 by Children with Disabilities Strategic Alliance (CDSA).

Stage 3: A statutory assessment will be carried out leading to a Co-ordinated Support Plan.

## **DUTIES AND RESPONSIBILITIES**

The Department's Code of Practice and its Supplement implement the current legislation. However, the Department has no role in the identification and assessment of children's SEN, or any power to intervene in the process. The process is intended to be conducted between parents, schools and Boards.

SENDO strengthened the rights of children with SEN to be educated in a mainstream school. It placed certain duties on Boards and schools and gave certain rights to parents and children with SEN. The duties and responsibilities that Boards and schools have in relation to children with SEN are detailed below.

### Schools

Under Article 9 of SENDO schools have a duty to inform parents from stage 1 of the Statementing process if the school is making SEN provision for their child within the school.

Responsibility for pupils within Stages 1-3 of the Statementing process is at school level. The Board becomes involved at stage 4 when the evidence provided by the school will determine whether a Board thinks a statutory assessment is necessary. At stages 4 and 5 the Board shares responsibility with schools.

### Boards

SENDO requires Boards to establish an independent informal body to try to resolve disputes between parents and schools or parents and Boards. The Dispute Avoidance and Resolution Service (DARS) has been established as a voluntary, informal and independent body. Its decisions are not binding on either side.

SENDO extended the powers of the Special Educational Needs Tribunal to consider claims of disability discrimination. Now known as the Special Educational Needs and Disability Tribunal (SENDIST), it is the formal route for parents to take to appeal a Board's decision and Boards are required to comply with the decision of SENDIST within a specified time-frame.

It is the duty of Boards to ensure that children with SEN are educated in mainstream schools, whether or not they have a Statement. Not all children with SEN have a Statement, but when they do they are to be educated in a mainstream school unless it is not in accordance with their parents' wishes, or will adversely impact on the provision of education for other pupils.

Boards must tell parents when an assessment of SEN is to be made for their child. They must also explain to parents the arrangements that allow them to express their preference for a particular mainstream, grant –aided or special school.

Under the current framework if a Board decides that an assessment, re-assessment or review is to be carried out a Board must inform parents of:

- Their intention to conduct an assessment;
- How it will be carried out;
- The name of someone in the Board who can provide the parents with information;
- Their right to be consulted

If a Board decides not to conduct an assessment, they must inform parents of their right to appeal this decision and right to access DARS or SENDIST.

When recommending a school a Board must consult with the Board of Governors of the grant-aided school and send them a copy of the Statement. The Board must also consider the wishes of parents, whether it is right for the needs of the child, whether it will impact on the education of other children in the school or the school's resources. When a school is named in a child's Statement, it must admit that child.

## **PARENTAL RIGHTS**

Under the current framework a Statement is a statutory document that provides parents with legal rights. Parents can challenge a Statement and have access to both informal and formal routes of appeal through DARS (informal) and SENDIST (formal) as outlined above. Using DARS does not affect parent's rights to use SENDIST.

Interest groups<sup>19</sup> giving evidence to the Education Committee pointed out that many parents are not aware, or in some cases convinced, that DARS is independent of the Boards and for this reason are reluctant to use its services.

Parents can request a Board to make a statutory assessment of their child's SEN. SENDO extended this right to include making a request to Boards of Governors and Proprietors of schools.

If a child is considered for a Statement at stage 4 of the Statementing process, or receives a Statement at stage 5, parents must be informed of all decisions and have a right of appeal to SENDIST if they:

- Disagree with a decision by the Board not to make a Statement;
- Disagree with the content of a Statement;
- Disagree with the choice of school the board recommends;
- Disagree with changes at an annual review of their child's Statement; or
- If the Board does not implement changes recommended at a review.

The Supplement to the Code of Practice states that the views of the child must also be taken into account throughout all the stages of assessment. Their views should be given due weight '*according to the age, maturity and capability of the child*'. This is in keeping with Articles 12 and 13 of the 'United Nations Convention on the Rights of the Child' which states that '*Children who are capable of forming views, have a right*

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<sup>19</sup> Evidence to the Education Committee on 11 November 2009 by Children with Disabilities Strategic Alliance (CDSA).

*to receive and make known information, to express an opinion, and to have that opinion taken into account in any matters affecting them’.*

#### **ENGLAND: THE LAMB INQUIRY**

In England in 2009 the number of children with SEN was approximately 20% of the total school population. Of the 20% in England, 222,000 had a Statement and 1,434,000 were at School Action or School Action Plus stage. The percentage of pupils with a Statement has reduced in recent years, but only marginally from 2.9% in 2007 to 2.7% in 2009. The main change in the same period was the increased percentage of pupils at School Action or School Action Plus stage. This rose from 14.9% in 2007 to 17.8% in 2009<sup>20</sup>.

In Northern Ireland the percentage of the total school population with SEN is 18%. There has been a steady increase in the percentage of children being referred for assessment and those with a Statement increased from 2.5% to 4% of the total school population between 1997 and 2007<sup>21</sup>.

In 2008 the Secretary of State commissioned the Lamb Inquiry<sup>22</sup> whose remit was to report on the level of confidence parents in England had in the SEN framework. The main findings showed that overall parents of children with SEN are less satisfied with their child’s school placement than parents of children who are not SEN.

While the majority of parents whose children have SEN were satisfied with the SEN framework, those who were not found that key factors leading to their dissatisfaction were the extent to which teachers and support staff understood their child’s disability or learning difficulty and the willingness of the school to listen to the parent’s views and respond flexibly to their child’s needs.

During the Lamb Inquiry the Secretary of State requested additional advice that involved interim reports on:

- SEN and disability information available for parents;
- Securing improvements to the quality and clarity of Statements - whether they made sense to parents and improved outcomes for children;
- Whether Ofsted’s<sup>23</sup> inspection provisions and the wider changes to the school improvement and accountability framework gave sufficient priority to SEN and disability.

The interim reports in April and August 2009 recommended a new framework for the provision of SEN and disability information that *“puts the relationship between parent and school back at the heart of the process; trades adherence to a laundry list of rules for clear principles to guide that relationship; and strengthens compliance where requirements are not followed.”*<sup>24</sup>

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<sup>20</sup> Lamb Inquiry: Special Educational Needs and Parental Confidence (2009), Final Report.

<sup>21</sup> *Every School a Good School: The Way Forward for Special Educational Needs and Inclusion* (August 2009); Introduction.

<sup>22</sup> Led by Brian Lamb, Chair, Special Education Consortium.

<sup>23</sup> Office for Standards in Education, Children’s Services and Skills.

<sup>24</sup> Report to the Secretary of State on the Lamb Inquiry Review of SEN and Disability Information; Brian Lamb (29 April 2009).

## THE STATEMENTING PROCESS

Evidence from parents during the Lamb Inquiry found that guidance in the SEN Code of Practice offered sound advice on Statements that was clear and workable. The problem was found to be more one of compliance. A separate report<sup>25</sup> identified practices that fell short of guidance:

...whilst several met basic requirements, the majority of statements raised a range of issues about their general quality and the extent to which they were fully compliant with the requirements. There were also significant concerns about their overall intelligibility.

In relation to the content of statements Lamb quotes a report from NatCen<sup>26</sup> in the interim report on the clarity of Statements:

Parents who felt the statement included specific detail about the level and type of support their child should receive reported feeling reassured that there was now a shared understanding about their child's special educational needs, the type of support they required and, in practical terms, what this support would be like at school for example.

Lamb found that if a Statement was prepared to a formula rather than clearly tailored to their child's individual needs, parents were less satisfied.

In concentrating on communication, Lamb argues for more focused information about SEN and disability provision as an integral part of the overall information on school policy, rather than as a separate issue.

Recommending a minimum amount of information that parents need, Lamb states that this must include a method of complaint. He recommends that the following be included in schools' SEN policies:

- Information about the school's policies for the identification, assessment and provision for all pupils with SEN;
- Information about outcomes for children with SEN;
- How parents can complain about the school's SEN policy or practice;
- Information about the local authority's SEN policy and where that is published;
- Information about parent's statutory rights.

The interim reports also contained recommendations that involve legislative changes including:

- A right of appeal for parents if a local authority decided not to amend a Statement following a review; and
- Placing a specific duty on Ofsted to report on the quality of the education provided for children with SEN and disabled children.

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<sup>25</sup> *National Strategies (2009) Writing Quality statements of SEN – Issues – 2009.*

<sup>26</sup> Penfold, C et al (2009) *Parental Confidence in the Special Educational Needs Assessment, Statementing and Tribunal System: a qualitative study.* National Centre for Social Research for DCSF



Lamb believes changes to the school inspection framework are critical in improving accountability and outcomes for children with SEN and from September 2009 new inspection arrangements will be in place for Ofsted. Lamb also recommends that Ofsted inspectors should have training in SEN.

Lamb views training for professionals involved in engaging with parents of children with SEN as vital. The final report of the Inquiry welcomes the fact that training for teachers in working with parents of children with SEN or a disability is now a specific unit in teacher training. Lamb recommends that this type of training needs to be available for those already in service who may fulfil the role of a lead professional or key worker.

### **THE SECRETARY OF STATE'S RESPONSE TO THE LAMB INQUIRY'S RECOMMENDATIONS**

The Secretary of State responded<sup>27</sup> to the final Inquiry Report announcing that an implementation plan would be published in the New Year to take forward the Inquiry's recommendations. In relation to recommendations that impacted on parents who had the least confidence in the system, the Secretary of State said he intended to prioritise providing better access to support and redress for parents.

On the 16 December 2009 the Secretary of State announced the following:

- The establishment of a national SEN helpline to offer independent expert advice and information to parents;
- The Government will strengthen Parent Partnership Services by ensuring that advisors are trained in SEN and disability law through the National Parent Partnership Network based at the Council for Disabled Children;
- To make it clear that advice professionals give should not be fettered by concerns about the capacity to deliver;
- Provision of start-up funding for the Local Government Ombudsman to take on parental complaints about local authorities;
- Statutory guidance to governing bodies and independent appeals panels on exclusions to ensure that head-teachers had regard to the guidance on SEN and disability;
- Provide funding for a further round of innovative projects to improve parental confidence. This will include more transparency in decision-making and using different service models for providing educational psychology advice; and
- Investment in a project led by the Anti-Bullying Alliance and key organisations to identify best practice in SEND related bullying.

The Government has already taken action to raise the importance of outcomes for children with SEN or a disability with national indicators on the achievement of children and inspections by Ofsted. There is also a commitment to provide one-to-one training for children who are falling behind and this will also provide additional support for children with SEN.

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<sup>27</sup> Letter from the Secretary of State to Brian Lamb dated 16 December 2009 and available on the DCSF website at: <http://www.dcsf.gov.uk/lambinquiry/>

### Tribunal appeals

If parents take their appeal to the Tribunal, Legal Aid is available to support them in preparing for their case. However, it is not available for legal representation at the hearing. A study<sup>28</sup> found that parents thought the first-tier of the Tribunal system<sup>29</sup> was too difficult and complex and felt unable to pursue their appeal without legal support. It was therefore only those parents who had the financial resources that were likely to take a case to the Tribunal and this was found to be a factor in undermining general confidence in the system.

The Lamb Inquiry recommended that the Ministry of Justice should review the procedures with legal advisors working with parents of children with SEN. The Secretary of State agreed that access to justice should be improved and announced a review of the exceptional funding scheme for providing legal aid for Tribunal hearings, with the aim of re-launching the scheme by March 2010.

The process for reviewing Statements was another significant factor for both parents and professionals. Concerns were expressed about the details of objectives in a Statement being carried forward after a review, irrespective of when the original Statement they were based on was written. Any progress that the child had made was often not taken into account resulting in, for example, a fourteen year old child with a Statement that was based on an assessment undertaken when they were aged five.

Currently if a local authority proposes a change at an annual review of a Statement, a parent has a right of appeal. However, there is no right of appeal if the local authority decides not to amend a Statement at an annual or interim review, even when a school report has recommended amendments based on the child's progress. Parents can press for a re-assessment, but Lamb describes this as a '*cumbersome, protracted and resource intensive procedure*'.

The Secretary of State has said he will amend legislation at the earliest opportunity to give parents a new right of appeal following the review of a Statement.

**January 2010**

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<sup>28</sup> Penfold et al (2009) 'Parental Confidence in the Special Educational Needs Assessment, Statementing and Tribunal System'; National Centre for Social Research available at: <http://www.natcen.ac.uk/study/parental-confidence-in-the-special-educational-needs-system>

<sup>29</sup> The first-tier Tribunal hears initial appeals. Appeals about decisions can only be heard on points of law.