



NORTHERN
IRELAND
HUMAN
RIGHTS
COMMISSION

**RESPONSE TO DEPARTMENT OF EDUCATION POLICY
PROPOSALS CONSULTATION DOCUMENT:
“THE WAY FORWARD FOR SPECIAL
EDUCATIONAL NEEDS AND INCLUSION”**

Summary

The Commission has a keen interest in the area of special educational needs, having earlier provided advice in relation to the development of the Special Educational Needs and Disability (Northern Ireland) Order 2005.

In June 2009, the UK ratified the new UN Convention on the Rights of Persons with Disabilities which establishes wide-ranging obligations for Member States, including in the area of special educational needs provision. This response notes, however, that the requirements of the UN Disability Convention and of the UN Convention on the Rights of the Child do not appear to have been taken into account in developing the Department of Education’s policy proposals. The Commission raises concerns about the lack of clarity in the consultation document and about what appears to be a reduction in enforceable legal rights in terms of securing appropriate provision. The absence of a long-term funding commitment for effective implementation of the proposals is also questioned.

1. The Northern Ireland Human Rights Commission (the Commission) is a statutory body created by the Northern Ireland Act 1998. It has a range of functions including reviewing the adequacy and effectiveness of Northern Ireland law and practice relating to the protection of human rights,¹ advising on legislative and other measures which ought to be taken to protect human rights,² advising on whether a Bill is compatible with human rights³ and promoting understanding and awareness of the importance of human rights in Northern Ireland.⁴ In all of that work the Commission bases its positions on the full range of internationally accepted human rights standards, including the European Convention on Human Rights (ECHR), other treaty obligations in the Council of Europe and United Nations systems, and the non-binding 'soft law' standards developed by the human rights bodies.
2. The Commission has an interest in the provision of effective and appropriate educational provision to children with special educational needs. The Commission welcomed the presumption in favour of mainstream schooling enshrined in the Special Educational Needs and Disability (Northern Ireland) Order 2005, having made submissions on the preceding consultation (in January 2003) and on the draft Order (in June 2004).
3. In these responses the Commission set out areas where it considered that the Government proposals fell short of the United Kingdom's obligations under the United Nations Convention on the Rights of the Child (CRC). The Commission also drew attention to the development of a new international treaty to protect the rights of people with disabilities. That treaty has since been concluded and the United Nations Convention on the Rights of Persons with Disabilities (CRPD) was ratified by the United Kingdom in June 2009.
4. The rights of children with special educational needs to an effective and inclusive education are thus protected in international instruments ratified by the United Kingdom (the CRC and CRPD) in addition to the obligation in the leading regional instrument, the ECHR, as domesticated through the Human Rights Act 1998. The right to education is set out in Article 2 of the First Protocol to the ECHR as follows:

¹ Northern Ireland Act 1998, s.69 (1).

² *Ibid*, s.69(3).

³ *Ibid*, s.69(4).

⁴ *Ibid*, s.69(6).

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

In the United Kingdom, the ECHR right has to be interpreted in light of a reservation entered by the UK on the date of signature of the Convention (20 March 1952):

... in view of certain provisions of the Education Acts in the United Kingdom, the principle affirmed in the second sentence of Article 2 is accepted by the United Kingdom only so far as it is compatible with the provision of efficient instruction and training, and the avoidance of unreasonable public expenditure.

5. The right to education under Article 24 of the UN Disability Convention requires, *inter alia*, that:
 - persons with disabilities can access an inclusive, quality and free primary education and secondary education on an equal basis with others in the communities in which they live;
 - reasonable accommodation of the individual's requirements is provided;
 - persons with disabilities receive the support required, within the general education system, to facilitate their effective education; and
 - effective individualised support measures are provided in environments that maximise academic and social development, consistent with the goal of full inclusion.⁵

6. When ratifying the UN Disability Convention, the United Kingdom entered a number of reservations and an interpretative declaration. These included both a reservation and an interpretative declaration in respect of the right to education under Article 24. The Minister for Education for Northern Ireland stated that she considered neither the reservation nor the interpretative declaration to be necessary for Northern Ireland.⁶ The Minister has since advised the

⁵ The full text of Article 24 regarding the right to education is set out in the Annex to this paper.

⁶ The statement of the Minister for Education is available at: <http://www.northernireland.gov.uk/news/news-de/news-de-march-2009/news-de-270309-special-educational-provision.htm>. The Commission's press release of March 2009 welcoming the statement of the Minister for Education for Northern Ireland in this regard is available at: http://www.nihrc.org/index.php?page=press_news_details&category_id=2&press_id=377&Itemid=65.

Commission that she is also opposed to the maintenance of the 57-year-old UK reservation to ECHR Prot. 1 Art. 2.⁷

7. The Commission recognises the expertise of the many voluntary groups which provide support to parents of children with special educational needs and is aware of the many concerns these groups have expressed regarding the current proposals. This response will focus on the United Kingdom's obligations under international human rights law and the extent to which the current proposals comply with these obligations.

How the proposals differ from the current system

8. At present the statutory responsibility for securing provision for pupils with special educational needs rests with the Education and Library Boards.⁸ Article 3(1) of the Education (NI) Order 1996 defines "special educational needs" as "a learning difficulty which calls for special educational provision to be made". A child has a "learning difficulty" if:
 - a) he has a significantly greater difficulty in learning than the majority of children of his age,
 - b) he has 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.⁹
9. Special Educational Needs (SEN) provision is governed by the five stages in the current Code of Practice.¹⁰ The proposal is to replace the current five stages by a new model made up of three strands:
 - Within School
 - Within School plus External Support (from other schools/Education and Skills Authority/Multi-Disciplinary

⁷ Correspondence from the Minister to the Commission, dated 4 November 2009.

⁸ Under the Education (NI) Order 1996 and the Special Educational Needs and Disability (NI) Order 2005.

⁹ Article 3(2) of the Education (NI) Order 1996 (the male form is cited as used in the Order).

¹⁰ Department of Education (1998) *Code of Practice on the Identification and Assessment of Special Education Needs*.

Groups)

- Co-ordinated Support Plans (CSPs).

10. Co-ordinated Support Plans will replace the existing statutory Statements of Special Educational Needs. The proposal is to greatly reduce the number of such statutory statements by confining the grant of statutory Co-ordinated Support Plans to those children with SEN who face complex or multi-barriers to learning. Personal Learning Plans will replace the existing non-statutory individual learning plans.
11. More responsibility will be placed on schools to carry out early assessment, delivery of support programmes and monitoring of progress. Allied to this, more of the SEN funds currently held centrally by Education and Library Boards will be delegated to mainstream schools. Schools will have discretion as to how to allocate these resources. Special Educational Needs will become one only of four themes under a new category of Additional Educational Need.¹¹
12. The new Education and Skills Authority, due to be launched in early 2010 to assume the present functions of the Boards and other educational authorities, will have a statutory duty to ensure that schools are effectively meeting their responsibilities in addressing the removal of possible barriers to learning.

General concerns

13. While the Commission acknowledges that the *Way Forward* document sets out high-level policy proposals, it considers that insufficient information is provided to allow for a proper assessment of the impact of the proposals. Based on the information available at this time, however, the Commission is concerned that a number of elements of the proposal would frustrate the Review's stated aim, namely:

...to move to a stronger, more robust framework for supporting learning, which, regardless of geographical location, focuses on early intervention and collaborative working.¹²

14. In addition, it is not at all clear to the Commission that the reasons for undertaking the review have been adequately

¹¹ The other three themes will be Learning Environment, Family Circumstances and Social and Emotional.

¹² See: *"Every School a Good School-The Way Forward for Special Educational Needs and Inclusion"*, p.iii.

addressed in the resulting proposals. There are a number of reasons given for undertaking the Review. These include:

...the bureaucracy of the current SEN framework, inconsistencies and delays in assessment and provision, associated rising cost of the provision for SEN, the year on year increase in the number of children issued with statements, and the need for clear accountability on resource utilisation.¹³

15. In particular, the Commission is concerned that the proposals, which are premised upon an increased delegation of responsibility to individual schools in terms of assessment, allocation of resources and provision of specialist teaching, will merely serve to increase the inconsistencies which currently arise in respect of provision across the five Education and Library Boards.
16. The United Kingdom's key obligation in this area arises under Article 3(1) of the UN Convention on the Rights of the Child which states that:

In all actions concerning children whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

The Commission regrets that the principle of the best interests of the child is not mentioned anywhere in the 92-page consultation document.

Key concerns

Definition of Special Educational Needs

17. The consultation document proposes that Special Educational Needs be subsumed under a new concept of Additional Educational Needs. SEN would be only one of four themes under Additional Educational Need, namely:
 - SEN
 - Learning Environment (e.g. English as an additional language)
 - Family Circumstances (e.g. looked after Children or children from the Traveller community)
 - Social and Emotional (e.g. children suffering from short term problems like bereavement).

¹³ *Ibid* at p.v.

18. Schools would receive an allocation of resources from the new Education and Skills Authority (which will replace the existing five Education and Library Boards) and they will have discretion as to how the funds are to be directed across this broad spectrum of Additional Educational Need.
19. The Commission welcomes the clear identification of the educational needs of a broad range of children who may experience barriers to learning. It is, however, concerned by what it considers the clear potential for the focus on the specific needs of children with SEN to be lost. The Commission would question how it is possible to address under one heading, for example, the specialist assessment and delivery of a package of educational and health services to a child with a long-term learning disability and the needs of a pupil who has suffered a bereavement, which may be more pastoral in nature.

Funding

20. At present, additional resources for children with statements in mainstream schools are allocated to the school by the Education and Library Boards (ELBs) and are based upon the specific provision required by the Statement, tailored to the needs of the individual child and the provision that has been identified for them. In addition, the ELB's budget is also expected to cover non-statemented children in mainstream schools (at stage 3 of the current five-stage process) together with special units in mainstream schools, special schools and central costs, for example, educational psychology costs.
21. It is proposed, however, that a fixed part of this budget for SEN should be allocated to schools "regardless of need, based on the assumption that every school has to have at least some facilities for pupils with special needs."¹⁴
22. This funding will now be allocated to schools across the broader category of Additional Educational Need. This money will not be ring fenced. Nonetheless, the document states that each Board of Governors and Headmaster will be fully accountable to ESA/ELBs for both the quality of the provision for children and for the effective use of the allocated funding. No detail is provided as to how this accountability will operate, in relation to the individual child or across the school as a whole.

¹⁴ *Ibid* at p.47.

23. A portion of the ELBs' funds that are currently earmarked for SEN provision are to be released to schools, regardless of need, without any guarantee of its continued use for SEN provision. This could lead to a reduction in current provision.

There appears to be no commitment to the long term funding which would be necessary to achieve the significant change required to the current arrangements for assessment and specialist provision for children with SEN. The cost of freeing up the time of teaching staff in mainstream schools for the identification and provision of SEN on an ongoing basis does not appear to be covered to date. Nor is there a clear funding commitment in relation to the proposal to release the expertise of teaching staff from special schools to provide advice, training and support to mainstream schools as required. While £24 million has been set aside for capacity building for the initial phase of implementation, as regards the remainder of the costs the consultation document states merely that "a number of the key proposals will require significant additional resources and can only be implemented as and when resources are made available."¹⁵

Partnership between parents and schools

24. The Consultation document states that the proposals are "*intended to create... greater partnership between parents and the school.*"¹⁶ The Commission is concerned, however, that with in-school assessment allied to delegated non ring fenced budgets to schools to cover all four areas of Additional Educational Need, there is a potential conflict of interest for schools between conducting assessments which identify the need for expensive specialist provision and the need to limit expenditure of resources across the school budget in general.
25. In addition, no clear time limits have been established either for conducting school-based assessments or for ensuring timely and effective provision. This again increases the potential for conflict between the parent and the school.

Legally enforceable rights and accountability

26. The consultation document clearly establishes that one of the aims of the review is to address "the year on year increase in the number of statemented pupils contributing to the rise in

¹⁵ *Ibid*, p.13.

¹⁶ *Ibid*, p.13.

the cost of SEN provision".¹⁷ This is confirmed in the introduction which states that "the proposals will enable **most** [emphasis added] children experiencing barriers to learning to get effective, well targeted support without the need to go through a time-consuming statementing process."¹⁸

27. The consultation document clearly demonstrates the increasing proportion of the total school population with SEN allied to an increase in the proportion of pupils with statements of educational need.¹⁹
28. In response to a recent Northern Ireland Assembly question posed by Carmel Hanna MLA, the Minister for Education said that the current consultation document "includes no proposals that dilute the rights of parents to challenge decisions about SEN provision. It is envisaged that a right of appeal through the Special Educational Needs and Disability Tribunal will remain."²⁰
29. The consultation document proposes that the new Co-ordinated Support Plans will only be for those children with SEN who face complex or multiple barriers to learning which "significantly or adversely affect (or could reasonably be expected to affect) their educational development in the long term and who require frequent access to a diversity of multi-agency services external to the school".²¹ This is a much higher threshold than the current definition of a SEN for the purposes of granting a statutory Statement of SEN. It is difficult to avoid the conclusion that the aim of the review is to ensure a drastic reduction in the number of pupils at mainstream schools who will have a statutory right to provision. Co-ordinated Support Plans appear to be intended for the 32% of children with existing statements who attend special schools.²² The consultation document states: "Special schools will therefore continue to play an important role in providing for the diverse needs of children with complex and multiple learning difficulties"²³ – a description which accords

¹⁷ *Ibid*, para 2.1(b), p.4.

¹⁸ *Ibid* at para 1.8, p.3.

¹⁹ *Ibid* at annex c. The proportion of pupils with SEN (at stages 1–5 of the Code of Practice), as a percentage of the total school population, is increasing each year, and has risen from 14.6% in 2003 to 17.7% in 2007. The proportion of pupils with statements as a percentage of the total school population, has shown a steady increase in recent years, from 1.6% in 1990/1 to 3.9% in 2007.

²⁰ See answer to AQW 2472/10, 13 November 2009.

²¹ *Ibid* at p.27.

²² *Ibid* at p.1.

²³ *Ibid* at p.viii.

entirely with the language employed in respect of CSPs.

30. The Commission cannot see how a proposal which is premised upon the need to reduce the number of pupils with statutory rights of appeal and access to the Special Educational Needs and Disability Tribunal (SENDIST) improves accountability. The number of children who are eligible for a CSP will be much less than those currently eligible for a statement. This appears to suggest a net loss in enforceable rights.
31. At present the statementing process can be initiated by a school, a parent or an Education and Library Board. Under the proposals it appears that only Multi-Disciplinary Groups will have the power to commence the statutory assessment process, which may or may not result in the provision of a CSP. The Groups can only decide to commence this process once they are satisfied that the school has exhausted its own resources and can show that the planned support programmes have not been successful. Again, this appears to indicate a reduction in the role of the parent in the initiation of the statutory assessment process.
32. In addition, it is proposed that the current right to an annual review of the Statement be reduced to review of the CLP only at transition points, for example, at the end of key stages and at change of school.²⁴ While the consultation document does refer to the possibility of the CLP being reviewed at the request of a parent or existing school, this is no longer a right. This appears to reduce the opportunities for parents and children with SEN to engage in structured discussion about the ongoing adequacy of the provision under the statement.
33. Personal Learning Plans are intended to cover the school-based stages of the new proposals and are intended to replace the current non statutory individual education plans within the current SEN framework. The consultation document states that PLPs will be "subject to regular review to ensure that any interventions employed are resulting in positive outcomes."²⁵ While the commitment to regular review is welcome, more detail is required regarding the frequency of such reviews, the mechanism for requesting a review outside of the normal timeframes, who can request such a review and the avenues of redress open to the parent

²⁴ The right to an annual review of the statement is provided for in Article 19 of the Education (NI) Order 1996.

²⁵ *Ibid*, p.16.

who is dissatisfied with the outcome of a review or indeed with the content of, or provision being made under a PLP. No detail is provided as to the consequences of a failure to implement a plan properly or in a timely manner.

34. The consultation document appears to envisage a potential role for the new Multi-Disciplinary Groups to oversee the performance of schools. The primary function of these groups is to:

...evaluate and determine the next steps for those children who have been identified as requiring multi-disciplinary support, over and above that which can be provided by the schools alone, and to ascertain which children actually require statutory assessment... another major role of the MGs will be to challenge the participating schools about the levels and effectiveness of the support they are providing for their pupils.²⁶

35. There is inadequate detail to evaluate the potential effectiveness of this challenge function. Can it be triggered by a parent or only by the MG itself? Will the challenge function be in respect of the provision for individual children or the exercise of the school's role as a whole? What would the consequences be for the school of failure to make effective, timely provision?
36. In addition, the consultation document proposes that "each Board of Governors and Principal will be fully accountable to ESA/ELBs for both the quality of provision for children and for the effective use of allocated funding."²⁷ Again, insufficient detail is provided as to how such accountability might operate in practice, or as to what role a parent or child with SEN might have in holding school Boards of Governors and Principals to account under this mechanism.
37. The consultation document states that the proposals are "firmly based on improved accountability at all levels for the progress and outcomes of all children including those with barriers to learning."²⁸ In the absence of further detail as to the opportunities for the vast majority of parents of children with SEN to ensure timely, effective educational intervention for their child under the proposed new system, the Commission cannot see how the proposals would improve accountability.

²⁶ *Ibid*, p.ix.

²⁷ *Ibid*, p.47.

²⁸ *Ibid* at p.x.

Presumption in favour of inclusion

38. The Commission is concerned about the potential impact of these proposals on the overall presumption towards inclusion in the Special Educational Needs and Disability (NI) Order 2005. Article 7(3) provides that if a child has a statement of SEN they should be educated in a mainstream school unless that is incompatible with the wishes of his/her parent or with the provision of efficient education for other children. This presumption in favour of inclusion is only possible with an additional resource commitment otherwise specialist provision is more likely to impact on the efficient education of other children. The delegation of increased discretion to schools regarding the expenditure for SEN may, as a result, have an adverse impact on the presumption towards inclusion.
39. This presumption forms part of the UK's commitments under international human rights law and as a result, a funding mechanism ought to be put in place in order to ensure its practical achievement under domestic law.²⁹

Human rights impact assessment

40. The human rights impact assessment of the proposals recorded in paragraph 19.1 refers only to the right to education guaranteed by Article 2 of Protocol 1 of the European Convention on Human Rights. It states that the need to protect this right in a practical and effective way has been taken into account during the development of this proposed policy.
41. The Commission regrets that the Department's human rights assessment has not also included consideration of the UK's obligations under international human rights law arising from the United Nations Convention on the Rights of the Child (CRC) and the United Nations Convention on the Rights of Persons with Disabilities (CRPD). These treaties contain a number of specific commitments of particular relevance to the current consultation; for example, Article 24 of the CRPD which deals with education and is reproduced in full in the Annex to this paper.
42. The United Kingdom ratified the UN Disability Convention in June 2009 and its first state report to the UN Committee on the Rights of Persons with Disabilities is due in June 2011. In this report the UK Government, together with the various

²⁹ See pp 2-3 above and footnote 6 for detail.

devolved governments, will have to set out the actions that have been taken in order to comply with the Convention commitments. The actions of the Northern Ireland Executive in respect of educational provision for children with SEN will therefore be subject to detailed consideration for compliance with Article 24 of the Convention during an oral examination of the UK by the UN Committee following the submission of the state report.

Voice of the child

43. The extent to which the United Kingdom is meeting its obligations under the CRC has already been the subject of adverse comment by the UN Committee on the Rights of the Child which examined the United Kingdom in September 2008. Article 12 of that Convention guarantees the right of the child to be heard in all matters affecting them. The UN Committee's Concluding Observations to the UK expressed concern that

...there has been little progress in enshrining article 12 in education law and policy. Furthermore, the Committee is concerned that insufficient action has been taken to ensure that the rights enshrined in article 12 are applied to children with disabilities.³⁰

44. The UN Committee recommended that the voice of the child be specifically heard in proceedings before the Special Educational Needs and Disability Tribunal in addition to the voice of the parents, requiring the state to "ensure that children who are able to express their views have the right to appeal... to special educational need tribunals."³¹

45. While the Commission welcomes the reference in the consultation document to the requirements of Article 12 of the CRC,³² it does not consider that the Article 12 right to be heard is currently adequately protected in education law and policy, particularly as regards the right of the child to be heard before the Special Educational Needs and Disability Tribunal.

³⁰ CRC/C/GBR/CO/4 para 32.

³¹ *Ibid* at para 67(h).

³² Para 12.29 states: "The current Code of Practice highlights the importance of children participating in all decisions about their education. This will continue to be an important element of the new approach. Schools and other bodies will be required to seek the views of the child and give due weight to those views according to the age, maturity and capability of the child in keeping with Articles 12 and 13 of the United Nations Convention on the Rights of the Child".

46. Article 7 of the UN Disability Convention also provides that children with disabilities have a right to express their views on all matters affecting them. Their views should be given due weight in accordance with their age and maturity on an equal basis with other children. Children with a disability should be provided with disability and age-appropriate assistance to realise that right.

Best interests of the child

47. The UN Committee on the Rights of the Child also recommended that the State party "take all appropriate measures to ensure that the principle of the best interests of the child, in accordance with article 3 of the Convention, is adequately integrated in all legislation and policies which have an impact on children."³³
48. Article 7 of the CRPD similarly provides that in all actions concerning children with disabilities the best interests of the child shall be a primary consideration.
49. If the human rights impact assessment does not formally consider the state's obligations under the relevant UN treaties, then it is unlikely that the key principles of those obligations under international law will be adequately reflected in the resulting legislation or policy.

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³³ *Ibid* at para 27.

Annex

UN Convention on the Rights of Persons with Disabilities

Article 24: The Right to Education

1. States Parties recognise the right of persons with disabilities to education. With a view to realising this right without discrimination and on the basis of equal opportunity, States Parties shall ensure an inclusive education system at all levels and lifelong learning directed to:

- (a) The full development of human potential and sense of dignity and self-worth, and the strengthening of respect for human rights, fundamental freedoms and human diversity;
- (b) The development by persons with disabilities of their personality, talents and creativity, as well as their mental and physical abilities, to their fullest potential;
- (c) Enabling persons with disabilities to participate effectively in a free society.

2. In realising this right, States Parties shall ensure that:

- (a) Persons with disabilities are not excluded from the general education system on the basis of disability, and that children with disabilities are not excluded from free and compulsory primary education, or from secondary education, on the basis of disability;
- (b) Persons with disabilities can access an inclusive, quality and free primary education and secondary education on an equal basis with others in the communities in which they live;
- (c) Reasonable accommodation of the individual's requirements is provided;
- (d) Persons with disabilities receive the support required, within the general education system, to facilitate their effective education;
- (e) Effective individualised support measures are provided in environments that maximise academic and social development, consistent with the goal of full inclusion.

3. States Parties shall enable persons with disabilities to learn life and social development skills to facilitate their full and equal participation in education and as members of the community. To this end, States Parties shall take appropriate measures, including:

- (a) Facilitating the learning of Braille, alternative script, augmentative and alternative modes, means and formats of communication and orientation and mobility skills, and facilitating peer support and mentoring;
- (b) Facilitating the learning of sign language and the promotion of the linguistic identity of the deaf community;

(c) Ensuring that the education of persons, and in particular children, who are blind, deaf or deafblind, is delivered in the most appropriate languages and modes and means of communication for the individual, and in environments which maximize academic and social development.

4. In order to help ensure the realisation of this right, States Parties shall take appropriate measures to employ teachers, including teachers with disabilities, who are qualified in sign language and/or Braille, and to train professionals and staff who work at all levels of education. Such training shall incorporate disability awareness and the use of appropriate augmentative and alternative modes, means and formats of communication, educational techniques and materials to support persons with disabilities.

5. States Parties shall ensure that persons with disabilities are able to access general tertiary education, vocational training, adult education and lifelong learning without discrimination and on an equal basis with others. To this end, States Parties shall ensure that reasonable accommodation is provided to persons with disabilities.